



EMPLOYMENT TRIBUNALS

Claimant: Miss K Thomas

Respondent: Haringey Council

Heard at: Watford (By CVP)

On: 13 June 2024

Before: Employment Judge Bansal

Representation

Claimant: In Person

Respondent; Mr M Gregson (Solicitor)

RESERVED PUBLIC PRELIMINARY JUDGMENT

1. The respondent's application to strike out the claimant's claim under Rule 37(1)(a)(b)(c) & (d) and/or a deposit order under Rule 39 of the Employment Tribunals Rules 2013 is refused.
2. The claim will proceed to a final hearing.

REASONS

Introduction

1. This Public Preliminary Hearing was listed to determine the respondent's application dated 19 March 2024 for an Order to strike out the claimant's claim and/or in the alternative for a deposit order.
2. The claimant attended in person and was not represented. The respondent was represented by Mr M Gregson (Solicitor). I was provided with a bundle of documents of 112 pages prepared by the respondent. The claimant for this hearing sent to the Tribunal and copied the respondent solicitors three emails, with attachments. One email disclosed some text messages. The other email enclosed medical information about her condition, a letter to EJ Alliot and two character references.
3. I heard representations from both parties. Mr Gregson provided written submissions which he expanded orally.

Background Facts

4. The claimant was employed by the respondent as a Customer Service Advisor, on a fixed term contract from 17 January 2021 to 31 March 2022. Following a period of early conciliation commenced on 22 May 2022 and which ended on 24 May 2022, the claimant presented a Claim Form (ET1) bringing complaints of unfair dismissal and age discrimination.
5. By a Judgment dated 22 December 2022 the complaint for unfair dismissal was struck out as the claimant did not have the necessary two years of continuous service.
6. At a preliminary hearing held on 20 April 2023, Employment Judge Allott, clarified the age discrimination complaint, to be that of harassment. The two allegations relied upon by the claimant were confirmed to be;
 - (i) Allegation 1 - On 22 February 2022, at a training day, Mr Michael Griffiths is alleged to have said to the claimant, words to the effect, "Where are you sitting? When the claimant replied, "in that corner", Mr Griffiths said words to the effect, "The young people corner who don't seem to do any work and seem to chat".
 - (ii) Allegation 2 - On 8 March 2022, at approximately 11am Ms Sue Marshall came up to the claimant and asked her to move seats as you was sitting next to a colleague Yasin. When the claimant asked for the reason Miss Marshall did not give her reason. Miss Marshall later sent a message to the three other managers with a cc to the claimant informing them that she had moved the claimant. It is the claimants case that he did this due to the claimant's age.
7. In addition, at this hearing case management orders were made namely;
 - (i) Respondent to serve an amended response by 5 June 2023;
 - (ii) Claimant to serve a Schedule of Loss by 18 May 2023;
 - (iii) Disclosure of documents by 15 June 2023;
 - (iv) Final hearing bundle to be agreed by the parties by 13 July 2023, and for the respondent to prepare and send a final paginated bundle to the claimant by 27 July 2023.
 - (v) Witness statements to be exchanged by 10 August 2023.
8. In their amended response, in respect of the two allegations the respondent averred as follows;
 - (i) There was no scheduled training day on 22 February 2022. In any event, it is denied Mr Griffiths engaged in the alleged conduct at all.
 - (ii) The claimant was moved from sitting next to Yasin, because Yasin was not in the same team as the claimant. It was necessary for the claimant to sit with her team colleagues who performed the same duties. All employees were seated together in their own teams.
9. By letter dated 26 June 2023, the claimant corrected the date in respect of the first allegation. The team training day corrected to 23 February 2022. The claimant explained she got confused with the dates.

Application for strike out

10. By letter dated 19 March 2024 the respondent made an application for a strike out of the claim on four grounds, namely;
- (i) it has no reasonable prospects of success;
 - (ii) the manner in which the proceedings have been conducted by the claimant has been unreasonable;
 - (iii) the claim has not been actively pursued; and
 - (vi) there has been non-compliance with the Tribunal Orders;
11. In the alternative, an application for a deposit order, and for the claimant to provide further clarification of the identity of Mr Griffiths.

Respondent representations

12. The respondent submissions in relation to each ground are summarised below;

(i) Ground 1 - Reasonable prospects of success

- (a) the complaint of 23 February 2022 is out of time by one day;
- (b) the two allegations do not form part of a series of continuing acts;
- (c) no application has been made to amend the training day to 23 February 2023;
- (d) the claimant has not particularised in pleadings or provided a witness statement why she believes the alleged acts are related to her age;
- (e) the claimant has provided no documentary evidence supporting the allegations of age discrimination;
- (f) the claimant has identified the alleged discriminator in allegation 1 to be Mr Griffiths who does not appear to exist with the respondent.

(ii) Ground 2 - Unreasonable conduct of the claimant

- (a) the claimant has not responded to the respondent's representatives emails dated 6/11/23, 14/11/23; 20/11/23; 12/12/23; 19/12/23; 5/01/24; 15/01/24; 26/02/24 27/02/24 and 14/03/24. These emails relate to a request made by the respondent to clarify the correct name of the alleged perpetrator in respect of allegation 1 Mr Griffiths and with compliance with the case management orders made at the preliminary hearing on 20 April 2023.

(iii) Ground 3 - Claim not been actively pursued

- (a) the claimant has not engaged with the respondent since 30 October 2023, which has prevented the respondent representative from complying with the orders and preparing the case for final hearing.
- (b) the claimant has not complied with the case management orders made on 20 April 2023 or to the respondent's specific disclosure request made on 20 November 2023.

(iv) Ground 4 – Non-compliance with Orders

- The claimant has failed to do the following;
- (a) provide any further disclosure;

- (b) engage with the respondent representative to agree the index and final hearing bundle;
- (c) agree date for exchange of witness statements;
- (d) exchanged any witness statements despite the respondent sending their statements on the due date of 26 February 2024.

Claimant's representations

- 13. The claimant explained she got the name wrong of the alleged perpetrator for allegation 1. She confirmed the correct name of the individual is Mr M Green.
- 14. The explanation given for the non-compliance with the Tribunal Orders and for not corresponding with the respondent representative was because of her health reasons. The claimant explained that since February 2022 she has been suffering from depression and was in a "dark place", until recently. She has not been able to obtain legal assistance and representation to assist her.
- 15. With regard to exchange of witness statements the claimant explained she did not know that she had to provide a witness statement. She understood she had provided sufficient information regarding the allegations to the Tribunal.

The legal framework

- 16. Rule 37(1) of the Employment Tribunal (Rules of Procedure) 2013 provides that at any stage of the proceedings, either on its own motion 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 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 either party 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.
- 17. Rule 37(2) provides 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.
- 18. The well-known case of **Anyanwu v South Bank Students Union 2001 IRLR 305** underlined the importance of not striking out claims for an abuse of process except in the most obvious of cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in a plural society.
- 19. In the case of **Mechkarov v Citibank NA (2016) ICR 121**, the guidance given was that: "(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is "conclusively disproved by" or is "totally and inexplicably

inconsistent” with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.”

20. Further the EAT gave guidance in **Cox v Adecco Group UK Limited 2021 ICR 1307** in relation to strike out applications against litigants in person. This case identified the following principles;
- (1) No-one gains by truly hopeless cases being pursued to a hearing;
 - (2) Strike out is not prohibited in discrimination or whistleblowing cases; but special care must be taken in such cases as it is very rarely appropriate;
 - (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
 - (4) The claimant’s case must ordinarily be taken at its highest;
 - (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can’t decide whether a claim has reasonable prospects of success if you don’t know what it is;
 - (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;
 - (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;
 - (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;
 - (9) 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 test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.
21. The guidance from the EAT in **Hasan v Tesco Stores UKEAT/0098/16** is that the Tribunal must undertake a two stage exercise when considering whether to strike out a claim. Firstly, it must consider whether any of the grounds in Rule 37(1) have been made out. If it finds that a ground is made out it must then decide whether to exercise its discretion to strike out a claim.

Deposit Order

22. The Tribunal has the power to make deposit orders against any specific allegations or arguments that it considers has little reasonable prospect of success under r39 of the 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 £1000 as a condition of continuing to advance that allegation or argument.*”
23. Rule 39(2) requires a Tribunal to 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.
24. Under Rule 39(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.
25. Under Rule 39(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.
26. When considering making a deposit order, the case of **Wright v Nipponkoi Insurance Europe Limited UKEAT/0113/14** is helpful. In this case it was held that, when making deposit orders employment tribunals should stand back and look at the total sum awarded and consider the question of proportionality before finalising the orders made. It was noted in that case that the employment judge did not make the maximum awards that he could have done, but made orders which gave rise to a total sum that seemed proportionate when taking account of the number of allegations to which the orders related and the claimant’s means. This was a proportionate view on the totality of the award and a conclusion that was entirely open to the employment judge as an exercise of his discretion.
27. Rule 2 sets out the overriding objective which is to enable Employment Tribunals to deal with cases fairly and justly, which includes ensuring that the parties are on an equal footing.

Conclusion

28. In my deliberations I have taken into account the parties representations, their final submissions, the legal framework and case law.
29. In reaching my decision, I have been mindful of the following principles, namely;
 - (a) Not to conduct a mini-trial on the issues of fact;
 - (b) the overriding objective which requires fairness between the parties and a proportionate approach to the claims;
 - (c) whether the defects in the pleaded case might be rectified by making further orders such as the provision of further information to help clarify the legal or factual basis upon which the claims are put;
 - (d) that striking out a claim is one of the most draconian powers a Tribunal

can exercise, since it brings the claim to an end and prevents a claimant's case being determined on its merits.

30. I have also born in mind the guidance in the cases of **Abegaze v Shrewsbury College of Arts & Technology [2010] IRLR 236; Bolch v Chapman (2004) IRLR 140, and De Keyser Ltd v Wilson (2001) IRLR 324.** which requires me to consider where there has been a default on part of a party, whether as a result of that default/behaviour, there cannot be a fair trial and whether strike out is a proportionate sanction.
31. In respect of the time point about allegation 1, being one day out of time. This issue will need to be determined by the Tribunal by hearing oral evidence and deciding whether it is just and equitable to extend time.
32. Taking the claimant's case at its highest, the complaint is that the alleged harassment suffered was an act of age discrimination. At the preliminary hearing held on 20 April 2024, the claimant identified the conduct she says was related to her age. As for the allegation on 23 February 2023 involving Mr Green there is a dispute on fact, whether Mr Green spoke the alleged words or not. That determination can only be made upon hearing oral evidence and assessing the credibility of the claimant and Mr Green. The Tribunal was not presented with Mr Green's statement to be able to make a preliminary assessment of his evidence to this alleged incident. Accordingly, in accordance with the case law and guidance, where there are disputed facts it is an error of law for a Tribunal to pre-empt the determination without hearing full oral evidence. Similarly, in relation to allegation 2, the same applies. The respondent has given an explanation for moving the claimant, however, the claimant disputes this explanation. Accordingly, this factual dispute will need to be determined at a final hearing as well as giving consideration to whether the conduct, if substantiated was related to the claimant's age. I accept that a mere assertion that such conduct was related to her age is not enough. The claimant is required provide some supporting evidence to persuade the Tribunal. That is for the claimant to address at the final hearing.
33. On my preliminary assessment I am not of the view that the claim has no or little prospect of success. I therefore conclude that it would not be appropriate to strike out the claim and/or to make a deposit order.

Non compliance

34. It is evident from the correspondence contained in the bundle that from 23 October 2023 onwards, the claimant has failed to correspond or co-operate with the respondent in their efforts to comply with the orders and progress with the preparation of this case for a final hearing. Apart from serving the schedule of loss on 8 May 2023 the claimant has failed to comply with the orders relating to disclosure of documents including responding to the respondent's request for specific disclosure; agreeing the contents of the final bundle and exchange of witness statements. This failure is unreasonable conduct of the proceedings by the claimant
35. I have considered whether this failure to comply with the orders was deliberate or inadvertent. The claimant explained the reason for non

engagement was because of her ill health. I have considered the medical evidence provided. The letter from the GP dated 4 June 2024 gives an account of her mental health which appears to have started in January 2022 and has been continuous since then for which she is on prescribed medication and been referred to counselling. I am persuaded the claimant's non-compliance has not been deliberate. Nonetheless there is no excuse for not making the respondent representative aware or seeking a variation to the Tribunal orders as stated in Para 8.2 of the Order.

36. The threshold to strike out the claim has been established because of the unreasonable conduct on part of the claimant and the unacceptable failure to comply with the orders. I therefore have given consideration to proportionality. In ***Blockbuster Entertainment v James 2006 IRLR*** the ***Court of Appeal*** reminds tribunals that will include asking whether a lesser measure to address the default would be appropriate, particularly focusing on whether a fair trial is still possible in spite of the default and whether striking out the claim is disproportionate. As Lord Sedgley remarked the first object of any system of justice is to get triable cases tried.
37. I have reached the conclusion that this case has not reached a stage where a fair trial is not possible. Mr Gregson did not argue this point. I was informed that the respondent has obtained witness statements from their witnesses in relation to the two allegations. In particular, a statement has already been taken from Mr M Green in relation to allegation 1. Therefore, there should be no effect on the cogency of the witness evidence.
38. I therefore do not consider that it would be proportionate to strike out the claim because of the claimants disobedience. However, I would make the point to the claimant that she runs a high risk of the claim being struck out for any further failure to comply with the order made in this judgement, which I set out below.

Not actively pursuing the claim

39. By the claimant's own admission, from October 2023 until the date of this hearing she did not engage with the respondent, progress with her claim or write to the Tribunal seeking a variation to the orders given her health issues.
40. By not engaging with respondent there has been an intentional default by the claimant which has caused a delay to the final hearing. However for the reason stated in paragraph 37 above, I consider a fair trial is still possible. Therefore I have decided not to strike out his claim under this ground.

ORDERS FOR FINAL HEARING

Made pursuant to the Employment Tribunal Rules 2013

Final Hearing

1. This case will be heard by a full Tribunal on **12 & 13 November 2024** by **Cloud Video Platform (CVP)**. The hearing will start at 10.00am. Details of the link to the CVP will be sent to the parties nearer the hearing date.

2. By no later than **4pm on 4 October 2024** the claimant must send to the respondent her witness statement and of any other witnesses to be called to give evidence at the final hearing. A failure to comply with this order may result in the claimant and/or the witnesses not being permitted to give evidence without the leave of the Tribunal.
3. By **25 October 2024** the respondent must send to the Tribunal by using the DUC link, a copy of the hearing bundle and parties witness statements for use at the hearing.

Employment Judge Bansal
Date 9 September 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

..10 September 2024.....

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FOR THE TRIBUNAL OFFICE