



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104914/2016

Preliminary Hearing Held at Edinburgh on 2 May 2017

Employment Judge: I McFatridge (sitting alone)

Mr Abdelghani Berdi

**Claimant
In person**

Servest Group Ltd

**Respondents
Represented by:
Ms A Stobart
Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim was automatically dismissed on 24 February 2017 in terms of Rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 on the basis that the claimant failed to comply with the terms of an Unless Order granted on 3 February 2017.

REASONS

1. In this case the claimant lodged an ET1 in which he ticked the box on page 6 to indicate that he had been discriminated against on grounds of race and religion or belief. He also stated that he was owed holiday pay, arrears of pay and other payments. The respondents submitted an ET3 in which they stated that they resisted the claims however they also sought additional particulars. A Preliminary Hearing was held on 2 December 2016 and reference is made to the Note issued following this hearing. At that stage it was noted that the respondents were unclear as to the precise basis upon which the claims were set out against them and sought leave to apply for an Order for Further and Better Particulars in respect of the different claims. The Employment Judge is recorded as agreeing to this and noting that it would be served on the claimant within seven days. He also notes that he explained to the claimant what was meant by this procedure and what would be required of him. A further Preliminary Hearing was fixed to take place in January 2017.

2. The further hearing in fact took place on 3 February 2017. It was noted that the Order for Further Particulars had been made on 6 December 2016 and that a response had been provided to the Tribunal on 4 January which was copied to the respondents on 9 January 2017. The respondents did not accept that the Order had been complied with. At that stage the respondents were seeking strike out of the claim given what they considered to be the claimant's failure to comply with a request for further and better particulars failing which an Unless Order. After discussion an Unless Order was granted. The Employment Judge notes in paragraph 5

"I took the claimant through the terms of his answers to questions, and observed that he had only partly answered the questions. It was notable both in his written response and in answering points made at this Preliminary Hearing that the claimant pointed to a large bundle of documents and suggested that the respondent already knew what he was referring to. I pointed out to the claimant that that is evidential material which does not set out for the Tribunal nor the respondent the

precise allegations which the claimant is offering to prove in support of his claims.

5 *6. Having heard from the claimant, I am satisfied that he understood now that he requires to answer the request by detailed responses to each of the questions. In the circumstances, I granted the respondent's request for an Unless Order. The Order is attached to this Note."*

- 10 3. The Unless Order was therefore granted on 3 February 2017. It is as well to set out the terms of the Unless Order here.

"In accordance with the power set out in rule 29 of the Employment Tribunals Rules of Procedure 2013, an Employment Judge has issued the following Order:

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On or before 5pm on Friday 24 February 2017, the claimant shall provide to the respondents, with a copy to the Tribunal (at the address shown in the enclosed letter):

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1. Provide full details of the names of the individuals whom the claimant alleges conducted the discriminatory or harassing treatment, and set out in detail what that treatment was, including the date and time of each incident, who was involved, who said what, and the head of claim to which each allegation relates.

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2. Provide full details of the date, time and location of the incidents which he claims were acts of discrimination or harassment, and say which head of claim each allegation relates to.

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3. Provide full details of those individuals who witnessed such alleged acts of discrimination, including name, job title and where they work for the respondent.

4. *Provide a concise timeline of events, from start to finish, setting out the unlawful acts alleged to have been carried out by the respondent against him.*

5 5. *Provide details of the basis for the claimant's allegation that the alleged acts were committed due to his race and/or religion or belief.*

10 6. *Provide details of the basis for the claimant's allegation that the alleged acts were committed as an act or acts of victimization, and on the grounds of what protected characteristics he makes such an allegation.*

15 7. *Provide details of the claims for holiday pay made by the claimant, setting out which year or years he seeks to claim for, and what precise entitlement he says is outstanding towards him.*

20 8. *Provide details of any comparator with whom the claimant seeks to be compared in respect of his claim for direct discrimination.*

25 9. *Provide details of the amounts which the claimant is seeking, giving a detailed breakdown of the way in which he calculates all sums sought, and details of the attempts which the claimant has made to recover those sums he says are outstanding, from the respondent."*

30 4. The Order contained a statement to the effect that unless it was complied with by the dates specified the claim would be dismissed on the date of non-compliance without further Order. The Order was therefore in my view an "Unless Order in terms of Rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1".

5. Following this the claimant provided certain information to the Tribunal which was received on 23 February 2017. On 2 March the respondents wrote to the Tribunal indicating that in their view the Order had not been complied with. The Tribunal wrote to the respondents on 6 March 2017 enquiring under which rule the application was being made and on 8 March 2017 the respondents indicated that they were seeking a strike out of the proceedings under Rule 37(1)(c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. They were also seeking strike out in relation to what they described as the vexatious nature of the proceedings under Rule 37(1)(a). In view of this response the claimant was asked for his comments and on 21 March 2017 the claimant wrote to the Tribunal indicating that he felt had fully answered the questions and given evidence to back up his claims. A Hearing was therefore fixed which took place on 2 May 2017. No evidence was led at the Hearing however both parties made detailed legal submissions. The respondents indicated that contrary to what had previously been stated by the respondents her primary submission was that the claimant had failed to comply with the terms of an Unless Order and that accordingly the claim be regarded as having been automatically dismissed on 24 February 2017. Their secondary position was that in any event, even if the claim had not been automatically dismissed it should be dismissed for the reasons previously given by the respondents. The claimant was in breach of the Tribunal's Order and the manner in which the proceedings had been conducted by or on behalf of the claimant had been scandalous, unreasonable or vexatious.
6. The law with regard to breach of the Unless Order was clear. The issue was whether or not there had been substantial non-compliance with the Order. The respondents' representative took me through the sequence of events in this case and went through the various questions posed in the Order and set against these the answers provided by the claimant. It was her position that the Order had quite clearly not been complied with in a substantial way. She pointed to the history of the case and noted that at this stage the respondents were still unaware of the nature of the claims being made against them. The claimant was required to specifically outline the details of each event, whether he had perceived it as discrimination or harassment and detail specifically what about the event he had

perceived as less favourable or harassing treatment, the reason he believed the alleged events were related to a protected characteristic and what was the involvement of the parties against which he claimed. He had not done this.

- 5 7. The claimant then made a short submission on his own behalf. During this he attempted to set out what he considered to be the nature of the claim. He said that he had taken advice from Citizens Advice and that he had been specifically warned against being too detailed in his pleadings. He indicated he had no legal training and that English was not his first language. He indicated that if I were not with him
10 then he would be prepared to instruct a solicitor.

Discussion and Decision

- 15 8. Having briefly set out the position of the parties I should state that I agreed entirely with the legal analysis of Ms Stobart. The principal question before me was whether or not there had been substantial non-compliance with the Unless Order made on 3 February 2017. If the claimant had not substantially complied with this Order on or before 24 February then the claim was automatically dismissed on 24 February and I would have no further locus to hear anything regarding the case.
20 I therefore required, as a first step, to analyse the answers given by the claimant in his e-mail of 23 February and decide whether he had substantially complied with the Order or not. I considered that this was an analysis which I required to take some time doing since I wished to avoid the possibility of penalising the claimant simply for not being able to express himself to a high enough standard in a language which is not his own and I also wished to avoid penalising him for not
25 having legal representation. The process therefore took longer than I would have liked to deal with what is at base an interlocutory matter and I would apologise that the Judgment has therefore taken longer than I would have liked.
- 30 9. I have tried to analyse the claimant's response and representations against the questions asked.

10. With regard to question 1 the claimant gives the names of three individuals and has complied with the Order in that respect. So far as the detail of each incident of discriminatory or harassing treatment, what the treatment was including the date and time of each incident I really cannot see that he has provided an answer which would allow the Tribunal to have sufficient detail of the claim to properly hear the case. It appears to me that he has not substantially complied with the Order. He first of all sets out a number of instances in 2013/14/15/16 when it appears he was not allocated the holidays which he requested. I have to say that from this I could not get any feel for the nature of the discriminatory or harassing treatment which he was referring to. He refers in September/October 2015 to returning from holiday and being told by Alan Steele (who does not feature in the list of discriminators) that he should leave the premises immediately as he would not be working there any more. He then goes on to say that after a grievance meeting this situation was resolved I am at a loss as to where the sex and race discrimination arises and I do not see where or if the claimant's claim of holiday pay relates to this period or not. His own statement is that the matter was resolved. He says that in 2016 he passed his holiday form to Szymon Pieczonka Area Manager (who is one of the people supposed to have discriminated against him) but that his manager never got back to him so he asked him again. It would appear that some incident took place which might relate to the claimant's claim of discrimination since he said that he had not been satisfied with Mr Pieczonka's response and that formal grievance proceedings started. No detail is provided as to what the grievance was about, what Mr Pieczonka is supposed to have said or done or in what way his behaviour was believed by the claimant to be unacceptable. A little further detail is provided later on in the paragraph where the claimant says Mr Pieczonka accused him of not following correct company policy regarding booking a holiday and could not authorise it due to short notice given. Although there is perhaps some detail as to what the claimant alleges was done there is absolutely nothing to link this to being discriminatory or harassing treatment on grounds of any protected characteristic.
11. The claimant then goes on to refer to lack of provision of uniform. He states he made frequent requests for uniform which were not complied with however the Order asked for the date and time of each incident, who was involved, who said

what and the head of claim to which each allegation relates. None of this information is provided in relation to the uniform issue. The claimant also in this section refers to having to do work for which he was not trained but no detail is provided with regard to this.

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12. The claimant then goes on to list under harassment a statement to the effect that he had been harassed at work after submitting his formal complaint against someone described as "my Regional Manager". None of the alleged discriminators listed at the start of answer 1 are referred to as a Regional Manager so I don't know who this refers to. The claimant refers to continual criticisms of his work standards, attitude and false allegations. He then lists a number of conversations. No real detail is given. He refers to an incident on 20 May 2016 when he was approached by Magda Pekata and Szymon Pieczonka who allegedly took him to task about various aspects of his work performance and accused him of racist comments. He states that they were both speaking in Polish to each other which he felt was unacceptable and he was not allowed to be accompanied. He complains that he asked for a record of the meeting but this was refused. I accept that this gives some detail regarding an incident which took place on 20 May 2016. It is unclear to me how this is alleged to be linked to the claimant's protected characteristics unless he is stating that by talking Polish the alleged discriminators were harassing him.

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13. The claimant then complains about a grievance investigation and an investigation meeting on 14 and 15 June. His concern about this meeting appears to be that no-one was allowed to accompany him as the meetings were deemed to be informal. There is no link suggested to any protected characteristic. He then refers to being "spied upon" by Valya Ivanova (an alleged discriminator) when he visited another Tesco store on that date. He says he felt that his managers and Valya were conspiring against him to case build. Again there is no link to any protected characteristic. He refers to a record of conversation on 12 July 2016. He says that he was accused of unacceptable and aggressive behaviour which he denied. There was nothing specific said about what Mr Pieczonka is supposed to have done wrong at this meeting and again no link to any protected characteristic. Next

the claimant refers to a disciplinary meeting on 13 July 2016 where he says he was told to *"forget about everything and watch his back"*. It is unclear what is being alleged about this meeting. He refers to a record of conversation on 19 July 2016 where he was accused of lack of respect for his Line Manager raising his voice and not following requests. It is not clear what Mr Pieczonka is supposed to have done apart from accuse the claimant. Again no link to a protected characteristic. He refers to an incident of 2 August 2016 where he was being trained by Magda Pekata and it is alleged that she was raising her voice and ordering him about. I accept this gives details of what could be harassing treatment however there is no link to a protected characteristic. He then states that he was harassed at the grievance meeting with Ivan Allen on 17 August 2016. No detail whatsoever is given.

14. In question 2 the claimant was asked to provide full details of the date, time and location of the incidents which he claims were acts of discrimination or harassment and say which head of claim each allegation relates to. Under this head the claimant refers to not being paid for holidays in November/December 2013, 2014, 2015 and 2016 as discrimination. He refers to a meeting of 15 June 2016 where holidays were discussed as being discrimination and he refers to an e-mail from Mr Pieczonka of 22 July 2016 in which Mr Pieczonka denied any knowledge of the claimant's holiday requests. He states that lack of provision of uniform was discrimination and describes these as being frequently requested but not provided. He again refers to the various incidents of harassment already listed but does not actually give any further details. He does state that the disciplinary invite by Valya Ivanova 23 June 2016 referred to false allegations against him. He refers to an incident of harassment on 2 August 2016 at approximately 18:15 with Magda Pekata but does not say what this was. This would appear to be the incident where Magda Pekata was training the claimant and is alleged to have raised her voice.

15. In paragraph 3 the claimant is asked to provide details of individuals and he does provide details of four individuals. In question 4 the claimant is asked to provide a timeline and he does provide a timeline listing incidents starting in

November/December 2013 with holiday pay not received and then going on to the final act being the grievance meeting on 17 August 2016. He provides minimal details at each stage. This would be acceptable if further details of the incident were given elsewhere and the incident's possible relevance was clear however this is simply not the case. In question 5 the claimant is asked for the basis of his allegation that the alleged acts were committed due to his race and or religion or belief. It is probably as well to set out the claimant's response to this in full since in my view this sets out the difficulty with much of his response. He states

"I have worked with Servest since 2011 with no complaint against my character or my work or my relationships with other staff members of different nationalities. Following a complaint I made to Head Office I have felt badly treated and picked upon, in such a way that made me want to leave my job many times. As other members of the team have not reported such acts against themselves I can only assume that these allegations were a deliberate attempt to drive me from my job. Being an Arab and Muslim, I was made to feel I no longer fitted in with the manager's plan for building the team. The 50% Arab/Muslim team that was working there when I started had dwindled until I was the only Muslim left there."

In my view the purpose of the question posed by the respondents and incorporated in Employment Judge Macleod's Order was to establish what evidence the claimant intended to lead so as to provide a link between the alleged poor treatment and his protected characteristics. In my view the question has not been answered in any meaningful way. The claimant is simply saying that he felt picked on and believed this must be due to his race and or religion as he believed no-one else had these problems. He states that there used to be more Muslims working there but they have left. He does not appear to be offering to prove anything about the reason why they left or whether this has anything to do with any protected characteristic.

16. In question 6 the claimant is asked to provide details of the basis for his allegation that the acts were victimisation on the grounds of what protected characteristic he makes such an allegation. His statement in response to this is that he states no other team member had experienced the treatment he had over the past month. He goes on to state that he is over qualified to do the job as he had previously been working in management and owning his own business and that he was made to feel totally humiliated by being asked to take training on how to clean a toilet after six years in the job. I would observe that this is the first point where the claimant is alleging that being given training in how to clean a toilet was part of the complaint he is making. He states that other staff members were left alone to do their job but some were recruited without an interview. I do not consider that this answers the point in any meaningful way. Question 7 asked the claimant to provide details of the claims for holiday pay made. In answer he states that he believes his right to make any financial claim for 2013 and 2014 had expired. He said he still wanted to draw attention to the unfair treatment of this and felt victimised. He says that the holiday complaint for 2015 was eventually solved by Head Office where he received payment for them with an apology for inconvenience. He said that his holidays for 2016 were still outstanding and that no leave was authorised and no payment was made despite his numerous attempts to obtain them. He said he had written evidence to prove this. He said that his claim was therefore *“for full annual leave for this year. Unfortunately I cannot be specific because I have not been informed of my actual entitlement.”* With the greatest respect this does not answer the question at all.
17. In question 8 the claimant was asked to provide details of any comparator. He appears to be saying that he wishes to be compared with all staff since he alleges that none of them suffered the difficulties which he does. I do not consider that this answers the question. In their ET3 the respondents state they employ 20,000 people in Great Britain. I think it is probably safe to assume that when he refers to all staff the claimant is actually referring to some smaller number but from the answer to the question one would not be able to identify them.

18. In question 9 the claimant is asked to provide details of the amounts which he was seeking giving a detailed breakdown of the way he calculates each item. The claimant indicates he is seeking compensation for unpaid holidays, full compensation for the cost of the Tribunal Hearing, compensation for loss of earnings for period of suspension, compensation for the stress of false accusations and frequent stressful meetings which he lists as 10 hours 39 minutes in meetings held in his own free time, calls made to Head Office and expenses incurred for making trips to Citizens Advice namely petrol and parking costs. No actual figure is given. The claimant then however goes on to state

"I have been advised by the Citizens Advice Bureau that 'in successful cases the eEmployment tribunal awards between £6000 and £18000 in cases where there has been lengthy acts of discrimination'."

I am assuming from this that the claimant is seeking an award for injury to feelings in the middle Vento/Da'bell band although the claimant does not actually state this. I would therefore be prepared to agree there has been partial compliance albeit the claimant has not tried to particularise his claim beyond this.

19. Having gone through the claimant's answers I am required to ask the question whether or not there has been substantial non-compliance with the Order. In my view there has been substantial non-compliance. That is really the end of the matter since given that the claimant has not complied with the Order prior to 24 February the claim must be regarded as having been automatically dismissed from that date. As noted above however I am concerned in this case in that I am being asked to strike out a claim of discrimination without hearing any evidence. The difficulty for the Tribunal which I am sure was pointed out to the claimant by Employment Judge Macleod is that before the Tribunal can hear a claim there requires to be adequate pleadings setting out clearly what it is that is being alleged. It is necessary that this is done so that the Tribunal might identify any preliminary issues which exist and also importantly so that the respondents have fair notice of the claim. The principle of fair notice is at the heart of our system of civil justice. The respondents need to know exactly what it is that is being alleged so that they

can bring the appropriate evidence to the Hearing. In my view the Order which was made in this case on 6 December was designed to achieve that purpose. I note that in advance of this Order Employment Judge Macleod records that he carefully advised the claimant what was required yet despite this the claimant's response was inadequate. It is clear to me that Employment Judge Macleod explained matters again to the claimant at the Hearing in February and clearly explained to the claimant what was meant by an Unless Order.

20. It is therefore my view that the claimant must have been under no illusions that if he did not comply with the Order in the way that had been explained to him by Employment Judge Macleod then his claim would be struck out. Having heard the claimant I do believe that he has a genuine sense of grievance in the way that he is being treated by his employer. He also appears to believe that his employer's treatment of him is linked to either his race or his religion or belief. Probably the most important job that Employment Tribunals are tasked with in our society is to deal with such complaints however we can only do so where they are brought properly. Our rules are extremely flexible but do have as their overriding objective the principal of doing justice between the parties. The principal of fair notice is an important part of doing justice as well as being a practical necessity if Tribunals are to discharge their function efficiently. It is clear to me that not only has the claimant not complied with the Order but his non-compliance with the Order would mean inevitably that the case would still not be ready to go to a Hearing until further clarification had been obtained from the claimant. Whilst it might well be the case that if the claimant was given unlimited time and unlimited attempts he could eventually produce something which sets out his concerns in a way which would make it possible for the case to be heard; it is entirely proper for the Tribunal to put some limit on the number of chances a claimant is given. It was no doubt this is what Employment Judge Macleod had in mind when instead of acceding to the respondents' request for a strike out at the Hearing in February he granted an Unless Order. This was clearly the claimant's last chance to comply and in my view it is clear that the claimant has not complied and I therefore have no option but to make a declaration to the effect that the claim has been struck out.

21. It does appear to me that the case has gone slightly off the rails in that in terms of Rule 38 I am required to give written notice to the parties confirming that the claim has been struck out in terms of Rule 38 and that the claimant has 14 days thereafter to make written representations. Although somewhat late in the day I therefore rule that the Secretary of the Tribunals should write to the claimant with written notice to the effect that the claim is being struck out under Rule 38. The claimant will then have a further 14 days to make further representations to the effect that my analysis above is incorrect however at the end of 14 days unless this Judgment is reconsidered the written notice will become final and the case will stand dismissed.

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20 Employment Judge: Ian McFatridge
Date of Judgment: 24 May 2017
Entered in register: 27 May 2017
and copied to parties