



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121485/2018 (V)

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Held via Cloud Video Platform (CVP) on 22 September 2020

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**Employment Judge
Tribunal Members**

**R Gall
J McElwee
J McCaig**

Miss F Greasley

**Claimant
In Person**

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Common Thread Group

**Respondent
Represented by:
Mr C Edward -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The unanimous Judgment of the Tribunal is

- (1) That the hearing set down for 22, 23, 24 and 25 September is postponed in circumstances where the main witness for the respondents is unable to participate by giving of evidence due to injury.
- (2) That the hearing is rescheduled and set down for 2, 3, 4 and 5 November 2020, to take place via CVP. A reading day should be set down for the Tribunal on 30 October, with appropriate deliberations and writing time being set down for the period after the hearing concludes.
- (3) That the statements submitted by the respondents from potential witnesses Allison Sharp and Austin Gracie will not be considered by the Tribunal as evidence in their absence before the Tribunal as witnesses.

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- (4) That the statement contained within paragraph 14 of the witness statement of the claimant sets out background information and is not permitted to be an allegation of discrimination advanced in this case.
- (5) The respondents have 21 days from this hearing to respond to this background information from the claimant in paragraph 14 and also to the passage in her evidence set out in paragraph 8 below.
- (6) That the statement in paragraph 24 (a) of the witness statement of the claimant sets out background information and not an allegation of alleged discriminatory conduct.
- (7) That the claim made that dismissal was a discriminatory act is a claim advanced in terms of Section 15 of the Equality Act 2010 notwithstanding the reference to Section 13 of that Act in the Scott Schedule submitted by the claimant.
- (8) That paragraphs 38 to 42 and paragraph 45 (a) of the statement of the claimant are excluded from the evidence given by the claimant, save for the passage in paragraph 38 reading "I started a new job at ALE. 3 months into my employment I was racially abused by one of the young people, however I provided (sic) suitable support by staff and all the managers, the young person was educated on racism and I done (sic) some individual restored work to have a more positive relationship. I was offered weekly mandatory counselling one week speaking about personal issues and the next speaking in groups with a counsellor to discuss ways of improving relationship building for staff and young people."
- (9) The email initially attached to the statement of the witness Darren Dow, being an email from Rianne Ward-Hilton to Darren Dow dated 5 June 2018 is accepted as a production in the case, becoming pages 463 and 464 of the file of documents.
- (10) Within 14 days of thi hearing the respondents will submit to the Tribunal and copy to the claimant any medical certificate obtained by Mr Dow confirming his ability or otherwise to give evidence at this hearing.

REASONS

1. This case called for hearing on 22 September 2020. It had been set down for that day and the following 3 days. It was to be conducted by video conference, utilising the CVP platform. The claimant appeared on her own behalf. Mr Edward appeared for the respondents.
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2. On the day prior to the hearing the respondents had emailed the Tribunal and the claimant. They explained that their principal witness, Mr Dow, had been involved in an incident at work. He had, as a result, been affected by concussion. The incident had occurred on the evening of 13 September/early morning of 14 September. He had consulted doctors and had received treatment. He required to be symptom free for 24 hours before being considered fit for work and potentially fit to give evidence.
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3. Mr Edward updated the Tribunal. Unfortunately, whilst Mr Dow had attended work on 21 September, he felt sick that day and was affected by memory loss. He had sought to obtain a GP appointment; however, it was a local holiday. He was attending his GP on 22 September. This was to obtain a fit note and also to obtain a note in relation to his fitness to give evidence. He was however unable to be present as a witness at the Tribunal.
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4. The position of the respondents was that it would be possible to proceed with the claimant's evidence and that of Mr McKechnie, their other witness. Mr Dow could give evidence at a future date when fit so to do. They were however "neutral" as to whether the diet proceeded with the case going part heard or, in the alternative, was rescheduled without evidence having commenced.
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5. They also explained in an email of 18 September that Ms Sharp and Mr Austin, whose witness statements had been submitted, were not now to give evidence. When I enquired as to whether there was an issue from their point of view with devices or internet connection, Mr Edward candidly said that the prospective witnesses had changed jobs and were reluctant to appear as witnesses. He sought however that their statements be taken into account by the Tribunal. Mr Edward is, of course, aware of the possibility of witness orders being sought.
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6. Ms Greasley was very disappointed, she said. She had hoped that the case would proceed at this hearing. The respondents had presented their statements late, had then said that 2 witnesses would not be appearing and were now explaining that Mr Dow could not appear today. She was not keen on the case going part heard, however. That would involve her own evidence and cross examination with any re-examination, together with the evidence of Mr McKechnie being taken. In her view this would place her at a disadvantage.
7. Mr Edward recognised and understood the claimant's disappointment. He said that the case had been "live" for some time, with the reasons for that not lying at the respondents' door in many instances. He recognised that the respondents could have informed the Tribunal of the issue from Mr Dow's point of view at an earlier stage. It was always their hope and their understanding that he would be able to give evidence in this diet. As soon as that became a real difficulty, they had contacted the claimant and the Tribunal to explain the position more fully.
8. The Tribunal adjourned to consider the position. It returned to confirm its unanimous decision that this hearing would be postponed. It was explained that the Tribunal was concerned at possible prejudice to the claimant if the case proceeded at present with her evidence and that of Mr McKechnie being taken, the evidence from Mr Dow to follow. It appeared very possible unfortunately that Mr Dow would not be able to give evidence during the course of this week. The option of rescheduling was considered by the Tribunal to be a far fairer one than that of taking some of the evidence at the moment.
9. The Tribunal later concluded that 4 days remained the appropriate time for the hearing when it did proceed. It was conscious of the emotional nature of evidence. It might be that due to that and the tiring nature of evidence being given over video, more breaks than would otherwise be the case were necessary. The Tribunal was keen that the hearing be concluded at as early a date as was possible.

10. Looking to dates, after discussion it was agreed that the hearing be set down to be conducted by CVP on 2, 3, 4 and 5 November. The hearing should be before this Tribunal if at all possible as this Tribunal has read the papers, including the statements. A reading day should, nonetheless, be set down for 5 30 October as the Tribunal will require to re-familiarise itself with the case. Deliberations and writing days should also be set down. The Clerk to the Tribunals is requested to issue the appropriate hearing notices.
11. In relation to the statements of Ms Sharp and Mr Gracie, the Tribunal stated that it would not have regard to those in circumstances where the witnesses were not to be present to speak to them and to be cross-examined on them. 10 Although they bore to be signed, the Tribunal had no knowledge of the circumstances of signature. The Tribunal was now being informed that these witnesses did not wish to be present at Tribunal to speak to their statements.
12. At a later stage, Mr Edward expressed his view once more that the statements 15 should be read by the Tribunal as part of the evidence. The Tribunal could then put such weight as it felt appropriate on the statements. The respondents recognised that the weight attached to them might not be of particular significance. They were however, said Mr Edward, written representations from a party and so in terms of Rule 42 the Tribunal required to have regard 20 to them.
13. Ms Greasley opposed the statements being considered by the Tribunal when she could not challenge them
14. The Tribunal in its second adjournment considered the further submissions of Mr Edward on this, and other, points. It remained of the view that in 25 circumstances where the witness is not present and especially where the witness is known to be unprepared to attend Tribunal to confirm his/her statement and to be cross-examined on it, it would be wrong to have regard to the statements. Rule 42 did not in the view of the Tribunal deal with this point. That Rule referred to written representations from parties. A statement 30 from a witness is not viewed as a written representation from a party. It might support a party. It was not however from a party. Equally, it did not comprise

written representations in the view of the Tribunal. The conclusion of the Tribunal was that a document produced by a party purporting to be the evidence of a witness was not what was envisaged in Rule 42 as being something which the Tribunal required to consider. Taking it to an extreme it is recognised, that view would entitle a party to submit purported statements from people said to be witnesses who never appeared as witnesses and therefore might or might not exist and who might or might not be “torn apart” if subjected to cross examination. This interpretation would require the Tribunal to consider any such document. Notwithstanding the possibility of the Tribunal attaching little or no weight to such a document, it was the view of the Tribunal that it would not be in the interests of justice for the Tribunal to consider such a document. There might be the appearance of the Tribunal being influenced by comments made in an untested statement given by a purported witness.

- 15 15. Other preliminary points were covered at this hearing before it concluded.
16. It was agreed that the email from Rianne Ward-Hilton to Mr Dow which was attached to his statement would be added as an additional document in the file for the hearing.
17. It was also agreed that the information provided by the claimant in paragraph 20 24 (a) of her statement setting out her view of there being hypocrisy on the part of Mr Dow in relation to the incident with Ms Ward-Hilton was background information rather than an allegation of discriminatory conduct.
18. In the Scott Schedule submitted by the claimant she refers to dismissal as being an act which is one of direct discrimination, Section 13 of the Equality Act 2010 being the relevant provision. After discussion, it was agreed by the claimant that her position was that dismissal was in fact alleged to be discriminatory in terms of Section 15 of that Act. This was as that had been understood by the respondents and indeed the Tribunal. The reference to Section 13 in relation to dismissal is therefore to be disregarded.
- 30 19. The claimant alleges that comments were made by Mr Dow in relation to the colour of her knees. She does this in paragraph 14 of her statement. She also

refers to hits as an act of discrimination in the Scott Schedule. The respondents objected to this being present in the statement whether it was an allegation of discrimination or whether it was said to be background. The claimant said it was an allegation of discriminatory conduct and wished it to be treated as such. Failing that, she sought that it remain, as background information.

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20. The Tribunal considered the submissions made to it. No view is expressed by the Tribunal, clearly, as to the truth of the events as described by the claimant. That has yet to be determined. It was clear, however, that this event had not previously been mentioned by the claimant. It was appreciated that the claimant's disability means that her memory is such that sometimes she remembers things only when going over events, as she had in her statement. Nevertheless, this claim has been current for some time. Opportunities have been given for the claimant to specify her claim. Orders, including Unless Orders in some areas, have been issued. Other allegations sought to be added at earlier stages have been refused. On balance the view of the Tribunal was that this would not be permitted as an additional ground of claim. It was the decision of the Tribunal that it did however legitimately form part of background information which potentially might assist the Tribunal in its assessment of the motivation and approach of Mr Dow. The Tribunal therefore allowed the information to remain in the claimant's statement on that basis. It is not however an allegation of discriminatory conduct.

21. It was recognised by the Tribunal that Mr Dow had not had any opportunity to answer this comment. He is therefore given 21 days from date of this PH to respond to this element of the statement.

22. Mr Edward submitted that paragraphs 38-42 of the claimant's statement, together with paragraph 45 (a) should be excluded. Those dealt with matters which were irrelevant to this hearing, which was on liability. The references to SSSC had already been ruled out as a potential ground of claim when sought to be added as a claim of victimisation.

23. Ms Greasley submitted that these paragraphs were relevant. They described her experiences. She understood and accepted that her claim of victimisation had not been permitted to proceed. Her view was that her experience, which had involved approaching and involving her MSP, was something about which the Tribunal should hear.
24. The Tribunal adjourned on two occasions. Firstly, it adjourned to consider the possible postponement of the case and the issue of the witness statements from Ms Sharp and Mr Gracie. It later adjourned to consider that further points made by Mr Edward in relation to the witness statements and also with regard to the content of the claimant's statement. It returned on each occasion to announce its unanimous view as recorded above.
25. The hearing will therefore proceed on the November dates detailed.

Employment Judge: R Gall
Date of Judgment: 23 September 2020
Entered in register: 30 September 2020
and copied to parties