



EMPLOYMENT TRIBUNALS

Claimant: Miss S Browne

Respondent: Lewisham and Greenwich NHS Trust

Heard at: London South (by CVP)

On: 17 October 2023

Before: Employment Judge B Smith

Representation:

Claimant: Did not attend

Respondent: Mr O'Keeffe (Counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

Strike out of claim

1. The complaint of harassment is struck out under Employment Tribunal Rule 37(1)(d) because it has not been actively pursued.
2. The complaint of victimisation is struck out under Employment Tribunal Rule 37(1)(d) because it has not been actively pursued.
3. The complaint of protected disclosure detriment is struck out under Employment Tribunal Rule 37(1)(d) because it has not been actively pursued.

REASONS

1. The claimant has brought claims for harassment, direct race discrimination, disability discrimination (both discrimination arising in consequence of a disability and failure to make reasonable adjustments), pregnancy/maternity discrimination, victimisation, protected disclosure detriment, and unlawful deduction of wages. The claimant started employment at the respondent, an NHS Trust, on 30 March 2020 as a Healthcare/Administration Assistant. She

recently left that employment. ACAS conciliation started on 6 October 2021 and ended on 17 November 2021. The claim was presented on 30 December 2021.

2. The claimant ticked the boxes for discrimination on the grounds of race, pregnancy/maternity, and disability in the claim form. It also includes a claim for 'bullying and harrassment' [sic]. Box 8.2 refers to the claimant having made various informal and formal complaints of bullying and harassment however no clear details of alleged harassment are provided.
3. At a preliminary hearing on 29 March 2023 EJ Self conducted what is described in his order as an '*exhaustive attempt to seek to understand the Claimant's claim*'. The hearing lasted for three hours. Sufficient details were obtained from the claimant to draft a list of issues for the claims of direct race discrimination, pregnancy and maternity discrimination (subject to an application to amend the claim by the claimant), discrimination arising from disability, and failure to provide reasonable adjustments. There is no mention of harassment in the orders which resulted from that hearing. The claimant was ordered to provide full particulars to the respondent and Tribunal by 10 May 2023 for the victimisation claim, protected disclosure detriment claim, and in respect of disability. No such particulars were provided by the claimant although some limited information in respect of disability was provided to the Tribunal.
4. The parties were ordered to agree the documents for an open preliminary hearing on 30 August 2023 by 21 June 2023 and witness statements were to be exchanged by 11 July 2023. The issues to be determined at that hearing were: any further identification of the issues; whether an amendment application needed to be made by the claimant, and if so considering that application; determination of time limits on the claims; whether the claims should be struck out as having no reasonable prospects of success or whether a deposit order should be made on the basis that any claim had little reasonable prospects of success, and to list and make any further directions necessary for the final hearing. That hearing was adjourned until 17 October 2023 due to a lack of judicial availability.
5. On 23 May 2023 the claimant by email (copying in the respondent) requested more time (unspecified) to produce documents from a third party, which appeared to be medical records, referring to general trauma as a reason why she was finding it difficult to deal with matters and engage.
6. On 25 May 2023 the respondent sought unless orders in relation to the claimant's failure to provide full particulars of any victimisation claim, full particulars of any protected disclosure detriment claim, and particulars and medical records in respect of disability. They stated that they had written to the claimant on 15 May 2023 to establish the reasons for non-compliance and did not receive a response until the 23 May 2023 when the claimant stated that she was unavailable due to personal matters.

7. On 4 July 2023 the claimant wrote to the Tribunal refusing permission for the enclosed information to be shared with a third-party – presumably the respondent – and referring to personal matters, objecting to any strike out. The claimant failed to copy in the respondent contrary to the express order of EJ Self dated 29 March 2023 and rule 92.
8. On 12 July 2023 the respondent’s solicitors wrote to the Tribunal raising the fact that they have not been sent the claimant’s medical information and pointing to the fact that no difficulties with the proposed timetable for compliance were raised on 29 March 2023 by the claimant. That email states that as of 12 July 2023 the claimant had not indicated when she would be in a position to engage with the Employment Tribunal process. A strike out of the disability discrimination, victimisation, and protected disclosure claims was sought in that email which also alleges that the claimant is not actively pursuing her claims.
9. On 2 August 2023 EJ Perry ordered that at the onset of the upcoming preliminary hearing the Tribunal will decide whether to strike out the claimant’s claim for failure to comply with the orders of the Tribunal and her failure to actively pursue the claim. The orders of EJ Self dated 29 March 2023 included that the parties may file skeleton arguments in relation to the issues to be considered and are encouraged to do so and to exchange them at least 48 hours in advance of the hearing. Those orders also included a strike out warning. I am satisfied therefore that the claimant has received the requisite warning and opportunities to make representations under rule 37.
10. The claimant did not attend this hearing on Tuesday 17 October 2023. On Monday 16 October 2023 at 13:57 the claimant emailed the Tribunal and respondent’s solicitors stating that she will not be able to attend because of ill health. The contents of that email should be considered in full to understand this decision. No medical evidence was provided with that email and no express request for a postponement was made. It simply states that the claimant will not be able to attend.
11. I considered whether today’s hearing should continue in the absence of the claimant in those circumstances. I decided that it was in the interests of justice for certain matters to be determined in the absence of the claimant, including those that are subject to this judgment. This is because there has already been substantial delay to the resolution of the various applications in this case, the next available hearing date is not until January 2024, and the claimant was given more than an adequate opportunity to address the relevant matters before the hearing. There was no express request for a postponement. Also, the information that the claimant was ordered to provide to the Tribunal should have been provided in accordance with the Tribunal’s previous orders. The claimant also had an opportunity to file a skeleton argument if she had wanted to before the hearing. At most the claimant could have sought to provide an explanation for her

failure to provide the ordered information, but with no written notice of any explanation, or written evidence in support, it is unclear what any oral submissions from the claimant could have been. In any event, I have treated the claimant's email to the Tribunal dated 4 July 2023 as her representations. There is nothing in those representations which provides a good explanation for her conduct throughout the proceedings. This is because they are vague, unsupported by evidence, and in any event do not account for the very lengthy period of time that the claimant has been given to provide the further details ordered by the Tribunal. I am therefore further satisfied that the requirements of rule 37 are met in the specific circumstances of this case, taking into account the full history of proceedings.

12. Although it was not expressly identified in the draft list of issues or claims by EJ Self, I consider that a harassment claim has been brought by the claimant because of the content of the ET1. However, no details of this have been provided at any stage despite the claimant having been given the opportunity during a three hour hearing to do so. The harassment claim itself did not appear to have been identified by the claimant at that hearing, in any event. I therefore consider that it has not been actively pursued by the claimant, and that it is appropriate for it to be struck out. The reality of this complaint is that although a harassment claim was brought, it has not been pursued by the claimant in these proceedings. If it was, then details of that claim would have been provided by her in the ET1, during the hearing of 29 March 2023, which EJ Self described as an exhaustive attempt to seek to understand the claimant's claim over three hours, or subsequently.
13. The claims for victimisation and protected disclosure detriment are also struck out because they have not been actively pursued. This is for the following reasons. Although the ET1 refers to victimisation and whistleblowing, this is only in very general terms. The claimant failed to provide the details ordered by the Tribunal by 10 May 2023, or subsequently in advance of the original hearing date of 30 August 2023, or in advance of today. There is no suggestion that the claimant has identified in writing any of the particulars necessary for these claims to be case managed, and even if personal matters might have justified a short extension of time from 10 May 2023, the fact that the claimant did not provide them even by Friday 13 October 2023 is such that I find that they are not being actively pursued. Also, no application to amend the claim to include additional factual particulars for these claims has been made. This is despite amendment applications having been raised as a potential issue at the hearing on 29 March 2023.
14. Although the claimant alluded to more general ongoing health matters in her email explaining her absence at this hearing, there is no medical evidence to show that she is entirely unable to engage in these proceedings more generally. Although the respondent's email to the Tribunal dated 12 July 2023 refers to other proceedings relating to the claimant, there is no evidential basis for these to

explain her non-engagement with the Tribunal process, at least for the entirety of the relevant period of non-engagement.

15. For the above reasons, I find that these claims have not been actively pursued and it is just and proportionate for them to be struck out. There is no good reason for the claimant's delay to provide the required particulars. If a further opportunity was given these proceedings would be subject to even further delay. There is a substantial risk that a fair hearing is impossible in light of fading memories of any potential witness evidence, and the lack of particulars of these claims makes it increasingly difficult for the respondent to be in a position where could fairly respond to claims which remain unspecified with no indication as to when they might be specified. Also, any attempt to respond after such a long delay by the claimant would put the respondent to considerable prejudice in terms of costs, the identification of relevant material, and fading witness memories. I do not consider that any other response, such as further orders, would be proportionate or would be consistent with the overriding objective. This is because further orders would inevitably result in significant further delay when the claimant has already had since 29 March 2023 to truly actively pursue these claims and there is no good reason to provide an extension of time. I have taken into account the likely prejudice to the claimant in making this decision in not being able to pursue these claims further. However, the claimant does have other claims which will continue to a final hearing, subject to any other orders of the Tribunal. This mitigates against the prejudice that will be caused to her by this outcome.
16. These strike out orders could equally be made on the basis of the claimant's failure to comply with Tribunal orders under rule 37(c), in the alternative, for the same reasons.
17. In the alternative, in the absence of particulars, these claims are so poorly set out that they have no prospects of success and are bound to fail, even taking into account the public interest in these type of claims being determined. The claimant has been given an opportunity to provide those details and they have not been provided, so a lesser sanction would not be in keeping with the overriding objective and would not be proportionate. It would therefore be proportionate to strike them out under rule 37(a) as having no reasonable prospect of success.

Employment Judge B Smith
Date: 17 October 2023

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