



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr U Hussain

Automatic Data Processing

PRELIMINARY HEARING

HELD AT London South

ON 14 August 2017

BEFORE: EMPLOYMENT JUDGE HALL-SMITH

Appearances

For Claimant: In person

For Respondent: Mrs C Ashiru, Counsel

UPON HEARING the Claimant, Mr Umaad Hussein in, in person and Mrs C Ashiru, Counsel, on behalf of the Respondent, Automatic Data Processing, I gave the following Judgment and issued the subsequent directions.

JUDGMENT

The Claimant's complaint of disability discrimination is struck out pursuant to rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 on the ground that it has no reasonable prospect of success.

DIRECTIONS

Hearing Bundle of Documents

1. No later than **4 September 2017** the Respondent shall provide the Claimant with a draft bundle of all documents which are or have been in its possession or control relevant to the issues in the proceedings. No later than **18 September 2017** the Claimant shall add any relevant document in his possession or control to the bundle and the Respondent shall finalise the bundles and provide one copy of the finalised bundle to the Claimant no later than **2 October 2017**. The Respondent shall ensure that there are sufficient copies of the bundle available for the Tribunal at the hearing.

Further information

2. no later than **1 September 2017** the Claimant shall provide the Respondent with the following further information, namely, the identity/identities of any actual comparator/comparators relied upon by him in relation to the allegations set out in boxes 1 to 11 of the Respondent's schedule of allegations provided to him, or whether the Claimant is relying upon hypothetical comparators.

Updated schedule of loss

3. No later than **27 February 2018**, the Claimant shall provide the Respondent with an updated schedule of all financial losses allegedly sustained by him as a result of the matters complained of.

Witness Statements

4. The parties are directed to prepare and no later than **13 February 2018** to exchange written statements for each witness (including the Claimant who will give evidence personally), whom it is intended will be called to give evidence on their behalf at the Tribunal hearing. Such witness statements shall be typed in double spacing, be laid out in short consecutively numbered paragraphs and shall refer by page number in the bundle of documents to any document mentioned in the statement. Each party **shall** ensure that there are six copies of each statement for their own witnesses available at the Tribunal hearing.

Full Merits Hearing

5. The case was listed with the agreement of the parties for hearing before a Full Tribunal at Croydon for **four** consecutive days commencing on **13 March 2018** at 10.00 a.m. on the first day. No postponement of the hearing date will be granted unless there are exceptional and unforeseen circumstances.

REASONS

1. The case was listed as a one day open preliminary hearing to consider whether to strike out the Claimant's complaints of unlawful racial discrimination and disc disability discrimination on the ground that they had no reasonable prospect of success and whether the Claimant should be required to pay a deposit as a condition of enabling him to continue to continue with any of his Tribunal complaints.
2. The hearing was also listed to consider whether the Claimant's discrimination complaints had been adequately clarified, to identify the issues for determination by the Tribunal at a full merits hearing and to give directions for an appropriately revised timetable for the proceedings.
3. At the hearing the Claimant attended in person. The Respondent was represented by Mrs C Ashiru, Counsel. Unfortunately, there was no bundle of relevant documents for use by the Tribunal which would have been of great assistance in dealing with all the issues which had been listed for consideration by the Tribunal.

The background

4. By a claim form received by the Tribunal on 6 January 2017 the Claimant, Mr Umaad Hussain brought complaints of unfair dismissal and unlawful discrimination on grounds of race and on grounds of disability against the Respondent, Automatic Data Processing.
5. In his grounds of complaint at the Claimant identified himself as Pakistani Muslim. Although the Claimant had ticked the relevant boxes in his Claim Form indicating that his discrimination complaints were on grounds of race and on grounds of disability, the Claimant did not identify any specific allegations of disability discrimination, apart from alleging that due to stress initially he had been diagnosed with spinal degeneration disease and had an operation. The Claimant additionally alleged that that he had had a telephone occupational health assessment and was told that he needed a work ergonomic assessment of his office at his home, which had not been provided by the Respondent.
6. A preliminary hearing was listed on 7 March 2017. At that hearing the Claimant was directed to respond to the Respondent's request for further information, a request which was limited to information founded upon the contents of the Claimant's grounds of complaint. The order directed the Claimant to provide the further information requested by 21 March 2017. The Claimant failed to provide the further information as directed and on 1 May 2017 Employment Judge Balogun issued an 'Unless Order' requiring the Claimant to reply to the Respondent's request for information no later than 15 May 2017.

7. On 12 May 2017 the Claimant provided the further information which also included further allegations which had not been raised in the Claimant's claim form. Thus, under the heading discrimination arising from disability – S 15 of the Equality Act 2010, the Claimant alleged at the following:

11 November 2015 – all week no one communicated with me, I feel this is due to my disability and my mental health. I've had several experiences whether is a lack of communication and my mental health is brushed aside and sneered at.

8. The Claimant had not previously alleged a mental impairment and his allegation that no one had communicated with him had not been raised in his claim form.
9. The Respondent raised an issue as to whether the Claimant had complied with the terms of the 'Unless Order' and applied for a preliminary hearing to determine whether either or both of the discrimination claims had been struck out pursuant to the Unless Order. The Respondent also applied for directions aimed at ensuring that any surviving discrimination claims were adequately clarified, dealing with a list of issues, and setting out an appropriately revised timetable for the proceedings. At the preliminary hearing on 7 March 2017, the case had already been listed for a four-day hearing to commence on 14 August 2017.
10. Accordingly, the matter was listed for a further preliminary hearing on 12 of July 2017. At the hearing, Regional Judge Hildebrand decided that the Claimant's complaints of both racial and disability discrimination had not been dismissed pursuant to the Unless Order in circumstances where he concluded the Claimant had complied with the Unless Order of 1 May 2017. The hearing listed for four days was postponed and the first day of the hearing, namely 14 August 2017 was listed as a one day preliminary hearing.
11. At the hearing before me, the Claimant's Counsel produced a helpful schedule which set out the Claimant's alleged acts/omissions involved in his complaints of unlawful discrimination alleged in his Claim Form together with the particulars provided by the Claimant relevant to such allegations. The schedule did not include the further allegations which had surfaced in the further information provided by the Claimant.
12. The Claimant also produced a document, pursuant to a direction of the Regional Employment Judge at the preliminary hearing on 12 of July 2017, requiring him to indicate by 2 August 2017, whether in relation to the factual allegations made, which he had stated to be examples, whether the examples given were representative of the totality of the factual allegations which the Claimant had made and that if there were further allegations, the Claimant was to set out within that time such further allegations as he sought to make.
13. At the hearing, I informed the Claimant that in the event that he wished to rely on further allegations of unlawful discrimination which had not been

included in his claim for he should do so by applying for an amendment. I explained that in the event of an application to amend, the Tribunal might have to consider time/jurisdiction issues, if relevant.

14. I also informed Counsel for the Respondent, Mrs Ashiru, that in circumstances where the Claimant was a litigant in person, the interests of justice required me to adopt a purposive interpretation of the Claimant's claim form and to assist as far as possible in my role as Employment Judge, in identifying issues.
15. In circumstances where the Claimant had ticked the box in his claim form indicating that he was making a complaint of disability discrimination, I was prepared to allow an amendment, if applied for by the Claimant, to include an allegation that the Claimant's dismissal had amounted to an act of disability discrimination. However, the Claimant stated that he was not applying for such an amendment.
16. It was notable that the Claimant's claim form had clearly identified his allegations of racial discrimination, but had not identified any allegation which could reasonably be interpreted as an allegation of disability discrimination, apart from the reference to the Respondent's failure to undertake an ergonomic assessment. Thus, in relation to race, the Claimant alleged the following in his grounds of complaint:

I have been treated differently due to my race and colour, why was I not given the right role, why was I bullied to a certain extent. I can't hit my number without others, so quota allocation is an issue. There are no other Pakistani Muslim men in my position so I have been forced out, and now they have only made me redundant.

17. Apart from the allegation relating to a failure to undertake an ergonomic assessment, I was unable to identify any other allegation of disability discrimination from the Claimant's claim form. In relation to the additional information provided by the Claimant the only allegation I could identify was the allegation that in November 2015 he had been ignored for a week by his colleagues, which he felt was due to his disability.
18. On behalf of the Respondent, Mrs Ashiru submitted that it would be disproportionate and involve the Respondent in significant costs if the Claimant was able to proceed with allegations of disability discrimination. I considered this was an unattractive argument because such considerations should play no part in circumstances when Claimants were pursuing valid allegations of discrimination.
19. The Claimant's allegation that he had been ignored was a new allegation which surfaced after his claim form had been received. I heard evidence from the Claimant in relation to time issues and he said that the reason he had not made a claim any earlier was because he hoped things would change.

20. Although the Claimant did not expressly make an application to amend his claim form to include the allegation that he had been ignored I treated his position at the hearing as if he had made such an application.
21. Mrs Ashiru on behalf of the Respondent forcibly opposed any application to amend and also contended that a failure to make an ergonomic assessment could not amount to discrimination because of disability in the absence of any allegation that a provision criterion or practice of the Claimant Respondent had placed him at a substantial disadvantage. Mrs Ashiru also contended that a failure to consult or carry out an assessment could not in itself constitute a failure to make reasonable adjustments because it was not a step which would avoid the disadvantage. Indeed when asked, the Claimant stated at that he had been better since his operation and he did not identify any adverse effect.
22. In relation to what I treated as an application to amend, I concluded that the allegation of being ignored was substantially out of time and that there would be substantial prejudice to the Respondent in investigating such an allegation at this stage, nearly two years later even, in the event that the individuals allegedly involved, so far unnamed by the Claimant, could be identified. Further I considered that there was no justifiable reason why the Claimant had not included such complaint in his claim form.
23. I concluded that there were no grounds justifying the exercise of the discretion afforded to Tribunals to extend time on just and equitable grounds pursuant to section 123 of the Equality Act 2010, and that accordingly the balance of justice was not in favour of granting such amendment.
24. In relation to the allegation involving the failure to undertake an ergonomic assessment, in the absence of any allegation relating to any adverse effect on the Claimant as a result of such failure, I considered that such an allegation had no reasonable prospect of success. The Claimant had not alleged any substantial disadvantage or detriment. In my judgment an allegation of a failure to undertake an assessment in itself cannot amount to a failure to make reasonable adjustments – see **Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664**.
25. I concluded that the allegation of a failure to undertake an ergonomic assessment had no reasonable prospect of success and that accordingly it amounted to an allegation which justified the step of strike out pursuant to rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2004.
26. There were no other allegations of disability discrimination which could be identified and accordingly I directed that the Claimant's case would proceed on the basis of the allegations of racial discrimination set out in the schedule produced by the Respondent at the hearing, with the exception of issue 9, namely the allegation that the Respondent failed to undertake an ergonomic assessment.

27. I listed the case for a four-day hearing in March 2018 and I also made the above directions.

NOTES

- 1 *This Order constitutes a notice of hearing under the Employment Tribunals Rules of Procedure 2013. At the Hearing all parties will have the opportunity to submit written representations and to advance oral argument. If a party wishes to submit written representations for consideration to the hearing s/he shall present them to the Employment Tribunal Office not less than 7 days before the Hearing and shall, at the same time send a copy to all other parties.*
- 2 *Failure to comply with an Order relating to the disclosure or inspection of documents may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under section 7(4) of the Employment Tribunals Act 1996.*
- 3 *The Tribunal may also make a further Order (an “Unless Order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be dismissed without further order.*
- 4 *An Order may be varied or revoked upon application by a person affected by the Order or by an Employment Judge on his or her own initiative.*
- 5 *This Order confirms orders made/directions given at a hearing on 14 August 2017.*
- 6 *No further notice of hearing will follow.*

Employment Judge Hall-Smith
16 August 2017 London South