

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102597/2016 Preliminary Hearing at Edinburgh on 27 February 2017

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Employment Judge: M A Macleod

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Mrs Dorota Jakusz-Gostomska

Claimant
Represented by
Mr L Moodie
Solicitor

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Little Sisters of the Poor Scotland

Respondent
Represented by
Mr I MacLean
Consultant

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Employment Tribunal is that the respondent's application for strike out of the claimant's claims is refused, and that the case must now proceed to a hearing on the merits.

REASONS

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1. In this case, which has a substantial history, there had been two previous case management Preliminary Hearings in order to make progress in the proceedings. After a period of time following the most recent PH, 35 Mr MacLean for the respondent made an application to strike out the claim on the basis that the claimant had failed to comply with an Order of the Employment Tribunal.
2. Accordingly, a further Preliminary Hearing was convened on 27 February 2017 in order to consider and determine that application.

3. Mr Moodie appeared again for the claimant, and Mr MacLean for the respondent.
4. At the outset of the hearing, the sitting Employment Judge clarified with Mr Moodie that he remains the claimant's representative, notwithstanding his change of business address. It was pointed out to him that he had failed to communicate with the Tribunal following his change of employment.
5. Mr MacLean then addressed the Tribunal in support of his application. He lodged a number of productions, to which reference is made below by way of page numbers. He observed that this is the second occasion upon which the respondent had sought strike out of the claim owing to the failure of the claimant to obtemper an Order of the Employment Tribunal. He reminded the Tribunal that on a previous occasion, having heard the claimant's solicitor's explanation, he withdrew the respondent's application for strike out.
6. Essentially, he now seeks strike out on the basis that despite an extension of time being granted to Mr Moodie, he remains in default in relation to the Orders issued by Employment Judge Lucas dated 18 August 2016 (13).
7. If strike out of the whole claim is not granted, Mr MacLean invited the Tribunal to strike out the discrimination claim advanced by the claimant. The Orders required further specification of the claimant's claim of harassment, but that information has not been received. He pointed out that the information which has been provided only repeats the sex discrimination claim set out in the ET1. Despite being advised to present an application to amend the claim, the claimant has failed to do so.
8. In any event, it appears, he said, that the last act of harassment was 26 November 2015, some 5 months before the ET1 was presented. The complaint about the behaviour makes no indication as to why this was said to have been on the grounds of race or sex. There remains an issue of time bar in relation to these allegations.

9. Mr Moodie opposed this application. He referred to the email of 1 December 2016 (1) in which Mr MacLean sought strike out of the claim, and indicated that he was unsure what Orders that application was referring to. In any event, he pointed out that he had provided responses to the Orders, in his email of 2 December 2016 (2ff).

10. He explained that he had been “hors de combat” for 10 days in early November, owing to a bout of influenza. From October, he said, his eyesight had deteriorated considerably, which had caused him a lot of difficulty. In November, he underwent hand surgery, and he reacted to the anaesthetic administered to him during that surgery, and he said he was “out for a week or more” with that complication. He also had a flu injection in November, to which he suffered a strong reaction, and he was not able to work. He said, after being pressed, that he was absent from work during the weeks commencing 7 and 14 November 2016.

11. He did not apply for a further extension of time to comply with the Orders for the same reason as he was unable to comply with the Orders.

12. With regard to the response to the Orders, he insisted that he had set out the abuse by Mr McCulloch to which the claimant had been subjected. He gave specific instances on 22 July 2014 and 23 November 2015, but they were merely instances. He said that he could not give instances of every action, and that it amounted to a course of conduct. He drew the analogy between this kind of treatment and a long term exposure to a harmful substance in the workplace.

13. He maintained that time bar starts when the claimant leaves her employment, and that the claim was submitted within the 3 months after that date.

14. He described the claim as relating to a “general harassment over a period of time”. He has given two examples; there will be evidence led about others.

15. With regard to the issue of categorisation, under the claim of sex discrimination, he asked the Tribunal “does it matter what the categories of claim are”? It was said to be harassment.

Discussion and Decision

5 16. The issue before the Tribunal at this point is whether the respondent’s application for strike out of the whole claim, which failing strike out of the harassment claim, should be granted. It is said by Mr MacLean that the claimant has both failed to pursue the claim and failed to comply with Orders of the Tribunal.

10 17. Mr Moodie now confirms that he opposes the application, though he did not do so in writing within the timescale given by the respondent, and permitted by the Tribunal Rules of Procedure.

15 18. The context into which these issues fall is set out in Employment Judge Lucas’s helpful and detailed Note following the Preliminary Hearing on 21 July 2016, following which the Orders were issued on 18 August 2016.

20 19. In my reading of that Note, it is quite apparent that the Employment Judge explained, with some degree of forbearance, that the claims were not sufficiently pled so as to give the respondent fair notice of the complaints which they required to meet. The Orders which followed that Note made plain that further specification is required, in some detail.

25 20. There is no doubt that the claimant failed to answer the Orders at all by the deadline which was given, namely (by extension granted by the sitting Employment Judge) 25 November 2016. Nothing came to the respondent or the Tribunal until Mr MacLean took the step of making an application, by email, for strike out of the claim on 1 December, intimating that application to Mr Moodie.

30 21. The following day – and it is not clear to this Tribunal whether that was as a result of the application or merely coincidental – Mr Moodie emailed the Tribunal and the respondent to provide the responses sought, though he did not formally intimate his opposition to the application.

22. In his email to the Tribunal dated 2 December, Mr Moodie attached the specification of claim and schedule of loss, and explained: "I regret this has been delayed somewhat due to unforeseen consequences and complications of surgery I had last month. Please accept my apologies."

5 23. He provided an appendix in which he set out the claimant's claims under each head of claim.

24. Firstly, he set out a sequence of events which narrated the claimant's constructive unfair dismissal claim. Secondly, he set out the same facts under the heading "Claim under section 26 of the Equality Act 2010", and then quoted from that section, before stating the following:

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"To call someone 'a fucking foreigner' is a remark referring to a person's race.

To call someone 'a fucking Cow' or 'a stupid cow' is a remark referring to a person's sex.

15 *By making those remarks McCulloch violated the applicant's dignity and created an intimidating, hostile, degrading, humiliating and offensive environment for her."*

25. The issue for the Tribunal, therefore, is whether this amounts to a failure to pursue the claim, or a failure to comply with the Orders set out on 18 August 2016.

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26. In my judgment, the claimant has now responded to the Orders. The reason why the response was late was given by Mr Moodie, with, it should be said, some reluctance, to the Tribunal, as his own medical problems. Very little detail has been provided by Mr Moodie as to exactly when he was unable to work on this matter, though he has indicated that he was off work for two complete weeks, beginning 7 and 14 November.

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27. He has not said that he was off work on any other occasions, though he clearly tried to create the impression – by use of the phrase "hors de combat" – that he was incapacitated for longer than this.

28. The situation with which the Tribunal was presented at this PH was one in which the claimant had, by email of 2 December, sought to respond to the Orders issued in August.

5 29. Mr MacLean argues that the responses are inadequate. I am not persuaded that this is so. What Mr Moodie, on the claimant's behalf, has now done, is focused the claim of unfair dismissal and that of harassment to a number of acts carried out by an individual employed by the respondent, Mr McCulloch. As a result, it is my judgment that Mr Moodie has now complied with the Orders.

10 30. I am therefore not minded to take the draconian step of striking out the claimant's claim as a whole, since a form of compliance has taken place by the claimant.

15 31. I am mindful of the fact that the claimant relies upon her solicitor in this period, during which he appears, on any view, to have undergone a series of medical problems which have affected his ability to address the Orders. Whatever failings he may be accused of, it is not, in my judgment, in the interests of justice to visit them upon the claimant, who has delineated a number of complaints which the Tribunal may seek to determine on the evidence to be given in a final hearing.

20 32. With regard to Mr MacLean's secondary position, it is my judgment that the same points arise. He has criticised the claim of harassment as unclear, but in my judgment it is in fact quite comprehensible. The claimant complains that Mr McCulloch subjected her to harassment on the grounds of sex by referring to her as a cow, and race by referring to her as a
25 foreigner.

33. Accordingly, it is my judgment that the respondent's application should be refused, and that the claimant's claim should not be struck out.

34. However, it is important to make a number of further observations.

30 35. The proceedings in this case have progressed very little since the PH in July 2016, largely due to the need to address the issue of specification of

the claimant's claim. Progress now requires to be made, by listing this case for a hearing on the merits as soon as possible, and date listing letters will be issued at the same time as, or shortly after, this Note is sent to the parties.

5 36. The claim is now defined by Mr Moodie in terms of the further specification provided on 2 December 2016, and this is a matter of some importance. Mr Moodie appeared to suggest that it would be acceptable to rely upon the pleadings as they are now set out to lead specific evidence of instances of harassment other than those given in the further specification provided. In
10 my judgment, that is not correct. He has set out two specific instances. If he wished to rely upon other instances, this was his opportunity to do so. He has not taken it. His attitude in this PH to this issue was, it must be said, extraordinarily casual. He suggested that he did not need to provide further specification, as he was referring to "a generalised course of conduct". It
15 will be for the Tribunal hearing the case at the final hearing to decide what is relevant and what is not, but in circumstances in which the claimant has been given very clear notice by the Tribunal of the need to provide specification of the claims before it, and has provided what is provided on 2 December, it would not be in the interests of justice for the claimant then
20 to seek to give detailed evidence about other instances of harassment of which no notice has been given to the respondent. That is a simple issue of fairness.

37. It is therefore important that the claimant understands that the claim now rests upon the pleadings as they stand, and that the evidence to be heard
25 must fall within the four walls of the claim as it has been presented, after exhaustive attempts by the Tribunal to ensure that proper notice has been given.

38. The issue of time bar remains, and will be reserved to the final hearing as a preliminary issue to be addressed at the conclusion of the evidence, as has
30 been agreed by the parties and directed by the Tribunal in Employment Judge Lucas's Note.

39. Accordingly, a full hearing on the merits will now be fixed in this case, in the hope that the matter may be brought to proof at an early stage.

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Employment Judge: Murdo Macleod

Date of Judgment: 24 March 2017

Entered in Register: 27 March 2017

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