



EMPLOYMENT TRIBUNALS

Claimant: Mrs Caroline Griffith
Respondent: London Borough of Hounslow
Heard at: London South (by CVP)
On: 29 November 2023
Before: Employment Judge Yardley

Representation

Claimant: Mr John McCann. lay representative
Mrs Griffiths
Respondent: Stephen Bishop, Counsel

JUDGMENT ON APPLICATIONS UNDER RULE 37 having been sent to the parties and written reasons having been requested on 12 December 2023 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 the following reasons are provided:

REASONS

INTRODUCTION

1. This was a preliminary hearing which was held to consider the Respondent's application for strike out and/or deposit orders in relation to the Claimant's claims for a redundancy payment and unfair constructive dismissal who contends they have no reasonable prospect of success.
2. The Claimant is a litigant in person and was assisted by her friend Mr McCann. The Respondent was represented by Mr Bishop.
3. I was provided with a bundle of documents for use at today's hearing that ran to 68 pages. The Respondent also submitted a note setting to assist the Tribunal which ran to 4 pages. Both parties made submissions.

RELEVANT FINDINGS OF FACT FOR THIS HEARING

4. In August 2020, the Respondent underwent a reorganisation, leading to the redundancy of the Claimant's former position. The Claimant confirmed that she did not wish to take voluntary redundancy and accepted a new position as People Advisor.
5. On 9 September 2022, the Claimant stated that her role as People Adviser would be more fitting to a Scale 6/ SO1 Administrative role and that the role had not developed as she had hoped. The Claimant therefore considered the role redundant. The Claimant asked the Respondent to revisit the decision with regards to her request for redundancy and a severance payment. This was not forthcoming and on 18 October 2022, the Claimant resigned from her position.
6. The Claimant now claims a statutory redundancy payment and/or constructive unfair dismissal.

THE LAW

Strike out

7. Rule 37 of the Rules provides that:

“(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 is scandalous or vexatious or has no reasonable prospect of success;*
- (b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious; ...*
- (e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response...”*

8. The EAT held that the striking out process requires a two-stage test in **HM Prison Service v Dolby [2003] IRLR 694**, and in **Hassan v Tesco Stores Ltd UKEAT/0098/16**. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In *Hassan* Lady Wise stated that the second stage is important as it is a fundamental cross check to avoid the ending prematurely of a claim that may yet have merit.
9. Strike out is a draconian sanction and not one that should be applied lightly. Tribunals should be particularly cautious about exercising their power to strike out badly pleaded claims brought by litigants in person who are not familiar with articulating complex arguments in written form on the ground that they have no reasonable prospect of success (***Mbuisa v Cygnet Healthcare Ltd EAT 0119/18***).
10. It will generally not be appropriate to strike out a claim where the central facts necessary to prove the case are in dispute. It is not the function of a tribunal in

such an application to conduct a mini trial. The proper approach is to take the Claimant's case at its highest as it appears from their ET1 unless there are exceptional circumstances (**North Glamorgan NHS Trust v Ezsias [2007] IRLR 603**).

11. The Employment Appeal Tribunal, in **Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108** commented that whilst in some cases strike out may save time, expense and anxiety, in cases that are fact sensitive, the circumstances in which a claim is likely to be struck out are rare.
12. In **Cox v Adecco and ors [2021] ICR 1307** the Employment Appeal Tribunal gave guidance to Tribunals dealing with strike-out applications against litigants in person. It held that when considering strike out of claims brought against litigants in person, the claimant's case should be taken at its highest and the Tribunal must consider, in reasonable detail, what the claims and issues are. A Tribunal should not strike out a claim where it does not know what the claim is. There should, therefore, be a reasonable attempt at identifying the claim and the issues before considering strike out. The EAT also said that, if the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual tests that apply to amendments.

Deposit Orders

13. The power to make Deposit Orders is contained in Rules 39 of the ET Rules:

“(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit...”

14. The rationale of a deposit order is to warn a claimant against pursuing claims with little merit, which may leave them open to a risk of costs should they proceed with the claim and lose on the same basis as identified as the reason for the making a deposit order.
15. The purpose of a deposit order is not to make it difficult to access justice or to affect the strike out through the back door. The tribunal is to conduct a summary assessment of the claim and not conduct a mini-trial of the facts (**Hemdan v Ishmail [2017] IRLR 228**).

RESPONDENT'S SUBMISSIONS

16. The Respondent's application to strike out both claims was based on the grounds that the claims had no reasonable prospect of success.
17. If the Tribunal considers that the claims have little reasonable prospect, the

Respondent sought a deposit order, under Rule 39 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (“the Rules”).

Claim for Redundancy Payment

18. Regarding the claim for a redundancy payment, under Part XI of the Employment Rights Act 1996 (ERA 1996), to be entitled to a redundancy payment, there must be dismissal due to redundancy. The Respondent argued that the Claimant giving notice of their resignation in 2022 did not create a dismissal due to redundancy and therefore there was no reasonable prospect of the Claimant succeeding on a claim for a redundancy payment.

Claim for Constructive Dismissal

19. Regarding the claim for unfair constructive dismissal, the Respondent argued that there cannot be a claim for a redundancy payment at the same time as a claim for constructive dismissal. The Respondent argued that because the Claimant had accepted the role of People’s Officer and continued in that role for approximately 2 years, any alleged breach of the term of trust and confidence was waived by the Claimant who had affirmed the contract by working for 2 years in the role.

20. The Respondent further submitted that the delay of 39 days by the Respondent to respond to a request by the Claimant was not a repudiatory breach of contract. Neither was it a breach of contract for the Respondent to refuse a request to be made redundant where there is no redundancy situation or refuse to pay a severance payment on resignation.

CLAIMANT’S SUBMISSIONS

21. The Claimant resisted the Respondent’s application. Mr McCann asserted that the Grounds of Resistance contained several inaccuracies. In particular:

- a. The Claimant disputes the assertion that suitable alternative roles were available at the time of the 2020 reorganisation, and contends that there were no such options.
- b. The Claimant challenges the statement that she applied for roles, pointing out that the roles were offered. The Claimant also disputes the mention of a trial period, asserting that this was never documented or notified.
- c. The Claimant contradicts the assertion that she did not communicate her desire to progress to grade PO4 to the Respondent. The Claimant says that she had weekly meetings with Scarlett Sanctuary at which she explained that the level of administrative work was hindering her development. The Claimant also mentioned being asked to complete a worksheet setting out her administrative tasks but was uncertain as to what had happened to this.
- d. The Claimant refutes the claim that opportunities to work at a higher level

were refused. The Claimant asserts that job evaluations were carried and said that she has submitted a Subject Access Request (SAR) requesting evidence of this.

- e. The Claimant rejects the assertion that she simply chose to remain employed. She claims that she was given false promises that the situation would improve but was eventually forced to resign due to the Respondent's conduct.
- f. The Claimant submits that the role she was carrying out immediately prior to her resignation was made redundant on the basis that the replacement post is advertised at a lower grade and is not the same job.

CONCLUSIONS

Strike out

- 22. In order to strike out the claims, I need to be certain that they have no reasonable prospect of success.
- 23. Having considered the claim and response, and the submissions of both parties, I am not satisfied that there are no reasonable prospects of the claim succeeding. There are clear disputes of fact on key issues which are not capable of determination otherwise than by hearing and evaluating the evidence.
- 24. I have also heard today that the Claimant wishes to adduce evidence that promises were made by the Respondent to improve her position in the period between September 2020 and October 2022. The Claimant alleges that it was the failure of the Respondent to meet these promises that ultimately led to her decision to resign. Whilst the Respondent asserts that it was the failure of the Respondent to pay the redundancy payment requested by C and/or the fact that the Claimant was nearing retirement age that ultimately led to her resignation, this is a key factual dispute and goes to the heart of the Claimant's claims.
- 25. In relation to the claim regarding a redundancy payment, evidence will be necessary to determine whether or not the Claimant's role immediately prior to her resignation i.e. that of People Adviser was in fact deleted. The Claimant says that she believes her position has been made redundant. The Respondent, on the other hand, says that this is not the case because others are carrying out the Claimant's role. Again, this is a clear point of dispute and will need to be considered at a final hearing.
- 26. When considering my decision I have also had regard to the fact that the Claimant is a litigant in person. She has been represented admirably by her lay friend Mr McGann today and has done her best to comply with the directions set by the Tribunal. Whilst the Claim Form, and Further and Better Particulars are not particularly focussed on the legal issues that the claims engage; and it is not clear that she has always a full understanding of the legal tests that apply to such claims, this is unsurprising given that she is not a lawyer and that the issues are not simple ones.

27. If however one reads both the Claim Form and Further and Better Particulars there is a possibility that, if the facts are established in evidence, this may lead to a finding in the Claimant's favour. The Respondent's view may prevail but it is an issue that must be decided once the factual disputes are resolved. Whether or not that has been done is a decision better taken after evidence has been heard, rather than purely on the basis of pleadings.

28. Accordingly, those issues cannot in my view be resolved without the hearing of evidence and I am therefore not persuaded that either claim has no reasonable prospect of success such that the Respondent's application to strike them out must be refused.

Deposit Orders

29. I am also not, I consider, able either to make a judgment that the claim has little reasonable prospects of success, for the same reasons similar in respect of strike out. In view of the importance and number of points that appear to be in conflict I cannot find that the claimant has little reasonable prospect of success and I make no deposit orders.

Employment Judge **EJ Yardley**
Date: **29 November 2023**

JUDGMENT SENT TO THE PARTIES ON
24 January 2024

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FOR THE TRIBUNAL OFFICE