IN THE EMPLOYMENT TRIBUNAL

Case N° 16 of 2018

JACQUELINE SCRIVEN

Claimant

–and–

THE GIBRALTAR BOOKSHOP

Respondent

Dated this 24th day April 2019.

DECISION

Background

In the Claim Form received by the Employment Tribunal on the 24th May 2018, the Claimant claims unfair dismissal pursuant to section 59 of the Employment Act and discrimination contrary to section 15(2)(c) of the Equal Opportunities Act 2006 and section 14 of the Gibraltar Constitution. The Claimant also alleges that the Respondent had failed to comply with its duty under paragraph 2 of Schedule 3 of the Equal Opportunities Act. The basis for the Claimant's claim was that on the 20th February 2018, she had received a letter, dated the 1st February 2018, informing her that her employment would end on the 28th February 2018, by reason of her having reached her 65th birthday.

On the 6th June 2018, the Employment Tribunal received the Respondent's duly completed Response Form. The essence of the statements made therein were to the effect that (i) labour inspectors had advised the Respondent that they could retire women at any time after the age of 60 and that (ii) the Claimant had not only on numerous occasions expressed the desire to retire at 60 but had discussed the matter at various meetings with a Mr Sevilla and that she had finished employment content although not over the moon with the financial settlement obtained.

On the 18th June 2018, the Mediator, appointed by the Employment Tribunal, Lesley Louise, received, in accordance with the provisions of Rule 25 of the Employment Tribunal (Constitution and Procedure) Rules 2016 ("the Rules"), from the secretary to the Tribunal a copy of the Claim Form and Response filed.

On the 21st June 2018, the Employment Tribunal notified both parties of the appointment of Ms Lesley Louise as mediator.

On the 25th July 2018, the Mediator conducted her mediation by speaking to the Claimant, who throughout the process was accompanied by a friend, and Mr Joseph Pilcher on behalf of the Respondent. At some point that day the

Claimant and Mr Pilcher signed a Mediation Agreement. The document is clearly a template (indeed the actual form had clearly been used before by another person) presumeably designed to cover a myriad of situations so that all the mediator has to do is fill in certain parts of the document. In my opinion the template as it stands leaves a lot to be desired of it and requires more thought to be given to it than simply filling in a bit here and there.

According to the mediation agreement signed the parties resolved their differences by the Respondent agreeing to pay the Claimant one months salary and two days annual leave. However, both parties and the Mediator agree that the document omitted one other term; according to the Claimant and the Mediator a letter of apology and according to Mr Pilcher a letter of appreciation. Both parties signed the document but the Mediator did not.

On the 10th August 2018, Hassans, on behalf of the Claimant, wrote to the Tribunal stating that on the basis of instructions received their client had serious concerns as to "what transpired and the manner in which an agreement was reached". Hassans went on to request that the mediator "set out in detail what had transpired at the mediation".

On the 28th August 2018, Hassans sent the Secretary to the Tribunal an e-mail stating:-

> "We understand that you have left a telephone message for Mrs Scriven enquiring as to whether she has been paid by the bookshop"

and then referring the secretary to Hassans letter of the 10th August 2018.

On the 30th August 2018, the Secretary to the Tribunal e-mailed Hassans basically quoting Rule 25 (15) of the Rules at them; ie that all discussions during a mediation are confidential. However, curiously, the e-mail further went on to ask the following:-

> "I should be grateful if you would confirm that, notwithstanding the Mediation Agreement, the dispute or part of it, has not been settled and the Mediator should issue a conciliation certificate".

On the 5th September 2018, Hassan's e-mailed the Secretary informing her that:-

> "We have taken our client's instructions and our position is that the dispute has not been settled and that the purported agreement is invalid and of no effect".

On the 7th September 2018, the Mediator signed two Conciliation Certificates. In the first certificate the following paragraph appears:-

> "After mediation, at which an agreement in principle was reached, the respondent has failed to meet its obligations in that agreement so I am of the opinion that a settlement of the dispute between the Claimant and Respondent is not possible".

At the preliminary hearing (see below) it suddenly turned out to everyone's surprise that a second Conciliation Certificate had subsequently been issued but with the same date.

In the second certificate the wording quoted above does not appear. I pause here to add that this second certificate does not appear to comply with the provisions of Rule 25(10)(d) of the Rules since it couldn't have been signed on the 7th September 2018 on the evidence given by the Mediator.

On the 14th September 2018, the first conciliation certificate was forwarded by the Tribunal to Mr Pilcher, and presumeably to the Claimant. Not surprisingly Mr Pilcher replied that same day expressing surprise since "as far as we are concerned, the matter was resolved and Mrs Scriven got the letter that she requested and the compensation that we agreed".

The secretary to the Tribunal forwarded Mr Pilcher's e-mail to Hassans who on the 26th September 2018, replied. In this e-mail Hassans set out the chronology of events upto that point and then submited that the mediation agreement signed was not valid, binding or enforceable for the following three reasons:-

(i) the mediation had occurred outside the time period set by Rule 25(2) of the Rules and therefore the Mediation Agreement signed was not a valid one for the purposes of the provisions of section 62 of the Equal Opportunities Act which was the pertinent provision for the purposes of the claim for discrimination made by the Claimant;

(ii) the agreement was invalid and unenforceable for duress exercised by the Mediator on the Claimant; and

(iii) the certificate issued (ie the First Certificate) referred to the agreement being "in principle" and therefore subject to the Claimant exercising her right to obtain legal advice prior to binding herself to it.

The e-mail concludes by Hassans, very fairly, confirming that the Respondent had complied with the terms of the mediation agreement.

On the 26th September 2018, Mr Pilcher replied to Hassans e-mail of that same day. In the e-mail Mr Pilcher denies that the Mediator was "directing" the situation or that the Claimant was "visibly upset to the point of tears" during the mediation and that what had been agreed the Respondent would provide was a letter of appreciation and not of apology.

On the 8th November 2018, a directions hearing took place at which the following two orders were made:-

(i) that a hearing take place to decide the preliminary point of whether there had been a valid and binding mediation agreement signed; and

(ii) the Claimant file further and better particulars of her claim.

The preliminary hearing took place on the 27th March 2019.

THE PRELIMINARY HEARING

At the hearing Mr Philip Dumas appeared for and with the Claimant whilst Mr Joseph Pilcher appeared on behalf of the Respondent.

Evidence was due to be heard from Ms Lesley Louise, the Claimant and another person but in the end only Ms Louise gave evidence.

In the course of her evidence Ms Louise, amongst other things, stated the following:-

- she accepted that the mediation took place outside the one month period provided for by Rule 25(2) of the Rules and that she did not draw the attention of either party to this. It was her view that by both parties agreeing to meet with her on the 25th July that they were in effect agreeing to the extension of the one month limit set out in Rule 25(2) of the Rules. She accepted that she should have been more precise on the issue;

- that the terms of settlement which eventually both parties agreed to sign up to were terms proposed by the Claimant and not Mr Pilcher;

- that she didn't take notes of what transpired during the mediation and therefore was relying on memory;

- she agreed that once the mediation agreement had been signed that should have been the end of her involvement in this case;

- she agreed that the agreement signed was not signed on the basis of being "in principle".

- she issued the first conciliation certificate at the request of the secretary to the tribunal because the secretary was under the impression that the Respondent had not adhered to its side of the agreement;

- that subsequent to the issue of the first conciliation certificate Mr Pilcher had contacted her to say that the Respondent had indeed complied with the agreement and that consequently the second conciliation agreement had been issued;

- she accepted that a letter of apology (not one of appreciation) was one of the conditions of the settlement and that this had not been included in the agreement signed; and

- she could not recall whether the Claimant's claim under the Equal Opportunities Act had been discussed and/or formed part of the settlement and she categorically denied having put the Claimant under duress or having acted other than impartially.

On Ms Louise finishing giving evidence I drew Mr Dumas's attention to various provisions of the Rules and my concern as to whether the tribunal had the jurisdiction to hear this case in the first place. After a short adjournment Mr Dumas confirmed that he would not be calling any witnesses and would simply be addressing me on the question of jurisdiction, the issue of duress no longer being pertinent.

THE LAW

Insofar as the preliminary point is concerned the starting point is Rule 25 of the Rules, which where relevant provides as follows:-

> "25 (1) Where the Tribunal accepts a claim and response, it shall deliver copies of all of the accepted documents to a mediator".

It is accepted by both parties that this occurred on the 18th June 2018.

> "(2) For up to one calendar month commencing with the date on which the Tribunal delivers accepted documents to a Mediator, the Mediator shall endeavour to promote a settlement between the claimant and the respondent".

It is accepted by both parties and the Mediator that no action to promote a settlement occurred until the 25th July 2018 and that this was outside the one month period prescribed by sub-rule (2). The use of the word "calendar" in this sub-rule appears to me to be a drafting error for obvious reasons.

> "(3) The period for conciliation may be extended by a Mediator, provided that the claimant and the respondent consent to the extension and the Mediator considers that there is a reasonable prospect of achieving a settlement before the expiry of the extended period.
>
> (4) An extension under sub-rule (3) of the period for conciliation may only occur once and may be for up to a maximum of 2 months".

It is the Respondent's contention, as indeed it is the Mediator's, that the period of conciliation was extended pursuant to sub-rule (3) because the parties must have consented to it since otherwise they would not have turned up on the 25th July, and the Mediator must have thought there was a reasonable prospect of settlement since otherwise she would not have called the parties to attend on the 25th July. Originally, it was Hassans contention, discarded for obvious reasons at the preliminary hearing (see below), as argued before me on the 29th January 2019, that the consent of the parties to the extension had to be explicit or informed and in this case the parties had not even been made aware let alone agreed to the extension, their mere presence on the 25th July not being sufficient to satisfy the provisions of the sub-rule. In may opinion the clear intention behind sub-rules (3) and (4) is to enable a conciliation process that has been began within the one month (calendar) period provided for in sub-rule (2) to be extended beyond this period since otherwise sub-rule (9) would kick in. It is not a provision that in my opinion can be relied on to justify the commencement of the mediation outside the one month (calendar) period as occurred in this case. But assuming I am wrong in that, lets take the matter further. It is clear that sub-rule (3) requires two hurdles to be surpassed; namely:-

(i) the claimant and the respondent have to consent to the extension; and

(ii) the mediator must consider that there is a reasonable prospect of achieving a settlement before the expiry of the extended period.

In my opinion the first limb requires that the claimant and the respondent have actual knowledge of the need to extend the one month (calendar) period and that they explicitely consent to such an extension. There is no evidence whatsoever produced to date to show that either party knew about let alone consented to the extension (this is even more so in the case of the Respondent who has not had legal representation throughout). But even if I am wrong in this, I am of the opinion that the second limb is not met either. In my view prior to and up to commencing the mediation on the 25th July 2018, the mediator could not have considered whether there was a reasonable prospect of achieving a settlement since she had not even met the parties let alone heard their respective positions and/or demands. The Mediator had the Claim Form, which was so unclear as to what exactly was being claimed that Further and Better Particulars of Claim dated 4th January 2019 had to be filed, and the Response but neither of these documents could in my view have been sufficient to enable the Mediator to consider there was a reasonable prospect of achieving a settlement. The end result of all of the above is that the mediation that took place on the 25th July 2018 contravened the provisions of Rule 25(2) and (3) of the Rules. So where does this leave the Agreement signed, by both parties on the 25th July 2018?. I park this question on the side to deal with another issue which is of primary importance; the validity of the conciliation certificate(s) issued.

There are, on my understanding of the Rules, only three situations in which a conciliation certificate can be issued; namely:-

> "25 (7) If the Mediator is unable to make contact with the claimant or respondent the Mediator shall conclude that settlement is not possible.
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> (8) If at any point during the period for conciliation, or during any extension of that period, the Mediator concludes that a settlement of a dispute, or part if it, is not possible, the Mediator shall issue a conciliation certificate.
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> (9) If the period for conciliation, including any extension of that period, expires without a settlement having been reached, the Mediator shall issue a conciliation certificate".

In this case none of those three situations applies.

Mr Dumas has sought to persuade me that I do have jurisdiction to continue to hear the case since there is before the tribunal a validly issued conciliation certificate. Mr Dumas has submitted that on the expiry of the one month (calendar) period provided for by Rule 25(2) of the Rules, and as no valid extension to that period had come into effect, the Mediator was required by the provisions of Rule 25(9) to issue a conciliation certificate. Mr Dumas further states that whilst it is true that no conciliation certificate was issued at that time a conciliation certificate was issued subsequently on the 7th September 2018 albeit in bizarre circumstances. The argument is an attractive one but it does not take into account that either of the conciliation certificate was not issued for the reason provided for in sub-rule (9) since up to September 2018 the Mediator was of the belief that a settlement had been reached and that the only reason that the conciliation certificate was issued in the first place was that the secretary to the tribunal asked the Mediator to do so at the behest of Hassans and/or that both the secretary and the Mediator, at

least initially, were under the mistaken belief that the Respondent had failed to adhere to the mediation agreement and/or that a conciliation certificate issued 50 days after it should have been is within the spirit of the Rules, albeit that there is no specified time limit for the issue of a certificate. In my opinion, on the particular facts of this case the Mediator had no power to issue such certificate(s) on the basis and for the reasons that she issued the same. The reason that such a finding is important is that as the Rules currently stand a chairperson only becomes seized of a complaint in two circumstances provided for in Rule 26 of the Rules; namely:-

> "26 (1) Upon the issue of a conciliation certificate by the Mediator, the Chairperson shall consider all the documents held by the Tribunal in relation to that claim, to confirm whether there are arguable complaints and defences within the jurisdiction of the Tribunal (and for that purpose the Chairperson may order a party to provide further information").
>
> and
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> "(3) The Chairperson shall consider all the documents under sub- rule (1) without receipt of a conciliation certificate where:-
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> (a) another claimant ('A') has complied with that requirement in relation to the same dispute and the claimant wishes to institute proceedings on the same claim form as A; or
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> (b) where the requirement is complied with by another person instituting proceedings relating to the same matter".

Sub-rule 26(3) obviously does not apply to this case so I turn to sub-rule 26(1). In my opinion the first line of rule 26(1) has to be read as if the word "valid" were inserted before the words "conciliation certificate". This being the case, and bearing in mind the opinion expressed above that on the particulars facts of this case the conciliation certificate(s) issued were not valid, it follows that I do not have the necessary jurisdiction to determine this claim.

CONCLUSION

Rule 3(3) of the Rules requires tribunal's to give effect to the overriding objective of dealing with cases fairly and justly when interpreting or exercising any power given to it by these Rules. I have borne in mind and been very conscious of this sub-rule when interpreting the afore-mentioned provisions of the Rules.

I have come to the conclusion for the reasons expressed that there was no valid conciliation certificate(s) issued by the mediator. No valid conciliation certificate having been issued there is nothing further for this tribunal to consider as it does not have the jurisdiction to hear the claim and consequently the claim is dismissed.

In any event assuming that I were to be wrong in this I am of the opinion, with regard to the question I referred to above as having been parked, that on the particular facts of this case and in line with the requirements of Rule 3, a valid mediation agreement was reached.

The series of procedural errors that have occurred in this case on the part of the Tribunal (which includes the Mediator) is to say the least unfortunate and I think that the necessary measures should be taken by all concerned to ensure that such procedural mistakes do not re-occur in the future.

Joseph Nunez
Chairman