



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101441/2020

Held by telephone conference call on 24 August 2021

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Employment Judge McFatridge

Ms A Canaj

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**Claimant
Represented by:
Mr Kadirgolam,
Solicitor**

Atalian Servest Limited

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**Respondent
Represented by:
Ms Stonehouse,
HR Consultant**

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JUDGMENT

1. The claimant having failed to substantially comply with paragraphs 1a, 1b, 1c of the unless order issued on 21 April 2021 the claims of direct discrimination, harassment and a failure to make reasonable adjustments were dismissed by operation of rule 30 of the Employment Tribunals (Constitution and Rules of Procedure) regulations 2013 on 8 May 2021.

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2. The claimant shall no later than 7 September 2021 confirm to the Tribunal whether she is seeking to amend her claim so as to include a claim of discrimination arising from disability in terms of section 15 of the Equality Act. In this event the respondent shall advise the Tribunal no later than 21 September 2021 whether they oppose the amendment. In the event

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of the amendment being opposed the matter will be dealt with at a preliminary hearing to be held by telephone on 12 October 2021.

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NOTE

1. This case has a lengthy history. The claimant submitted a claim to the Tribunal in which she claimed disability discrimination, personal injury and unpaid wages. The claims of personal injury and unpaid wages were subsequently dismissed following withdrawal. The respondent submitted a response in which they denied the claims. The first preliminary hearing took place on 20 August 2020 following which the claimant was ordered to provide further and better particulars of her claim of disability discrimination. Regrettably the claimant did not comply with this order or at least did not do so in a manner which was acceptable and the matter was raised at two further preliminary hearings. Eventually on 21 April 2021 Employment Judge Gall issued an unless order. It is as well to set out the terms of the unless order here. It stated

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“1. Within 14 days of the date of this order being sent to parties the claimant will

(a) Set out what is said to have been the act(s) of direct discrimination. She will specify the less favourable treatment she received identifying a comparator actual or hypothetical. She will name any actual comparator. If there is none she will define the hypothetical comparator. She will set out why it is that she regards any difference in treatment to be due to her disability.

(b) Set out what provision, criterion or practice (“PCP”) of the respondents she founds upon in her claim of alleged failure to make reasonable adjustments. She will detail a substantial disadvantage at which she says this PCP placed her and other disabled employees compared to employees who are not disabled. She will detail the reasonable adjustment she says which ought to have been made to avoid the disadvantage. She

will confirm if she raised those with anyone within the respondents' organisation and, if so, who that was and when these were raised.

- 5 (c) Set out the act(s) of harassment alleged, when they occurred and who was involved. She will also say why she regards them as being related to her disability.
- 10 (d) In relation to the proposed claim under Section 15 of the Equality Act 2010, the claimant will specify the 'something arising' from her disability and the unfavourable treatment which is said to have resulted because of that.
- 15 (e) In relation to her position that she informed the respondents of her disability, the claimant will set out how it is that she says the respondents had knowledge of her disability and in particular what it is that she said to inform the respondents of her disability, her mental health impairment, to whom she said this and when she said it."

The order was sent to the parties on 23 April 2021 which meant that the last date for compliance was 7 May 2021. On that date the claimant's representative sent a document to the Tribunal entitled "Response to the
20 Employment Tribunal's unless order from the preliminary hearing of 21 April 2021". It was the respondent's position that the claimant's response did not amount to substantial compliance with the unless order and that as a result the claimant's claims are automatically dismissed on 8 May. The claimant did not accept this. A preliminary hearing was fixed
25 in order to determine this matter and also to deal with any further case management of the case which might be required. At the hearing I asked each party to set out their position starting with the respondent. I then gave each party the opportunity to comment on the submissions made by the other. I shall set out the submissions briefly below.

30 **Respondent's submissions**

2. The respondent's representative referred to and essentially repeated what was stated in a document entitled "Respondent's reply to claimant's additional information provided on 7 May" which had been sent to the Tribunal on or about 21 May 2021. Essentially her position was that the

5 additional information provided by the claimant in respect of the claims of direct discrimination, failure to make reasonable adjustments and harassment did not substantially comply with the order. Furthermore, the claims as drafted, even with the additional specification lodged on 7 May were entirely inept and did not plead a relevant case which the Tribunal could deal with under these heads.

10 3. With regard to the claim of direct discrimination the claimant had identified the act of dismissal as the “less favourable treatment” alleged. The claimant had however failed to relate this in any way to her disability. At its highest the claimant was saying that the claimant had been dismissed for forgetting to follow an instruction and if it were accepted that forgetfulness was a concomitant of her disability (which it was not) then this could potentially amount to a claim of disability arising from discrimination but could not amount to a claim of direct discrimination.

15 4. With regard to the claim of failure to make reasonable adjustments the PCP alleged was the respondent’s instruction that the claimant must not return staff to rooms that had been cleaned. It was the respondent’s position that the claimant had entirely failed to show why that PCP placed the claimant at a particular disadvantage because of her disability. The
20 respondent was also critical of the information provided by the claimant in relation to a suggested reasonable adjustment on the basis that it was not something which could prevent the PCP from having such adverse effect as might exist.

25 5. With regard to the claim of harassment the respondent’s position was that the claimant had entirely failed to link the alleged behaviour (which they accepted might amount to unwanted conduct which had the purpose or effect described in section 26(1)(b) of the Act) but had entirely failed to suggest how this alleged conduct was related to the claimant’s protected characteristic of disability.

30 6. The respondent did not dispute that the claimant had complied with the requirement to set out those occasions where she alleged she had disclosed her disability to the respondent albeit the respondent still

disputed that they knew or could reasonably have been expected to know that the claimant was disabled at the relevant time.

- 5 7. With regard to the proposed claim of discrimination arising from disability under section 15 the respondent's position was that this claim was not made in the original ET1. If the claimant wished the Tribunal to deal with such a claim then the claimant would require to make a formal application to amend her claim so as to include this. Such an application would be opposed by the respondent.

Claimant's position

- 10 8. The claimant's position was that the matter was an important one for the claimant and that she had a serious disability. Despite the fact that the respondent was not challenging the answer to the unless order in relation to the information provided relating to knowledge of disability, the claimant's representative made a point several times of advising that the respondent were well aware of the claimant's disability and that they were under a duty from the outset of her employment to make reasonable adjustments.

- 15 9. I stressed the point that what was disputed here was whether the claimant had complied with the order. I also pointed out that the respondent's position was that despite the best attempts of various Employment Judges over a number of preliminary hearings and after a year of trying the claimant had still not properly set out a relevant claim under three of the heads which she was claiming. It was the view of the claimant's representative that the claimant had set out enough information to show that the claimant was dismissed because of her disability. He then, in relation to the harassment claim, made a statement that the claimant had not been allowed to speak. He believed that the facts in the case should be considered by the Tribunal. It was his position that the claimant could reasonably have expected that some adjustments would be made after she mentioned her disability to the respondent.
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10. Despite various attempts by me to have the claimant's representative directly address the issues raised by the respondent's representative he did not do so.
11. With regard to the section 15 claim he accepted that there was no section 5 15 claim made in the original ET1. It was however his position that the facts of the claim were set out and that any amendment should be allowed on the basis that it was simply a relabelling. It should be noted that the respondent's representative directed me to the relevant part of the ET1 and set out her view that the facts now being relied upon by the claimant 10 in relation to forgetfulness being a symptom of her disability were not mentioned in the ET1.

Discussion and decision

12. I considered that the criticisms of the claimant's pleadings made by the respondent were entirely justified. It is a matter of some concern that the 15 claimant has entirely failed to plead a relevant case under any of the three heads of claim referred to despite having had over a year to do so and despite the various comments made by previous employment judges. In my view there is no doubt that, even with the additional information provided, the pleading is woefully defective.
- 20 13. In this case however it was not my job to make an assessment as to whether the claim should be struck out or not. I noted that at the previous preliminary hearing conducted by Employment Judge Gall the respondent were asking for the claims to be struck out on essentially on the same basis as they mentioned today. On that occasion Employment Judge Gall 25 indicated to the claimant's representative that he considered the respondent's criticisms well founded but indicated that he was prepared to give the claimant a further final chance by complying with the order which he had made. The order was an unless order. It was drafted in such a way that had the claimant complied with it then she may have cured 30 at least some of the glaring deficiencies in her pleadings. The question for me was to decide whether or not there had been substantial compliance with the order or not. In my view it was clear that in relation

to the three claims currently before the Tribunal there had been no substantial compliance.

14. With regard to the claim of direct discrimination the claimant had failed to set out why it is that she regarded any difference in treatment to be due to her disability. With regard to the claim of a failure to make reasonable adjustments the claimant has set out a PCP however she has failed to detail the substantial disadvantage at which she says this PCP placed her. With regard to the harassment claim the claimant has failed to state how the alleged unwanted conduct is linked to her disability. In my view there has been no substantial compliance with the order.
15. The rule regarding unless orders is set out at rule 30 of the Tribunal Rules. So far as I am aware the Tribunal has not yet given written notice to the parties confirming that the claim or part of it has been automatically dismissed following non-compliance. My view therefore is that as a matter of case management such a written notice ought to be sent out to the parties confirming that the claims of direct discrimination, a failure to make reasonable adjustments and harassment have been dismissed in terms of Rule 30.
16. Whilst these three claims are the only claims currently before the Tribunal I feel that given that the question of a claim under section 15 appears to have been discussed at the previously case management preliminary hearing the claimant ought to be given the opportunity to seek to amend his claim so as to include a claim under section 15. I make no comment as to whether such an amendment ought to be permitted or not but I believe that the claimant ought to be given a further opportunity to pursue this. Accordingly, I indicated to the claimant's representative at the close of the hearing that should he wish to amend the claimant's claim then he must write to the Tribunal within 14 days setting out the terms of the amendment sought. The respondent's representative had indicated that such an amendment would be opposed however I also consider that it is appropriate that the respondent be ordered to confirm their position no later than 14 days after this. There will then be a further preliminary hearing on 12 October in order to deal with the question of whether or not the amendment should be allowed. I also indicated to the parties that it

would be helpful if, in advance of the hearing on 12 October, they could produce a written note of argument setting out their respective positions but given the fairly tight timescale I will make no order to that effect.

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10 Employment Judge: Ian McFatridge
Date of Judgment: 31 August 2021
Entered in register: 10 September 2021
and copied to parties