



EMPLOYMENT TRIBUNALS

Claimant: Ms S Lindsay

Respondent: NHS England

Heard at: London Central (by CVP) **On:** 6 June 2024

Before: Employment Judge Khan (sitting alone)

Appearances

For the claimant: In person

For the respondent: Mr H Dhorajiwala, counsel

JUDGMENT

Save for the allegations that the institution of the disciplinary proceedings and the decision to dismiss the claimant amounted to direct discrimination on the grounds of the claimant's race, the race discrimination complaint is struck out under rule 37 of the Employment Tribunals Rules of Procedure 2013.

REASONS

1. The respondent applied to the tribunal on 21 May 2024 to strike out the remaining complaint of race discrimination on the grounds of: (i) the claimant's continued non-compliance with the tribunal's orders; (ii) the claim not being actively pursued; or (iii) the claim having no reasonable prospect of success.
2. Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides that 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 one of five grounds. These grounds include: that the claimant or response is scandalous or vexatious or has no reasonable prospect of success (rule 37(1)(a)); 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 (rule 37(1)(b)); and non-compliance with any of these rules or with an order of the tribunal (rule 37(1)(c)).

3. Where a tribunal is considering a strike out under rule 37(1)(c) regard must be had to the overriding objective which is to deal with cases fairly and justly. In *Weir Valve and Controls (UK) Ltd v Armitage* [2004] ICR 371, the EAT explained that this requires consideration of the following factors: (i) the magnitude of the non-compliance; (ii) whether the default was the responsibility of the party or his or her representative; (iii) what disruption, unfairness or prejudice has been caused; (iv) whether a fair hearing would still be possible; and (v) whether striking out or some lesser remedy would be an appropriate response to the non-compliance. This therefore requires consideration of whether a strike out is a proportionate sanction.
4. I was satisfied that it was in the interests of justice to strike out each of the allegations of race discrimination save for the two allegations of direct race discrimination which shall proceed (as set out above), under rule 37(1)(c), for the following reasons:
 - (1) Those allegations of race discrimination are not sufficiently particularised in the claim form.
 - (2) The claimant has failed to provide all necessary further information in relation to those allegations having been ordered to do so by the tribunal on two previous occasions.
 - (3) At this third preliminary hearing, I gave the claimant a further opportunity to provide this information, with reference to the 12 items listed at paragraph 25 of the Case Management Order of EJ Isaacson which was sent to the parties on 28 February 2024 (“EJ Isaacson’s CMO”). The claimant refused to provide this information. She insisted that she had already provided this information but refused, when asked, to identify any specific document or correspondence other than an updated schedule of loss which did not assist.
 - (4) Without this information being provided, the basis of each of these allegations is unclear and the respondent cannot understand the case it is required to meet in order to formulate its response and nor can the tribunal effectively case manage these proceedings.
 - (5) Given the claimant’s repeated failure to provide this outstanding information to date, including a refusal to cooperate with my enquiries at this hearing, I have little confidence that a further order, including one made under rule 38 (i.e. an unless order) would result in this information being provided by the claimant.
 - (6) Having regard to the overriding objective and the factors enumerated in *Armitage* and particularly: (i) the magnitude of the claimant’s non-compliance in respect of an order to provide this further information which is of fundamental importance to these proceedings; (ii) there being no prospect of a fair hearing without this information being provided and little prospect of the claimant providing this information based on her conduct to date; and (iii) there being no lesser appropriate sanction (including an unless order), I was satisfied that striking out was proportionate and in the interests of justice.

5. In respect of the two allegations of race discrimination which proceed, I was satisfied that the tribunal was already in possession of the requisite information to understand the basis on which these allegations were advanced i.e. that the claimant's complaint was that if she was white she would not have been subjected to a disciplinary process and dismissed. It was relevant that the respondent had not requested any further information in relation to item 6 listed at paragraph 25 of EJ Isaacson's CMO which concerned the institution of disciplinary proceedings. Whilst the respondent had requested further particulars (Q11) in relation to item 12, which concerned the claimant's dismissal, which the claimant had not provided, it was difficult to see why the respondent needed to understand the basis on which the claimant alleged that it was because of her race, nor was I satisfied that the claimant's failure to provide this information meant that a fair hearing was not possible. Equally, although I gave the respondent leave to amend its response, it seemed to me that the grounds of resistance already contained the factual basis of the respondent's defence to these allegations. I therefore concluded that neither of these allegations should be struck out on the basis that the claimant had failed to comply with any of the tribunal's orders. Nor for completeness was I satisfied that these allegations should be struck out on the merits, as it was necessary to take the claimant's case at its highest and, in any event, there were core facts in dispute which could not be resolved without hearing oral evidence. Nor did I find the assertion that the claimant was not actively pursuing the claim to be sustainable given her attendance at this hearing.

Employment Judge Khan

06.06.2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

12 June 2024

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FOR THE TRIBUNAL OFFICE