



EMPLOYMENT TRIBUNALS

Claimant: Mr T-J Nicol-Hinde

Respondent: Stellar Tax And Business Advisory Services Limited

Heard at: Exeter(remotely) **On:** 28 June 2021

Before: Employment Judge Goraj

Representation

The claimant: did not attend

The respondent: Mr E Hayes, director

JUDGMENT AT PRELIMINARY HEARING

The JUDGMENT of the Tribunal is that: -

- 1. The claimant's claims are not struck out.**
- 2. The Tribunal will however consider further striking out the claimant's claims for failing to comply with the directions of the Tribunal and/or failing actively to pursue his claims, without further warning, if the claimant fails to comply with the directions set out at paragraph 31 below by 30 July 2021 unless by such date, the claimant objects to (with reasons) or applies (with reasons) to vary such directions.**
- 3. The matter is relisted for hearing for 4 days before an Employment Judge sitting with members at the Bristol Employment Tribunal, Civil and Family Justice Centre, 2 Redcliff Street, Bristol, BS1 6GR on 25, 26, 27 and 28 April 2022 commencing at 10am.**
- 4. The directions contained in the Case Management Order dated 29 September 2020 are varied as separately recorded.**

REASONS

Background

- 1. By a claim form presented on 17 March 2020, the claimant brought claims of disability discrimination together with monetary claims for holiday pay and arrears of pay. The claimant stated in his claim form that he commenced his employment with the respondent on 15 July 2019 and resigned his employment on 21 November 2019 due to discrimination. The claimant further stated that he was owed 81 hours of wages (for the period between 4 November 2019 and 21 November 2019) in the sum of £364.50.**

2. At the direction of the Tribunal, the claimant provided further information in March 2020 regarding his claims, including a copy of his letter of resignation dated 22 November 2019 (in which he stated that his last day of employment would be 21 November 2019) together with a summary of his grounds of complaint and associated correspondence. The claimant indicated in such information that he was disabled by reason of dyslexia. He also provided a summary of the events leading up to his resignation. The claimant also confirmed that the correct name of the respondent was Stellar Tax and Business Advisory Services Limited.
3. The claimant's ACAS Early Conciliation Certificate records that the claimant's EC notification was received on 29 January 2020 and that the claimant's EC Certificate was issued on 29 February 2020.
4. By a response form which was received by the Tribunals on 11 May 2020, the respondent denied the allegations. The respondent also contended that the claim form had been presented outside the statutory time period.
5. The claimant submitted on 7 July 2020, further information regarding his disability which he described as "dyslexia (a lifelong problem)".

The Case Management Hearing on 29 September 2020.

6. The Tribunal conducted a case management hearing by telephone on 29 September 2020 and issued an associated order ("the Order"). The respondent did not attend the hearing. The respondent was issued with a strike out warning in respect of its non- attendance. The claimant was represented at the hearing by his mother.
7. At the hearing on 29 September 2020, the matter was listed for a final hearing for 4 days on 28 June – 1 July 2021 and associated directions given for the preparation of the case. The directions included: - (a) an order requiring the claimant to serve on the Tribunal and the respondent a Schedule of Loss setting out details of the monies that he claimed to have lost as a result of the matters complained off together with details of any compensation sought for injury to feelings arising from the alleged disability discrimination (paragraphs 9 and 10). The Order contained details of where further advice could be found to assist the claimant in the preparation of such document (b) required the parties mutually to exchange copies of any relevant documents (including from the claimant with regard to remedy) by 10 December 2020 (paragraphs 16 and 17 of the Order) (c) required the parties to agree by 29 January 2021 a file of hearing documents for use at the final hearing. The Order made the claimant responsible for the preparation of such file of documents (paragraphs 20 and 22 of the Order) (d) instructed the parties to exchange by 26 February 2021 witness statements containing everything relevant that the witness could tell the Tribunal about the issues in the case (paragraphs 28- 32 of the Order) and (d) an instruction requiring the parties to write to the Tribunal by 31 March 2021 confirming that they had complied with the directions contained in the Order and that the matter was therefore ready for the final hearing (paragraph 35 of the Order).

8. The Employment Judge also set out in the Order, the issues for determination by the Tribunal at the final hearing (in summary, in respect of the claimant's claims for direct disability discrimination, discrimination arising from disability and disability related harassment) and monetary payments (paragraph 58.1 onwards of the Order). The claimant confirmed that since issuing proceedings he had received some monies from the respondent and that there was now an alleged reduced outstanding sum of £114.50. The Employment Judge explained and recorded in the Order (paragraph 55) that for the reasons set out in the Order the claimant's claims appeared to have been received within the relevant statutory time limits (but did not make any formal finding which was reserved to the final hearing). The Employment Judge explained to the respondent at this hearing that she concurred with the analysis of time limits set out at paragraph 55 of the Order and that there does not appear to be any time issue in this case.
9. The Order was sent to the parties by the Tribunal on 7 October 2020.

Subsequent events

10. The respondent's response was not struck out as the respondent subsequently advised the Tribunal that it had not attended the case management hearing on 29 September 2020 because of serious health issues on the part of the person who was dealing with the matter (Mr Hayes).
11. The claimant wrote to the Tribunal on 11 November 2020 confirming (in response to the directions of the Tribunal) that he was prepared to participate in judicial mediation including that he would like to agree (in addition to his monetary claim of £114.50) compensation for disability discrimination. The claimant did not however provide a schedule of loss providing details of his alleged financial losses arising from the alleged disability discrimination as directed in the Order. The respondent therefore does not know how much the claimant is claiming by way of financial compensation in respect of the allegations of disability discrimination.
12. On 30 December 2020, the respondent wrote to the Tribunal stating that although they had complied with the directions of the Tribunal, they had not received any correspondence from the claimant.
13. The Tribunal wrote to the parties by letter dated 31 January 2021 reminding the parties of the requirement to comply with the directions of the Tribunal and to copy correspondence to each other.
14. The respondent wrote to the Tribunal by letter dated 24 March 2021 advising the Tribunal that they had had no information or communication from the claimant since December 2019 and that they were prejudiced by such failure. The Tribunal directed the claimant to provide his comments by 22 June 2021.

15. The claimant responded by letter dated 21 June 2021 (to which he attached his response regarding judicial mediation dated 11 November 2020) and apologised for his “late and slow replies” which he contended was because of work and exam pressure and because he was not sure what further was required of him. The claimant also reiterated in general terms, the nature of his claim. The claimant however provided no explanation of why he had not complied with the directions of the Tribunal including why he had not provided relevant documentation for inclusion in the bundle / complied with the remaining directions.
16. The respondent wrote to the Tribunal again by email dated 24 June 2021 asking for the hearing to be postponed to allow the claimant to present details of his claims in the light of the failure of the claimant to provide any information since 21 December 2019. This application was refused on the basis that the matter would instead proceed as set out below.
17. The Tribunal wrote to the parties by letter dated 24 June 2021 advising them that the Regional Employment Judge had directed that in the light of the circumstances outlined in that letter the four-day hearing had been cancelled. The letter further advised the parties that the first day of the hearing would be converted to a 3-hour Preliminary Hearing to determine the following matters: - (a) whether the claimant’s claim should be struck out for failure to comply with case management orders (b) whether, if the claim was not struck out, the parties were able to settle the case without recourse to trial and (d) if the case was not struck out, further case management.

The events of 28 June 2021

18. On the morning of 28 June 2021, the Employment Judge conducting the case received a copy of an email from the claimant to the Tribunal (copied to the respondent) dated 27 June 2021 in which the claimant stated as follows :-

“Dear sir or madam

Sorry that it is late notice, but I won’t be able to attend on Monday since I am sitting a maths exam for the duration of the day. Although this was planned there is nothing within my control.”

The respondent’s position

19. The Tribunal explored with the respondent its position in the litigation by reference in particular to the contents of the Order. The Tribunal ascertained in particular, the following: - (a) the respondent accepts that the claimant had, at the relevant times, “learning style difficulties” and that it had the requisite knowledge thereof. The respondent was not however in a position to accept that the claimant has dyslexia/ was a disabled person for the purposes of the Equality Act 2010 (“the 2010 Act”) as it has not had sight of any relevant assessments confirming such condition (b) having taken the respondent through the List of issues contained in the Order they are understand the

allegations which they are required to meet and are able to respond to the matters identified in the List of Issues (c) they have still not received a schedule of loss from the claimant and therefore do not know what he is claiming by way of financial loss other in respect of the outstanding monies in the sum of £114.50 (d) the respondent does not believe that it has received all of the information which has been submitted by the claimant to the Tribunal including it does not believe that it has received the additional information which was sent by the claimant to the Tribunal during March 2020 and/ or the claimant's disability statement (e) the respondent believes that it has sent a bundle of documents to the claimant (f) the respondent has not yet prepared its witness statements as it was awaiting further information/ contact from the claimant (f) the respondent is willing to explore with the claimant the possibility of resolving the matter by way of settlement.

The strike out application – submissions

20. The respondent contended that the claimant's claims should be struck out in the light of his failure actively to pursue the matter / comply with the directions of the Tribunal. The respondent relied in particular on the claimant's failure to engage with it regarding the preparation for the hearing, his non-attendance at this Hearing/ late notification of his non-attendance. The respondent queried whether the claimant's alleged attendance at a maths exam was genuine and questioned why, if it was genuine, he had made no mention of the matter previously notwithstanding that (a) he had known since September October 2020 that the claim had been listed for a 4-day hearing commencing on 28 June 2021 and (b) he had made no reference to it in his recent correspondence with the Tribunal.

The Law

21. For the purposes of this hearing the Tribunal has had regard in particular to Rules 2, 37 (particularly 37 (1) (c)) and 38 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules"). The Tribunal has reminded itself in particular that when deciding whether to strike out a claim for non-compliance with an order pursuant to Rule 37 (1) (c) of the 2013 Rules, it must have regard to the overriding objective set out in Rule 2. This requires a Tribunal to consider all relevant factors, including: -
- 21.1 The magnitude of the non-compliance.
 - 21.2 Whether the default was the responsibility of the party or his or her representative.
 - 21.3 What disruption, unfairness or prejudice has been caused.
 - 21.4 Whether a fair trial would still be possible.
 - 21.5 Whether striking out or some lesser sanction would be an appropriate response to the disobedience.

The conclusions of the Tribunal

- 22 Paragraphs - 21.1. and 21.2 above - Having given careful consideration to all of the above, the Tribunal is satisfied that there has been serious non-compliance/ participation by the claimant including that the claimant has: - (a) failed to comply with several directions contained in the Order as identified above (including in respect of the service of a schedule of loss setting out details of his claim for compensation for disability discrimination, providing the respondent with a copy of any relevant documents not previously sent to the Tribunal, the agreement/ preparation of the agreed file of documents for hearing (for which the claimant agreed to be responsible under the terms of the Order) and the preparation and exchange of witness statements addressing the issues identified in the Order (at paragraph 58.1 onwards).
- 23 The claimant also failed to attend the hearing on 28 June 2021 notwithstanding that it was the first day of what had been due to be the start of the four-day final hearing. Further :- (a) such dates were agreed with the claimant's mother at the hearing on 29 September 2020 (as confirmed in the associated order, which was sent to the parties on 7th October 2020) (b) this hearing was specifically listed to consider the possible strike out of his claims for failing to comply with the orders of the tribunal and also to assist the parties to resolve the case and (c) the claimant gave late notice of his non-attendance (an email on Sunday 27 June 2021) and sought to justify such absence by reason of a maths examination which the claimant accepted in his letter had been "planned".
- 24 The Tribunal appreciates that the claimant is a litigant in person who is not familiar with the litigation process and that he says that he has a disability of dyslexia. However, the claimant was represented by his mother at the case management hearing on 29 September 2020 and the Order contained details of sources of guidance on the process. Further it appears from the correspondence which the Tribunal has received from the claimant, that he has been able to understand the directions of/ communicate effectively with the Tribunal.
- 25 Paragraph 21.3 - The failure of the claimant to provide outstanding information including, relevant documentation and a schedule of loss, and further to attend the hearing on 28 June 2021 has caused disruption, unfairness and prejudice to the respondent. The final hearing has not been able to proceed as listed commencing on 28 June 2021. Further, although the respondent has accepted that it is aware of the case which it is required to meet (the Tribunal having gone through the List of Issues during the hearing) the respondent has not been provided with any documentary evidence of the claimant's dyslexia / any relevant documentation beyond that submitted to the Tribunal in March 2020 (including any documents relating to the claimant's dealings with his College / any schedule of loss setting out details of the claimant's claim for compensation for the alleged disability discrimination). Further the respondent are professional advisers who have had to spend work time attending the hearing on 28 June 2021 and who were denied an opportunity to explore with the

claimant at such hearing whether his claim could be resolved without recourse to trial (one of the stated purposes of this hearing).

- 26 Paragraph 21.4 – Having given the matter careful consideration, the Tribunal is satisfied that a fair trial is still possible in this case notwithstanding the claimant’s failures to comply with the directions of the Tribunal as identified above. When reaching such conclusion, the Tribunal has taken into account in particular that :- (a) the claimant has previously provided some details of his case / some documentation in March 2020 in response to a direction of the Tribunal (b) the claimant (via his mother) clarified his claims at the case management hearing on 29 September 2020 as set in the Order. The central issues in this case appear to be the treatment of the claimant during November 2019 as set out in the List of Issues (c) having taken the respondent through the List of Issues the Tribunal is satisfied that the respondent is aware and able to meet the issues identified in the Order including that the relevant witnesses are still available to give evidence in response and (d) further, although the respondent does not accept, without further documentation the diagnosis of dyslexia, the respondent accepts that the claimant had at the relevant time “learning style difficulties”.
- 27 Paragraph 21.5 – although the Tribunal has serious concerns about the conduct of the claimant the Tribunal does not consider that striking out is an appropriate sanction at this time. The Tribunal has reminded itself that the striking out of a claim, particularly one of discrimination, is a draconian step which should only be taken in exceptional circumstances and where other, lesser sanctions are not appropriate.
- 28 When reaching this decision, the Tribunal has taken into account in particular the following matters: - (a) the claimant has previously provided information regarding his claim as contained in: - the documents and information provided in March 2020, as identified in the Order and in the subsequent (brief) disability statement (b) although the respondent has participated in the litigation to a greater extent than the claimant, the respondent is not prepared for hearing. The respondent has not collated all of the relevant documents (including in particular to address the alleged shortcomings of the claimant / difficulties and costs caused to the respondent identified in the List of Issues at paragraph 58.3 & 4 of the Order) or prepared its witness statements. In all the circumstances, the Tribunal is satisfied a lesser sanction is appropriate at this stage.
- 29 The claimant’s claims are therefore not struck out and the matter has therefore been relisted for a further final 4-day hearing as recorded above. It is important however that the claimant appreciates the seriousness of the matter and the potential consequences of any future failure to comply with the directions of the Tribunal.

The way forward

- 30 In the light of all the above, the Tribunal considers that it is appropriate to issue further directions to the claimant in respect of:- (a) his non-attendance at the hearing on 28 June 2021/ late notification of such non- attendance and (b) the outstanding matters **on the basis that if he fails to comply with the**

following directions by 30 July 2021 the Tribunal will consider striking out his claims without further warning on the grounds that the claimant has failed to comply with the directions of the Tribunal / his claims have not been actively pursued. If the claimant has any difficulty complying with such directions, he must write to the Tribunal by 30 July 2021 explaining any such difficulty together with any requested changes to the directions.

- 31 **By 30 July 2021** the claimant is required to send to the respondent and to the Tribunal (unless otherwise stated below) the following: -
- 31.1 Documentary evidence (including the start and finish times) of his maths examination on 28 June 2021.
 - 31.2 Documentary evidence of the date when he was first informed that he would have a maths examination on 28 June 2021.
 - 31.3 Any documentary evidence confirming his diagnosis of dyslexia (or confirmation that he does not have any such documents).
 - 31.4 A schedule of loss setting out details of any alleged financial losses incurred and/or claim for injury to feelings in respect of his claim for disability discrimination. This schedule shall be prepared in accordance with the directions contained at paragraphs 9 and 10 of the Order. If the claimant contends that he has lost any income as a result of his dismissal he shall provide details of any such losses and details of any income from any alternative employment obtained since the termination of his employment with the respondent. The claimant is referred to the further sources of guidance referred to at paragraphs 44 and 46 of the Order. The Tribunal has also attached to this Judgment details of a possible source of advice.
 - 31.5 **Send to the respondent only** - a copy of any further relevant documents relating to the issues identified in the List of Issues contained at paragraph 58.1 onwards of the Order. This shall include (a) any relevant correspondence/ emails relating to the facts of the case including any relevant correspondence/ emails with the respondent (not previously forwarded by the claimant to the respondent / Tribunal) and his College and (b) any documents evidencing any alleged financial losses or claim for injury to feelings (including documents evidencing any alternative employment and any earnings from such employment).

Costs

- 32 The respondent is at liberty to make, at conclusion of the final hearing in April 2022 an application for any wasted costs occurred in respect of the hearing on 28 June 2021 (insofar as any such costs are attributable to the conduct of the claimant and details of any such costs are provided to the claimant at least 7 days prior to the final hearing).

Further directions

- 33 If the claimant complies with the above directions and his claims are therefore permitted to continue both parties are required to comply with the remaining directions for the future preparation of the case for hearing as previously set out in the Order as amended in the enclosed covering letter.

- 34 The respondent expressed during the hearing on 28 June 2021, a willingness to seek to resolve the matter with the claimant without recourse to a hearing. The parties are strongly encouraged to discuss any without prejudice proposals to resolve the matter via the ACAS officer assigned to the case. The Tribunal did not however, consider it appropriate to consider this matter further for judicial mediation in the light of the failure of the claimant to provide a calculation of his claims/ attend the hearing on 28 June 2021 particularly when one of the stated purposes of this hearing was to explore with the parties the possibility of settlement.

**Employment Judge Goraj
Date: 02 July 2021**

Judgment and Reasons sent to the Parties: 06 July 2021

FOR THE TRIBUNAL OFFICE

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The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness