



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Kane

Respondent: PPM 2013 Limited

Heard at: Manchester

On: 3 August 2021

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: Written submissions

Respondent: Written submissions

JUDGMENT

The judgment of the Tribunal is that the respondent's application for the claimant's claim to be struck out is refused.

REASONS

1. The claimant brought claims of unfair dismissal, for a redundancy payment, for notice pay and arrears of pay against the respondent. The case has been listed for a final hearing at Manchester Employment Tribunal on 9 September 2021.
2. Standard directions were given. The parties have been in dispute for some time about the contents of the bundle of documents to be used at the final hearing. The claimant says that the bundle does not include documents which it should and includes documents which it should not. Each party has written to the Tribunal on a number of occasions complaining about the conduct of the other.
3. On 15 July 2021 the respondent made an application in writing that the claimant's claim be struck out. That was on two grounds. The first was that the claim had no reasonable prospects of success. The second was that the claimant had conducted the claim in a wholly unreasonable manner and been (in the wording of the application) "obstructively and uncooperative through the course of the litigation".

4. The claimant sent her written submissions objecting to the striking out order on 19 July 2021. I considered the written submissions on 3 August 2021 and decided that the application for a striking out order should be refused.

Relevant Law

5. Rule 37 of the Employment Tribunal Rules of Procedure 2013 (“the ET Rules”) gives the Tribunal the power to strike out all or part of a claim:

“37.— Striking out

(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;
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;
- (d) that it has not been actively pursued;
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).”

6. Rule 37(2) says 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.

7. In relation to striking out under 37(1)(a) in **Ezsias v North Glamorgan NHS Trust [2007] I.C.R. 1126** the Court of Appeal said that “It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation”

8. In relation to striking out under rule 37(1)(b) in **Bolch v Chipman 2004 IRLR 140, EAT**, the EAT set out the steps that a tribunal must ordinarily take when determining whether to make a strike-out order:

- a. before making a striking-out order under what is now rule 37(1)(b), an employment judge must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings
- b. once such a finding has been made, he or she must consider whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed
- c. even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her

claim or response

Discussion and Conclusion

9. As recorded above, the case is listed for a final one-day hearing on 9 September 2021. Case law authorities endorse the view that in some cases a striking out application may be proportionate in order to save time and costs. In this case the final hearing is imminent. Having regard to the overriding objective and the need to avoid delay and additional costs, I decided that it was not proportionate in terms of costs and delay to hold a separate preliminary hearing given that imminent final hearing. I therefore decided the strike out application on the papers. The claimant had not requested a hearing to consider the application.

10. Dealing first with the application to strike out on the merits, I have to take the claimant's case at its highest. The respondent in its written submissions said that the claimant had not been employed by the respondent for a sufficient length of time to be entitled to claim unfair dismissal. There were no supporting documents supplied with the application to strike out to support that contention. The claimant disputes that she has insufficient length of service. The respondent's response form itself refers to the claimant being employed as a personal assistant to the director of the respondent in June 2018. If that is correct, then she would have sufficient length of service since the respondent says that her employment was terminated by a letter dated 5 November 2020. There is a dispute about the claimant's length of service and there were no evidential documents supplied by the respondent. The Tribunal will need to hear evidence in order to decide which party's contentions are correct. The respondent has not shown this part of the claimant's claim has no reasonable prospects of success.

11. When it comes to the claims relating to unpaid wages and notice pay, there was no evidence given of the payments made. There is a live dispute as to what payments were made and what payments the claimant was entitled to. The respondent has not shown that the claimant has no reasonable prospect of showing that she is owed monies by the respondent.

12. When it comes to the claim based on rule 37(1)(b), it is clear that this has been a fractious dispute. Certain aspects of the claimant's conduct could be criticised. In particular, she has continued to copy the respondent's director, Dr Rose, into correspondence despite the respondent being legally represented and the claimant being told she should not do so.

13. When it comes to striking out on the basis of unreasonable conduct, authorities make it clear that a Tribunal should only do so if it is satisfied that a fair hearing of the case is no longer possible. Regardless of whether the claimant's conduct does fall within rule 37(1)(b), I am satisfied that a fair hearing of this case is still possible. I therefore decline to make the strike out order on the conduct basis. My decision that a fair hearing is still possible is based on the fact that there is still time (given the relatively narrow issues in this case) for the parties to agree either a joint bundle of documents or two bundles (one for each party) and for witness statements to be exchanged so that the hearing on 9 September 2021 can proceed. I have made case management directions providing for those steps to be taken.

14. In those circumstances I declined to strike out the claimant's claim. Given the relatively short amount of time before the final hearing I emailed the parties with the outcome of my decision on 3 August 2021 confirming that this Judgment with full Reasons would be sent in due course.

Employment Judge McDonald
Date: 5 August 2021.

JUDGMENT AND REASONS SENT TO THE PARTIES ON
6 August 2021

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

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.