



EMPLOYMENT TRIBUNALS

Claimant: 1. Ms C Hopley
2. Ms R McManus
3. Dr C Noyes

Respondent: London Borough of Southwark

Heard at: London South (in private by CVP) **On:** 5 November 2024

Before: Employment Judge Heath

Appearances

For the claimant: In person

For the respondent: Mr Olatokun (Counsel)

JUDGMENT

The claimants' claims are not struck out.

REASONS

Introduction

1. The respondent applied to strike out the claimants' claims for various reasons:
 - a. That they were compromised by previous COT3 agreements in the case of Ms Hopley and Ms McManus;
 - b. that they stood no reasonable prospects of success for a variety of reasons.

Procedure

2. This hearing was first listed by a Notice of Hearing dated 22 February 2024. At a Preliminary Hearing for Case Management on 25 July 2024 EJ Richter ordered as follows:

"A public preliminary hearing will be held on 5th November 2024 with a 1 day time estimate. The hearing will seek to further clarify the claims and issues. If appropriate it will seek to determine whether any claimant is compromised in proceeding with these claims by consequence of having previously entered into a COT3 settlement with the respondent and/or whether any part of the claim is out of time or should be struck out."

3. The claimants prepared a joint written submission for this hearing. The respondent prepared a written submission with two COT3 agreements annexed to it.

The law

4. Rule 37 of the ET Rules provides:-

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;*

5. For the purposes of a strikeout application I am to take the claimant's pleadings at their highest.
6. In *Mechkarov v Citibank NA* [2016] ICR 1121 the EAT summarised the principles that emerge from the authorities in dealing with applications for strike out of discrimination claims:

"(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."

7. The guidance in *Mechkarov* followed from a line of authorities including *Anyanwu v South Bank Students' Union* [2001] IRLR 305 and *Eszias v North Glamorgan NHS Trust* [2007] IRLR 603. *Chandok v Turkey* [2015] ICR 527 shows that there is not a "blanket ban on strikeout application succeeding in discrimination claims". They may be struck out in appropriate circumstances, such as a time-barred jurisdiction where no evidence is advanced that it would be just and equitable to extend time, or where the claim is no more than an assertion of the difference in treatment

and a differencing protected characteristic. *Eszias* also made clear that a dispute of fact also covers disputes over reasons why events occurred, including why a decision-maker acted as they did, even when there is no dispute as to what the decision maker did.

8. In *Ahir v British Airways plc* [2017] EWCA 1392 the Court of Appeal held that tribunal's should "*not be deterred from striking out claims, discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger in reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context*".
9. The authorities similarly cautioned against striking out whistleblowing claims except in the clearest of circumstances.

The application and conclusions

COT3

10. The COT3 agreements of Ms Hopley and Ms McManus are materially identical, were signed on behalf of the respondent 10 February 2020, and provide at clause 2:

"2. The payment referred to in clause 1 is in full and final settlement of:

(a) the claim brought by the Claimant against the Respondent in the Employment Tribunal under [case number]

(b) any grievance(s) raised by the Claimant against the Respondent; and

*(c) all and any claims which the claimant has or may have, whether known or not in all jurisdictions under contract, tort, statute, European law or otherwise against the Respondent and its directors, members, officers, agents and employees whether arising, in relation to, in connection with, or as a consequence of her employment with the Respondent **as at the date of this agreement** including, but not limited to, claims under [various legislation listed] (emphasis added).*

11. The pleadings in the previous case settled by the agreements were not provided. The respondent made no submissions about the nature of these claims, and I was told by the respondent that they related to holiday pay claim
12. The claims in these proceedings brought by the claimants by ET1s presented in September 2023 are for unfair dismissal (including automatically unfair dismissal for making protected disclosures in 2023), whistleblowing detriment, unlawful deduction from wages and breach of contract.

13. I was taken to no material from which I could conclude that the claims being brought in these proceedings arose, were in relation to, in connection with or as a consequence of her employment as at the date of the COT3 agreements. The respondent submitted that the agreements compromised future agreements. From the plain wording of them, they do not.
14. I do not strike out these claims on the basis that there is no reasonable prospect of the claimants showing that these claims were not compromised by the agreements.

Unfair dismissal

15. The respondent submits that the claimants will not be able to establish employment status which is foundational to their ability to claim unfair dismissal.
16. However, I take the claimant's pleadings at the highest, and it cannot be said that their claim forms disclose no reasonable prospect of them establishing that they had the status of employees with the respondent. Whether they are or not will be a matter for evidence in due course, including examination of the terms of their IRO agreement, and whether it reflected the reality of the working relationship.
17. The respondent said it had a potentially fair reason for dismissal. Again, this is a matter for evidence at the hearing, and it cannot be said that, taking the case at its highest, the claimants have no reasonable prospect that they were unfairly dismissed.

Pensions claims

18. While I have not closely examined the law, I believe that whether or not an employee is enrolled on a pension scheme is a matter for the exclusive jurisdiction of the Pensions Regulator. It is also the case that pension contributions are not considered wages for the purposes of section 27 Employment Rights Act 1996 ("ERA").
19. However, as is made clear in the List of Issues prepared by EJ Richter, the claimants advance their claims for pension contributions as breach of contract claims. I cannot say on the basis of the pleaded case, taking it at its highest, that the claimants have no reasonable prospects of establishing that failure to pay pension contributions was a breach of the terms of their contracts. All the more the case, when the claim is that it was in breach of a written contract which was not put before me.
20. It is also correct to say that the wages claims are not simply in relation to pension contributions, but failure to pay a local government pay rise.

Discrimination claims

21. The age discrimination claim, if such is made, is subject to an application to amend which may or may not be made by the claimants. I cannot strike out a claim which has not been made yet.

22. Ms McManus's disability discrimination claim was largely set out in the List of Issues prepared by EJ Richter. As set out above, a discrimination claim will only be struck out in the clearest of circumstances. The way the claim has been formulated in the List of Issues is not hopeless. It stacks up as a legal claim and there is nothing from which I could conclude that there is no reasonable prospect of the claims succeeding.

Whistleblowing claims

23. The claimants make automatic unfair dismissal and whistleblowing detriments claims. Again, there is a strong public interest in whistleblowing claims only being struck out in the clearest of circumstances. The claimants pleaded case, as clarified at today's hearing again is not hopeless. It is not a claim that clearly merits being struck out. The respondent has not established that the claimants have no reasonable prospect of succeeding in these claims.

Employment Judge **Heath**

Date: 5 November 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

20th November 2024

O.Miranda
20th November 2024
FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

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