EMPLOYMENT TRIBUNALS

Claimant		Respondent
Miss N Ocekci	v	Tom Paxman

Heard at: Bury St Edmunds On: 13 December 2018

Before: Employment Judge KJ Palmer

Appearances
For the Claimant: No attendance
For the Respondent: Miss A Rokad, Counsel

JUDGMENT

1. Pursuant to a preliminary hearing, it is the tribunal's Judgment that the claimant's claims be struck out under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

REASONS

1. This matter came before me today originally listed as a preliminary hearing case management discussion, but converted to a three hour hearing to also consider the respondent's application to strike out the claimant's claim under Rule 37 of the Employment Tribunal Rules or make a deposit order under Rule 39.

The History of this Claim

2. The claimant who was then unrepresented, presented a claim to this tribunal which was received on 13 August 2018. That claim was home made and in it the claimant ticked at paragraph 8 the box indicating that

she was pursuing a claim for race discrimination and the box that indicated she was pursuing a claim for arrears of pay.

3. The nature of the arrears of pay claim appears to be clarified at paragraph 6.5 of the ET1 where she indicates that she was promised commission for appointments generated. She says she was also promised to be paid commission on the sales that she generated. That rather conflicts with the further information provided at paragraph 8 in the details of her claim, where at the end of her claim she makes it clear that with the help of ACAS she received all the monies which she says she was rightfully owed. Therefore, it is unclear from her claim, whether she pursues her claim for arrears of pay. Further, in the fairly perfunctory agenda, which ultimately made its way before the tribunal today lodged by those representing her there is no mention of the arrears of pay claim.

4. Turning back to the ET1 her claim in race discrimination is unparticularised, but clearly revolves around a very narrow set of circumstances where upon being interviewed for the role that she finally took up at the respondent's, she was asked to provide certain information to clarify her identity so that the respondents could, in accordance with the obligations upon them, ascertain that she was someone who was permitted to work in the United Kingdom. All companies have to go through an identity check in these circumstances and she was subjected to such an identity check by being asked for her passport and asked to fill in certain documentation.

5. Her claim appears to arise out of her ire that she was asked for that documentation and she claims that two others, who are white English employees, Alex Dryball and Andrew Hancock, were not so asked. It is on this basis that she appears to advance her claim in race discrimination, albeit that as I say it is largely unparticularised. There appears to be nothing else and the nature of her claim appears to revolve around a very narrow set of facts.

6. She was employed by the respondents for a short period of time between 19 February 2018 and 11 May 2018, when she was dismissed, the respondents say by reason of poor performance.

7. The tribunal then received a letter by email from a Kathy Durham of the Merseyside Employment Law Consultancy which was dated 19 September 2018, confirming that they were henceforth instructed by the claimant to represent her.

8. This followed the tribunal sending a notice of this hearing to both the claimant direct and to the respondent. That notice indicated that a

preliminary hearing case management discussion would take place today at 2 pm and that two hours would be allowed for that hearing. Subsequently, those instructed by the respondents wrote to the tribunal with a copy of their application sent also to the representatives of the claimant on 5 October, requesting a strike out of the claimant's claim. Their application was based upon the identical set of circumstances which they had outlined in the ET3 filed in response to the claimant's claim. I will come back to those circumstances later on.

9. Pursuant to that application, my colleague Judge Laidler, wrote to both parties on 14 November 2018 indicating that the application for strike out and / or a deposit order would be considered at this preliminary hearing and she relisted the hearing to commence at 10 am today allowing a time estimate of 3 hours. She specifically said that the respondent's application for a strike out and / or deposit order would be considered at this preliminary hearing.

10. That letter was dispatched on 14 November and was received by those representing the respondent, it was sent to the Merseyside Employment Law Consultants and I have confirmed with the Watford administration that it was sent to them by email.

11. Neither the claimant, nor her representative, has attended today for this hearing and my decision is to proceed to hear the application.

12. In the absence of the claimant or her representative attending today, I caused the Watford administration to make contact with the claimant and her representatives. The claimant said that she understood that today's hearing was taking place at 2 pm, but indicated she had no intention of attending. Her representatives said that they also felt that the hearing was at 2 pm, but equally had no intention of attending. They said they had not received the letter of 14 November relisting the hearing for 10 am and including the strike out application. They also say that they had not seen the strike out application under cover of the respondent's representatives email of 5 October 2018.

13. I have before me some recent correspondence prior to today, where in essence on 11 December, two days ago, at 12.32 pm, the claimant's representative sent an email to the Employment Tribunal administration offices at Watford requesting that this hearing be converted to a telephone hearing. They gave no reason for that request and no formal application was made.

14. Within 40 minutes, those representing the respondents had replied to that request emailing the claimant's representatives and pointing out that they objected to any such application, if indeed an application had been made

and further pointing out that for some time it had been settled that the hearing today was going to incorporate the respondent's application to strike out and that it had been listed for 3 hours.

15. Still, neither the claimant nor her representative have attended today.

16. The tribunal received a further email, also on 11 December, where the claimant's representative refer to an application to convert the hearing to a telephone hearing, but make no formal application. I have also had handed up to me by Counsel representing the respondent today, evidence of the fact that those representing the respondent caused a copy of the bundle that is before me today to be sent to both the claimant and those representing the claimant in advance. In that bundle is a copy of the respondent's application to strike out and a copy of the tribunal's letter of 14 November making it clear that the hearing would start at 10 am, would include the strike out application and would be for 3 hours.

17. All of this evidence leads me to believe that it is inexcusable for those representing the claimant to fail to attend today. On any analysis they have clearly had notice of the strike out application on more than one occasion and it is very detailed in its content. They have also seen a bundle that incorporates it and the letter from the tribunal setting out the terms of this hearing. That letter was also emailed to them and there is no evidence that it was not received.

18. Even if those representing the claimant had not received those documents, which seems highly unlikely, it must be the case that they should have attended here at this tribunal this afternoon at 2 pm. They have failed to do so. Presumably they have just assumed that their on-line application to have this matter converted to a telephone hearing would be accepted. That is simply not good enough and in any event for the reasons I have set out above, I do not believe that they have not had due notice of the nature of this hearing and the strike out application.

19. For all those reasons I have decided to proceed and hear the respondents on their strike out application.

The Strike Out Application

20. The respondents were represented by Miss Rokad of Counsel today, who ventured their application for a strike out and / or a deposit order. I have before me a bundle of documents, a skeleton argument handed up by Counsel and a chronology of events handed up by Counsel which tied in events to numbered pages in the bundle.

21. Strike out applications are dealt with by Rule 37 of the Employment Tribunal (Constitutional Rules of Procedure) Regulations 2013, schedule 1. Miss Rokad referred me to the detail of that strike out rule and I did not propose to repeat it here. Essentially a tribunal is empowered to strike out a claim or response on the basis that it is either scandalous or vexatious or has no reasonable prospect of success.

22. The application before me is on the basis that the claimant's claims have no reasonable prospects of success.

23. In the alternative, I am also asked to consider if I am not minded to strike out the claimant's claims to make a deposit order under rule 39.

24. Miss Rokad's very helpful skeleton has directed me to all the relevant authorities on strike out and in particular has guided me to the case of Silape v Cambridge University Hospital NHS Foundation [2017] UK EAT 0285–16–2510, an EAT case which essentially summarises all the recent appellant authority on strike out. I do not propose to repeat all those authorities, nor to repeat paragraphs of the case of Neckles v National Westminster Bank [2003] EAT/1358/01/ST, which was also before me. Save to say I have taken into account the principles set out in Silape and in Neckles and in the cases referred to in the summary in Silape.

25. I am very mindful of the fact that that it is a very rare course of events for a tribunal to strike out a discrimination claim without hearing evidence. Discrimination claims are usually fact specific and it is very difficult for a tribunal to conclude that it is appropriate to strike out for no reasonable prospect of success without that evidence being tested. The summary in the Silape case tells us that,

"…only in the very clearest of cases should a discrimination claim be struck out."

It says,

"…where there are issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence. The claimant's case must ordinarily be taken at its highest. If however, the claimant's case is conclusively disproved by, or is totally and inexplicably inconsistent with undisputed contemporaneous documents, it may be struck out".

26. Turning to the respondent's application, they say the claimant's case has no or little, reasonable prospects of success. It is very narrowly based and it is clear from documentation that has been produced before me in the bundle, that any averment put forward by the claimant in her ET1, albeit unparticularised, is readily answered by documentary evidence in that bundle. For example, it appears that her claim principally rests on the

different treatment meted out to two other employees, Alex Dryball and Andrew Hancock, who she says were not requested to produce their passports as evidence of identity prior to being employed. There is clear documentary evidence in front of me that they were so asked to produce their passports and did so.

27. There is further documentary evidence of a Skype telephone conversation between the claimant and an employee of the respondent's called Ray Allwork, who is a Sales Manager, which completely contradicts the claimant's assertions that she advanced a claim that she had been discriminated against.

28. There is further evidence in the documents before me, that assertions made in the ET1 cannot be the case and having carefully considered those documents and the submissions made to me by Miss Rokad, I do consider that this case falls into the very rare envelope of cases which are capable of strike out on the basis of the parameters set out in the Silape case. Mainly that there are no core issues of fact that turn to any extent on oral evidence and the claimant's case is conclusively disproved and is totally and inexplicably inconsistent with documentary evidence that has been submitted to me.

29. I do not take this decision lightly as I am very mindful of how rare it is to strike out a case in these circumstances. Nevertheless, I do consider that that rare threshold has been crossed in this case and it is therefore appropriate for me to strike out the claimant's race discrimination claim on the grounds that it has no reasonable prospect of success.

30. With respect to the claimant's arrears of pay claim, whilst I am not sure that such a claim exists in light of the wording attached to the ET1, if it does then it clearly also has no reasonable prospect of success and is struck out.

31. There is one aspect which I must deal with which is that at rule 37(2), it is clearly stated that a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations either in writing, or if requested by the party, at a hearing. That was one aspect of the strike out order that was exercising me today.

32. Having analysed the sequence of events as I have done earlier in this judgment, it is clear to me that the claimant and those representing her have had ample opportunity of responding to the strike out application and therefore the threshold of reasonable opportunity in rule 37(2) has been crossed and therefore I am comfortable and content that on the grounds that I have set out above, the claimant's claims should be struck out and they are dismissed.

33. Pursuant to the delivery of this judgment in open tribunal, the respondent's Counsel ventured that she wished to make an application for costs and / or wasted costs. Some discussion ensued, but I take the view that pursuant to rule 77 of the Employment Tribunals Rules of Procedure 2013, I cannot hear such applications and make a determination on them without giving the paying party a reasonable opportunity of making representation.

34. Accordingly, I am bound to say that in light of the judgment I have given above, an application for costs and / or wasted costs on the face of it seems like an application which may find some traction and which is a sensible application, but that it is only right and proper that the claimant and those who represent her are given the opportunity of ventilating arguments to counter those applications at a costs hearing.

The Hearing for Costs and / or Wasted Costs

35. That there be a hearing for costs, or wasted costs, to take place at the Bury St Edmunds Employment Tribunal, 1st Floor, Triton House, St Andrews Street North, Bury St Edmunds, Suffolk, IP33 1TR on 15 April 2019 to start promptly at 10 am.

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Employment Judge KJ Palmer

Date:20/2/2019

Sent to the parties on: .....

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For the Tribunal Office