



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122324/2018 Held in Edinburgh on 30 September 2019

Employment Judge O'Dempsey

Mr A Leitch

Claimant
Represented by:
Self

Lothian Heath Board

Respondents
Represented by:-
Mr James
(Solicitor)

JUDGMENT

I declare that, pursuant to the order made on 22 July 2019 by Employment Judge Kemp, the claimant's claim was struck out under rule 38(1) of the Employment Tribunal Rules of Procedure on 26 August 2019. The claimant's claim is accordingly dismissed.

REASONS

1. This is the judgment consequent on the orders made by Judge Kemp on 22 July 2019. I do not repeat what the learned judge set out concerning the facts of this case, but it concerns multiple applications for employment by the claimant to the respondent which the claimant states were refused as a result of disability discrimination, and or failure to make reasonable adjustments and or victimisation of the claimant by the respondent.
2. This hearing resulted however from certain orders that were made by the learned judge in the form of “unless orders”.
3. The learned judge ordered the claimant to complete and return to the respondent within 28 days of the judgment being sent to him a Schedule in which he was to do the following (which I summarise):
 - (a) provide the date of each application for employment with the respondent which he claims was unlawfully rejected;
 - (b) provide the date, or a reasonable estimate of the date on which he was informed that each of the applications was not successful;
 - (c) set out each section of the Equality Act 2010 on which he founds;
 - (d) provide the essential facts on which he founds for the purposes of each section;
 - (e) if any issue of timebar arises and the claimant seeks to argue that it is just and equitable to permit his claim to proceed, the basis for that argument.

The learned judge was very clear that the effect of non-compliance was that the claim is dismissed under rule 38. For the avoidance of doubt this states:

“— Unless orders

(1) 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 written notice to the parties confirming what has occurred.

(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.

(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21.”

4. The learned judge did specify in the order that if the order was not complied with by the date specified the claim shall be dismissed. If I conclude that there has been non-compliance, the decision has been made already and I cannot consider the matter further.

Has the claimant complied with the order?

5. From the file it appears that the claimant has presented a document called “Scott Schedule” This does not set out the essential facts on which he bases his claims for discrimination in each case. He has not indicated that he is seeking to argue that it is just and equitable to extend the limitation period under the Equality Act 2010 so that no point can be taken on the non-provision of information under (e) above.

6. In those circumstances I have to consider the law relating to making a declaration that a claim has been struck out.

The law: Automatic dismissal for failure to comply with unless order

7. The party wishing to rely on the unless order should ensure that, on receipt from the tribunal, the order is correctly drafted and accurately relates to the non-compliance of the other party (see *Hamdoun v London General Transport Services Ltd and another* UKEAT/0414/14). In *McCarron v Road Chef Motorways Ltd* [2019] 2 WLUK 731 the EAT emphasised the importance of compliance with the "letter" of an unless order, as well as what might be considered the "spirit" of it.
8. The party who has to comply with an unless order "must be able to see from its terms what is required to comply with it and the order will not be read expansively" against the putative defaulter (see *Wentworth-Wood and others v Maritime Transport Ltd* UKEAT/0316/15).
9. It is important to ensure that the effect of such an order is made clear to the party against whom it is made. It is sufficient if the tribunal has made it "utterly plain" to the party whose case is to be struck out if they do not comply with an order, that this is what will happen (see *Bennett v London Probation Service and others* UKEAT/0194/09).
10. There need not be a total failure to comply. I have to ask whether the claimant has breached the order because he has failed to comply in "any material respect" (*Marcan Shipping (London) Ltd v Kefalas and another* [2007] EWCA Civ 463). I am expected to take a qualitative rather than a "quantative" approach to considering whether there has been compliance (see *Johnson v Oldham Metropolitan Borough Council* [2013] UKEAT/0095/13). It will not, for example, be sufficient if the claimant has complied fully with some parts of the

order but not others. If that is the case, it is likely that there has been a failure to comply.

11. The effect of an unless order is automatic (see e.g. *Royal Bank of Scotland v Abraham* UKEAT/0305/09). If there is non-compliance with an unless order, even partial non-compliance, the consequences set out in the order take effect. In short there is no discretion (see *Scottish Ambulance Service v Laing* UKEAT/0038/12 and *Richards v Manpower Services Ltd* UKEAT/0014/13). The EAT in *Laing* emphasised that the role of this tribunal, where there is already an unless order in place, is to decide whether there has been compliance with the order and to confirm the dismissal of the claim if there has not.
12. The tribunal does however, have the power to grant relief from the sanction of striking out, under rule 38(2). However the defaulting party applies in writing for a reconsideration of the dismissal of the claim or response.

Submissions and discussion

13. The respondent provided a written submission. It refers to 38(1). It correctly makes the point that partial compliance with an unless order is not sufficient and that once the tribunal has determined that there has been partial non-compliance the unless order automatically takes effect.
14. Mr James submitted that in relation to each of the heads of claim there was a defect. He said that in relation to direct discrimination, and by reference to paragraph 57 of the earlier judgment and orders of 22 July 2019, the claimant had failed to comply. He said that the individuals that were allegedly involved in the discrimination had not been identified.
15. In response to this the claimant said that he had indicated that it was the recruitment staff who were responsible. It is correct that in his covering note and in the particulars he has supplied references made to recruitment staff. It

is not entirely clear who he is referring to but I accept that without disclosure by the respondent the claimant is not in a position to be more precise. I do not regard this, therefore as a material breach of the order despite the fact that his covering note indicates that it was only in some cases that it was recruitment staff who were involved in the alleged acts of discrimination.

16. Mr James then submitted that in relation to the claim for indirect discrimination no provision criterion or practice was identified. He refers to paragraph 59 of the earlier judgement. In relation to this the claimant does appear to have specified a provision criterion or practice. However it is not one that can constitute a provision criterion or practice under section 19 (2). This is because the wall which has been identified as one which specifically applied to persons with disability namely the application of the disability competence scheme. I accept that there is facial compliance with the order however.
17. In relation to the claim for reasonable adjustments (by reference to paragraph 60 of the earlier judgment) Mr James makes the point that the claimant has not identified any provision criterion or practice which the respondent allegedly applied to him. Looking at what the claimant has said, I have to agree with the respondent. The claimant says "I have already supplied a training transcript of the respondent which has a nursing PIN number. This pin is linked to my disability work reference and the disability adjustment that I had in place when I started nurse training. This transcript representing skills and knowledge has never helped me secure even basic employment within my organisation".
18. This in no way complies with the requirement to provide the essential facts on which the claim for reasonable adjustments is based. It is a material non-compliance with the order.
19. Finally in relation to the claim for victimisation, by reference to paragraph 61 of the earlier judgement, Mr James makes the point that the claimant has not given the essential facts upon which such a claim could be based. In particular the claimant has not set out the protected acts or acts taken by him.

20. Mr James also made the point that the claimant had not specified the reaction by the respondent to the protected acts. However I am prepared to infer that he is saying that he did not get employment because of what he had done.
21. Finally Mr James complains that the claimant does not specify the causal link between the protected act and the detriment. Given that I accept that no protected act has been specified I have to agree with this point as well.
22. In those circumstances there has been material non-compliance with the tribunal's unless order. The claim is struck out already, and there is no role for me other than to declare that this is the case. I have not in those circumstances considered the alternative basis for the application to strike the claimant's claim out.

Conclusion

23. I make the declaration that the claim was struck out on 26 August 2019, being 28 days after the order was sent to the parties.

Date of Judgement: 30th September 2019
Employment Judge: D O'Dempsey
Date Entered in Register: 11th October 2019
And Issued to Parties