



EMPLOYMENT TRIBUNALS

Claimant: Mr Marius Zubrzycki

Respondent: Tesco Stores Limited

Heard at: London South via CVP

On: 11 October 2022

Before: EMPLOYMENT JUDGE BECKETT
Sitting Alone

Representation

Claimant: In person

Interpreter: Ms M Parker

Respondents: Mr T Westwell (counsel)

JUDGMENT

1. The Unless Order made by EJ Siddall on 25 April 2022 relating to the claim of disability discrimination is set aside, in the interests of justice.

REASONS

2. Reasons were given orally at the hearing on the afternoon of 11 October 2022. However, as the claimant chose not to rejoin the hearing in the afternoon, I have set out the reasons in writing.

The hearing

3. The hearing today was listed for the claimant to apply to set aside the striking out of his claim following an Unless Order which was made in respect of his claim for disability discrimination against the respondent. His other claims

remain listed for a final hearing in September 2023. Prior to the hearing I was provided with a bundle containing 96 pages, a witness statement made by the claimant consisting of two pages, the skeleton argument drafted by counsel for the respondent Mr Westwell amounting to 10 pages, and a bundle of authorities in support of his response.

4. At the hearing at 10am the claimant had indicated that he had not read the skeleton argument, nor had he seen the e-mail sent to him by the respondent which had been sent on Sunday. He also stated that he had not expecting a Judge to be at the hearing today, and he had been expecting Mr Brown for the respondent, and Mr Smith. I clarified that in fact the hearing on the last occasion was in front of EJ Smith, and was a tribunal hearing not a conference as the claimant believed.
5. Having considered the note of the hearing, and the orders made by EJ Smith I was satisfied that the claimant knew the reason for the hearing, and ought to have prepared for it. He had made a witness statement relating to his claim being struck out, despite saying that he did not know the claim had been struck out. On a number of occasions during the hearing he referred to decisions being made "behind his back" (referring to decisions made on papers without a hearing), and he accused the Tribunal of favouring the respondent and their arguments.
6. Initially he asked for the case to be postponed so that his children could assist him in reading the documents, as he had not seen them. However, I asked the respondent's representative Mr Westwell to go through the chronology and explain to the claimant, who appeared not to understand why his claim had been struck out, how it was that at a previous judge arrived at that conclusion.
7. In doing so Mr Westwell used his skeleton argument from paragraph 7 onwards and explained the background. In my oral judgment I did not rehearse the relevant dates as it was not necessary. However, I set these out now.

Timeline of key events

8. On 18 October 2021 EJ Khalil ordered the Claimant to provide the respondent with medical evidence and a disability impact statement in support of his claim of disability discrimination. He was ordered to provide that information by 12 November 2021.
9. The claimant did not send any information or evidence to the respondent. However, he did draft a letter dated 8 November (a copy of which is in the bundle), and he did send an item by recorded delivery to the Tribunal which was received on 12 November 2021.
10. That information did not make its way to the file. The respondent applied for strike-out of the claim on 24 November 2021. On 15 March 2022 the Tribunal issued the claimant with a strike-out warning on the basis that the claimant had not complied with the order and that the claim was not actively being pursued.

11. The claimant was ordered to respond within 7 days.
12. The claimant sent an email to the Tribunal on 18 March 2022 attaching documents relating to his disability discrimination claim. That email was not sent to the respondent. I specifically requested, prior to the anticipated evidence from the claimant, that the file be retrieved to check for any correspondence from the claimant, which led to the discovery of the email and its attachments. These were sent to me just before 2pm. It appears that the Judges dealing with the case between March 2022 and today's hearings were not aware of that correspondence.
13. On 25 April 2022 EJ Siddall made the Unless Order which stated that the claimant had not responded to the warning and that if the order was not complied with by 6 June 2022 the claim would be struck out.
14. The claim was struck out and then a hearing was listed in front of EJ Smith to deal with the other claims. At that hearing the claimant advised the Tribunal that he had sent documents by recorded delivery and by email, and that he had proof of doing so.

The hearing

15. Returning to the hearing before me, I had asked the claimant if he was prepared to give evidence or whether he would wish for further time to be given to him to read the papers provided by the respondent before he wished to give evidence. At that stage the claimant indicated that he was not feeling well, and he had a headache. The tribunal took a short break to see if that would assist but upon returning into the hearing the claimant stated that he still felt unwell.
16. He repeated that he felt that the Tribunal was preferring the information given by Mr Westwell on behalf of the respondent to his own information. He then told the Tribunal that he had a new job which he was due to start today at 9am but the employer had agreed to put it back to 12pm for him to attend today's hearing. He therefore applied to postpone the hearing, not only to new date but also to be heard in front of a different judge. During the proceedings you also wish stated that he wished to make complaints about various judges who don't deal with the case prior to my involvement.
17. I explained that the reason the case was listed today was his application to set aside a previous ruling that his case in respect of direct disability discrimination was struck out.
18. The respondent objected to a postponement, stating that the real reason for the application was not that the respondent was unwell, but that he had not prepared for the hearing. At 12.40pm I indicated that I would rule on the application at 2pm, but invited the claimant to spend the intervening period reading through the relevant documentation if he felt well enough to do so. He stated that he would be going to work.

19. The case was put back to 2pm. In the interim, I asked my clerk (as I was sitting remotely) to find the paper file so that I could check the information that the claimant had given in his witness statement, albeit he had not yet given evidence. It is right to say that, as set out above, in November 2021 the claimant sent an item by recorded delivery to the tribunal. The claimant has provided the receipt for the postage, it was signed for and we know it was delivered to the tribunal. Unfortunately, the contents of that envelope were not placed on the file.
20. The claimant indicated in subsequent correspondence that he was surprised when he received further documentation indicating that his case might not be able to proceed because he had not provided the relevant evidence to support his disability discrimination claim.
21. In his witness statement the claimant said that he forwarded all documents on 18 March 2022 to the tribunal and that he had telephoned the tribunal who confirmed the e-mail had been received. It is right to say that in fact that e-mail was received by the tribunal and indeed the papers relating to the disability discrimination were attached to it and provided on the paper file. The claimant sent further documentation in an e-mail on 23 March providing more clear copies of the documents he relied upon. He stated within his witness statement that he had simply provided the same documentation by e-mail that he had provided by way of a letter in November 2021. I have no reason to disbelieve him in respect of that aspect.
22. Unfortunately, the claimant decided not to re-join the hearing at 2pm. The interpreter rejoined the hearing. I advised the respondent's representative Mr Westwell of the two emails that had been found printed on the paper file and arranged for copies to be sent to him. I asked if the position had changed as a result of that information.
23. Mr Westwell confirmed that the respondent maintained that the Order ought not be set aside for two key reasons. The order was not in fact complied with as the information was not sent to the respondent, only to the tribunal. Furthermore, the information sent within the documents relating to disability was insufficient.
24. I of course accept that the material was only sent to the Tribunal and not to the respondent as ordered. However, in my view had the Judge who dealt with the Unless Order being aware of the e-mail sent in March 2020, which was said to contain the material that had been sent into the tribunal by post in November 2019, the Judge would not have made the Unless Order.
25. It is unfortunate that the emails on the paper file were not given to Judge Smith on the last occasion in July.
26. I have borne in mind that the claimant is a litigant in person, whose first language is not English. I have also borne in mind the limited legal advice that

he has had thus far, albeit the fact that he has not sought further advice in respect of this application is entirely his own fault.

27. I have considered rule 38 of the Employment Tribunal Rules and the overriding and I do consider that it is in the interests of justice that the Unless Order must be set aside.

28. The claim in respect of disability discrimination will therefore continue to a full hearing. I am also mindful of the fact that if the respondent had in fact received the documentation back in November 2019 it is highly unlikely that an unless order or any form of strike out would have been sought by them, they would simply have sought further and better particulars. Any order to strike out a claim must be used sparingly, and I am not satisfied that it remains appropriate in this case.

29. For those reasons, the Unless Order made by EJ Siddall on 25 April 2022 is set aside.

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Employment Judge Beckett
London South Employment Tribunal
Dated: 11 October 2022