



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Y Sin

**Respondent:** Trade Wind Recruitment Ltd

**Heard at:** Manchester (by CVP)

**On:** 5 October 2021

**Before:** Employment Judge McDonald

## REPRESENTATION:

**Claimant:** Ms A Niaz-Dickinson, Counsel

**Respondent:** Mr B Williams, Counsel

# JUDGMENT

The respondent's application that the claimant's claims of unfair dismissal, failure to make reasonable adjustments and of discrimination arising from disability be struck out is refused.

# REASONS

## Introduction

1. At a public preliminary hearing on 5 October 2021 I heard an application for striking out or (alternatively) for a deposit order in relation to three of the claimant's claims. The strike out and deposit applications were in relation to the claims of unfair dismissal, failure to make reasonable adjustments and discrimination arising from disability in breach of section 15 of the Equality Act 2010. There was no strike out or deposit order application in relation to the direct discrimination and harassment claims.

2. The parties had agreed a bundle of documents and both counsel had prepared written skeleton arguments. I heard oral submissions from each. I heard no evidence.

3. I decided to refuse the strike out application but to make a deposit order. I have explained why I decided to make deposit orders in the reasons attached to that order. They should be read with the reasons set out in this judgment.

### **The Facts**

4. In brief, the facts of this case are that the claimant was dismissed for gross misconduct. That dismissal took place at a time when she had already resigned from her employment. The central factual issue at the heart of the application to strike out was the reason for the claimant's absence or inability to attend the disciplinary hearing on 18 December 2019.

5. The respondent's case is that the claimant falsified various documents which seemed to corroborate her evidence that she was at Chesterfield Royal Hospital all day on 18 December 2019 so could not attend the disciplinary hearing. The respondent accepts that the claimant had undergone a sleep test on 17 December 2019 and was required to return the machine to the hospital the next day at 10.00am. The claimant says that she then underwent an emergency bronchoscopy and was therefore detained at the hospital until 4.20pm and so was unable to attend the disciplinary hearing. She says that the failure to postpone the disciplinary hearing and/or allow her to make written submissions instead was a failure to make a reasonable adjustment, a breach of s.15 of the 2010 Act (the "something arising" being her inability to attend the hearing because she was at hospital) and rendered the dismissal unfair.

6. In the bundle before me was an email thread which included responses from Neena Morgan, the Performance and Planning Manager for the Cardiorespiratory Department of Chesterfield Royal Hospital to queries raised by the respondent's HR department about the documentation provided by the claimant relating to the 18 December 2019. Mr Williams confirmed that the claimant did not dispute that the email responses were from Ms Morgan. The responses (at pages 120 and 121 of the bundle) were to an email from Ms Speranskaya, the respondent's then Head of HR.

7. In brief, what those responses said was that a number of the documents put forward by the claimant were "falsified". In relation to the central disputed document, which was a letter dated 10 January 2020 allegedly issued by that Cardiorespiratory Department confirming that the claimant was required to attend an urgent bronchoscopy and was held in hospital until 4.20pm, Ms Morgan said that she could confirm that, "This is falsified. A patient would not be sent for a bronchoscopy following a sleep study. I have also checked the system to see if she has ever had a bronchoscopy procedure, which she has not".

8. The respondent's case was that this showed that the claimant had falsified documents and that that had two consequences. The first was that a fair trial was no longer possible, and the 3 claims should be struck out on that basis. The second was that those three claims had no reasonable prospects of success and should be struck out on that basis.

### **Relevant Law**

9. 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)."

10. The respondent relied on the "no reasonable prospect of success" element of (a) and on (e) (fair trial no longer possible).

11. In the House of Lords case of **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391**, Lord Hope said that "discrimination issues... should, as a general rule, be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

12. In **Abertawe Bro Morgannwg University Health Board v Ferguson [2013] I.C.R. 1108** the EAT acknowledged that applications for strike-out may in a proper case succeed but warned that "in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not."

13. In **Ahir v British Airways Plc [2017] EWCA Civ 1392** the Court of Appeal said that "Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. The hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'".

14. 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".

15. When it comes to striking out on the "fair hearing" ground (ground (e)) most of the authorities deal with the effect of delay on the possibility of a fair hearing. Neither counsel referred me to any cases under (e) arising from the falsification of documents. I drew counsels' attention to **De Keyser Ltd v. Wilson [2001] UKEAT 1438\_00\_2003** which discusses the "fair hearing" issue in the context of a strike out based on the conduct of the case (the equivalent of current ground (b)).

16. The EAT in **De Keyser** quotes Chadwick L.J. in **Arrow Nominees Inc -v- Blackledge [2000] 2 BCLC 167, para 193** in a passage which, "although directed to discovery, is of more general application":

"I adopt as a general principle, the observations of Millett J. in **Logicrose** ... that the object of the rules as to discovery is to secure the fair trial of the action in accordance with due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules, even if such disobedience amounts to contempt for or defiance of the Court, if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the processes of the Court as to render further proceedings unsatisfactory and to prevent the Court from doing justice, the Court is entitled, indeed, I would hold bound, to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the Court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the Court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."

## Conclusions

17. Dealing firstly with the issue of whether the documentation was falsified, I accept Ms Niaz-Dickinson's submissions that the answers from the NHS are pretty categorical. Mr Williams submitted that I could not at this stage and without hearing further evidence make a definitive decision whether in fact the claimant had falsified the documents. He suggested, for example, that the response was based to a certain extent on assumptions ("a patient would not be sent for a bronchoscopy"), and that it was to some extent conditioned by the way that the questions asked to the NHS had been put i.e. it was suggested that the documents were falsified, rather than the question being put in an open or neutral way.

18. I have to say that the response from Ms Morgan to Ms Sperenskaya's questions are fairly categorical. I take into account that those responses are from a third party, which is apparently disinterested in the case. Having said that, I take into account what the authorities tell me about the way I should approach matters on a strike out application. In particular, it is clear that I should take the claimant's case at its highest. That does not preclude me from striking out a case if, for example, there is a clear incompatibility between a case being put and contemporaneous documents. In this case the difficulty is that the documents are not contemporaneous ones (the medical records relevant to this period were not in the bundle, as I understood it), but instead a response being provided some 18 months after the event by someone who did not herself see the claimant on 18 December.

19. On balance therefore I accept Mr Williams' submission that I simply cannot decide categorically at this hearing that the documents on which the claimant relies to corroborate her attendance on 18 December are falsified. On that basis it is not strictly necessary for me to decide whether a fair hearing would be possible.

20. In case I am wrong in my conclusion that the documents were not falsified I go on to record that I would have found that a fair hearing was still possible. The reason for that is that this is not a document heavy case and therefore the risks of further fabricated documents infecting the case are not significant. In addition, the issue of fabrication has been raised and therefore could be dealt with in cross examination at the hearing itself. This is not a case where the claimant has lied to the Tribunal, either in giving evidence under oath or in response, for example, to a specific direction or order. To that extent it does not seem to me objectively that this is a case where a fair hearing is no longer possible.

21. Moving on to decide whether or not the claimant's claims should be struck out on the basis that they have no reasonable prospect of success, again I need to take the claimant's case at its highest.

22. At its highest the claimant says that the NHS is simply mistaken in its responses at pages 120 or 121. It seems to me, again without hearing evidence, that I cannot definitively decide that what the NHS says is correct. In those circumstances I cannot say that there is no reasonable prospect of the claimant showing that she did indeed attend the hospital until 4.20pm on 18 December 2019.

23. In reaching my decision on strike out I take into account the authorities which made clear not only that I need to take the claimant's case at its highest but also that strike out is a draconian step which should only be taken where it is very clearly required.

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Employment Judge McDonald

Date 6 October 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

6 October 2021

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