



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4106915/2017

Employment Judge: M A Macleod (sitting alone)

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Kathleen Dykes

Claimant

Whitbread Group PLC

Respondent

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Represented by
Mr P Bownes
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is Tribunal is that the claimant failed to comply in full with the Unless Order issued by the Employment Tribunal on 23 November 2018 by the date specified therein; and that the claim was therefore dismissed with effect from 11 January 2019 in terms of Rule 38(1) of the Employment Tribunals Rules of Procedure 2013.

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REASONS

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1. Following a Preliminary Hearing on 17 October 2018, the Tribunal issued a Judgment refusing the respondent's application to strike out the claim, but reissuing the original Order as an Unless Order, for compliance by no later than 11 January 2019.
- 5 2. The respondent has now written to the Tribunal to confirm that the claimant has failed to comply with the Unless Order, in full, and therefore that her claim should now be treated as struck out.
3. The Tribunal must therefore consider the history of the matter following the issuing of the Unless Order, in order to determine whether or not the claim
10 has been or should be struck out.

The Order

4. The Tribunal issued the Unless Order on 23 November 2018, and on the same date issued its Judgment following the Preliminary Hearing.
5. At paragraph 47 of that Judgment, the Tribunal made clear the
15 consequences for the claimant of any failure to comply with the Unless Order:

*"...it is crucial that the Tribunal's Order is taken seriously, and given a proper response. As a result, the Order is now reissued to the claimant, and attached to this Judgment, but now in the form of an Unless Order. An
20 Unless Order is an Order which requires compliance by the party against whom it is directed, by the date which is identified in the Order. If compliance is not received in respect of the Order, the claim will be dismissed automatically. This is therefore a final warning to the claimant that she must comply with this Order, by no later than Friday 11 January
25 2019. I have extended the period for compliance simply because the festive holiday period will intervene during the next four weeks, but the claimant should be in no doubt that if she fails to answer the Order this time, her claim will not be allowed to continue."*

6. The terms of the Order itself were contained in a separate document, and
30 after setting out the following warning – **"UNLESS THIS ORDER IS**

COMPLIED WITH BY THE DATE SPECIFIED, THE CLAIM SHALL BE DISMISSED ON THE DATE OF NON COMPLIANCE WITHOUT FURTHER ORDER.” – in bold and in large type, it required the claimant to provide the following information:

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SCHEDULE

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1. *A copy of the General Practitioner medical records for the relevant period demonstrating the background and history of your impairments.*

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2. *A copy of a General Practitioner report, if available, showing the background and history of your impairments, together with a copy of any reports from specialist practitioners showing the background and history of your impairments.*

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3. *A copy of any other reports available to you from any other practitioners involved in treating your impairments, such as your Community Psychiatric Nurse and the Intensive Home Treatment Team.*

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4. *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 following activities are affected: ie*

a. Mobility;

b. Manual dexterity;

c. Physical co-ordination;

d. Continence;

e. Ability to lift, carry or otherwise move everyday objects;

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f. Speech, hearing or eyesight;

g. Memory or ability to concentrate, learn or understand; or

h. Perception of the risk of physical danger?

5 *5. Please set out in as much detail as possible in respect of each of your conditions; its history, the date of first diagnosis, its progress, how it has affected your ability to carry out normal day-to-day activities, and the prognosis for your condition.*

10 *Please set out in as much detail as possible the impact of your condition upon your ability to carry out the duties of your employment with the respondent, setting out each of the main duties of your employment and how they have been affected.*

The Claimant's Response

15 7. The claimant instructed solicitors, Messrs Livingstone Brown, to act on her behalf, and they wrote to the Tribunal on 10 January 2019 to provide responses to the Order.

20 8. It is not necessary to rehearse the entirety of that response here but the questions which required information were answered by the solicitors at answers 4 and 5, and further information was provided towards the end of the letter in order to explain a number of matters, which will be addressed below.

25 9. With regard to paragraphs 1 to 3 of the Order, essentially the response was to advise the Tribunal that she had requested copies of her GP records from her GP, which she expected to have by the end of the week (11 January 2019); that she had requested a report from her GP and would provide that as soon as the GP had prepared it; and that she had requested reports from her CPN and intensive home treatment team, recognising that these were material to her case.

30 10. Towards the end of that letter, the solicitor provided further explanation as to the claimant's illness and she stated that she had had particular stressors over the last few months in addition to requiring to manage her condition,

and having her 6 month old baby to care for. Further, she had to prepare for a child protection hearing on 8 January 2019. It was said that *“We are sure that the tribunal will appreciate that such matters are of great importance to the claimant and were of concern to her, and therefore, the claimant attending to the unless order requirements have been delayed.”*

11. No application for an extension of time to comply with the Unless Order was made in this letter, nor in any other correspondence by or on behalf of the claimant.

The Respondent’s Submission

12. On 15 January 2019, Mr Bownes, the respondent’s solicitor, wrote to the Tribunal in response to this correspondence. He submitted that the claimant had not provided her GP records by the deadline of the Unless Order, nor had she provided any other medical evidence than a photograph attached to the claimant’s email. As a result, he submitted that the claim must be treated as having been dismissed. He argued that partial compliance will not do.

13. He went on to argue that the situation was made abundantly clear to the claimant by the sitting Employment Judge when it was explained that the Order required to be complied with.

Discussion and Decision

14. The Employment Tribunal is governed by the Rules of Procedure 2013, and reference requires to be made to the terms of Rule 38 in which Unless Orders are provided for.

15. In Rule 38(1), it is provided that *“An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.”*

16. It should perhaps be pointed out, however, that Rule 38(2) provides that “a party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.”

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18. The issue for consideration by the Tribunal in this case, at this stage, is a straightforward one: has the claimant complied with the Unless Order of 23 November 2018 by the deadline set out therein of 11 January 2019?

19. The reason why the issue is straightforward is that the essence of an Unless Order is different to that of a general case management order. The case of **Scottish Ambulance Service v Laing UKEATS/0038/12/BI**, which was cited by the respondent, makes clear that an Unless Order is a conditional judgment (referring to **Uyanwa-Odu v Schools Offices Services Ltd UKEAT/0281/08**) which becomes a final determination of the proceedings if the party fails to comply with the underlying order. Lady Smith, in **Laing** (paragraph 35) confirmed that matters such as fair notice, remembering that strike out was a power that ought not to be readily exercised, considering proportionality and reaching a decision by the exercise of discretion are not relevant when considering whether or not an Unless Order has been complied with.

20. Much of what has been put forward on behalf of the claimant in the letter of 10 January 2019 appears to me to amount to a plea that the Tribunal considers all of the circumstances surrounding the claimant’s response to the Unless Order. However, as Lady Smith points out, these are not relevant matters for consideration at this stage.

21. The respondent also made reference to the case of **Royal Bank of Scotland plc v Abraham UKEAT/0305/09/DM**, as authority for the

proposition that partial compliance with an Unless Order is insufficient to stave off strike out of the claim.

22. It is clear, in my judgment, that the claimant has failed to comply with the Unless Order in full. The records and reports which were sought in paragraphs 1 to 3 of the Order were not, and still have not been, provided to the Tribunal and to the respondent.

23. The terms of the Order were quite explicit, and were accompanied by warnings given both in person at the Preliminary Hearing by the sitting Employment Judge and by the terms of paragraph 47 of the Judgment issued with the Order; if the claimant were not to comply with the Unless Order, the claim would be dismissed forthwith.

24. The claimant had in fact been given very considerable latitude prior to the granting of the Unless Order, since she had for a very long time failed to respond to the Orders of the Tribunal, and was well aware, in my judgment, that she was on a final warning.

25. It was open to her to seek an extension of time, or to vary the terms of the Unless Order, but she did not do so. The letter by her solicitors dated 10 January was framed in slightly curious terms, in that it recognised that it was an Unless Order to which a response must be provided, noted that the claimant had still to provide some information under that Order and yet did not seek an extension of time within which the Order could be complied with.

26. An Unless Order is an action of last resort, taken by an Employment Tribunal to make clear to a party that they must comply with its Order, or face the most draconian consequences. The claimant gave every appearance of understanding that this was the case, and assured the Tribunal that she would comply within 4 weeks. The Order gave her longer than that. Her solicitors make reference to difficulty in obtaining appointments over the Christmas period, but the Order was issued on 23 November 2018, some 4 weeks before Christmas.

27. In any event, it is no part of this Judgment to consider the reasons why the Order was not fully complied with. It is clear that the Order has not been fully complied with by the claimant. As a consequence, given that the Order is a conditional Judgment, it is my Judgment that partial non compliance means that the claim is dismissed, with effect from 11 January 2019.

28. It is open to the claimant to seek to review this Judgment under Rule 38(2), as set out above.

Employment Judge: M A Macleod
Date of Judgement: 22 January 2019
Entered in register: 24 January 2019
And copied to parties