



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss A Aparicio

v

Amazon UK Services Limited

Heard at: Watford

On: 12 December 2019

Before: Employment Judge Andrew Clarke QC

Appearances

For the Claimant: In person

For the Respondent: Mr O Holloway, Counsel

JUDGMENT

1. The respondent's applications to strike out the claim (under Rule 37 of the Employment Tribunal Rules of Procedure), alternatively for a deposit order (under Rule 39) are dismissed.
2. The claim for constructive unfair dismissal will proceed to a full hearing on the merits.

REASONS

1. The claimant, who is Spanish and with limited English, was employed by the respondent from 5 December 2015 to 4 January 2019. She presented her claim for constructive unfair dismissal on 4 March 2019. There is no dispute that this claim was presented in time given the ACAS early conciliation process in which the notification was given on 5 January and the certificate provided on 5 February 2019.
2. The claim form contains a chronological narrative of events from 28 July, when the claimant experienced heart problems, through to her resignation on 4 January. The narrative is incomplete in that it omits reference to the disciplinary process which was commenced against her and her own grievance and appeal. It was unclear to the respondent what conduct on its part the claimant was relying upon as amounting to a repudiatory breach of contract which the claimant had accepted when resigning.

3. In its ET3 and subsequent correspondence the respondent complained of that lack of particularity. Eventually, in response to an employment tribunal order, the claimant provided some particulars by email of 18 July. These were further fleshed out in a very lengthy schedule sent to the respondent and the tribunal on 27 September. The claimant also made an application for 13 witness orders, which application is set out over 17 closely typed pages. That document also provides some further clarification of the claimant's case.
4. The hearing today was converted to a preliminary hearing from a trial on the merits by an order made in October 2019. This was done when it became clear that the factual issues between the parties were such that the hearing was unlikely to be concluded in a day, especially if the nature of the claimant's case had not been clearly established in advance.
5. The respondent had intimated a desire to make an application to strike the claim out in its response and reiterated that in correspondence in advance of this hearing stating that such an application would be made today, as it was.
6. I began by seeking to clarify the claimant's case on what amounted to a repudiatory breach of contract. She says that the following conduct on the part of the respondent, taken together, breached her contract of employment in a way that was repudiatory of it. A lawyer would describe this as conduct cumulatively giving rise to a breach of the implied term found in all contracts of employment as to trust and confidence.
7. The conduct the claimant relies upon is as follows:
 - 7.1 Mr Kurylo and Mrs Nantege (of Human Resources) deliberately failed to produce accurate notes of an 11 August meeting.
 - 7.2 Ms Axinte of Human Resources did not give all of the information which she had regarding the claimant's illness when asked to provide an account of what she knew and Mrs Nantege claimed to have lost the scan of the claimant's test results as sent to her, when she had not lost it. This led to their giving inaccurate accounts when asked to explain what had happened.
 - 7.3 Mr Kurylo put an instructor with the claimant, not due to concerns that he might have had about her performance, but in order to bully her.
 - 7.4 Mr Kurylo (on 18 August) tried to force the claimant to sign notes of the 11 August meeting. He did so by behaving as set out below and without showing her the notes and/or giving her an opportunity to read them through carefully.
 - 7.5 Mr Kurylo changed the draft notes of that meeting and falsified documents from (apparently) the hospital which had treated the claimant and on 19 August persisted in refusing to show the claimant

the notes which he was asking her to approve and/or giving her an opportunity to read them through carefully.

- 7.6 Both on 18 and 19 August Mr Kurylo shouted at the claimant when she would not sign the notes, screamed at her and constantly interrupted her when she tried to speak.
 - 7.7 Mr Kurylo instigated disciplinary proceedings against the claimant for refusing to sign the notes, alleging that she was abusive, shouting and swearing at him, thereby making allegations he knew to be false. In particular, he accused her of saying that she would not sign “this shit” when he knew, or ought to have known, the word she used was “sheet” not “shit”.
 - 7.8 Mr Jaycek and Mr Karam made false statements about the claimant shrieking and swearing at Mr Kurylo on 18 August.
 - 7.9 The respondent failed or refused properly to investigate the claimant’s complaints against Mr Kurylo, in particular failing to use appropriately independent and/or external investigators.
 - 7.10 On 25 August (and thereafter) Ms Axinte (of Human Resources) and another employee, Mr Tuicu, falsely accused the claimant of being “crazy” and Mr Tuicu falsely accused the claimant of threatening Mr Alvarez, who supported that allegation knowing it to be untrue.
 - 7.11 The respondent failed and/or refused properly to investigate the conduct of the various of its employees referred to above.
 - 7.12 Ms Jayasingha made false statements about the claimant by changing the notes of a meeting of 2 September 2018.
 - 7.13 The respondent gave the claimant insufficient notice of a disciplinary hearing on 21 September and changed the claimant’s name in a letter of 19 September 2018.
8. The claimant says that the respondent’s conduct as summarised above caused her such stress that she was ill and signed off work by her GP from 23 September 2018 to 4 January 2019 and that her GP advised her to resign so as to bring the stress to an end.
 9. Mr Holloway, on behalf of the respondent, submits that some items in the list of conduct complained of are not set out on the face of the ET1. That is so, however the substance (if not all of the detail) of most of them is to be found there and I consider that the further information given does not change the nature of the case being brought. The only item in the list not referred to in some way in the claimant’s ET1 is the suggestion that her manager was having her supervised by an instructor, not because of performance concerns, but to bully her. However, it is clearly related to the matters already alleged against Mr Kurylo. If it was necessary to have

permission to amend the ET1 to add that as an additional matter said cumulatively to amount to a repudiatory breach of contract, I would give it. There is no substantial prejudice to the respondent and it is but one of a number of matters relied upon which are all interrelated and form part of the alleged pattern of behaviour of the respondent's employees towards the claimant over a short period of time. There is no new cause of action relied upon. I take the same view about any other points which might be said not to be made now with the same detail or focus as in the ET1.

10. At the heart of the claimant's complaint are meetings and conversations of which the parties respective accounts differ radically. The respondent says that the claimant said on 18 and 19 August that she would not sign "this shit" (referring to the notes produced by Mr Kurylo). The claimant says that as a Spanish speaker with limited English she did not say "shit", but "sheet", Spanish speakers having some difficulty in dealing with the long e sound in English. The respondent points out that the claimant signed notes which appeared to acknowledge that she said "shit" and used the term "bullshit" in the meetings in question. The claimant says that she did not carefully read the notes. I keep in mind that she has limited English and that the heart of her case is her suggestion that her manager was bullying her and others were falsely supporting him and that the meeting notes are inaccurate.
11. In order to strike out this claim I would need to satisfy myself (in accordance with Rule 37) that the claim has no reasonable prospect of success. The higher Courts have periodically reminded judges that the Rule 37 power is a drastic one and the hurdle to be surmounted a high one.
12. This is a case where the key facts are hotly disputed. Who swore, shouted and screamed at the August meetings? Was it the claimant or Mr Kurylo? Did he and others thereafter lie (or, at least, exaggerate) about what had happened then and at other times? Was Mr Kurylo's conduct in the disciplinary and grievance process motivated by a belief that the claimant had behaved as alleged, or was he bullying her?
13. If I assume that the claimant's account of events was to be substantially accepted by an employment tribunal, could she win her case? I consider that she could; the conduct she relies upon could amount to a breach of the implied terms of trust and confidence. Did she resign relying upon that breach? Mr Holloway suggests not because (he says) she resigned on her GP's advice. I do not regard that as fatal to her case succeeding. If the GP's advice was consequent upon a state of health caused by the conduct of the respondent's employees, then I consider it arguable that her resignation amounted to an acceptance of the repudiatory breach whether or not it was done after discussions with or even on the advice of some third party.
14. In those circumstances I cannot find that the claimant's case lacks any reasonably prospects of success.
15. I next turn to consider whether to make a deposit order under Rule 39. Here the test is somewhat less stringent. I would have to find there to be

little reasonable prospect of success. I do not believe that I can properly reach such a conclusion. I recognise that the claimant has significant practical hurdles to surmount. She is unrepresented, English is not her first language and that impacts not only upon her presentation of the case but upon her contemporaneous behaviour (she accepts that she became emotional, waived her arms about for emphasis and struggled to express herself at the time). However, she is making serious allegations against the respondent acting by several of its employees. Some contemporaneous documents appear (see above) to undermine her case. However, I note that her grievance in relation to Mr Kurylo's behavior in relation to his attempts to get her to sign meeting notes was partially upheld. I do not consider that these matters suggest that this is a case which has little reasonable prospects of success.

16. The claimant is clearly a determined lady, she is handicapped by her limited English, but she has generated detailed documents which set out her case. I have (see above) drawn from those documents what I consider to be the essence of her case, which she has confirmed. My experience of cases where behaviour such as this is relied upon as cumulatively amounting to a repudiatory breach of contract suggests that this will not be a straightforward case to bring to victory, but I consider that the claimant is entitled to her day in court. The prospects of success in a case such as this are, in my opinion, impossible to determine short of hearing the various witnesses give their evidence and having it tested by cross examination.
17. In those circumstances the applications for the claim to be struck out or alternatively for a deposit order are both dismissed and the claim will continue to a full merits hearing.

Employment Judge Andrew Clarke QC

Date:09.01.20.....

Sent to the parties on:09.01.20.....

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For the Tribunal Office