



EMPLOYMENT TRIBUNALS

Claimant

Miss D Rowe

Respondent

The West Yorkshire Community
Rehabilitation Company Ltd

JUDGMENT

1. The Claimant's breach of contract claim was not presented within the time limit in the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order. It was reasonably practicable to do so. The claim is therefore dismissed.
2. The Claimant's victimisation claim is struck out pursuant to Rule 37 of the Employment Tribunals Rules of Procedure because it has not been actively pursued and has no reasonable prospect of success.

REASONS

Introduction

3. This was a preliminary hearing in public to decide, among other things:
 - 3.1. whether any part of the claims have been brought outside the time limit and; if so, whether time should be extended; and
 - 3.2. whether the claims should be struck out on the basis that they have no reasonable prospect of success.
4. The Claimant did not attend and did not contact the Tribunal. The Tribunal file shows that the Claimant asked the Tribunal to correspond with her by email and provided an email address. The Tribunal has used that address. The Tribunal does not have a telephone number on record for the Claimant. The Tribunal therefore emailed her at the email address provided in the claim form. No reply was received. I decided to proceed in her absence.
5. The claim was presented on 25 October 2019. A preliminary hearing in public was listed for 16 December 2019 and notice of hearing was sent to the Claimant. The response was presented on 26 November 2019. It included an employer's contract claim. The response was served on the Claimant by email on 28 November 2019 and the Tribunal gave notice of the employer's contract claim, which was sent by email on 4 December 2019. A response was required within 28 days. None was provided. That notice also cancelled the preliminary hearing to allow time for the response to the employer's contract claim to be provided. There is no information on the Tribunal file to suggest that the Claimant attended on 16 December 2019. A revised notice of hearing was emailed to the Claimant on 17 December 2019, informing her of the hearing at 10am today.
6. The claim form makes complaints of breach of contract and victimisation.

Breach of contract claim

7. The breach of contract claim relates to what the Claimant says are failures by the Respondent to make all required employer pension contributions. She says there are gaps but she does not provide detail. The Respondent says that there were issues with the Claimant's pension contributions, and those of other employees, in 2018. They arose when the payroll office moved and the system was not properly set up to make appropriate contributions for employees who went onto half or nil pay. That was discovered in late 2018. An audit was carried out and a payment of £233.51 was made into the Claimant's pension in December 2018. The Respondent says that it notified the Claimant at the time although the Claimant appears to dispute that. The Respondent says that when the Claimant raised the issue again after her employment ended, it double checked and found that, in fact, there had now been a slight overpayment. From the claim form, it is clear that the Claimant reviewed her payslips and was raising queries about pension payments by 4 June 2019 at the latest. She says that she received an email on 12 July 2019 from the Respondent informing her that a payment of £233.51 had been made and that she had been correctly paid all her pension contributions.
8. The Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994 requires a complaint of breach of contract to be brought within three months (plus early conciliation extension) of the effective date of termination of employment. Time can be extended if it was not reasonably practicable to present the claim in time, and it was presented within a reasonable period.
9. The Claimant's effective date of termination was 17 April 2019. She contacted ACAS to start early conciliation on 13 August 2019, a certificate was issued on 27 September 2019 and the claim form was presented on 25 October 2019. The Claimant should have contacted ACAS or presented a claim by 16 July 2019. On the face of it the breach of contract claim was not brought within the time limit. The Claimant did not attend today to provide evidence about whether it was reasonably practicable to present a claim in time. There is no information before me to suggest that it was not. The Claimant refers to previous Tribunal proceedings, so she is clearly aware of the Tribunal process and how it works. She was, on her own case, concerned about pension contributions by 4 June 2019 at the latest. The Respondent had confirmed its position by 12 July 2019. Although she was making further enquiries to find out what had been paid after that, that did not mean that it was not reasonably practicable to contact ACAS or present a claim within the time limit, before those enquiries were resolved. On the face of it, the breach of contract claim was presented out of time and it was reasonably practicable to present it within the time limit. The Tribunal does not have jurisdiction to deal with the claim and it is dismissed.

Victimisation

10. The victimisation claim appears to relate to the repayment of the Claimant's student loan by the Respondent and to its handling of her pension queries after her employment ended.
11. Under Rule 37 of the Employment Tribunal Rules of Procedure 2013, a Tribunal may strike out all or part of a claim on the basis that (among other things) it has not been actively pursued and/or that it has no reasonable prospect of success.

12. A claim can be struck out on the basis it has not been actively pursued if there has been inordinate and inexcusable delay, which is likely to cause serious prejudice to the Respondent: *Evans v Commissioner of Police of the Metropolis* [1993] ICR 151.
13. In considering whether a claim or response has “no reasonable prospect of success” the question is not whether it is likely to fail; there must be *no* reasonable prospects: see *Balls v Downham Market High School and College* [2011] IRLR 217 EAT. In a case where the central facts are in dispute, in general it is not appropriate to strike out: see *North Glamorgan NHS Trust v Ezsias* [2007] ICR 1126. It is only in an exceptional case that striking out might be appropriate, for example where there is no real substance to the factual assertions made, particularly if contradicted by contemporary documents, or where the facts sought to be established were “totally and inexplicably inconsistent with the undisputed contemporaneous documentation.”
14. Further, as a general principle, discrimination cases should not be struck out except in the very clearest circumstances: see e.g. *Anyanwu v South Bank Students’ Union* [2001] IRLR 305, HL. That does not mean that they cannot be struck out, but indicates that Tribunal should exercise particular caution in discrimination cases. Guidance was given by the EAT in *Mechkarov v Citibank NA* [2016] ICR 1121:
 - 14.1. Only in the clearest case should a discrimination claim be struck out;
 - 14.2. Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
 - 14.3. The Claimant’s case must ordinarily be taken at its highest;
 - 14.4. If the Claimant’s case is “conclusively disproved by” or is “totally and inexplicably inconsistent” with undisputed contemporaneous documents, it may be struck out; and
 - 14.5. A Tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts.
15. Nonetheless, discrimination claims can in appropriate cases be struck out: see *Ahir v British Airways plc* [2017] EWCA Civ 1392. The Court of Appeal reminded Tribunals that they should not be deterred from striking out claims, including discrimination claims, involving a dispute of fact if they were indeed satisfied that there was no reasonable prospect of the facts necessary to liability being established, and provided that they were keenly aware of the danger of reaching such a conclusion without the full evidence having been heard and explored. Again, this is particularly so in a discrimination case. The question whether that threshold is met is a matter of judgment for the Tribunal in each case. The Court of Appeal held at para 24:

In a case of this kind, where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so.

16. The Claimant complains that £805 was deducted from her May 2019 pay, to repay in full her outstanding student loan. She appears to complain that this was an act of victimisation.
17. The Respondent says that its employees are paid on 15th of each month for that month (i.e. roughly two weeks in arrears and two weeks in advance). It says that the Claimant was paid on 15 April 2019, so she was paid in full for April, even though her employment ended on 17 April 2019. It has not sought to recover the overpayment. The Claimant was paid nil on 15 May 2019 because she had not worked in that month. However, the Respondent says that it was informed by its payroll department that when the Claimant's employment ended it was necessary to repay her student loan in full. I have my doubts about whether that information can be correct. However, the Respondent accepted the information. Because there was no pay due to the Claimant, it could not deduct the sum from pay due to her, so it unilaterally repaid the loan on her behalf. That payment may well have been recorded in a May payslip. The Respondent now seeks to recover the sum of £805 from the Claimant by way of an employer's contract claim (see further below).
18. The Claimant appears to contend that the Respondent subjected her to detriment by repaying her student loan and that it did so because she had brought previous Tribunal proceedings. Given the total absence of contact with the Tribunal since 25 October 2019, and the Claimant's failure to attend today's hearing, it appears to me that the Claimant is not actively pursuing that claim. Further, allowing it to continue gives rise to a risk of serious prejudice to the Respondent, because it will give rise to further delay in dealing with the claim, and further expenditure of public money, in circumstances where the Respondent attended today's hearing with counsel to deal with these claims. That is the first ground for striking it out. In any event, that claim seems to me to have no reasonable prospect of success. The Claimant has no reasonable prospect of establishing that by *repaying* her student loan the Respondent subjected her to detriment. Nor does she have a reasonable prospect of proving facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the reason for *repaying* the loan was because the Claimant had previously brought Tribunal proceedings.
19. The Respondent is now seeking to recover the student loan repayment in its employer's contract claim. At present it has not identified any contractual term it says the Claimant has breached in respect of this loan payment that would entitle it to damages. In those circumstances, even though the Claimant has not responded to the contract claim, I did not consider it appropriate to issue judgment for the Respondent under Rule 21. If the Respondent wishes to pursue its contract claim, it will need to provide further information about the contractual term said to have been breached.
20. The Claimant also appears to contend that the Respondent subjected her to detriment because she did a protected act, by not dealing with her pension queries in a timely way. This apparently relates to a failure to provide notification of the Claimant leaving the Respondent to the pension provider. The Respondent says that the form was mistakenly sent to the Claimant rather than the pension provider. When the mistake was realized, another copy was sent to the pension provider. On the Claimant's own case, she emailed the Respondent on 9 August 2019 to tell them that she had received a form entitled "Early leaver details" in relation to

pensions, which should have been send directly to the pensions department. That is wholly consistent with the Respondent's explanation. For the same reasons set out above, I find that this complaint should be struck out on the basis that it has not been actively pursued. Further, it too seems to me to have no reasonable prospect of success. This falls into the category in *Ahir* of having a straightforward and well-documented innocent explanation for what occurred.

**Employment Judge Davies
12 February 2020**