Case No: 2600157/18

EMPLOYMENT TRIBUNALS

Between:

Mr P Ennis **Claimant**	**and**	Park Industrial & Agricultural Holdings Ltd **Respondent**

RECORD OF A CLOSED TELEPHONE PRELIMINARY HEARING

Heard at: Nottingham **On:** Wednesday 24 October 2018

Before: Employment Judge P Britton (sitting alone)

Representation
For the Claimant: In person
For the Respondent: Mrs G Elliott, Solicitor

JUDGMENT

1.The Respondent will pay the Claimant in full and final settlement of his claim for breach of contract (non-payment of notice pay) the sum of £350 by cheque by **9 November 2018**.

2. The other remaining claims continue

Introduction

1. There was a first closed telephone preliminary hearing in this matter on 31 May 2018 held by Employment Judge Legard. Inter alia, he ordered that the Claimant should pay a deposit of £500 as a condition precedent of continuing with his age discrimination claim pursuant to section 13 of the Equality Act 2010 (the EqA). He similarly made a deposit order in the same amount in relation to the claim brought for disability discrimination pursuant to section 15.

2. The deposits were not paid by the Claimant and therefore those claims were struck out pursuant to rule 39(4) of the Employment Tribunals Rules of Procedure 2013. This was on 26 July 2018.

3. The Claimant made application that Employment Judge Legard reconsider that judgment. On 26 July, for reasons clearly given, the learned Judge refused the application.

4. What it therefore means is that the remaining claims as of today are as follows. A claim for breach of contract, otherwise known as wrongful dismissal. The compensation awardable for such a claim is notice entitlement. In the case of the Claimant as he was only employed by the Respondent between 14 December 2015 and 5 February 2016, this would only be one week's wages in lieu of notice. The Respondent had indicated at the last telephone preliminary hearing that they would check as to whether he had been paid the sum and if not, they would make sure that he was. Today it has been confirmed by Mrs Elliott that the payment has not been made but this will now be corrected. Thus, I am going to make a judgment today that the Respondent will pay the Claimant the notice pay outstanding, which is £350, within 14 days. Accordingly that is the end of that head of claim.

5. The next claim that was left was one of unfair dismissal. The problem there is that the Claimant lacks the necessary two years qualifying service pursuant to section 108(1) of the Employment Rights Act 1996 (the ERA). He has never pleaded any of the exceptions to that provision . It follows that the tribunal lacks jurisdiction to entertain that claim. But because it was not on the agenda today, in accordance with rule 27 of the Tribunals 2013 Rules of Procedure, I must give the Claimant time to show cause why I should not strike out that claim for want of jurisdiction. I am going to make an order to that effect.

6. There was also a claim which would invoke section 38 of the Employment Act 2002 on the basis that the Claimant had not been given written particulars of his employment. However, I pointed out to the Claimant today that pursuant to section 1(2) of the ERA he is not entitled to written particulars of employment because he has to have been employed 2 months in order to be entitled to the same. He was not and when the employer dismissed him without notice that is when the dismissal took effect. Thus of course, he has not got 2 months under his belt. Again, pursuant to rule 27, I am requiring him to show cause why that claim should not be struck out for want of jurisdiction.

7. What it means reverting to the EqA is that one head of claim remained in terms of the judgment of Employment Judge Legard and that is a claim of harassment pursuant to section 26. It centres upon as to whether or not the then transport manager raised with the Claimant that there had been a complaint by a customer in terms of the delivery of goods and to the effect that one of the two individuals who she was complaining about in the employ of the Respondent was by description "a miserable old man". There is no doubt that the Claimant was engaged in the relevant delivery and because he deals with it in what I might describe as further particularisation of his claim which he sent in in effect by way of the reconsideration application to which I have referred. But, the point becomes as to whether or not the Transport Manager should have relayed these words to him if in fact they had been sent by the customer.

8. I pointed out that even if those words were said, they would not provide a cause of action for the actual dismissal given the definition of harassment and which I read out to the Claimant. So, any award for injury to feelings would be confined to the making of the said remark.

9. The final point to make is that if in fact the Transport Manager did receive such a complaint from the customer, who I understand from the Claimant to be a Personnel Manager, then how can the Respondent be liable for simply relaying to the Claimant the complaint because prima facie it would be entitled to inform the Claimant that it had been made and how he could be put in the frame so to speak and which brings me back to the reported description of him. That of course will be an issue for the hearing of this matter. But if my analysis is correct, then I cannot see how the Transport Manager is guily of harassment as per s26 given the context. Furthermore pursuant to sections 109 and 110 of the EqA the Respondent could not be liable for the actions of the customer and in terms of making any such complaint, even if it was malicious, because that customer was self-evidently not an employee, a principal or an agent of the Respondent.

10. I finally observed that if my analysis is wrong and if the tribunal finds that the remark was harassment by the transport manager, then this is a one-off remark, even though it was hurtful to the Claimant, thus as to an award for injury to feelings, I would be very surprised indeed if an award was made of more than about £750. I of course might be wrong on that but there is in my judgement no way that any award would get either into the top band of the lowest band of ***Vento*** or rise above it.

11. The Claimant believes that the customer put her complaint in an email to the Respondent. Currently, the Respondent has not disclosed it. I urged Mrs Elliott to make sure that her client takes every possible step to double check as to whether there was any communication from the customer and to disclose it. It may very well be in its interests so to do. The Transport Manager is no longer employed by the Respondent.

12. The final issue that Mrs Elliott will need to establish with her client is as to whether, even if it was not in the context of the actual dismissal of the Claimant for alleged non-delivery of parcels, otherwise the Transport Manager did disclose this complaint to the Claimant. If not, we have a clear conflict because the Claimant says it was disclosed to him and of course the Respondent would not have the direct evidence of the Transport Manager unless of course he can be tracked down and is willing to give evidence.

13. The Claimant spent a lot of time this morning, for reasons I understand, wanting to go over the unfairness of his dismissal and the link to inter alia his age and his disability. I repeat that the direct and section 15 discrimination claims have gone. If the Claimant is unhappy with the judgment of Judge Legard and his refusal to reconsider, then his remedy is an appeal to the Employment Appeal Tribunal, albeit he is now significantly out of time. He made plain to be today that he now intends to so appeal. Obviously, I cannot predict what the EAT will do but he will first need to get its leave to appeal out of time.

14. Thus, I intend is to proceed with giving directions for the main hearing in this matter, working on the premise that all that will remain is the harassment claim. Given there are only two witnesses involved (ie the Managing Director of the Respondent who heard his appeal and the Claimant himself) we can comfortably get through it in one day.

15. The Respondent had raised that the Claim was per se out of time. I do not agree. It was first presented in time in 2016 but fell foul of the then fees regime and was thus dismissed by the secretariat at Arnhem House. The Unison judgment last year ruled the fees regime to be a nullity. Thus the rejection was void. However the then rejected claims had long since been destroyed by Arnhem House. It took some time for the MoJ to put in place redress in terms of contacting Claimants inviting them to confirm if they wanted their claims reinstated. The Claimant was so informed in November. He presented his claim in January 2018 and which had to be a new claim but based on the same scenario because the old claim had been destroyed. But in reality it is not a new claim but the reinstatement of the initially wrongly rejected claim Thus out of time does not engage as to the jurisdiction. Mrs Elliott therefore does not pursue her application.

16. Accordingly, I make the following orders.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The Claimant will by **9 November 2018** show cause in writing to the tribunal as to why pursuant to rule 27 of the Employment Tribunals Rules of Procedure 2013 his claim of unfair dismissal should not be struck out for want of jurisdiction. If he does not do so, then the claim will be struck out. If he does make representation, then a Judge will consider the same and determine whether or not to proceed to dismiss that claim or otherwise hold a preliminary hearing.

2. The Claimant will likewise by **9 November 2018** show cause pursuant to rule 27 as to why the claim based upon failure to provide written particulars of employment should not also be dismissed.

3. I make the following directions for the purposes of the hearing:

3.1 The hearing currently listed for 3 days in Nottingham before a full tribunal commencing on 18 March 2019 is hereby **reduced in time and will be confined** to a hearing on Monday 18 March 2019.

3.2 **The trial bundle process**

3.2.1 The Respondent will send the Claimant by way of first stage discovery a proposed draft trial bundle index. It will be

double spaced and in chronological order. They will send this to the Claimant by **7 December 2018**.

3.2.2 The Claimant will reply by **21 December 2018** as follows. If there are additional documents that he requires in the trial bundle, then at the appropriate space in the trial bundle index he will make the appropriate entry by way of brief description. He if has the relevant document, he will send a copy to the Respondent's solicitors for insertion in the trial bundle. If he does not have the document but believes it to be in the Respondent's custody or control and relevant and necessary for determination of the issue, he will make that plain and that he requires it in the trial bundle.

3.2.3 By not later than **11 January 2019**, a single bundle of documents is to be agreed. The Respondent will have custody of the preparation of the bundle. The bundle is to be bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;
- documents which will be referred to by a witness;
- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc
- correspondence between the tribunal and the parties, notices of hearing, location maps for the tribunal and other documents which do not form part of either party's case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should <u>not</u> be sent to the tribunal in advance of the hearing.

3.3 **Witness statements**

3.3.1 By not later than **8 February 2019**. there is to be mutual exchange of witness statements. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. The Claimant's witness statement must include an updated statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated and a description of their attempts to find employment. If they have found a new job, they must give the start date and their take home pay. Witness statements should not routinely include a précis of any document which the tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the tribunal to draw from the document as a whole.

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) 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 struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management':

https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(iv) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

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Employment Judge Britton

Date: 24 October 2018

Sent to the parties on:

For the Tribunal: