



EMPLOYMENT TRIBUNALS

Claimant
Mr. K. Walling

v

Respondent
Hertford Regional College

PRELIMINARY HEARING

Heard at: Watford
Before: Employment Judge Heal

On: 9 November 2018

Appearances

For the Claimant: Mr. L. Harris, counsel

For the Respondent: Ms. Latunji – Cockbill, solicitor

JUDGMENT

1. The claimant has materially complied with the Unless Order insofar as it relates to his complaint of disability discrimination. That claim continues to full hearing.
2. The claimant has not materially complied with the Unless Order insofar as it relates to his claim of race discrimination. I record that that claim was struck out on 12 October 2018.
3. All other claims continue.

REASONS

1. Written reasons are provided at the request of the claimant.

The issue

2. The issue before me is whether the claims or any of them have been struck out because of non-compliance with an Unless Order sent to the parties on 26 September 2018.

History

3. By a claim form dated 11 May 2018 the claimant made complaints of race and disability discrimination, unfair dismissal and breach of contract.

4. The respondent made a request for further information by solicitors' letter dated 24 July 2018. The claimant did not provide that information. Accordingly, the respondent sought and was granted an Unless Order.

5. The Unless Order said:

'On the application of the respondent and having considered any representations made by the parties, Employment Judge Henry orders that: –

Unless by the 12 October 2018 the claimant provides the following further particulars of the matter complained of in the Respondent's letter dated 24 July 2018 relating to his complaints of Race and Disability Discrimination (copy attached) the claim will stand dismissed without further order.'

6. By email dated 1 October 2018 a Ms Boylon sent to the respondent on the claimant's behalf an attached document intending to provide the information sought by the respondent.

7. That document is - curiously - dated 5 October 2018, however the odd feature of the dates has not been explored or explained before me and since the parties both accept that the document was sent on 1 October, it does not matter.

8. I am told, and I accept that the claimant drafted this document himself without legal assistance. He intended it to comply with the Unless Order.

The law

9. The representatives both agree that if there has not been material compliance with the Unless Order, then the claim has already been struck out on 12 October 2018. That would be something that has already happened, and I have no discretion over it.

10. Therefore, the issue arises before me as to how much of the claim, if any, has been struck out.

11. The respondent agreed that the part of the claim struck out would be the part affected by the non-compliance: not just the race discrimination claim, or the disability discrimination claim but the subset within that jurisdiction. By that I mean that if there had been material non-compliance with, say, the request relating to section 15 of the Equality Act only, then it is the claim made under section 15 only which would have been struck out.

12. I have been provided with a number of copy authorities, however the parties have only referred in argument to *Johnson v Oldham Metropolitan Borough Council* [2013] WL 2628757, UKEAT/0132/13/JOJ.

13. From the judgment of Langstaff J in *Johnson*, I take these principles:
14. It is a critical aspect of fairness that a party knows the case that it has to meet. Simultaneously it is central to justice that disputes should be heard wherever a hearing is possible and cases should not lightly be struck out for technical reasons without the real dispute being heard and determined (paragraph 2).
15. Compliance with an order need not be precise and exact. In a case, such as this, where the order seeks further particulars of a party's case, the tribunal should ask whether there has been *material* compliance (as opposed to substantial compliance). Use of the word 'material' focuses my attention on the purpose for which compliance with the order is sought. That purpose is the need for better particulars of the case, given that it is a critical aspect of fairness that a party knows the case it has to meet. Particulars of a case also enable the tribunal itself to understand what a claimant is saying (paragraph 7).
16. The respondent has to know the case that it has to meet so that it can prepare its evidence and argument ready for the full hearing. It is important too that the respondent knows the details of the allegations so that it can assess the strength or weakness of its own case and make decisions as to how to proceed accordingly.
17. The tribunal has to know the case which the claimant is bringing so that it can manage that case, list it properly for hearing, make the appropriate directions, and see, for example, whether there are any jurisdictional problems, such as whether the claim is out of time. These might then be heard in a preliminary hearing or otherwise dealt with clearly and fairly.

Analysis

18. So, I have looked at the claimant's response to the Unless Order under the different heads of claim, one at a time. Under each head of claim, I ask myself whether the claimant has materially complied with the order.

Race discrimination.

When did the acts/omissions take place?

19. The request asks *when* each act or omission is alleged to have taken place.
20. The respondent said that the claimant had provided no dates in answer to this question. However, the request does not ask for dates; it asks, 'when'.
21. Mr. Harris for the claimant says that the claim form itself already gives the answer to this: the acts or omissions took place during the probationary period.
22. If the probationary period had been short, say one month, then I would accept this as an answer which materially complied with the request. Claimants very often say that an act or omission took place during, for example 'June 2016' and very often that is sufficient to tell the respondent the case that it has to meet.

23. However, I am told by Mr. Harris that the probationary period started in April 2016, ran to December 2016 and was extended from March 2017 to June 2017. That is a long period. It does not tell the respondent when each act or omission took place. Plainly a more specific answer was sought, say: 'in or about June 2016', relating to a particular incident. Mr. Harris says that the period is narrowed down by the beginning of a particular manager's employment, in September 2016. That reduces the period to 8 months. I do not consider that it makes much difference.

24. So, Mr. Harris' answer: clever though it is, does not satisfy me that there has been material compliance with this part of the order. Even though an exact date would be too precise to expect in many circumstances (few employees keep diaries and written records of when day to day events take place, especially when they are not expecting to end up in a tribunal), some greater precision is needed than a 14 month or even an 8 month period.

25. There has not been material compliance with this request and therefore not with this part of the order.

Comparators.

26. Next Ms Lutunij-Cockbill for the respondent said that the claimant had not given particulars as ordered of those with whom he compared 'the alleged treatment and on what basis.'

27. I note that the request sensibly tells the claimant -who is not a lawyer- that the format in which he provides this information is a matter for him. The order has therefore adopted that qualification.

28. The claimant has not provided the information in a table or under a separate heading to enable it to be easily found. However, as Mr. Harris points out the information sought is in the document provided.

29. In the document sent on 1 October, under the heading Racial Discrimination and in 25 different items of treatment relied on, the claimant does identify some actual comparators. I accept Mr. Harris's submission that where no actual comparator is provided in a complaint of direct discrimination then by necessary inference the comparator is hypothetical.

30. I see these actual comparators identified in the 1 October document, using the paragraph numbering given by the claimant:

1 and 4 give a comparator: 'Shaffi'.

10, 11 and 12 name 'Jean'.

15 compare the claimant to other BME lecturers.

16 names 'Jean'.

18 compares the claimant to lecturers whose classrooms were not changed.

23 names 'Jean'.

25 makes comparison to other lecturers who are by inference of BME origin.

31. The other allegations by necessary inference rely on hypothetical comparators so there is material compliance with this request.

Why does the claimant say the treatment was because of his race?

32. Request 1.4 of the 24 July letter asks the claimant to set out the basis on which he says the treatment complained of was because of his race.

33. It is debatable whether this is a proper subject for a request for further particulars, this being a matter of evidence and argument, however in his document of 1 October, the claimant has explained why he says his treatment was because of his race.

34. The claimant has not given this point a separate heading, but it is clear that the basis is that different treatment was being meted out to BME staff. Again, I note that the claimant has, as permitted, set out the information in a format of his own choosing, not as a table or under a heading, but in the body of the text.

35. However, because there has been material non-compliance with the first request, about when the acts or omissions happened, and this affects the entire race discrimination claim, I have no choice but to find that the entire claim of race discrimination was struck out on 12 October 2018.

Disability.

Section 15.

36. Mr. Harris identifies paragraphs 1 and 7 of the 1 October document as the section 15 claims.

37. The condition is set out as chronic back pain and issues from transverse myelitis.

38. The disadvantage (or 'something') arising in consequence of that disability is referred to in the document: it talks about mobility and toileting issues. Subsequently there is reference to effects on the claimant's voice and also stress.

39. Under the heading Disability Discrimination, the section 15 claim breaks down as follows:

39.1 Paragraph 3: says that the claimant needed suitable access to a toilet quickly.

39.2 Paragraph 7 refers to effects on the claimant's voice and also stress.

39.3 These are each 'something arising in consequence of the disability'.

39.4 Paragraph 7 sets out the treatment complained of: 'he treated me as stupid and spoke to me with contempt in front of the students, colleagues and other professionals, made comments about my voice and mumbling when in pain due to flare ups and tired

due to the stress and medications'. this is because of the something arising in consequence of the disability.

Sections 20 and 21: failure to make reasonable adjustments.

40. Mr. Harris says that this claim relates to paragraphs 1, 2, 3, and 9 in the 1 October document.

41. (If paragraph 8 is, as Mr. Harris says, really race discrimination, that must have been struck out for reasons set out above.)

42. The complaint about failure to make adjustments breaks open as follows:

Paragraph 1.

43. The 'PCP' is not allocating chairs to lecturers. The claimant is at disadvantage because of his pain. Was it a reasonable adjustment for the respondent to provide a chair?

Paragraph 2.

44. The PCP would be the practice of changing the allocation of workshops to lecturers. The disadvantage is that the claimant lost the benefit of having furniture, tools and equipment adapted to his disability. Was it therefore a reasonable adjustment to allow the claimant to remain in the existing workshop as he had it organised?

Paragraph 3.

45. The PCP would be: not providing staff members to cover a class when a lecturer is absent. The disadvantage is that the claimant needed to absent himself from class to use the toilet. Was it therefore a reasonable adjustment to provide cover?

Paragraph 4:

46. Mr. Harris accepts that this is background only. It is not part of the claim.

Paragraphs 5 and 6.

47. Are not separate claims but are linked to the two points about workshops.

Paragraph 7

48. Is a section 15 case.

Paragraph 8.

49. Mr. Harris does not suggest that this is a reasonable adjustments claim. He says this 'has flavour of direct discrimination'. He said that it was better suited to or fits race discrimination.

Paragraph 9.

50. The 'PCP' was that of changing classrooms for computing at short or without notice. The disadvantage was that it was more difficult for the claimant to manage his pain. Was it therefore a reasonable adjustment not to change the classroom for computing or to have given the claimant reasonable notice?

51. I consider that the claimant has provided the particulars requested. The elements of each claim are set out.

52. So, I consider that the claimant has materially complied with the requests, and therefore the order, in relation to his claims of disability discrimination. That claim has not been struck out.

Employment Judge Heal

Date: ...14/11/18.....

Sent to the parties on:

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For the Tribunal Office