



EMPLOYMENT TRIBUNALS

Claimant
Mr G Smith

v

Respondent
SUK Retail Limited

RECORD OF AN ATTENDED PRELIMINARY HEARING

Heard at: Leicester

On: Friday 20 July 2018

Before: Employment Judge Moore (sitting alone)

Appearances

For the Claimant: Mr S Swanson, Solicitor

For the Respondent: Mr T Adkin of Counsel

JUDGMENT

1. Staples UK Limited is removed as a party to these proceedings.
2. The Respondent's application for wasted costs is refused.
3. The Respondent's application for a strike out of the Claimant's discrimination claims is refused.
4. Save for the disability discrimination claim, the Respondent's application for deposit order is refused.

REASONS AND CASE MANAGEMENT SUMMARY

Background

1. This is a claim for unfair dismissal (Section 98 Employment Rights Act 1996), direct discrimination on the grounds of disability and race, harassment related to disability and race, victimisation, unauthorised deduction from wages, breach of contract/wrongful dismissal, detriment on the grounds that the Claimant made a protected disclosure and automatic unfair dismissal by reason of a protected disclosure. The Claimant withdrew his claim of indirect disability discrimination at the hearing today. The ET1 was presented on 11 May 2017.

Discussion

2. This was a Preliminary Hearing to determine the matters set out in the order of Employment D Moore dated 3 September 2017. These were:-

- (i) Whether the second Respondent (Staples UK Limited) should be discharged from these proceedings?

- (ii) To hear the second Respondent's application for costs.
- (iii) To hear the Respondent's application for strike out or a deposit order on the grounds that the complaint either in whole or in part has little or no prospect of success.
- (iv) To hear the Respondent's application for wasted costs arising from the Claimant's and his representative's failure to attend the hearing listed on 16 August 2017.

3. In respect of the first issue the parties agreed that the appropriate Respondent to these proceedings was SUK Retail Limited (previously Staples UK Retail Limited). Accordingly, a judgment is issued that the second Respondent (Staples UK Limited) be discharged from these proceedings.

4. In respect of the second matter Counsel for the Respondent confirmed that the second Respondent's application for costs was withdrawn. This therefore left the third and fourth matters to be dealt with at the Preliminary Hearing.

Respondents application to strike out or for a deposit order

5. Counsel for the Respondent confirmed that the applications for a strike out / deposit order were in respect of the Claimant's discrimination claims only. These were the discrimination claims of race, disability and protected disclosure (detriment and dismissal). The claims were not in respect of the substantive unfair dismissal claim pursued under Section 98(4) of the Employment Rights Act 1996.

6. Mr Adkins also confirmed that he was not pursuing the strike out in relation to the race claim, rather was making an application for a deposit order. The reason a deposit order was still pursued in respect of the race claim was that whilst it was accepted the Claimant had cited an example of less favourable treatment he claims to have been subjected to in terms of a harsher disciplinary sanction than white comparators that the Claimant needed something more in order to get over the hurdle of showing that the claim had more than little prospect of success.

7. In respect of the disability claim the Respondent's position was that no cogent claim had been pleaded. The only reference to disability was at paragraph 10 of the ET1 which stated the race discrimination had made the Claimant's diabetes worse. As there was no cogent claim pleaded the strike out was sought in respect of the disability claim. In respect of the public interest disclosure claim the strike out was based on the submission that there was a paucity of information in relation to the disclosure. There were no details in the ET1 as to whom the disclosure was made and also why the disclosure relied on, namely that the Claimant informed the Respondent at an investigation meeting on 7 December 2016 that he was being treated less favourably on the grounds of his race, had a public interest aspect.

Strike out/deposit order decision

8. I declined to make an order for a strike out for any of the discrimination claims as I was not able to say the claims had no reasonable prospect of success. These claims require to have evidence heard and tested at a full hearing. In relation to the race claim this was not pursued. In relation to the disability claim I note that whilst the particulars of claim are inadequate the Claimant has indicated on the ET1 that he wishes to pursue a claim of disability and has alluded to his diabetes in the grounds of

complaint. I have concluded that this can be remedied by ordering further and better particulars and therefore strike out of the disability claim is not appropriate. However I do consider that it is appropriate to order a deposit in respect of the disability discrimination claim for the reasons set out in a separate deposit order that accompanies this record of the Preliminary Hearing.

Wasted costs application

9. This application came about following the events of the Preliminary Hearing that was listed at Huntington Employment Tribunal on 16 August 2017. This Preliminary Hearing had been listed as is usual practice following receipt of the Claimant's claim to set down directions for the substantive hearing and to list the claim as well as resolve other matters between the parties namely the Respondent's position that had been taken in the ET3 that further and better particulars were required and their intention to apply for strike out/deposit orders.

10. Prior to the hearing the Claimant's representative tried on several occasions to have the hearing converted to a telephone directions hearing due predominantly to the distance the Claimant and the representative would have to travel to attend a hearing in person. The Respondent had attached a request the further and better particulars to the ET3 response form but this had not been responded to voluntarily by the Claimant's representative even as of today's date.

11. On 14 August 2017 the parties were informed by the Tribunal that provided the Claimant and Respondent agree a list of issues by 15 August 2017 the hearing could be converted to telephone. The Claimant's representative wrote to the Tribunal on 15 August 2017 at 9:48 in the morning and confirmed that the draft list of issues was agreed. The Respondent's representative did not agree that the draft list of issues had been agreed and informed the Tribunal of such at 10:26 that same day. The Respondent was concerned that the draft list of issues that they had prepared was a draft and they had been unable to identify significant elements of the claim which were the same matters they were seeking further and better particulars on. The Respondent therefore pressed for a hearing in person, this was referred later on in the day on 15 August to an Employment Judge who notified the parties (the Claimant's representative accepted that he had been informed as such) that the application for a telephone hearing was refused and the parties should attend in person at the Leicester Tribunal Hearing Centre, Kings Court, 5A New Walk, Leicester LE1 6TE.

At 18:56 on 15 August therefore after the Tribunal office and Respondent's offices had closed, the Claimant's representative wrote to the Respondent and the Tribunal informing them that he would not be attending the hearing and made written representations in accordance with Rule 42 of the Employment Tribunal Rules of Procedure 2013. In his e-mail he repeated his objection to having to travel to the hearing centre and pointed out that the gaps in the draft list of issues could be addressed by him responding to further and better particulars. The Claimant's representative informed the Tribunal that he had a prior commitment in Birmingham commencing at 1:00 pm on 16 August 2017 and it would not physically be possible to attend the hearing and be back in Birmingham for that engagement.

12. This resulted in the hearing on 16 August 2017 having to be postponed. Counsel for the Respondent attended the hearing and as recorded in the record of that Preliminary Hearing at paragraph 3 Employment D Moore concurred with Counsel's view that it was not possible to make significant degree of process with the case in the circumstances of the Claimant's representative having not attended.

13. The Respondent's application for wasted costs was in respect of Counsel's fees for the hearing on 16 August 2017 as effectively a further Preliminary Hearing had to be listed which was heard on today's date.

14. I gave this matter very careful consideration. The rules in respect of wasted costs are set out in Rule 80 of the Employment Tribunal Rules of Procedure 2013. These provide:-

When a wasted costs order may be made

(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs:-

(a) As a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay."

Costs are so incurred are described as "wasted costs".

15. I considered the guidance set out in the case of **Godfrey Morgan Solicitors v Cobalt Systems Limited** [2012] ICR EAT and the discussions at paragraphs 36 to 39. I reminded myself of the authority of Court of Appeal in **Riden Halgh v Horsfield** in particular a 3 stage test:-

"(1) Has the Respondent acted improperly, unreasonably or negligently?

(2) If so did that conduct cause the opposition to incur unreasonable costs?

(3) If so if it was in all the circumstances just to order the legal representative to compensate the applicant for the whole or part of the costs?"

16. Elements of the Claimant's representative actions leading up to the Preliminary Hearing were unreasonable. Specifically whilst the Claimant's representative had the right to make written representations in accordance with Rule 42 it was unhelpful that these were made after the close of business on the day before the Preliminary Hearing. Furthermore, the Tribunal had specifically notified and the Claimant's representative accepted this point that the hearing would not be converted into a telephone case management hearing and the Claimant's representative was on notice that the hearing would be proceeding. The Claimant's representative could have lodged a response to the further and better particulars which could have enabled those matters to potentially have been dealt with in respect of written representations. As such Employment Judge D Moore found that it was not possible to make a significant degree of progress with the case and I find that this was as a result of the Claimant's representative's conduct in failing to attend the hearing.

It is plain that the Claimant's representative should have attended the hearing or sent someone in his place and his failure to do so led to the Respondent incurring Counsel's fees. Notwithstanding these factors I have concluded that it would not be just in all the circumstances to order the Claimant's representative to compensate the Respondent for the whole of the brief fee of the Counsel in attending on that day. I have taken into account the attempts made by the Claimant's representative to agree the list of issues as was directed on 14 August 2017 and there was a short period of

delay between the parties in trying to agree the issues as the Respondent inadvertently e-mailed the Claimant's representative at the wrong e-mail address. I took into account the means of the Claimant's representative as outlined to me at the Preliminary Hearing. The Claimant's representative is a company limited by guarantee of charitable aims. In considering the overriding objective and the need to ensure parties are on an equal footing I am concerned about the effect on the Claimant's ability to pursue his claim if a wasted costs order is made and so find it is not just to make an order. The Claimant's representative should be clear that any repeat of such conduct would not be viewed favourably by the Tribunal.

I made the following orders in respect of the remaining claims.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The Claimant is ordered to provide further and better particulars of his claim by completing the sections in the Respondent's proposed list of issues on or before 10 August 2018.
2. The Claimant is ordered to provide a schedule of loss on or before 10 August 2018.
3. The parties are to confirm whether they are interested in Judicial Mediation on or before 24 August 2018. It is noted that the Claimant has already indicated he would be interested in Judicial Mediation.
4. The Respondent is granted permission to amend their response on or before 7 September 2018.
5. The Claimant is ordered to provide an impact statement setting out how his disability impacts on his ability to carry out day to day activities and disclose his GP records insofar as they are relevant to his disability on or before 20 October 2018.
6. The Respondent is to confirm to the Claimant and the Tribunal if disability remains contested on or before 10 November 2018.
7. On or before 17 November 2018 the parties may apply to the Tribunal for a Preliminary Hearing to be listed on the issue of disability. The parties are encouraged to agree directions if a Preliminary Hearing is sought if at all possible.
8. On or before 5 October 2018 the parties shall send to each other a list of all documents they hold relevant to matters to be determined at the hearing and provide copies if requested.
9. On or before 7 December 2018 the Respondent shall send to the Claimant an indexed and paginated bundle of the disclosed documents for use at the hearing and provide four copies of the bundle for use at the hearing.
10. The parties shall exchange witness statements on or before 11 January 2019.
11. The case is listed for a full hearing in respect of liability only before an Employment Tribunal on 24, 25, 26, 27 and 28 June 2019 at **Leicester Employment Tribunal, 5a New Walk, Leicester, LE1 6TE.**

NOTES

- (i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.
- (ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
- (iii) The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
- (iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’:
<https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf>
- (v) The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*” If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Employment Judge Moore

Date: 04 September 2018

Sent to the parties on:

04 September 2018

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For the Tribunal:

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