



EMPLOYMENT TRIBUNALS

Claimant: Mr D J Lacey

Respondent: Vape Domain Ltd

JUDGMENT AT PRELIMINARY HEARING

Heard at: Nottingham **On:** 13 March 2019 and 13 June 2019

Before: Employment Judge Ayre (sitting alone)

Appearances

For the claimant: Mr Kennedy (lay representative)

For the respondent: Miss Murphy (solicitor)

JUDGMENT

1. The Judgment dated 12 June 2018 and sent to the parties on 14 June 2018 is revoked, and the respondent's Response is accepted.
2. The respondent is permitted to amend its Response as set out in its application to amend dated 30 August 2018.
3. The complaint of age discrimination is dismissed upon withdrawal.

REASONS

The Proceedings

1. By claim form dated 23 February 2018 the claimant brings complaints of disability discrimination, age discrimination, unlawful deduction from wages, and for notice pay and holiday pay.
2. The claim form was served on the respondent with a notice of preliminary hearing for case management purposes. The deadline for filing a response to the claim was 8th May 2018.
3. The respondent did not file a response to the claim by 8th May 2018.

4. On 12th June 2018 Judgment in default was entered against the respondent pursuant to Rule 21 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (“**the Rules**”).
5. The Judgment was sent to the parties on 14 June 2018. The respondent received it on 15 June 2018 and immediately filed a response.
6. The case was listed for a Preliminary Hearing on 5 July 2018 to consider whether the Judgment should be set aside / revoked and the response accepted. The claimant attended that Preliminary Hearing. The respondent arrived approximately 1 hour and 25 minutes late, after the Preliminary Hearing had taken place, due to his car breaking down as he was travelling to the Tribunal.
7. Orders were issued at the Preliminary Hearing on 5 July, and a further Preliminary Hearing was listed for 24 August 2018. That Preliminary Hearing was postponed due to the lack of judicial resource.
8. On 30 August 2018 the respondent made an application to amend its response.
9. The postponed Preliminary Hearing was relisted for 10 January 2019. The claimant’s representative applied for a postponement of that Preliminary Hearing on 10 January 2019 and a postponement was granted.
10. The case was then relisted for a Preliminary Hearing on 13th March 2019 with a time estimate of 3 hours. It was not possible to conclude the Preliminary Hearing on the day because the claimant’s representative had to leave to attend another appointment. The Preliminary Hearing therefore was part-heard, and concluded on 13 June.
11. The issues to be determined at this Preliminary Hearing were:-
 - a. Whether to set aside the Judgment in default entered on 12 June 2018; and
 - b. If so, whether to accept the response submitted by the respondent late; and
 - c. Whether to allow the respondent’s application to amend its response.
12. I also went on to make Case Management Orders.
13. At the Preliminary Hearing I heard evidence from Mr William John Fleming, Director, on behalf of the Respondent, and from the Claimant’s representative.
14. During the Preliminary Hearing Mr Kennedy indicated that the claimant did not wish to pursue a complaint of age discrimination, and withdrew that element of the claim. That complaint is dismissed.

Findings of fact

15. The respondent is a small business. It received the Claim Form and accompanying documents from the Tribunal, including the Notice of Preliminary Hearing for Case Management, to take place by telephone. The respondent’s

director, Mr Fleming, had no knowledge of the legal process, and did not take legal advice at the time.

16. Mr Fleming made what he accepted was a complete error on his part, due to his inexperience. He thought that the first stage in the proceedings was the Telephone Preliminary Hearing, and that only if that call went against him would he have to submit a Response to the Claim. The first time that Mr Fleming became aware that he was wrong was when he received the Judgment in Default. He immediately contacted the Tribunal and was told to file an ET3 / Response, which he did within 30 minutes.
17. The respondent's intention is to defend the Claim. Mr Fleming intended to attend the Preliminary Hearing on 5 July 2018, and went into the office to collect a colleague. They left the office just after 1pm for a hearing that was due to start at 2pm, anticipating a 40-50 minute drive.
18. The car broke down on the A614 and they could no longer drive it. Mr Fleming telephoned his wife and asked her to arrange for someone to pick him up or bring another car to him. In the meantime the Tribunal contacted Mr Fleming, who explained the position and apologised.
19. A friend of Mr Fleming arrived with another car and Mr Fleming was able to continue his journey, arriving at the tribunal at 15.17, having hit traffic on the way. Mr Fleming's friend contacted a company called Auto Repairs Broughton, who came to collect Mr Fleming's broken down car and repaired it.
20. It has always been the respondent's intention to defend this claim. By the time that Mr Fleming arrived at the Tribunal on 5 July however, the Preliminary Hearing had already concluded.
21. Mr Fleming attended the subsequent Preliminary Hearing on 13 March 2019 with legal representation. That Preliminary Hearing went part heard because the claimant's representative had to leave.

The Law

Reconsideration of judgment

22. Rule 21 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure etc) Regulations 2013 ("**the Rules**") gives an Employment Judge the power to enter a judgment if the respondent fails to present a Response to a Claim.
23. Rule 70 of the Rules provides that "*A Tribunal may, either on its own initiative... or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked...*". The overriding consideration for the Tribunal is whether it is necessary in the interests of justice for the judgment to be reconsidered.
24. Rule 72 sets out the process to be followed when reconsidering a judgment.

Extension of time for submission of the Response

25. Rule 5 provides that “*The Tribunal may, on its own initiative or on the application of party, extend or shorten any time limit specified in these Rules...*”
26. Miss Murphy referred me to the case of *Kwik Save Stores Ltd v Swain and Others* [1997] ICR 49 in which the EAT held that in deciding whether to exercise its discretion to grant an extension of time to file a Response, the Tribunal should take account of all relevant factors, including the explanation for the delay and the merits of the defence, and that the Tribunal should balance the possible prejudice to each party when making its decision.

Application to amend the response

27. The Tribunal has a general discretion to allow amendments to pleadings at any stage in the proceedings. The leading case on the exercise of discretion is *Selkent Bus Co Ltd v Moore* [1996] IRLR 661 in which the Employment Appeal Tribunal held that in deciding whether to exercise its discretion and allow an amendment, the Tribunal should take into account all of the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
28. The relevant factors to be taking into account can include:-
- a. The nature of the amendment (whether it is a minor one correcting clerical errors, the addition of factual details or relabelling of an existing claim, or a substantial amendment making new factual allegations and / or changing the basis of the existing claim;
 - b. The relevant time limits if a new complaint is being made; and
 - c. The timing and manner of the application.

Conclusions

29. I have considered carefully whether it would be in the interests of justice to reconsider the Judgment in default entered on 12 June 2018.
30. I accept the respondent’s evidence that the failure to file a response on time was a genuine mistake, made at a time when the respondent, a small business, had not taken legal advice. I also accept the respondent’s submissions that it always intended to defend the claim that has been made against it.
31. I also note that the respondent acted very promptly when it became aware of its mistake, filing its response within 30 minutes of being informed by Tribunal staff of the requirement to do so.
32. The events of the 5th July are, to some degree, a side issue in my view. I accept that the respondent intended to attend the Preliminary Hearing that day, and indeed did do so, albeit late due to a car breakdown.

33. The respondent has since taken legal advice, and is now legally represented in the proceedings, which is in my view a further indication of the seriousness with which the respondent is treating these proceedings.
34. Having seen the response that was filed, it seems to me that the respondent has a stateable defence to the claim. The allegations that have been made by the claimant are serious ones. There are clearly genuine issues between the parties that need to be determined at a Final Hearing, if it is not possible for the parties to resolve them before then.
35. It would in my view be in the interests of justice for the Judgment in default to be revoked, and the response accepted.
36. I have considered the balance of prejudice to the parties. Not revoking the Judgment or accepting the response would significantly prejudice the respondent, which would be effectively prevented from defending what are serious allegations. On the other hand, revoking the Judgment and accepting the response does not prevent the claimant in any way from pursuing his claim and the allegations against the respondent.
37. For those reasons, I have decided to revoke the Judgment in default and to accept the response filed on behalf of the respondent.
38. In relation to the application to amend, that application in my view was made at an early stage in the proceedings and does not substantially change the nature of the respondent's defence to the claim. Rather, the application was made promptly after the respondent appointed legal representatives, and seeks to set out in more detail the respondent's defence to the claim.
39. The balance of injustice and hardship is in my view in favour of allowing the amendment to the response, so that both parties and the Tribunal are clear about the nature of the respondent's defence to the claim and can prepare for a Final Hearing accordingly.

CASE MANAGEMENT SUMMARY

Open Preliminary Hearing on disability

- (1) There will be an open Preliminary Hearing to decide the issue of whether the claimant is a disabled person for the purposes of the Equality Act 2010 by reason of dyslexia and / or learning difficulties. The Preliminary Hearing will be before an Employment Judge sitting with Members at **The Tribunal Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG** on **Thursday 3rd October 2019** starting at 10 am or as soon as possible afterwards. The time estimate for the hearing is one day.
- (2) The claimant and the respondent **must** inform the Tribunal as soon as possible if the open Preliminary Hearing is no longer required.

Final hearing

- (3) All issues in the case, including remedy, will be determined at a Final Hearing before an Employment Judge sitting with Members at **The Tribunal Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG** on **Monday 18, Tuesday 19, Wednesday 20 and Thursday 21 November 2019** starting at 10 am or as soon as possible afterwards. The time estimate for the hearing is 4 days, based on the claimant's intention to give evidence and the respondent's to call 5 witnesses, and on the following provisional timetable:
- (i) 3 hours for reading in and any preliminary matters;
 - (ii) maximum 1.5 days for oral and other evidence on liability;
 - (iii) a maximum total of 2 hours (half each) for submissions on liability;
 - (iv) approximately 4 hours for the Tribunal to determine the issues which it has to decide, reach its conclusions and prepare its reasons;
 - (v) 2 hours for the Tribunal to give judgment, with reasons if possible;
 - (vi) 3 hours for the Tribunal to deal with remedy, including hearing further evidence if appropriate, reaching conclusions and giving judgment, if the claimant succeeds in whole or part.
- (4) The claimant and the respondent **must** inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.
- (5) If there is a Preliminary Hearing on the question of disability on 3rd October 2019, and the Tribunal determines at that Preliminary Hearing that the claimant is not a disabled person for the purposes of the Equality Act 2010, then the Final Hearing will be determined by an Employment Judge sitting alone at **The Tribunal Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG** on **Monday 18 and Tuesday 19 November 2019** only, starting at 10 am or as soon as possible afterwards.

The issues

- (6) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Disability

- (i) Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following conditions: dyslexia and learning difficulties?

EQA, section 13: direct discrimination because of disability.

- (ii) Did the respondent subject the claimant to less favourable treatment i.e. did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

- (iii) If so, was this because of the claimant's alleged disability?
- (iv) The respondent seeks further particulars of the complaint of direct discrimination and the claimant is to provide these, as set out in paragraph 2.2 below.

EQA, section 15: discrimination arising from disability

- (v) Did the respondent treat the claimant unfavourably because of something arising in consequence of the claimant's alleged disability:
- (vi) The respondent seeks further particulars of the complaint of discrimination arising from disability and the claimant is to provide these, as set out in paragraph 2.2 below.
- (vii) If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?
- (viii) Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

EQA, section 26: harassment related to disability

- (ix) Did the respondent engage in conduct that was unwanted?
- (x) If so, did it relate to the protected characteristic of disability?
- (xi) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- (xii) The respondent seeks further particulars of the complaint of harassment related to disability and the claimant is to provide these, as set out in paragraph 2.2 below.

Unpaid annual leave – Working Time Regulations

- (xiii) When the claimant's employment came to an end, was he paid all of the compensation he was entitled to under regulation 14 of the Working Time Regulations 1998?
- (xiv) What was the claimant's leave year?
- (xv) How much of the leave year had elapsed at the effective date of termination?

- (xvi) In consequence, how much leave had accrued for the year under regulations 13 and 13A?
- (xvii) How much paid leave had the claimant taken in the year?
- (xviii) How many days remain unpaid?
- (xix) What is the relevant net daily rate of pay?
- (xx) How much pay is outstanding to be paid to the claimant?

Unauthorised deductions

- (xxi) Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 and if so how much was deducted?

Breach of contract

- (xxii) To how much notice was the claimant entitled?
- (xxiii) Did the claimant fundamentally breach the contract of employment? If so, did the respondent affirm the contract of employment prior to dismissal?

Remedy

- (xxiv) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

Other matters

- (7) The claimant's representative indicated that he may apply for a change of venue for the final hearing, to enable him to get support from the PSU. I explained that any application for a change of venue must be made in writing and accompanied with evidence that support would be available in a different hearing centre, but not in Nottingham.
- (8) The claimant and the claimant's representative will need adjustments making to any further hearings, as identified in Section C of a document sent to the Tribunal by the respondent's representatives on 9 January 2019 and headed "DYSELXIA CONSULTANCY MALVERN". During the preliminary hearing today the claimant told me that he (the claimant) is able to write but has difficulty reading. The claimant's representative told me that he (the representative) is able to read, but has difficulty writing. Based on what the claimant and his representative told me, it did seem to me to be appropriate to order the claimant to provide documents in writing, provided that he was given extra time in order to do so.

- (9) The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at:
www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/
- (10) 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)...*". **If, when writing to the tribunal, the parties don't comply with this rule, the tribunal may decide not to consider what they have written.**
- (11) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- (12) If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.
- (13) The following case management orders were largely made by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Complaints and issues

- 1.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

2. Further information

- 2.1 The respondent must by **27 June 2019** serve on the claimant a written request for further particulars of the complaints of disability discrimination. The request should take the form of short, simple questions.
- 2.2 The claimant must provide written answers to the questions asked by the respondent by **18 July 2019**.

3. Statement of remedy / schedule of loss

- 3.1 The claimant must provide to the respondent by **24 September 2019** a document – a "Schedule of Loss" – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant's complaints and how the amounts have been calculated.

- 3.2 If any part of the claimant's claim relates to dismissal and includes a claim for earnings lost because of dismissal, the Schedule of Loss must include the following information: whether the claimant has obtained alternative employment and if so when and what; how much money the claimant has earned since dismissal and how it was earned; full details of social security benefits received as a result of dismissal.
- 3.3 The parties are referred to: the Presidential Guidance on pension loss at www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-pension-loss-20170810.pdf,
If the claimant is claiming for loss of pension, the Schedule of Loss must include precisely how much is being claimed and on what factual and arithmetical basis.

4. Disability issue

- 4.1 The claimant must by **20 August 2019** serve on the respondent copies of any medical notes, reports, occupational health assessments and other evidence in his possession and/or control relevant to the issue of whether the claimant was at all relevant times a disabled person under the EQA ("disability issue"). For the purposes of this paragraph: documentation already in existence that can be obtained by the claimant by requesting it from their GP or other treating healthcare provider or from the claimant's school is deemed to be within the claimant's possession and/or control.
- 4.2 The claimant must by **20 August 2019** provide the respondent with a witness statement (or statements): stating, in relation to each impairment relied on, between which dates it is alleged the claimant was a disabled person because of that impairment; dealing, by specific reference to schedule 1 to the EQA and any relevant provision of any statutory guidance or Code of Practice, with the effect of the alleged disability (or disabilities) on the ability of the claimant to carry out normal day to day activities. The claimant is referred to the part of the Presidential Guidance issued on General Case Management, referred to above, that relates to disability.
- 4.3 The respondent must by **3 September 2019** inform the Tribunal and the claimant of the extent to which the disability issue is conceded, and if it isn't conceded in full, the reasons why.
- 4.4 If the disability issue is not conceded there will be an Open Preliminary Hearing to determine the issue, which will take place on **3rd October 2019** as set out in paragraph (1) above.

5. Documents

- 5.1 On or before **3 September 2019** the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so. **The respondent shall include in the documents that it sends to**

the claimant copies of the claimant's payslips, timesheets and contract(s) of employment.

6. Final hearing bundle

6.1 By **21 October 2019**, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files ("bundle"), and provide the claimant with a 'hard' and an electronic copy of the bundle by the same date. The bundle should only include documents relevant to any disputed issue in the case including any documents relating to remedy and should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;
- documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

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 relevant 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 be simple chronological order.

7. Witness statements

7.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **4 November 2019**. The written statements must: have numbered paragraphs; be cross-referenced to the bundle; contain only evidence relevant to issues in the case. The claimant's witness statement must include a statement of the amount of compensation or damages he is claiming, together with an explanation of how it has been calculated.

8. Other matters

8.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

- 8.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 8.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.
- 8.4 **Public access to employment tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.
- 8.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 8.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

Employment Judge Ayre

05 August 2019

Sent to the parties on:

.....

For the Tribunal:

.....