



EMPLOYMENT TRIBUNALS

Claimant: Mr A P Paulinski

Respondent: First South West Limited

Heard at: Plymouth **On:** 8 August 2017

Before: Employment Judge Matthews

Representation:

Claimant: In Person

Respondent: Miss C Davies of Counsel

JUDGMENT on a Preliminary Hearing

Mr Paulinski's application to have the "unless order" (made and sent to the parties on 11 May 2017) set aside under rule 38(2) of the Employment Tribunals Rules of Procedure 2013 is dismissed.

REASONS

(These written reasons are provided on the application of Mr Paulinski, oral Judgment having been given with reasons at the hearing.)

INTRODUCTION and FACTS

1. This case has a considerable procedural history.
2. Mr Albin Paulinski, who is of Polish nationality, brought a number of claims to the Employment Tribunals. Depending on the outcome of this hearing, however, the only claims that may proceed are of direct and indirect race discrimination.

3. The issue for me to decide at this preliminary hearing is Mr Paulinski's application to have an "unless order" and the dismissal of his claims of direct and indirect race discrimination set aside. If they are set aside, Mr Paulinski's claims may proceed. If not, the claims will remain dismissed.
4. I heard evidence from Mr Paulinski and his brother, Mr Marek Paulinski, with the assistance of an interpreter (Ms M Glewska). Neither produced a written statement. The Respondent Company had produced a bundle for the hearing, which, apparently, had been sent to the Claimant. The Claimant did not seem, however, to have the bundle available at the hearing. Rather than refer to the bundle, I pieced together the relevant paperwork from the Tribunal file with the help of Miss Davies.
5. At a preliminary hearing on 27 January 2017 Employment Judge Goraj dismissed a number of the Claimant's claims and made a deposit order in respect of some, but not all, of the claims of direct and indirect race discrimination.
6. The deposit order was complied with, the required sum of £200 being paid.
7. On 22 February 2017 the Bristol Employment Tribunal wrote to the parties. The case was listed for a two day hearing in Bodmin on 22 and 23 May 2017. Case management orders were made. These included a requirement that witness statements be exchanged by 21 April 2017 as set out in a previous order dated 11 May 2016. Neither of these orders specifically directed that the Claimant was to prepare and serve a witness statement of his own, although that would have been understood as being the case by anyone familiar with the procedural language of the Employment Tribunals.
8. Apart from payment of the deposit, it is clear from documents on the Tribunal file that some limited progress was made in preparing for the merits hearing on 22 and 23 May 2017. The progress was prompted by the Company's solicitors. It was slow and difficult and some areas, such as witness statements, were not addressed by the Claimant.
9. On 10 May 2017 the Company's solicitors sent an email to the Bristol Employment Tribunal. Amongst other things it contained an application for an "unless order" in respect of the Claimant's non compliance with case management orders as far as the exchange of witness statements was concerned.
10. On 11 May 2017 Employment Judge O Harper made an "unless order" sent to the parties the same day. The order was in these terms:

"Unless by the 18 May 2017 the claimant provides the respondent and the Tribunal with a copy of his witness statement as directed by

the Tribunal on 22 February 2017 the claim will stand dismissed without further order.”

11. On the same day as the “unless order” was made but before it was sent to the parties, 11 May 2017, the Claimant sent an e-mail to the Tribunal to say that his brother, Mr Marek Paulinski, would be a witness at the merits hearing and would explain everything. This resulted in a further email from the Bristol Employment Tribunal to the Claimant, again on 11 May 2017. It included this:

“Employment Judge Harper has directed that I refer you to the Tribunal’s e-mail correspondence of 12:30 today (copy attached) and to the Unless Order made by the Tribunal today.

You are required to provide your written witness statement, and written witness statements from anyone else who will be giving evidence on your behalf, to the respondent and to the Tribunal, by 18 May 2017.

If you do not provide the written witness statements, your claim will be struck out and there will be no hearing on 22-23 May 2017.”

12. Having heard from the Paulinski brothers, I am satisfied that their understanding and use of the English language is very limited. This is especially so in the case of the Claimant himself. Apparently Mr Marek Paulinski, who had a considerable hand in managing his brother’s claims, used a Google translating tool to translate the various communications concerned.
13. However, it is clear that the Paulinskis understood that something needed to be done in relation to statements because, on 16 May 2017, the Claimant sent Mr Marek Paulinski’s statement to the Bristol Employment Tribunal.
14. This prompted a further e-mail from that Tribunal on 17 May 2017. It read as follows:

“Thank you for your email dated 16 in late 2017 attaching the witness statement of Marek Paulinski.” [Clearly something went awry with the wording here.] “A copy of your email is being sent to the respondent.

However, Regional Employment Judge Parkin has directed me to write that the Unless Order sent to the parties on 11 May 2017 refers to the Claimant providing a copy of his witness statement to the Respondent and to the Tribunal by the 18 May 2017.

If it is your position that you have nothing more to add as your own witness evidence, beyond the content of the claim form and the papers you sent to the Tribunal at the end of March/beginning of

April 2017 enclosing your documents, you must set that out clearly in writing to the Respondent and to the Tribunal by the 18 May 2017 or you will be in breach of the Unless Order.”

15. Mr Marek Paulinski says it was at this point that he finally understood that the Claimant was required to produce a written statement, but it was too late to do anything. He did not think to write to the Tribunal immediately to explain nor to take advantage of the “nothing more to add” lifeline offered in the Tribunal’s email of 17 May.
16. On 19 May 2017 the Bristol Employment Tribunal wrote to the Claimant confirming that the claims stood dismissed and the merits hearing was cancelled.
17. On 22 May 2017 the Claimant sent a document to the Bristol Employment Tribunal, which that Tribunal treated as the application before me today.
18. That document should be referred to in full. In essence it made one point. The Claimant had understood that he had to submit his brother’s written statement but not one of his own. The Claimant had assumed that his oral evidence would be sufficient for the merits hearing.
19. On 5 June 2017 the Claimant sent his written statement to the Company’s solicitors.

APPLICABLE LAW

20. Under rule 38(2) of the Employment Tribunals Rules of Procedure 2013 a party has the right to apply to the Tribunals in writing, within 14 days of the date the notice of dismissal is sent to the parties, to have an unless order set aside on the basis that it is in the interests of justice to do so.
21. Factors I must consider are the reason for the default, the seriousness of it, any prejudice that may result to the Company if the “unless order” is set aside and whether or not a fair trial is possible.

CONCLUSIONS

22. The Claimant says that the reason for his non compliance with the “unless order” was that he and his brother have little command of the English language and did not fully understand the order. In particular they did not understand that he should produce a witness statement.
23. If there had been no language barrier, it seems to me this application would be dismissed without much debate. The “unless order” was clear and it was explained and reinforced by further unambiguous communications from the Bristol Employment Tribunal on 11 and 17 May 2017.

24. However, there is no doubt that there was a language barrier. In my deliberations I have also given weight to the fact that the brothers were dealing with a legal process in an unfamiliar environment. The issue here is whether or not the Paulinski brothers' explanation that they did not understand the "unless order" is plausible. On the evidence I have heard, it is not. Enough was understood to supply Mr Marek Paulinski's statement and on the balance of probability I think the full requirements of the order were understood. I do not accept that what was admitted to be understood on 17 May 2017 was not understood on 11 May 2017. Even if their account is accepted, the brothers should have taken steps to understand what they had to do to avoid what they clearly recognised as a threat of strike out. As had happened on previous occasions in the preparation for the merits hearing, the brothers had not applied themselves sufficiently to the task in hand.
25. The default was, therefore, conscious. Such a conscious failure to provide the key witness statement a few days before a merits hearing in this way is, in my view, serious.
26. The Company has made considerable preparation for any merits hearing and any prejudice that may result from the hearing proceeding is not a significant factor in my deliberations.
27. I do have some concerns about a fair hearing at this distance from events in 2015. However, again, these are not such as to figure significantly in my conclusions.
28. For these reasons the Claimant's application is refused.

Employment Judge Matthews
16 August 2017

JUDGMENT SENT TO THE PARTIES ON

23rd August 2017

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AND ENTERED IN THE REGISTER

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FOR THE TRIBUNAL OFFICE