



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Cogan

**Respondent:** Sir Robert Pattinson Academy

**Heard at:** Nottingham by Cloud Video Platform

**On:** Monday 25 January 2021

**Before:** Employment Judge Hutchinson (sitting alone)

## Representatives

**Claimant:** Ms L A Amartey of Counsel

**Respondent:** Mr A Sugarman of Counsel

# JUDGMENT

The Employment Tribunal Judge gave judgment as follows: -

1. By consent the Employment Judge the unless order made by the Employment Judge on the 24 November 2020 is hereby set aside under Rule 29 of the Employment Tribunal Rules of Procedure 2013.
2. The Claimant's claims for costs fail and is dismissed.

# REASONS

## Background to this hearing

1. The Claimant presented his claim to the Tribunal on 10 September 2020. He had been employed by the Respondents as Sixth Form Pastoral Leader from 6 May 2019 until 4 May 2020.
2. The respondents say that he was dismissed for alleged gross misconduct on 4 May 2020. The Claimant says that the reason for his dismissal was because he had undertaken a protected act.
3. He says that one of the pupils suffers from a mental impairment amounting to a disability and that he sent an e-mail to the Assistant Headteacher and Head of Sixth Form, raising concerns that the Respondents were not observing its duty of care towards the pupil. He says this was a protected act pursuant to section 27(2)(c) and/or (d) of the Equality Act 2010 ("EqA").

4. He says that he was subjected to the disciplinary investigation, the dismissal and unsuccessful appeal because of that e-mail. That these were acts of victimisation contrary to section 27 EqA.

5. The Respondents say that the Claimant had engaged in and encouraged inappropriate dialogue between himself, the pupil and the pupil's mother and that he had failed to disclose the details of a potential personal data breach. They say that he then failed to cooperate with their investigation and covertly recorded the first investigation meeting, which together with the other matters led them to believe that they could no longer have trust and confidence in the Claimant.

6. So far as his sex discrimination claim is concerned the claim of direct discrimination under section 13 EqA. He does not name an actual comparator but says that he was treated less favourably than they would have treated a female comparator in the position that he held and that he would not have been subject to the investigation, dismissal and the refusal of his appeal.

7. On 16 September 2020 the claim was served on the Respondent. The case was listed for a three-day hearing commencing on 15 November 2021 and a case management Preliminary Hearing was also to take place on 4 December 2020.

8. Case management orders were made including the following:

“By no later than 28 October 2020 the Claimant shall set out in writing what remedy the Tribunal is being asked to award. The Claimant shall send a copy to the Respondent. The Claimant shall include any evidence and documentation supporting what is claimed and how it is calculated. The Claimant shall also include information about what steps the Claimant has taken to reduce any losses (including any earnings or benefits received from new employment.”

9. On 30 September 2020 the Respondents applied for an extension of time to present their ET3. No objection was raised in respect of this and my colleague Employment Judge Adkinson granted the application and ordered the Respondents to file their response by 4 November 2020. The response was filed on 3 November 2020.

10. On 17 November 2020 the matter came before me for initial consideration under Rule 26. I was in doubt as to whether all parts of the Claimant's claim were arguable and I made a note that these matters would be discussed at the listed telephone case management Preliminary Hearing (“TCMPH”).

11. The Claimant was represented by solicitors but did not comply with the order referred to above concerning the schedule of loss.

12. It is not in dispute that the Respondent's representative wrote to the Claimant's representative on 11 November 2020 pointing out the Claimant's failure to comply with the order and requesting compliance by 18 November 2020. The solicitor was told that in default they would apply for an unless order.

13. By a letter dated 20 November 2020 the Respondents applied for an unless order. They attached to their application a copy of their letter of 11 November requesting the schedule of loss and a copy of the response from the Claimant's solicitors which attached a schedule of loss to the value of £54,944.88.

14. The Respondent sought an unless order relating to the partial non-compliance with the order made on 16 September 2020.

15. When I reviewed the file on 24 November 2020 I decided to issue the unless order. I accept that when I issued the unless order I had not appreciated that there had been a partial compliance with the order i.e. that the schedule of loss had been sent albeit late. I would have simply asked for an explanation as to why the Claimant had not fully complied with the order.

16. On 27 November 2020 the Claimant applied to set aside the order. They pointed out that when I made the order I had not received representations from themselves and said that there had been insufficient time to make such representations. They pointed out that this would be a draconian step to strike out the claim, particularly claims of discrimination, and it would not be a proportionate response to do so.

17. They also pointed out that on 24 November 2020 they had sent mitigation evidence to the Respondents together with a table setting out the Claimant's efforts in his job search.

18. That correspondence was not referred to me and the matter came before my colleague Regional Employment Judge Swann on 4 December 2020. He listed this hearing for me to determine: -

18.1 Had there been material non-compliance with the unless order issued by me on 24 November 2020 on the part of the Claimant?

18.2 If so did the claim in its entirety stand as struck out effective on 1 December 2020 as a result of that non-compliance?

18.3 If so should the Claimant now be granted relief from sanction?

### **The hearing today**

19. There was an agreed bundle of documents and Counsel for the Claimant (Ms Amartey) and for the Respondent (Mr Sugarman) had provided me with skeleton arguments.

20. At the commencement of the hearing I explained to the parties that when I had issued the unless order on 24 November 2020 I had misunderstood the position. I had thought that there had been a total non-compliance with the order made on 16 September 2020. I had not realised that the Claimant had in fact provided a schedule of loss. I explained that I would not have issued the unless order simply because the Claimant had not provided the documentary evidence in support. That would have been a disproportionate response.

21. In any event, after making the order the Claimant had provided further information and documentary evidence in support of the schedule of loss and if the matter had been referred to me before the case management Preliminary Hearing I would have agreed to set aside the unless order.

22. Mr Sugarman was granted a short adjournment to consider his position and he sensibly agreed that I should exercise my power under Rule 29 of the Employment Tribunal Rules of Procedure 2013 to set aside the unless order. I am satisfied that it is necessary to do so in the interests of justice particularly in this case as the Claimant had not had a reasonable opportunity to make representations before the order was made.

### **The Claimant's application for costs**

23. Ms Amartey for the Claimant then made an application for costs against the Respondent under Rule 76 of the Employment Tribunal Rules of Procedure 2013 on the grounds that the Respondent's had acted unreasonably in the way that they had conducted the proceedings by pursuing the strike out application. That application for costs did have some merits because the Respondents had set off a chain of events by their application which had meant that both parties had had to incur considerable expense for the matter to come back before me today. She pointed out that the Respondents had been aware that they had partially complied with the order and had not given them the opportunity to put matters right by saying what documents they required.

24. Ms Amartey said that the Respondent's behaviour was not in accordance with the overriding objective and their duty to cooperate particularly where both parties were legally represented.

25. I declined to make an order for costs in this case. I must be satisfied that not only was the Respondent's behaviour unreasonable but it would also be appropriate to exercise my discretion to make the order for costs. The Claimant fails on both counts in respect of this matter. The reasons for this are as follows:

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- 25.1 A case management order was made on 16 September 2020 which required the Claimant not only to provide a schedule of loss but also documentary evidence in support and information about steps the Claimant had taken to reduce any loss.
- 25.2 The Claimant had not complied with the order as required by 16 September 2020 and had not applied for any extension of time.
- 25.3 By 28 October 2020 the Claimant was therefore in breach of the order and the Respondents had written to the Claimant on 11 November 2020 inviting compliance by 18 November 2020.
- 25.4 Only on 18 November 2020, three weeks after the original deadline did the Claimant provide the schedule of loss but did not provide any documentary evidence as required.

26. I am not satisfied that it amounted to unreasonable conduct to ask for an unless order even though it was unlikely that such an order would be made.

27. Orders are made and should be complied with. In this case nothing was done at all until 18 November 2020 and then they had only partially complied with it. I am not therefore satisfied that an application for an unless order amounted in any way to unreasonable conduct and even if it had because the Claimant had not complied with the order originally, I would not have been minded to exercise any discretion in the Claimant's favour in this case in any event.

28. I therefore declined to make an order.

### **Listing a Preliminary Hearing**

29. As I have recited above when I viewed the ET1 and the ET3 on 17 November 2020 in accordance with Rule 26 it appeared to me that there should be an open Preliminary Hearing to consider whether the claim of discrimination should be struck out because they had no reasonable prospect of success.

30. I reminded Ms Amartey that that did not mean that I had made my mind up that that is what I was going to do.

31. I listened to Ms Amartey's contentions which were that there was no prospect of the claims of discrimination being struck out in this case and that a deposit order would not be a useful use of the Tribunal's time.

32. She is right to say that a Preliminary Hearing will increase the costs of the parties if the matter goes forward to a final hearing but in exercising my judgment I also should consider that if the claim does not have any prospects of success then the Preliminary Hearing will save time.

33. I am satisfied that there should be a Preliminary Hearing to consider the point in this matter. Certainly, the Respondent wishes to pursue the matter and whilst I appreciate discrimination claims are fact sensitive it does not mean to say that no claim of discrimination can be struck out.

34. Any Employment Judge who hears this Preliminary Hearing (which I am not reserving to myself) will soon be able to decide whether: -

34.1 The claims should be struck out under Rule 37 of the rules on the grounds that the claims have no reasonable prospect of success or alternatively.

34.2 Whether to make a deposit order under Rule 39 of the rules if he or she considers that any specific allegation or argument in the claim has little reasonable prospect of success.

35. The Claimant should be prepared to provide details of his financial circumstances if the Employment Judge is considering making the deposit order.

36. The open Preliminary Hearing to decide the above shall be **heard by Cloud Video Platform on 5 March 2021 at 10:00 am** or as soon thereafter as the Tribunal can hear it. Details of how to join the CVP will be provided at a later date. Three hours have been allocated to decide the issues.

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Employment Judge Hutchinson

Date 29 January 2021

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