EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr S Deo **v** Grace Dieu Manor School

JUDGMENT AT A PRELIMINARY HEARING

Heard at: **Leicester** **On: Monday 6 August 2018**

Before: **Employment Judge Ahmed (sitting alone)**

Representation
For the Claimant: In Person
For the Respondent: Mr A Forest, Associate

JUDGMENT

1. The claim of unfair dismissal is *not* struck out.

2. Case management orders are made as set out below.

REASONS

1. In these proceedings the Claimant originally brought complaints of race discrimination, discrimination based on the protected characteristic of religion or belief, sex discrimination and unfair dismissal.

2. Following a Preliminary Hearing before Employment Judge Evans on 17 July 2017 the Claimant was ordered to pay a deposit of £1,000 in respect of the complaints of race discrimination, religion or belief discrimination and sex discrimination. The deposits in relation to religion or belief and sex discrimination were not paid and accordingly those complaints were struck out. The deposit in relation to the complaint of race discrimination was originally paid but then subsequently the complaint was withdrawn. The position therefore is that the only extant complaint is that of unfair dismissal.

3. This Preliminary Hearing was listed to consider the Respondent's application to strike out the Claim on the grounds that Mr Deo has not complied with case management orders and/or that a fair hearing is no longer possible.

4. Rule 37 of the Employment Tribunal Rules of Procedure 2013 ("the Rules") so far as it is relevant, states:

"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

[(a) and (b) not relevant]

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

5. Mr Deo was, amongst his other responsibilities, employed by the Respondent as Head of IT. He was dismissed in August 2016. The reason given by the Respondent for the dismissal is redundancy. The Claimant challenges that redundancy was the real reason for the dismissal and even if it was it was nevertheless unfair. He attacks the decision on a number of fronts. He was able to find alternative employment fairly quickly after the dismissal.

6. The Respondent's application for a strike out of the Claimant's claims is principally in relation to the Claimant's failure to comply with case management orders and so the main grounds of the application to strike out are under Rule 37(1)(c) and (d). In his fairly detailed and helpful skeleton arguments Mr Forest for the Respondent sets out the Claimant's failure to comply with previous orders. The Claimant for his part takes issue that the difficulties in preparation are entirely his fault. There are issues in relation to the bundle. The parties have yet to exchange witness statements. Despite the fact that dismissal occurred two years ago the case is not yet ready for a final hearing.

7. The Respondent has nevertheless managed to prepare a draft bundle which although as yet unpaginated runs into several hundred pages. Despite its size the Claimant does not consider that it contains all of the relevant documents. In fact he takes issue with not only what is missing but what it includes. He wants certain documents to be removed from the bundle. His reasons, apart from issues of relevance are not clear. Mr Forest considers that the additional documents sought to be added to be irrelevant and the ones included to be relevant.

8. Relevance is of course a matter for the Tribunal hearing the case at the full merits stage. The answer is of course fairly simple. If it transpires that the documents in the present draft bundle are irrelevant then they will simply not be referred to in evidence. It is unnecessary and hugely cumbersome to go through each and every document to decide its relevance now. Moreover, what appears irrelevant now may in the light of evidence become highly relevant later on. Accordingly, those documents that are already in the bundle shall remain. If Mr Deo wants to add other documents which he deems relevant he can prepare a short supplemental bundle of his own. This will need to be paginated and indexed. It should not include material which is privileged or any communication with ACAS. Mr Deo will be responsible for ensuring that sufficient copies of the supplemental bundle are available for use at the hearing.

9. As with most cases involving schools there may be reference to students. I must make this clear to the parties that in drawing up these bundles, that there should be no reference to the names of any of the pupils of the school or anything which may possibly identify them. The names or initials of any pupils in the documents should be redacted carefully. This is a responsibility of both parties. The Respondent will have the primary responsibility of ensuring that such matters are redacted from the main bundle. Subject to that the bundles can and should be capable of being agreed.

10. In relation to the witness evidence, the Claimant proposes to give evidence himself and to call 2 other witnesses. They are Mr Mite and Mr Locke. They have yet to finalise or approve their witness statements. They will need to do so by no later than the date of the order set out below. In the event that the Claimant is unable to obtain their statements he should at least ensure that his own witness statement, which is otherwise ready, should be served in accordance with the order below.

11. The Respondents propose to call 3 witnesses. They include Mr Fisher who was the Headmaster of the school at the time and is referred to extensively in the documents. He is no longer with the Respondent but will give without the need for any witness order at this stage. In the event that a witness order is necessary the Respondent should make the appropriate application as soon as possible. The other witnesses are Ms Margaret Kewell who is now the Head of the School and Father Cann who is based at the sister school, Ratcliffe College.

12. I have made an order below for mutual exchange of witness statements with an "unless order" attached which is applicable to both parties. I have made it clear to the parties, and the Claimant in particular who is not legally represented, that in the event that his witness statements is not sent to the Respondent in accordance with the Order below his claim will be struck out without the need for any further order, decision or judgment of the Tribunal.

13. Before a claim is struck out a tribunal needs to consider whether a fair hearing is still possible (see *De Keyser v Wilson* [2001] IRLR 324) and whether it is proportionate to do so (see *Bolch v Chipman* [2004] IRLR 140). Given that a fair hearing is clearly still possible if the new orders are complied with it would not be appropriate to strike out. It would also be disproportionate. The application to strike out the claim under rule 37(1)(c) and (d) of the Rules is therefore dismissed.

14. An issue considered today was whether the Claimant is likely to achieve any benefit from these proceedings even if he is successful in his complaint of unfair dismissal. He is not seeking reinstatement or re-engagement. He accepts that the redundancy payment which he received extinguishes any possible basic award. The Claimant's original schedule of loss included a significant sum for damages for race discrimination and an ACAS uplift based upon those damages. However as the discrimination complaints have now all either been dismissed or withdrawn his own schedule of loss shows a nil compensatory award. Mr Deo was able to fully mitigate his losses by finding better paid employment very soon after dismissal. So the question is whether the continuation of these proceedings should be permitted as there would appear to be no discernible benefit even if Mr Deo wins.

15. Mr Deo cannot continue these proceedings purely for the sake of vindication. Mr Forest cites **Nicolson Highlandwear Ltd v Nicolson** [2010] IRLR 859 as authority for the principle that it is not open to a Claimant to continue an unfair dismissal claim simply for the purpose of gaining a declaration that he was unfairly dismissed. The only remedies open to a Tribunal are to award reinstatement, re-engagement and compensation. Mr Deo does not seek the first two and he is not, even on his own schedule, likely to be awarded any compensation.

16. Mr Deo says that following dismissal he sought alternative employment locally but having regard to the paucity of opportunities applied successfully for a role in London. As a consequence he has suffered additional expenses by living there whilst maintaining a household in Birmingham. As such he is now paying significant expenses which has been forced upon him by reason of the dismissal. The Claimant's net salary with the Respondent was £41,904.36. His salary with his present employer, whom he joined in September 2016 and continues to be employed by them, is £50,800.00, a difference of almost £9,000.00. Mr Deo says however that in real terms he has suffered loss because he is having to pay higher rent and additional costs. I note however that his rent is subsidised by his new employer for a 2 year period though that is soon coming to an end. His rent will therefore increase significantly soon but he has so far been insulated from the high London rental costs. The Claimant says that whilst he put nil in his compensatory award that might on reflection have been an error and there are other factors to be put into the mix.

17. The first question is whether Mr Deo is as a matter of law entitled to claim any compensatory award on the basis of additional living expenses by having to live and work in a more expensive area and in circumstances where for a two year period he has had the benefit of a rent subsidy. That issue needs to be addressed as a matter of law as to whether the Tribunal has power to compensate Mr Deo for such loss, if indeed there has been a loss. There is no legal authority on the point before me from either party. It is of course really up to Mr Deo to find one but he is not in a position to do so today. He is a litigant in person but clearly he has resources to obtain some legal advice in the days ahead. In fact Mr Deo said he has identified some caselaw in support of his argument though he had not brought any of the case names or references today. Mr Forest is not aware of any such authority. Off the top of my head I cannot think of one. This is not a case of Mr Deo having lost any subsidised accommodation from the Respondent. On the face of it the Claimant does not appear to have suffered any loss which is capable of being compensated as a matter of law. If that is right it is arguable that for him to continue these proceedings amounts to an abuse of process. If he cannot establish the point at the final hearing it may be considered unreasonable conduct for the purpose of any costs application. However, it will be a matter to determine at the final hearing, if it is necessary. The Claimant of course needs to succeed on liability before any issues of remedy are dealt with. I have explained to the Claimant that there does not appear to be any basis for an ACAS uplift even if the Claimant is successful because the ACAS Code does not apply to redundancy dismissals.

18. Case management orders for the final hearing are set out below.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The parties are to inform the Tribunal by no later than 4:00 pm on 13 August 2018 their dates of availability for a 3 day hearing to determine the full merits of this case. Such available dates are to be provided up to the end of December 2019. In the event that a party does not supply any dates the hearing will be fixed on such dates as are available. Once the hearing dates have been fixed they will be adjourned in exceptional circumstances only.

2. By no later than 20 August 2018 the Respondent shall send to the Claimant the main bundle to be used at the final hearing by paginating and indexing the final version. For the avoidance of doubt the bundle which the Respondent has produced today shall stand as the main bundle for the final hearing. The additional documents which the Claimant has produced today shall form the supplemental bundle.

3. The Claimant shall by no later than 20 August 2018 send to the Respondent the supplemental bundle. In both cases the parties shall ensure that the bundles do not contain any documents which refer to pupils by name or any inadmissible material such as without prejudice correspondence or correspondence with ACAS.

4. By no later than 3 September 2018, the parties shall agree a list of the factual and legal issues to be determined in these proceedings. In the list of issues the Claimant shall set out:-

4.1 Why it is alleged that the redundancy process was unfair.

4.2 To identify the alleged procedural defects, if any.

5. By no later than 10 September 201,8 the Claimant shall send to the Respondent an amended schedule of loss setting out the amounts being claimed in these proceedings.

6. By no later than 24 September 2018 the parties shall mutually exchange witness statements of all witnesses on whom they intend to rely at the final hearing. In the event that a party fails to send its witness statements by electrical or any other means, the party that is in default may not be permitted to take any further part.

In the event that the Claimant fails to send his witness statements by 4.00pm on 24 September 2018 his claim shall be struck out without any further order. This is an 'unless order' within the meaning of Rule 38 of the Employment Tribunal Rules of Procedure 2013.

In the event that the Respondent fails to serve its witness statements by 4.00pm on 24 September 2018 their Response shall be struck out. This is an 'unless order' within the meaning of Rule 38 of the Employment Tribunal Rules of Procedure 2013.

7. This case shall be listed for a hearing before an Employment Judge sitting alone at the Leicester Hearing Centre on dates to be fixed. The first morning of the hearing shall be a reading-in morning. The hearing shall begin at 2:00 pm on the first day and at 10:00 am on the remaining two days. The hearing shall deal with the issue of remedy if necessary.

8. At least 7 days before the first day of the hearing the parties shall mutually exchange skeleton arguments on which they intend to rely.

9. At least 3 clear days before the first day of the hearing the parties shall ensure that two copies of their bundles and witness statements are lodged with the Leicester Hearing Centre along with their skeleton arguments.

10. Any applications for further orders should be made as soon as possible.

____

Employment Judge Ahmed

Date: 24 August 2018

Sent to the parties on:

25 August 2018

…………………………….

For the Tribunal:

…………………………..

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

(v) 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.