

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105110/2016 Preliminary Hearing at Edinburgh on 7 August 2017

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Employment Judge: M A Macleod

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Lukasz Domagala

Claimant
In Person

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XPO Supply Chain

Respondent
Represented by
Ms P Whelan
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim of disability discrimination is struck out on the basis that it has no reasonable prospects of success; and that the case is now to be listed for a hearing on the merits in relation to the claimant's unfair dismissal claim.

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REASONS

1. A Preliminary Hearing was fixed in this case to take place on 7 August 2017 to consider the respondent's application to strike out the claimant's claim under Rule 37 of the Employment Tribunals (Rules of Procedure) 2013, which failing a deposit order under Rule 39.
2. The claimant attended in person and represented himself, as before. The respondent was represented by Ms Whelan, solicitor.
3. The hearing proceeded by way of submission, in the course of which the claimant was assisted by an interpreter.

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Submissions

4. For the respondent, Ms Whelan observed that the original strike out application was made by the respondent on 3 March 2017. A previous Preliminary Hearing took place before the sitting Employment Judge on 18 April 2017, and the Note following that Hearing narrates the history of the matter. Essentially, the respondent complains that the claimant has failed to provide a sufficient response to Orders by the Tribunal, dated, firstly, 27 January 2017 and secondly 18 April 2017.
5. The Order dated 27 January 2017 required the claimant to provide responses to the following:
1. *What medical condition is the Claimant relying on as being a disability for the purposes of his claim against the Respondent, XPO Supply Chain UK Limited? During the preliminary hearing on 9 December 2016, the Claimant referred to a "crushing hand injury" which he says he sustained at work on 16 June 2015. Please detail the specific nature of the medical condition being relied upon by the Claimant in these proceedings, along with confirmation as to when the medical condition started and the symptoms which were immediately experienced by the Claimant.*
 2. *When did the Claimant first obtain medical advice in relation to the medical condition being relied upon in these proceedings?*
 3. *When did the Claimant first notify the Respondent about the existence and nature of the medical condition being relied upon in these proceedings, and whom did the Claimant notify about his medical condition?*
 4. *Please provide detailed information [including dates] about symptoms experienced by the Claimant throughout his absence from work [from 16 June 2015 until the date dismissal]?*

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5. *Please provide detailed information [including dates] about medical treatment, pain relief and pain management activity undertaken or experienced by the Claimant throughout his absence from work [from 16 June 2015 until the date dismissal]?*
6. *Please specify, with precise detail, the medical treatment which the Claimant was receiving in the eight week period leading up to the date of his dismissal? Please provide details of appointments attended, medication prescribed and any physiotherapy or other treatment being received by the Claimant in the eight week period leading up to the date of his dismissal.*
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7. *As at the date of the Claimant's dismissal, please specify how this medical condition affected the Claimant's ability to carry out his role as a Warehouse Operative? In answering this question, please list each element of the role undertaken by the Claimant, and specify how the medical condition affected the Claimant's ability to perform each task of the Claimant's warehouse operative role.*
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8. *As at the date of the Claimant's dismissal, please explain how the medical condition affected the Claimant's physical or mental well-being outside work? In answering this question, please detail the Claimant's ability, as at the date of dismissal, to perform such personal "home" activities as gardening, ironing and shopping by reference to the frequency with which these tasks were performed by the Claimant, the extent to which they were performed by the Claimant or someone else on the Claimant's behalf.*
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9. *In relation to the claim for direct disability discrimination [i.e. discrimination "because of" an alleged disability as per section 13 of the Equality Act 2010], please describe the acts which the Claimant believes were discriminatory by reference to [1] the date of each incident being relied upon, [2] the event which the Claimant is relying upon, [3] the names of any witnesses or anyone else involved in the incident being complained about and [4] supply copies of any paperwork or evidence relating to the allegedly discriminatory events.*
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10. *In relation to the claim for indirect disability discrimination [i.e. discrimination arising “in consequence of a disability” as per section 15 of the Equality Act 2010], please describe the acts which the Claimant believes were indirectly discriminatory by reference to [1] the date of each incident being relied upon, [2] the event which the Claimant is relying upon, [3] the names of any witnesses or anyone else involved in the incident being complained about and [4] supply copies of any paperwork or evidence relating to the allegedly discriminatory events.*

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11. *In relation to the claim for discrimination relating to the Respondent’s alleged failure to make reasonable adjustments as per sections 20 and 21 of the Equality Act 2010], please describe the adjustments which the Claimant believes the Respondent failed to make, by reference to [1] the precise adjustment which the Claimant believes the Respondent should have made, [2] the date when such adjustments should allegedly have been made, and [3] the date[s] when the Claimant informed the Respondent that he wanted such adjustments to be made for him.*

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12. *What is the current status of the medical condition that the Claimant is relying upon in support of his tribunal claim? More specifically, please detail any treatment, medication or other support which the Claimant has received, or is continuing to receive, since the date of his dismissal.*

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13. *Is the Claimant currently working? If so, when did the new role begin and what income is the Claimant receiving? If the Claimant is not currently working [as was the case at the date of the ET1], please confirm whether the Claimant is medically certified as able and available for work?*

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6. The claimant responded to that Order by letter dated 10 February 2017. The respondent submitted that that response was inadequate, and initially sought strike out of the claim, which failing a deposit order, but during the course of the Preliminary Hearing on 18 April 2017, moderated their position

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to accept that the claimant should be given one further opportunity to respond to the Order, on an Unless basis.

7. Accordingly, the following Order was issued at the conclusion of the Tribunal's Note at the conclusion of that hearing;

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ORDER

In accordance with the power set out in rule 29 of the Employment Tribunals Rules of Procedure 2013, the Tribunal has issued the following Order:

10 **By no later than Friday 12 May 2017, at 5pm, please respond to the following questions and copy your response both to the Tribunal and to the respondent:**

1. **Do you claim that you are a disabled person within the meaning of section 6 of the Equality Act 2010?**
2. **If so, what physical or mental impairment do you suffer from?**
- 15 3. **If so, please specify in what way this impairment has a substantial and long-term adverse effect on your ability to carry out normal day-to-day activities (stating particularly which of the activities listed in Article 4(1) of Schedule 1 to the Act are affected: ie**
 - (a) **mobility;**
 - 20 (b) **manual dexterity;**
 - (c) **physical co-ordination;**
 - (d) **continence;**
 - (e) **ability to lift, carry or otherwise move everyday objects;**
 - (f) **speech, hearing or eyesight;**
 - 25 (g) **memory or ability to concentrate, learn or understand; or**

(h) perception of the risk of physical danger)?

4. Do you have medical evidence to suggest that you have a condition covered by the Equality Act 2010? If so you are required to provide all copies of that medical evidence in your possession to the Tribunal and to the respondent.

UNLESS THIS ORDER IS COMPLIED WITH BY FRIDAY 12 MAY 2017, THE CLAIM SHALL BE DISMISSED ON THE DATE OF NON COMPLIANCE WITHOUT FURTHER ORDER.

NOTES

1 You may make an application under Rule 29 for this Order to be varied, suspended or set aside. Your application should set out the reason why you say that the Order should be varied, suspended or set aside. You must confirm when making the application that you have copied it to the other party and notified them that they should provide the Tribunal with any objections to the application as soon as possible.

2 If this order is not complied with, the Tribunal may make an Order under Rule 76 (2) for expenses or preparation time against the party in default.

8. The claimant's response to that Order is what has provoked this Hearing. Ms Whelan addressed the Tribunal on the matter. She observed that it was made clear to the claimant that in a claim in which he is seeking to argue that he has been discriminated against on the grounds of disability, he must demonstrate that he is a person who meets the definition of disability within section 6 of the Equality Act 2010. The claimant had indicated at the Preliminary Hearing that he was in possession of medical records, and accordingly these were sought by the respondent in the Unless Order, together with answers to the questions set out therein.

9. Ms Whelan submitted that what had been received from the claimant was a generic email of 2 June 2017, together with his GP medical records, the most recent record of which is dated 17 February 2017. She pointed out that the GP stated, at that date, that “I suspect we are clutching at straws here”. The Hand Clinic at St John’s Hospital, Livingston, issued correspondence which stated that there is no medical reason or diagnosis which explains the claimant’s condition. She said that the medical records show that there were numerous appointments, but that there is no medical information showing that the claimant is suffering from any medical condition.
10. She argued that the Unless Order has been breached. No specialist medical information has been provided, and there is nothing available since February 2017.
11. The respondent’s basis for this application is that the claimant’s claim has no reasonable prospects of success, and it should be struck out on the basis that the claimant has failed to actively pursue his claim, and on the basis of how he has conducted the proceedings.
12. The claimant was informed at the hearing of 18 April that this was his last chance, and the consequences of breaching an Unless Order were explained to him. Ms Whelan said that she consented to the Unless Order because she considered it to be a reasonable act, but since then she has received nothing which provides the basis for any medical conclusions to be reached. The claimant’s own email is very generic, and describes the effect upon the claimant subjectively.
13. More than 2 years have now passed since the claimant went off sick, and it is 14 months since he was dismissed. The parties, she said, are no further forward than they were in December 2016. The costs to the respondent have been “huge” without any tangible progress. The respondent has demonstrated a willingness to agree a way forward to extract the medical information to which the claimant has continually referred. Since it must be

accepted that the claimant has no further medical information, it is clear, she argued, that the claimant is deliberately stalling.

14. Ms Whelan accepted that the claimant may well be genuine in his expressions of pain, and sincere in his belief that he suffers from the medical condition of which he complains, but it now requires to be
5 determined whether the claimant can actively pursue a claim in a way which appropriately balances the interests of the claimant and respondent.

15. The claimant spoke on his own behalf, initially relying upon the assistance of the interpreter, but gradually speaking English with a degree of fluency and confidence on his own behalf.
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16. He confirmed that he had provided all the medical information which he has. He said that there is no mention of his disability in the medical records because he never asked his doctor about this disability.

17. He stressed that he cannot find a job, and has “completely lost track of my life”. He went on to say that he cannot speak to his doctor, nor can he
15 represent himself properly in court at the present time. He described himself as “completely shut down”, and claimed that his life had been “completely destroyed by the company”

The Relevant Law

20 1. Rules 37(1) of the Rules of Procedure of 2013 provide:

“At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –

(a) *that it is scandalous or vexatious or has no reasonable prospects of success;*
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(b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious:*

(c) *for non-compliance with any of these Rules or with an order of the Tribunal;*

(d) *that it has not been actively pursued;*

5 (e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)...*"

Discussion and Decision

10 18. This is a case with a significant history, in the course of which a number of Preliminary Hearings have taken place. The claimant is an unrepresented party, with limited grasp of English, who has required the assistance of an interpreter during each of these Hearings.

15 19. The fundamental issue here is whether the claimant has acted in such a way as to find himself vulnerable to a strike out decision on the basis that he has either conducted the proceedings scandalously, vexatiously or unreasonably, has failed to comply with an Order of the Tribunal or has failed to actively pursue his claim; or that it has no reasonable prospects of success.

20. It is appropriate to address each of these matters in turn.

20 21. Ms Whelan argued that the manner in which the claimant has conducted the proceedings has been unreasonable, primarily on the basis that he has failed adequately to respond to Orders by the Tribunal, and in particular the Unless Order issued on 18 April 2017.

25 22. This is a difficult issue, but I have come to the conclusion that it would be unfair to the claimant to strike his claim out on this basis. He has responded to each of the Orders to which he has been subject, and in particular he has provided to the respondent (though not to the Tribunal) copies of his GP records, as he was required to do.

23. He has therefore answered the Orders. I do not consider that his conduct of the proceedings has been unreasonable. It is quite clear that the claimant has been attempting to provide what was required by the Tribunal in a form

which assisted the Tribunal, while finding it very difficult to do so where he is unable to afford the services of an employment lawyer.

24. In the same way, I cannot find that the claimant can properly be said to have failed to actively pursue his claim. He has not ignored
5 correspondence or Orders from the Tribunal. He has sought to provide medical information in relation to his medical condition in order to support his claim for disability discrimination. That the respondent considers, quite understandably, that the responses have not assisted matters is not the issue; he has sought to pursue his claim, without the benefit of legal advice,
10 and in so doing, in my judgment, he has not failed to actively pursue his claim.

25. The greatest difficulty for the claimant is that his claim for disability discrimination depends upon him being able to demonstrate to the Tribunal that he meets the definition of disability within the meaning of section 6 of
15 the 2010 Act. Even on his own account, he has failed to do so. He accepts that the information he has sought to provide fails to support his submission that he was suffering from a disability. The responses he has provided to the Orders have been, as Ms Whelan points out, generic and unhelpful, and do not assist in establishing the matter.

26. He admits that he never spoke to his doctor about his disability. As a result,
20 the medical records contain no reference to it. While he may well believe that he is suffering from such a disability, there is no basis upon which it appears that a Tribunal could conclude that he meets the statutory definition.

27. I am therefore of the view that given the inadequate responses the claimant
25 has made to the Unless Order, his claim for discrimination on the grounds of disability must be struck out because it has no reasonable prospects of success. In reaching this conclusion I take account of the fact that one possible option open to the Tribunal is to fix an Open Preliminary Hearing in
30 order to hear the claimant's evidence about the day to day impact of his condition upon him, but in light of the history of Orders issued by the

Tribunal to ensure that medical support for his assertions might be provided, and in light of their absence following those Orders, I am bound, in my judgment, to conclude that the claim for disability discrimination has no reasonable prospects of success, and must therefore be struck out.

5 28. That leaves the claimant's claim of unfair dismissal. In my judgment, that claim survives the strike out of the discrimination claim. The Orders issued were directly intended to draw forth from the claimant the details and basis of his discrimination claim, and did not address the unfair dismissal claim, which is a freestanding unfair dismissal claim rather than being made under
10 the Equality Act 2010.

29. I am sympathetic to the respondent's position in these proceedings. They have acted entirely reasonably, through their solicitor, and have attended three Preliminary Hearings on this point, but that is not a basis upon which it would be just, in my judgment, to strike out the claimant's claim for unfair
15 dismissal. I have not found that the claimant's conduct of the proceedings is itself unreasonable, nor that he has failed to actively pursue it.

30. In these circumstances, the unfair dismissal claim alone must now be listed for a hearing on the merits.

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Employment Judge: Murdo A MacLeod
Date of Judgment: 01 September 2017
Entered in Register: 04 September 2017
and Copied to Parties

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