



EMPLOYMENT TRIBUNALS

Claimant: Dr Cinzia Yates

Respondent: Richard Newton Consulting Limited

Heard at: Cardiff by video

On: 20th March 2024

Before: Employment Judge W Brady

Representation

Claimant: Mr W Cowley

Respondent: Ms A Pitt

JUDGMENT having been sent to the parties on 25th March 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant was employed by the Respondent as a research and consultation manager from 12 July 2021 until 25 August 2022. Early Conciliation started on 6th October 2022 and ended on 10 November 2022. The claim was presented on 9 December 2022.
2. The Claimant is making the following complaints
 1. Direct disability discrimination (including a discriminatory dismissal)
 2. Discrimination arising from disability
 3. Failure to make reasonable adjustments
 4. Disability related harassment
 5. Victimisation
 6. Wrongful dismissal (this is admitted)
 7. Unauthorised deduction from wages.
3. The case was listed today to hear the Respondent's application for the Tribunal to strike out all of the above claims on the grounds that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent has been scandalous unreasonable or vexatious and that

- the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or the response.
4. I have read the extremely thorough and helpful skeleton argument prepared by Ms Pitt for the Respondent and I heard her oral representations today. I also heard from Mr Cowley from the Citizen's Advice Bureau who represents the Claimant.
 5. When considering this case I have taken into account the overriding objective to deal with cases fairly and justly and Rule 2 of the Employment Tribunal Rules of Procedure.
 6. Rule 37 of the Employment Tribunal Rules of Procedure states that at any stage of the proceedings either by its own initiative or on an application of a party, A Tribunal may strike out all or part of a claim in response on any of the following grounds:
 - a. That it is scandalous vexatious or has no reasonable prospect of success
 - b. The manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent has been scandalous unreasonable or vexatious
 - c. For non-compliance with any Rules or with any order of the Tribunal
 - d. It has not been actively pursued
 - e. That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or the response.
 7. The Respondent in this case is making the application under Rule 37(1) B, 37 (1) (c) and 37 1(d)
 8. I was referred to the case of Bolch v Chipman 2004 ILIR 140 EAT which gave guidance on the steps a Tribunal should take in determining a strike out application under section 37(1)(b).
 9. Firstly, an employment judge must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings.
 10. Secondly, if so the Judge must then consider whether a fair trial is still possible. If a fair trial is still possible then the case should be permitted to proceed.
 11. Thirdly if a fair trial is not possible the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty for example by making a costs or preparation order against the party concerned rather than striking out his or her claim or response.
 12. Ms Pitt submitted on behalf of the Respondent that the Claimant has accepted the conduct of her representatives and has indicated her wish to continue to instruct them to represent her and therefore any conduct of the Claimant or her representatives can be taken into account.

13. The Respondent alleges that the general conduct of the Claimant's representative in not replying to emails, failure to comply with court orders, lost evidence and lack of cooperation amounts to "scandalous, unreasonable or vexatious behaviour". The Respondent argues that the conduct is deliberate and gave a number of examples of behaviour that could be inferred as deliberate for example when asked for the medical evidence the claimant raised the issue of confidentiality, terminating the ACAS telephone call unexpectedly, not putting the Respondent on notice of Mr Cowley's unavailability for the final hearing at the same time as the Tribunal were notified.
14. Mr Cowley on behalf of the Claimant explained that there had been a number of staffing issues within his organisation which had resulted a reduction from 6 caseworkers to 2, leaving Mr Cowley and one other caseworker to carry the entire workload. He explained that any failure to comply with orders was not deliberate but due to sheer pressures of work, which unfortunately, he says resulted in his own sickness leave prior to the final hearing which was listed for January 2024. Mr Cowley reassured the Tribunal that he would in future personally ensure that all timeframes were met.
15. Mr Cowley confirmed that he had no problems obtaining instructions from Dr Yates.
16. Ms Pitt submitted that due to the delay in the proceedings and the fact that this case has twice been listed for final hearings which have not been effective that a fair trial would no longer be possible. She argued on behalf of the Respondent that part of the Harassment claims and all of the Victimisation claim relies solely on parties' recollections. As the Claimant's claims are based on her lack of memory, then the effect of the delay in these proceedings will affect her more than such a delay may affect other claimants. (The Claimant had stated that the issue of memory will not be a problem as much of the case is based on documents).
17. In response, Mr Cowley accepted that the case had been delayed, but pointed out that in other areas in the country, Tribunal cases are routinely heard a considerable time after the ET1 has been filed and that this length of time is not extraordinary and does not mean that a fair trial cannot proceed.

Proportionality

18. Ms Pitt argued that striking out the claims in these circumstances would be proportionate particularly in view of the detrimental effect that it is having on the Respondent's business. He is unable to apply for some government contracts while he has ongoing discrimination cases in the Tribunal. He is also concerned about the loss of reputation to his business.
19. I have to balance his loss and hardship against that of the claimant who would have no redress for her claims if they were struck out.

20. Ms Pitt also argued that the claims should be struck out due to wholesale noncompliance with the Orders of the Tribunal and that the representative has also failed in their duty under the overriding objective. The Respondent provided a list of orders that had not been complied with. Again, the Tribunal will have to consider the issue of proportionality and fair trial.
21. Finally, the respondent asked for the claims to be struck out under rule 37(1)(e) that a fair trial is not possible due to the delay as was relied upon above.

Decision.

22. Having considered all of the submissions, I am concerned about the delay in these proceedings. I note that there have been a number of occasions where delay has been caused by the conduct of the Claimant and her representatives. There have also been occasions when emails have not been answered.
23. However I do accept what Mr Cowley says in relation to the very difficult circumstances that his organisation found itself in last year. I also note that the claimant's GP medical records have now been obtained by the Claimant and can be forwarded to Mr Cowley and to the Respondent very shortly.
24. I am concerned that there appears to be a lack of communication between both parties and that some of the correspondence between both parties has not always been courteous or professional. I accept that some orders have been breached and that there has sometimes been difficulty progressing the case due to the lack of communication between the parties. That said, I do not find that the behaviour of the Claimant amounts to scandalous, unreasonable or vexatious behaviour.
25. I have also considered the arguments in relation to a fair trial. I note that the Respondent has raised concerns about the Claimant's memory problems which may form part of her disability claim, and the difficulties that she may have recalling the events in question. However, it is not unusual for final hearings in many jurisdictions to be heard a number of months or years after the events in question. While I hear the Respondent's argument that in view of this particular claimant's specific reported memory problems the effect may be greater, these matters can be put to the Claimant in cross-examination at the final hearing and may undermine her credibility, but do not prevent a fair trial.
26. As I do not find the claimant's actions to be deliberately scandalous, unreasonable or vexatious, and I do not find that there to be difficulty with the issue of a fair trial, I do not strike out under Rule 37 1(b) or 37 1(e).
27. I do note that a number of orders have not been complied with, or have been adhered to after the directed time. I have considered whether it would be proportionate to strike out the claims due to this. In view of the explanations given and taking into account the overriding objective, I do not consider that it would be proportionate to strike out the claims under rule 37 (1)(c) but this may be the subject of a costs application after the final hearing.

28. The claims listed above are not struck out and all claims remain listed for final hearing.

Employment Judge Brady

Date 15th April 2024

REASONS SENT TO THE PARTIES ON 16 April 2024

FOR THE TRIBUNAL OFFICE Mr N Roche