



EMPLOYMENT TRIBUNALS

Claimant: Mr K Kelly-Fleming

Respondent: The Northview Group Limited

Heard at: Reading **On: 18 October 2019**

Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: Mrs S Ashiru (Counsel)
For the Respondent: Ms C Darwin (Counsel)

JUDGMENT

1. The order of the 28 August 2019 is varied so that the date of compliance is the 11 October 2019.
2. The claimant's complaints of discrimination arising from disability pursuant to section 15 Equality Act 2010 and indirect discrimination pursuant to section 19 equality Act 2010 are dismissed upon withdrawal by the claimant.

REASONS

1. The Tribunal made an order that unless the claimant provides the further information referred to in the Tribunal's letter of 22 June 2019 by 12 September 2019 the claim is dismissed without further order. The reasons for making the order were that the claim required clarification; the respondent had asked for further information; the Tribunal had ordered that the further information be provided; despite an extension of time agreed by the parties the claimant had not provided the information requested.
2. On the 12 September 2019 the claimant provided some of the requested information. The information provided by the claimant failed to comply with the Tribunal's order. The claimant subsequently provided the information required on 11 October 2019. The respondent contends that the effect of the Tribunal's order was that the claim was dismissed.
3. The hearing today was for me to determine whether the effect of the Tribunal's order was to dismiss the claim and if so whether to grant any relief from the effect of the unless order.

4. The claimant argued that there had been no material non-compliance with the Tribunal's order. I disagree. The information provided by the claimant on the 12 September 2019 dealt with only part of the information required. From the information provided it would not have been possible to know what the answer was to the unanswered questions in the request for information. An answer to the unanswered questions was necessary for the claimant's complaints to be understood in full. There was therefore in my view a material non-compliance with the order.
5. The explanation for the failure to comply was contained in the witness statement of Mr Ryan Holman Carthew. The explanation provided was not accepted by the respondent and parts of the evidence given was challenged in cross examination. I make my decision on the basis that the evidence in the statement is correct. However, even after accepting the account given by Mr Carthew as to how the further information came to be provided in two tranches, I am not satisfied that there is any good explanation for it. The explanation does not justify a conclusion that the breach can be excused. There is in my view no good reason for the default.
6. The effect of the breach on preparation for the hearing of this case is not serious, save that it has resulted in the respondent having to chase the claimant for further information clarifying his case. The information was requested before the date listed for the closed preliminary hearing for case management. It has not prejudiced the final hearing which had not been listed, and the late provision of the information did not have any impact on the date on which the case was to be listed. There is in my view no serious effect on the preparation for the hearing other than a delay in the respondent having a better understanding of the case it has to meet.
7. While the dilatory manner in which the claimant has responded to the request for further information is an unreasonable way to conduct proceedings a fair trial is still possible between the parties.
8. I note that this is a case where the claimant remains in employment with the respondent. The information requested has now been fully provided. A substantial part of the required information was provided by the claimant in time. The fault giving rise to the failure to provide the information in time was not the claimant's but that of his representatives.
9. Having considered the reason for the default; the effect on preparation for the hearing; and the interest of justice, I am of the view that this is an appropriate case in which to grant relief. I therefore amend the order of the 28 August 2019 so that the date of compliance is the 11 October 2019.
10. A further issue arises namely whether the claimant has withdrawn the claims made pursuant to sections 15 and 19 of the Equality Act 2010. This arises from the manner in which the further information has been provided by the claimant. In various places the claimant states in answer to questions that the "the claimant is no longer pursuing this head of claim". The claimant says that this should not be read as a withdrawal of any complaint. The respondent states that it is a clear statement having the effect of withdrawing the claim.

11. I note that there are ambiguities in the way in which the phrase “the claimant is no longer pursuing this head of claim” has been used in two instances. In respect of the claim for reasonable adjustments pursuant to section 20 Equality Act 2010 and where reference is made to section 39 (2)(d) Equality Act 2010. The effect where the phrase is used in these instances in my view, having regard to the document read as whole, is not to withdraw any complaint.
12. However, where the phrase is used in respect of the claims made relying on sections 15 and 19 Equality Act 2010 there is in my view a clear and unambiguous withdrawal.
13. Rule 51 of the Employment Tribunals Rules of Procedure 2013 provides that: “Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.” There is no specific form required to withdraw a claim. What is required is an unambiguous statement that the claim is withdrawn. I am satisfied that the use of the phrase “the claimant is no longer pursuing this head of claim” in respect of the claims made under sections 15 and 19, read in its proper context and having regard to the nature of the document in the context of the claim, is an unambiguous statement that the claim is being withdrawn.
14. The effect of rule 51 is that when a claim is withdrawn it comes to an end. Rule 52 is concerned with what happens after a case has been withdrawn. Rule 52 provides: “Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.
15. I am satisfied that the claims made under sections 15 and 19 of the Equality Act 2010 are to be dismissed pursuant to rule 52.

Employment Judge Gumbiti-Zimuto

Date: 22 October 2019

Sent to the parties on:

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For the Tribunals Office

Note

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