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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss A Khamis

and

Respondent

Sainsbury's
Supermarkets Ltd

Held by CVP on 19 April 2021

Representation

Claimant:

Mr C Fray, Equality
Officer

Respondent:

Mr J Fireman,
Counsel

Employment Judge Kurrein

Statement on behalf of the Senior President of Tribunals

This has been a remote hearing that has not objected to by the parties. A face to face hearing was not held because it was not practicable and all issues could be determined in a CVP hearing. The documents that I was referred to are in a bundle of 218 pages, the contents of which I have recorded.

JUDGMENT

The Claimant's claims are struck out because they have no reasonable prospect of success.

REASONS

Background

- 1 This case has a long and unfortunate history. I set out the principal milestones as follows:-
 - 1.1 The Claimant was born on 13 November 1963 and started her employment with the Respondent as a customer service assistant on 14 November 2018.

- 1.2 On 20 June 2019 the Claimant was suspended pending a decision on potential disciplinary proceedings which resulted in her being invited to attend an investigation a meeting on 27 June 2019.
- 1.3 On 24 June 2019 the Claimant was signed off with stress and on 30 July 2019, without returning to work, the Claimant resigned with an effective date of termination on 6 August 2019.
- 1.4 She started early conciliation on 6 August 2019, it ended on 7 August 2019, and she presented a claim to the tribunal on 7 August 2019 alleging disability discrimination, age discrimination and unpaid holiday pay.
- 1.5 On 22 August 2019 notice was given for a preliminary hearing to take place on 9 April 2020.
- 1.6 The Respondent presented its response on 27 September 2019. It did not accept that the Claimant was a disabled person at any relevant time and specifically pleaded,

“The Claimant ET1 indicates that the Claimant is bringing claims for discrimination on grounds of age and disability; however, the Claimant does not explain how the information provided by her regarding the termination of her employment supports her claims of discrimination. This will need to be clarified. In the event that the Claimant does apply further particulars of these claims the Respondent reserves the right to provide additional grounds of resistance by way of response.
- 1.7 On 26 October 2019 the Claimant was directed to provide evidence and documentation regarding her alleged disabilities. She did so, after the date it was due, on 2 December 2019. She was also asked to clarify whether there were omissions from her claim form because it appeared to end mid-sentence.
- 1.8 In the interim, on 27 November 2019, the Northamptonshire Rights and Equality Council, acting by Mr Fray, wrote to the tribunal to inform it that they were acting as her legal representatives and might wish to amend her claim and add further Respondents. It stated that the words “I went in on 1st expecting to do my return to work with Cathy.” were missing from the end of her claim form. It sought a brief extension of time for compliance with the earlier directions and, by a letter of even date, set out a schedule of loss that was effectively confined to a *Vento* award in the sum of £18,000, because the Claimant started work with a competitor of the Respondent immediately after her EDT.
- 1.9 The Respondent, following receipt of the Claimant’s evidence in support of her claim to have been disabled at the relevant time, wrote to the tribunal on 4 December 2019 to indicate that it maintained its position that the Claimant had not been a disabled person at the relevant time. It confirmed that position in a further letter on 11 December the 2019.
- 1.10 On 16 December 2019 the Claimants representative wrote to the tribunal concerning the issue of disability. That letter contained the following passage,

“The Claimant requests to amend her ET1 statement in full at a date by the end of January 2020, and her representative will produce at the same time a matrix setting out the claims made against all Respondents certainly: as new Respondents may be added to this claim at the case management preliminary hearing set to take place on the 9 April 2020. In providing this information the Claimant hopes to clarify on what basis she asserts she has been subjected to discrimination.”

1.11 By a letter of 28 December 2019 the Claimant was permitted to amend the final sentence of her grounds of complaint to add the words she had omitted.

1.12 On 16 January 2020 the Claimants representative wrote to the tribunal about the disability issue and in his penultimate paragraph said,

“We look forward to hearing back from the employment tribunal about the Claimant’s requests to amend her ET1 statement in full at a date by the end of January 2020, and I as her representative will produce at the same time a matrix setting out the claims made against all Respondents. In providing this information the Claimant hopes to clarify on what basis she asserts that she's been subjected to discrimination and harassment and any unlawful deductions if any have occurred.”

1.13 On 26 January 2020 the employment tribunal gave notice of a preliminary hearing to take place on 9 April 2020 for a full day to determine the issue of whether or not the Claimant had been a disabled person at a relevant time.

1.14 On 17 February 2020 the Claimants representative wrote to the tribunal again and requested ,

“ a case management order to amend her Original ET1 claim form to state on page 4 at paragraph 4 - **cases where the Respondent was not your employer** – (Other named Respondents being Catherine Ball, Rubicel Adams or Rubicel Austria Cruz, Kimberley Walsh, Danny Everest Hayes, and Josh Hartley). And that page 7 of the original ET1 claim form on page 7 under the section **please set out the background and details of your claim in the space below** amended to read in brackets (please see the attached Statement of [the Claimant]). This attached 16 page statement sets out the Claimant’s complaints in full and should be added to her Original application.”

1.15 That letter was accompanied by the 16 page statement containing 52 paragraphs and a Scott type schedule containing 18 claims set out over 17 pages. those claims started in 2017, with an allegation that the Claimant may not have been provided with a written statement of terms and conditions of employment, and ended with her letter of resignation, which was said to be a matter of health and safety. Every claim was said to be of a continuing nature.

1.16 The Respondent replied promptly, at 9:45 AM on 17 February 202, to object to that application because it failed to set out the Claimant’s position on what claims she was proposing to make despite the Claimant’s representative’s earlier promises

- 1.17 On 20 February 2020 the Claimant's representative wrote to the tribunal seeking to provide further evidence to support the Claimant's assertion that she was disabled at the relevant time.
- 1.18 On 14 March 2020 EJ Ord directed that the Claimant should prepare, submit to the tribunal and serve on the Respondent a copy of the proposed amended claim.
- 1.19 That direction has never been complied with.
- 1.20 On 9 April 2020 a preliminary hearing took place before EJ Bloom. The Covid crisis was at its height, and it was a telephone hearing which the Claimant's representative failed to attend. As a consequence: -
- 1.20.1 A preliminary hearing was listed to take place on 19 April 2021;
- 1.20.2 The Claimant was required to confirm which of her alleged impairments she relied on .
- 1.20.3 No later than 3 September 2020 the Claimant should show cause why her claim alleging constructive unfair dismissal should not be struck out as she did not have two years continuous employment.
- 1.21 On 20 August 2020 the Claimant's representative wrote to the tribunal and the Respondent to inform it that she relied on
- Brain damage
 - Scoliosis
 - Muscle deformity
 - Depression
- It also sought to assert that the Claimant did not require two years continuous service for her claim for unfair constructive dismissal because she had resigned in order to protect herself and her health and safety.
- 1.22 On 21 October 2020 the Respondent complained that the Claimant had failed to show cause and the unfair dismissal claim should therefore be struck out.
- 1.23 On 5 February 2021 a direction was made that the Respondent's application to strike out the unfair dismissal claim should be dealt with at the hearing on 19 April 2021.
- 1.24 On 29 March 2021 the Respondent wrote to the Claimant and the tribunal to say that it accepted that at the relevant times of the Claimant's employment she was a disabled person by reason of her scoliosis.
- 2 I read the file of documents provided for the Claimant and heard the submissions on her behalf. I read and heard the Respondent's submissions. I deal with each issue before me in turn.

Disability

- 3 In light of the Respondent's recent concession I indicated my view that, subject to dealing with other issues that arose for my determination, it was likely to be

more appropriate to deal with the issue of whether the Claimant was disabled by any of her other impairments at the full hearing. No-one sought to persuade me otherwise.

Amendment

- 4 The principles to be applied to the amendment of claims and/or parties after the claim has been started have been dealt with at length in the past.
- 5 I start with the decision in Chandhok v Tirkey [2015] ICR 527, which is widely accepted as authority for the proposition that,

The formal claim, which must be set out in the ET1, is not an initial document free to be augmented by whatever the parties choose to add or subtract. It sets out the essential case to which a Respondent is required to respond. An approach whereby a “claim” or “case” is to be understood as being far wider than as set out in the ET1 or ET3 defeats the purpose of permitting or denying amendments. An employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

- 6 The Claimant’s case as pleaded in her claim form, which I accept was written without legal assistance, was far from clear. She had ticked boxes for disability and age discrimination and non-payment of holiday pay. Nothing was said that sought to connect any of the events she recorded with her impairments or disability.

Existing Claims

- 7 In his helpful Skeleton Argument Mr Fireman, in my view more than fairly, quoted the majority of what the Claimant had set out and identified six matters of complaint:-
 - 7.1 On 28 May 2019 Catherine Ball took a piece of paper out of the Claimant’s hand and tore it in half.
 - 7.2 The Claimant struggled to sleep on 29 May 2019, she felt unsteady and as she was getting out of bed hit her head. She awoke on 30 May 2019 with a headache and a black eye. She came into work, was vomiting and feared she would die, and then went to A & E. On 31 May 2019 she noticed a message from a colleague Rubercil Adams asking her if she was ‘going in’ and she replied saying ‘no’ due to her still having a headache and feeling dizzy. She then woke up on 1 June 2020 ‘expecting to do [something]’.
 - 7.3 On an unidentified date Catherine Ball got a colleague to harass the Claimant in an unidentified way for information about why she was unhappy.
 - 7.4 On an unidentified date Catherine Ball made her presence known to the Claimant and was intimidating in an unidentified way, which led to the Claimant ‘being done for gross misconduct’
 - 7.5 On an unidentified date the Claimant was insulted in an unidentified meeting about being disabled.
 - 7.6 The Respondent is trying to replace older employees with younger employees.

- 8 I thought it, at the very least, unfortunate that the Claimant's representative was unaware of the existence of the Presidential Guidance on amendment and adding parties, and had not complied with the direction made over a year before this hearing that he should set out the proposed amended claim and serve it on the parties. I did not accept that his "matrix" was any substitute for compliance with that direction. He appeared to be similarly unaware of the principles set out in Selkent Bus Co Ltd v Moore [1996] ICR 836.
- 9 In considering whether or not to grant an application for an amendment I must not use that authority as a checklist, far less as a rule. Similarly, the Presidential Guidance is just that: guidance.
- 10 Nevertheless, there are clearly issues that I have to determine in considering this application and I deal with them under the following headings.

Time of application

- 11 Clearly, the sooner an application is made the less prejudice is likely to be suffered by the other party. The Claimant's representative first intimated that she might wish to amend a claim and add Respondents in his letter of 27 November 2019. He has given similar indication in his letters of 16 December 2019 and in his purported application for amendment on the 17 February 2020.
- 12 However, even today, and despite a direction to prepare and serve a proposed amended claim made by EJ Ord on 14 March 2020, there is no clear application of precisely what the Claimant wishes to add by way of claims to her case.
- 13 I accept that the backlog in the employment tribunal is such that there have been delays in organising hearings, but in my view this does not excuse the Claimant's representatives abject failure to formulate the claims in the manner he has been directed to.
- 14 The Claimant's representative has given no explanation for his failure to comply with the directions of the tribunal or why he did not make an appropriate application much earlier than he has sought to.

Nature of Application

- 15 Despite that lack of clarity there can be no doubt that the amendments sought are very substantial indeed. There has never been a formal application accompanied by a proposed draft pleading.

Time Limits

- 16 Based on the date on which the Claimant started early conciliation any events she seeks to rely on that took place before 7 May 2019 are likely to be outside the primary limitation unless they are continuing acts, or one of a series of similar events.
- 17 This is, no doubt, why the Claimant's representative has described each of the 18 claims in his matrix as being continuing acts.
- 18 They start with the possibility that the Claimant was not provided with a statement of terms and conditions of employment. That is not set out as a

discrimination claim, but as one under S.1 Employment Rights Act 1996, to which the strict 3 month time limit applies.

- 19 In any event, that is clearly an omission to perform a legal duty and would fall within the decision in Matuszowicz v. Kingston upon Hull [2009] IRLR 28. This is also true of the proposed amendments numbered 1 to 4.
- 20 Those 4 claims are all alleged to have taken place between November 2017 and February 2019. They are clearly substantially out of time. There are no allegations of similar alleged detriments after February 2019.
- 21 It is also the case that all the claims the Claimant is seeking to add are out of time as at the date the amendments were sought. Even giving the Claimant the benefit of every doubt (so that the date of her purported application on 17 February 2020 may be treated as the date of amendment, a generous step in my view) this was over 6 months after her effective date of termination and the presentation of her claim.
- 22 Despite this clearly identifiable out of time issue the Claimant has failed to set out any explanation for the reason for the delay or why it might be just and equitable for her to be granted an extension of time.

Nature of Claims

- 23 With the exception of the proposed amendments numbered 8, 9 and 11, which may give further particulars of purported claims in the original claim form, each of the proposed amendments requires new facts. They are not a re-labelling exercise.
- 24 In those circumstances the proposed amended claims numbered 1 to 7, 10 and 12 to 18, add new claims that are wholly unconnected to the existing claims.

New Respondents

- 25 In 11 of the 18 claims in the Claimant's 'matrix' she is seeking to add some nine individual employees of the Respondent as additional Respondents.
- 26 Many of these are named in her original claim, so she was aware at the time of the events or their involvement. I also refer to my findings, below, regarding the merits of those claims where these individuals are named.
- 27 However, she has given no explanation of why she has delayed for more than six months after starting her claim to even attempt to add them as parties.

Hardship and Prejudice

- 28 The hardship and prejudice to the Respondent in having to investigate new allegations, search for documents and interview potential witnesses if the amendments are allowed is clear and substantial.
- 29 The Claimant has not advanced any evidence or made submissions to counter that difficulty.
- 30 The prejudice to the Respondent is compounded by the fact that the claims are not clearly pleaded. In particular, a matter I refer to below again, in many cases

the causal connection between the actual or admitted disability and the alleged detriment is not set out at all.

- 31 Against that, there is no prejudice to the Claimant in not being permitted to amend to bring claims that are so poorly pleaded as to be verging on hopeless.

Amendment - Conclusion

- 32 In light of all my above findings the Claimant's purported application to amend is refused because it would be contrary to the interests of justice to permit it.

Unfair Dismissal

- 33 The Claimant has wholly failed to show cause why this claim should not be struck out. The Claimant did not have two years continuous service at the time her employment ended. There is no pleaded case on Health and Safety or, indeed, any other 'automatic' unfair dismissal right.

- 34 I strike the claim out.

Original Claims

- 35 Having given Judgment on the above issues I indicated to the parties that at some future time I intended to consider the merits of the Claimant's original claims with a view to potentially ordering the Claimant to pay a deposit as a condition of being permitted to continue that claim, or to strike out any claim if I was of the view that it had no reasonable prospect of success .

- 36 I asked both parties to consider their position on my intention and to take instructions, informing them that I might proceed to deal with the matter later that day or to deal with some aspects later that day and to require the Claimant to show cause as to why matters should not be the subject of a deposit order or strike out at a future date.

- 37 Following a longer than usual adjournment I asked each of the parties to address me. Neither made any objection to me considering such orders that day or requested more time to consider that position.

- 38 The Claimant's representative inform me of the Claimant's very limited means, that she was no longer working and relied on benefits. He submitted that it would be unfair to order a deposit or to strike out any of her claims because her claim had been so weakened by not allowing the amendments she sought.

- 39 It was the Respondent's case that the Claimant's claims in her original claim form had no reasonable prospect of success, in particular because there was no pleaded causation between the matters of which she complained and her disability.

- 40 I had earlier asked the Claimant to assist me to identify what the Claimants case was on her existing claim in terms of causation. I set out those claims again for ease of reference and set out his response and my view of it.

7.1 On 28 May 2019 Catherine Ball took a piece of paper out of the Claimant's hand and tore it in half.

41 It was the Claimant's case that Ms Ball did this because the Claimant was not able-bodied. It was direct discrimination.

42 I thought this claim to be based on no more than bare assertion. It also seemed highly likely to be defeated by the comparator issue as in London Borough of Lewisham v. Malcolm [2008] IRLR 700.

7.2 The Claimant struggled to sleep on 29 May 2019, she felt unsteady and as she was getting out of bed and hit her head. She awoke on 30 May 2019 with a headache and a black eye. She came into work, was vomiting and feared she would die, and then went to A & E. On 31 May 2019 she noticed a message from a colleague Rubercil Adams asking her if she was 'going in' and she replied saying 'no' due to her still having a headache and feeling dizzy. She then woke up on 1 June 2020 'expecting to do [something]'.

43 When I asked the Claimant's representative what the alleged causal connection was he said, "Hmmm". When I rephrased the question and asked him what it was alleged the Respondent had done that it should not have he said, "I can't answer that."

44 I thought that to be quite unacceptable.

7.3 On an unidentified date Catherine Ball got a colleague to harass the Claimant in an unidentified way for information about why she was unhappy.

45 When I sought clarification of this I was told that the Claimant believed that Ms Ball was asked to get information from her and that there was a causal connection because the Claimant believed that the Respondent felt it could take advantage of her.

46 I thought that to be wholly inadequate to support even the beginnings of a claim alleging disability discrimination.

7.4 On an unidentified date Catherine Ball made her presence known to the Claimant and was intimidating in an unidentified way, which led to the Claimant 'being done for gross misconduct'

47 Part of the above answer was repeated, "the Claimant believed that the Respondent felt it could take advantage of her."

48 I repeat my above finding.

7.5 On an unidentified date the Claimant was insulted in an unidentified meeting about being disabled.

49 Whilst I accepted that the proposed amendment 11 gave some more particulars of this claim I have, for the reasons set out above, rejected that application. As it is, this claim is incapable of being sensibly responded to.

7.6 The Respondent is trying to replace older employees with younger employees.

50 When I sought clarification of this claim, suggesting that it appeared to be one of indirect discrimination, I was initially told it was of direct age discrimination. When I sought clarity on the age groups relied on I was then told it was indirect discrimination, but the Claimant's representative repeatedly identified the discrimination, 'treating younger people better', as the PCP.

- 51 It appears the Claimant, after she left her employment, was told by a former customer that a former colleague had said to that customer words to the effect that it would not be long before all the old staff had gone.
- 52 I considered that to be a wholly insufficient basis on which to even consider a claim. I suggested to the Claimant's representative that it would be hard to 'get off the ground' and he responded that it would be difficult.

The Law

- 53 The power to strike out a claim if it has no reasonable prospect of success is set out in Rule 37 Employment Tribunal Rules of Procedure 2013.

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).

(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.

- 54 I accept that, as a general principle, I should not strike out a claim under this Rule if there are material facts in dispute: Anyanwu v South Bank Student Union [2001] UKHL 14, [2001] ICR 391; Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, [2007] ICR 1126

- 55 However, it is also clear from the more recent case of Ahir v British Airways plc [2017] EWCA Civ 1392, that I should not be inhibited from exercising my power under this Rule in a suitable case. Underhill LJ, said this, at paragraph 16,

... Employment 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. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that 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'.

- 56 In light of all my above findings I have concluded that the Claimant's claims have no reasonable prospect of success and should be struck out

Employment Judge Kurrein
26th May 2021

Sent to the parties and
entered in the Register on : 07 :06 :2021

THY

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For the Tribunal

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