



EMPLOYMENT TRIBUNALS

Claimant: Mr V Kulkarni

Respondent: Manchester University NHS Foundation Trust

Heard at: Manchester

On: 11 July 2019
4 September 2019 (in chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person

Respondent: Mr E Williams, Solicitor

JUDGMENT

The judgment of the Tribunal is that there has been material non compliance with the unless order of 29 May 2019. Accordingly the claimant's claims are struck out.

REASONS

Introduction

1. Following the making of an Unless Order on 29 July 2019 the respondent applied for consideration by the Tribunal that there had been non compliance with the Unless Order, for the striking out of some or all of the claimant's claim and/or for the making of a deposit if matters were not struck out. The main basis of the respondent's contentions was that the claimant's claims were still unclear after three case management hearings.

Findings of Fact

2. The claimant presented a claim on 8 April 2018. The claimant was a Medical Laboratory Assistant (MLA) and had worked for the respondent since 2002 and is still employed by the respondent. He brought a claim of race discrimination. He stated that his grievance had caused him a lot of upset and distress for the last three years and went on to attach 15 pages purporting to set out his claim, although several of those were lists of documents and events which happened in respect of his grievances. There were headings such as “Highlights of Grievances”, “Stage 2 Hearing Background”, “Highlight of Trust’s Policies”, “Summary of Grievance”, “Presentation/Discussion in Stage 2 Hearing Process”. It was not evident what the claimant’s actual claims were.

3. A preliminary hearing case management was held on 11 July 2018 before Employment Judge Howard which ordered the claimant, by 13 August 2018, to send to the Tribunal and the respondent full details of his claim “as requested at Schedule 1 to this Order” with copies of his grievance letters of 8 July, his appeal against the stage one outcome and his complaint to which the respondent had replied on 11 January 2018.

4. Schedule one set out the basis of the claims as the Employment Judge understood them and highlighted in bold the information which was still needed:

“(1) Harassment – GS harassed me because of my race.

When did this harassment start and when did it continue to? I have made complaints about her behaviour in 2007, 2009, 2011, 2014, 2015. I complained about GS discriminating against me in a conversation with Andrew Moran following a complaint by email of 27/11/2014. I accept the email makes no reference to discrimination but I mentioned it to Mr Moran. GS became my manager in October 2015. My complaint was supported by an email from Gareth Attwood (a colleague) sent in December 2015 to my managers, JH and AM, saying that GS doesn’t like working with me and others because of my protected characteristic.

Below are examples of the harassment you allege –

You micromanaged and over supervised my work – **how and when?**

She bullied me – **how and when?**

Give examples of any other behaviour towards you which you say was harassment.

Who witnessed her behaviour?

(2) Direct discrimination – My managers discriminated against me because of my race. JH, AM, CD, DB.

(i) They treated my grievance less seriously than the grievance raised against me by GS who is white, and they failed to properly investigate my grievance by comparison to GS’s. This

has continued up to DB's investigation and outcome of my stage 2 grievance.

- (ii) they dealt with GS's grievance before mine.
- (iii) they ignored my emails and inappropriately breached confidentiality and shared personal information.
- (iv) An action plan was drawn up but the outcome document was never provided to me despite me asking to see it.
- (v) Since 2012 when I raised a grievance about it GS has been treated more favourably than me. We started on the same band, she has been given a promotion and a job created for her and given career support and I have been blocked from career progression.
- (vi) Ignoring or not taking seriously the concerns that I have raised about poor practices and procedures in the workplace.

Please provide further details of each of the above and explain which manager was involved, when the events took place, why you believe the treatment was because of your race. Are there any other examples of discriminatory behaviour you want to raise?

- (3) Victimisation – because of alleging discrimination against GS, which I did orally in November 2014 to AM, and then in my writing in my grievance in July 2016, GS has deliberately ignored the two risk assessments which were done in July 2015 and July 2016 and has not implemented them and has overworked me which has impacted on my health and wellbeing.

Please provide details of what the overworking has been, explain what the risk assessments have advised, who you discussed them with and what action was taken.

In respect of the whole of your claim please make sure that you provide details of all incidents that you are relying on as being discriminatory.”

5. There was then a further case management preliminary hearing on 26 February 2019 where Employment Judge Robinson analysed the claimant's further and better particulars resulting from Employment Judge Howard's preliminary hearing case management and compiled a list of specific questions, 27 in all, but Employment Judge Robinson also pointed out that the claimant had not responded to all the issues raised by Employment Judge Howard in the first preliminary hearing case management, and re-stated that for each and every allegation the claimant makes he must identify those involved, the date certain occurrences happened and whether her makes a claim in relation to those issues for direct discrimination, victimisation or harassment – in addition to answering the 27 questions.

6. The 27 questions were as follows:
- (1) With regard to the promotion of GS, identify when she was promoted and why the claimant thinks she was promoted instead of him.
 - (2) With regard to the allegation that the claimant was harassed by GS, details of what sort of harassment that amounted to, including the words used, the dates that they occurred and the particular place they occurred.
 - (3) How and in what way did managers of the claimant misuse their power in choosing more difficult work for him to do, identifying the work he had to do that he says is more difficult compared to the work carried out by his white colleagues.
 - (4) The claimant suggests that he was pressured to do multiple jobs, therefore he must give examples of the work that he was asked to do which put him under pressure.
 - (5) In what circumstances, when, where and how, did Ms Shanks ask advice from her white colleagues but not from the claimant, identifying the white colleagues that he says she asked advice of.
 - (6) When and in what circumstances did Ms Shanks refuse to give him breaks? In particular the dates and times when those allegations occurred.
 - (7) In what way was the claimant insulted over his health, what was said, by whom and when?
 - (8) Name the duties that were suddenly changed by the claimant's managers; when, where and in what circumstances and by whom?
 - (9) In what way was the seriousness of the claimant's claims ignored because of his race?
 - (10) If the claimant was labelled as "a trouble maker" and as alleged humiliated in front of white colleagues, name the dates, the times and in what circumstances he was so humiliated and in front of which white colleagues. The names of those colleagues must be set down.
 - (11) In what way did management fail to investigate the harassment from GS in April 2018?
 - (12) Give details of why the claimant believes that GS's grievance was investigated properly and not the claimant's, giving full details of that allegation.
 - (13) The claimant must give details of how GS bullied him with the help of "young white colleagues". The claimant must name those colleagues and also inform the respondent of the time, date and place that that bullying occurred.

- (14) What specifically did GA witness, and the claimant must give the details of the email that he says confirms GA's view that the treatment of the claimant was based on race.
- (15) What specifically caused the claimant anxiety so that he had to visit his GP in June 2016?
- (16) In what way was the claimant threatened by AM on 21 July 2018? In particular what did AM say to him, where and in front of whom, if anybody?
- (17) The claimant must give details to the respondent of exactly what was not considered at stage one and stage two of the grievance hearings. He must list the issues that were not considered.
- (18) The claimant must be specific in how he says the Trust did not follow the Dignity at Work and the Equality and Diversity policy. He must also set out what best practice the managers did not follow.
- (19) How, when and in what circumstances did management use GS to make allegations against the claimant? Furthermore, how, when and in what circumstances did management cover up for GS?
- (20) How, when and in what circumstances did DB force the claimant to attend meetings, and in what terms did AM threaten the claimant to attend the investigatory meeting?
- (21) When the claimant says that management targeted him personally because of his race he must set out who did, when, where and in what circumstances.
- (22) What breaches of confidentiality occurred, on what dates, by whom and relating to what document or issue?
- (23) How was JH's refusal to provide an action plan from the grievance of February 2016 anything to do with the claimant's race?
- (24) How were any issues with the break time system in the department anything to do with the claimant's race? He must explain himself in that regard.
- (25) Who does the claimant compare himself with, and why does he think that he has been treated less favourably with regard to the break time system?
- (26) In what way was the claimant's career progression hampered? What connection has that with race? The claimant must set out with whom he compares himself in that regard.
- (27) With regard to overloading of work in 2016, what work was the claimant given that other white employees did not get? The claimant must give full details.

7. The Order ended with the Employment Judge advising the claimant that he must keep the answers brief but provide exact details. It was stated that the claimant should:

“...identify the issues properly succinctly and yet in enough detail for the respondent to be able to defend themselves. The claimant must not be tempted to expand his claim by adding other allegations not referred to in the list above.”

The matter was to be considered at a further hearing on 29 May 2019.

8. At the hearing on 29 May 2019 an Unless Order was made. The reasons given for that were as follows:

- “(1) The claimant has failed on a number of occasions now to set out the specific allegations he makes with regard to the Trust’s behaviour to him.
- (2) The Employment Judge on the last occasion in February set out specifically 27 points to which the claimant needed to reply. He has failed to do that. The Employment Judge made it clear to the claimant that those questions must be answered briefly but with details as requested and he has failed to do so. Those matters set out in the 27 subparagraphs are the only matters that will be dealt with if this matter gets to a final hearing. However, for the matter to proceed to a final hearing those questions need to be answered appropriately and in detail, with the specific information that the Employment Judge has requested.
- (3) The claimant should understand that he must therefore send his response to those questions to both the Tribunal and the respondent’s solicitors by the date and time mentioned above.
- (4) If he does and the Employment Judge believes that they are adequate responses then the claimant should read and consider the directions which have been sent with this document.”

9. The Unless Order actually said:

“Unless by 4.00pm on 26 June 2019 the claimant prepares and sends, both to the Tribunal and to the respondent’s solicitors, a document specifically dealing with the issues set out in paragraph 8(1)-(27) of the minute sent out to the parties after the 26 February 2019 hearing on 6 March 2019, the claims of the claimant will stand dismissed without further order.”

10. The additional order sent out on the same day after referring to the Unless Order, stated at paragraph 2:

- “(2) The claimant is put on notice that if he does not respond or responds inadequately then all his claims will be struck out at 4.00pm on that day without further order or judgment. (i.e. 26 June 2019)

- (3) There are three possible scenarios, therefore, that will face the parties over the next few weeks. Those scenarios are as follows:
- (i) The claimant inadequately replies to the 27 questions set out in the minute of 26 February 2019 and therefore all his claims will be struck out.
 - (ii) The claimant answers the questions adequately so that the respondent will be able to understand what claim or claims they have to meet. If this occurs then the hearing on 11 July 2019, referred to below, will be a closed preliminary hearing in order for directions to be made. One of the first directions will be for the respondent to file an ET3.
 - (iii) The third alternative is that although the claimant's responses may satisfy the Unless Order they do not set out claims in law which are likely to be successful. In those circumstances the hearing on 11 July 2019 will be a hearing to decide which claims of the claimant survive, if any. The Judge may strike out the claims if he/she believes they have no reasonable prospect of success, or the Judge may decide that the claims have little reasonable prospect of success in which case a deposit will be ordered to be paid by the claimant commensurate upon his ability to pay. If the Employment Judge decides, however, that all or some of those claims can proceed then the preliminary hearing will be changed to a closed preliminary hearing and the appropriate directions made taking this matter on to a final hearing."

11. There was no specific reference to the claimant partially complying with the unless order and what would happen in those circumstances, although "inadequately" suggests a holistic approach

12. On 25 June 2019 the claimant replied to the Unless Order with 24½ pages of closely typed information and argument. Unfortunately, it is clear by the sheer volume that the claimant had not adhered to the request of Employment Judge Robinson to reply succinctly to the 27 questions.

13. On 5 July 2019 the Regional Employment Judge directed that the claimant's claim was not struck out at this stage and a preliminary hearing listed for 11 July 2019 would proceed. The respondent was to provide its representations as to which category within Employment Judge Robinson's Case Management Order made on 29 July 2019 the further information falls, with a copy to the claimant as soon as possible.

14. Accordingly, I understand from that that it was still possible the Unless Order would bite, this being scenario number one, however that hearing was necessary in order to determine whether in effect there was material non compliance.

15. The respondent replied on 5 July 2019 to state that they had understood in any event that the intention was that the Tribunal would decide at the listed hearing

on 11 July which of the three categories in paragraph (iii) of the 31 May 2019 Case Management Order the claimant's reply fell into. The respondent said unfortunately they did not have the time to set out their view before the hearing due to the fact that there were only six days remaining, but they would endeavour to do so ahead of the hearing. If they had to make written representatives or submissions fully in advance there would have to be a postponement of the hearing as there was insufficient time to do so.

16. The Regional Employment Judge ordered that the hearing should proceed and the issues raised by the respondent would be considered then i.e. amongst other things whether there should be a postponement.

17. The respondent did manage to provide some written submissions for the hearing on 11 July 2019. The postponement request was not pursued.

18. The claimant today at first stated he was not ready to deal with the matter once he had sight of the respondent's submissions, however it had always been made clear that the Tribunal would be dealing with the three eventualities set out in Employment Judge Robinson's Case Management Order of 31 May 2019, unless the respondent's postponement request was considered. The claimant had not made a prior postponement request. I advised the claimant it was not the respondent's fault that the submissions were only produced today: the respondent had asked for a postponement in order that they could be served and the claimant could consider them in advance but this had been refused in advance of this hearing. I advised the claimant that although the matter was only listed for three hours I could consider moving it to 2.15pm and then he would have all morning to consider it.

19. The respondent said it could be dealt with today on the basis that it was always known that would be what the issues were today. The simple question was: has the claimant complied with the Unless Order and if not, should his claims be struck out or a deposit ordered. In any event the claimant was given time to read and consider the submissions and his compliance with the unless order would be considered question by question.

The Law

Unless Orders

20. Rule 38(1) of the Employment Tribunals Rules of Procedure 2013 provides that an order of the Tribunal may specify that unless it is complied with by a specified date the claim or response, or part of it, will be dismissed without further order.

21. Rule 38(1) states as follows:

“An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give notice to the parties confirming what has occurred. Where there is non compliance with an Unless Order in “any material respects” a Tribunal has no discretion as to whether or not the claim or response should be struck out. The claim or response, or part, is automatically struck out as at the date of

non compliance and there is no requirement for a further order addressed to the party whom the Unless Order was made. Therefore parties seeking to take advantage of the Unless Order need not make an application for strike out on the basis of failure to comply.”

22. Partial compliance with an Unless Order is not enough. In **The Royal Bank of Scotland v Abraham** EAT the Employment Judge was found to have erred by allowing part of the case to proceed on the basis there had been partial compliance with the Order. This can only occur if the Unless Order is phrased to cater for that possibility.

23. Where a claim or response is dismissed following a failure to comply with an Unless Order the Tribunal must give written notice to the parties confirming what has occurred.

24. Under Rule 38(2) a party can apply for a claim or response which has been dismissed under subsection (1) to be reinstated in the interests of justice This used to be referred to as relief from sanction.

Striking Out

25. Under rule 37 a claim can be struck out on the following basis:

“At any time 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) That it is scandalous or vexatious or has no reasonable prospect of success;
- (b) The manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent, as the case may be, has been scandalous, unreasonable or vexatious;
- (c) For non compliance with any of the rules or with an order of the Tribunal;
- (d) That it has not been actively pursued;
- (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.
- (f) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations either in writing or if requested by the party at a hearing.”

26. In this case the preliminary hearing on 29 May 2019 indicated that the hearing on 11 July 2019 would consider whether or not the matter should be struck out or a deposit ordered.

27. In **Anyanwu & another v South Bank Students Union & another [2001]** the House of Lords highlighted the importance of not striking out discrimination claims

except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination.

Deposit Orders

28. Rule 39 provides that:

“Where a Tribunal considers that an allegation or argument has little reasonable prospect of success it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.”

29. This applies to each claim rather than to the whole of the claim.

30. Rule 39 states:

“(1) Where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party (the paying party) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

...

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out the consequence shall be as if no response had been presented.”

Conclusions

Unless Order

31. Unfortunately the claimant has provided pages of information, however that information is vague and repetitive and barely advances his case in any material respect.

32. Out of the 27 questions it could be said that the claimant has answered numbers 7, 11, 15, 16, 19 in part, and 22. Had the Unless Order been framed to allow the claimant's claim to be partially struck out based on the parts of the Unless Order complied with, I would have done so and left those claims in to consider whether they should be struck out under the ordinary rules 37 and/or whether a deposit order should be made. (In fact I have done this in any event for completeness where the questions relate to a discernible pleaded claim).

33. However, I believe that this Unless Order does not cater for the prospect of a partial strike out and accordingly given my findings I have no alternative but to strike

out the whole of the claimant's claim on the basis that there has been material non compliance with the Unless Order.

34. If I am wrong in that or if the claimant successfully applies for relief from sanction or partial relief from sanction under rule 38(2) I also make the following findings:

- (i) I would strike out the following claims as having no reasonable prospect of success/fair trial not possible/ failure to comply with case management orders; those claims relating to questions 1 (except the 'in advance' claim), 2, 3, (save for the maximum deliveries point) 4, (save for the Occupational Therapy/heavy lifting point), 5, 9 (save in relation to the informal resolution point) 10 (save for the same Occupational Health point)11, 17, 18, 20 and 26.
- (ii) I would issue a deposit order of £100 per claim in respect of the following claims: those relating to questions 11, 12, 19, 23 and 25 save for the finishing early point.
- (iii) I would have allowed the following to proceed subject to time limits issues being resolved: claims relating to questions 1, 3 and 4 as described above only; 7, 9 in relation to the informal resolution point; 10 in relation to the heavy lifting/occupational health point; 16 in respect of AM; 22 in relation to the one specific breach of confidentiality; and 25 relating to allegations GS was allowed to finish early on Fridays.

35. I have borne in mind fully that discrimination cases are fact sensitive and rely on inferences rather than direct evidence.

36. I have generally not considered time limit points as again they require evidence which has not been canvassed. However it was possible to decide that if the claimant's 'in time' claims were struck out then all his claims would be out of time whether there was a continuing course of conduct or not. Therefore the only issue would be whether it would be just and equitable to allow the claims out of time – the earliest claim I have identified as 'discernible' arose in 2012. My opinion at this stage is that if the point is reached where any of the claimant's claims can proceed a preliminary hearing should be held on the discrete point of whether it would be just and equitable to allow the claims out of time (it would also have to be considered whether there was an out of time continuous course of conduct).

37. I have considered below each point of the 27 questions in detail.

38. The respondent's submissions were that the claimant had not complied with the Unless Order of 29 May 2019; that the claims should be struck out as the claimant had not complied with the original Case Management Order made by Employment Judge Howard and subsequent one of Judge Robinson. Further that claims should also be struck out for inter alia having no reasonable prospect of success and providing so little detail that a fair trial was not possible. Alternatively that there was little prospect of success in relation to some of the claimant's claims and a deposit order should be made in relation to each one.

39. It will not be possible in this Judgment to quote everything in the claimant's letter of 25 June 2019 seeking to comply with the unless order but the salient points are recorded or lack of salient points.

Question (1)

40. The claimant provided a copious amount of information, part of which he stated was background information. The specific information which can be gleaned from this after considering it for a considerable amount of time was that GS who is white started working in the department from 2006. In 2012 she applied for and successfully obtained the higher post of Trainee Assistant Practitioner ("TAP"). The claimant did not apply for this but stated management did not make him aware of it before the job was advertised, however the claimant agreed that he was not interested in applying. Accordingly, it is not clear how this, ignoring for the minute that it occurred six years before the claimant issued his claim, can be race discrimination if the claimant did not apply for the job.

41. The claimant then goes on to describe how he was studying for a certificate of achievement and GS for a foundation degree and that study time was denied him. The claimant seems to imply that GS was preparing for her degree in working time but this was not a claim the claimant had made.

42. The claimant then refers to a system of having mock interviews to help people with promotion, however he does not say what relevance this has to any claim or whether he asked for this and it was refused.

43. The claimant goes on to say that he requested an investigation into whether GS was qualified to apply for TAP in 2012.

44. The claimant then referred to his letter of 11 August 2018 giving an example of race discrimination in the recruitment process from 11 July 2018. Paragraph 22 of that letter of 11 August 2018 stated:

"There was a history in the department of promoting staff. Only certain people who the management like are the most that gets promoted with great support although there is no encouragement to promote or support people like me who work sincerely and hard in the department and do not get recognised."

45. The claimant went on to give an example of the Assistant Practitioner post in April 2018 which was given to an unqualified person in the department. He stated the recruitment was not done as per the job advertisement:

"This was disadvantageous for me and other candidates who did not apply for the post thinking the essential qualification criteria required was a must for the post."

46. The claimant was on bereavement leave and the post was advertised and closed within the time he was on bereavement leave. The candidate selected was on sick leave but support was provided to her to complete the work after selection, however this was not an example in relation to GS and the Unless Order required that the claimant provide details in respect of GS. Further this claim had already been disallowed as an amendment.

47. Therefore the only information provided regarding GS was from 2012, however as the claimant did not apply for this job it will be difficult for the claimant to establish race discrimination. Indeed the claimant cannot answer question (1) because he cannot say why she was promoted instead of him as he did not apply for the role. Presumably the question arose because it was assumed prior to these particulars that he did apply for the role.

Conclusions

48. The claimant has answered part of this question in that the promotion occurred in 2012 but not the second part. Accordingly there is material non compliance.

49. If the claimant had complied with the unless order I would have struck this claim out as if the claimant did not apply for the post but positively said as he did he was not interested there can be no less favourable treatment in respect of the actual job.

50. The only potential claims are that the claimant was:

- (1) Not told in advance of the job in 2012 which could be less favourable treatment . This claim is out of time unless it can be shown there was a pattern of acts relating to denying the claimant career progression or a pattern of less favourable treatment i.e. a continuing course of conduct or that it would be just and equitable to extend time. One act is in time relating to the claimant's grievance outcome however if the claim (or claims) relating to that issue is struck out (see below question 17) there would be no 'in time act' and the only issue would be whether it would be just and equitable to extend time. If the situation arises a separate preliminary hearing could be held to determine the point; and/or
- (2) That he was not given the same assistance as GS on subsequent occasions but as he has not given any examples of when this was denied to him that claim has no reasonable prospect of success and would be struck out.

Question (2)

51. The claimant begins by stating harassment was routine in the department and that he believed GS started "troubling him" because of his previous complaints against her in 2007; that she started purposefully leaving him alone in busy areas of work without any help or support; ignoring his queries in relation to workload; advising through other new APs how to do the job in areas he already competent to do; getting extra jobs for him, for example deliveries including lifting heavy boxes, housekeeping in between the massive workload, covering other benches in break times and no support to complete his job. He said he had to sort out "maximum deliveries" in the department until 2015.

52. The claimant stated GS insulted him three times, which was reported to JH, but he does not state what was said in his further particulars. The claimant complained about GS's bad practices, for example he alleged she signed the weekly

fire safety checks before checking that it had been done. However, the claimant does not say why this would be race discrimination: this was him complaining that GS was not doing her job properly, not examples of harassment

53. The claimant states that he has always been assigned to areas with more work and more pressure or where something had gone wrong or a machine had broken down, but he provided no specific examples.

54. The claimant stated that on 25 September 2015 he had emailed AM, JH and VM to state that GS was ignoring him. He goes on to mention an allegation made by GS against him received on 24 April 2016. He referred to an email from GA of 11 December 2015 to AM stating that GS was picking on the claimant because of his race (this was produced at tribunal), however there was no detail. He went on to say his complaints were ignored, which was not a complaint against GS but it appears to be a complaint against potentially AM, VE or JH.

55. The claimant then refers to the new break time system which he complained about on 15 April 2016: that it was strict and rigid only for him but others were having flexible breaks.

56. There was a specific reference to an email of 25 September 2015 but this did not raise concerns about GS ignoring the claimant and makes no mention of race. He does not suggest he has been treated any differently than his other colleagues. This email says:

“Dear Gemma

We will appreciate if you could inform us well in advance about CSR meetings and ask MLAs for any suggestion in the future. Also, any feedback from the meeting will help us to update and improve our knowledge to give our best in the department.”

57. This email does not at all suggest that the claimant was being singled out in any way rather the opposite.

58. There is also a reference in this section to not being provided with an action plan, which was not something GS was involved in.

59. The claimant continues to say that the respondent did not investigate his grievances.

Conclusions

60. The claimant has not complied with the requirement to answer this question.

61. If the claimant had complied with the unless order I would have struck this claim out for complete lack of particularisation as the respondent is unable to know the case it has to meet on the details, or lack of, provided so that a fair trial would not be possible, there is no reasonable prospect of success as no understandable details have been provided and there is still a failure to comply with two case management orders to provide these details.

Question (3)

62. The claimant repeated his allegation that GS left him alone in busy areas of work without any help and gave the example of 'maximum deliveries'. He stated that the maximum deliveries responsibility ended in 2015. He complained about her taking advice from new white colleagues but was not interested in discussing issues with him even though he was the oldest employee in the department and had more experience. He says GS bullied him on many occasions with the help of young white colleagues but gave no examples, save for generalised issues that she ignored him and left him overloaded with work. He also again relied on the email of 25 September. However this email does not allege that GS was ignoring him.

Conclusions

63. The claimant only refers specifically to maximum deliveries, he only refers to GS whereas the question related to managers (in response to his own further particulars). He provides no dates other than the maximum deliveries ended in 2015. There has been material non compliance with the unless order.

64. If the claimant has complied with the unless this claim would have to be struck out as having no reasonable prospect of success as it is simply too vague to be provable, excepting the maximum deliveries point and a fair trial is not possible as there is no information capable of explaining to the respondent in sufficient detail the claim it has to meet. In relation to the maximum deliveries point a preliminary hearing should be held to determine whether it would be just and equitable to allow this claim to proceed as if there is no continuing act (either on the basis it is clearly a specific discrete matter or that the last act relied on is out of time) that is the only argument open to the claimant.

Question (4)

65. The claimant said he was working on busy benches between 2014 and 2016 covering others' work, given plenty of extra jobs. Even though GS was aware of his health issues and recommendations by Occupational Health, he had to sort out heavy deliveries and left him alone to complete massive repetitive work with the help of other APs. No further detail was given.

Conclusions

66. The claimant has not complied with the unless order the information is so general as to be meaningless and the respondent is unable to understand the case it has to meet.

67. If there was compliance with the unless order I would strike out this claim as a fair trial would not be possible as no detail is provided nor comparators delineated in order to begin to establish a prima facie case save for the ignoring of the Occupational health recommendations as if proven inferences could be drawn from this subject to comparators and an explanation from the respondent.

68. The claim is also out of time and the claimant would have to rely on the just and equitable extension for which as I have said before a hearing would be necessary.

Question (5)

69. The claimant said in various situations between 2015 and 2016 GS took advice from AMH, Mark Hilton, David Davies and new MLAs who have now left but not interested in discussing things with him.

Conclusion

70. The claimant has not answered this question in respect of when and where these incidents occurred. Neither has he answered the “how” i.e. giving examples of what was actually said. There is material non compliance with the unless order.

71. If there was compliance the claim would be struck out as a fair trial is not possible given the lack of detail.

Question (6)

72. The claimant identified no times when he was refused breaks. He made allegations that GS socialised in working hours, especially Friday, and had early finishes. He repeated allegations in relation to previous questions in this section.

Conclusion

73. The claimant has failed to answer this question. There is material non compliance.

74. If there had been compliance I would have struck out this claim on the grounds a fair trial is not possible as the claimant has provided no detail whatsoever and has been given three opportunities to do so.

Question (7)

75. This is regarding GS insulting the claimant over his health. He states this occurred between October and December 2015. He states:

“I wasn’t very well that day but came to work as we had a staffing issue. When I saw her I said to her ‘today I am not feeling great’ and immediately GS sarcastically commented ‘you should not be here then’.”

76. This was reported to John Hewitt and GS apologised for what she had said to the claimant.

Conclusion

77. The claimant has answered this question. There is compliance therefore with the unless order.

78. However the incident is three years before the claimant brought his claim and therefore I consider that unless the claimant can show a continuing course of conduct by GS against him ending with an “in time” incident he would be out of time (see question 17).

79. Again a hearing would have to be held to decide if it would be just and equitable to extend time in circumstances where he has had access to union advice throughout.

Question (8)

80. The claimant refers to harassment in his answer although the question is more specific. The harassment allegation is simply that it was every day, particularly after AMH joined in 2014, and he states that he was put under constant pressure to do time consuming duties and more amounts of work but he did not specify any. He stated GS was always on light duties and the pressure of work was always on him. There were last minute changes in rotas and that work documents could easily prove all of this but he did not give any specific examples. He complaint about GS being given unrecorded study leave for most of the week before she became his line manager in mid 2015 which is not a complaint of less favourable treatment of the claimant.

Conclusion

81. The claimant has not complied with the unless order.

82. If there was compliance this claim would be struck out as a fair trial would not be possible due to the lack of detail provided the respondent would not know the case it had to meet

83. The claims are also out of time. My comments above regarding continuous course of conduct and just and equitable apply.

Question (9)

84. The claimant refers to his grievance of 8 July 2016 and 6 February 2017 and an informal grievance in 2015, however he does not say how his claims were ignored because of his race. He does refer to GS but only to complain that she did not seek an informal resolution with him before making a grievance. He goes to complain about being micromanaged for petty issues. He ended up by stating in bold:

“Actions of managers have placed me at a disadvantage at work because of my race and made be uncomfortable to discuss any issues or concerns I had with GS especially since October 2015. I was humiliated in front of white colleagues, unnecessarily pressurised to do extra jobs without support most of the time.”

Conclusion

85. Whilst the claimant refers to other complaints already raised he does not answer the question for e.g. he could reference specific complaints he alleges were ignored, he could say he has been pressurised to resolve matters informally when GS has not been, he could compare an outcome letter to his complaints and set out any complaints which were not dealt with, he could point out deficiencies in the

grievance investigator's methodology. Even if the claimant had provided such information the claimant has given no indication as to why he believes any deficiency in dealing with his claims was because of his race. There is no material compliance with the unless order.

86. If there had been compliance the only discernible claim is that GS should have sought informal resolution with him in 2015. There is no information provided as to why here failure to do so was less favourable treatment (i.e. that the nature of the complaint was amenable to informal resolution?) or why the failure to do so was because of race discrimination. However, as the question of whether the reason for less favourable treatment is race is subject to drawing inferences it is not appropriate to strike out this claim or issue a deposit order. However the claim would be subject to the same time limit issues as referred to above.

87. Any other claims are struck out as a fair trial would not be possible for the reasons I have referred to before.

Question (10)

88. The claimant states this issue arose between 2015 and 2016: that a team of white colleagues were ignoring him and he was forced to complete additional heavy duties and had constant overbearing supervision from them. Occupational Health recommendation of 21 July 2015 was ignored. He names a number of other staff but blames GS as she had not communicated with them appropriately.

89. There are no specific examples of the type of humiliation he complains of, no dates or places.

Conclusion

90. There is material non compliance with the unless order.

91. There is a discernible claim that occupational health recommendations were ignored in that he had to carry out heavy duties but no indication why this was because of the claimant's race. Again because this is a matter subject to inferences I would not strike that claim out or make a deposit order This matter could proceed subject to time limit issues being resolved as indicated above.

92. However any other claims are struck out. It is really quite extraordinary that given numerous opportunities to describe the humiliation he suffered the claimant has failed to do so. The respondent can have no understanding of the case it has to meet; a fair trial therefore is not possible. The claimant has no reasonable prospect of success with this claim in view of the complete lack of detail provided.

Question (11)

93. The claimant refers to an informal grievance raised with JH in October 2015 ongoing until March 2016. The claimant complains about JH refusing to provide him with a final action plan, but the respondent provided copies of an action plan dated 17 November signed off by the claimant on 27 November, further there was evidence this was updated in February. Further, there was an email from the

claimant to JH of 7 December in which he acknowledged that an action plan had been sent to him.

94. In relation to 2016 the claimant's email to AM of 24 February 2016 this made no reference to race. The claimant's email was replied to and not ignored and he was signposted towards raising a grievance and to his union if he was unhappy with the outcome. There were further email exchanges with CD. The respondent submits this is all evidence the claimant's complaints were not ignored

Conclusions

95. The claimant has complied with the unless order however the details provided and the respondent's document's clearly show his grievance was investigated accordingly his claim has little prospect of success and a deposit order of £100 is ordered.

96. These claims are out of time and I refer to my observations above.

Question (12)

97. The claimant alleges that his allegations of race discrimination against GS were not investigated whereas her allegations against him were, however he did not specify dates other than to say from October 2015 to May 2016. The respondent points out that the claimant was directed when he raised issues to union representative and sent a copy of the grievance disputes procedure on 26 February 2016. This was before the grievance raised by GS about the claimant which was 4 April 2016. The claimant's grievance about GS was not raised until July 2016.

98. The claimant states he reported serious allegations against AM to DB but there was no action. However, the email chain from 21 July 2016 to 25 July 2016 shows the claimant agreed no investigation was necessary and ended up by thanking DB.

99. The claimant was unhappy with the outcome of his stage one grievance (26 May 2017) and stage two (18 December 2017) and, as expressed in a follow-up letter on 11 January 2018 he states the outcomes were not arrived at in good faith but he does not allege there was race discrimination, and the outcome letters exemplify that the claimant's complaints had been looked into in considerable detail.

Conclusions

100. The claimant has complied to some extent but does not provide the crucial information which is the differences between the response to GS's grievance against him and his against her.

101. I would order a deposit in relation to this allegation of £100 as it has little prospect of success - the claimant's grievance was investigated and the claimant has failed to set out a cogent case to establish a difference in treatment between himself and GS which is necessary to establish less favourable treatment.

Question (13)

102. The claimant refers to question (2).

Conclusion

103. As the answer to question 2 was inadequate the same conclusion is drawn in respect of this question.

Question (14)

104. The respondent provided a copy of GA's email as the claimant's response to this question was extremely vague. The email did cast aspersions on GS's character but he does not make a specific allegation that the claimant has been less favourably treated due to his race. This was an email of 11 December 2015 which said:

"I am briefly aware of these complaints in regards to Gemma. I think for Andrew to tell him 'you just don't like her' is offensive. I do not think that the matter would be considered objectively by yourselves. I too believe that she has an issue working with people with protected characteristics and/or of ethnic backgrounds. It may also involve social economic background too. She is the type of person who would move seats just because someone sits next to her with a shaven head, and that's something you cannot even label."

Conclusion

105. The email does establish that GA thought GS had difficulties with people from ethnic minorities but also other sorts of individuals. GA does not however refer to any specific incidents he has witnessed and the claimant has not alleged any in his response to the unless order.

106. Therefore there is partial failure to comply.

107. Nothing turns on this question other than GA might be a potential witness accordingly the issue of striking out or a deposit does not arise.

Question (15)

108. The claimant refers to the allegation in 2016 against him (by GS), being given extra work, staff gossiping and being ignored, and the respondent organising investigations with him when he was on sick leave.

Conclusion

109. The claimant has answered this question.

110. Nothing further turns on the answer to this question.

Question (16)

111. The claimant says that he was threatened by AM on 21 July 2016 not 2018 to attend an investigation meeting when he had booked annual leave. He states AM was not aware of his annual leave, and he had to provide evidence to him. AM was not happy and used threatening language, though he does not say what the

threatening language was. He was aggressive, forcing him to attend the meeting. The claimant quotes:

“You must attend the meeting otherwise we will carry on with this meeting and take a decision which will not be good for you. I do not care whatever your family commitments are.”

112. The claimant said he reported this to DB on the same day. We heard this was witnessed by Kasya but she would not give a statement because it may affect her promotion possibilities. He stated that AM had been aggressive before this and refers to an issue regarding a BME meeting that AM called him back from. However, this is not an issue the claimant has ever raised before.

113. The respondent states that it is clear from DB's email to the claimant of 25 July and the claimant's reply of the same date that the claimant agreed this matter re AM did not need to be investigated.

Conclusion

114. The claimant has answered this question

115. The claimant would have to show that AM would not have said the same to someone white which appears to be a mere assertion as it would not be unknown for HR to advise if a person does not attend a hearing it will go ahead in their absence. There is no information about potential comparators. However the words quoted are quite harsh and if proven and not satisfactorily explained may give rise to an inference. This is a discernible claim subject to time limits and I would allow it to proceed if the claim survived the unless order.

116. It is out of time without a continuing course of conduct being established see question 17) or a just and equitable extension being granted.

Question (17)

117. The claimant refers here to his complaints in 2014-16 referred to above: a failure to investigate thoroughly, a failure to follow the ACAS Code of Practice and inconsistent application of Trust policies in his case compared to GS, and a failure to protect his health or deal with harassment properly. Management did not follow best practice to resolve the allegation on 22 April 2016 from GS. The investigating officer was unfair and disadvantageous because he had been involved in the claimant's grievance against GS.

118. The respondent submits that this does not identify the matters required by this question: what were the matters not considered at stage one and stage two? The respondent stated that the outcome letters of 26 May 2017, 18 December 2017 and 11 January 2018 did address the claimant's issues.

Conclusion

119. The claimant has completely failed to answer the question. Therefore there is material non compliance with the unless order

120. Further I would strike this claim out as the claimant has provided no detail at all of how he says the investigations were deficient (this is without considering whether the deficiencies were because of the claimant's race which I have not relied on as that is fact sensitive and subject to inferences). The claimant has no reasonable prospect of success as no details of any less favourable treatment is provided. Further a fair trial is not possible where the respondent has no understanding of the claim it has to meet. Further the claimant has failed to comply with 3 case management orders for further particulars. .

121. If this claim is struck out it means that there are no longer any in time claims and all of the claimant's remaining claims are out of time even if there was a continuous course of conduct.

Question (18)

122. The claimant repeats many of the matters above about the failure to investigate his grievances compared to GS's, and that when they were investigated it was not a reasonable investigation, however without any specific reasons why it was not reasonable; nor does he say why he believes this was due to his race; nor does he specify how the dignity at work or equality and diversity policies were not followed in any specific way. His main contention appears to be that GS's allegations should have been resolved via an informal process rather than a formal process, and he should have been given a chance to challenge the allegations against him before a decision was reached and the opportunity to appeal. This appears to be a reference to the disciplinary policy rather than the policies referred to in question (18).

Conclusion

123. The claimant has failed to answer the question. There is material non compliance.

124. If there had been compliance this claim would be struck out as a fair trial would not be possible without the detail requested by this question.

Question (19)

125. The claimant refers to being in contact with his union in March 2016 to discuss raising a formal grievance against GS and his managers, and that JH and other senior members of staff were aware of the union meetings and that he believes that because they were aware he was going to bring a grievance against JS or themselves that senior management prompted GS to bring a grievance against the claimant which they then promptly dealt with as a disciplinary situation rather than as informally.

126. However, the respondent points out again that on 26 February Mr Hewitt signposted the claimant to the union and to raising a grievance, therefore the suggestion that the respondent "twigged" he was going to make a claim and therefore put GS up to her complaint completely lacks credibility and is illogical. Neither does the claimant specify who used GS to make an allegation against him or how management covered up for GS.

Conclusion

127. The claimant has partly answered the question.

128. However, I would have made a deposit order of £100 in any event as the claim has little prospect of success as the respondent clearly suggested to the claimant well in advance of GS's grievance that he should consult his union and consider taking a grievance. This is inconsistent with the claimant's premise.

Question (20)

129. The claimant refers to communications in October 2017 but does not actually specify the meeting he says that DB forced him to attend.

Conclusion

130. The claimant has not answered this question although he has already indicated that AM forced him to attend an investigatory meeting. There is non compliance with the unless order.

131. If there was compliance I would strike this claim out as it has no reasonable prospect of success as no information regarding any less favourable treatment in respect of DB has been provided.

Question (21)

132. The claimant states two circumstances: one in the allegation against him by GS and the other in career progression compared to white colleagues. He refers to inconsistency in the investigation process and the lack of support for his career progression since he raised a grievance against GS. The claimant states that the investigatory panel involved in both circumstances has tried to cover up known facts.

Conclusion

133. The claimant has provided no specific examples other than the two matters referred to above which are already dealt with in respect of GS in respect of question 19. The only career progression specific issue the claimant has raised is in respect of GS and he has advised that he did not want to apply for that role at the time. Accordingly, nothing has been raised other than in relation to GS's grievance. The claimant has not identified who has targeted him as required by question 21. Accordingly he has not complied with the unless order.

134. If there had been compliance with the unless order I would have struck out the claimant's claim in respect of the career progression as the claimant did not apply for GS's job and no other examples are cited. Accordingly there is no less favourable treatment identified.

135. In respect of the grievance issue the claim is struck out for the same reasons as given re question 17.

Question (22)

136. The claimant says, "The investigating officer and commissioning manager in his case as compared to GS", but nothing specific is mentioned other than the

involvement of VE which he says was “questionable”, and “too many people were involved before the decision was reached”. An email to VE of 5 April 2016 was shared to other staff. This is referred to in the claimant’s grievance and the grievance outcome agrees that the claimant should have been asked before his email was shared with other staff.

Conclusion

137. The claimant has partially complied with the unless order in respect of specifying the 2016 email.

138. If there was compliance with the unless order this claim could continue in respect of the specific email only but would be subject to time limit issues as specified above.

139. All other claims are struck out for the same reasons as given previously in relation to no reasonable prospects of success and lack of a fair trial.

Question (23)

140. The claimant’s allegation that JH refused to provide a final action plan in February 2016 to cover up and hide favourable investigations carried out in favour of GS within the department. The respondent denies that JH refused to provide an action plan. He did so and it was updated.

Conclusion

141. Whilst the respondent denies the factual basis of the claimant’s case and produced documentary evidence that a final action plan was produced but the claimant complained about it and he was advised the only further step was for him to take a grievance the claimant has not said why he believes this was connected to his race

142. Due the lack of response to the actual question the claimant has not complied with the unless order.

143. If there was compliance with the unless order in the light of the documentary evidence produced by the respondent this has little prospect of success and a deposit order would be made of £100.

Question (24)

144. An allegation that the issue was raised in April 2016 stating that his breaks were strictly enforced but no-one else’s. No further information given.

145. The respondent cross referenced this to paragraph 6.

Conclusion

146. The claimant could rely on GS as a comparator and/or his colleagues, however he has not stated if all his colleagues were white. There is compliance with the unless order here.

147. However, I would strike out this claim as there is so little detail provided it has no reasonable prospect of success. The claimant has been given several opportunities to provide this detail but he has failed to do so. Further a fair trial is not possible as it is impossible for the respondent to know the case it has to answer.

Question (25)

148. The claimant relies on GS in relation to a difference in timekeeping, saying that she had flexibility in her breaks, long breaks and early finishes every week and he had to cover for her, however no specific dates or allegations are made.

Conclusions

149. The claimant has answered this question, there is basic compliance with the unless order.

150. However the claim has little prospect of success where the claimant provides no actual examples the only matter the respondent could answer is whether GS finished early every week and C had to cover for her. Accordingly I would allow that issue to proceed if the unless order had been complied with and a deposit order of £100 regarding the other allegations.

Question (26)

151. The claimant first of all refers back to a Certificate of Achievement course started in 2013 which was delayed. The claimant states that the Trust should have provided encouragement to him as an unrepresented group under the Equality and Diversity policy. He was not given support to complete his portfolio compared to other colleagues. Over the last three years the department had recruited ten AP positions and he was the right candidate next to be promoted if he had received the right support to complete his course in time. He again refers to GS's progression in 2012 and her promotion to TAP in 2015.

152. This seems to be a complaint that the Certificate of Achievement was not regarded as equivalent to the Foundation Degree.

153. The claimant quoted the following:

“The Certificate of Achievement is not currently recognised as an approved qualification to progress to a Band 4 Assistant Practitioner role within Laboratory Medicine.”

154. The claimant alleged that Kasya in 2018, however, had her Certificate of Achievement considered in a shortlisting process, but he does not say when and for what role. He does not say who said this or when it occurred. However the respondent points out this job offer was made on 20 April 2018 and it therefore postdates the claimant's Tribunal claim. The claimant had previously sought to amend to include this issue but permission was refused on 6 March 2019.

Conclusion

155. The claimant has mentioned one issue, the certificate of achievement. He has not said how this is connected to his race. The claimant makes no assertion within the ambit of his recognised claim that someone white had their Certificate of Achievement taken into account for a Band 4 role.

156. Accordingly, the claimant has not complied with the unless order.

157. I would strike this claim out. It has no reasonable prospect of success given there is no actual comparator and it is not a claim amenable to a hypothetical comparator.

Question (27)

158. The claimant refers to questions (3) and (4) above, as does the respondent.

Conclusion

159. The conclusions in respect of 3 and 4 are relied on.

Summary

160. Accordingly the claimant's claims are struck out for failure to comply with the unless order.

161. The findings in relation to striking out and deposit orders are in the alternative if I am wrong in deciding there has been material non compliance with the unless order and/or that the order was not severable.

Employment Judge Feeney

Date: 6 September 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 September 2019

FOR THE TRIBUNAL OFFICE

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