



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121485/2018

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Held in Glasgow on 23 September 2019

Employment Judge L Wiseman

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Miss F Greasley

**Claimant
In Person**

Common Thread Ltd

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

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided:-

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- (i) to refuse the respondent's application to have the claim struck out.
- (ii) to issue an Unless Order in terms of rule 38 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 and
- (iii) to refuse the claimant's application to amend the claim.

REASONS

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1. The hearing today was a preliminary hearing to determine three issues:

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- (i) The respondent's application to have the claim struck out for failure to respond to various Orders;
- (ii) Whether the claimant was a disabled person at the relevant time and
- (iii) The claimant's application to amend the claim to include a complaint of victimisation in terms of section 27 Equality Act.

E.T. Z4(WR)

2. I, having heard the respondent's strike out application, accepted Mr Edward's position that it would not be appropriate to determine the issue of whether the claimant was a disabled person. I made that decision because the claimant has not provided the information which would be helpful not only to the tribunal, but also to the respondent in preparing cross examination. Accordingly, the issues to be decided today were limited to:- (i) the respondent's application for strike out of the claim and (ii) the claimant's application to amend the claim.

Background

3. The claimant presented a claim to the Employment Tribunal on the 12 October 2018, alleging she had been unfairly dismissed and discriminated against because of the protected characteristics of race and disability. The claimant asserted she had been the subject of racist behaviour by the young people in the residential setting where she worked.

4. The respondent entered a response denying the allegations of discrimination and asserting the claimant's employment had come to an end because she had failed the probationary period.

5. A case management preliminary hearing took place on the 4 January 2019 and a Note from that hearing was issued on the 7 January. The Employment Judge noted the claimant was represented by a solicitor from the Ethnic Minorities Law Centre, and that he had been recently instructed. The claimant's representative indicated he would be able to provide a medical report regarding the claimant's asserted disability of dyslexia. He also agreed to provide further and better particulars of the claim by the 1 February.

6. The claimant's representative, by letter of the 1 February 2019, provided two paragraphs of further particulars. He confirmed the claimant was dyslexic, and confirmed a complaint of direct race discrimination was being made based upon alleged harassment by service users.

7. The respondent replied to those further particulars on the 15 February and confirmed it did not accept the claimant was a disabled person in terms of the

Equality Act. The respondent also considered the claimant had merely restated the content of the claim form in respect of alleged race discrimination and asked for specification of the claim to be provided.

- 5 8. A second case management preliminary hearing took place on the 7 March 2019. The Employment Judge agreed it would be necessary to arrange a one day preliminary hearing to determine whether the claimant was a disabled person in terms of the Equality Act. He decided it would be appropriate, in advance of that hearing, to issue the standard Disability Discrimination Order for completion by the claimant.
- 10 9. The Employment Judge also ordered the claimant to (a) provide details in writing of when she alleged she communicated her alleged disability to the respondent, the circumstances in which it was communicated, to whom it was communicated and what she said; (b) provide details of the legal basis of the complaint of race discrimination and (c) clarify whether she was pursuing a
15 complaint of unfair dismissal or automatically unfair dismissal.
10. A preliminary hearing to determine whether the claimant was a disabled person was arranged for the 8 May.
11. The claimant's representative advised the tribunal, in a letter dated 10 April, that he had withdrawn from acting.
- 20 12. An Employment Judge, by email of the 26 April, noted the claimant had not responded to the Orders, and confirmed the date for compliance had been varied to the 3 May.
13. The claimant sought a postponement of the hearing arranged for the 8 May. The respondent agreed to the postponement because the claimant had not
25 provided the information necessary for the issue to be determined at the preliminary hearing.
14. The hearing on the 8 May was postponed and converted to a case management preliminary hearing.

15. A note was issued following the preliminary hearing on the 8 May. The Employment Judge refused the respondent's application for an Unless Order, and granted the claimant a further period of 14 days to comply with the Orders previously made.
- 5 16. The claimant, by email of the 22 May, made an application to amend her claim to include a complaint of victimisation in terms of section 27 Equality Act. The claimant attached information from her GP surgery, a report from her High School, a letter from Student Awards Agency for Scotland, a Scottish Social Services Council personal statement and a one page document prepared by
- 10 the claimant and/or her representative which appeared to focus on the claimant's position that she did not have a duty to disclose her medical condition.

The respondent's application for strike out of the claim

17. Mr Edward referred the tribunal to the orders issued by the Employment
- 15 Judge at the preliminary hearing on the 7 March. The Disability Impact Order was produced at page 92 and asked the claimant the following questions:
- what do you say was the date when you were discriminated against, or over what period do you say you were discriminated against;
 - 20 • at that time what kind of physical or mental impairment did you have;
 - for how long has the impairment lasted, or how long is it likely to last;
 - at the relevant time, did the impairment affect your ability to

25 carry out day to day activities;

 - if so, which day to day activities were affected;
 - was the effect substantial;
 - do you take any medication for your condition and

- do you have any medical evidence concerning your condition.
18. The three other Orders were set out in the Note following the preliminary hearing at paragraphs 8, 9 and 10 (page 90). The claimant was given 14 days to provide a response.
- 5 19. Mr Edward confirmed the claimant had not responded to the Orders within the timescale, or indeed at all.
20. Mr Edward acknowledged the claimant's representative had withdrawn from acting, but noted this was after the time limit for responding to the Orders had passed.
- 10 21. The Order regarding the disability impact statement had been reissued on the 26 April, with a time limit for response by the 2 May. There had not been a response to this Order and the forthcoming preliminary hearing had had to be postponed.
- 15 22. Mr Edward submitted the claimant had been given a final chance to comply with the Order on the 8 May, but had failed to respond. Mr Edward invited the tribunal to note the Employment Judge had confirmed in his Note that if the claimant did not respond, steps would need to be considered to strike out the claim.
- 20 23. Mr Edward submitted the content of the Orders was within the knowledge of the claimant, who had had every opportunity to respond, but had failed to do so. He submitted no further opportunity to respond should be given and submitted the tribunal should strike out the claim.
24. Mr Edward, in the alternative sought an Unless Order.
- 25 25. Mr Edward, in response to the claimant's submission, stated there had not been a sufficient explanation for the non-compliance with the Orders.

The claimant's response

26. Ms Greasley understood Mr Edward's frustration but suggested any delay was the responsibility of her previous representative who had given poor

advice and had had poor communication skills. Ms Greasley had provided medical notes and confirmed her claim for race discrimination was as set out in the claim form. Ms Greasley suggested she had not noted her disability on the application form because she has a learning difficulty.

- 5 27. Ms Greasley confirmed she was not complaining about (ordinary) unfair dismissal. Her claim was that the discrimination led to her dismissal.
28. The claimant produced a letter from the University of the Highlands and Islands explaining the adjustments she had required.

The claimant's application to amend the claim

- 10 29. Ms Greasley told the tribunal that she had been informed by ACAS that it was standard procedure for employers to report dismissals to the SSSC. The claimant's employment ended in June 2018 and she presented her claim in October 2018. She had then received a letter from the SSSC in November, informing her they understood she had resigned prior to an investigation being
15 conducted.
30. Ms Greasley submitted this had had consequences for her in her alternative employment. Ms Greasley considered the respondent was making life very difficult for her.
31. Ms Greasley waited until May 2019 to make the application to amend because
20 by then she had met with Citizens Advice, and received advice, and she had recently lost a job because matters with SSSC had still not been resolved.

The respondent's response to the application to amend

32. Mr Edward noted the SSSC may not have contacted the claimant until November, but the Agenda completed by the claimant prior to the first case
25 management preliminary hearing, showed she was aware of the report to the SSSC.
33. Mr Edward further noted it was not only standard practice, but also a requirement, for employers to inform the SSSC of the type of issue noted in the respondent's ET3.

34. Mr Edward submitted the amendment should have been made earlier in circumstances where the claimant had been aware of the SSSC report since January. Further, the amendment was not specified: for example, there was no indication of the protected characteristic.
- 5 35. Mr Edward submitted the balance of prejudice lay with the respondent who would be required to respond to the new claim. If the application to amend was allowed, it would lead to further delay with the claim which was already protracted.
- 10 36. Mr Edward invited the tribunal to have regard to the issues raised in the strike out application, and the additional points above, and to refuse the application to amend.

Discussion and Decision

(i) The respondent's application to strike out the claim

- 15 37. I firstly had regard to the terms of rule 37(1)(c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, which provides as follows:

20 *"At any stage of the proceedings, either on its own initiative or on the application of a party, a tribunal may strike out all or part of a claim or response on any of the following grounds -*

(c) for non compliance with any of these Rules or with an order of the tribunal. "

- 25 38. I next had regard to the overriding objective set out in rule 2, of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including:-

- the magnitude of the non compliance;
- whether the default was the responsibility of the party or her representative;
- what disruption, unfairness or prejudice has been caused;

- whether a fair trial is still possible and
- whether striking out or some lesser remedy would be an appropriate response to the disobedience.

- 5 39. I addressed each of these points in turn. I noted there was no dispute regarding the fact an Employment Judge issued Orders at a preliminary hearing on the 7 March. I considered the Orders were clear in their terms and I noted the claimant did not seek to suggest she had not understood what was being asked of her. No response was provided to the Orders.
- 10 40. The Order concerning the disability impact information was re-issued on the 26 April, and the claimant was given until the 3 May to respond. She failed to reply.
- 15 41. The claimant was unable to explain to me why she had not responded to the Orders. The claimant referred to the further particulars provided by her representative, but these were provided prior to the case management preliminary hearing where the Orders were made. She also referred to some paperwork she produced when seeking the postponement of the hearing on the 8 May. The difficulty with the document referred to was that it was one page, with the numbers starting at 5/6. The claimant suggested there had been another page, but she did not have it and the document sent to the tribunal only had the page starting with 5/6. I considered that even taking the document at its highest, it neither explained why there had been no response to the Orders previously, nor provided a response to the Orders.
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- 25 42. I asked the claimant why she had not responded to the disability impact Order, and the only point she put forward was to refer to documents which had been provided noting she had Dyslexia. I asked the claimant to read the Order (page 92) and she confirmed she understood what was being asked of her. I was somewhat perplexed by the fact the claimant could not tell me why she had not responded to the Orders.
- 30 43. The claimant's position at its highest is that in response to the various Orders she provided a letter on the 22 May attaching a letter from her GP surgery, an

undated letter from her High School (which she left in 2008), a letter from the Students Awards Agency dated 2 November 2010 and a one page document commencing with point 5/6. I noted some of these documents had been provided previously. There has been no attempt to respond to the Orders seeking information regarding communication of her disability; the legal basis of the race discrimination claim and the legal basis of the unfair dismissal claim.

44. I, in considering the magnitude of the non-compliance, was satisfied there had been a total failure by the claimant to respond to each of the Orders.
- 10 45. The claimant was, at the time the Orders were issued, represented. The representative withdrew from acting on the 10 April 2019. The tribunal contacted the claimant direct to ask if she was proceeding with her claim and, as set out above, reissued the disability impact order. The claimant failed to respond.
- 15 46. The claimant, today, sought to place blame for failure to respond on her representative. I could not accept the blame lay wholly with the representative in circumstances where the claimant has had every opportunity to respond to the Orders since the representative withdrew from acting and has not done so.
- 20 47. The disruption, unfairness or prejudice caused by the claimant's failure to respond to the Orders lies in the fact that the claim is no further forward than when it was presented in October 2018. The respondent has been required to attend case management preliminary hearings, but no progress has been made regarding clarifying the claim.
- 25 48. I had regard to whether a fair trial was still possible. I considered, on the one hand, that the claim of disability discrimination is not set out with any clarity in the claim form. There is reference to dyslexia and requiring more time to read documents, but beyond this there is no hint of the type of claim being brought except for a reference to reasonable adjustments in the final paragraph. The
- 30 complaint of race discrimination is more factually detailed, but there appeared to be confusion between the claim form, which referred to racial harassment,

and the further particulars provided by the claimant's representative on the 1 February, which referred to a claim of direct discrimination.

49. I, on the other hand, considered that it would be for the claimant to go first in any hearing and that the respondent could be given time, if necessary and upon hearing the claimant's evidence, to consider and prepare their position.
50. I concluded that with further case management it would be possible to have a fair trial.
51. I had regard to the case of **De Keyser Ltd v Wilson 2001 IRLR 324** where the EAT made clear that although certain conduct could lead directly to the question of a strike out order, ordinarily, neither a claim or a response should be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is not possible.
52. I next considered whether striking out, or some lesser remedy, would be an appropriate response to the claimant's failure to respond to the Orders. I, in considering this point, had regard to the fact there has been a total failure to comply with the Orders and that the parties were, essentially, no further forward with the case than they were a year ago. I also accepted the respondent has been put to the cost (both a financial cost and a time cost) of attending the various preliminary hearings which have taken place thus far.
53. I also had regard to the fact that striking out a claim is a draconian action. I acknowledged a lesser remedy of an Unless Order was available to me.
54. I decided, having had regard to and having balanced all of the points set out above, to refuse the respondent's application to have the claim struck out. I decided to issue an Unless Order because this will give the claimant one final opportunity to provide the information sought, and will give the respondent some comfort from the fact that if the claimant does not comply with the Order, her claim will be struck out.
55. I also decided it would be appropriate to set aside the existing Orders which have not been complied with, and to issue a new Unless Order which will include the previous orders and some additional points.

56. I explained to the claimant (at the preliminary hearing) that she must answer the questions set out in the Order. I would encourage her to take each of the points at 1-9 of the Order, and to set out her response to each point, and following the same numbering.

5 57. I also explained to the claimant that she is not being asked to provide medical evidence of her disability. The claimant is being asked to explain to the tribunal (and the respondent) how her disability impacts on her.

58. I encouraged the claimant to seek legal advice before responding to the Unless Order.

10 **(ii) The claimant's application to amend the claim**

59. I had regard to rule 29 of the Rules which gives tribunals power to allow amendments at any stage of the proceedings.

15 60. I also had regard to the case of **Selkent Bus Co Ltd v Moore 1996 ICR 836** where the then President of the EAT gave some guidance as to how tribunals should approach applications for leave to amend. It was said a tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. The relevant factors may include:

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- the nature of the amendment;
 - the applicability of time limits and
 - the timing and manner of the application.

25 61. I had regard to the nature of the amendment the claimant wishes to make. The initial claim form concerned claims of disability discrimination and race discrimination. There is a lack of clarity regarding the nature of the claims being pursued, although (as stated above) there was reference in the claim form to a failure to make reasonable adjustments and to a complaint of direct (race) discrimination and/or harassment.

62. I was satisfied that notwithstanding the fact the complaints have not been specified, there was no complaint of victimisation referred to or foreshadowed in the claim form. I concluded, on that basis, that the amendment the claimant wishes to make, is to introduce a new head of claim.
- 5 63. I next had regard to the applicability of time limits. The claimant's employment with the respondent ended on the 14 July 2018. Early conciliation commenced on the 13 August 2018 and the early conciliation certificate was issued on the 13 September 2018. The claim form was presented to the Employment Tribunal on the 12 October 2018. The claimant's application to amend the claim form was dated 22 May 2019. I was satisfied that on the face of it (and
10 subject to what is said below) there would appear to be an issue regarding whether any such claim was presented in time.
64. I next had regard to the timing and manner of the application. I understood from the claimant that the complaint of victimisation is based on the
15 respondent reporting her dismissal to the SSSC, and the SSSC undertaking their own investigation into matters. The claimant says this has had an impact on her ability to hold alternative employment. The claimant suggested she had received a letter from the SSSC in November 2018 but she did not raise the matter until May because it was only at that time she lost her job as a
20 consequence of delay with the SSSC concluding matters.
65. Mr Edward suggested the claimant knew of the fact the respondent had reported the matter to the SSSC in January 2019 and therefore she could, and should, have raised the matter earlier.
66. I acknowledged this may impact on the issue of timebar, and at this stage it
25 was not possible to reach any firm conclusions.
67. I next had regard to the relative hardship which may be caused by granting or refusing the application. I balanced, on the one hand, the fact that refusing the application will mean the claimant is denied an opportunity to advance this aspect of the claim. On the other hand, I took into account that if the
30 application is granted, the respondent will require to defend another claim and

this will involve them in preparation time and is likely to lead to a longer hearing.

68. I also had regard to the fact the application to amend does not include details of the complaint it seeks to introduce. I considered this to be an important factor in this case because of the difficulties there have been to date in trying to obtain information from the claimant regarding the other complaints being pursued. An Unless Order has been issued giving the claimant a final opportunity to provide the information requested by the tribunal.

69. I decided, having had regard to all of the points set out above, that the balance of prejudice was with the respondent. I considered the introduction of a new claim in circumstances where the claimant is already finding it challenging to specify her existing claims mitigated against the application being allowed.

70. I, for these reasons, decided to refuse the claimant's application to amend the claim form.

Employment Judge: Lucy Wiseman
Date of Judgment: 26 September 2019
Entered in register: 08 October 2019
and copied to parties