



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102721/2019

Held in Edinburgh on 13th December 2019

Employment Judge R Sorrell

Ms E Storey

**Claimant
In Person**

Whisky Merchant Trading Ltd

**Respondent
Represented by
Mr A Wilson, Solicitor**

JUDGMENT OF THE TRIBUNAL

The Judgment of the Tribunal is that the claims of disability discrimination and age discrimination are struck out under Rule 38 (1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

ORDER OF THE TRIBUNAL

1) It is the Order of the Tribunal that the claimant shall provide the following further specification to the respondent within 28 days of receipt of this Judgment:-

- (i) Details of all alleged acts of sex discrimination, including the dates on which these occurred and the person(s) who meted out the less favourable treatment and their job title;
- (ii) The nature of the less favourable treatment the claimant alleges she has suffered and;
- (iii) The basis on which the less favourable treatment is because of the claimant's sex.

2) It is the Order of the Tribunal that the respondent shall provide the following further specification to the claimant within 28 days of receipt of this Judgment:-

- (i) Details of the actual full time equivalent salary offered to the claimant's male predecessor referred to in the ET3 response form as compared to the claimant's and her female predecessor's salary in the same role;
- (ii) Copies of the respondent's bank statements showing that the claimant's wages were paid on or before 28 February 2019;
- (iii) Copies of the claimant's final wage slip and her P45 form together with an explanation of the calculation of each.

REASONS

Introduction

1. This Open Preliminary Hearing was arranged following a Case Management Preliminary Hearing on 3rd October 2019 at which EJ d'Inverno noted parties' positions in respect of the claimant's compliance with EJ Young's Order of 17th May 2019 in that the claimant considered she had complied with the Order and that the respondent did not. This Hearing was therefore scheduled in order for the Tribunal to determine whether the terms of EJ Young's Order of 17th May 2019 have been complied with and accordingly, if the automatic strike out of the age and disability discrimination claims has occurred by operation of Rule 38 (1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
2. At the Case Management Preliminary Hearing that took place on 17th May 2019, Employment Judge Young issued the following Order:-

"If the claimant advises that she intends to proceed with her claim against the respondents then within 28 days of the date of intimation of this Note she shall supply to the Tribunal (and copy to the respondents) written specification of the facts upon which she would found her complaints of discrimination on the grounds of age and disability.

If this Order is not complied with by the date specified the complaints of discrimination on the grounds of age and disability shall be dismissed without further Order in terms of Rule 38 to Schedule 1 of the Employment

Tribunals (Constitution and Rules of Procedure) Regulations 2013. If those claims are dismissed on that basis the Tribunal shall give written notice to the parties confirming that has occurred.”

3. In an email of 18th June 2019, the claimant responded to this Order as follows:-

“I am providing specifics in that I was discriminated against on grounds of disability, in that reference have been made to me getting “the help I need” and repeated references to me as being “erratic”.

I am providing specifics about being discriminated on grounds of age in that I was subjected to derogatory comments about fat old women, whilst in the workplace.”

4. The day before this Hearing, the respondent lodged written submissions. In summary, these are that it is the respondent’s position that the terms of the Order have not been complied with. Employment Judge Young made an Order which was quite specific as to its terms. All that the claimant has done is to issue an email in the most general of terms on the allegations without any attempt being made to offer any specification of facts, context or grounds for advancing these claims whatsoever. The result of this total absence of any meaningful specification is that the respondents still do not know what case is being made against them by the claimant. So far as the allegation of disability discrimination is concerned, no attempt is made by the claimant to set out what the nature of her disability is, what unfavourable treatment is said to have arisen and that this unfavourable treatment

occurs by reason of that disability. Similarly in relation to the allegation of age discrimination, no attempt is made to identify what less favourable treatment has occurred and that such less favourable treatment occurs by reference to her age.

5. The respondents are simply left wholly in the dark as to the alleged conduct by them which they are supposed to answer. As a matter of proper practice Tribunal Orders are there to be obeyed otherwise cases cannot be properly case managed and fairness achieved between parties (**Essombe v Nandos Chickenland Limited** (2007) UKEAT0550_06_1801, paragraph 18). In this particular case the claimant has simply not addressed the direction given. The original Employment Tribunal claim in this case was lodged on 27th February 2019. Some 10 months later we are no further forward in understanding the allegations against the respondents and there have been various procedural Hearings. Striking out is a draconian order to be deployed only in a clear and obvious case (**Essombe**, paragraph 17). This is such a case. Any prejudice to the claimant is wholly self-induced. Strike out by operation of Rule 38 is an appropriate response having regard to the overriding objective.

6. The claimant replied by email to the respondent's written submissions as follows:-

"As you have not provided any of the information I have requested you be ordered to, despite for much of this saying you had no problem in doing so ... I am in no position to respond. Sending documents like this to a vulnerable mentally ill party just two working hours before a Hearing also means I do not have sufficient time to respond and would need a further

CMD (which I am sure you would be billing your client top dollar for ...) I have initiated I would accept a substantially reduced settlement some months ago ... but you have not only refused to engage, but told me I should not inform the Tribunal ... I would remind you that Employment Tribunal rulings are publicly available and with the publicity your international fraudster client (albeit by slightly changing his name) has already attracted they may wish to take this into consideration.”

7. At the Hearing the claimant made further submissions. These were that she was only able to provide the specification she did because she was not in possession of the information that she required from the respondent. She did not ask for this information from the respondent prior to complying with the Order as she thought the case was sisted and because around the same time she was arrested and detained by the police following a complaint made by Mr Ryan McCafferty of the respondent company. In particular the information from the respondent that would have assisted her were all of the logs/screenshots for “wee chats” relating to her, as well as details of the actual full time equivalent salary offered to her male predecessor as per her requests for a Documents Order on 20th October 2019. This information would have allowed her to give the exact dates in respect to the alleged discriminatory treatment, what was said and by whom and would show that these comments were the reason for her dismissal by the respondent.

8. The respondent submitted at the Hearing that while the Order to sist these proceedings was issued on 27th June 2019, which post- dated EJ Young’s Order of 17 May 2019 and is therefore irrelevant, it did not post-date the request by the

police to the claimant not to contact the respondent. The claimant's request for documentation of 20th October 2019 was responded to by the respondent on 13th November 2019 in that there was no basis in the claim presented in respect of the request for all logs/screenshots for "wee chat" which in any event were irrelevant. As the respondents do not know what the issues of fact are in respect of the age and disability discrimination claims and therefore what the relevant documents are, this request is considered to be a fishing diligence exercise in order for the claimant to base her claim on the information sought which is not acceptable. The claimant's application for recovery of documentation comes at far too late a stage and does not address the manifest deficiencies in her claim as identified by EJ Young. The respondents are however happy to voluntarily produce the information regarding the salary of the claimant's male predecessor.

9. In reply, the claimant submitted that the less favourable treatment she suffered was her dismissal which was as a result of her disability and that she did not state these things at the time because she needed all of the relevant information first. Further, that in her response to EJ Young's Order, she didn't state that she required more information in order to comply with that Order as she had just been detained by the police on or about 8th to 9th June 2019 following the complaint made by Mr Ryan McCafferty of the respondent company and she was afraid that she would be sent to prison if she sent an email to the respondent.
10. On a separate matter Mr Wilson sought to make a formal application regarding emails he has received from the claimant that he alleges range from the offensive to the inflammatory, some of which are in the possession of the Tribunal. In view

of the fact that no prior notice of his application had been given to the claimant or indeed the Tribunal, Mr Wilson was directed to make such an application in writing.

Relevant Law

Unless Order

11. **Rule 38 of the Employment Tribunal (Constitution and Rules of Procedure)**

Regulations 2013 provides that:

- (i) *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.*
- (ii) *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.*
- (iii) *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*

12. The case of **Marcan Shipping (London) Ltd v Kefalas and anor 2007 EWCA Civ 463, CA** held that where there is non-compliance with an unless order in 'any material respect,' a Tribunal has no discretion as to whether or not the claim or response should be struck out and it is automatically struck out as at the date of non-compliance. The authority of **Scottish Ambulance Service v Laing EATS 0038/12** determined that while issues of fair notice, proportionality, if a fair hearing is still possible and the exercise of discretion are all relevant features when considering whether to issue a strike-out under Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, they are not of any relevance when considering whether or not an unless order has complied with.

13. Although compliance need not be precise and exact, partial compliance with an unless order is not enough. In **Johnson v Oldham Metropolitan Borough Council EAT 0095/13** it was held that 'material' compliance is a better word than 'substantial' compliance because it draws attention to the purpose for which compliance with the order is sought. What is relevant (i.e. 'material') is that the particulars given enable the other party to know the case it has to meet or enable the Tribunal to understand what is being asserted. The Tribunal should therefore approach the question of whether there has been compliance qualitatively. This approach was more recently endorsed in the case of **Uwhubetine v NHS Commissioning Board England UKEAT/0264/18/JOJ**.

Issues to be determined

1. Has the claimant complied with the Order of EJ Young dated 17th May 2019?

2. If not, should the claim be automatically struck out in accordance with Rule 38 (1) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013?
3. If so, is further specification of the claims required?
4. Is further disclosure by either party required in respect of the sex discrimination claim?

Conclusion

14. Having considered the Order issued by EJ Young on 17 May 2019 that the claimant provide written specification of the facts upon which she would found her complaints of discrimination on the grounds of age and disability, the claimant's response to that on 18 June 2019 and parties' submissions, I have taken the view that there has been no material compliance by the claimant in respect to the Order.
15. This is because her response in respect to the disability discrimination claim does not set out the nature of her disability and the unfavourable treatment she allegedly suffered by reason of that disability. Equally, her response in respect of the age discrimination claim does not specify the unfavourable treatment she allegedly suffered by reference to her age. In applying the authorities of **Johnson** ("*supra*") and **Uwhubetine** ("*supra*"), I am therefore of the view that the particulars given do not enable the respondent to know the case it has to meet or enable the Tribunal to understand what is being asserted.

16. In reaching this view, I have had regard to the authorities of **Marcan Shipping (London) Ltd (“supra”)** and **Scottish Ambulance Service (“supra”)** in that where there is no material compliance with the Order, the Tribunal has no discretion as to whether or not the claim or response should be struck out and cannot take account of the factors considered in determining whether to issue a strike out under Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.
17. I accordingly found that the claims of age and disability discrimination should be automatically struck out in accordance with EJ Young’s Order under Rule 38 (1) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.
18. In respect of further case management of the residual claim of sex discrimination, I considered that it was appropriate to issue an Order that the claimant provides further specification of that claim as set out above and that the respondent provides the claimant with the information sought by her on 20 October 2019 that they have indicated they are willing to provide. Any additional disclosure sought by parties’ in respect of this claim should be made without further delay in specific terms stating the relevance of the information sought to the claim.
19. **Date listings stencils for a Final Hearing in respect to the sex discrimination claim are issued to parties with this Judgment which should be completed and returned within 7 days of receipt of this Judgment.**

Date of Judgment: 23 December 2019
Employment Judge: Rosie Sorrell
Entered Into the Register: 30 December 2019
And Copied to Parties