



EMPLOYMENT TRIBUNALS

Claimant: Miss R Grzondziela

Respondents: 1. St Barnabus and St Paul's School
2. Mrs Carla Martini

Heard at: Manchester

On: 30 May 2019

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: Written representations

Respondents: Written representations

JUDGMENT

Rule 38

The judgment of the Tribunal is that the claimant's application under Rule 38(2) to have the striking out of her claim for non compliance with an unless order varied or set aside fails.

REASONS

1. The claimant applies for the striking out of her claim when she did not comply with an Unless Order to be set aside and her claim reinstated.

Preamble

2. The claimant and the respondent agreed the matter could be dealt with in chambers, although following making my decision in this case I was advised by Tribunal staff that the claimant had in fact attended and brought with her a letter dated 28 May asking for a Polish interpreter for today's hearing. She was advised that the hearing was in chambers. She also included a sick note covering the period 23 May 2019 to 23 June 2019 saying that she had a "chronic *****/stress ongoing Tribunal".

Findings of Fact

My findings of fact are as follows:

3. The claimant's case has a convoluted history which it is not necessary to go into in full for the purposes of this Judgment.
4. The claimant brings race discrimination claims, her unfair dismissal claim having been struck out because she did not have the requisite service.
5. Following a preliminary hearing to determine numerous jurisdictional points I gave further directions for the preparation of the case for hearing. I set out in these directions my understanding of the claimant's claims and asked her to agree whether those were her claims by 10 July 2017; to provide further particulars including dates regarding comments made, identify who was responsible for the actions complained of, and indicate when she raised these as complaints. The claimant was advised she must set out and apply to amend if any of the claims she believed she had were not included in that list.
6. The claimant was ordered to serve a Schedule of Loss by 24 July 2017. Orders were made requiring the parties to exchange lists of documents on which they intended to rely by 31 July and provide any requested copies of those documents by 14 August 2017. The respondent was to be responsible for the bundle and to have completed the bundle and served it on the claimant by 11 September 2017.
7. Witness statements were to be sent to the other party by 4.00pm on 9 October 2017, and more details were given regarding the content and layout of the witness statements. The matter was listed for four days on 13-16 November 2017.
8. On 18 July 2017 the respondents wrote to the Tribunal and stated that the claimant had failed to confirm whether the claims set out in the previous Order were correct, had failed to provide any dates or personnel and had failed to indicate whether or not there were further claims not listed for which she applied to amend. The respondents therefore said they were unable to respond to the claim by way of an amended response without that further information, and they requested an Unless Order.
9. On 18 July 2017 the claimant wrote to the Tribunal a letter regarding the exclusion of her son from the school, even though I had advised her that issues regarding her son would generally not be within the jurisdiction of the Tribunal.
10. On 17 July 2017 the claimant provided a complaint regarding a social worker and she provided various other documents in relation to that dispute., again not within the tribunal's jurisdiction.
11. On 21 July 2017 the Tribunal wrote to the claimant to remind her of the orders issued on 28 June 2017 (this was a typing error for the 19 June) following the hearing on 14 June 2017 and which referred to a childcare issue in relation to her son which had not been resolved (the claimant had advised she would have to leave the tribunal in time to pick up her son and the school had offered to provide free after school care but then this was withdrawn).

12. The claimant failed to comply with the orders. An Unless Order was then issued on 26 July 2017 ordering the claimant to comply by 7 August 2017 with Case Management Orders 48 and 50 made on 19 July 2017. These orders concerned further particulars of her claim and any amendment request.

13. On 21 August 2017 the respondents had confirmed it was their view that the claimant had not complied with the Order. The claimant had provided copious documentation regarding her son's situation, however nothing of relevance to constitute compliance with the relevant orders. Accordingly, on 23 August 2017 a letter was sent to the claimant stating that her claim was struck out, advising her she could apply for relief from sanction and asking her to include in such an application the information originally required by orders 48 and 50, and the reasons why she had been unable to comply with the Unless Order by 7 August 2017.

14. On 14 September 2017 the claimant wrote in stating she wanted the Tribunal to reconsider their decision. She said she had sent relevant information on 7 August 2017 by post to the Tribunal and the respondents' representative.

15. A hearing was then held on 10 November 2017, the outcome of which was that the claimant's claims were reinstated. She based her case on the fact that she understood 7 August 2017 was the date she had to comply with the matter and that by sending the information on 7 August this was compliance, that she had considerable language difficulties, no legal representation and that she was absent in Poland for medical reasons in the crucial period. It was also observed she was only one day late.

16. Further orders were then promulgated on 23 November 2017 referring back to the seven issues set out in paragraph 47 of the 19 June Case Management Orders, and in the new Order at paragraph 27 she was advised that by 14 December 2017 she had to state:

- (1) Who was responsible for the matters complained of?
- (2) When they occurred;
- (3) Whether there were any witnesses; and
- (4) What were the precise words spoken or any other relevant details?

17. At paragraph 28, in respect of the new claims which would require amendment the claimant within 21 days, i.e. by 14 December 2017, was ordered to state whether she agreed that the following were additional claims that she had raised, and then three additional claims were set out.

18. At paragraph 29, the claimant also by 14 December 2017 to state in relation to her claims "listed above":

- (1) When the matters occurred;

- (2) Whether she was arguing direct race discrimination and/or victimisation in respect of each one; and
- (3) If victimisation, what was the protected act?

19. The claimant then wrote in around 13 December 2017 to state that she was too ill to attend a consecutive five day hearing. She sent in a sick note and a doctor's letter describing her illness and stating that she struggled to go out and found it difficult to face people.

20. On 26 January 2018 I replied making new Case Management Orders. I stated that I proposed to list the matter for two sets of three days in consecutive weeks sitting 10.00am-12.00noon and then 12.30pm-2.30pm.

21. The further Case Management Orders were:

- (1) The respondent to send to the claimant by 5 March 2018 a list of all documents relevant to the issues in the case.
- (2) By 19 March 2018 the claimant to send to the respondent all additional documents she wishes to be included in the bundle, the respondent to prepare the bundle and send a copy to the claimant by 9 April,
- (3) the claimant's witness statement and any additional witnesses to be served on the respondent by 4.00pm on 14 May 2018, the respondent to serve their witness statements on the claimant by 11 June 2018.

New dates would be found for the hearing.

22. By a letter of 30 May 2018 the respondent asked for amendments to the timetable and confirmed that they had sent a list of documents and a bundle of their documents to the claimant which she had signed for on 26 April. They advised that the claimant had failed to provide her documents. The claimant had said she wanted to bring her documents to the hearing and not provide them in advance.

23. They suggested new orders and on 26 June I ordered the claimant to exchange her documents by 8 July and stated that she could not produce them on the day of the hearing and advised that an Unless Order may be issued if she failed to comply with the order. On 17 June the respondent applied for the claim to be struck out as the claimant had not served her documents and not complied with other Case Management Orders.

24. On 23 July 2018 the claimant wrote to the Tribunal stating the respondent had not sent her their documents.

25. By a letter of 7 August 2018 the respondent stated that the claimant had received all of the respondent's documents sent in two ring-binders in a clear and sensible order, sent by recorded delivery with proof of receipt from the claimant on 26 April 2018. The claimant had not provided the respondent with her documents and they were concerned that the claimant intended to attend to Tribunal hearing bringing documents along with her without prior disclosure as she had indicated this was her intention

26. They were also concerned that the claimant did not intend to properly conduct the hearing or attend at all, as she had stated in correspondence,

“I do not agree to interrogate the respondents for several days in court, it is unnecessary.”

27. The claimant was also intimating that she may be too unwell to attend the hearing and the respondent request that medical evidence be provided to clarify whether the claimant was in a fit state to attend the Tribunal.

28. The respondent applied for a further Unless Order or that she be struck out as of their application of 17 July for non compliance with the 26 January orders regarding providing her documents.

29. In respect of her illness, the claimant was asked whether she was too sick to attend and to obtain medical evidence stating:

- (1) Whether she was unable to attend the hearing and if not, why not;
- (2) Confirming that her GP or consultant had reached this view after hearing the adjustment to the times and dates of the hearing brought to his/her attention; and
- (3) When she would be fit to attend a hearing or if in fact it is unlikely she will be in the foreseeable future.

30. The claimant had written to the Tribunal on 7 August also stating:

“I am unable to send all documents before this date because I do not have them in hand.”

She asked, as she had done before and been advised this was inappropriate, for the Tribunal to obtain police reports regarding the discrimination, persecution and harassment of herself and her family. The claimant copied with that letter numerous documents comprising party to party correspondence, Tribunal correspondence and medical information.

31. An Unless Order was then issued on 19 September 2018 requiring the claimant to provide all her relevant documents to the respondent by 4.00pm on 4 October 2018.

32. On 3 October 2018 the claimant emailed to say she would be sending her documents by post on 4 October 2018 as a postscript, although in the same letter she said she was bringing the documents to the hearing. By a letter dated 4 October 2018 the claimant advised that because of the weight of the documents she could not afford to send them.

33. The claimant did not comply with the unless Order, and on 24 October 2018 the Tribunal confirmed that her claim was struck out. The letter said:

“Employment Judge Feeney directs that the claimant has requested that she be allowed to submit documents on the day. Whilst this is unacceptable in

itself it also demonstrates that there are documents on which the claimant wishes to rely but has continually failed to disclose.”

34. The claimant repeated this request i.e. to bring her documents on the day, by a letter of 6 November 2018. It was treated as a request under rule 38(2) for the striking out to be varied or set aside. She also stated that the respondent had not sent her their various letters and applications.

35. The respondent by a letter of 19 November 2018 replied that as far as they could see the claimant was relying on:

- (1) Extenuating circumstances for why she had not complied with the Order, namely her health; and
- (2) That the respondents' representative had not provided her with copies of their application.

36. They set out a chronology:

- On 28 June the Tribunal ordered the claimant to disclose to the respondent all the documents she wished to rely on by 8 July 2018. A strike out application or an Unless Order application was made on 17 July 2018 by the respondent. She was copied into that using the email address which she had corresponded throughout with the respondent and the Tribunal. She provided her comments on 23 July and the Tribunal asked the respondents for their comments.
- On 7 August the respondents clarified their position, that she had still not provided the documents, and requested an Unless Order. Again the claimant was copied into this.
- A further application was made on 6 September that the claim be struck or an Unless Order served on the basis that the claimant's disclosure had still not been received. Again, the claimant was copied into these applications.
- An Unless Order was issued on 19 September: documents were to be served by 4 October.
- On 3 October the claimant provided some documents, namely medical evidence, however there was no substantial disclosure.
- On 8 October the respondents applied for the claim to be struck out for non compliance with the Unless Order and that was granted.

37. The respondents stated that whilst it was unfortunate the claimant was in poor health the chronology highlighted that:

“The issue of her refusal to provide disclosure has been ongoing for a number of months. The claimant has had more than ample time to seek advice or assistance to provide disclosure she has been ordered to provide. In any regard it appears the claimant still has no intention to provide the disclosure

as within her application of 6 November she states, 'I am asking the court to allow me to bring my documents to court'."

38. The respondents pointed out that the email address had been the same throughout and the claimant had used that email address to email the respondents. It was obvious from the claimant's own correspondence that she had received correspondence from the respondents and the Tribunal.

39. On 3 December 2018 I asked the parties whether they would agree to the matter proceeding by way of written representations. The claimant said:

"I would like to personally attend court hearings but I know that is impossible at this time because of finances and health."

The claimant provided representations by a letter of 16 December 2018.

40. On 17 December 2018 the respondents agreed for the matter to be decided in chambers.

41. On 18 January 2019 I wrote again to the parties saying the following:

"The Judge has considered the claimant's letter of 16 December 2018 and notes that the claimant agrees to the matter being dealt with by way of written representations. Some representations are already included in the claimant's letter but if she wishes to make such representations and if the respondent wishes to make representations the Judge makes the following orders:

- (1) The claimant to provide any representations by 25 January 2019 to the respondent and to the Tribunal.
- (2) The respondent to provide any written representations by 8 February 2019 to the claimant and the Tribunal.
- (3) The claimant's comments and the respondent's representations, should they wish to make them, to be served on the respondent and the Tribunal by 15 February 2019. The Judge will make her decision on relief from sanction after 15 February."

42. Unfortunately, the Employment Judge was then absent from the Tribunal until the beginning of May, of which the parties were advised on 7 March 2019.

43. On 4 April 2019 the claimant sent correspondence to the tribunal which concerned matters at Burnley County Court unconnected with the tribunal proceedings. This was acknowledged and ultimately the parties were informed that the matter was listed for an "in Chambers" decision on 30 May 2019 and the parties were advised not to attend.

44. Correspondence from the claimant was received on 13 May 2019 which again was directed to Burnley County Court but copied to the Tribunal, regarding other proceedings against the claimant which it is not necessarily appropriate to detail save that it did exemplify that the claimant was in a difficult situation. We acknowledged that correspondence on 21 May 2019.

45. A further email was sent on 28 May 2019 to the claimant and the respondent advising that the parties were not required to attend and therefore an interpreter was not required. As mentioned above, the claimant did attend the Tribunal today. I was unaware of this until after I had made my decision, and she was advised that the matter to be decided in chambers.

The Law

46. Rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 states that:

- “(1) 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 should give notice to the parties confirming what has occurred.
- (2) 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 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. Where a response is dismissed under this rule the effect shall be as if no response has been presented as set out in rule 21.”

47. Where there is non compliance with an Unless Order in any material respect the Tribunal has no discretion as to whether or not the claim or response should be struck out. It is automatically struck out as the date of non compliance and there is no requirement for a further order to be addressed to a party against whom the Unless Order was made (**Markham Shipping (London) Ltd v Kefalas & Another [2007] Court of Appeal**), although in many circumstances as a matter of courtesy and to assist an unrepresented claimant or respondent the Tribunal will advise them of the situation and also intimate what actions they can take in response to it.

48. Compliance need not be precise and exact (**Markham Shipping** above) and in **Johnson v Oldham Metropolitan Borough Council EAT [2013]** Mr Justice Langstaff held that the test of “substantial compliance” adopted by the Employment Judge was in accordance with the law but stated that “material” is a better word than “substantial” because it draws attention to the purpose for which compliance with the order is sought.

49. Before the date for compliance with the Unless Order expires the Order can be revisited under rule 29 and varied, suspended or set aside if necessary in the interests of justice.

50. However, once dismissal for non compliance has taken effect the relevant party has the right to apply to the Tribunal in writing within 14 days of the date the notice of dismissal was sent to the parties to have the Order set aside on the basis that it is in the interests of justice to do so (rule 38(2)). Factors to be considered include the reason for the default, the seriousness of the default, the prejudice to the

other party and whether a fair trial remains possible. This matter can be determined on the basis of written representations only unless a party requests a hearing.

Conclusion

51. Having considered the parties' representations in this matter it appears that the claimant provides reasons for not complying with the requests to serve her documents on the respondent. Initially she "did not have them to hand", and secondly because they weighed so much that the cost would be prohibitive giving her limited means. I have no doubt the claimant has limited means. However I find her reference to not having the documents to hand evidences a disregard for the tribunal's procedures and exemplifies an unwillingness to comply to ensure the proper preparation of the case for hearing.

52. Regarding the postage issue in a case of this nature it is inconceivable that the relevant documents would weigh anything like one kilogram. One suspects that the claimant will submit documents relating to her son's situation, his expulsion from school, her housing situation, her benefits situation and her ill health. These are not all matters that are relevant. Certainly the claimant's ill health has from time to time been relevant to her failure to comply with orders, however she brings a claim of race discrimination not disability discrimination however the medical records may have some relevance. However it is not clear why, on any understanding of her claims, the claimant would need to disclose so many documents.

53. In any event she has sent all these documents to the respondent and the tribunal and the fact the claimant still wishes to attend on the day with documents suggests there are other relevant documents to be disclosed.

54. Neither has the claimant proposed any other way of conveying the documents other than posting them. However I have also observed that the claimant has managed to send a considerable number of documents to the Tribunal and the respondent over the course of these proceedings and therefore she could send them in more manageable amounts but has not proposed doing so but continued to request she brings her documents on the day of the hearing. The claimant has clearly a preference to bring them along to a hearing, which it has been pointed out to her more than once is unacceptable. It would be entirely prejudicial to the respondent for the case to continue on the basis that the claimant would arrive at the hearing with her documents.

55. In addition, while the claimant has said she was ill she has been in a position to write copious letters to the Tribunal and the Burnley County Court and copy the same letters to the Tribunal throughout these proceedings. She has managed to attend four hearings already: on 6 April 2016, 27 October 2016, 6 March 2017 and 14 June 2017. On this evidence her illness has not prevented her from complying with the order, indeed she was given considerable time to comply in any event.

56. I have considered whether the claimant simply has no relevant documents but this seems unlikely on the balance of probabilities in a discrimination claim. I have also considered whether she is incapable of distinguishing what are relevant documents, and whether in the light of that the order should be varied. Therefore I have considered whether I should vary the order to require the claimant to bring

copies of her documents to the Tribunal as she has demonstrated an ability to attend the Tribunal. The Tribunal will then send those documents to the respondent. However it is likely those documents will include a large number of irrelevant documents and in that case a disproportionate amount of time and cost simply adding the claimant's irrelevant documents to the bundle would result. It is outwith the overriding objective to require the respondent to copy copious amounts of irrelevant documents. Further it is outwith the overriding objective to list the matter for a further preliminary hearing where the documents could be considered one by one. There have been several preliminary hearings in the case and the claimant has continually been advised about case management throughout but continues to raise irrelevant matters.

57. I further considered ordering the claimant to simply provide her own bundle and copies thereof but if she states that she cannot afford to send the documents she has she will not be in a position to produce and send a bundle to the respondent and certainly not to provide 5 copies to the Tribunal.

58. Further it is clearly the claimant's preferred option to bring her documents on the day, whilst it may not be the claimant's intention to frustrate the hearing that would be the effect as the hearing would undoubtedly have to be adjourned and relisted to give the respondent time to prepare and take instructions. Of course the witness statements may then be redundant or may require amending or new witnesses may be required. There cannot be a fair hearing in these circumstances.

59. In addition, due to the claimant's ill health the hearing had actually been truncated into two sessions per day comprising four hours in total, (although I note the claimant has declined this offer and wishes to attend one day per week on the limited hours originally proposed), which is a considerably shorter day than is normal for the Tribunal, and it would be highly unlikely to conclude unless all the preparations for hearing were done properly and in a timely fashion, which obviously would not be the case if the claimant's documents were not disclosed until the hearing date.

60. I have also taken into account the fact that there has been an ongoing failure to comply with orders in this case, the claimant has already been struck out on the basis of an Unless Order once and in that case her claims were reinstated.

61. Accordingly, as there is evidence that the claimant is unable without good cause and unwilling to comply with the tribunal's orders given the claimant's failure to comply with the original orders, her previous failure to comply with an Unless Order, and her continual refusal to provide the respondents with the documents, the fact that she has been able to send many documents to the tribunal and the respondent yet now cannot and the claimant's repeated request to bring documents to the Tribunal; the fact this causes the respondent severe prejudice in preparing for the case, in costs and in there being any certainty that any listed hearing will go ahead, the claimant's application to have the judgment to strike out the claim varied or set aside is refused.

Employment Judge Feeney

Date: 3 June 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

5 June 2019

FOR THE TRIBUNAL OFFICE

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