



EMPLOYMENT TRIBUNALS

Claimant

Mrs J Lewis

v

Respondent

**HH Care Limited
T/A Meadows Home Care**

Heard at: Bury St Edmunds

On: 12 December 2017

Before: Employment Judge Laidler

Appearances:

For the Claimant: Written representations

For the Respondent: Mr P Holmes, Consultant

JUDGMENT

The Claimants application under Rule 38(2) to have the Unless Order of the 24 April 2017 set aside is refused and the claims remain struck out in pursuance of it.

REASONS

1. The ET1 in this matter was received on 1 January 2017 in which the claimant brought claims of less favourable treatment on the grounds of her race and disability, and monetary claims for arrears of pay and unlawful deduction from wages. The claimant had been employed from 25 July 2016 but stated that the employment was continuing. In a response received on 8 February 2017 in which the respondent defended the proceedings it stated that the claimant's employment had been terminated under her probationary period on 18 August 2016. The employment therefore lasted approximately three weeks.
2. In denying all the claims the respondent sought further particularisation of the nature and form of any alleged protected disclosure.

3. There was a preliminary hearing before Employment Judge Warren on 9 March 2017. The summary of the matters discussed and orders made were sent to the parties on 31 March 2017.
4. The claimant who was represented by the representatives who still act for her stated at that hearing that she was disabled with asthma and high blood pressure. The orders which are relevant to this decision were set out at numbers 1 through to 4 and for the sake of completeness are set out below: -

“FURTHER AND BETTER PARTICULARS

1. By no later than **23 March 2017** the Claimant is to provide further and better particulars of what she relies upon as a protected disclosure, in particular, what precisely was said, to whom and when.

DISABILITY

2. By no later than **6 April 2017** the Claimant is to disclose all the evidence that she relies upon to show that she was a disabled person as defined in the Equality Act 2010 at the material time, (August 2016) such evidence to include an Impact Statement.

DISCLOSURE OF DOCUMENTS

3. On or before **24 March 2017** each party shall send to the other a list of the documents in their possession or control relevant to the issues in this case.
 4. By the same date, the Claimant shall send to the Respondent a “schedule of loss”, i.e. a written statement of what is claimed, including a breakdown of the sums concerned showing how they are calculated and the Claimant’s list of documents should include any documents relevant to the schedule of loss.”
5. Due to non-compliance with the orders the respondent applied for an unless order, and this was granted by Employment Judge Postle, and an order to that effect sent to the parties on the 24 April 2017. This provided: -

“Unless by the 2 May 2017 the Claimant fully complies with Employment Judge Warren order of 9 March 2017 at paragraphs 1,2,3,4 of the case management orders as sent to the parties on 31 March 2017.

The claim will stand dismissed without further order.”

6. By letter of 2 May 2017 (the last day for compliance) the claimant’s representative provided documents which it was submitted complied with the unless order. In their very own letter however it was accepted that not all of the documentation had been provided with regard to the medical conditions said to amount to a disability although in this letter they referred to the disabilities of

diabetes and a lower back condition which had never been mentioned at the preliminary hearing.

7. Having realised that they had omitted the schedule of loss this was sent by letter of 8 May 2017 stating that that was “due to an oversight”.
8. By letter of 10 May 2017 the respondent asserted that the unless order had been breached as the schedule of loss was not provided and they were still awaiting further medical evidence which fell within the unless order. They asked for confirmation that the claim had been dismissed.
9. This Employment Judge considered the paperwork and had a letter sent to the parties on the 16 May 2017 which stated: -

‘Subject to receipt of the schedule of loss requested from the claimant (received 09 May 2017) Employment Judge Laidler is prepared to accept the claimant has now complied with Employment Judge Warren’s orders. The fact that the respondent believes the claims may still not be adequately set out may be a matter for another preliminary hearing’

10. That letter was subject to an urgent reconsideration application on behalf of the respondent by letter of 16 May 2017. The Employment Judge considered that request and the representations from the parties, and confirmed by letter of 26 May 2017 that that case management decision was indeed set aside. The Employment Judge’s decision was: -

‘The Judge accepts that the claimant did not send to the Respondent a schedule of loss within the meaning of Employment Judge Warren’s order by the 2 May 2017 as required by Employment Judge Postle’s ‘Unless Order’ of the 24 April 2017.

Further, the Judge accepts that the Claimant’s representative made it clear in the letter of the 2 May 2017 that not all the relevant medical evidence had been served in relation to the conditions of asthma and high blood pressure. Indeed, an extension of time was requested to do so. That was a further failure to comply with Employment Judge Postle’s Unless Order.

The Judge therefore sets aside her case management decision sent to the parties on the 16 May 2017. It is hereby confirmed pursuant to Rule 38(1) that the Unless Order sent to the parties on the 24 April 2017 was not complied with by the 2 May 2017 and the claims have been dismissed.

Rule 38(2) provides that the Claimant may apply in writing within 14 days of this notice of strike out being sent to the parties for the order to be set aside on the basis that it is in the interests of justice to do so.’

11. It came to light at this hearing that the claimant’s representative had appealed that decision. By letter of 5 December 2017 the EAT communicated to the parties that the Honourable Mr Justice Soole considered the appeal had no

reasonable prospect of success, and that no further action would be taken on it. This was on the grounds that the claimant had been advised of the right to apply under rule 38(2) and that was in progress.

12. The claimant's representative sought to rely on the written representations of the 2, 8 and 23 May, and 7 June 2017 but chose not to attend this hearing.

Relevant Law

13. The position with regard to unless orders is set out at rule 38 which provides as follows: -

“38.

- (1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.
- (2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.
- (3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21.”

Submissions

14. Both parties relied on written submissions which it is not proposed to set out again in these reasons.

Conclusions

15. The claimant's representatives letter of the 2 May 2017 sent on the date required for compliance with the Unless order sent:
1. Further and better particulars,
 2. Claimant's witness statement (impact statement) regarding her disabilities
 3. the claimant's list of documents,
 4. the claimant's schedule of loss.

16. The letter itself accepted that the witness statement attached “such documents as is presently to hand” but relating to the disabilities of “diabetes and lower back condition”. Those were not the disabilities identified at the earlier preliminary hearing heard by Employment Judge Warren which were asthma and high blood pressure. The claimant’s representative went on to say that he required an extension of time of 10 days to serve other relevant medical evidence from the claimant’s GP in relation to those disabilities of asthma and high blood pressure. It transpired that the letter did not in fact include the schedule of loss which was not served until the 8 May 2017 due to an “oversight”.
17. The further and better particulars supplied were in respect of the alleged protected disclosures. At numerous places the claimant states that she cannot recall the specific words she used, and cannot even state who she contacted at the respondents referring only to “the respondent’s staff”. The order made by Employment Judge Warren stated that in particular she was to provide “what precisely was said, to whom and when”.
18. The impact statement provided is not signed by the claimant, and it refers to alleged disabilities of asthma, diabetes and high blood pressure. Diabetes was not identified at the preliminary hearing. It rather unusually refers to information obtained from an NHS website setting out the classic symptoms of the conditions relied upon. It does not set out how the claimant says they have impacted on her own day to day activities within the meaning of the statutory definition. Attached to it were some appointment letters about back pain, again not a condition identified at Judge Warren’s preliminary hearing.
19. The claimant did attach a list of documents.
20. Eventually with a letter of 7 June 2017 was sent a letter from the claimant’s GP of 10 May 2017. There was no explanation as to why it had taken a number of weeks to forward that on. All this letter said was the date of diagnosis of certain conditions; asthma diagnosed 2008; type 2 diabetes in 2010; and high blood pressure in 2005. It then listed current medication but said no more.
21. The claimant has done nothing to provide further clarity on the medical conditions relied upon as disabilities and how she says they satisfy the provisions of the Equality Act 2010 and there have been no further particulars with regard to the protected disclosure claim. There has been disregard for the tribunal’s orders and the need for the claimant to particularise her claim.
22. When the Unless Order was made on 24 April 2017 it was already approximately three weeks to one month after the date for original compliance, the dates being the 23 March 2017 and 6 April 2017. The claimant only attempted to comply on the last date for compliance and never applied for an extension of time until that last date. The claimant has not fully complied with the orders for further and better particulars, and the impact statement and the respondent does not yet know what the disabilities are relied upon.

23. The facts of this case are not the same as the facts in *Thind v Salvesen Logistics Ltd* UKEAT/0487/09 the authority the claimant relies upon. In that case it is clear that the claimant's representative applied promptly for a reconsideration, but provided at that point the missing document and the court accepted there was no prejudice to the respondent. This tribunal is however satisfied that the respondent is prejudiced as it still does not know the case it has to meet on disability or protected disclosure. If the strike out and unless order were set aside there would need to be a further preliminary hearing and further orders made. The full merits hearing may not be until the middle of next year at the earliest which will be approximately 2 years from the date of employment. It is difficult for the respondent to ascertain at this point the number of witnesses it needs and memories may and will have faded. In conclusion the tribunal has determined it is not in the interests of justice for the unless order to be set aside and the claims remain struck out pursuant to it.

Employment Judge Laidler

Sent to the parties on:

11 January 2018

For the Tribunal:

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