



EMPLOYMENT TRIBUNALS

Between:

Mr T Nurse

and Showsec International Limited

Claimant

Respondent

JUDGMENT

The Claimant's application to have the Unless Order made on 16 August 2018 set aside is refused.

REASONS

Method of consideration of the application

1. In one of the five emails the Claimant sent to the Tribunal in which he effectively asked for the Unless Order to be set aside, he stated: "My case remains important to me. I want to have a hearing." It was not clear from this whether the Claimant was merely saying that he wanted his claim to be heard or whether he was saying more specifically that he wanted his application for the Unless Order to be set aside to be dealt with at a Hearing. The Tribunal would normally be required under Rule 38(2) of its Rules of Procedure to decide such an application at a Hearing if the Claimant has requested one. The Tribunal decided, in the Claimant's favour, to treat this statement as a request for a Hearing on his application and duly sent the parties a Notice of Hearing.
2. The Claimant failed to attend the Hearing.

3. The Tribunal does not interpret Rule 38(2) as meaning that its decision on the Claimant's application must be re-listed for hearing even if the Claimant fails to attend the original Hearing without good reason. It therefore ordered the Claimant to explain why he has failed to attend the Hearing. In the reasons for this Order, the Tribunal stated that if the Claimant failed to provide an explanation, or a sufficient explanation, for his non-attendance the Tribunal intended to decide his application on the basis of written representations.
4. In his response to this Order, the Claimant said that he did not realise he was expected to be in Leeds for the Hearing and went to the Sheffield hearing centre instead. The Notice of Hearing clearly states that the Hearing will be in Leeds. The Tribunal considers that, if the Claimant did not read the Notice of Hearing, he has only himself to blame.
5. The Claimant went on to complain about the Tribunal staff and said that their "abuse of position has caused a malice that provoked are [sic] current situation and I am still having to cope with the same team of openly miscreant staff". The Tribunal considers that the responsibility for attending at the wrong hearing centre is the Claimant's, not that of the Tribunal's administrative staff.
6. The Claimant said that he did not want the expense of travelling to Leeds from Sheffield, that Leeds was an inconvenient location for him and that this was "part of a course of harassment". The Tribunal accepts that Sheffield would be a more convenient hearing centre for the Claimant than Leeds, as he lives in Sheffield, but it does not accept that the journey from Sheffield to Leeds is so difficult or expensive as to justify the Claimant's non-attendance at the Hearing of his application.
7. In conclusion, the Tribunal is not satisfied that the Claimant had a sufficient reason for his non-attendance at the Hearing of his application and so has decided to consider the application on the basis of the Claimant's written representations.

The merits of the application

8. At a Preliminary Hearing on 1 June 2018 the claim was listed to be heard over four days beginning on 23 August 2018. The parties were ordered to exchange witness statements on 3 August 2018. The Claimant failed to provide a witness statement. The Tribunal issued an Unless Order, sent to the parties on 16 August, giving the Claimant until 20 August 2018 to provide his witness statement, failing which his claim would be dismissed without further Order.
9. In his application, which was contained in five separate emails, the Claimant appears to allege that he did not need to provide a witness statement because

he has already addressed many issues at two Preliminary Hearings and through ACAS negotiations. It is the case that the Claimant discussed his claim with an Employment Judge at two lengthy Preliminary Hearings at which the Judge helped the Claimant to clarify his allegations. He also sent the Tribunal various documents complaining about certain individuals' and companies' behaviour, although none of those documents appears to be relevant to his claim as he had explained it to the Judges at the Preliminary Hearings. None of the information or documents he has supplied amount to a witness statement. As the original Case Management Order and the Unless Order both made entirely clear, he needed to provide a written statement of the evidence he intended to give the Tribunal at the Hearing in support of his claim.

10. A witness statement was particularly important in this claim, given the substantial assistance the Claimant had needed from the Tribunal to clarify his allegations. Even if the Tribunal had been prepared to allow the Claimant to give his evidence in an oral form only, at the Hearing itself, it is unlikely that he would have been able to provide a coherent account of his evidence on the day without substantial assistance from the Tribunal. His evidence needed to address a number of complex matters including, amongst other things, the nature of his employment relationship with the Respondent, whether he had made a protected disclosure, whether he had been subjected to a detriment or dismissed because of a protected disclosure, whether he had been treated less favourably in various ways because of his race or because he had done a protected act. It would not have been fair to the Respondent for the Tribunal to have been drawn into providing the Claimant with the amount of assistance that he would have needed to give his evidence on all those matters. Further and equally fundamentally, the Respondent was not in a position to address the Claimant's evidence if it did not have fair notice of what he intended to say on these matters. In summary, it was not possible to have a fair trial if the Claimant did not produce a witness statement in advance.
11. In explaining why he did not comply with the Unless Order, the Claimant states that the final demand to comply came too late, and after the deadline had already expired. This is not the case. The Unless Order was sent to him by email on 16 August 2018 at 9.41am and gave him until 10am on 20 August 2018 to provide his witness statement, an extension of over two weeks after the original deadline and three clear days to write his statement after receiving the Order.
12. The Claimant also complains that he did not have the opportunity to submit his disapproval of the Respondent's request. This appears to be a reference to the fact that on 6 August 2018 the Respondent wrote to the Tribunal to inform it that the Claimant had not provided his witness statement by 3 August and had told the Respondent that he did not intend to provide one. The attached correspondence between the Respondent and the Claimant confirmed this to

be the case. The Respondent applied for an Order requiring the Claimant to serve his witness statement by 10 August. The Claimant did know about that application because the Respondent sent him a copy of its email, albeit that it did not inform him, as it should have done under Rule 30(2), that if he had any objections to its application he should send them to the Tribunal as soon as possible. The Respondent's application was not referred to an Employment Judge until 15 August 2018. By that time the Hearing was imminent and the Employment Judge decided that, in the light of the fact that the Claimant was showing no signs of intending to provide a witness statement, an Unless Order was more appropriate, to bring home to the Claimant the importance of providing a witness statement, to ensure that a fair Hearing was possible and to spare the Respondent the cost and disruption of preparing for the Hearing if the Claimant had in fact decided not to pursue his claim. So whilst the Respondent had not told the Claimant in its original application that he needed to provide any objections to the Tribunal, in the event the Tribunal decided to make an Unless Order on its own initiative and in the light of the circumstances that existed when the application was referred to the Employment Judge.

13. In his application for the Unless Order to be set aside, the Claimant further explains that he was "very busy with other very important cases one involving a possible murder", his free time was limited and he was working 7 nights a week for a fortnight. He does not provide any detail of when he was working nights nor explain why he had no time to write his witness statement between the date the original Case Management Order was made on 1 June and the extended deadline of 20 August 2018.
14. The Claimant states that he was not informed of the severity of the Unless Order. The Unless Order clearly stated the consequences of not complying with it.
15. The Tribunal is satisfied that it would not be in the interests of justice to set the Unless Order aside. The requirements of the Unless Order and the consequences of not complying with it were clear. The Claimant has provided no good reason for his failure to provide a witness statement. From the large number of emails he has sent the Tribunal it is apparent that he is able to express himself in writing. The Claimant's default has had serious consequences in that it has meant that the Respondent has been unfairly prejudiced in its potential ability to defend his claim. More fundamentally, the Tribunal is satisfied that without the provision of the Claimant's witness statement a fair trial would not be possible. The Tribunal notes that, even though the Claimant has sent the Tribunal more documentation in response to its Order that he explain his non-attendance at the Hearing of his application, he has still not provided a witness statement.

16. For these reasons, the Tribunal refuses the Claimant's application for the Unless Order to be set aside and re-confirms the notice sent to the Claimant on 21 August 2018 that his claim has been dismissed.

Employment Judge Cox

Date: 24 October 2018