EMPLOYMENT TRIBUNALS

Claimant: Miss Sarah Taylor

Respondent: Altegra Integrated Solutions Limited

OPEN PRELIMINARY HEARING

Heard at: Bristol **On:** 2 March 2023

Before: Employment Judge C H O'Rourke

Representation
Claimant: Not in attendance, or represented
Respondent: Mrs V McKenna – HR Manager

JUDGMENT

1. The Claimant's claims of constructive unfair dismissal and direct pregnancy and maternity discrimination are struck out, subject to Rule 37 of the Tribunal's Rules of Procedure 2013, because:

    a. They have no reasonable prospect of success;

    b. The Claimant has not complied with Tribunal orders; and

    c. The Claims are not being actively pursued.

REASONS

Background and Issues

1. The Claimant was employed by the Respondent, as a service controller, from May 2016, until her resignation with immediate effect on 29 September 2021.

2. She brought claims of constructive unfair dismissal and direct pregnancy and maternity discrimination. At a case management hearing on 19 January 2023 (at which the Claimant did attend), Regional Employment

Judge Pirani ordered that this matter be listed for an open preliminary hearing to:

a. Determine whether to order the Claimant to pay a deposit (not exceeding £1,000) as a condition of continuing to advance any specific allegation or argument in the claims if the Tribunal considers that allegation or argument has little reasonable prospect of success; or

b. Determine whether to strike out part or all of the claims because they have no reasonable prospects of success; and

c. Make further case management orders, if the claims proceed.

3. The Claimant did not attend this Hearing, or give any advance indication of her intentions in that respect. She was phoned by the Tribunal staff shortly after 10.00 am (when the Hearing was due to commence) and a voicemail was left to the effect that the Hearing would be adjourned until 10.30, pending any attendance or notification by her, but would proceed at that point, in her absence, if necessary. No further notification was received from her.

4. The Case Management Order (CMO) of 19 January 2023, ordered the Claimant to do the following, with which she has not complied:

a. To provide a schedule of loss, by 27 January 2023;

b. By 20 February 2023, to agree the contents of a document bundle. The Respondent confirms that they have had no correspondence or contact from the Claimant;

c. By 28 February 2023, to exchange written submissions on the above issues.

The Law

5. Rule 37 states:

Striking out

37.—

(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 … has no reasonable prospect of success;
(b)…;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;

(2) 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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

6. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), a tribunal will have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including:

    - the magnitude of the non-compliance;
    - whether the default was the responsibility of the party or his or her representative;
    - what disruption, unfairness or prejudice has been caused;
    - whether a fair hearing would still be possible, and
    - whether striking out or some lesser remedy would be an appropriate response to the disobedience (**Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371, UKEAT***).*

7. In respect of strike-out for a claim having no reasonable prospects of success, the Employment Appeal Tribunal gave guidance on the Tribunal's duties in relation to strike-out applications against litigants in person, in discrimination claims, in **Cox v Adecco and ors [2021] ICR 1307, EAT**. There the EAT stated that, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest.

8. As to a claim not being actively pursued, in **Rolls Royce plc v Riddle [2008] IRLR 873, EAT**, the EAT noted that what is now Rule 37(1)(d)) is not drafted in such a way as to oblige a tribunal to take account of any particular considerations but found that, in accordance with the principles applied in the employment tribunal in **Evans and anor v Commissioner of Police of the Metropolis [1993] ICR 151, CA**, strike-out applications on this ground will generally fall into one or other of two categories identified by the House of Lords (and as applicable to this claim) - that the default is intentional and contumelious (showing disrespect or contempt for the tribunal and/or its procedures).

This Hearing

9. Mrs McKenna confirmed that she had nothing to add to her written submissions. I informed her that I would be striking out the claims, on grounds of no reasonable prospects of success, non-compliance with orders and the claims not being actively pursued and for which written reasons would follow.

Discussion

10. No Reasonable Prospects of Success. The previous CMO set out the issues in the claims as follows:

    a. Constructive unfair dismissal

    (1) The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to trust and confidence. The breach(es) were as follows:

    (a) she was not allowed any witnesses/supporter in attendance with her when she was interviewed as part of the process: she does not suggest that others were treated differently in this respect;
    (b) it was her word against theirs which is what made the process unfair;
    (c) although the Claimant asked for the notes of her interview, she was told that she would not be permitted to see them.

    (2) The Tribunal will need to decide whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent and whether it had reasonable and proper cause for doing so (the test set out in **Malik v BCCI [1997] UKHL 23**).

    (3) Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

    (4) Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

    (5) In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

    b. Direct pregnancy and maternity discrimination (Equality Act 2010 section 13)

    (1) Did the Respondent do the following things:

    (a) The Claimant was not allowed any witnesses/supporter in attendance with her when she was interviewed as part of the process: she does not suggest that others were treated differently in this respect;
    (b) it was her word against theirs which is what made the process unfair; and
    (c) although the Claimant asked for the notes of her interview, she was told that she would not be permitted to see them.

(2) Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

(3) If so, was it because of her prior maternity leave?

(4) Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to pregnancy/maternity?

11. The previous CMO recorded that the Claimant said in her claim form that she has been accused of being a bully/ringleader after complaints she made regarding two other colleagues. She went on to say that the relevant procedure was not followed, and it was dealt with in a very unprofessional way. She said that the outcome left her with no choice but to leave her position. In response to initial queries from the Tribunal in respect of her discrimination claim, she wrote on 2 March 2022, explaining that she was unsure whether what she alleged amounted to discrimination but said that she felt as though everything changed after she returned to work after giving birth. She had gone on maternity leave in mid-January 2021, returning in early June 2021. The events leading up to her resignation were in August and September 2021.

12. The CMO also recorded that the Respondent said in its response that no formal sanction was applied to the Claimant. The recommendation was for a performance improvement plan only, following an agreed informal procedure. Further, the Respondent said that the Claimant did not specifically ask for the notes of her interview but rather her personnel file. The Respondent says it replied by saying she could make a subject access request.

13. The Respondent's written submissions (in summary) set out the following:

a. No particulars of any discrimination had been provided in the ET1, or were mentioned at the time of the events leading up to the Claimant's resignation, or in her resignation letter.

b. Following complaints and counter-complaints being made between various members of staff working in the same open-plan office, the Respondent attempted an informal mediation, but which failed. It then instigated an HR investigation, conducted by an external consultant, to establish the facts and make recommendations. Following that exercise, it was concluded that the matter would be dealt with informally and the Respondent carried out the following actions:

(1) On-line training was provided for all involved, in relation to anti-bullying and harassment;

(2) Individuals in respect of whom the Claimant had complained were moved to different office locations; and
(3) The Claimant was invited to an informal performance management meeting to discuss a performance improvement plan (PIP), shortly after which invitation she resigned.

c. Accordingly, the Respondent denies any breach of the implied term of trust and confidence or any act of discrimination.

Conclusions

14. I reach conclusions as set out below.

15. Constructive Unfair Dismissal. This claim has no reasonable prospects of success, for the following reasons:

a. The alleged breaches are unlikely to be factually correct (or to be breaches), as follows:

(1) There is no requirement in the ACAS Code, or in law, for a person attending an investigator meeting to be accompanied, or to call witnesses.
(2) In any such dispute, dependent on oral witness evidence (as opposed to say CCTV, voice recording or written communication), it is inevitable that it 'will be one person's word against another'. It is for the person investigating to decide whose word they prefer, but, in any event, in this case, no disciplinary action was taken against the Claimant.
(3) As to requesting notes of her interview, the Claimant provided no evidence of such a request and the Respondent stated that she in fact requested a copy of her personnel file, for which, because it contained information about third parties, she was directed to make a Subject Access Request. There is no evidence that she did so and nor has she disputed the Respondent's account.

b. In any event, applying the test in **Malik**, even if such events had occurred, as alleged by the Claimant, it seems inherently unlikely that they did so because the Respondent sought to behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between them and the Claimant. All the evidence indicates that the Respondent simply sought to resolve a workplace dispute between colleagues that was disrupting their working relationships. The Respondent did so by deliberately unconfrontational means, firstly by attempting a mediation and then instituting an investigation, which resulted in no disciplinary charges against the Claimant (or anybody else involved). She was to be cautioned in the PIP against the '*excessive use of bad language, as it is not professional … and can make others feel intimidated and uncomfortable*', against '*inappropriate topics of discussion*' and '*volume levels'*, which, on the face of it, seem entirely reasonable

expectations by an employer. The Claimant resigned before she would have had the opportunity to discuss these points, indicating that the real reason she resigned was because she was unwilling to accept any criticism or direction by her employer, if it contradicted her own view of her behaviour. Also, the Respondent clearly had 'reasonable and proper cause' for doing so, as, again, the evidence indicates a prolonged dispute between colleagues, with complaint and counter-complaint which had to be resolved, for the good of the business. The **Malik** test is therefore very unlikely to be met in this case.

16. Pregnancy and Maternity Discrimination. I also consider that this claim has, likewise, no reasonable prospects of success, for the following reasons:

    a. Applying **Cox v Adecco** and taking this claim 'at its highest', it gets nowhere near the Claimant establishing a *prima facie* case of discrimination, on grounds of her pregnancy or maternity.

    b. For the reasons set out above in respect of the constructive unfair dismissal claim and in respect of identical allegations, the Claimant is very unlikely to establish that she suffered any detriment. She was not entitled to demand to be accompanied; such disputes are very often 'one word against another' and there is no evidence of her request for notes of the investigation meeting.

    c. Even if she had suffered detriment, there is no evidence that anybody else who was being investigated, or who was involved in the dispute was treated more favourably than her. Others were investigated and the investigation concluded that several persons were at fault, with some being moved to other work locations.

    d. Finally, apart from the coincidence of time, of the Claimant having returned from maternity leave a couple of months earlier, she advanced no rationale as to why any unfavourable treatment would have been because of that factor. Indeed, she herself said, in answer to a direction from the Tribunal 'that she was unsure whether what she alleged amounted to discrimination'. She made no reference to the issue at the time of the investigation, nor in her resignation letter and apart from ticking the 'pregnancy and maternity discrimination' box in the ET1, does not refer to the issue otherwise. This gives all the indications that this claim is simply an afterthought on her part, having seen the relevant box on the form and was inserted merely as a 'makeweight'.

    e. It seems highly likely, even if the Claimant were to establish a *prima facie* case of discrimination and the burden of proof were to shift to the Respondent that it would be able to prove a non-discriminatory reason for the treatment (as outlined previously).

    f. I am conscious of the guidance in the authorities such as **Adecco**, in respect of the striking out of discrimination claims, in particular against litigants-in-person, but in this case the allegations

themselves are insubstantial and in respect of which there is little or no factual dispute. The Claimant could, if she sought to contest the Respondent's account of her request for the meeting notes, have provided documentary evidence to that effect, but did not do so. Similarly, it was open to her to provide both written submissions and to attend this Hearing, to put her case, but she has chosen not to, leaving me to conclude that she has no such evidence, or counter-submissions of any merit. The Claimant's claims and precise allegations were established at the previous case management hearing and she has had ample opportunity to consider them. This is, I consider, one of those 'obvious cases' (as cited in **Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391, HL**), where strike-out is appropriate.

17. Failure to comply with Tribunal Orders and to Progress the Claim. Both these factors would be unlikely, of themselves, to justify strike-out, but, cumulatively, when added to the conclusion of there being no reasonable prospects of success, support that decision. That failure is as follows:

    a. The non-compliance is serious, in preventing the Respondent from knowing the financial scale of the claims against them and also, had the Claimant attended this Hearing, in understanding, or preparing for her arguments against strike-out.

    b. The default is clearly hers alone, no other explanation being offered.

    c. If, as it seems, it was not the Claimant's intention to progress her claims, then she could have withdrawn them, obviating the need for the Respondent's attendance today and the costs incurred, in addition to the effect on Tribunal resources. Her failure to engage with the Tribunal or Respondent, at all, particularly considering the clear and recent direction provided in the January CMO, engages the principle in **Riddle**.

    d. Applying **Weir Valves**, it doesn't seem, in the absence of engagement or explanation by the Claimant that any lesser sanction than strike-out was appropriate.

Judgment

18. For these reasons, therefore, the Claimant's claims of constructive unfair dismissal and pregnancy and maternity discrimination are, subject to Rule 37, struck out.

_____

Employment Judge O'Rourke
Date: 2 March 2023

Judgment & reasons sent to the Parties on 16 March 2023

For the Tribunal Office