**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4121996/2018**

**Heard at Edinburgh on 7 October 2019**

**Employment Judge J D Young**

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| **Mr A Okongwu** | **Claimant**<br>**In Person** |
| **Edinburgh Napier University** | **Respondent**<br>**Represented by**<br>**Mr B Nichol -**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that the claim by the claimant is dismissed under Rule 38 of Schedule 1 to the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013.

**REASONS**

## Introduction

1. The claimant submitted a claim to the Tribunal complaining that he had been unlawfully discriminated against on the grounds of race and/or disability. The respondents submitted a response in which they denied discrimination and

indicated that the claimant had been summarily dismissed for reasons which they believed to amount to gross misconduct. They sought additional specification of the claimant's claims. In particular they advised that they did not accept that the claimant was disabled as defined within section 6 of the Equality Act 2010.

2. Preliminary hearings took place in relation to the claim being:-

(1) Preliminary hearing of 11 January 2019 after which the Tribunal issued an order for the claimant to provide further and better particulars of his claim in various respects. That order was issued on 15 January 2019 and indicated that if the order was not complied with then the Tribunal may strike out the whole or part of the claim under Rule 37 of the Tribunal Rules of Procedure. The claimant was to respond to the order made by 16 February 2019. As part of the note on the preliminary hearing it was recorded that the claimant was free to take advice from Edinburgh Napier Advice Clinic on his claim and the order made. At that time a further preliminary hearing was fixed for 7 March 2019.

(2) At the further preliminary hearing of 7 March 2019 it was noted that while there had been correspondence between the claimant and the Tribunal office the claimant had not answered the questions posed in the order issued 15 January 2019. That had resulted in the respondent seeking a hearing on "strike out" or alternatively an "unless order" in a letter to the Tribunal dated 27 February 2019. The note of the hearing indicates that the claimant had not yet sought advice from Edinburgh Napier University Advice Clinic or elsewhere and he was urged to do so. It was also agreed that the claimant be assisted by an interpreter at any future hearing and in the circumstances it was considered inappropriate to issue an "unless order" but that a preliminary hearing on "strike out" should be fixed for 14 May 2019. In the meantime the claimant was to use his best endeavours (with the assistance of law clinics or other agencies) to answer the orders made in the note issued 15 January 2019.

Again the claimant was advised that if the order was not complied with then the Tribunal may strike out the whole or part of the claim under Rule 37 of the Rules of Procedure.

(3) At the preliminary hearing of 14 May 2019 the claimant was assisted by an interpreter familiar with the Igbo language. By that time the Tribunal had received a note of argument from the respondent setting out their application to strike out under Rule 31(7)(1)(a), (c) and (d). On the same date the claimant had submitted a letter setting out the arguments as to why his claim should not be struck out. Also on 14 May 2019 before the start of the preliminary hearing the claimant submitted an email setting out a number of points in support of his claims but not complying either in format or content with the 0rder issued 15 January 2019. At that time it was decided that further time be given to the claimant to comply with the order set out in the note issued 15 January 2019. The claimant was granted 2 months to comply given his explanation that he had been assisted by a volunteer advisor at CAB who was not always available. It was stressed to the claimant at that time that this was his "last chance" to comply with the orders. In those circumstances the existing application of 27 February 2019 for strike out was refused; the claimant's application of 7 March 19 to set aside the orders was also refused; and the claimant's application to vary the January 2019 order was granted. The order was varied as follows –

> "In accordance with the power set out in Rule 29 of the Rules the January 2019 orders are varied so that the date by which they must be complied with is extended to the date which is 2 calendar months from the date of this Order, that is 15 July 2019.

**UNLESS THIS ORDER IS COMPLIED WITH BY THE DATE SPECIFIED THE CLAIM SHALL BE DISMISSED ON THE DATE OF NON COMPLIANCE WITHOUT FURTHER ORDER**"

3. The claimant sent an email to the Tribunal office dated 14 July 2019 with a copy to the respondent. By email of 17 July 2019 the respondent advised that they did not consider that the email from the claimant complied with the "unless order" and requested that the claim be struck out in terms of the Tribunal Rules of Procedure. The Tribunal then fixed a hearing on that application for 7 October 2019.

**Documentation**

4. The respondent produced documents paginated 1-56 for the hearing. That included the email to the Tribunal of 14 July 2019 from the claimant (41/43); a further email to the Tribunal of 30 September 2019 (51/52); a copy of report from Dr F Ogundipe at Astley Ainsley Hospital dated 15 August 2019 (55); and information from Dr Hayley Harris of Muirhouse Medical Group dated 27 September 2018 (56).

**The Hearing**

5. At the hearing I heard submissions from both Mr Nichol for the respondent and the claimant. The claimant was assisted by Mr Mottoh an interpreter familiar with the Igbo language.

**Submission for the Respondent**

6. Mr Nichol for the respondent referred to the background of preliminary hearings to this point. He made reference to the note of the preliminary hearing of 11 January 2019 issued 15 January 2019 (2/8); the note of the preliminary hearing of 7 March 2019 issued on that day (24/27); and note of preliminary hearing of 14 May 2019 issued 15 May 2019 (37/40).

7. He emphasised that there had been consideration given to the claimant unrepresented and that he had been encouraged to seek appropriate advice on the response to the orders made in January 2019. He also noted that within the email response to the Tribunal dated 15 February 2019 (9/10) the claimant had agreed that the respondent was not aware of any disability at the point of their investigation and disciplinary hearings. He emphasised that in the note of the hearing of 7 March 2019 it was stated that the claimant had not answered the matters posed in the order of 15 January 2019. The claimant had intimated a further email on 7 May 2019 (30/34) but this was a note of argument as to why the claim should not be struck out rather than seeking to address the order made by providing further and better particulars of the claim.

8. That had led to the unless order being made on 15 May 2019. That order was very clear in its terms namely that the compliance with the order of January 19 required to be made by 15 July 2019 otherwise the claim would be dismissed on the date of non-compliance.

9. It was submitted that the email sent to the Tribunal and copied to the respondent of 14 July 2019 (41/43) did not address or comply with the order made The respondent's position was that email wholly failed to comply with the order of 15 January 2019 as varied.

10. While the claimant had submitted some further documents by email of 30 September 2019 those were irrelevant. There had been no compliance by 15 July 19 being the date for compliance of the order of 15 January 2019.

11. Reference was made to cases of:-

    (a) ***Marcan Shipping (London) Limited v George Kefalas, Candida Corporation*** [2007] EWCA Civ 463 where it was submitted the law was clearly set out (paragraph 34) namely that the "sanction embodied in an "unless" order in traditional form takes effect without the need for

any further order if the party to whom it is addressed fails to comply with it in any material respect". In those circumstances the court's function was limited to deciding what order should properly be made to reflect the sanction which has already taken effect. It should be assumed that at the time of making the order the court considered all the relevant factors and reached the decision that the sanction should take effect in the event of default.

(b) ***Royal Bank of Scotland v Abraham*** [2009] WL 4667073 wherein (paragraphs 28/29) it was stated that once there was non-compliance the "automatic order" made previously came into effect.

(c) ***Scottish Ambulance Service v Laing*** UKEATS/0038/12 wherein it was accepted (paragraph 35) that the only outcome open to a Tribunal where there has been non-compliance with an unless order is that the claim should be struck out.

12. It was also submitted that if the claim was not to be dismissed under Rule 38 then it should be struck out under Rule 37 (a) (b) (c) or (d).

**Submission by the Claimant**

13. The claimant's submission covered the following matters:-

(a) The Tribunal should take into consideration the position of someone who is not well. Reference was made to the report from Dr Rebecca Sharp (55) which indicated that the "working diagnosis is still one of a delusional disorder" for the claimant. That report dated 15 August 2019 and intimated to the Tribunal on 30 September 2019 advised that the claimant was on medication in the form of "Olanzapine and Fluoxetine". He had been referred to Psychology but there was some "wait for this". And meantime would be offered review in outpatient

clinics. The claimant was advised that he had a further appointment of 7 November 2019.

The claimant also referred to the report from Muirhouse Medical Group dated 27 September 2018 (56) again intimated to the Tribunal on 30 September 2019 indicating that the claimant's thoughts could be "disordered" and he had "paranoid ideation". It was also indicated that his condition was likely to be long term and medication may help.

(b) He advised that at the time of his dismissal the respondent wished to ascertain if he had "done wrong" and as a result he was suspended. The respondent had conducted their investigation and had indicated that before he could be readmitted they needed to confirm whether he was well or not and so had obtained the reply from Dr Harris (56 of the productions).The claimant advised that he did not consider that the respondent had taken appropriate advice. Their contact with an Occupational Health advisor had not been done properly and "shabbily". They had not followed appropriate procedure. The respondent had not had a clear view of the condition affecting the appellant.

(c) The orders that had been made may be appropriate for someone of very good mental health but compliance should not be expected of someone who was not well enough to do all that was required. In this case the respondent was trying to convince the Tribunal that if someone was "less than 100% well" then they had "failed" and he was confused about that.

(d) He considered that if he was able to get access to the respondent's records then he would find that others had not been dealt with in the same way by the respondent. He referred to statements by the President of Ghana to the effect "I do not know the law – I know what it means to be hungry – I know what it means to sleep at night without

food". Orders or laws were made in such a way that someone of limited ability could be victimised and it was then difficult for that person to obtain justice.

(e) He referred to the email sent on 14 July 2019 wherein it was said how the law discriminated against a person of his colour based on his own reasoning and that he "gave instances". He had also given an account of how he saw himself as regards the law.

(f) He advised that the Tribunal should look into this case. It was the case that rules guided the Tribunal and the respondent should also be expected to go by the rules. They wanted the case struck out because they did not want to get to the merits of the case. They had taken this action because they knew that because of his health problems it would be difficult for him to go by the rules. Thus it was necessary to appeal to the Tribunal to allow the case to proceed.

(g) It was important for citizens to have redress where wrongs affected those citizens. He had not done anything wrong and he expected that there would be an avenue for redress.

(h) He had said previously that he would like the CCTV footage to confirm his claim that he had done nothing wrong in respect of the incident founded upon by the respondent. He was the only black person involved and because of that there had been a failure to investigate properly. He wanted the CCTV to provide a true record of matters. It was important for the Tribunal to look at the root cause of the matter.

(i) He submitted that others would have faced the same problems but would have kept quiet about it. It was important to follow the case to a conclusion. The Courts of Justice including the Tribunal were the last resort of the common man and it was important that matters be heard. The reports that had been produced should be sufficient to convince

the Tribunal and the respondent that it was best that matters be resolved by hearing the merits of his case.

## Conclusions

### The Relevant Law

14. Mr Nichol for the respondent correctly identified the relevant law applicable to "unless orders". The order which was issued 15 May 2019 is an "unless order". In the case of the "unless order" the only function of the Tribunal is to consider if there has been compliance. The Tribunal has no other discretion. As was stated in ***Scottish Ambulance Service v Laing*** "notice has been given in the order itself and if the order is not complied with then the claim or response is struck out as at the date of non-compliance without any further proceeding being required or indeed provided for under the Employment Tribunal Rules. The recipient of an "unless order" should be under no illusions – the claim or response will be struck out without further ado if he does not do as the Tribunal directs him. Further partial compliance will not do. If there is a failure to comply, whether wholly or partially, the Tribunal cannot revisit its decision that failure to comply will result in automatic strike out".

15. Accordingly issues of fair notice, proportionality and reaching a decision by means of exercising discretion were not relevant when considering an "unless order". The issue for the Tribunal at the stage reached in this hearing was whether or not the claimant had complied with the order issued 15 January 2019 by 15 July 2019.

### Compliance

16. The orders of 15 January 2019 were explicit. The claimant had not the relevant qualifying period of employment to bring a case of unfair dismissal. He brings a case of discrimination on grounds of disability and on grounds of race. In essence he was ordered to provide further and better particulars of those claims.

17. In respect of disability he was essentially ordered to:-

- Identify the nature of the impairment or impairments from which he claims to suffer and how that affected his ability to perform day to day activities; give details of how he said the adverse effects were substantial; how the adverse effects were long term in the sense of lasting for 12 months or more or being expected to last for more than 12 months; and the date from which he asserted his impairment constituted a disability.

- Identify details in chronological order of the events or incidents upon which he relied in support of his case including the date of each event; the persons involved; what happened and what was done or said in each case

- Where it was stated that the claimant alleged unlawful discrimination on the grounds of disability he was to provide specification of whether those acts were said to amount to less favourable treatment or harassment or both; to specify the acts complained of which are said to amount to less favourable treatment or harassment; the identity of the person or persons with whom the claimant compares his treatment; and the basis upon which the less favourable treatment or harassment is said to have occurred because of his disability

- Where he alleged failure to make reasonable adjustments he was to specify the provision, criteria or practice which put him as a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled; and those steps he considers it would have been reasonable for the respondents to take to avoid such disadvantage

- Where he alleged indirect discrimination on the grounds of disability he was to set out the identity of the group of those he considered share

his protected characteristic; the provision, criteria or practice which he considered put such group at a disadvantage; and the nature of that disadvantage

- Where he alleged unlawful victimisation he should set out what he considered to be the protected act and what he considered to be the detriment suffered as a result of making such a protected act

- In relation to the claim of race discrimination he should provide specification of any comparator with whom he sought to compare his treatment; where the comparator was hypothetical the characteristics of that comparator; the act or acts complained of which were said to amount to less favourable treatment; and the basis on which he asserted that the less favourable treatment is said to have occurred because of his race

18. Those orders were set out in explicit format (2/4).

19. The issue then is whether the email of 14 July 2019 sent to the Tribunal complied with that order. I find that it did not.

20. That email (41/43 of the productions) set out:-

(a) an appeal that the appellant's capability was limited not only by accessibility to consistent legal representation but also by the "fundamentals of the present psychological and psychiatric position I am presently dealing with with the help of specialist health providers from the NHS and my other employers who are taking a compassionate approach to ensure my welfare is taken seriously".

(b) that his occupational therapist had indicated that while the claimant was able to associate with life better as a result of engagement with specialist health providers "the failings of the occupational health

recommendations of the respondent to recognise this in their report present concerns of a discriminatory approach or strategy on the part of the respondent in dealing with health concerns of employee".

(c) while he accepted that the respondent were unaware of his different ability he believed that the respondent failed in their duty of care to investigate findings from the investigation and correspondence that prompted an employee of the respondent to advise him to consult specialist health providers.

(d) his belief that he had a responsibility to raise his concerns on the matter in the "general interest of posterity and society".

(e) that he would wish to address the order for "information for discriminatory concern on disability". He states that the mere fact that the respondent relied on an investigation report that failed to take account of non-biased evidence sources was sufficient to shift the burden of proof to the respondent to satisfy the Tribunal that his dismissal was not racially motivated.

(f) that the respondent should be seen to have a responsibility to satisfy the Tribunal that their failure to comply with the "RIDDOR Act and my immediate request for the CCTV footage of the incident of the 20/4/2019 was not discriminatory". It was also important for the Tribunal to take into account the reply from the respondent to his request for security officers on shift on the day of the alleged altercation to be presented as witness. That would support his concerns of racial discrimination because it seemed to be the case that the respondent was unwilling to take the chance that he called for the only "black security in the security team to present his observation from the CCTV footage on the incident of altercation". That, in his view, was an appropriate perspective from which the case should be considered given that from a "psychic and historical awareness he would be

investigated by a predominantly white team". Also the respondent should have considered engaging interpretation services as the Tribunal had done.

(g) that it was discriminatory in his view that the investigation procedures did not take the preservation of CCTV evidence seriously. If it had it would have become clear that there was no action undertaken by himself that was inappropriate. That evidence would have presented a non-biased account. That was sufficient to pass the legal burden of proof to the respondent.

(h) that considering the depth of information and concerns raised by his decision to approach the Tribunal striking out was not within the objective set out by the law. He followed his conscience by approaching the Tribunal as part of his awareness of the need to always follow due process. There had to be a provision set out by Parliament to empower a court to curtail the ability of institutions to withhold or fail to properly process vital evidence such as CCTV evidence that would lead to the termination of an employment in a way that leaves an employee feeling discriminated.

21. I could not consider that the response of 14 July 2019 went near to answering the specific orders for further and better particulars of the claims of disability and racial discrimination.

22. On disability the claimant did not give details of the impairment or impairments affecting him; how that affected his day to day activities; and any long term effect. The response did not set out in chronological order any events upon which he relied. It did not set out facts which were said to amount to less favourable treatment or harassment or both. It did not set out the provision, criteria or practice which put him at a substantial disadvantage and what steps he considers should have been taken to avoid such disadvantage. It did not set out the identity of the group of those he considered share his protected characteristics to support his

claim of indirect discrimination. It did not set out the protected act in respect of the claim for unlawful victimisation.

23. In respect of racial discrimination the email did not set out the identity of any comparator with whom he sought to compare his treatment; if that comparator was hypothetical the characteristics of that comparator; the act or acts complained of which are said to amount to less favourable treatment; and the basis upon which he would say that occurred because of his race.

24. The order issued on 15 May 2019 was explicit in its terms. It stated that the date by which the orders of 15 January 2019 were to be complied with was extended to 15 July 2019. It was stated that unless that order was complied with by the specified date the claim "shall be dismissed on the date of non-compliance". I find that the email of 14 July 2019 did not effect compliance and so the claim was dismissed under Rule 38 of the Tribunal's Rules of Procedure 2013.

25. Given that there has been non-compliance with an order of the Tribunal over a substantial period I would also have struck out the claim under Rule 37(c) of the Tribunal's Rules of Procedure 2013. It is important that the party knows the case that is made against them. The orders requested in January 2019 were to that end. There has been persistent failure to comply and so had the claim not been dismissed under Rule 38 I would have struck it out under Rule 37(c) of the Rules of Procedure.

**Date of Judgment: 03 November 2019**
**Employment Judge: James Young**
**Entered Into the Register: 07 November 2019**
**And Copied to Parties**