



EMPLOYMENT TRIBUNALS

Claimant: Ms A Dasilva

Respondent: Children Assisted in a Real Environment Ltd.

PRELIMINARY HEARING (OPEN)

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 16 March 2022

Before: Employment Judge B Elgot

Representation

Claimant: Mr T Badiru, Friend

Respondent: Ms L Hatch, Counsel instructed by DAC Beachcroft LLP

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

The Claimant's application to have the Response struck out under Rule 37 (1) (a) and/or (b) and/or (c) and/or (e) does NOT SUCCEED. No application was made for a deposit order by reference to Rule 39. I did however consider whether such an order should be made on the ground that any argument or allegation in the Response has little reasonable prospect of success. I am satisfied that this is not the case for the reasons set out below.

REASONS

1. I had the benefit of reading skeleton arguments submitted by both representatives.
2. I am not satisfied that the Respondent's defence to the claims of unfair dismissal, race and age discrimination (including harassment) and failure to pay holiday and sick pay have no reasonable prospect of success. The Respondent has lodged a robust defence particularised in its ET3 Response and Grounds of Resistance including a contention that the Claimant does not have the two year qualifying period of employment to entitle her to make a claim for unfair dismissal. The factual basis of the defence is set out in part, for example, at paragraph 18 of Ms Hatch's Skeleton Argument. There is a comprehensive and detailed Case Summary and Schedule of Issues at paragraphs 41-46 of the Case Management Orders made by Employment Judge Scott at a telephone hearing attended by both parties on 22 December 2020. The orders were sent in writing to the parties on 11 January 2021. None of the content of the Case Summary or Schedule of Issues was queried by either party.
3. The pleadings, the Case Summary and the Schedule of Issues make detailed reference to disputed matters of fact which will require a decision to be made by a full tribunal of three members at a full merits hearing.
4. The Claimant is reminded that even if the Response were to be struck out there would still need to be a hearing to deal with remedy and that hearing would need to consider jurisdictional issues such as whether some of her claims have been filed on time and whether she has the necessary two years' service so as to entitle her to the right not to be unfairly dismissed.
5. The prejudice to the Respondent in being prevented from defending the claims would be not only in terms of any financial remedy awarded but also significantly prejudicial to its reputation as a provider of services to vulnerable children.
6. The Claimant also applies for the Response to be struck out on the ground that the manner in which the proceedings have been conducted by or on behalf of the Respondent has been vexatious, scandalous and/or unreasonable. I find no evidence of any such behaviour on the part of the Respondent save that the claims are opposed and defended. The late disclosure of the Respondent's documents is addressed below.
7. The Claimant's application under Rule 37 (c) that the Respondent has failed to comply with an order of the Tribunal and that therefore the Response should be wholly struck out does not succeed. The Claimant refers to a failure to comply with orders at paragraph 10 and 13 of Case Management Orders made by Employment Judge Scott on 22 December 2020. Paragraph 10 is not an order; it gives permission for the Respondent to serve amended Grounds of Resistance if it wishes to do so but there is no obligation imposed on the Respondent to take this procedural step. Paragraph 13 imposes a deadline of 30 April 2021 for disclosure of the Respondent's documents relevant to the claims and issues in this case.
8. The Respondent did disclose its documents to the Claimant late. They were sent by the Respondent's previous solicitors on 24 January 2022 as appears from page 96 of the

preliminary hearing bundle. The Claimant has not disclosed all of the additional documents as she has and which she may wish to add to an agreed file of documents for the final hearing, however, disclosure is now almost complete. There are so far only 123 pages of documents in one small file which makes disclosure manageable. I agree that the Respondent's disclosure is very late and is in breach of the relevant case management order. However I am certain that this is not vexatious or abusive conduct of the Respondent itself; it arises out of apparent errors made by the Respondent's previous solicitors and from staffing difficulties at the firm which is a matter over which the Respondent has no control. I am satisfied that this is unlikely to be repeated. A fair hearing of the claims remains possible once further case management steps have been properly undertaken.

9. In summary I am certain that a fair trial remains possible and that this case should proceed to a full hearing; a strike out is dis-proportionate to the failures of the Respondent. I am mindful that several appellate authorities make it plain that discrimination cases, including the defence to such claims; should not be struck out save in the clearest of circumstances. For the avoidance of doubt it is not vexatious for either party to seek a postponement of a hearing because of witness non-availability. It is up to the Tribunal to decide whether to grant such an application.

10. I agree with and adopt the additional arguments put forward by Ms Hatch at her paragraph 43 a-d in the Respondent's Skeleton Argument.

11. There is no non-compliance with the directions of Employment Judge Crosfill in his letter of 2 November 2020 which amount to vexatious, scandalous or unreasonable behaviour of the Respondent sufficient to make a fair hearing of the substantive issues impossible.

12. The Respondent intends to call four witnesses and the Claimant will give evidence on her own behalf. The parties are reminded to check the relevant guidance in relation to any witness giving evidence from abroad. The case is now listed for hearing at East London Hearing Centre on **27,28 and 29 September 2023**. A Notice of Hearing will be sent out in due course. Further case management orders will be sent out in a separate document.

Employment Judge B Elgot
Date: 22 March 2022