



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107430/2019

Held in Glasgow on 7 January 2020

Employment Judge R King

Miss A Knowles

**Claimant
Not present and
Not represented**

Asda Stores Limited

**Respondent
Represented by:
Ms K Gallacher -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is that the respondent's application to strike out the applicant's claim is dismissed.

ORDER

Within 28 days of the date of this judgment, the claimant shall send to the respondent and to the tribunal the following information in relation to her claim.

Disability

1 . In relation to the claimant's complaint of disability discrimination, by what physical or mental impairment(s) is the claimant affected?

2. In what way(s) does this impairment have a substantial and long-term

3. Does the claimant allege that the respondent knew or could reasonably be expected to know that she had a disability at the relevant time?

Claim under section 15 Equality Act 2010- Discrimination arising from disability

4. In what way(s) does the claimant argue that the respondent treated her unfavourably because of something arising in consequence of her disability?
Please list all acts of unfavourable treatment relied upon with dates, names

of those involved and all facts the claimant offers to prove in support of her claim. Please describe the "something arising".

Claim of failure to make reasonable adjustments under section 20 Equality Act 2010

5. Does the claimant complain that:

(i) A provision, criterion or practice applied by or on behalf of the respondent placed her at a substantial disadvantage in comparison with people who are not disabled? If so, what is the provision, criterion or practice?

(ii) A physical feature of premises occupied by the respondent placed her at a substantial disadvantage in comparison with people who are not disabled? If so, what is the physical feature?

(iii) She was placed at a substantial disadvantage in comparison with people who are not disabled because she was not provided with an auxiliary aid? If so, what is the auxiliary aid?

6. What is the substantial disadvantage at which the claimant says she was placed?

7. Does the claimant say that the respondent knew or could reasonably be expected to know that she was likely to be placed at the substantial disadvantage?

8. What are the steps or adjustments which the claimant says it would have been reasonable for the respondent to make?

9. In what way would those adjustments have prevented the substantial disadvantage which the claimant believes has arisen?

Indirect discrimination under section 19 Equality Act 2010

10. What is the provision criterion or practice which the claimant says the respondent has applied to her? When was it applied?

11. What is the particular disadvantage to which the claimant states that people who share her protected characteristic would have been put when compared

to other people because of that protected characteristic?

12. Was the claimant at this particular disadvantage due to having the protected characteristic?

Harassment claim under section 26 Equality Act 2010

13. The claimant is ordered to set out all instances of "unwanted conduct" of which she complains including in each case the date(s); the person(s) responsible; and all the facts upon which she will rely.

14. Why does the claimant consider that the conduct was related to her disability? Please state all facts upon which the claimant will rely on to show that the conduct was related to her disability.

15. Does the claimant state that this conduct had the purpose or effect of violating her dignity? If so, please state how.

16. Does the claimant state that the conduct had the purpose or effect of "creating an intimidating, hostile, degrading, humiliating or offensive environment" for

her? If so, please describe how.

17. Within 28 days of date of this judgment, the claimant shall also send to the respondent copies of all medical records held by her doctors) which are relevant to the disability upon which she relies.

In accordance with rule 38 (1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, unless the Order is complied with by the date specified, the claim shall be dismissed without further order and the Tribunal shall give written notice to the parties confirming what has occurred. Within 21 days of receipt of the claimant's response to the order, the respondent shall, if required, reply to the claimant's response.

REASONS

Preliminary issues

1. The case called for a preliminary hearing on 7 January 2020 in order to determine (i) whether the claim ought to be struck out in terms of either rule 37 (1)(c) or rule 37 (1)(d) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013; and (ii) whether the claim should be dismissed on grounds of time bar.

2. The claimant was not in attendance and was not represented. Miss Gallacher represented the respondent. An attempt was made to contact the claimant's representative by telephone but without success. The clerk also checked the tribunal's general email inbox to see whether any late application for postponement had been made or if otherwise the claimant's representative had made contact to explain his non-attendance. However, no such e-mail had been received.

3. As I was satisfied that the notice of the preliminary hearing had been sent to the claimant's representative I determined that it was in the interests of justice and consistent with the overriding objective to proceed with the preliminary hearing in the absence of the claimant or her representative.

Time bar

4. Having decided that it was appropriate to proceed I decided that I was nevertheless unable to deal with the question of time bar in the absence of the specification of the dates of the alleged discrimination that had been sought in the tribunal's previous orders and because neither the claimant nor her representative were present to speak to the issues that would be relevant to the 'just and equitable' test in the event that it was determined that the claim had been lodged outside the statutory time limit.

Application for strike out

5. Miss Gallacher submitted that the respondent sought strike out of the claimant's claim on two separate bases; namely (a) in terms of Rule 37(1)(c) for her non compliance with the tribunal's case management orders ('the orders') made at the preliminary hearing on 18 October 2019 and issued on 24 October 2019; and (b) in terms Rule 37(1)(d) on the ground that the claim had not been actively pursued.

6. Miss Gallacher referred to the chronology of the case. The claimant had

lodged his ET1 on 20 June 2019 and a case management preliminary hearing had been fixed for 30 August 2019. However that was postponed on the application of the claimant's representative, on the ground that he was dealing with a personal matter, and rearranged for 8 October 2019. The 8 October 2019 preliminary hearing was subsequently also postponed, again at the request of the claimant's representative, on the ground that this date clashed with his attendance at a final hearing on another claim. It was therefore rearranged for 18 October 2019.

7. The claimant's agent did not attend the preliminary hearing on 18 October 2019 and he could not be contacted by telephone. Having checked that the notice of the hearing had been sent to him, the employment judge concluded that it would be in line with the overriding objective to continue with the preliminary hearing in his absence.

8. At the preliminary hearing the Employment Judge issued a note setting out case management orders and a separate order for additional information, which were both sent to the parties on 24 October 2019.

9. Miss Gallacher explained that the case management order required the claimant to provide the respondent with a disability impact statement within 21 days of the date of the Judge's note but she had not done so until 10 December 2019.

10. The case management order had also required the claimant to provide the respondent with copies of all medical records held by the claimant's doctors, which were relevant to her disability, within 6 weeks of the Judge's note. These had still not been produced, although Miss Gallacher informed me that the claimant's representative had contacted her colleague in her Leeds office on 6 January and informed him that he would produce the medical records by 7 January. In any event, even if he produced the medical records on 7 January, he would still be significantly late in complying with the order.

11. The case management order had also required the claimant, within 7 days of the note, to state the reason for his non-appearance at the 18 October 2019 preliminary hearing. However, he had not done so until 3 December 2019.

12. The claimant had not responded at all to the separate order for further information.

13. On 25 November 2019, the respondent's agents made an application for strike out pursuant to Rule 37(c) and/or 37 (d) because of the claimant's failure to comply with the Tribunal's orders and/or for failing to actively pursue the claim or, alternatively, that the tribunal make an unless order.

14. In response to that application, the claimant's representative, Mr Miller, sent an email to the respondent and to the tribunal on 3 December 2019 in the following terms:

'We refer to the above and to our correspondence relative to this matter. We note the emails received by both the respondent and the tribunal in this matter.

We advise that we understand the concerns of all parties involved and wish to respond as follows; our company which is representing the claimant, Hilltop Solutions, is a small company run by myself. I am the only agent within the small company who can deal with tribunal matters. Sadly, over the course of

the last few weeks, I have been severely ill in relation to ongoing illnesses I have personally which can have a very significant detrimental effect on my own health. In relation to the preliminary hearing, it is my understanding that a letter was sent from my assistant to the tribunal with request for postponement, however from the nature of the emails this does not seem to be the case. As this request would be with my PA, I will seek to find the same.

In relation to my absence, I have only returned to work today and having to deal with all outstanding issues. Naturally, we would object to the respondent's requests for strikeout in relation to this matter. Additionally, we are happy to comply with the respondent's request to receive an impact statement in relation to the claimant's mental health ailments in anticipation that it would be ordered at the preliminary hearing. We advise that the respondent has not sought medical records at this time however, if these are sought by the respondent, we would require additional time to request these from the claimant's physician.

Additionally, we would like to advise on a personal level, that no disrespect has been intended to the employment tribunal or any of the respondent's agents, nor the respondent themselves, in relation to the lack of communication on my part. "

15. In response to that email, on 3 December 2019, the respondent renewed its application that the claim be struck out in terms of rule 37 and also on the ground that it was time barred. On 17 December 2019, the tribunal issued a formal notice that there would be a preliminary hearing on 7 January 2020 to determine the respondent's application to strike out the claim and the issue of time bar.

The respondent's submissions

Non compliance with orders - rule 37 1(c)

16. Miss Gallacher submitted that the claim should be struck out because of the claimant's failure to comply with the tribunal's orders. In relation to the case management order the claimant had failed to comply with the requirements to produce a disability impact statement within 21 days, to produce medical records within 6 weeks and to provide details of his non-appearance at the preliminary hearing on 18 October within 7 days. She had also completely failed to comply with the separate order to provide information about the details of her claim.

17. The claimant's delay had prejudiced the respondent who had incurred unnecessary costs despite no progress having been made in terms of its understanding of the claim to be answered, including the cost of its application for strike out.

The claim has not been actively pursued - rule 37 1(d)

18. The respondent's alternative submission was that the claim should be struck out on the basis that it had not been actively pursued. The claimant's and her representative's absence from the hearing today only added weight to its argument that she had failed to actively pursue her claim.

19. Miss Gallacher referred to the claimant's concession in section 15 of the ET 1 that the claim form was lacking in specification, which the claimant had still

taken no steps to address. The claimant's failures to respond to the tribunal's orders in order to remedy that admitted lack of specification was clear evidence of her failure to actively pursue the claim.

20. The respondent acknowledged the claimant's explanation in his 3 December 2019 e-mail that he had been unwell and unable to comply with the orders for that reason. However, even if the delay was unintentional because of that reason, it was nevertheless inexcusable given the delays incurred and the number of postponements that had occurred at the claimant's request.

21. Even the orders that had been complied with had not been complied with timeously and no medical records had yet been produced. The absence of communication and the various delays caused by the claimant's representative had prejudiced the respondent's position to the extent that seven months after the original claim had been issued, it was no further forward in its understanding of the claim to be answered.

22. Miss Gallacher referred to the factors that the EAT in ***Weir Valves & Controls (UK) Limited v Armitage 2004 ICR 371***, had said should be taken into account, which were -

- (i) The magnitude of the non compliance;
- (ii) Whether the default was the responsibility of the party or his or her representative;
- (iii) What disruption, unfairness or prejudice has been caused;
- (iv) Whether a fair hearing would still be possible; and
- (v) Whether striking out or some lesser remedy would be an appropriate response to the disobedience.

23. The respondent believed that a fair trial could no longer take place because of the sparseness of the information in the claim form and because despite an order from the tribunal, the claimant had provided no further information in relation to the claims she was advancing. The respondent's position was seriously prejudiced because it did not have fair notice of the claim against it at this advanced stage in the proceedings.

24. Miss Gallacher submitted that according to the respondent's records the main incidents set out in the ET1 occurred could not have occurred any later than 8 November 2018.

25. In respect of the "checkout" incident, this could have occurred no later than 12 June 2018 because the claimant had not been at work since that date. As described, this alleged incident had taken place in the presence of colleagues who probably had no idea that the claimant was disabled. It was likely that the incident was relatively insignificant for them and therefore given the delay, it would be increasingly difficult for them to recall the events.

26. In the circumstances, the claimant's continued failure to provide full details of this alleged incident had significantly prejudiced the respondent's ability to investigate it before memories faded. That was becoming increasingly difficult in circumstances where the allegation was now at least almost 19 months old. Miss Gallacher submitted that it was highly unlikely that the claimant's colleagues would now remember such an incident

27. In respect of the allegation about the home visit, the respondent had recorded that incident as having occurred on 8 November 2018. It was accepted that

the managers involved were still employed by the respondent or, if not, could still be contacted. Miss Gallacher conceded that during the absence management procedure prior to her dismissal, the claimant had complained, in a meeting on or around 21 February 2019, about her treatment in relation to this home visit.

28. In Miss Gallacher's submission, while it would be harsh in light of her representative's ill health to call the claimant's failure to pursue her claim "deliberate", it was certainly persistent and inexcusable. The failure had been particularly serious in circumstances where the claimant's representative must have been aware from the terms of the correspondence that both the tribunal and the respondent were trying to progress the claim, but yet he had simply ignored orders and hearing dates.

29. As a result, after incurring significant cost and having attended two preliminary hearings, the respondent still did not know the case against it and it could not yet assess whether a fair trial was even possible.

Unless Order

30. Miss Gallacher submitted that if the tribunal was not prepared to strike out the claim it should, in the alternative, make an unless order requiring the claimant to comply with the terms of the previous order for further information, lest her claim would be dismissed.

Relevant law

Rule 37 1(c) - Strike out for non-compliance with the tribunal's orders

31. In **Weir Valves & Controls (UK) Limited V Armitage 2004 ICR 317**, the EAT set out the principles that tribunals should apply when considering whether to strike out a claim on this ground:-

"...it does not follow that a striking-out order or other sanction should always be the result of a disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some other lesser remedy would be an appropriate response to the disobedience."

32. In **Blockbuster Entertainment Video Limited v James 2006 ECWA Civ 684**, the Court of Appeal held that the power to strike out a claim:

..is a draconian power not to be too readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard for required procedural steps, or that it has made a fair trial impossible. If these two conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.

It is not only by reason of the convention right to a fair hearing vouchsafed by Article 6 that striking out, even if otherwise warranted, must be a proportionate response...

The particular question... is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take account the fact - if it is a fact - that the Tribunal is ready to try the claims, or that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which and its procedure exists. ”

Rule 37 1(d) - Strike-out on the ground that the claim has not been actively pursued

33. In **Rolls Royce Pic v Riddell 2008 IRLR 873**, the EAT, dealing with an application to strike under Rule 18(7)(d) of the 2004 Employment Tribunal Rules, held that: -

“The rule is not drafted so as to fetter the discretion that is conferred by any particular considerations. However, as with all exercises of discretion, it will be important to take account of the whole facts and circumstances including the fact that strike out is the most serious of sanctions. That being so, as commented in Harvey, it is usually considered appropriate to take account of the principles laid down by the High Court in England prior to the introduction of the current Civil Procedure Rules. Those show an expectation that cases of failure to actively pursue a claim will fall into one of two categories. The first of these is whether there has been “intentional and contumelious” default by the claimant and the second is whether there has been such inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the respondent”.

Discussion and Decision

Failure to comply

34. The claimant’s failure to comply with the Tribunal’s Orders is not in doubt. The Tribunal must however determine whether in all the circumstances her failure has been deliberate and persistent or has made a fair trial impossible. In response to an application to strike out that the respondent was undoubtedly reasonably entitled to make on 25 November 2019 the claimant’s representative wrote to the respondent and to the Employment Tribunal on 3 December 2019 in the terms I have repeated above.

35. While the claimant has clearly been in default I do not find that in the circumstances her conduct has amounted to *“deliberate and persistent disregard of required procedural steps”*. Although the claimant has failed to comply with the orders, that failure has in fact been attributable to her representative who has nevertheless engaged with the tribunal about the reasons for his non-compliance, which relate to health difficulties that he is currently experiencing.

36. Furthermore, I do not find that the claimant’s failure to comply has made a fair trial impossible. No hearing has yet been fixed and there is still time to make orderly preparation. While it is accepted that some time has passed since the dates that the respondent understands the allegations relate to, it was clear from Miss Gallagher’s submission that it is likely that any witnesses will still be available and that in respect of both the “home visit” incident and the internal procedure that took place in January/February 2019 documentation is still available.

37. I accept that the 'checkout' incident may be more difficult for the respondent to investigate in the absence of a date for that allegation, for the reasons explained by Miss Gallacher. However I am not persuaded that it will be impossible for the respondent to deal with this incident, particularly in light of the amount of detail about it that is already set out in the ET1 .

38. In the circumstances I do not find that the claimant's failure to comply has made a fair trial impossible.

Failure to actively pursue the claim

39. Having regard to the principles set out in ***Rolls Royce v Riddell***, I am satisfied that the claimant's failure to comply with the Tribunal's Order has been because of matters affecting her representative, so I am not persuaded that her failure has been intentional and contumelious. While he has failed to comply with the tribunal's orders, the claimant's representative has not disengaged from the proceedings and it is clear from his correspondence to the tribunal on 3 December 2019 that he is well aware of his obligation to comply, albeit his health has prevented him thus far from doing so. There has been no disrespect or lack of intention to comply on his part.

40. Nor am I persuaded that in all the circumstances there has been an inordinate and inexcusable delay. The delay is because of the claimant's representative's ill health and his difficulties associated with that. Furthermore, for the reasons I have already set out above I do not accept that there is a substantial risk that a fair trial would not be possible.

41. I recognise the prejudice that the respondent has suffered in terms of its inability to understand the claimant's case some 7 months after the claim was raised and also the additional cost that it has gone to in terms of the application to strike out.

42. However, I must also recognise the draconian nature of a strike out decision and the need to consider whether the sanction of strike out is a proportionate response in the particular circumstances of this case, or if a lesser sanction is available.

43. In all the circumstances and having regard to the overriding objective I find that there is still time in which orderly preparation can be made and that there is a more proportionate and less drastic means to take matters forward than to strike out the claim.

44. It is clear that the claimant's representative has had difficulty complying with the orders because of his health. However, there is no doubt the respondent is entitled to greater clarity of the case against it and that the claimant must provide due notice of the claim before the case proceeds to a final hearing or, indeed, a preliminary hearing on the question of time bar subject to what is contained in the response.

45. In all the circumstances I therefore find that in accordance with the overriding objective the claimant is entitled to a final chance to articulate the basis of her claim and that it is reasonable and proportionate to make an unless order in the terms set out.

46. For all these reasons, the respondent's application for strike out is dismissed.

Employment Judge: Robert King
Date of Judgment: 20 January 2020
Entered in register: 24 January 2020
and copied to parties