Case No: 2601147/17 **Reserved**

EMPLOYMENT TRIBUNALS

Between:

Dr G Ijomah **Claimant**	**and**	Nottinghamshire Healthcare NHS Foundation Trust **Respondent**

AT A PRELIMINARY HEARING

Heard at: Nottingham **On:** 24 April 2018

Before: Employment Judge Clark (sitting alone)

Representation
For the Claimant: Dr Ahmed of Counsel.
For the Respondent: Miss Barney of Counsel.

RESERVED JUDGMENT

1. The application for relief from sanction is refused.

2. Case management orders follow separately.

REASONS

Introduction

1. This is the claimant's application for relief from sanctions under rule 38(2) of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. On 24 August 2018, I made an unless order to be complied with no later than 4pm on 7 September 2018. The substance was compliance with the order of EJ Evans sent to the parties on 22 June 2018 following extensive assistance to ensure Dr Ijomah understood what it was that was required. My unless order did not apply to the claimant's claim of ordinary unfair dismissal which continues unaffected. In response to the unless order, the claimant filed and served a document in time. The respondent then applied for the sanction to apply on the ground that the document he served did not materially comply with the terms of the order. The issue of compliance was determined at a preliminary hearing before EJ Moore on 4 December 2014. She

held that there was a material breach of the order and, as an automatic consequence, the sanction of strike out of those relevant parts of the claim was engaged.

3. EJ Moore's decision was expressed as a judgment and sent to the parties on 22 January 2019. The claimant applied for both a reconsideration and relief from sanctions. EJ Moore undertook a reconsideration and varied her judgment only insofar as she provided further reasons for the conclusion she originally came to which otherwise was not disturbed. I understand from the parties before me, both of whom appeared before EJ Moore, that she was invited not to deal with the relief from sanctions part of the application, hence it returning to me to determine in this hearing.

Preliminary Matters

4. There are aspects of the application that have given me significant cause for concern about the nature, timing and conduct of this hearing.

5. The first arises from the separation of the Judges dealing with essentially the same matter. There is a difference in procedure between an application under r.70 and one under r.38 although both are founded on the concept of the interests of justice. They could have been dealt with as alternatives at the same time by the same Judge as there is no inconsistency in a conclusion that there was (a) material default but (b) the interests of justice warrant relief from sanctions. Conversely, the applications being considered by two judges does not necessarily lead to difficulties where the first decision is accepted by the party in default. Typically, an application under rule 38(2) will be accompanied by a compliant draft of whatever was necessary to remedy the default in question. In this case, that would have been a compliant "appendix one" setting out the further particulars required by EJ Evans. That is not the case here. There is no draft compliant document produced.

6. My first concern dovetails with the second. That is that Dr Ijomah does not accept he is in default and as a result has no meaningful submission to make on some of the key aspects of the test before me. For example, he says the default was not serious or substantial because there was no default. Likewise, he does not advance a reason for default because he says there was no default. In that respect it would seem his recourse is to seek reconsideration of, and to appeal, EJ Moore's decision which, of course, is the route he does take.

7. So how is the application for relief to unfold before me? Those two concerns combine to create potential problems in the conduct of this application. Whilst there is no issue in principal of different judges dealing with the two applications, difficulties arise where the claimant's case is, as here, that the first decision was wrong. I am most definitely not sitting in an appellate capacity. This in turn means the claimant is in difficulty advancing a case against the applicable tests for relief from sanction without conceding non-compliance, whereas before EJ Moore, that is before he had decided to appeal her decision, he could have properly advanced an alternative submission notwithstanding that she was against him on the reconsideration.

8. It was accepted by all that I cannot and should not stray into areas which amount to an appeal against the decisions of EJ Moore. I am therefore bound by the fact that her decision, whether it was right or wrong, is that there was material default in compliance. That decision is now the subject of an appeal to the EAT. I understand it has been accepted but has not yet been subject to an initial sift. Notwithstanding this, the claimant maintains a relief from sanctions application.

9. Dr Ahmed has skilfully sought to plot a course with his submissions which revisits what the claimant did in response to the unless order in a way which seeks to engage rule 38(2) but which neither invites me to overturn a fellow first instance judge nor undermines his case on appeal. For the most part, I found those submissions looked and felt very much like an impermissible argument that Dr Ijomah did in fact comply and it was therefore in the interests of justice to grant relief because EJ Moore was wrong. At one point, I had understood that conflict to be reconciled when it seemed that what the claimant was arguing was that the default was minimal and, to put it in the words I used at the time, it was a case of inviting me to "look how close he got to substantial compliance" and that, together with the surrounding circumstances, granting relief and some further time to comply was in the interest of justice. Such an argument would have been proper application for relief and my understanding of this apparent concession of some non-compliance was reinforced by the terms of the written application and his submission that "a fully compliant set of further and better particulars was being worked on, but was not before the Tribunal today due in part to finances but could be provided within a matter of a week or so". At the end of the hearing I clarified with Dr Ahmed the effect such a position was likely to have on the submissions that might be made to the pending appeal and was told that my understanding was incorrect, that the claimant did not accept he was in default at all save, perhaps, in respect of his claim for accrued annual leave. Against that, I merely observe that the risk when attempting to ride two horses is the increased likelihood of falling from both.

The Claimant's Submission

10. The claimant relies on his written submission submitted on 18 December 2018 following EJ Moore's original decision that there had been non-compliance.

11. I was taken through the chronology of the claim in detail. Dr Ahmed relied on a number of matters in the background to the case. In summary they were:-

    a. That the claimant had until recently been acting in person and had a history of PTSD although was not advancing it as a reason for non-compliance.
    b. As a litigant in person he had struggled to deal with complex legal argument.
    c. That the claimant had submitted an exceptionally detailed Scott schedule in the compliance with the first case management order.
    d. That the claimant sought professional advice and did comply with the temporal requirement of the unless order.
    e. That in seeking to show non-compliance, the respondent had showed it was able to respond to most of the disclosures particularised.
    f. That there clearly was some compliance.
    g. That Dr Ijomah had substantially narrowed his claim, limiting it to matters arising after September 2011 and not going back to 2005.
    h. That he concedes the particulars do not identify the passages in documents that are said to contain protected disclosures as ordered, but he did attach the documents.
    i. That when the "appendix one" particulars are read together with his earlier Scott schedule, there was substantial compliance.
    j. That he complied with the requirement to particularise his breach of contract claim and where he didn't, that was because he required further disclosure from the respondent.

12. He submitted that in determining an application under rule 38(2), the Tribunal was bound by Denton v TH White Ltd [2014] EWCA Civ 906. Against that test, he submits that the breach was not serious or significant. He says Dr Ijomah was genuine in his attempt to comply as best he could and that he relied on his solicitors to do it. There was no intention not to comply. In oral submissions, it was said that he had complied; That the respondent would gain a windfall if the strike out was allowed to stand as all it needed to do was serve a request for further and better particulars which would have resulted in any minor deficiencies being clarified. He submitted the just order was to allow time for this to happen and for the claimant to be ordered to respond. He conceded if he failed at that final opportunity, consideration could then be given to strike out.

13. He submitted that in applying the test in Denton, as the default was neither serious nor significant, relief should be granted at stage 1 and it was not necessary to consider the other elements of Denton. In particular, I should not need to consider the reason for the default or even all the circumstances of the case.

14. As to the other stages of Denton, he could not advance any reason why the default occurred because he says it didn't. In respect of my consideration of "all the circumstances of the case", and in addition to his background submissions above, he relied on the fact that he made a timely application for relief and, as he put it, "the case is at the early stages of case management and no trial date has been fixed and disclosure has not yet been ordered". Consequently, the claimant submits a fair trial can still be had in relation to all his claims.

The Respondent's Submissions.

15. The respondent submits that the correct guidance on the application of rule 38(2) is that given in Thind v Salvesen Logistics Ltd [2009] UKEAT/0487 which required a broad assessment of the case and that what was material will vary from case to case but will generally include the reason for default and whether deliberate, the prejudice to the other party and whether a fair trial remains possible. The fact that an unless order was made was also an important consideration, albeit only one. The application and relevance of the civil procedure rules to the determination of relief from sanctions in the Employment Tribunal is informative only and not binding (Governing Body of St Albans Girls School v Neary [2009] EQCA Civ 1190). That there is a policy objective behind the making of unless orders which attaches importance to the general concern for the proper administration of justice within the Court and Tribunal system (Morgan Motor Company Ltd v Morgan [2015] UKEAT 0128.

16. The respondent accepts it is open to me to take a view on seriousness but that I am bound by EJ Moore's findings on non-compliance. It says the claimant's default was serious and the findings of EJ Moore demonstrate wholesale failings. The claimant has only ever advanced his allegations in opaque language and the basic ingredients of his whistleblowing complaint have never been detailed. The case is now approaching 18 months old and it is incredulous to suggest his continued default is minor. The respondent, and ET, are no further forward in understanding the breach of contract or public interest disclosure claims.

17. The Tribunal must have regard to all the relevant circumstances and in this case I am invited to refresh my memory of the extensive efforts invested in supporting the claimant. Although, a litigant in person he is an intelligent one who has had unprecedented support not only from the Tribunal which has invested significantly in explaining what was required but also the respondent's solicitors who have explained

in correspondence what it is that is needed and have been patient in applying for orders in the face of delay and non-compliance. The history of the claim shows the claimant to have been in breach of orders repeatedly. That his submission that it wasn't clear what he had to do was surprising and, bluntly, false as he had acknowledged to the Tribunal he understood what was required of him.

18. The Claimant's submission that he had substantially narrowed his claim limiting it to matters arising after September 2011 was inconsistent with his other plea that "read together with the original detailed Scott schedule, the full particulars were there." If it was necessary to read together with the original document that itself did not particularise his claims, then the totality did not particularise it either. Moreover, reading the two together did not limit the claim to matters post 2011 as the original schedule went back a further 5 years which left the respondent in the same uncertainty and was inconsistent with how his revised claim had been presented until today.

19. Suggesting all can be solved by the respondent serving a request for further and better particulars completely missed the point. It is for the claimant to set out his claim, further particulars have been sought and the claimant has repeatedly failed to provide them. An entire lever arch file is devoted to the claimant being assisted to provide his particulars. It is concerning to learn that the claimant has suggested that he could very quickly produce a compliant set of particulars. If that truly was the case, it would be before the Tribunal. It is not proportionate to embark on this once again and a line has to be drawn.

20. On the reason for default. The respondent submits that a solicitor can only act on instructions given. The claimant had responsibility to ensure the bare bones of his claim was set out and he ought not be able to blame his solicitors when he is not waiving privilege. These are not good reasons in any event but in this case the claimant does not accept there is default.

21. The balance of prejudice to the parties in granting or refusing the application falls in favour of the respondent and in not granting relief. The claimant still has a valid claim of unfair dismissal to be determined and he can challenge the respondent's stated reason within that hearing. The respondent is prejudiced in preparing a case. There were still 18 witnesses warned of their potential need to give evidence as it does not know who may or may not be needed and it offends justice for them to be kept in limbo for so long. There is a significant lapse in time of 2 years from dismissal and at least 7½ years from the first alleged disclosure and the quality of witness evidence is fading with time. The cost to the respondent is already huge in both money and resources expended yet it is no further forward than it was 18 months ago. The Tribunal system itself is a finite resource that needs allocating proportionately. A 3 week trial has already had to be vacated. The Tribunal must apply the overriding objective to both parties and to grant relief would render the claimant's past breaches unimportant. The overriding objective includes conducting litigation efficiently and proportionately.

<u>The Claimant's Reply</u>

22. Whether <u>Denton</u> applied or not, the cost and efficient conduct of litigation were not in the overriding objective of the Tribunal rules however dealing with matter in a manner proportionate to the complexity and importance of the issues were.

23. The claimant accepts the history of the claim so far and the help provided to support him in compliance and makes no submissions in that regard, they are matters of fact.

24. It falls within the interests of justice to grant relief. The claimant was not asking the Tribunal to set aside the decision of EJ Moore.

Discussion and Conclusions

25. Relief from sanctions is not a process for revisiting the making of original "unless order". That order was not challenged either with the Employment Tribunal or on appeal and it stands. Whilst there could be aspects of the terms of such an order that engaged the interests of justice test, that is not how this application is put.

26. Rule 38(2) provides a single test that it is in the interests of justice to grant relief. The interests of justice has a wide ambit and admits all and any matters that are relevant. It is a concept that applies to both parties and to all Tribunal users.

27. On the relevant law, I seek to apply rule 38(2) in accordance with the guidance in Thind and do so in preference to the claimant's submission that I am bound by Denton. That is not to say there isn't learning to be had on the approach taken by the civil courts to the same issues of principal, but Denton is specifically guidance on how to approach what was at the time a relatively newly recast version of CPR3.9 which itself was borne out of the new era of costs management in the civil courts and the elevation of the principal of proportionality. In most cases, one might think the application of Denton in the Employment Tribunal would result in too harsh an outcome for claimants compared to Thind and that it would be unusual for a claimant to seek to apply it. In this case, it seems the claimant advances the Denton test so as to apply the sequential stages it sets out in the hope he can avoid consideration of the factors at stages 2 and 3, if he succeeds at stage 1. That being said, the general principals within Denton are relevant for consideration under rule 38(2), it is only their sequential application and intermediate consequences which apply to the interpretation of CPR 3.9 which I conclude is not relevant to the application of the relevant Tribunal rule.

28. Both Counsel were of the view that in the circumstances of this case it makes no difference whether I consider the application as at the time of non-compliance or at today's hearing.

29. To the extent that it is necessary to categorise the default on a scale of seriousness or significance, I reject the Claimant's contention that it was not serious. His principal contention, in oral submissions at least, is that it was not serious because there was no breach. I am not to determine whether what I had wrongly understood to be his case, namely that he had very nearly complied, as to do so will amount to proceeding on an alternative factual basis. His case is that he did comply. I am bound by the existing conclusion of widespread and serious failure. It is fundamental to litigation that the claims are set out with sufficient particularity to be both defended and determined and there is no small margin given in this jurisdiction as to when that degree of sufficiency has been met, particular when parties appear in person. Repeated judges have found it has not. There have been 5½ days of Tribunal time devoted to assisting the claimant to explore the elements of his claim, 5 more than would normally be expected. The claimant's repeated and numerous delay's and breaches of existing timescales throughout the first 12 months of the claim has undoubtedly meant this matter is being conducted with wholly disproportionate consequences to cost and time. On that point, I am not persuaded that because the

overriding objective of the Tribunal's procedure does not explicitly refer to certain matters that are explicitly included in the equivalent objective for civil procedure does not mean those matters are not applicable. To be fair, Dr Ahmed did not maintain the point. Rule 2 simply requires that the Employment Tribunal deals with cases fairly and justly. The list of what that includes is clearly not exhaustive. For example dealing with cases at proportionate cost; allotting an appropriate share of the [court's] resources, while taking into account the need to allot resources to other cases; and enforcing compliance with rules, practice directions and orders are clearly matters capable of falling with the Tribunal's objective of dealing with cases fairly and justly. Indeed, the latter two are in line with the policy objectives identified in Morgan. Similarly, I do not accept it is right to say the instant default should be diminished in its seriousness simply because we are still yet to deal with basic standard directions and no trial is listed, when the reason why they are yet to be dealt with, nearly 2 years on, is only because of the claimant's failure to comply with previous orders of which this is the latest in the series.

30. It follows that if I were applying the sequential staged approach in Denton, I would not grant relief at stage 1 alone and would move on to engage with all the relevant circumstances, as I intend to do in line with Thind.

31. I turn to the reason for the default. The written application explicitly states that the claimant can advance no reasons as there has been no default. That is not a good reason and gives the Tribunal nothing to exercise any discretion in his favour. For what it adds I suspect what may lie behind the default, and the difficulty in actually identifying the constituent elements of the claims, is that the claimant starts from a genuine, but generalised, sense of injustice that he is trying to fit within one particular statutory claim or another and which do not necessarily fit the facts of the case. Victims of whistleblowing tend to instinctively know the disclosure they made and the consequences that followed. These are principally questions of fact and litigants are often better placed than lawyers to identify the disclosure. Whether it amounts to a disclosure in law may require a lawyer's eye, but identifying it in the first place should flow naturally from the claimant. Dr Ijomah instructed lawyers, who in turn acted on their instructions. The binary options of deliberate default or not are not always apt. There is no deliberate default in this case, but a failing in the continuation of the same inability to articulate the particulars ordered may be due to the possibility of it being an artificial fit.

32. I am satisfied that the respondent is prejudiced. I have no doubt the costs are now substantial; potentially disproportionate to the defence of such a claim and will not be recoverable if the general cost rules remain engaged. Dr Ijomah has only recently returned to work and he has referred to his limited means a number of times which would suggest no realistic prospect of interim costs orders remedying this particular injustice. I am satisfied that there is further prejudice caused to witnesses and the quality of evidence the respondent may be able to call. The purpose of this jurisdiction is swift determination of industrial disputes and this is becoming anything but swift. There is a prejudice in a large number of the respondent's employees being left in limbo. All that is likely to be detrimental to some degree to the quality of evidence that will be given as recollections fade.

33. Can a fair trial still happen? It may be true to say a trial could still happen as there is no date listed and the claimant could be afforded a further opportunity to comply with the order. That is not the same as a fair trial within the context of a just and fair process. I have no doubt that the latest default, on the back of the history of the claim, has had a further negative effect on the quality of evidence witnesses might

give. Beyond the prospect of fading memories and potentially relevant witnesses having moved on I am also satisfied that there is an unfairness on those witnesses in being left hanging, not knowing whether they may or may not they may be required to give evidence and that this has already gone on for longer than it should. Turning then to whether there can be confidence that allowing further time would resolve the default, I am not confident it would. Typically, an application for relief would include a draft of the compliant particulars and any doubt about future compliance would be resolved as the case could proceed without further cost or disruption. That has not happened and what is proposed is confused on a number of fronts. One is simply that there was in fact compliance. That will have to be resolved in another place. The other is that there could be compliance if only the Respondent was to serve further and better particulars. I agree with Miss Barney that that contention fundamentally misses the point of why we are where we are now. The other suggestion is that there is a compliant draft that can be prepared very quickly, and only hasn't due to funds. I also note the claimant concedes the steps taken to assist him so far and, on his own submission, if he failed one more time then it would be appropriate to order strike out. Of all the chances he has had to particularise his case, he and I are therefore only one chance apart on where strike out should properly fall.

34. I am not satisfied that permitting any more time will have any greater prospect of generating the necessary particulars than it did when extensions of time have repeatedly been granted over the past year. Against that analysis, it is not fair to put the respondent to further delay and cost, whether money time or resources. I am not satisfied it could be said that a fair trial was still possible. Moreover, there is a trial waiting to happen on the ordinary unfair dismissal claim and the continued delay risks becoming detrimental to the fairness of that trial.

35. I then turn to any other relevant factors. The fact that an unless order was made is an important consideration, albeit only one. I do not apply too much weight to that fact as to do so would risk the point becoming circular and self-serving in any relief hearing. Nevertheless, the authorities do recognise the importance of unless orders as a procedural case management tool and indicate that those who fail to comply should expect little sympathy.

36. The fact of an unless order being made is, however, another way of recognising the history of default that led to it being made. In this case the history does weigh heavily against relief. Within that, the weight of costs to the respondent and the effect on other Tribunal users looms large. True it is that the respondent is a large organisation and well resourced and the claimant has acted in person. Each of those respective starting positions are attenuated by the fact that the respondent's financial resources are not limitless, and the money being spent is being diverted from other uses. Similarly, the claimant's position as a litigant in person with limited experience of litigation has been extensively supported by the Tribunal. The amount of judicial time invested in the claimant's case has undoubtedly had an effect on other users' access to the Tribunal. That would be the case at any time, but it so happens the additional hearings in Dr Ijomah's case have coincided with a period of high case load and limited judicial resource. I found the application for an unless order to be a compelling one in order to make some meaningful progress on a case which had already consumed a great deal of time to the detriment of the Respondent and other Tribunal users. Nothing is before me to persuade me that is not still the case.

37. Looking at all the circumstances of the case, I have concluded it is not in the interest of justice to grant the application for relief from sanctions.

_____

Employment Judge Clark

Date: 31 May 2019

Sent to the parties on:

For the Tribunal:

……