



EMPLOYMENT TRIBUNALS

Claimant

Miss A Idowu

v

Respondent

West London YMCA

Heard at: Norwich

On: 30 March 2023

Before: Employment Judge M Warren

Appearances

For the Claimants: In person

For the Respondent: Miss J Linford, Solicitor

JUDGMENT on an OPEN PRELIMINARY HEARING

1. The Claimant's Application to Amend her claim is granted. Her complaint that she was victimised contrary to s.27 of the Equality Act 2010 shall be substituted with a complaint that she was subjected to a detriment on the ground that she had alleged that the Respondent had infringed a right under the Working Time Regulations 1998.
2. The Respondent's Applications to Strike Out the Claimant's claims, or in the alternative for a Deposit Order, are refused and dismissed.

REASONS

Background

1. By way of background, Miss Idowu worked for the Respondent as a Night Support Manager between 28 January 2015 and her resignation on 18 March 2022. After Early Conciliation between 26 March and 6 May 2022, she issued these proceedings on 3 June 2022 claiming unfair dismissal and disability discrimination.
2. The matter came before Employment Judge Lewis on 22 February 2023. He identified some technical issues with regard to the claim.

3. The claim appeared to be that Miss Idowu had been badly treated by the Respondent because she had given evidence in an Employment Tribunal in relation to a disability discrimination claim brought by a colleague. It emerged that in fact, she did give evidence at an Employment Tribunal of a colleague, but that his claim was in relation to the Working Time Regulations and not the Equality Act 2010.
4. Employment Judge Lewis explained that Miss Idowu potentially had a claim under s.45A(1)(f) of the Employment Rights Act 1996 and gave her an opportunity to apply to amend. He therefore listed this Open Preliminary Hearing firstly to consider any such Application.
5. Employment Judge Lewis also identified that there were potential problems with the prospects of success, or Miss Idowu suggesting that the Respondents had simply been following a process. He therefore directed that this Open Preliminary Hearing should consider the question of whether a Deposit Order should be made and the Respondent would have the opportunity of making an Application for Strike Out if it wished.
6. Subsequently, the Tribunal received an Application to Amend from Miss Idowu. It does not appear to be dated, it appears in the Bundle, (with which I have been presented by the Respondent's Solicitors, for which I am grateful) at page 45, (electronic page 47. The Respondent's made a Strike Out Application by letter dated 9 March 2023, page 49, (electronic page 51).

Application to Amend

7. The Respondents have very sensibly not opposed the Application to Amend. I can deal with it therefore in short order; the Application is granted. It amounts to a legal re-labelling of the pleaded facts and is made on the suggestion of an Employment Judge to a litigant in person.

Application for Strike Out

8. That then brings me to the more tricky question of the Respondent's Strike Out Application and in the alternative, Application for a Deposit Order.

The Law

Strike Out

9. Employment Tribunals Rules of Procedure, rule 37 provides that:
 - (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 a claim or response on any of the following grounds—*
 - (a) *that it is scandalous or vexatious or has no reasonable prospect of success;*

10. Strike out is a draconian step. One should take the Claimant's case at its highest. See for example Ezsias v North Glamorgan NHS Trust 2007 CA ICR 1126: at paragraph 29, Kay LJ said that only in exceptional cases would a case be struck out when the central facts are in dispute.
11. In Morgan v Royal Mencap Society [2016] IRLR 428 the President of the EAT, (as she then was) Mrs Justice Simler, reminded us that the threshold is high, (paragraph 13). She acknowledged at paragraph 14 that there are cases where, if one takes the claimant's case at its highest, it cannot succeed on the legal basis on which it is advanced and in those circumstances, it will be appropriate to strike out. However, she said that where there are disputed facts, unless there are very strong reasons for concluding that the claimant's view of the facts is unsustainable, a resolution of the conflict of facts is likely to be required.
12. In exercising discretion, a Tribunal should have regard to the overriding objective. Rule 2 sets out the Overriding Objective as follows:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) *ensuring that the parties are on an equal footing;*
- (b) *dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) *avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) *avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) *saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

13. In exercising discretion, one must also balance the relative prejudice to the parties.

Deposit Order

14. The Employment Tribunals' rules of procedure at Rule 39 provide as follows:

*(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 £1,000 as a condition of continuing to advance that allegation or argument.
is shown; ...*

15. There is a lower threshold for a Deposit Order than there is for a strike out; the question is whether there is little reasonable chance of success, rather than no reasonable chance. One does not take the Claimant’s case at highest when considering a Deposit Order application and one is not limited to legal questions only, one can make a provisional assessment on the credibility of the assertions being put forward, see Jansen van Rensberg v Royal Borough of Kingston upon Thames EAT 00956/07 and Arthur v HertfordshirePartnership University NHS Foundation Trust UKEAT/0121/19.
16. There must be a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim, Hemdan v Ishmail and another UKEAT/0021/16.
17. Although one has a wider discretion than in relation to strike out, there is still a need for caution before making a Deposit Order when key facts are in dispute. A core factual dispute ought usually to be resolved at a final hearing, see Hemdan referred to above and Sami v Avellan [2022] EAT 22.
18. These principles were recently approved and summarised by Eady P in **Rojha v Zinc Media Group plc** [2023] EAT 39.

Miss Idowu’s Case

19. In order to determine these Applications, one has to understand Miss Idowu’s case. It is as follows.
20. Miss Idowu gave evidence at the Employment Tribunal hearing of a colleague on 26 March 2021, in relation to a claim under the Working Time Regulations. On the same date, she says, the Respondent commenced investigation into mis-use of a printer at Miss Idowu’s place of work.
21. Miss Idowu accepts that she used that printer to print out information for her son of school age, in respect of his exams. But, she says, she used her own paper and did not print anything in colour. She also says that others used the printer for personal reasons and they were not investigated or disciplined as she was.
22. Miss Idowu was issued with a First Written Warning on 2 July 2021. She acknowledges that she did not appeal against that warning because she accepted that she had used the printer and she should not have done so.

However, she says that in effect, the injustice of what had happened to her ate away at her. In particular, that others had done the same and had not been punished, that she had used her own paper but the Respondents did not accept that she had, that she had not printed out anything in colour but the Respondents did not accept that, and that it is not possible for her to override the IT system as she was accused of doing which the Respondents did not accept either.

23. Miss Idowu therefore chose to subsequently raise a Grievance about the way those points had been dealt with in the disciplinary process. She says that the Respondent mis-represent her Grievance when they suggest it was to do with re-payment of over payments.
24. The Grievance was not upheld. The outcome was provided on 3 December 2021. Miss Idowu complains of the delay in that outcome. She appealed the outcome. Her Appeal was not upheld. The Appeal Outcome was on 4 February 2022 and again, she complains of the delay in that process.
25. Miss Idowu's case is then that because she had assisted her colleague at the Employment Tribunal in relation to his Working Time Regulations claim: her use of the printer had been investigated; she was disciplined and subjected to a First Written Warning; she was falsely accused of not using her own paper, of printing in colour and overriding the Respondent's IT system; the investigation and outcome to her Grievance and her Appeal against that outcome were delayed; and her Grievance and the Grievance Appeal were not upheld.
26. Miss Idowu resigned on 18 March 2022.
27. Miss Idowu will say that all of the above caused her to become mentally unwell and endure a prolonged period of absence from work.
28. Miss Odowu says that a Miss Ademoye, who dealt with the Grievance Appeal at the Grievance Appeal Hearing, confirmed that she had not investigated the allegations that Miss Idowu had overridden the IT system, nor that she only printed in black and white. Miss Idowu says such could have been established by checking the websites that she had been printing from and checking the IT records.
29. Miss Idowu relies on all of the foregoing as also a breach of the implied term requiring employers to maintain mutual trust and confidence. There will be a question for the Tribunal whether the delay between the Appeal Outcome and her resignation a month later amounted to affirmation of the contract, (that is that she acknowledged her employment could continue) or whether her ill health had some impact on the timing of her resignation such that it could be said she had not affirmed the contract.

Conclusions

30. The Respondents will say Miss Idowu's absence from work between 14 June 2021 and 1 February 2022, were supported by fit notes from her Doctor. But that after that latter date, she was absent from work without leave and her resignation coincided with the Respondent's suggestion that it was going to hold an Absence Review Meeting because her absence had not been supported by fit notes latterly and she was refusing to provide her written consent to an Occupational Health Referral.
31. Those are allegations that need testing. They may be a problem for Miss Idowu. The extent to which they are a problem may depend upon evidence about her mental health at the time.
32. The Respondent has its own problems as to timing, I would observe. That is the remarkable co-incidence that after seven years of apparent good service, it investigates Miss Idowu's use of a printer on the same day that she gives evidence in an Employment Tribunal on behalf of a colleague. That is suspicious and something which the Respondent must answer. It may well be that the allegation Miss Idowu mis-used the printer is well founded. But why did the Respondent investigate it at that particular time? Why did it not investigate others, if it is true that they did not? Why did they not take disciplinary action against others, if it is true that they did not?
33. I cannot predict what the outcome of that enquiry might be. The Respondent points to the lapse of time. The warning was in July 2021 and the resignation in March 2022. But there are events in the meantime which on Miss Idowu's case, are cumulative. I cannot say she is likely to fail because of the lapse of time as the Respondent suggests, I simply do not know.
34. The Respondents say that there is no breach of the implied term to maintain mutual trust and confidence in the handling of the Grievance and the Grievance Appeal. How do I know that? I cannot just take that assertion at face value. It might be right, in which case Miss Idowu will probably lose. It might not be right. I simply cannot assess.
35. The Respondents say that Miss Idowu never suggested that there was a link between her giving evidence on behalf of her colleague and her being disciplined for using the printer. Miss Idowu says she did. She says she raised it regularly during the disciplinary and grievance process. How can I assess her prospects of succeeding on that assertion? I cannot, I have no idea.
36. In these circumstances I cannot say that Miss Idowu has no reasonable prospects of success on either of her claims. Can I say that she has little prospects of success? Certainly I have misgivings about Miss Idowu's chances of succeeding and I suggest that she keeps that in mind. But, to assess whether Miss Idowu has little prospects of success requires me to

pre-judge and make assumptions which I am not in a position to do on the information that is before me.

37. I therefore decline to strike the claims out or make a Deposit Order. That is not to be taken as an assurance that the case is a winner, as I have said, I have misgivings.

Listing for Final Hearing

38. Miss Linford has no instructions as to who the Respondents might be calling as witnesses, or their dates of availability. She guessed that there would probably be three witnesses.
39. Miss Idowu is planning to call in addition to herself, Ms Miriam Enwelim, (who had attended and observed today) who she says was also victimised for supporting the same colleague at Tribunal, and Ms Ikie Sunday.
40. I allowed one half a day for preliminary reading, one and a half days each for the evidence of the Respondents and the Claimant, half a day for a combination of submissions and oral Judgment and one day for deliberation by the Tribunal.
41. Ms Idowu has made reference to claiming psychiatric injury as a result of the way that she was treated. Therefore I decided the case should be listed as to a Hearing on liability only, a Hearing as to Remedy will have to be arranged subsequently if Miss Idowu succeeds.
42. Both parties agreed that a Hearing by use of the Cloud Video Platform (CVP) would be appropriate. It would involve a significant saving in terms of how soon the case could be listed.
43. In the presence of the parties and on the basis of their known dates of availability, I arranged with the Listing Team for the case to be listed for its Final Hearing on 22 – 26 January 2024.
44. Miss Linford rightly queried whether a full Tribunal was required, or whether this was a case that could be heard by an Employment Judge sitting alone. I am grateful to her for raising the point, I was not sure and said that I would check. Claims for detriment under s.45A of the Employment Rights Act 1996 requires a Full Tribunal.

Judicial Mediation

45. Miss Linford has no instructions on whether the Respondents would be interested in Judicial Mediation. I explained what was involved to Miss Idowu. Miss Linford will ensure the Respondents understand that if they wish to make use of that facility, they need only write to the Tribunal and ask for it. Miss Idowu would be prepared to take part in Mediation if the Respondents were interested.

46. The parties are referred to the “*Judicial Mediation*” section of the Presidential Guidance on ‘General Case Management’, which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/

The Issues

47. I indicated to the parties that as we did not have sufficient time to go through the issues, I would prepare a draft List of Issues based upon a summary of Miss Idowu’s case as set out above and what I have read in the papers. I do so on the basis that both parties have the opportunity of raising objection if they consider that I have got anything wrong in any material way. If they wish to raise any points regarding the List of Issues, they must write to the Tribunal within 14 days of this Hearing Summary being posted to them.

Detriment for alleging infringement of Working Time Regulations 1998

1. Did the Respondent subject Miss Idowu to detriment as follows:
 - 1.1 Investigating Miss Idowu’s use of a printer on 26 March 2021 and in the days immediately thereafter;
 - 1.2 Subjecting Miss Idowu to disciplinary action in relation to her use of a printer;
 - 1.3 Issuing Miss Idowu with a First Written Warning in respect of her use of a printer;
 - 1.4 Falsely accusing Miss Idowu in respect of her use of a printer, of not using her own paper, of printing in colour and of overriding the Respondent’s printer IT systems;
 - 1.5 Unreasonably delaying implementation of the Grievance process;
 - 1.6 Unreasonably delaying the process involved in considering her Grievance Outcome Appeal;
 - 1.7 Not upholding her Grievance;
 - 1.8 Not upholding her Appeal against the Grievance Outcome;
 - 1.9 Miss Ademoye confirming to Miss Idowu in a Grievance Appeal meeting that she had not investigated allegations that Miss Idowu had overridden the Respondent’s printer IT systems, Miss Idowu’s assertion that she had printed in black and white only; and

- 1.10 In fact, failing to investigate Miss Idowu's assertions that she could not have overridden the Respondent's printer IT system and had only printed in black and white.
2. Insofar as any of these allegations are upheld, do they amount to a detriment?
3. If so, did the Respondents subject Miss Idowu to such detriment because by assisting her colleague in his complaint to an Employment Tribunal about the Respondent's alleged breach of the Working Time Regulations, Miss Idowu had alleged that the Respondent had infringed his rights under the Working Time Regulations.

Constructive Unfair Dismissal

4. Was Miss Idowu dismissed? In other words:
 - 4.1 Did the Respondent breach the so called "trust and confidence term", i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and Miss Idowu?
 - 4.2 If so, did Miss Idowu affirm the contract of employment before resigning, in particular by the delay between the Appeal Investigation Meeting with Miss Ademoye (relied upon as the last straw) and her resignation on 18 March 2022?
 - 4.3 If not, did Miss Idowu resign in response to the Respondent's conduct? Was it a reason for her resignation, (it need not be 'the' reason for the resignation)? If Miss Idowu was dismissed, she will necessarily have been wrongfully dismissed because she resigned without notice.
5. The conduct Miss Idowu relies upon as breaching the trust and confidence term is that outlined above as amounting to detriments in respect of the claim pursuant to s.45A of the Employment Rights Act 1996 ("ERA").
6. If Miss Idowu was dismissed, what was the principal reason for dismissal and was it a potentially fair one in accordance of s.91(1) and (2) ERA 1996? If so, was the dismissal fair or unfair in accordance with s.98(4) ERA 1996 and in particular did the Respondent in all respects act within the so called "band of reasonable responses"?

Case Management Orders

48. I explained to Miss Idowu what was involved in preparing a Schedule of Loss, the obligations of disclosure, preparation of the Bundle by the Respondent and the exchange of witness statements.

49. In discussion with the parties and with their agreement, I made the Case Management Orders set out below.

ORDERS

Made under the Employment Tribunals Rules of Procedure 2013

THE ISSUES

1. The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

SCHEDULE OF LOSS

2. On or before **11 May 2023** the Claimant shall send to the Respondent a “schedule of loss”, i.e. a written statement of what is claimed, including a breakdown of the sums concerned showing how they are calculated.

DISCLOSURE OF DOCUMENTS

3. On or before **11 May 2023** each party shall send to the other a copy of the documents in their possession or control relevant to the issues in this case, whether they assist their case or not.

BUNDLE OF DOCUMENTS

4. By **22 June 2023** the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files (“bundle”), and provide the claimant with a ‘hard’ and an electronic copy of the bundle **by the same date**. The bundle should only include documents relevant to any disputed issue in the case and should only include the following documents:

- 4.1. The Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;

- 4.2. Documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

5. In preparing the bundle the following rules must be observed:

- 5.1. Unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- 5.2. The documents in the bundle must follow a logical sequence which should normally be simple chronological order.
6. Where an electronic bundle is provided in PDF format:
 - 6.1. The case number(s) should be clearly identifiable.
 - 6.2. Pages in a PDF bundle must be numbered so that they correspond to the automated PDF numbering system.
 - 6.3. Any additional or late submitted documents should be numbered sequentially at the end of the PDF file and not inserted between other pages.
 - 6.4. The parties may choose to send the bundle index or table of contents as a separate PDF file.
 - 6.5. Where possible documents should appear the right way up in portrait mode.
 - 6.6. Images of text must have been subjected to Optical Character Recognition.
7. The Bundle shall be filed with the tribunal using its Document Upload Centre no later than 7 days before the final hearing.

WITNESS STATEMENTS

8. On or before **21 September 2023** the parties shall exchange written witness statements (including one from a party who intends to give evidence). The witness statement should set out all of the evidence of the relevant facts, set out in chronological order, which that witness intends to put before the Tribunal. The Claimant's statement should contain evidence relevant to the remedy claimed, including financial claims and losses. Such statements should consist of facts only and should not consist of argument, hypothesis or supposition.

A failure to comply with this order may result in a witness not being permitted to give evidence because it has not been disclosed in a witness statement; or in an adjournment of the hearing and an appropriate order for costs caused by such adjournment.

9. The statement should be typed if possible and should be set out in short, numbered paragraphs. If reference is made to a document, it should include the relevant page number in the agreed bundle.
10. The Respondent shall file electronic copies of both sides documents with the tribunal by no later than 7 days before the final hearing.

HEARINGS

11. This matter has been listed for hearing by a full tribunal by CVP with a time estimate of 5 days on **22 to 26 January 2024** inclusive. This time estimate has been arrived at after discussion with the parties, to include the time needed for considering the oral and written evidence; the party's closing statements; the consideration and delivery of the fully reasoned Judgment of the Tribunal on liability and evidence, consideration and Judgment on remedy, if arising. The parties are expected to ensure that they prepare the case in such a way that it may be concluded within that time frame. The date of the hearing has been set on the basis of dates of availability provided by the parties and therefore any application for a postponement will only be granted in the most extenuating of circumstances.

CHRONOLOGY AND CAST LIST

12. An agreed, (if possible) neutral chronology and cast list shall be prepared by the Respondent and filed with the Tribunal on the morning of the first day of the final main hearing.

Public access to employment tribunal decisions

The parties should note that all 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.

President's guidance

The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/

Other matters

(a) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(b) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(c) You may apply under rule 29 for this Order to be varied, suspended or set aside.

Employment Judge M Warren

Date: 30 May 2023

Sent to the parties on: 30 May 2023

For the Tribunal Office.