



EMPLOYMENT TRIBUNALS

Claimant

Mrs L Ladley

v

Respondents

1. TUI UK Retail Limited

2. Lisa Aldred

3. Claire Le Moinge

PRELIMINARY HEARING

Heard at: Leeds

On: 3 June 2019

Before:

Employment Judge Rogerson

Appearance:

For the Claimant:

No attendance

For the Respondents:

Ms C Lord, of Counsel

JUDGMENT

1. The complaints of a failure to make reasonable adjustments and harassment related to disability are struck out in accordance with rule 37 of the Rules of Procedure.

REASONS

1. This hearing listed for 10am, was delayed until 11 am, while attempts were made by the tribunal to contact the claimant's representative, without success. The tribunal has not been notified of any settlement of the claim and Ms Lord confirmed that she had been instructed there had been no settlement, which is why she has attended today on behalf of the respondent.
2. I considered whether the hearing should be postponed and was satisfied that the claimant's representative had been notified of this hearing on 11 April 2019 and this was confirmed again on 15 May 2019 which was the last correspondence received from him. Ms Lord persuaded me to deal with the strike out application made by the respondent in the claimant's absence based upon the material before me. The Claimant's representative knew about the hearing today and knew the preliminary issues to be decided included the respondent's application for a strike out of the claim, and for a costs order as well as case management

orders if appropriate. It was the claimant's representative's responsibility to ensure he attended today or to contact the tribunal if there was a good reason why he had not attended. It was not in the interests of justice to delay this hearing. The background to this application is clear from the documents on the file.

3. By a claim form presented on 10 September 2019, the claimant brought complaints of unfair constructive dismissal, disability, sex and pregnancy discrimination, notice pay and arrears of pay.
4. At a preliminary hearing on 12 December 2018, the claimant confirmed the only complaints she was bringing were unfair dismissal and disability discrimination (harassment related to disability and the failure to make reasonable adjustments). Having identified the issues that applied for each cause of action, it was clear that the claim form did not provide sufficient details of those complaints for the tribunal or the respondent to understand the claim being made.
5. For the harassment related to disability: what was said/done by whom, how was the conduct identified related to the claimant's disability and how it had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile degrading humiliating or offensive environment for the claimant.
6. For the reasonable adjustment complaint, at the preliminary hearing the claimant identified the sickness management process as the 'PCP' applied and the respondent's inappropriate contact during her sickness absence, which is when she contends they failed to make reasonable adjustments to the process. She was ordered to provide details of the date of contact, the nature of contact, and how the contact identified was said to put the claimant at a substantial disadvantage because of her disability. She was also asked to provide details of how the respondent knew or ought to have known about the disadvantage identified, to trigger the duty to make the adjustment.
7. These were key components of those complaints and a considerable amount of time was spent at the hearing explaining to the Mr Thorpe what was needed and why to support the claims made. It was clear that the claimant was unclear about her claims alleging pregnancy discrimination when it was not a factor and identifying invalid protected characteristic. A detailed summary of the hearing was sent to the parties on 18 December 2018, requiring the claimant to confirm any inaccuracies in that record. No issue was taken with the accuracy of that summary or the orders made. At that hearing further guidance in the Equality and Human Rights Commission Code of Practice (2011) and the sections of the Code that applied were referred to assist Mr Thorpe.
8. Mr Thorpe provided a document headed 'further and better particulars' on 14 January 2019. The respondent considered the particulars provided were inadequate, because the information required by the order had not been provided.
9. By 28 January 2019, the respondent had provided a table, setting out the further information provided, exactly why the information provided was inadequate and what further information was required to comply with the order. This table with the order made, would have clearly demonstrated to the claimant what information was missing to enable her to provide it. Unfortunately, it was not provided with Mr Thorpe adopting the position that the information supplied was adequate.

10. By order of Employment Judge Rogerson, dated 7 March 2019, the claimant was warned that her claim may be struck out if the missing responses were not provided by 13 March 2019. The order makes it clear the reasons why the warning was given and that the claimant was being given a final opportunity to provide the information required to support her claim.
11. On 8 March 2019, Mr Thorpe informed the Tribunal that a new representative had been appointed to act for the claimant, Dr Rahnavard (Barrister) and he requested a brief extension of time so that the barrister could provide the *“legal response required”*.
12. By email dated 14 March 2019, Employment Judge Lancaster granted a further extension of time to noon 18 March 2019.
13. By email dated (a day late) Dr Rahnavard wrote to the Leeds Employment Tribunal confirming that he was instructed to act on behalf of the claimant and that *“no further amendments are required to the amended particulars, the merits of which are at the discretion of the court to decide at the tribunal”*.
14. On 26 March 2019, the respondent’s solicitors sent an email to the Tribunal applying for a strike out of the claim, treating the claimant’s representative’s email as a refusal to comply with the orders made by the Tribunal dated 7 March 2019 and 14 March 2019 which was evidence of unreasonable conduct of the proceedings, failure to actively pursue the claim and was repeated non-compliance with the tribunal orders and grounds for striking out the claim.
15. By email dated 10 April 2019, Dr Rahnavard commented on that email and reconfirms his earlier position as at 19 March 2019 that no amendments were required and that he could see no prejudice to the respondent in the circumstances. He suggests it was factually incorrect to suggest the claimant or her representative were refusing to adhere to the court orders. He contended there was no basis for a strike out citing Rule 37(1)(e) that *“for a claim to be struck out on the grounds of unreasonable behaviour it must be shown if a fair hearing is no longer, we fail to see any basis for this being established by you.* He states: *“in addition, the Tribunal is not permitted to strike out a claim for unreasonableness alone”*.
16. On 11 April the parties were informed a preliminary hearing would determine the respondents’ application for strike out of the claim, its application for costs and then to decide if appropriate further case management orders.
17. The last communication the Tribunal had from Dr Rahnavard was 13 May 2019 when he thanked the Tribunal for supplying a further copy of the 11 April 2019 letter confirming the issues to be determined at this preliminary hearing.
18. Ms Lord relies on that history which is clear from the documents. She submits the Tribunal and the respondent have on more than one occasion clearly identified why information was required for each cause of action made as a necessary part of the pleading. The respondent has gone to great lengths to identify what was missing so the claimant could clearly that to rectify the failure. The claimant’s representative’s approach of ‘refusal’ and continued non-compliance has been taken without considering what the respondent and the tribunal were saying. She points to the ‘clarity’ of the Tribunal’s order of 7 March which gave reasons why the information was required and gave the claimant a further final opportunity which was then extended to 18 March 2019, at the claimant’s request. This was because a barrister now on board to provide the legal response required. Despite

that opportunity to simply provide the information sought the claimant's representative has refused to provide information because he does not think it necessary. The conduct of the proceedings is unreasonable, the claimant/her representative are not actively pursuing the claim and have chosen to repeatedly breach the orders made supporting a strike out. She says that the claimant's representative has misunderstood 37(e) of the Tribunal rules of procedure which provide that a ground for striking out all or part of a claim is "that the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out). The missing information was fundamental to the discrimination complaints brought. It was necessary for the respondents, to understand the case brought to then have the opportunity, to defend the complaint before the hearing. The respondent needed to know what is the link made between conduct and disability, what contact was made and how did it put the claimant at a substantial disadvantage as a disabled person. The claimant/her representative were simply refusing to provide this information rather than providing it and then let the Tribunal consider the merits of the inadequate information provided at the final hearing when it was too late. This would place the respondent at a considerable disadvantage and was prejudicial when the fault for the failure was not theirs.

19. Having gone through each item in the table helpfully prepared by the respondent I agreed the claimant has failed to comply with the orders made. Ms Lord's submission is supported by the chronology which comes from the documents set out above. I had also conducted the first preliminary hearing and the summary reflects the time spent explaining to the claimant representative, the complaints that were misconstrued (pregnancy/sex discrimination) and identifying the complaint that appeared to be made of disability discrimination and the issues to put some context to why the information ordered had to be provided. It was essential information required to support the complaints made ordered to be provided by 14 January 2019.
20. I had issued the strike out warning on 7 March 2019, after reviewing the correspondence from the parties and the respondent's application for strike out. The order made should have removed any doubt about why it was necessary for the missing information ordered to be provided. It was made clear this was a final opportunity to provide the information ordered which has still not been provided as at the date of this hearing. It is a pity the extra time was not used to simply provide the information ordered. Instead a choice was made not to provide this information which has impacted on the rest of the orders made including a postponement of the final hearing listed for 5 days on 13-17 May 2019. The respondent could not, as a result, of the claimant's representative's failure to comply, defend an unparticularised disability discrimination complaint at a final hearing.
21. Ms Lord invites me to strike out the whole claim not just part, because of the 'link' the missing information for the discrimination complaint has, to the unfair dismissal complaint. I do not agree. The further information provided can still be considered as part of the unfair dismissal complaint. Although it is inadequate for the discrimination complaints in an unfair dismissal context, whether it amounts to conduct which is sufficiently serious to entitle the claimant to resign and claim constructive dismissal is a matter which can be decided, when the merits of the information given in evidence is considered at the hearing.

22. Although striking out a part of a claim is a decision that requires careful consideration I was satisfied the grounds relied upon in this case based on deliberate repeated failure by the claimant or her legal representative to comply with the orders made of the Employment Tribunal pursuant to rule 37(c), that this failure is unreasonable conduct of these proceedings by or on behalf of the claimant pursuant to rule 37(b), especially when so many opportunities for compliance have been given including a strike out warning and the information required has clearly been identified. The claimant's response after seeking legal representation was not to revisit the orders made to comply but to fail with the risk of a strike out warning by the tribunal giving reasons why she should comply. The claimant's failure has affected the respondent's ability to defend the complaint and prepare its case, to ensure a fair hearing of that part of the claim. The overriding objective requires the tribunal to deal with cases fairly and justly having regard to the prejudice caused to both parties to ensure they are on an equal footing. The claimant or her representative have deliberately and repeatedly failed to comply with orders made from 14 January 2019 to this hearing on 3 June 2019. That has affected the respondent's ability to defend what is a serious complaint of disability discrimination, it has affected the hearing (postponement) and has delayed these proceedings. In all the circumstances I considered it was appropriate to strike out the disability discrimination complaints of a failure to make reasonable adjustments and disability related harassment. The complaint of unfair dismissal will proceed to a hearing.

Employment Judge Rogerson

6 June 2019