



EMPLOYMENT TRIBUNALS

Claimant: Mr E Anthonio

Respondent: Tesco Stores PLC

Heard: Watford by CVP

On: 30th November 2023

Before: Employment Judge Codd

Appearances

For the Claimant: Mr E Anthonio

For the Respondent: Ms Kight (Counsel)

JUDGMENT

Rule 37, Employment Tribunal Rules of Procedure 2013

1. The claim for unfair dismissal is struck out because:
 - a) The manner in which the litigation has been pursued by the claimant, has been unreasonable.
 - b) The claimant has failed to comply with the directions of the Tribunal,
 - c) The claim has not been actively pursued.

REASONS

Background

1. The claimant applied for written reasons on the 19th of December 2023, following my determination of this matter on the 30th of November 2023.
2. The claimant was employed by the respondent as a 'Shift Leader' between 15th August 2005 and the 24th June 2022. The claimant was dismissed on the basis of alleged gross misconduct, relating to purported sexual harassment of a colleague. In the main this related to messages that the claimant had sent a female colleague via WhatsApp, as well as an allegation that he picked up the same female colleague without her consent, and made generalised inappropriate comments to colleagues.
3. The claimant engaged in ACAS early conciliation between the 4th of September 2022 and the 16th of October 2022. The ET1 claim was issued on 3rd November 2022. The claimant asserts that he was unfairly dismissed and seeks compensation.
4. This decision deals solely with the respondent's application for strike out of the claim.

Chronology of the proceedings

5. Standard directions were issued by the Tribunal, with notices sent to the respondent on 4th November 2022, following receipt of the claim form. Following an extension of time, the respondent filed its grounds of response on 17th March 2023.
6. The case was set down for a two day hearing to determine the unfair dismissal claim on the 30th of November and the 1st of December 2023, via a remote hearing, before me sitting alone.
7. Although the claimant had ticked the box on his claim form for discrimination, nothing within the narrative of the form explained the nature of the discrimination claimed. It therefore appears to have been presumed at a case management stage, that this claim was not being advanced. Nothing within the narrative I have heard from the claimant suggested that this was still being advanced.
8. On the 2nd of August 2023 the parties were sent the hearing notice with a list of case management directions. The respondent has complied wholesale with their requirements. In particular the following directions applied to the claimant:
 - a. A schedule of loss to be provided by the 16th August 2023.
 - b. Disclosure by 30th August 2023.
 - c. Agreed hearing file by the 13th September 2023.
 - d. Witness statements to be exchanged by 11th of October 2023.

9. On the 29th of September 2023 the respondent applied for the claim to be struck out on the basis that the claimant had not engaged with the directions of the Tribunal, and had not responded to any of the respondent's communication with him. Communication which was necessary, in order to agree disclosure and the hearing bundle.
10. On the 29th of September 2023 the claimant responded to the Tribunal (via email) stating that all the points he wished to make were in his witness statement.
11. On the 11th of October 2023 the claimant failed to comply with the direction to file a witness statement.
12. On the 7th of November 2023 the claimant was sent a strike out warning, and given until the 14th of November 2023 to respond, which he failed to do.
13. It appears that the determination on that strike out warning was left in abeyance, to be determined as a preliminary issue at this hearing.
14. On the 8th of November 2023 the claimant wrote to the respondent saying that he was having difficulty opening the link he had been sent to the hearing bundle. Aside from this there has been no further communication from the claimant with the respondent.

Preliminary matters

15. At the outset of the hearing Ms Kight on behalf of the respondent invited me to determine the strike out application. as a preliminary issue, before I moved on to determine the application for unfair dismissal.
16. I noted that the application had been properly made, and that the claimant was on notice. I also queried the proportionality of hearing that application as opposed to the hearing of the substantive application for unfair dismissal. Ms Kight argued that it was essential to determine whether the strike out was successful, as if the hearing were to progress, she would have secondary submissions to make, as to whether the hearing could be effective, absent further information from the claimant.
17. It is that strike out application which this decision is therefore confined to. Prior to hearing that application, I adjourned the case for a period of time, directing the claimant to Rule 37, in order to allow him some time to prepare a response to the application.

The Law

18. Rule 37 of the Employment Tribunals Rules of Procedure 2013 (ETRP) sets out the basis upon which an application may be struck out, either by way of application or at any stage of the Tribunals own motion.

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 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 the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;
- (d) that it has not been actively pursued;
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

19. When exercising any of my case management powers under the ETRP 2013 I must have regard to the overriding objective, set out within Rule 2.

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

20. In respect of the particular elements of Rule 37 which are applicable, Ms Kight focussed on 37 (c) and (d), although she argued that each limb of 37 may be applicable.

Findings and Analysis

21. I allowed each party to address me in submissions in respect of the application. Hearing from Ms Kight in the first instance, who helpfully took me through the chronology which I have set out above.
22. Ms Kight also drew my attention to the fact that the claimant had brought a previous Tribunal claim, for which he similarly failed to comply with directions. I made it clear to Ms Kight, that without details of the matter, this would not be something that I could attribute weight to, and I do not do so.
23. Ms Kight drew my attention to the substance of the original claim form, which sets out a few short paragraphs of explanation, of his claim. She argued that the information was too limited and vague to understand the meaningful challenge to the dismissal.
24. I note that some of the points raised in that document are incomprehensible without further explanation. Such as a conspiracy between his manager and the alleged complainant of his behaviour.
25. The claimant argues that the information provided to the disciplinary hearing was a snapshot of messages between himself and the complainant. I find it is of significance that despite having had the opportunity to do so in these proceedings, the claimant has failed to disclose the messages which he says are the complete chain, which are in his possession and control.
26. The majority of the claim form sets out a narrative of the procedural history of his dismissal. Whilst there are generic complaints as to alleged flaws in the procedure and an argument that there was a problem with regard to the interpretation of the messages, which should have been seen as 'banter' rather than sexual harassment, it is impossible to discern the substance of the claimant's case from his claim form without further explanation.
27. I provided the claimant with an opportunity to explain his case as well as the reasons why he had not complied with the Tribunal's directions.
28. The claimant explained that all of the information he relied upon was in the hearing bundle. He explained that the decision of the disciplinary meeting was a misconception of what the case was about and that he had a witness who he says should have been called at the disciplinary process. No witness statement has been filed by the claimant in this regard.

29. The claimant argued that by sending the email to the Tribunal on the 29th of September 2023, he is actively engaging in the process as everything he seeks to rely on is in the bundle.
30. Having considered the claim form and the claimants submissions, I do not know what it is that he challenges. One of the respondent's witnesses is not present (It has not been necessary to further explore the reasons for this). I cannot assess whether she is needed, as I do not understand the claimant's case, or whether he challenges that evidence. I am not clear that the claimant knows himself, whether he challenges this either. I could therefore embark on a trial that is abortive or manifestly unfair to the claimant, because a key witness is not available. But that would not be apparent until part of the way through a contested hearing, which I would be attempting to navigate blindly, because there is no witness statement available to me from the claimant to assess the nature of the challenge and the claim form is too limited.
31. The claimant has accepted factually a number of the allegations, which are serious (although he denies a sexual element to them and disputes some of the context). Perhaps most serious was that he physically picked up a female colleague whilst she was stood on a stool, stacking a top shelf, without her consent. He has not explained what it is about those findings that are unfair. If it is a policy or finding he has not set that out and having read his submissions, I am none the wiser as to his case.
32. I have given the claimant time to prepare his case. He has not given me an adequate reason for his non compliance. I am at a loss to understand why he has not engaged with the respondent, or complied with any of the directions. Even assuming he was confused about the direction for a witness statement, he has not provided a response as to why he did not engage with the direction of Employment Judge Lewis by the 14th November 2023, in respect of the strike out warning.
33. Orders are not optional. They are there to ensure the hearing is fair to all the parties. The claimant's non compliance has had an obvious impact, and I find that there has been a substantial portion of the case where he has not been actively pursuing it. He has in my view simply hoped that by attending today, and having his say that this would somehow swing the balance in his favour. In doing so he has given insufficient consideration that this has on his own case, and the ability of others to respond to it at trial.
34. Throughout the submissions and preliminary argument, I have been at pains to consider with the parties whether a hybrid approach could be achieved, which may allow the hearing to proceed in a proportionate way and fair way. In doing so I have had in mind the overriding objective.

35. However, on balance I am persuaded that a fair hearing is not possible and that the respondent would effectively be ambushed and have no mechanism to understand the claim or how to address its case. The parties are not on an equal footing. I also find that the claimant's failure to disclose his WhatsApp messages, which he says would complete the chain (a chain which he criticises as selective), is unreasonable conduct in terms of the litigation.

Application of the Law to the Fact

36. I have considered whether I should adjourn the case, and allow more time for the claimant to address his case. However, I am completely satisfied that were I to do this that the claimant would not comply. He is operating on the basis that he will have his say and that will be sufficient. He has entirely ignored the disadvantage that this causes the respondent and indeed his own case.

37. If I gave more time then we would be in the same position with more costs incurred to the respondent. If the non compliance were the other way around the claimant would certainly have something to say about it.

38. The proximity of the hearing to the strike out warning is perhaps the only reason that administratively these proceedings have not already been struck out due to the claimant's non compliance.

39. I have considered whether to restrict the claimant's role, however, there has been so little participation that this would be to prevent him running any active case, and his case would be doomed to fail in those circumstances. I have also considered whether some reasonable degree of latitude should be awarded to the claimant as he is unrepresented. However, a lack of representation is not a licence to ignore directions, or to allow special treatment, to do so would be equally unjust. It would also not escape the unfairness which I have articulated above. I am satisfied that the claimant was on notice of what he had to do and that he has simply chosen not to engage.

40. Having weighed all the matters in the round, it seems to me that the manner in which the proceedings have been conducted by the claimant have been unreasonable, and creates a manifest unfairness to the respondent. He has failed to comply with the reasonable directions of the Tribunal, which has resulted in his own failure to pursue his case.

41. For all of those reasons it seems entirely appropriate and necessary for me to exercise my discretion pursuant to Rule 37 ETRP 2013. I therefore strike out the claimant's claim, and dismiss the proceedings accordingly.

CASE NUMBER 3313194/2022

Employment Judge Codd

14th February 2024

Sent to the parties on
27 February 2024

For the Tribunal