



EMPLOYMENT TRIBUNALS

Claimant: Mr K. Guergour

Respondent: Sussex Estates and Facilities LLP

Heard at: London South **On:** 21 December 2017

Before: Employment Judge Cheetham

Representation

Claimant: no appearance

Respondent: Ms I. Ferber (counsel)

JUDGMENT

1. The Claimant's complaints of discrimination because of religion or belief, breach of contract and unlawful deduction of wages are struck out under Rule 37 of the Rules of Procedure 2013 and the claim is dismissed.
2. The Claimant shall respond to the Respondent's application for costs by writing to the Tribunal (and copying any response to the Respondent) within 14 days of the date on which this Judgment is sent to the parties.

REASONS

1. This Preliminary Hearing was listed to consider the Respondent's application to strike out the claim, alternatively obtain a deposit order. There was also an application in respect of the Respondent's costs of a previous hearing on 30 October, when the Claimant did not attend.
2. At 9.34 on the morning of this hearing, the Claimant emailed the Tribunal to say that he would not be attending, as he thought the hearing was going to be heard on the following day.
3. This was very unconvincing. The Tribunal's file showed that the Claimant had clearly been notified of the hearing date (having failed to attend on the

previous occasion). Moreover, the Respondent's counsel referred the Tribunal to correspondence (both email and letters) sent to the Claimant referring to and/or attaching documents for today's hearing.

4. The Tribunal therefore decided to proceed in the Claimant's absence, as he had failed to provide a plausible explanation for his non-attendance.

The Law

5. The Tribunal's power to strike out a statement of case is contained in Rule 37 of the Rules of Procedure 2013:

(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).

6. The proper approach to be taken to striking out claims was summarised by Mitting J. in ***Mechkarov v Citibank NA [2016] ICR 1121***, in which – after reviewing the authorities - he said:

“...the approach that should be taken in a strike out application in a discrimination case is 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.”

7. Under the Equality Act 2010 s.123:

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

...

(3) For the purposes of this section—

- (a) conduct extending over a period is to be treated as done at the end of the period;*
(b) failure to do something is to be treated as occurring when the person in question decided on it.

The application to strike out

8. Ms Ferber made her application to strike out the claim on 3 grounds. First, she submitted that the Claimant's failure to attend, both today and on 30 October, suggested that the manner in which the proceedings were being conducted by the Claimant was unreasonable. She also pointed to the Claimant having previously been ordered to serve a witness statement, which he had failed to do.
9. Secondly, she submitted that – in any event – the claim was time-barred. The claim (as far as it can be understood from the pleadings) relates to incidents in 2016. It comprises complaints of discrimination because of religion or belief, breach of contract and unlawful deduction of wages. Putting the Claimant's case at its very highest, the last allegation of discrimination would be his grievance appeal outcome on 7 April 2017. Early Conciliation was from 4 April to 4 May 2017 (and so that last discriminatory act was within that time). The claim was brought on 6 August 2017 and was therefore out of time.
10. Thirdly, Ms Ferber argued that the pleaded claim was wholly without merit. On its face, it had nothing whatsoever to do with religion or belief.
11. The Tribunal concluded that the Claimant's failure to attend on two occasions, without providing a plausible explanation, and to comply with the Tribunal's orders amounts to unreasonable conduct of the claim and the claim is struck out on that first ground.
12. The pleaded claim is also out of time and, as pleaded, lacks any merit at all, so the claim is struck out on the second and third grounds also. Whilst it is well-established that Tribunals should only strike out discrimination claims in the clearest cases, this is such a case. Taking the claim at its highest, the particulars of claim do not assist the Claimant by showing either that his claim is in time or that there is any basis for his discrimination claim. There is no pleaded set of facts which requires oral evidence to be heard, nor is there any explanation for the delay in bringing the claim.
13. The Claimant has now been dismissed from his employment, so there is nothing preventing him from bringing a further claim in relation to his dismissal. However, for the avoidance of doubt, any further claim does not present an opportunity to re-litigate the claims struck out at this hearing.

Respondent's costs

14. The Respondent then made its application for costs under Rule 76, namely that the Claimant had acted unreasonably by failing to attend on 30 October. The application was extended to include today's non-attendance. Ms Ferber submitted that the Claimant's non-attendance meant that the

Respondent had incurred costs unnecessarily in attending the hearing on 30 October. Today's hearing could have been listed for only an hour, thus reducing her fee, had the Claimant indicated in good time that he was not attending.

15. Under Rule 77, the Tribunal may not make a costs order unless the paying party (in other words, the Claimant) has had a reasonable opportunity to make representations in writing or at a hearing, as the Tribunal may order, in response to the application. The Claimant should therefore respond to the application, explaining why he should not be ordered to pay the Respondent's costs, within 14 days of the date this Judgment is sent to the parties. That response should be in writing and should be sent to the Tribunal and copied to the Respondent. The Employment Judge will then decide what, if any, further steps to take in respect of the application.
16. Although the Tribunal has not made a decision in relation to the application, it went on to hear what amount of costs the Respondent would be seeking. These are:

30 October: counsel's fees and travel costs for attending in the sum of £440.23 (£425 + £15.23)

21 December: £250 (which is half of counsel's fee and does not include travel expenses).

Total: £690.23

17. If it decides to make a costs order, then (under Rule 84) a Tribunal may have regard to the paying party's ability to pay. The sums sought by the Respondent appear reasonable and therefore the Claimant is also asked to address the amount sought by the Respondent and his ability to pay that sum in the event that the application is allowed.

Employment Judge Cheetham

Date 2 January 2018