



EMPLOYMENT TRIBUNALS

Claimant

Miss K Dunning

Respondent

Kathryn Maclean

v

Heard by CVP:

On: 28 January 2021

Before:

Employment Judge Wedderspoon

Representation:

Claimant:

In Person

Respondents:

Mr. P. Wilson, Counsel

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal, unlawful deductions, a redundancy payment and claims of age and/or disability discrimination have no reasonable prospect of success and are struck out.

REASONS

1. A closed Preliminary Hearing in this matter took place before Employment Judge Eeley on 29 October 2020. At that time a deposit order was made as a condition of proceeding with the claimant's claims for unfair dismissal, unlawful deductions and a redundancy payment. It was recorded in the Judge's reasons that the reason for dismissal namely redundancy was not challenged by the claimant but she seemed to be claiming procedural deficiencies. At the closed preliminary hearing the claimant was ordered to apply to amend her claim concerning age and disability discrimination by 26 November 2020 and to set out full particulars of the claims. Alternatively, where the claimant did not wish to amend her claim or give further particulars of her discrimination claim she should write to the Tribunal by 26 November 2020 to confirm whether the discrimination complaints are withdrawn. A further open preliminary hearing was listed for today.
2. The claimant had paid the deposits to pursue her claims of unfair dismissal, unlawful deductions and a redundancy payment. The claimant did not make an application to amend her claim nor did she confirm to the Tribunal whether her discrimination complaints were withdrawn by 26 November 2020. A reminder letter was sent by the Tribunal to the claimant on 21 December 2020 (at 9.36 a.m).

3. The respondent applied to strike out all of the claimant's claims on the basis that they had no reasonable prospect of success pursuant to Schedule 1 of the rule 37 of the Employment Tribunal Rules of Procedure Regulations and in the alternative sought to strike out the discrimination complaint on the basis that the claimant had failed to comply with the tribunal order dated 29 October 2020.
4. At today's hearing the claimant stated at she did not receive the reminder letter on 21 December 2020 but she did send in an amendment application. The Tribunal system was checked and it was recorded that the claimant had been sent a reminder letter dated 21 December 2010 and no response from the claimant had been received. The claimant was given an opportunity to research her email account and forward anything she said she had previously sent the Tribunal. The claimant emailed in an agenda for today's preliminary hearing which did not contain any amendment application.
5. The claimant raised that she was dyslexic and had special needs. It was apparent to the Tribunal having listened to the claimant that the Tribunal needed to make reasonable adjustments and to take account of paragraphs 25 of the Equal Treatment Bench Book and she may have misunderstood what she was required to do. In the circumstances a further opportunity was given to the claimant to inform the Tribunal why she considered that she had been discriminated against by reason of her age and her disability.

The claimant's case

6. During the previous preliminary hearing, the claimant had indicated that there was no dispute there was a genuine redundancy situation. She was unhappy about the process. In the course of today's hearing, it was apparent that the claimant was upset to be told she was to be made redundant. She said in fact in March 2020 redundancy was not mentioned she was told she was not needed. Her brother assisted her to be furloughed by the respondent. She said she would have been simply laid off by the respondent in March following lockdown had he not helped her. Instead, she was furloughed for a period. The claimant disputed that the respondent told her in March she was to be furloughed; she was clear she was told she would be laid off which really upset her. The claimant was the only stable assistant at the time and the only employee of the respondent. The respondent served the claimant with notice on 21 May 2020 that her employment was to be terminated on grounds of redundancy on 31 July 2020. The claimant complained that the respondent had kept changing the amount of redundancy payment the claimant would receive; the claimant recalled that she was told she would receive £34,000 but in fact she only received £3,400. She stated when she raised this discrepancy with the respondent, the respondent told her she had mixed up the figures. The claimant pointed out she was dyslexic but she was not stupid. The claimant stated that the respondent had been lying to the Tribunal and her. The procedural criticisms of the process are the fact that the claimant was told her employment was to be terminated, the manner in which it was done and the alleged discrepancy of the redundancy payment. The claimant does not say anyone else is doing her job; the fact that her role was redundant is non-contentious.

7. The claimant also complained that she had previously been paid cash by the respondent in an envelope; she said she had a gap in her employment record. She was put on the books in 2018 and then received wage slips. In 2019, she found out from her discussions with the Citizens' Advice Bureau, that the respondent had failed to pay her national insurance contributions. She said she did not raise this with the respondent or make a tribunal claim because she felt frightened of the respondent.
8. In the course of the open preliminary hearing, the claimant was requested to try and explain why she was saying her dismissal was discriminatory by reason of her age and/or disability. The claimant did struggle to articulate what she was complaining about. In respect of her age complaint she said her employer knew she had allergies. She then conceded really her claim was more about her dyslexia than her age. She could not explain why she thought her dismissal was related to age. She confirmed she relied upon the disability of dyslexia. When asked to clarify her disability claim, she felt that redundancy was used as a reason to get rid of her. She felt the employer had had enough of her. The claimant was asked to clarify why she thought that. The claimant felt the respondent thought that she was slow; she was all right if she sits down and she is a good listener. She felt that the respondent just wanted rid of her and she hadn't been paid properly because she suffered from dyslexia. However, the claimant was not challenging that she was actually redundant.

The respondent's case

9. Mr. Wilson on behalf of the respondent contended that this was a case where the Tribunal could conclude that there was no reasonable prospect of success. At the previous Preliminary Hearing, it was identified there was no dispute between the parties that there was a genuine redundancy situation at the stables. The respondent's pleaded case is that there was adequate consultation; he relied upon paragraphs 13, 14, 17 and 18 of the pleaded response; the claimant was informed in March 2020 she was at risk of redundancy; in April 2020 she was furloughed; by May 2020 it was proposed to make the claimant redundant as there was no need for a stable assistant and the claimant received a statutory redundancy sum of £3,400. This is a small employer; a sole employer with a sole employee; there was no need for a stable assistant; the claimant does not suggest any other alternative job; the eventual outcome would have been due to the circumstances that this employee would be dismissed; any consultation would have been futile. Mr. Wilson submitted reviewing the facts it is likely a Tribunal would find that this was a fair dismissal. The claim has no reasonable prospect of success.
10. In respect of the claim for a redundancy payment, the claimant did receive a redundancy payment calculated correctly in accordance with the statutory framework; using a 15 year service at a weekly pay rate of £254.50; the claimant received £3,400.80 on 14 August 2020. There is no agreement for the claimant to receive any enhanced redundancy payment; there was no such contractual term. Even if the claimant is correct that she was told she would receive £34,000 in the course of discussions (which is disputed by the

respondent) it is not enforceable in the absence of an express contractual agreement; there was none. This claim has no reasonable prospect of success.

11. In respect of the claimant's claim for unlawful deductions; this is significantly out of time. An unlawful deduction claim must be made within three months of the last deduction pursuant to section 23 of the Employment Rights Act 1996 and has a cutoff point of 2 years. The claimant was aware of her right to claim in 2019. Her last claim was in 2018 when she was placed on the books. In the absence of any extenuating circumstances to extend time, the claim is time barred. In any event a failure to pay national insurance sums is not "wages" within the meaning of section 13 of the Employment Rights Act 1996. He submitted that this claim had no reasonable prospect of success.
12. In respect of the Tribunal suggesting a way forward could be to adjourn the Preliminary hearing today to allow the claimant further time to consider an amendment application, the respondent objected. The respondent submitted it understood that the Tribunal was under a duty to make reasonable adjustments but the claimant despite her limitations (no offence meant by this to the claimant) that she had been given ample opportunities to clarify her case and still had not been able to clarify her claim. He pointed to the claim form where the claimant stated her case, a letter from Employment Judge Davies prior to the first Preliminary Hearing requesting the claimant to set out her discrimination claim, a further opportunity at the Preliminary hearing on 29 October 2020, a further opportunity to make a written application by 26 November 2020, a further opportunity with a reminder letter dated 21 December 2020 and today's hearing. He submitted that the Tribunal had already made significant reasonable adjustments and afforded the claimant ample opportunity to state what her discrimination case was and she is still unable to clarify what her case is. He submitted a balance had to be made and the respondent is a small employer having to incur costs of a claim which has no reasonable prospect of success.
13. The Respondent further submitted that the claimant has made a very tenuous link between her dismissal and her disability. The respondent continued to employ the claimant for a long period of time and there is no connection with a lack of need for a stable assistant at the time of the pandemic (which is unchallenged) and the claimant's dyslexia.

The Law

Strike out

14. A Tribunal may strike out all or part of a claim in circumstances including where a claim has no reasonable prospect of success pursuant to rule 37 of schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the rules'). This is a lower threshold than no prospect of success and has been interpreted as meaning it has a realistic as opposed to merely a fanciful prospect of success (**Balamoody**). The Tribunal is cautioned against making a strike out order because it is a draconian step and therefore, such an order should only be taken in the most obvious and plain cases (**Anyanwu v South Banks Student Union 2001 UK HL 14**). Cases should not,

as a general principle be struck out where the central facts are in dispute (**Tayside North Glamorgan NHS Trust v Ezsias 2007 EWCA Civ 330**).

General Principles

15. In making such an order the tribunal takes account of the Presidential Guidance on Case management and the overriding objective, rule 2 of the rules; this means the Tribunal must deal with cases fairly and justly when interpreting and exercising its powers under the Rules. This includes (a) ensures 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.

Equal Treatment Bench Book

16. The Equal Treatment Bench Book notes that Litigants in Person may make basic errors in the preparation of cases including failing to put salient points in their statement of case; overlooking limitation periods and not understanding the law (see Chapter 1 page 14). I take these matters into account.

Conclusions

17. The statutory framework of unfair dismissal law and in particular a claim based on unfair redundancy requires the Tribunal (where the reason of redundancy is not in dispute) to consider whether the reason of redundancy was a fair one in the circumstances of the case taking into account the equity and merits of the case and the size of the employer. This involves considerations including the adequacy of consultation with the employee. There may be cases that the predicament of an employer is so grave or that there is no other alternative employment that any consultation would be futile so to retain an employee and an employer is left with no option but to dismiss. It is not the role of the Employment Tribunal under the statutory framework to admonish an employer or to substitute its own view for that of the employer's decision to dismiss. The Tribunal's role is to determine pursuant to section 98 (4) of the Employment Rights Act 1996, when there is no dispute that the reason for dismissal is redundancy situation, whether the decision to dismiss was fair.
18. The claimant does not dispute that her role was redundant. She complains that she was treated unfairly by the respondent in terms of being told directly she was not required; she was not immediately furloughed; and there was a discrepancy what she was told about the redundancy figure to be paid. The claimant does not suggest any other alternative employment. She was the one and only employee of a sole employer. The claimant, as she expressed in this hearing was very upset to be told she was no longer required by the respondent.
19. In the context that the claimant was the only employee of this sole employer; there is no challenge that this was a genuine redundancy situation; there is no suggestion that there was any alternative work for the claimant, the tribunal concludes that the claimant's claim for unfair dismissal has no reasonable prospect of success. On balance it is likely a Tribunal would conclude that any consultation with this employee in the circumstances would have been futile.

Her case of unfair redundancy has no reasonable prospect of success. This is not to say that the Tribunal is unsympathetic with the claimant for being upset about losing her job, or how she alleges she was told or the discrepancy she alleges (not admitted by the respondent) of the likely redundancy sum.

20. In respect of the alleged discrepancy of the amount of redundancy payment; it is not suggested that there was any contractual agreement to pay an enhanced redundancy payment. The claimant was paid a redundancy payment in accordance with a statutory calculation. This allegation has no reasonable prospect of success and is struck out.
21. I am satisfied that the Tribunal has made reasonable adjustments and granted the claimant a number of opportunities to clarify her case. This includes a letter from Employment Judge Davies prior to the first Preliminary Hearing requesting the claimant to set out her discrimination claim, a further opportunity at the Preliminary hearing on 29 October 2020, a further opportunity to make a written application by 26 November 2020, a further opportunity with a reminder letter dated 21 December 2020 and also at today's hearing. The claimant has suggested that she was dismissed because of the respondent's knowledge of her allergies or that she was slow but this is inconsistent with her agreement that her post was redundant. I am mindful that a Tribunal must be cautious in striking out a claim of discrimination because of the fact sensitive nature of such claims and I also take into account that the claimant that reasonable adjustments must be made for this claimant. However, the claimant has not provided, save for a bland allegation, any basis that any part of the decision to dismiss her was for discriminatory reasons and fundamentally she was employed for a significant period by the respondent and she does not detract from her concession she was redundant. I conclude that this is one of the rare cases where it can be said in the context that the claimant concedes she was actually redundant that her claim of discriminatory dismissal has no reasonable prospect of success and it should be dismissed.
22. Wages are defined by section 27 of the Employment Rights Act 1996. National insurance payments are not included. In any event complaints for unlawful deductions of wages must be brought to the Tribunal before the end of the period of three months beginning with the date of the payment of the wages from which the deduction was made or within three months of the last deduction in a series pursuant to section 23 of the Employment Rights Act 1996. The respondent placed the claimant onto the "books" in 2018. The claimant was aware in 2019 that her employer had not paid national insurance in respect of any periods of employment prior to that date. The claim is brought woefully out of time and there is no reasonable prospect of establishing that it was not reasonably practicable to have brought the claim in time. This claim has no reasonable prospect of success.
23. In the circumstances, it is unnecessary to strike out the claimant's claims on the basis of a failure to comply with a tribunal order. In its role to make reasonable adjustments, the Tribunal afforded the claimant a further opportunity to clarify her claims of discrimination at today's hearing. She failed to do so.

Case Number: 1804991/2020

Employment Judge Wedderspoon

9 February 2021