



EMPLOYMENT TRIBUNALS

Claimant: Miss R Grzondziela

Respondent: St Barnabas and St Paul Church of England School

HELD AT: Manchester

ON: 10 November 2017

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: In person

Respondent: Mr S Flynn, Counsel

RECONSIDERATION JUDGMENT

The judgment of the Tribunal is that:

1. The decision to strike out the claimant's claim is reconsidered in the interests of justice.
2. The claimant's claims are reinstated.

Further case management orders are made at the end of this judgment.

REASONS

1. This hearing was held following the claimant being struck out as a result of non-compliance with an Unless Order on 7 August 2017. The claimant was advised she could apply for a relief from sanction and/or a reconsideration and that the hearing was listed today to consider that matter.

Background

2. There have been a number of hearings on this case as a result of initial issues arising regarding the identity of the respondent. The respondents are now Mrs Martini and St Barnabas and St Paul's Church of England School.

3. Following a hearing on 14 June by a Judgment promulgated on the 19 June but only sent to the parties on 28 June I identified seven direct discrimination /harassment cases which I believed the claimant was making and asked her to confirm by 10 July whether this was a totality of her claims and if not to identify what other claims she had. Further, by the same date provide particulars of those seven claims. Those claims are set out in paragraph 47 of the judgment of the 19 June, one relates to her dismissal and the other six relate to alleged harassment and bullying allegations.

4. The judgment was sent by post and by email on 28 June although the claimant now says that she does not want things sent by email, the claimant does correspond with the Tribunal by email.

5. On 18 July the respondents wrote to the Tribunal asking for an Unless Order as the claimant had failed to comply with the 19 June Order and the respondents still did not know the case they had to meet.

6. On 21 July a number of letters were received from the claimant regarding the situation of the claimant's son said to be in reply to the Tribunal's letter of 12 July, this was asking the claimant whether she wished to take up the offer of a free school place for the duration of the hearing dates, and that letter did not touch on the other orders of 19 June as they were at that stage a matter between the parties. She did refer to ongoing discrimination in that letter and included a letter to the Governors of 3rd July about the treatment of her son but this was not a letter to the respondents providing any of the information ordered in the 19 June case management discussion. Accordingly I agree to issue an Unless Order and wrote to the claimant on 21 July advising her that the issues regarding her son were outside the jurisdiction of the Tribunal save in respect of the offer of free childcare which had been withdrawn in any event due to the claimant's son being excluded. The Unless Order was signed on 26 July and had a compliance date of 7 August. This was emailed to the claimant on 28 July.

7. On 25 July the claimant again stated that she was responding to the letter of 21 July and asked that the documents of 18 July should be attached as acts of discrimination. Whilst she said they were matters relating to her job they appeared to be matters which occurred after the claimant had been dismissed. These documents were to various individuals, in terms of complying with the CMD orders they appeared irrelevant. It is possible scrutinising these documents in more detail that the claimant did refer to a number of additional claims, for example that the school/Carla Martini had inappropriately referred the claimant to a Psychiatrist and that the claimant had been reported to a Social Worker out of malice by Mrs Martini.

8. However, the claimant did not provide the further particulars required of, for example, what courses she said she was not allowed to go on and the dates when other matters she complained of occurred i.e. when she alleges she was told 'this was not a Polish school,' none of that was provided. Neither did the claimant confirm that the seven claims identified were the totality of her claims to date although she has done that today. She did send some information on 7th August but this was not received by the tribunal until 8th August, the requisite information was not provided..

9. The claimant was therefore struck out for non compliance with the Unless Order.

10. On 21 August I wrote to the claimant advising her she had failed to comply with orders 48 and 50 promulgated on 19 June and that in accordance with the Unless Order made on 28 July her claim was now struck out i.e. it was automatically struck out on the 7 August, I advised her she could apply for relief from sanction but should do so by 31 August and I asked her for certain specific information:

- (i) the information required by orders 48 and 50; and
- (ii) the reasons why she was unable to comply with the Unless Order by 7 August.

I advised her that how she had been treated as an employee was the relevant issue, not how her son had been treated by Social Services.

11. The claimant then wrote to the Tribunal on 14 September asking me to reconsider the decision to strike out her claim. Her letter said "I am writing to you to kindly ask you to reconsider your decision to strike out my claim, please understand that I have done what I thought was right, I was understanding that the last date that I can send the relevant documents was 7 August and this is what I have done, please note that I do not have a legal representative who could correct me I was waiting until the last moment because I wanted to prepare documents that I have to ask for on 7th August I have sent documents to the Tribunal and to the respondent's representative, I must say again I thought that date is the actual deadline, to support this letter I have attached a bill from the post office. I would like to refer to the chance that was given to me to ask for relief from sanction, please note I could not prepare this because I was out of the UK in Poland due to my health problem and medical tests".

12. Today the claimant has given evidence to say that she thought she was complying by sending the documentation on 7 August, that she was absent from the country between 10 August and 3 or 4 September when she was in Poland. After a lengthy discussion the claimant advised me that she was not able to retrieve electronically any proof of this, she also said she was ill and had had a haemorrhoid operation in May 2017 and had had further tests in Poland. She was asked why if she had returned to the country on 9 September she had not contacted the Tribunal to ask for a reconsideration until 14 September. The claimant stated it was because she was not well.

The Law

13. Rule 70 of the Employment Tribunal Constitution and Rules of Procedure (Regulations 2013) Schedule 1 deals with consideration, Rule 75 however does not apply where a claim has been struck out following an Unless Order (as submitted by the respondents) relying on *Enamejewa -v- British Gas Trading Company Limited* and another EAT 2014. The EAT ruled that once dismissal for non-compliance with an Unless Order has taken effect an application for re-consideration should be considered under Rule 38(2) not Rule 70.

14. Rule 38 states that under the title Unless Orders:

- "(1) an order may specify 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 that on the basis of written representations.

In *Thind -v- Salvesons Logistics Limited* EAT 2009 which the Judge referred to in the *British Gas* case commenting that "clarification brought about by Neary is welcome". The law in this area had become undesirably technical involved, it had also I might note in passing caused considerable concern in Scotland where the CPR has of course no application. The law as it now stands is much more straightforward. The Tribunal must decide whether it is right in the interests of justice and the overriding objective to grant relief to the party in default notwithstanding the breach of the Unless Order. That involves a broad assessment of what is in the interests of justice and the factors which may be material to that assessment which will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will include but may not be linked to the reason for the default and in particular whether it is deliberate, the seriousness of the default, the prejudice to the other party and whether a fair trial remains possible. The fact that an Unless Order has been made which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so will always be an important consideration. Unless Orders are an important part of the Tribunal's procedural armoury (albeit not one to be used lightly) and they must be taken very seriously, their effectiveness will be undermined if Tribunals are too ready to set them aside, but that is nevertheless no more than one consideration, no one factor is necessarily determinative of the cause which the Tribunal should take, each case will depend on its own facts".

The Respondent's Submissions

15. The respondents say that under Section 38(2) the claimant has not applied for a re-consideration within 14 days and therefore she is out of time to do so. They go further and say the Tribunal's rules prevents such a reconsideration. In the alternative they say the interests of justice do not lie in favour of such a reconsideration, the claimant was ordered to comply with paragraphs 48 and 50 of the Case Management Order of 19 June by 10 July, and has still failed to do so on 10 November.

16. In points made today the respondents pointed out that the claimant's operation was in May 2017 and cannot still be affecting her, that we had no further

details of the claimant's illness and why it should prevent her responding to the orders and Unless Order.

17. There was no proper explanation why there was a gap from when she returned from Poland on 4 September to 14 September when she finally asked the Tribunal for a reconsideration. The Judge had already found that there was no compliance with orders 48 and 50.

18. If the application was allowed the parties were no further on, the claimant had still not provided further and better particulars of claims set out in paragraph 47 and it was unclear whether there were any viable additional claims.

19. It was also now difficult to have a fair trial the respondents had not prepared witness statements as they were unclear what the claimant's claims were and so it was inappropriate to do so. They still did not have sufficient detail even to answer the claims set out in paragraph 47 of the 19 June.

20. Further, there had been a consistent failure to comply which left the respondents with no confidence that if the claimant was given a further opportunity to provide further particulars she would be able to do so. The respondents were also in a position where they did not know exactly what witnesses they needed as the claim had not completely been particularised.

The Claimant's Submissions

21. I should mention here that the claimant initially refused to provide submissions therefore I said I would make them and she could agree if this is what she wanted to say and then she proceeded in that way and added some additional points as we went along.

22. The claimant's position is that she has complied and provided information in compliance with those orders, that she understood that the 7 August was the date to send correspondence on and she should not be penalised for her misunderstanding as she does not have legal representation. She does not agree that the matter she raises are outside the jurisdiction and she confirmed that if she was given the opportunity to complete a witness statement she would set out the full details of the seven issues. I also discussed with the claimant the content of the documentation she had provided, received on 8 August, where she refers to Mrs Martini raising what must have been safeguarding issues with Social Services in respect of the claimant and her son and it appeared that she was suggesting this was victimisation or direct discrimination. It also mentions matters not in the correspondence regarding sending teachers to bother her at home, but this is not a matter contained in the particulars she had provided.

Conclusions

23. Bearing in mind the claimant's language difficulties, her absence during a crucial period and her attempts to comply with the orders which were only one day late and also the fact that she has provided some of the information requested I have decided to re-consider my decision to strike the claimant out and to allow her case to proceed on the following grounds:.

- (1) In respect of the respondent saying the claimant only has fourteen days in which to apply for a reconsideration and that she failed to do so, I note that I have shortened that period in my letter of 21 August but that in fact the claimant was not in the country at that point and therefore could neither apply for a postponement nor comply with that request, had I been aware of this I would have extended time until a reasonable time after she had returned to the country. Whilst the claimant does not have a convincing explanation for the ten day gap between her return to the country and when she did write in asking for a reconsideration I would have allowed an extension of time had the facts been presented to me, therefore the interests of justice requires that that time is extended.
- (2) In reconsidering my decision I have also formed the view that the claimant in the particulars she has provided has partially complied with the order in respect of putting forward a number of other claims which although I took the initial view were outside the jurisdiction of the Tribunal it is possible they are within the jurisdiction of the Tribunal, I will set out what I understand those to be from the correspondence the claimant submitted which we received on 8 August, they will require an amendment application and I will seek the respondent's views on whether they accept those matters as amendment.

24. Further, the claimant is still in default in relation to further particulars of the seven matters set out in the order of 19 June and she needs to provide details of these in terms of who was responsible for the victimisation, who may have witnessed it, when did it occur.

25. In respect of the new matters from discussion with the claimant it appears that these are victimisation claims, in respect of the victimisation claims the claimant has to show she had done a protected act which was known to the respondent. Without knowing when these events occurred that she now seeks to rely on it is not possible to ascertain whether there was a protected act. Obviously bringing a Tribunal claim would be a protected act but it is not clear whether the matter she complained of occurred after the issuing of Tribunal proceedings or before, that needs to be clarified immediately. I enclose with this judgment and orders a definition of victimisation under the Equality Act 2010 for the claimant's assistance.

26. I therefore make the following orders.

27. That the claimant within 21 days i.e. by 14th December complies with the orders to provide further particulars of the 7 issues at paragraph 47 of the Case Management Orders made in the decision promulgated on 19 June setting out:-

- (a) who is responsible for the matters complained of
- (b) when they occurred
- (c) whether there were any witnesses and

- (d) what were the precise words spoken or any other relevant details (for example what is the course she said she was not allowed to go on?).

28. In respect of the new claims which would require amendment the claimant within 21 days i.e. by 14th December should state whether she agrees that the following are the additional claims that she has raised.

- (a) That Mrs Martini referred her to a Psychiatrist.
- (b) That Mrs Martini "publicly insulted her for being mentally ill"
- (c) That Mrs Martini maliciously reported the claimant and her son to Social Services.

29. That claimant also within 21 days i.e. by 14th December is ordered to state in relation 24(a), (b) and (c) above:

- (a) when these matters occurred;
- (b) if she is arguing direct race discrimination and/or victimisation in respect of each one of them and
- (c) if victimisation, what was the protected act i.e. when does she say she raised the issue of race discrimination with Mrs Martini or anyone else and what did she say.

30. Having re-read the claimant's correspondence I believe that those are the three potentially new matters raised in the correspondence.

I have given the claimant 21 days to comply so that these orders can be sent by post, the claimant have this decision and orders translated and be able to comply with them by the due date, 14th December.

31. In respect of the orders the claimant is to copy her response to the Tribunal as well as the respondents within the time allocated, following which the Judge will make further directions as to how the matter should then proceed.

Employment Judge Feeney

Date 23rd November 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 November 2017

FOR THE TRIBUNAL OFFICE