



EMPLOYMENT TRIBUNALS

Claimant: Ms M Jones

Respondent: NWCS (Training) Limited

HELD AT: Liverpool (by CVP)

DATE: 21 February 2022

BEFORE: Employment Judge Johnson

MEMBERS:

Ms S Humphreys

Ms S Moores-Gould

REPRESENTATION:

Claimant: Mr R J Brennan (Equalities Lead, Sefton CVS)

Respondent: Mr Middleton (solicitor)

JUDGMENT

- (1) The claim is struck out in accordance with Rules 37(1)(c) and (d) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.
- (2) The final hearing listed for 21, 22 and 23 February 2022 will not now take place.

REASONS

1. The claimant presented a claim form to the Tribunal on 26 March 2020. It contained limited information and although accepted by the Tribunal, it simply indicated that a disability discrimination complaint was being brought and that by way of background, the claimant only provided the following information: '*I applied for a position*'. Although one of the disabilities relied upon by the claimant is dyslexia, throughout the

proceedings she has been represented by Mr Brennan and he has not alerted the Tribunal to any difficulties that he might have in obtaining detailed instructions from the claimant.

2. The respondent presented a response which attempted to provide detailed grounds of resistance. However, it was unable to identify with any certainty the type(s) of discrimination relied upon by the claimant and the factual background which gave rise to the claim. Not surprisingly, given that the claim was brought shortly after the claimant's dismissal, the respondent's grounds of resistance focused upon the reasons for the dismissal and why they believed the decision was not discriminatory by reason of the claimant's asserted disability.
3. Mr Brennan provided a letter to the respondent on 4 May 2020 following his receipt of the response and provided what was effectively a reply rather than further particulars. Reference was made to the respondent's duty as an employer to make reasonable adjustments in accordance with section 20 of the Equality Act 2010, but the letter did not go further to explain what the failures were under section 21 and the necessary background information that would explain why the claimant believed she had been discriminated against in this way. While providing some information about the claim, it did provide the necessary information that would usually be found in a claim form at section 8.2.
4. The case was listed in the usual way for a preliminary hearing case management before Employment Judge Warren on 19 February 2021. Of particular note were the EJ Warren's comments in the 'Issues' section of the Note of Preliminary hearing and where she described the claim as being '*difficult to understand*', that it '*lacks particulars*' and that it was not possible from the absence of that information to finalise a list of issues.
5. Instead, she made case management orders for further particulars (order 1.1) and an amended response (order 1.2). Additional case management orders were also made for a schedule of loss, disability impact statement and medical documents in respect of the disputed mental health impairment, disclosure of documents and bundles and of course, exchange of witness evidence, (the latter being order 6.1).
6. The claimant did manage to comply with the orders relating to the schedule of loss and disability impact statement. However, the further particulars were not provided (and therefore the respondent could not amend their response) and her witness evidence was not provided to the respondent. The respondent was able to prepare a hearing bundle and did disclose its witness statements, albeit only two weeks before the final hearing.
7. The case had been listed for a 3-day final hearing by EJ Warren and it was expected that the case would be ready to be heard on 21, 22 and 23 February 2022. There was no indication given to the Tribunal by the claimant or her representative that they were experiencing any difficulties with preparation.

8. By a letter dated **15 February 2022** the respondent made an application to the Tribunal seeking an order that the claim be struck out in accordance with Rules 37(1)(c) and (d) in that the claimant had failed to comply with case management orders 1 and 6 and that there had been a failure to actively pursue the case. The respondent had also raised the question of the application of Rule 37(1)(a), namely that the claim had no reasonable prospects of success, although Mr Middleton conceded that in a discrimination case, it would be difficult for a Tribunal to reach this conclusion without having first heard evidence during the hearing.
9. As the application was not made until less than a week before the final hearing, the Tribunal considered it in detail before the case could proceed. What was clear was that the claimant had not produced a witness statement despite having been ordered to do so by the Tribunal and in addition to the failure to provide a sufficiently detailed claim form, or further particulars, it was not possible to identify a list of issues and evidence which could form the basis of the claimant's case.
10. The Tribunal was concerned to hear from Mr Brennan on behalf of the claimant and noted that he had objected to the respondent's application in an email sent to the Tribunal on 18 February 2022. Reference was made to the respondent being uncooperative in allowing the claimant to access former colleagues in order that she could obtain witness evidence. However, despite having an opportunity to raise this at the preliminary hearing and in the months in between then and to the final hearing, no objection or application for a witness order had been made to the Tribunal. Although Mr Brennan clearly believed there was discrimination committed by the respondent against the claimant, he was unable to clarify what it was, when it took place and how it connected with the information previously disclosed.
11. EJ Johnson did mention that while it might be possible to amend the claim at this very late stage, the claimant would face considerable difficulties if the proposed amendment sought to introduce new complaints, which would be highly likely given the limited information provided in the claim form and the absence of further particulars. In any event, no such application was made. It was also proposed to Mr Brennan that it might be possible to agree a delay to the start of the hearing until day 2, but when the Tribunal was taken to the hearing bundle, it became clear that there was no background information which could be meaningfully 'converted' into a list of issues and rudimentary 'witness evidence'. EJ Johnson reminded Mr Brennan that the respondent and the Tribunal could not be expected to tell the claimant what her case was and advance an argument to be considered at the hearing.
12. The Tribunal retired to discuss the application in chambers. It was noted to the parties that although Employment Judge Ficklin was observing the hearing and this included the chambers discussion, he played no part in the decision making carried out by the Tribunal.

13. Although the Tribunal had given Mr Brennan an opportunity on behalf of the claimant to make representations, it was determined that this was a case which must be struck out because of a failure to comply with case management orders 1.1 and 6.1 made by EJ Warren on 19 February 2022 and an overall failure to actively pursue the case contrary to Rules 37(1)(c) and (d).
14. The Tribunal took into account the overriding objective under Rule 2 and wanted to ensure that this decision was in the interests of justice taking into account the need to be flexible, proportionate, to avoid delay and save expense, but also to ensure that the parties were on an equal footing. Moreover, the Tribunal considered the relevant section of the Equal Treatment Bench Book with regards to part which considers Specific Learning Disorders such as dyslexia.
15. The Tribunal acknowledged that in many cases where a party fails to provide a witness statement before the beginning of a final hearing, it is often possible to rely upon the contents of the claim form and in particular to any narrative provided in section 8.2 concerning background information. However, no such information had been provided within the claim form and the second opportunity provided by EJ Warren to correct this omission, was not complied with. Accordingly, the Tribunal were face with the unusual situation of not only having no witness statement, but also not grounds of complaint or further particulars. It was simply not possible to identify a meaningful list of issues and the basis of a 'witness statement' from the information that she had provided.
16. It was not considered proportionate to postpone the hearing, given that ample time had been available for the parties to prepare the hearing for the final hearing and the consequential impact that this would have upon the Tribunal listing backlog overall. The case arose from events which took place in 2019, the claim form had been presented in 2020 and the preliminary hearing took place almost a year ago in 2021 and it would not be in the interests of justice to delay the case any further.
17. While it was acknowledged that the claimant was disabled by reason of her dyslexia, (this was not in dispute although the asserted mental health issues were), she had been represented throughout the case by Mr Brennan and the Tribunal would expect any difficulties arising from the taking of instructions from the claimant because of her dyslexia, would have been raised to the Tribunal by him. Neither the respondent's solicitor, nor the Tribunal received such instructions and while appropriate adjustments would have been made at the hearing in terms of giving evidence as appropriate, there was no evidence that the disability caused any difficulties in the claimant being able to prepare for the final hearing with the assistance of her representative.
18. Accordingly, for the reasons given above, the case must be struck out in accordance with Rule 37(1)(c) and (d) and the final hearing will now not take place.

Case Number: 2402516/2020

Employment Judge Johnson
21 February 2022

JUDGMENT SENT TO THE PARTIES ON

24 February 2022

FOR THE TRIBUNAL OFFICE