



EMPLOYMENT TRIBUNALS

Claimant

Mr. H. Gaforghlu

v

Respondent

Sofra International Ltd

Heard at: London Central

On: 3 December 2019

Before: Employment Judge Mason

Representation:

Claimant: Mr. R. Robinson, paralegal.

Respondent: Miss E. Grace, counsel.

PRELIMINARY HEARING (OPEN) RESERVED JUDGMENT

The Judgment of the Tribunal is that the Respondent's application dated 17 September 2019 to strike out the Claimant's claims on the following basis:

- (i) the manner in which the proceedings have been conducted is unreasonable; and/or
 - (ii) the Claimant failed to comply with Tribunal's orders
- fails and the Claimant's claims are allowed to proceed.

REASONS

Background and procedure at the hearing

1. The Respondent is a chain of middle-Eastern restaurants owed by Mr. Huseyin Ozer. The Claimant was employed by the Respondent as Head Chef at its restaurant in St Christopher's Place, London from 20 September 2016 to 8 February 2019. The Claimant is Turkish and of Azeri ethnicity.
2. On 4 April 2019, the Claimant lodged this Employment Tribunal claim. He brings a number of claims including unfair dismissal, harassment (race) and unlawful deductions from wages. The Respondent lodged a response denying all the claims with the exception of a failure to give particulars of employment (s1 Employment Rights Act 1996 ("ERA")).

3. At the Preliminary Hearing (PH) before me on 3 December 2019, the Claimant attended and was represented by Mr. Robinson. The Respondent provided a bundle (pages 1- 195) and draft List of Issues (agreed); both sides provided Skeleton Arguments.
4. On 14 August 2019, EJ Sharma conducted a Preliminary Hearing (closed) ("PH"):
 - 4.1 EJ Sharma made various orders [pages 48-53] including the following:
 - (i) By 6 September 2019: the Claimant to provide further and better particulars of all his claims ("the Particulars").
 - (ii) By 4 October 2019: the Respondent to submit Amended Grounds of Resistance.
 - (iii) By 18 October 2019: the Claimant to send to the Respondent a draft List of Issues.
 - (iv) By 1 November 2019: the parties to send to the Tribunal an agreed List of Issues.
 - 4.2 EJ Sharma postponed the full merits hearing (previously listed 4, 5, 6 and 9 December 2019) and relisted it for 1, 4, 5, 6, 7, 11 and 12 May 2020;
 - 4.3 EJ Sharma listed this case for a further closed PH to take place today (3 December 2019).
 - 4.4 EJ Sharma directed that a Turkish interpreter be available to assist the Claimant at the full merits hearing but not at the PH today.
5. Subsequent to EJ Sharma's orders:
 - 5.1 10 September 2019:
 - (i) The Respondent wrote to the Claimant objecting to the Particulars not having been provided as per EJ Sharma's order [page 138];
 - (ii) The Claimant replied the same day asking the Respondent for an extension of time until 20 September 2019 to provide the Particulars [page 139];
 - (iii) The Respondent agreed to an extension until 16 September 2019 with an extension until 14 October 2019 for the Respondent to issue an Amended Grounds of Resistance [page 142].
 - 5.2 17 September 2019:
 - (i) The Respondent made an application to strike out the claims [page 145-146] on the following basis:
 - a. the manner in which the proceedings have been conducted is unreasonable (Rule 37(1)(b));
 - b. the Claimant had failed to comply with EJ Sharma's orders dated 14 August 2019 (Rule 37(1)(c));
 - c. the claim was not being actively pursued (Rule 37(1)(d)).
 - (ii) Later that day the Claimant provided the Particulars [pages 54-59];
 - 5.3 22 October 2019: EJ Wade directed that the Respondent's strike out application be dealt with at the PH on 3 December 2019 [pages 60-61].
 - 5.4 11 November 2019: the Respondent provided Amended Grounds of Resistance with apologies for the delay [pages 64-73].
 - 5.5 13 November 2019: the Claimant sent a draft List of Issues to the Respondent [page 164].
 - 5.6 27 November 2019 at 12.30: the Respondent emailed the Tribunal (cc the Claimant) putting the Tribunal on notice that it would be making an application to strike out the Claimant's claims on the basis they have no reasonable prospects of success (Rule 37(1)(a) [page 169].

6. At the PH before me, I did not allow the Respondent to pursue its application to strike out on the additional basis of “no prospects of success” (Rule 37(1)(a)) for the following reasons:
 - 6.1 Insufficient notice was given of this further ground to the Claimant; the Respondent’s application on 27 November 2019 was less than 3 full working days before the hearing. This allowed insufficient time for the Claimant to give instructions to his legal representatives given the language barriers.
 - 6.2 The Claimant was unable to give evidence in the absence of an interpreter and without hearing from him I would be unable to determine key points such as whether, if any claims are out of time, time should be extended
7. I then heard the Respondent’s application to strike out the claims on the grounds set out in their letter of 17 September 2019. Ms. Grace informed me that in fact the Respondent is no longer seeking a strike out on the basis the claim was not being actively pursued (Rule 37(1)(d)).
8. I also heard from Mr. Robinson who opposed the application.
9. Having listened to both representatives, I reserved my decision which I now give with reasons.

The law

10. A claim or response can be struck out on the grounds set out in Rule 37 of the Employment Tribunal Rules of Procedure. The two relevant grounds in this case are:
 - 10.1 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
 - 10.2 for non-compliance with any of the Tribunal Rules or with an order of the tribunal (Rule 37(1)(c)).
11. Manner in which proceedings are conducted (Rule 37(1)(b)):
 - 11.1 Before striking out for unreasonable conduct the Tribunal has to be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; in either case, the striking out must be a proportionate response (**Blockbuster Entertainment Ltd v James** [2006] IRLR 630 CA).
 - 11.2 The critical question is whether a fair trial is still possible. If a fair trial is still possible, a striking out order is inappropriate (**Bolch v Chipman** [2004] IRLR 140).
12. Non-compliance with tribunal rules or a tribunal order (Rule 37(1)(c)):
 - 12.1 Before striking out for non-compliance, the Tribunal will have regard to the overriding objective (Rule 2) to deal with cases fairly and justly.
 - 12.2 This requires consideration of all relevant factors including the magnitude of the non-compliance; whether the default was the responsibility of the party or their representative; what disruption, unfairness or prejudice has been caused; whether a fair hearing would still be possible; and whether striking out is an appropriate response (**Weirs Valves and Controls (UK) Ltd v Armitage** [2004] ICR 371 EAT).

12.3 A “proportionate response” requires the Tribunal to consider if there is a less drastic means of addressing the failures such as “unless orders” and costs penalties.

Respondent’s submissions

13. Ms. Grace provided a Skeleton Argument but this was largely focused on the “prospects of success” strike out application. She made additional verbal submissions to address the two relevant grounds of (i) manner in which proceedings are conducted (Rule 37(1)(b) and (ii) non-compliance with tribunal rules or a tribunal order (Rule 37(1)(c).
14. Ms Grace says this application was made on the basis of the Claimant’s persistent and repeated failure to particularise his claims. She acknowledges the linguistic barriers but points out that the Claimant has had legal representation from the outset.
15. The WTregs, unlawful deductions and race harassment claims are so vague as to be impossible to respond to and/or are vexatious and an abuse of the process

Claimant’s submissions

16. Mr. Robinson also provided a Skeleton Argument and made verbal submissions.
17. Mr Robinson submits:
 - 17.1 The delay in providing the Particulars was due to language problems as neither the Claimant nor one of his witnesses speaks English.
 - 17.2 The Claimant’s representative was responsive to communications from the Respondent.
 - 17.3 The Particulars were provided only one day after the agreed extended deadline.
 - 17.4 There was no “contumelious conduct” on the part of the Claimant.
 - 17.5 A fair trial is still possible:
 - (i) The relatively small delay does not create a risk that it is no longer possible for a fair trial to take place on the issues in this case.
 - (ii) The Claimant had to wait a considerable time for the Respondent to provide its amended response but the litigation is now proceeding as per the time table set out by EJ Sharma and the case can be ready for trial in April/May 2020.
 - 17.6 Striking out would not be a proportionate response to the delay:
 - (i) There is still sufficient time for preparation for the final hearing;
 - (ii) This is the first occasion the Claimant has been in default;
 - (ii) The Respondent had to be asked more than once to produce their Amended Grounds of Resistance.

Conclusions

18. I have concluded it would be inappropriate and unjust to strike out the Claimant’s claims on either of the grounds relied on by the Respondent. My reasons are as follows:
 - 18.1 I am satisfied that a fair trial in April/May 2020 is still entirely possible. The parties, despite delays on both sides in complying with EJ Sharma’s orders, are now back on track.

- 18.2 I am not persuaded that the conduct of the Claimant or his representative involved deliberate and persistent disregard of required procedural steps:
- (i) The Claimant provided the Particulars only one day after the agreed extended deadline;
 - (ii) I accept that the default was due to language barriers;
 - (iii) This minor delay is insignificant when viewed in the context of the Respondent's own considerable delay in providing the Amended Grounds of Resistance.
- 18.3 I am not persuaded that striking out is a proportionate response and any failure to provide the Particulars can be addressed with appropriate case management orders, which I have made.

Employment Judge Mason
5 December 2019

Sent to the parties on:
06/12/2019

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For the Tribunal Office