



EMPLOYMENT TRIBUNALS

Between:

Ms T M Eva
Claimant

and

Leicestershire County Council
Respondent

At a Preliminary Hearing

Held at: Leicester

On: Wednesday 21 March 2018

Before: Employment Judge Hutchinson (sitting alone)

Representation

For the Claimant:

Mr C Johnstone, One Assist Legal Services

For the Respondent:

Miss Dickinson of Counsel

JUDGMENT

The Employment Judge gave judgment as follows:

1. The following claims are struck out, namely
 - 1.1 direct sex discrimination
 - 1.2 direct disability discrimination
 - 1.3 failure to make reasonable adjustments
 - 1.4 victimisation
 - 1.5 harassment.
2. The remaining claims proceed to a hearing, namely
 - 2.1 unfair dismissal
 - 2.2 breach of contract in respect of notice pay
3. The claim for holiday pay is dismissed on withdrawal by the Claimant.

REASONS

Background and issues

1. The Claimant presented her claim to the tribunal on 20 June 2017. At the time she was represented by Mr Johnstone. Mr Johnstone is an employment law specialist.
2. The Claimant was employed by the Respondent as a Premises Officer between 7 January 2008 and 6 February 2017 when she resigned. In her Claim Form, she claimed the following;
 - unfair dismissal
 - disability discrimination
 - notice pay
 - holiday pay.
3. Attached to the Claim Form were details of her claim. The details went to 52 paragraphs. Even so, the claim was inadequately pleaded.
4. The claim was listed for hearing on 8, 9 and 10 May and the Respondent served their ET3 on 22 August 2017. They denied all claims made by the Claimant.
5. I conducted a case management preliminary hearing on 31 August 2017. At that hearing, I ordered the Claimant to provide further and better particulars of her claim by 28 September 2017.
6. The Claimant provided a Scott Schedule on 29 September 2017. The Scott Schedule allegedly provided the further particulars that I had required at the preliminary hearing.
7. That Scott Schedule provided the names of the alleged perpetrators and some dates. It still lacked particularisation.
8. On 19 October, the Respondent wrote to the Claimant with a response which set out its position as to the allegations made by the Claimant. The Respondent requested that the Claimant be directed to provide the further information requested within the Response.
9. The matter was referred to my colleague, Employment Judge Britton, who on 13 November directed as follows:

“Response from the Claimant by 20/11/2017 on the following. Including why no reference to comparators for Section 13; or how Section 19 – Pool; Provision, criteria or practice etc – is engaged. At least these 2 claims at present appear to thus have no legal merit. This is before considering that you haven’t answered as ordered with regards to Section 15; Section 20 – 21; Section 26”

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10. On 20 November 2017, the tribunal received a further document from the Claimant entitled;

“In compliance with Employment Judge Britton’s Orders”

The information provided by the Claimant still failed to address the issues raised. The Claimant did not provide any explanation in the response to the points raised by Employment Judge Britton as to the failure to comply with my orders. It remained vague and lacked particularisation.

11. On 30 November 2017, the Respondent applied for a preliminary hearing. The preliminary hearing would deal with;

11.1 whether the Claimant is a disabled person within the meaning of the Equality Act 2010;

11.2 whether the claims of disability and sex discrimination have no reasonable prospect of success and should be struck out;

11.3 whether the claims of disability and sex discrimination have little reasonable prospect of success and a deposit order should be made.

12. That correspondence was referred to my colleague Regional Employment Judge Swann who agreed that these matters should be dealt with at a preliminary hearing, which I have conducted today. It was also said that case management orders made be made at the conclusion of this preliminary hearing.

The hearing today

13. At the commencement of the hearing, the Claimant withdrew the claim for holiday pay and that was dismissed.

14. The Respondent conceded that at the relevant time, the Claimant did suffer from a disability. It was accepted that the Claimant’s disability related to her back, neck and shoulder injury. The disability in respect of stress and anxiety would have to be determined if appropriate by the tribunal.

15. I was invited by Miss Dickinson to strike out all the claims made under the Equality Act and I heard submissions from her and from Mr Johnstone in respect of that.

The law

16. The application for a strike out the claims is made under Rule 37 of the Employment Tribunal Rules 2013. That provides:

“(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 claim or a 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).”

17. I acknowledge that striking out claims, particularly those under the Equality Act is a Draconian measure and I do not do it lightly. I referred myself to various authorities.

18. As to whether the claim has no reasonable prospect of success, I referred myself to the case of ***Anyanwu and another -v- Southbank Students’ Union and another [2001] ICR 391***. That highlighted that in a claim of discrimination, strike out should only occur in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination.

19. When I am considering the manner in which proceedings have been conducted, the power to strike out includes the manner in which the proceedings have been conducted on behalf of a claimant. I can therefore consider the Claimant’s representative’s conduct. In that respect, I referred myself to the case of ***Bennett -v- Southwark London Borough Council [2002] ICR 881***. The guidance in that case reminded me;

- it is not simply the representative’s conduct that needs to be characterised as scandalous but the way in which he or she is conducting the proceedings on behalf of his or her client;
- the tribunal must therefore consider;
 - the way in which the proceedings have been conducted
 - how far that is attributable to the party’s representative
 - the significance of the ‘scandalous conduct’ (or in this case unreasonable conduct).

20. In considering whether a party has complied with orders of the tribunal, I have to consider whether there has actually been compliance with the orders made by the tribunal and whether striking out is a proportionate response to the non-compliance. I have to decide whether there are less drastic means of addressing the Claimant’s failures and achieving a fair trial for the parties. Guidance in respect of this is given in the case of ***Weirs Valves and Controls (UK) Ltd -v- Armitage [2004] ICR 371***.

21. To strike out a case on the basis that a fair hearing was no longer possible is a highly unusual order to make. I referred myself particularly to the guidance in ***Peixoto -v- British Telecommunications plc [EAT/0222/07]***.

My conclusions

22. I am satisfied in this case that all the claims under the Equality Act are not pleaded in any way that the Respondent could sensibly answer the allegations or indeed the tribunal could determine the case.

23. In this case, the Claimant has had repeated opportunities to set out her case via her representative. As can be seen above, there was;

- 23.1 the ET1
- 23.2 the Scott Schedule
- 23.3 the response to Employment Judge Britton's order
- 23.4 today's hearing.

24. It can be seen from all these responses the following;

- 24.1 there is no reference to the protected characteristic of sex in any of the Claimant's particulars;
- 24.2 in respect of the claims of direct discrimination, no comparators or details of hypothetical comparators are provided at all;
- 24.3 in respect of those direct discrimination claims, there is no explanation of how the detrimental treatment in any way relates to her protected characteristic;
- 24.4 in respect of the claims of failure to make reasonable adjustment, there is
 - no explanation on any provision, criterion or practice
 - no details of any substantial disadvantage, and
 - no mention of what adjustments, if any should be made.

25. In respect of the harassment claim, she does not set out what the behaviour is that amounted to the unwanted conduct related to the protected characteristic and it does not set out why it relates to that characteristic.

26. In respect of the victimisation claim, there is no reference to what the protected act is.

27. I have considered whether there are any alternatives to striking out the claim but I have decided that there are none.

28. I am satisfied that;

- 28.1 the claims under the Equality Act as currently pleaded have no reasonable prospect of success;
- 28.2 the manner in which the proceedings have been conducted by the Claimant's representative is unreasonable;
- 28.3 the Claimant has not complied with the orders made for further particulars and has done so repeatedly;
- 28.4 in this case, the Claimant resigned on 6 February 2017. The matter has been listed for hearing in May since last June and

there is no prospect that the Claimant will be able to rectify the deficiencies in time for a hearing. Delay in hearing a case affects the possibility of a fair hearing and if I was to adjourn the case to give the Claimant a further opportunity, then the matter is unlikely to be able to be heard until next year. That will be 2 years after the Claimant had resigned. In those circumstances, I am satisfied that it would not be possible to have a fair hearing at that time.

29. The claims made therefore under the Equality Act 2010 are dismissed. The claims for constructive unfair dismissal and breach of contract in respect of notice pay will proceed.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. It is ordered that the Respondent has primary responsibility for the creation of a single joint bundle of documents required for the hearing.
2. To this end, the Claimant is ordered to provide copies of any documents that she wishes to be included in the bundle at her request. These must be documents to which she intends to refer, either by evidence-in-chief or by cross-examining the Respondent's witnesses during the course of the hearing.
3. The Respondent is ordered to provide to the Claimant a fully indexed, page numbered bundle to arrive on or before **4 April 2018**.
4. The parties are ordered to exchange their witness statements so as to arrive on or before **27 April 2018**.
5. The Respondent is ordered to bring 2 copies of the bundle and the parties will also bring 2 copies of their witness statements for use at the hearing by **09:30 on the morning of the hearing**.

Listing the hearing

1. The claim remains listed for hearing on **Tuesday 8 May 2018, Wednesday 9 May 2018, Thursday 10 May 2018 and Friday 11 May 2018**. The case will now be heard by an Employment Judge sitting alone at the **Tribunal Hearing Centre at 5a New Walk, Leicester LE1 6TE**. The first morning will be a reading morning and the parties are to attend for a **14:00** start on the first day.

NOTES

- (i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.
- (ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
- (iii) The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
- (iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’: <https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf>
- (iv) The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*” If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Employment Judge Hutchinson

Date: 20/04/18

JUDGMENT SENT TO THE PARTIES ON

21/04/18

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