



EMPLOYMENT TRIBUNALS

Claimant: Ms Yoana Yoshovska
Respondent: Goldman Sachs International
Heard at: London Central, by video (CVP)
On: 16 December 2021
Before: Employment Judge Coghlin QC

Appearances

For the claimant: In person
For the respondent: Mr Andrew Edge, counsel

JUDGMENT

The claimant's claim under section 11 of the Employment Relations Act 1999 is struck out as having no reasonable prospect of success.

REASONS

Introduction

1. The respondent applies for an order, under rule 37 of the Rules, striking out the claimant's claim under section 11(1) of the Employment Relations Act 1999 ("EReIA 1999") that the respondent failed to allow her to be accompanied to a disciplinary meeting on the grounds that that claim has no reasonable prospects of success; or alternatively making a deposit order in relation to that claim.

Procedural history

2. The claimant presented her claim on 6 February 2021 following an early conciliation period which ran from 21 December 2020 to 6 January 2021. The respondent submitted its ET3 and grounds of resistance on 24 June 2021. The claimant provided further particulars of her claim on 18 July 2021 and the respondent provided further particulars of its response on 30 July 2021.
3. A preliminary hearing for case management took place by video on 11 August 2021 before Employment Judge Sutton QC. At that hearing, the issues in the case were identified, and the respondent's application for strike out was listed to be heard today.
4. At the hearing before me, the claimant represented herself and the respondent was represented by Mr Andrew Edge of counsel. I am grateful to them both for the helpful manner in which they presented their cases. Both parties made oral submissions, and Mr Edge also provided a detailed and helpful skeleton argument.

The facts

5. The relevant facts are not in dispute, at least for present purposes.
6. The claimant was employed by the respondent from 2015. She was invited to a meeting on 29 September 2020 ("the Meeting") with her line manager. Before the meeting she was told nothing more about the purpose of the meeting than that it was for a "catch-up." However, when she attended the meeting, to her surprise, she was told that she was being dismissed. She was given notice of termination of employment, which was to take effect on 28 December 2020. She was put on garden leave in the interim.
7. The claimant says she had no reason to suppose she would be dismissed at this meeting. She did not have a companion at this meeting. She accepts that she did not ask to be accompanied, and that the respondent did not expressly refuse such a request, but in the circumstances she had no real opportunity to make such a request.

The power to strike out

8. Rule 37(1)(a) of the 2013 Rules provides that the tribunal may strike out all or part of a claim on the ground that it lacks reasonable prospect of success.

9. I was referred to and have had regard to a range of cases which offer guidance as to how this power should be exercised. The cases cited to me focussed on discrimination and whistleblowing claims: **Anyanwu v South Bank Students' Union** [2001] IRLR 305; **Mechkarov v Citibank NA** [2016] ICR 1121; **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126.

10. Key principles which emerge from these authorities were summarised by Mitting J in **Mechkarov** as follows:

“(1) only in the clearest case should a discrimination claim be struck out; (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; (3) the Claimant's case must ordinarily be taken at its highest; (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 (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.”

11. Although this claim is not a discrimination claim, these points apply in relation to other types of claims too, save that the public interest in the determination of claims on their facts is not as powerful in a case brought under section 11 EReIA 1999 than a claim for discrimination (cf **Anyanwu** per Lord Steyn at paragraph 24).

12. However there is a countervailing public interest, identified by Lord Hope in **Anyanwu**, which is that the time and resources of the employment tribunals (and for that matter of the parties) should not be taken up with having to hear evidence in claims which have no reasonable prospects of success.

13. If the power to strike out is engaged on the ground that the tribunal is satisfied that the claim (or part of it) has no reasonable prospect of success, the tribunal has a discretion as to whether to exercise that power: see **HM Prison Service v Dalby** [2003] IRLR 694; **Hasan v Tesco Stores Ltd** UKEAT/0098/16.

14. Where there are no key disputes of fact, the tribunal may be more willing to strike out claims which are legally misconceived: as Underhill LJ observed in **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1:

“Whether it is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed. There were in this case no relevant issues of primary fact. Had the matter proceeded to a full hearing the job of the tribunal would not have been to decide the rights and wrongs of the incident of 22 April [the alleged final straw], and it would not have heard evidence directly about that question. The issue would have been whether the disciplinary processes were conducted seriously unfairly so as to constitute, or contribute to, a repudiatory breach of the claimant's contract of employment. The evidence relevant to that

question in substance consisted only of the documentary record. It is true that if there were any real grounds for asserting actual bad faith on the part of the decision-makers that could not have been resolved without oral evidence; but that was not the pleaded case, and the employment judge was entitled to conclude that there was no arguable basis for it. Judge Hand QC recognised that strike-outs of this kind might not be something to be done “on a daily basis”, but he said that each case must depend on its own facts and that in the present case the judge’s decision was justified. I agree.”

The statutory right to be accompanied

15. Section 10 of the EReIA 1999 provides a worker a right to be accompanied at a disciplinary or grievance hearing.

16. For these purposes a disciplinary hearing is defined by section 13 EReIA 1999 as a hearing which could result in the administration of a formal warning to a worker by her employer, the taking of some other action in respect of a worker by her employer, or the confirmation of a warning issued or some other action taken. The respondent has not sought to argue that the meeting on 29 September 2020 was not a disciplinary hearing, and I shall proceed on the assumption that it was. It is also common ground that the claimant was a “worker” for this purpose.

17. Section 10 of the EReIA provides for a series of rights for workers in cases where it applies. These are that:
 - a. the employer must permit the worker to be accompanied at the hearing by a companion of the worker’s choice who is either a trade union representative or a fellow worker (section 10(2A) and (3));

 - b. the employer must permit the companion to address the hearing in order to put the worker’s case, or to sum up the case, or to respond on the worker’s behalf to any view expressed at the hearing (section 10(2B)); and

 - c. the employer must postpone the hearing for up to five days if the worker’s chosen companion will not be available at the time proposed for the hearing by the employer (section 10(4) and (5)).

18. However Section 10(1) EReIA 1999 provides that the section applies where a worker (a) is required or invited by his employer to attend a disciplinary or grievance hearing, and (b) reasonably requests to be accompanied at the hearing. It is the respondent’s position on this application that it is a condition precedent of the existence of the rights and

obligations set out in Section 10 that such a request is made; and here, it is common ground that it was not.

19. Section 11 of the EReIA provides that a worker may present a complaint to the employment tribunal that her employer has failed, or threatened to fail, to comply with sections 10(2A), 10(2B) or 10(4).
20. Where a tribunal finds that a complaint under section 11 is well-founded, it shall order the employer to pay compensation to the worker of an amount not exceeding two weeks' pay (section 11(3)). A week's pay for this purpose is capped in accordance with the formula provided by section 227(1) Employment Rights Act 1996: section 11(5). In this case, that maximum would be £1,076.
21. The rights under section 10 EReIA 1999, and the right to bring a complaint for breach of them under section 11, are "day one rights": there is no qualifying period in order for such rights to be enjoyed by the worker.

The parties' submissions

22. Mr Edge, for the respondent, submits that the rights set out in section 10 EReIA 1999 do not apply if the pre-conditions set out in section 10(1) are met, namely that the worker is invited or required to attend a disciplinary or grievance hearing, and that the worker reasonably requests to be accompanied at the hearing. Mr Edge submits that *unless those two pre-conditions are met, the section simply does not apply. The section does not purport to place an employer under any obligation to compel a worker to be accompanied, to draw the worker's attention to the right, or to provide the worker with notice of the meeting in question. Of course, a failure to do these things may (or may not) be relevant to the fairness of a dismissal - but they are immaterial to the question of whether the necessary pre-conditions of section 10 have been met.*
23. For her part, the claimant contended that she had been effectively ambushed by her employer, and that by acting in such a way her employer denied her the chance to make a request. She contended that sections 10 and 11 EReIA should be read so as to say that in such circumstances the employer should be treated as having denied the worker the right to be accompanied, and as if that request had been made by the worker.

Authorities

24. Mr Edge was unable to draw my attention to any binding authority on the question which this application raises. He referred me to the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) which states at paragraph 15:

“To exercise the statutory right to be accompanied workers must make a reasonable request. What is reasonable will depend on the circumstances of each individual case. A request to be accompanied does not have to be in writing or within a certain timeframe. However, a worker should provide enough time for the employer to deal with the companion's attendance at the meeting. Workers should also consider how they make their request so that it is clearly understood, for instance by letting the employer know in advance the name of the companion where possible and whether they are a fellow worker or trade union official or representative.”

25. I do not regard this as of any assistance. As the EAT held in **Toal v GB Oils Ltd** [2013] IRLR 696 at [16]:

“An ACAS Code is not an available aid to the construction of a statute. Section 199 does not say so nor is it necessarily implicit in section 199 that it should be so. On the contrary, it contravenes a basic constitutional principle that it is for Parliament to legislate in words of its choosing for the ends which it seeks to accomplish and for the courts to interpret its legislation, applying established methods of construction.”

26. Mr Edge referred to two decisions where the point had been referred to, but which are not binding on me. The first was **Heathmill Multimedia ASP Ltd v Jones** [2003] IRLR 856. The question which arose in that case was whether a meeting to discuss a dismissal by reason of redundancy could be classified as a “disciplinary hearing” for these purposes, and the EAT (HHJ Reid QC presiding) held that it could not, and that the reference to “the taking of some other action in respect of a worker by his employer” in section 10(4)(b) must be construed as the taking of some other *disciplinary* action in respect of a worker by his employer.

27. The circumstances in which the applicants in **Heathmill** were invited to the meeting are not unlike those of the current case. On the tribunal's findings:

“The applicants therefore had a right to be accompanied. They were unaware of the reason for the meeting. They were given very little warning of it and it was not therefore possible for them to make a request that they should be accompanied. They should have been advised of that right by Mrs Rumack and she failed to do so. This part of the applicants' claims therefore succeeds.”

28. The EAT noted at paragraph 10 that a potential argument had been open to the employer:

“ss.10(2) and 10(4) refer to the requirement that the employer permit the worker to be accompanied and requiring an employer to postpone a hearing if the chosen companion is not available. Section 11 entitles a worker to present a complaint to an employment tribunal ‘that his employer has failed or threatened to fail to comply with s.10(2) or (4)’. It is at least arguable that

a mere failure to notify an employee that he has a right to be accompanied does not amount either to a failure to comply with s.10(2) or 10(4) or a threat to fail to comply with that section.”

29. Mr Edge also draws my attention to the case of **Page v K&T McCormack Ltd** (ET Case No. 3200389/2017). This is a decision of Employment Judge Brown sitting at East London employment tribunal. The claimant was invited to what was clearly a disciplinary meeting but was not told by the respondent of her right to be accompanied at it. It is not clear from the judgment whether there was any notice of the nature of the meeting. EJ Brown’s reasoning on the point was as follows:

“It is clear, under the provisions of the section, that the employee must reasonably request to be accompanied at the hearing, in order for the section 10 right to apply. In this case, the Claimant accepted during her evidence to the Tribunal, that she did not make a request to be accompanied at the hearing. I have not seen any case law which establishes that, even the Claimant did not know there was a disciplinary hearing, so that she was not aware that she needed to ask to be accompanied, the s10 right applies. Accordingly, I do not find that the Respondent breached the provisions of s10 ERA 1999.”

30. As **Page** is a decision of the employment tribunal, it is not binding on me. I note also that the parties were not legally represented and it does not appear that EJ Brown was furnished with detailed submissions on the matter.

31. In **Toal**, to which I have referred above, Mitting J made various observations about the scheme of section 10 EReIA including that

“The employee must request to be accompanied at the hearing. In modern times, good practice on the part of the employers leads responsible employers to remind the employee of that right and invites them to exercise it.”

32. However Mitting J was not dealing with a situation where the nature of the hearing itself was kept from the worker: in **Toal**, the nature of the hearing had been clear in advance and the claimant had made a request to be accompanied. The question was whether the request was reasonable or unreasonable.

33. The editors of **Harvey on Industrial Relations and Employment Law** expressed the following view at 7D(5)(a) at [372]:

“The right is to be permitted to have a companion present at the hearing if the worker reasonably so requests. There is nothing in the legislation compelling workers to be represented or choose companions, or requiring employers to draw attention to the right or facilitate its exercise (beyond giving paid time off to the companion, if employed by the employer, to attend the hearing). The employer would thus not be liable for a breach of s 10 simply because the employee was not told of his or her right of accompaniment, although arranging a hearing in such way (eg without any notice) that the worker is unable to secure a companion would, it is suggested, be a breach of s

10; the dividing line was briefly considered, but with no conclusions expressed, by the EAT in the *Heathmill* case, below, at para 10.”

Analysis and conclusion

34. On its face, the statutory wording means that there must be a request made by the claimant (indeed a reasonable request) as a condition precedent of the rights set out in section 10 applying.
35. From the point of view of a general sense of fairness and common sense there is much to commend the claimant’s argument in his case, and the view expressed by the editors of **Harvey** which I have set out above.
36. The respondent’s argument leads to the conclusion that an employer who, to use the claimant’s word, “ambushes” an employee by giving her no notice whatsoever of the fact that disciplinary action – including potentially dismissal – is to be considered or imposed at a particular meeting, can effectively side-step the operation of section 10 of the EReA 1999. On the respondent’s analysis, that employer will by that unfair act place itself a *better* position than the employer who gives the employee proper advance notice of the meeting and of its purpose, and who then accrues an obligation to permit the employee to be accompanied to the meeting.
37. Those who are indeed “ambushed”, as the claimant asserts (and for present purposes I must assume) she was, are not necessarily left without recourse. In the case of the claimant, who had two years’ qualifying service as an employee, she also has the right not to be unfairly dismissed. In such a case, the fact that the employer has acted in such a way as would deny the employee the opportunity to exercise an express statutory entitlement designed to offer them procedural rights and protections is likely to be highly relevant to the question of whether the employer acted reasonably or unreasonably in dismissing the claimant.
38. Of course, those workers who are sufficiently knowledgeable and clear-headed may invoke their right to representation *during* the meeting itself, as soon as the nature of the meeting becomes clear to them, and thereby forcing the employer to adjourn the meeting to a later date when the worker can be accompanied. There is no reason why the right cannot be invoked in the course of a disciplinary or grievance meeting as much as before it. However in the real world the individuals with sufficient knowledge and clarity of

thought to exercise the right in the middle of a meeting of that kind are likely to be few and far between.

39. Were there a way of construing section 10 in the manner contended for by the claimant, I would have done so. But I do not consider that the statute can be interpreted in such a way. The statutory provision has no underpinnings in EU law, and neither does it involve the protection of rights under the European Convention on Human Rights such as might require a purposive interpretation under section 3 of the Human Rights Act 1998. The wording of section 10(1) is absolutely clear, and its normal meaning is the meaning for which the respondent contends. The claimant's suggested interpretation would involve either rewriting the wording entirely, or disregarding it entirely. I cannot see a basis on which I can properly do that.

40. It follows that, on the undisputed facts of this part of the claimant's case, I conclude that the claim under section 11 of the ERelA 1999 has no reasonable prospects of success. That being the case, I see nothing to be gained by allowing this part of the case to proceed to trial, and I conclude that it is appropriate and in the interests of justice to strike it out.

Employment Judge Coghlin QC

17 January 2022

Sent to Parties on

18/01/2022