



EMPLOYMENT TRIBUNALS

Claimant: Mr K Sivarajah

Respondent: Lyons Davidson Limited T/A Lyons Davidson Solicitors

Heard at: LONDON SOUTH

On: 19 January 2018

Before: EMPLOYMENT JUDGE PHILLIPS

Representation

Claimant: Did not attend

Respondent: Mr D Sillitoe, Solicitor

JUDGMENT

Pursuant to Rule 37(1) of the Employment Tribunal Rules of Procedure 2013, the Claimant's ET1 (and all the claims set out therein) is struck out in its entirety.

REASONS

1. This case relates to a claim for amongst other things unfair dismissal, race, sex and disability discrimination and wrongful dismissal following the Claimant's summary dismissal for gross misconduct by the Respondent on 27 March 2017. Following a Preliminary Hearing before Employment Judge Sage, on 27 September 2017, which the Claimant did not attend, and after consideration of more detailed Particulars of the Claim provided by the Claimant in a document dated 21 September, a number of other claims (including age, gender reassignment, religion and sexual orientation discrimination, and redundancy and holiday pay claims), were struck out and various Orders were made, including that:
 - a. 1.1 the Claimant was ordered to respond to the Respondent's requests for Further and Better Particulars (as set out in the Respondent's draft agenda for the Hearing at 2.3) by supplying answers to the Respondent and the Tribunal, by 18 October;
 - b. 2.5 the Claimant was ordered to disclose by list and copy by 6 December 2017, his medical records for all medical conditions that he relied upon in support of his disability discrimination claim, from 2012 to date, together with a Disability Impact Statement;
 - c. 3.1 the Claimant was ordered to provide to the Respondent and the

Tribunal, by 18 October, a properly itemised schedule of loss.

2. Further, as set out in the Case Management Summary, the case was listed for a further Preliminary Hearing on 19 January 2018, to consider any strike out or deposit order applications, whether it was appropriate to make an Unless Order, as well as to make any other orders or Directions and to list the matter for a full Merits Hearing.
3. Owing to a delay on the Employment Tribunal's part in sending out the Case Management Summary with the Orders, the Respondent sought and was granted extensions to the original time limits set out at 1.1 and 1.2 of the Case Management Summary until 25 October and 15 November respectively, the former being to the benefit of the Claimant.
4. The Claimant did not comply with any of these orders. The Claimant did not respond to any of the various email communications from the Respondent's solicitor, between October and November, reminding him of his obligations under the Case Management Summary. The last communication from the Claimant either to the Respondent or the Tribunal at this point in time had been on 21 September. A letter was sent by the Respondent's solicitor to the Claimant in the post on 20 November enclosing copies of the email correspondence and seeking his response.
5. On 27 November, the Respondent's solicitor wrote to the Claimant to say that the Claimant did not appear to be actively pursuing the matter and that he would be making an application to strike out the Claimant's Claim unless he heard from him within 7 days. This was sent by email. No response was received.
6. On 7 December, the Respondent's solicitor applied by email, copied to the Claimant, for the Claimant's Claim to be struck out on the ground that he was not actively pursuing the claim (Rule 37 (1) (d) of the Employment Tribunal Rules of Procedure 2013. The Respondent's solicitor attached all the previous communications from it to the Claimant. The Respondent pointed out that the Claimant had also not provided the Further and Better Particulars, nor had he shown any indication that he intended to do so. It was submitted that, granting the application for a strike out would therefore be in accordance with the overriding objective (Rule 2 of the Employment Tribunal Rules of Procedure 2013, which includes dealing with cases in a proportionate way and avoiding delay so far as compatible with the proper consideration of the issues).
7. On 15 December, the Claimant sent an email to the Tribunal. This was copied to an incorrect email address for the Respondent's solicitor, so he did not receive it; a copy was provided to him on the morning of this Preliminary Hearing. This email said that the Claimant objected to the strike out request. The Claimant repeated a number of the matters that had been previously provided by him in his 21 September Particulars. He said he had provided Particulars of his claim and details of his losses. He did not set out any responses by way of the Further and Better Particulars that had been requested. Other than as mentioned, he did not provide a schedule of loss or the medical records or any details about them. He did not set out any reason for not having provided that information.

8. On 21 December, the Respondent's solicitor wrote to the Tribunal, copied by email to the Claimant, to say that they understood the Claimant had objected to the strike out application, albeit that they had not seen the objection. They asked that if the Tribunal was not minded to strike out the Claim, that consideration be given to an Unless order.
9. All these matters were considered at this Preliminary Hearing.
10. The Claimant did not attend the Preliminary Hearing and by the time of the Hearing there had been no further communications from him since the email of 15 December. Mr Sillitoe requested that the Claimant's Claim be struck out under Rule 37 on the grounds that he was not actively pursuing the case and / or that Orders had not been complied with.
11. Having read all the documents referred to above and having heard from Mr Sillitoe, I struck out the entirety of the Claim, as remained after the Preliminary Hearing on 27 September, under Rule 37(1) on the grounds that the Claimant was not actively pursuing the case and / or that Orders had not been complied with.
12. In making this strike out order, I took into account that the Claimant was a litigant in person, but that did not seem to me to offer as such any excuse or explanation for the way he was conducting his claim. I also took account of the various statements from superior courts that striking out a claim is a draconian power that should not be exercised too readily. Further, in my judgment given the correspondence and communications set out above, the Claimant has been given, in accordance with Rule 37(2), ample and a reasonable opportunity to make representations. Not only was it made clear in the Case Management Summary after the hearing on 27 September that a strike out would be considered, but this was also referenced in the email correspondence from the Respondent's solicitor. Indeed, as noted, representations were in fact made by the Claimant in an email dated 15 December.
13. In the first instance, in my judgment, at the time of this hearing, the Claimant had not complied with any of the Orders set out at Paragraph 1 above. No explanation had been provided for this, nor was there any indication that he was intending to comply. I did not regard the 15 December email as complying or even attempting to comply with the outstanding Orders, it simply stated the information had already been provided. As the only additional document provided was the one dated 21 September which had been provided before the previous Preliminary Hearing, and had been considered then and found to be inadequate, clearly nothing had advanced since then. The email of 15 December did not in my judgment advance or clarify any of the outstanding matters. Further, the Case Management Summary of 27 September sets out the consequences of non-compliance with an Order. Bearing in mind the overriding objective and interests of justice, there were in my judgment, considerable and substantial failures by the Claimant to comply with important orders, without any explanation being offered. These are in my judgment serious defaults. Without the provision of proper particulars, the case simply cannot proceed. Likewise, the provision of proper medical details and records was very important to the advancement of his claim, not just to the disability discrimination claim, but also to the unfair dismissal claim, given the references by the Claimant to

stress and how it affected his work. It is impossible to see how there could be any final hearing, of any of the claims, let alone a fair one, given the current state of affairs. There does not appear to me, given the previous history, to be any proportionate alternative to a strike out. The Claimant has had many opportunities to comply or explain his defaults. He has done nothing.

14. Further, and in the alternative, in my judgment, despite the email of 15 December, there was no real evidence that the Claimant was actually actively pursuing his claim. In addition to the matters already set out at paragraph 13 in connection with a ground 37(1)(c) application, the Claimant has failed to respond to any of the Tribunal's orders. He did not respond to the Respondent's solicitor's emails, he had not turned up to either of the Preliminary Hearings and had not provided any explanation for this non attendance. The 15 December email did not, as I have said in my view, contain anything that actually advanced his claim. The delays in complying with the Orders set out at paragraph 1 remain unexplained. No excuses have been advanced. Those delays are now in close to 3 months. Without the provision of proper particulars, including details of medical history, the Respondent is seriously prejudiced, as it cannot know the case it has to meet and cannot properly prepare its defence. Indeed, as things stand it is impossible to see how the case can proceed to any final hearing, let alone a fair one. All the mechanisms available for the case to move forward are in the Claimant's hands, and he has not enabled any of them. Moreover, this is the second Preliminary Hearing; it was made clear in the opening paragraph of the Case Management Summary on 27 September, that "it was not possible to list the matter for a full hearing until the issues had been clarified" and that matters relating to this, strike out and unless orders would be considered at this hearing.

15. Therefore, for the reasons set out above, the Claimant's claim is struck out.

Employment Judge Phillips

Date: 19 January 2018