EMPLOYMENT TRIBUNALS

Claimant: Ms Muthoni Mwangi & Ors

Respondent: Geneston Park Lane LLP

Heard at: by video **On:** 01.08.2024

Before: Employment Judge Mensah

Appearances
For the claimant/s: Not in attendance
For the respondent: Ms Greenley (Counsel)

JUDGMENT

1. The Claimant's complaints under reference 2200571/2024 and 2200572/2024 are struck out without further notice, on the grounds they have no reasonable prospect of success under Rule 37(a) of the Employment Tribunal Procedure Rules 2013.

The Background

2. The Claimant did not attend the hearing. The Tribunal had no evidence the Claimant had made any contact with the Tribunal to indicate why she could not attend the hearing. The Tribunal telephoned the Claimant on two separate occasions today and got no reply. The previous Case Management order gave notice of the hearing, and a second notice of the same hearing was sent out to the parties. I am satisfied the Claimant knew of the hearing and its importance. Ms Greenley told me the Claimant has not been in touch with the Respondent since the last hearing and even after the bundle was sent to the Claimant on Friday 25th July 2024 and again yesterday.

3. The Claimant has not filed any application to amend her claim as discussed at the last hearing despite the Judge giving time and an opportunity to seek advice about what this would mean for the Claimant and what was required.

4. The Respondent seeks to strike out on the basis the claim/s have no reasonable prospect of success. In the skeleton argument the procedural history is set out,

"*The Claimant presented a claim on 17 January 2024* ***[3]****. The only boxes ticked at Section 8.1 of the ET1 were for "other payments".*

In the additional information box the Claimant stated that "my line manager discriminate on me". In box 8.2 the Claimant stated that her line manager "was always picking on me with petty issues….this was nothing to do with my performance or mistakes it was discrimative [sic] accusations".

The Respondent set out in its Grounds of Resistance ***[30]*** *that it did not understand the legal or factual basis for the claims. The Claimant did not have sufficient service for an ordinary unfair dismissal claim nor had the Claimant set out any details of a claim for discrimination including the protected characteristic, type of discrimination, alleged unfavourable treatment or why she said it was because of a protected characteristic.*

In a document sent on 7 May 2024, the Claimant provided a long narrative statement setting out her account of the history of her employment ***[49]****. No discrimination is mentioned or intimated.*

At a preliminary hearing on 7 May 2024, the Claimant confirmed she did not seek to bring a claim for unfair dismissal ***[41]****.*

Further, Employment Judge Hodgson noted ***[41]****:*

"2.4 The claimant was unable to identify any specific claims but stated, generally, the respondent failed to respond to her adequately, which led to depression. I confirmed the tribunal did not have a general jurisdiction to consider personal injury claims.

2.5 I considered whether there are any other claims, including claims of discrimination. I could identify no claim of discrimination, whether in the claim form, or the claimant's subsequent description of the claim she wish to bring.

2.6 I have noted that the claimant wishes to bring any claims, she may wish to seek to amend. Any applicant to amend should be in writing and it should set out in detail the claim she wishes to bring. The claimant may wish to seek advice.

2.7 In the circumstances, I considered appropriate to list this matter for a preliminary hearing to consider the claims further and whether they can proceed."

No application to amend has been made."

5. Ms Greenley pointed out the Tribunal has already given the Claimant the benefit of a previous Case Management hearing and so she had ample opportunity to set out her claim and had been invited to amend her claim and has not attended and given no reasons. Ms Greenley argued it was not proportionate to continue in this manner given the costs to the Respondent and the lack of engagement. She

argued the Claimant had taken no steps to engage and pursue her claim and is unlikely to be able to be able to pay the Respondent's costs. Finally, she argued there is nothing to indicate an unless order would be a proportionate route given the lack of engagement since the last hearing.

The applications by the Respondent

"In short, despite having submitted lengthy "further particulars" and had the benefit of a preliminary case management hearing where a judge discussed the claims she wished to bring, none have been identified and no application to amend has been received.

It is trite law that a claim form is not something "to get the ball rolling" (Chandok v Tirkey [2015] IRLR 195). For a party to be able to defend claims made against them, it must understand what they are, and they must be reasonably cogent so as to be prosecuted before the tribunal.

The Claimant has failed to set out any claims that could be determined by this tribunal, discrimination or otherwise. Rather it appears the Claimant simply complains of unfair treatment, a matter which is not justiciable in and of itself.

As to any discrimination claim:

i. *none is apparent on the face of the ET1, the "further particulars" and no amendment application has been made;*

ii. *it remains unclear, if the Claimant intended to bring a discrimination claim but if she did, there is no pleaded protected characteristic, unfavourable treatment, comparator or case on causation. Clearly without these ingredients no claim for discrimination can have any reasonable prospect of success and could not come close to shifting the burden of proof as required by s.136 EqA 2010;*

iii. *the Claimant has already had ample opportunity to set out her case including the benefit of a previous case management hearing at which the issues were discussed;*

iv. *no further attempt has been made by the Claimant to set out a claim.*

It is often said that pleading is not an iterative process, but here there is not even any incremental progression. Rather despite enquiry, there is no discernible claim over which the tribunal has jurisdiction and that the Respondent can sensibly defend or that the tribunal can determine. "

The Law

6. (19) Rule 2 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") provides:

"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."

Strike Out

7. (20) 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…"

8. In the House of Lords in ***Anyanwu v South Bank Students Union and South Bank University [2001] IRLR 305*** it was confirmed that strike out is not normally appropriate where there are substantial disputes of fact, most notably in fact-sensitive discrimination claims. It is trite that it is only the clearest cases where a discrimination claim should be struck out. As per the case of ***Mechkaroy v Citibank NA [2016] ICR 1211*** and ***Ezsias v North Glamorgan NHS Trust [2007] ICR 1126***, a strike out is not appropriate where there is a crucial core of disputed facts that are not susceptible to determination otherwise than by hearing and evaluating the evidence.

9. In ***Ahir v British Airways plc [2017] EWCA Civ 1392*** Underhill LJ stated that:

"Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospects of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context….Nevertheless it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be "little reasonable prospects of success".

Deposit orders

10. (25) Rule 39 of the Rules contains the power to make a deposit order. This provides:

"(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.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order. (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21. (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

11. A deposit order is available early on in proceedings where the claim/s are shown to have little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails, see ***Hemdan v Ishmail and Another [2017] ICR 486*** 27. Underhill LJ in the case of ***Ahir v British Airways Plc [2017] EWCA Civ 1392*** that:

"*16. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'. ... [However,] Where there is on the face of it a straightforward and well documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that the explanation is not the true explanation for what happened without the claimant being able to advance some cogent basis for that being so*."

12. Even taking the Claimant's claims from her claim form, the case management hearing records and the further information she provided for the previous hearing she has not identified a basis of claim to pursue a claim before the Tribunal.

13. The Claimant does not have the required two years' service for an Unfair Dismissal claim. No discrimination claims have been identified and she has not complied with Judge's orders and not attended today with no excuse.

14. The Claimant has not applied for an amendment and the Judge in the previous hearing gave her the clear opportunity to do this and to seek advice if she didn't understand what she had been told. The further information before the previous Judge gives no more than a history of complaints which might have been relevant to an Unfair Dismissal claim but did not identify a basis to bring those complaints before this Tribunal for any other reason upon which it has jurisdiction.

15. I am satisfied on the information before me the Claimant has no reasonable prospect of success and strike out her claims under Rule 37(a). Had I not taken the decision to strike out under Rule 37(a), I would have in the alternative struck out the claims under Rule 37(c) for non-compliance with the previous Judge's order to attend this hearing, given the history and lack of any application to amend or engagement in the process.

Conclusions

16. In considering the Respondent's application for strike out I have taken the Claimant's claim at its highest. I have reminded myself that it is only in the clearest of cases that a discrimination claim be struck out, but the Claimant has not identified any discrimination claim before this Tribunal. These claims as before me and on the evidence, I have seen have no reasonable prospect of success. In those circumstances, I do not need to consider a deposit order.

Second claim

17. Ms Greenley confirmed the second Claimant is not known and appears to be living with the Claimant and the Respondent thought she might be a lay friend or relative of the Claimant. The Respondent has no separate ET1 and has only seen the name of this second individual in this claim. No particulars are provided in the claim form. I checked with the Tribunal, and it appears no separate particulars are filed for a second claim and the second case number relates only to this claim. On that basis I also include the second claim in my strike out order as it appears to be no more than an administrative way of recording the second claimant as identified in these proceedings, it does not represent a pleaded claim for the second Claimant and no grounds have been file for a separate claim for the second Claimant.

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Employment Judge **Mensah**

Date 01.08.2024

JUDGMENT SENT TO THE PARTIES ON

8 August 2024

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FOR THE TRIBUNAL OFFICE

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The Employment Tribunals Rules of Procedure are here:

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