



EMPLOYMENT TRIBUNALS

Claimant: Mr T S Lander

Respondent: Yeomans Limited

Heard on the papers

On: 30 July 2021

Before: Employment Judge C H O'Rourke

JUDGMENT

The Claimant's claims of constructive unfair dismissal and discrimination/victimisation on grounds of age and/or disability are dismissed, upon withdrawal.

REASONS

Background and Issues

1. The Claimant has applied to withdraw his claims of constructive unfair dismissal and discrimination on grounds of age and/or disability, but, subject to Rule 52(a) of the Employment Tribunal's Rules of Procedure 2013, expressed a wish, on medical grounds, to reserve the right to bring such further claims, at some point in the future. He is proceeding with a claim for unlawful deduction from wages, which is listed for hearing on 8 December 2021.
2. This application was discussed at a case management hearing on 30 June 2021 and it was ordered that the Claimant provide a witness statement and such relevant medical evidence as he sought to rely on, followed by the Respondent being afforded an opportunity to make written submissions in respect of such evidence, which both parties have now done (Claimant's statement of 13 July 2021 and Respondent's letter of 28 July 2021). No application was made by either party that this matter be determined at a hearing and therefore it is determined by written submissions only.

The Law

3. Rule 52 states:

Dismissal following withdrawal

52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

- (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
- (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

4. Rule 2 states:

Overriding objective

2. 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.

Submissions

5. In summary, the Claimant made the following submissions/provided the following evidence:
- a. While he considers the withdrawn claims as worthwhile and with merit, he is forced to do so due to his disability and his general health. He therefore wishes *'the opportunity to be able to explore, if my physical and mental health ever allowed me to in the future, whether there might be options for bringing the claims which remain available.'*
 - b. He is currently prescribed medication for epilepsy, type 2 diabetes, high cholesterol, prevention of upper gastrointestinal bleeding, depression and anxiety and post-traumatic stress.

- c. The medication he takes for his epilepsy (Keppra) has the worst side-effects, leading to him feeling aggressive, irritable, angry, agitated or depressed. These symptoms are more present when he is placed under pressure.
 - d. He does not consider, as a consequence that he could cope '*at this time*' with the level of scrutiny and pressure that would be inevitable in tribunal proceedings in relation to those claims.
 - e. A letter from a consultant psychologist, Dr Moore, dated 9 June 2020, stated that the Claimant had suffered seizures, in or about 2018 and has sought his treatment in November 2019. His diagnosis is that the Claimant has a '*permanent acquired brain injury*'.
 - f. A list of prescribed medications and an extract from his GP's notes (for 28 September 2020 to 1 March 2021) was provided. The notes record that he has '*been on meds 3 years*' (describing some of them, to include Keppra) and '*has not managed to change his lifestyle, as originally planned*'
6. The Respondent made the following submissions:
- a. Granting of the application would leave the Respondent '*in limbo*', with the Claimant able to pursue further claims at any time.
 - b. There would be no finality to the litigation.
 - c. It would be contrary to the '*overriding objective*', specifically by not placing the parties on an equal footing, to the prejudice of the Respondent.
 - d. It would not be in the interests of justice to grant the application.

Conclusions

7. I refuse the application, for the following reasons:
- a. While I don't doubt the evidence in respect of the Claimant's medical condition, I don't consider that that is, of itself, a '*legitimate reason*', when he, nonetheless, continues to seek to pursue his claim for unlawful deduction from wages, with a hearing due in four months' time. He will need to give evidence at that hearing, as he alleges that there was an implied term of his contract that he would be paid full pay during sick leave, as opposed to Statutory Sick Pay, which will inevitably involve some detailed cross-examination. While the potential evidence for the withdrawn claims may be more detailed, or lengthy, he is either medically able to stand up to cross-examination, or he is not. It would have been possible, were those now dismissed claims to have proceeded, to have ensured that appropriate

breaks could have been provided, to facilitate his evidence, but he has not sought this.

- b. In any event, I decline to consider it not in the interests of justice to dismiss those claims, on withdrawal, for the following reasons:
- i. The interests of justice apply to both the Claimant and the Respondent and it cannot be in such interests to permit the possibility of such claims being brought at some indeterminate point in the future. The submissions and evidence provided by the Claimant give no indication of *any* possible date by which he may be in a position, in respect of his health, to conduct these proceedings. I agree with the Respondent's submissions that permitting this application would leave them *'in limbo'*, with no idea when, if at all, the Claimant might choose to resurrect these claims.
 - ii. I note the case of **Outasight VB Ltd v Brown [2015] ICR D11, UKEAT**, in which it was accepted that the wording 'necessary in the interests of justice' in Rule 70 (and therefore not, I consider, inapplicable to Rule 52) allows employment tribunals a broad discretion to determine whether (in that case) reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, *'which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation'*. What the Claimant proposes provides for no foreseeable finality in this litigation.
 - iii. Prolonged delay in proceeding with these claims (and I have no reason to consider that it would be otherwise) would inevitably have a severe effect on the cogency of the evidence to be provided to the Tribunal, particularly in relation to discrimination claims stretching back several years. While the (at least initial) burden of proof would fall on the Claimant and therefore it might be argued that there would be no prejudice to the Respondent, they would, nonetheless, have to defend themselves against potentially very aged claims, but serious claims, with all the risks to them of failing memory and future witness availability. I consider, therefore, while the Claimant will be debarred from bringing those claims that, in view of the impossibility of putting an end date to this litigation that the balance of prejudice falls firmly in the Respondent's favour.

- iv. I consider that, applying the overriding objective, the need to avoid unquantifiable delay, renders it fair and just to dismiss these claims.

Employment Judge O'Rourke

Date: 30 July 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
02/08/2021

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FOR THE TRIBUNAL OFFICE