



EMPLOYMENT TRIBUNALS

Claimant: Ms Dilara Begum

Respondent: Selfridges Retail Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: London Central (video link ("CVP"))

On: 17 November 2023

Before: Employment Judge R S Drake

Appearances

For the Claimant: **In Person**

For the Respondent: **Ms M Wooding** (Solicitor)

JUDGMENT

1. The Claimant's application for leave to amend the content of her ET1 by adding the contents of particulars filed by her on 25 September 2023 is refused.
2. The claim as set out in the unamended ET1 is struck out under Rule 37(1) paragraphs (a) and (c) of Schedule 1 to the Employment Tribunals (Constitution & Rules etc) Regulations 2013 ("the Rules") on the grounds that the claim as pleaded has no reasonable prospect of success and the Claimant has not fully complied with the Directions of EJ Fredericks-Boyer promulgated on 31 August 2023.

Introduction

3. The Claimant ("C") explained that she is completely deaf. Accordingly on being assured that her cochlear implants were working and she could therefore hear me and the Respondent's ("R") solicitor, I was able to ensure she could proceed with the hearing subject to taking any necessary breaks (there were three) for her to refresh herself or take time to reflect.

4. I note the Orders made by EJ Fredericks-Bowyer which defined my tasks today as follows (using his numbering):

“1.1 - to consider the C’s further particulars of claim and to-

1.1.1 Identify which parts of that document require permission from the Tribunal to be relied upon by way of an application to amend the claim;

1.1.2 Hear and determine any amendment application which follows; and

1.1.3 Case manage the matter to a final hearing.”

5. I noted that the further particulars referred to are said to have been filed by C some days before the Preliminary Hearing taken by EJ Fredericks-Bowyer (“the 31 August PHR”) and then, by her own admission to me today, largely repeated by what she filed on 24 September 2023. Therefore my task today started with determining whether these particulars were such that in comparison with the claim as originally pleaded they amounted to amendments by adding new heads of claim as opposed to clarifying any existing head of claim as raised in the original ET1. If they did, I then had to determine whether leave should be granted under Rule 30 permitting amendment, and thus admitting these particulars to the pleadings so as to be considered by a full panel eventually hearing this case.
6. I recognised and advised the parties that if the particulars are new pleadings and leave to admit them was not granted, it may be necessary for me to consider the application of Rule 37 as referred to above. I gave both sides clear guidance as to what would need to be considered and gave C time to collect her thoughts before proceeding with her responses to R’s submissions and my advice that Rule 37 may need to be considered.

Consideration and Findings

7. Those which C asserts are the more detailed particulars of the claim as set out in her ET1 were first served and filed in August 2023 preceding the 31 August PHR. Despite this, I find that what was lodged 24 September 2023 in response to the Orders made at that Hearing largely repeat the same particulars. I examined both carefully and conclude that they represent a stream of C’s consciousness and in effect all respects they express new claims not touched upon in the ET1.
8. The ET1 at Box 8.2 says C’s claim is that she was “dismissed because of my (her) disability”. Thus she is making a complaint of direct discrimination and/or a claim of automatically unfair dismissal because of disability. The Particulars filed later go well beyond such a clear head of claim and much further than merely clarifying that one claim. I cite as examples the many references to certain events happening in October 2019, April 2020, October and November 2021, December 2021, January 2022, March 2022, August 2022, October 2022. They may in C’s

view set out events to which she took objection and to which she feels she was justified in so doing, but none clearly argue that they were the cause of or that there was any causal link between them and her subsequent (as distinct from consequent) dismissal. She does not say that dismissal was a consequence of disability but appears to imply it at best. Thus by definition, they are new claims in comparison with the starting point in this analysis which is the ET1.

9. In **Chandhok v Tirkey [2015] ICR 527**, Langstaff J in the EAT said:

At Para 16 - "The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."

Thus, I infer (inter alia) that I must base my starting point on C's pleading in her ET1 and not allow expansion into new heads of claim where they are not already identified and pleaded in the ET1. C has "nailed her colours to the mast" in expressing certain detailed particulars "to the particular masts" of direct discrimination by dismissal, but not to any other mast or head of claim recognised by the Equality Act 2010. She presented her claims today as a perspicacious though self-represented party and thus must accept the limits of her claim as in initially pleaded as that is the way she has chosen to express her claims.

10. For the sake of completeness, I set out below the basis upon which I had to consider the position as far as set out in Rule 37(1): -

"At any stage of the proceedings, either on its own initiative or on the application of a party, a tribunal may strike out all or part of a claim or response on any of the following grounds –

- (a) that it ... has no reasonable prospect of success - (*my emphasis*) ;
- (c) for non-compliance with any of these rules or with an Order of the Tribunal";

Case Law cited and/or considered

11. I took account of the Court of Appeal's finding in **Swain v Hillman [2001] 1 All ER 91** in which it was held that a Court (or Tribunal in this case) must consider whether a party " ... has a realistic as opposed to fanciful prospect of success ..." in the context of assertions, as in this case, that C's case has no, as opposed to little prospect of success. In this case there is clearly on my examination no conflict of pleading on the key points such as would necessitate ventilation of evidence necessary to make factual findings on

contested allegations at a full hearing. On C's own pleadings, there are no such factual disputes to be determined one way or another at a full hearing.

12. **A v B (and another) [2011] ICR D9, CA** - In this case the Court of Appeal held that a Tribunal was wrong to find a claim had no reasonable prospect of success basing this conclusion on a finding that on proper analysis it had "more than a fanciful prospect" of success. From this I derive a distinction between "no prospect" and no more than a "fanciful prospect." If a point is clear cut to show that a case as pleaded is such that n C simply does not set out a basis for asserting connection between disability and dismissal, then C's claims **MUST** be doomed to fail. I conclude that this is a clear example of no prospect as opposed to no more than a fanciful prospect of success.
13. **Anyanwu (and another) v South Bank Students' Union [2001] ICR 391.** - In this case the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and usually require full examination to make a proper determination. This is still dependent on how the claim is initially pleaded.
14. This was followed by the Court of Appeal's decision in **Community Law Clinic Solicitors v Methuen [2012] EWCA Civ 571**, in which it was held that and employee's claim for age discrimination should not be struck out because the case required further examination of the facts so as to properly consider whether age discrimination could be inferred. C's case before me today as currently pleaded is easily distinguishable from **Methuen** because though C has pleaded disability, she has not pleaded connection of causality between that and dismissal.
15. In **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**, the Court of Appeal again held that it will only be in an exceptional case that a claim will be struck out as having no reasonable prospect of success when the central facts are in dispute. However, in the current case, C's claim as pleaded and as responded to does not show that central facts are in dispute - BUT - I find that, as pleaded C's claim shows a complete absence of pleading as to R's response that she was dismissed because of misconduct at a time when she faced a live warning for similar misconduct.
16. I considered the balance of prejudice facing C if I struck out her case leaving her with no further way of arguing here her views as to what has happened, or to R if the case were not struck out causing them to have to devote considerable time and energy to meeting claims which on what I have seen and heard today, and also based on C's admissions, has no prospect of success.
17. On this analysis, I conclude that the balance of prejudice favours R leading me to conclude it is right I should strike out the claims.
18. I have considered as an alternative to striking out some other form of finding which would permit C to proceed with her claim. However the cruciality of the

need for her to have asserted up front in initially causal connection between disability and dismissal in the face of dismissal being pleaded by R as being for fair reason is so central to his case that as she has not pleaded it , her case is fatally flawed from the start. Logic dictates that her claim is therefore doomed to fail at any hearing whatever order I make today. It is in the interests of justice and fulfilling the overriding objective to achieve finality where it is possible and necessary to do so and I conclude that it is not in C's interests to pursue a claim which is doomed to fail.

19. For all the reasons set out above, I conclude that paragraphs (a) and (c) of Rule 37(1) is engaged and empowers me to strike out the discrimination claims in accordance with Rule 37. Therefore, I find that I have no alternative but to dismiss the claims of alleged unlawful discrimination.

Signed 17 November 2023

Sent to the parties on:

29/11/2023

For the Tribunal Office

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing, or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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