



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106970/19

Held on 16 December 2019

Employment Judge N M Hosie

Mr D Hale

**Claimant
In Person**

Aberdeen Skills And Enterprise Training Ltd

**Respondent
Represented by
Mr J Guyan, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's discrimination claim is struck out in terms of Rules 37(1)(a) and (c) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS**Introduction**

1. This case has something of a history. Mr Hale submitted his claim form on 18 May 2019. He intimated complaints of constructive unfair dismissal and disability discrimination. The claim was denied in its entirety by the respondent.

Preliminary Hearing on 29 July 2019

2. A Preliminary Hearing to consider case management was held on 29 July 2019. The Note which Employment Judge Hendry issued following that Hearing is referred to for its terms. As the respondent's solicitor had not accepted that the claimant was disabled in terms of the Equality Act 2010 ("the 2010 Act"), EJ Hendry issued an Order requiring the claimant to submit an "Impact Statement" and further details in relation to the issue of disability status. He also ordered the claimant, within a period of 21 days, to provide Further and Better Particulars of his discrimination complaints.
3. EJ Hendry also ordered the claimant to provide Further and Better Particulars of an allegation by the claimant that he had been subjected to detriment(s) as a consequence of making protected disclosures (whistleblowing). However, subsequently the claimant intimated that he did not wish to pursue this complaint.
4. The claimant responded to EJ Hendry's Orders by email on 18 August 2019; he also submitted "medical information" on 23 August; on 27 August he submitted an "Impact Statement".
5. On 28 August, the respondent's solicitor applied to the Tribunal to have the discrimination claim struck out on the basis that the claimant had failed to comply with EJ Hendry's Orders.

6. On 2 September, the claimant intimated that he objected to his discrimination claim being struck out.

Preliminary Hearing on 4 September 2019

7. I conducted a Preliminary Hearing on 4 September to consider the application for strike out of the discrimination claim or an “Unless Order”, in terms of the letter of 28 August from the respondent’s solicitor. The Note which I issued following that Hearing is referred to for its terms.

Disability Status

8. I noted that although I had issued an Order in this regard on 5 July the claimant had not complied with the Order timeously but had provided a response by email on 18 August with further information concerning the impact on his ability to carry out day to day activities by email on 27 August. Nevertheless, the respondent’s solicitor advised that it was still not accepted that the claimant was disabled in terms of the 2010 Act.

Further and Better Particulars

9. I recorded in my Note that I was of the view that there was merit in the submission by the respondent’s solicitor that there had still not been full compliance with EJ Hendry’s Order in his Note of the Hearing on 29 July. I also recorded the following in my Note:-

“8. While the claimant had already been afforded considerable latitude and given ample time to provide the necessary details, I was mindful that claims of this nature are complex and that the claimant was unrepresented and had no experience of Employment Tribunal proceedings.

Having regard to the “overriding objective” and despite concerns about the costs the respondent was incurring, I decided, albeit with considerable hesitation, to afford the claimant a final opportunity of setting out his discrimination claim in a proper form.

9. I directed him, therefore, by no later than 18 September 2019, to write to the Tribunal and at the same time copy the respondent's solicitor with Further and Better Particulars of his discrimination claim."

I explained how he to set out each of the discrimination complaints he wished to advance and referred to, *"the sort of detail required as set out in para 2 of the Orders in Judge Hendry's Note"*.

Claimant's Further and Better Particulars

10. On 15 September, the claimant provided, by email, Further and Better Particulars, in the form of a "Table", comprising 61 numbered paragraphs.

Second Strike Out Application by the Respondent's Solicitor

11. On 3 October 2019, the respondent's solicitor applied again for the discrimination claim to be struck out. She attached to her letter the claimant's Further and Better Particulars of his disability discrimination claim with her comments added.

12. By email on 14 October, the claimant intimated that he objected to his claim being struck out. He also intimated that he was not agreeable to the respondent's strike out application being considered and determined by an Employment Judge, *"on the papers"* and that he wished to have a Hearing.

Respondent's Third Strike Out Application

13. As the claimant was unrepresented and had requested a Hearing in person and also having regard to the "overriding objective" in the Rules of Procedure, I decided to fix a Preliminary Hearing to consider whether the claim should be struck out, as requested by the respondent's solicitor.

14. On 29 October, the respondent's solicitor expressed "*severe disappointment that the claimant had been afforded yet more latitude by the Tribunal*" and confirmed that she was maintaining her application to have the discrimination claim struck out, "*for the reasons set out in the applications of 28 August 2019 and our letter of 3 October 2019*". She submitted that, "*there is nothing in the claimant's Note of 14 October which alters the respondent's position in this regard*".

Preliminary Hearing on 16 December 2019

15. The case came before me, therefore, by way of a Preliminary Hearing on 16 December 2019, to consider and determine the respondent's strike out application. The claimant appeared in person. The respondent was represented by a solicitor, Mr J Guyan.
16. It was not necessary for me to hear any evidence from witnesses at the Preliminary Hearing. For the purposes of the exercise with which I was concerned, I took the claimant's averments at their highest value. In other words, I proceeded on the basis that the claimant would be able to establish all that he averred.
17. An Inventory of Productions was lodged on behalf of the parties ("P").
18. The respondent's solicitor confirmed that he was relying on the terms of the various strike out applications which had been made. He also referred to the following cases:-
- W M Croke v Leeds City Council* UKEAT/0512/07/LA**
***Wright v Nipponkoa (Europe) Ltd* UKEAT/0113/14/JOJ**
19. The claimant maintained he had complied with EJ Hendry's Orders; he also denied the assertion by the respondent's solicitor that his discrimination claim "*had no reasonable prospect of success*" or "*little reasonable prospect of success*". He referred me to his responses to the Orders, the Further and Better Particulars which he had submitted and the terms of his objections to the respondent's strike out applications.

Discussion and Decision

20. In every employment tribunal case it is necessary for the claimant to provide the respondent with "*fair notice*" of the complaints which he or she wishes to advance. This enables the respondent's solicitor, in turn, to take instructions from the respondent and frame an appropriate response.
21. That was why Employment Judge Hendry ordered the claimant in his Note, following the case management Preliminary Hearing on 29 July, to provide Further and Better Particulars of his discrimination complaints.
22. However, when the case came before me by way of a case management Preliminary Hearing on 4 September, I recorded in my subsequent Note that the claimant had still not provided the requisite "*fair notice*".
23. It was clear that it was only with considerable hesitation and having regard to the facts that the claimant was unrepresented and had no experience of employment tribunal proceedings, that I allowed him by, no later than 18 September, to provide Further and Better Particulars.
24. On 15 September, the claimant responded by way of a Table in which he set out, in considerable detail, his various "complaints". However, I had directed him in my Note, "*to set out each of the complaints in terms of the 2010 Act he wishes to pursue under separate headings (e.g. direct discrimination, indirect, harassment etc.) with the facts relied upon in support of each of these complaints. It is also important in respect of each of the complaints that he detail the basis upon which he alleges the less favourable/unfavourable treatment is said to have occurred because of his disability. So far as the detail is concerned, the facts relied upon should be as concise as possible, consistent with the requirement to provide "fair notice". The sort of detail required was set out in para 2 of the Orders in Judge Hendry's Note*".

25. Despite his lengthy response, the claimant failed to comply with that direction. He failed to set out his complaints in that manner. It appeared to me that the 44 paragraphs in the Table were no more than details of all the complaints he had about the way he was treated by the respondent going all the way back to 24 October 2016.
26. I found it impossible, therefore, to identify the sections in the Equality Act 2010 Act on which he sought to rely with the supporting facts. I also found it impossible to discern why he maintained that the less favourable/unfavourable treatment occurred because of his disability.
27. Thereafter, helpfully, on 3 October 2019 in support of her application to strike out the discrimination claim, the respondent's solicitor submitted the claimant's Table along with her comments. In my view those submissions are well-founded.
28. While the claimant is unrepresented, such claims can be complex and clearly he had put a considerable amount of work into preparing the "Table", he had already been "*afforded considerable latitude and given ample time to provide the necessary details*". In my view, he has failed to do so. He has failed not only to comply with the Orders contained within Employment Judge Hendry's Note of the Hearing on 29 July, but also the directions in my Note which was issued on 10 September 2019.
29. Accordingly, as requested by the respondent's solicitor, the claimant's discrimination claim is struck out in terms of Rule 37(1)(c) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the rules of Procedure") in respect of non-compliance with Orders of the Tribunal.

“Prospects”

30. For the sake of completeness, I also record that in my view, the discrimination claim (insofar as it can be discerned) has *“no reasonable prospect of success”*.
31. Any discrimination complaint requires a claimant first to establish facts that amount to a *prima facie* case. S.136 of the Equality Act 2010 (“the 2010 Act”) provides that, once there are facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof “shifts” to the respondent to prove a non-discriminatory explanation.
32. ***Igen Ltd v Wong*** [2005] IRLR 258 remains one of the leading cases in this area. In that case the Court of Appeal established that the correct approach for an Employment Tribunal to take to the burden of proof provisions entails a two-stage analysis. At the first stage the claimant has to prove facts from which the Tribunal could infer the discrimination has taken place. Only if such facts have been made out to the Tribunal’s satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then “shifts” to the respondent to prove, again on the balance of probabilities, that the treatment in question was *“in no sense whatsoever”* on the protected ground.
33. Further, in ***Bahl v The Law Society and others*** [2004] IRLR 799 the Court of Appeal upheld the reasoning of the EAT and emphasised that unreasonable treatment of a claimant cannot in itself lead to an inference of discrimination, even if there is nothing else to explain it. Although that case proceeded under legislation prior to changes made to the burden of proof, the principle is still valid. In other words, unreasonable treatment is not sufficient, in itself, to raise a *prima facie* case requiring an answer. As the EAT said in ***Bahl*** at para 89: *“... merely to identify detrimental conduct tells us nothing at all about whether it has resulted from discriminatory conduct”*.

34. It is also necessary for a claimant to establish more than simply the *possibility* of discrimination having occurred before the burden will shift to the employer. That point was emphasised by LJ Mummery giving the judgment of the Court of Appeal in ***Madarassy v Nomura International Plc*** [2007] IRLR 246:

“For a prima facie case to be established it will not be enough for a claimant simply to prove facts from which the Tribunal could conclude that the respondent could have committed an act of discrimination. Such facts would only indicate a possibility of discrimination, nothing more. So the bare facts of a difference in his status and a difference in treatment – for example, in a direct discrimination claim evidence that a female claimant had been treated less favourably than a male comparator – would not be sufficient material from which a Tribunal could conclude that, on the balance of probabilities, discrimination had occurred. In order to get to that stage, the claimant would also have to adduce evidence of the reason for the treatment complained of”.

35. While I was mindful that the respondent had still not conceded that the claimant was disabled in terms of the Equality Act 2010, even assuming that he is able to establish that he was disabled, the averments which he has advanced in support of his discrimination claim appear to me to be no more than allegations of unreasonable treatment.
36. The respondent’s solicitor has also identified in her comments on the claimant’s Table a number of other issues such as time bar, failure to identify a comparator and failure to identify a “PCP”, when required, which in my view are well-founded.
37. I was also of the view, therefore, that the discrimination claim has no reasonable prospect of success. It is also struck out, therefore, in terms of Rule 37(1)(a) of the Rules of Procedure.

Further Procedure/Constructive Unfair Dismissal Complaint

38. This complaint still remains. I direct the parties to make representations to the Tribunal within the next 7 days, copied to the other party, as to further procedure with regard to this complaint and whether, in particular, dates can now be fixed for a Final Hearing. As the claimant is unrepresented, it may be helpful to have a further case management Preliminary Hearing by means of telephone conference call to discuss this.

Employment Judge:

Nicol Hosie

Date of Judgment:

17 February 2020

Date sent to parties:

19 February 2020