



EMPLOYMENT TRIBUNALS

Claimant: Mr. I Bates

Respondent: David Wilson Trailers Ltd t/a DWT Exhibitions

Heard at: Nottingham

On: 26th September 2019

Before: Employment Judge Heap (Sitting Alone)

Representatives

Claimant: No attendance and no representations

Respondent: Mr. D Bunting - Counsel

JUDGMENT AT A PRELIMINARY HEARING

1. The Unless Order made on 18th July 2019 is not set aside under Rule 38(2) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.
2. The Claimant did not comply with the terms of the Unless Order by 1st August 2019 and so the claim in its entirety stood as dismissed as at 2nd August 2019. This Judgment stands as written notice of the dismissal under Rule 38(1) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.
3. The hearing listed for 20th and 21st November 2019 is cancelled.

REASONS

BACKGROUND & THE ISSUES

1. This hearing was listed by Employment Judge Batten following a Preliminary hearing before her on 1st August 2019. The purpose of the hearing was to determine whether the Claimant had complied, or had been able to comply, with the terms of an Unless Order that I made on 18th July 2019.

2. Although not expressly said to be the case, in essence it was to consider whether the Unless Order ought to be set aside under Rule 38(2) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations").
3. The Claimant had not made an application under Rule 38(2) of the Regulations but had telephoned the Tribunal after receipt of the Unless Order to express in strident terms his displeasure with the same. He indicated during that telephone call that he was unable to comply with the Order because the Respondent had not complied with earlier Orders made by Employment Judge Britton which meant that he could not do what was required of him.
4. It was against that background that the matter came before Employment Judge Batton. She expressed some concern that the Claimant may not have received from the Respondent the documentation and information that Employment Judge Britton had Ordered them to provide and that that may be the reason for non-compliance. That is a brief summary of her observations which are set out in full at paragraph 5 of Annex A of her Orders which were sent to the parties on 2nd August 2019. I observe that Employment Judge Batten was not able to explore with the Claimant the issue of compliance because he did not attend that Preliminary hearing.
5. The Orders of Employment Judge Batten set out the date, time and place of the hearing before me today and that the purpose would be to determine whether the Claimant had complied or had been able to comply with the terms of my Unless Order. Those were sent to both parties by email on 2nd August 2019. It is clear from the Tribunal file that they were sent to the correct email account for the Claimant which was set out on his Claim Form and which he has used to correspond with the Tribunal. I observe that the Claimant's Claim Form identified at section 1.8 that his preferred method of communication from the Tribunal was expressed to be email.
6. The Claimant did not attend the hearing today. He had made no contact with the Tribunal to say that he would not be attending or that he was running late. As far as Mr. Bunting is aware from his instructions, his Instructing Solicitors have not heard from the Claimant at all since a time before the Preliminary hearing before Employment Judge Batten.
7. The hearing today had been due to commence at 10.00 a.m. At 10.05 a.m. I asked a clerk of the Tribunal to telephone the Claimant on the mobile telephone number that he had provided to ascertain his whereabouts and if he did intend to attend the hearing. The Claimant's mobile telephone went straight to voicemail. I allowed some further time before commencing the hearing in the event that the Claimant was running late but by 10.15 a.m. he had neither arrived nor made contact with the Tribunal. Indeed, by 10.30 a.m. when the hearing concluded the Claimant had still not arrived or made any contact with the Tribunal.
8. I considered whether to postpone the hearing or to continue in the Claimant's absence. I determined that it was appropriate in the circumstances to continue. In this regard I have in mind that this is not the first time that the Claimant has failed to attend a Preliminary hearing. He did not dial in for the hearing before Employment Judge Batten on 1st August 2019 either. The Claimant had been emailed the Notice of hearing on 30th July 2019 and again that was to the correct email address and having regard to the Claimant's preferred method of communication. It is conceivable if he does not check his email regularly that he

might not have seen the Notice of hearing for the 1st August Preliminary hearing but he made no contact with the Tribunal after receipt of the Orders to suggest that that had been the case.

9. However, even if the Claimant does not regularly check his email and that had resulted in his non-attendance before Employment Judge Batton, the notice of this hearing was sent to him as long ago as 2nd August 2019 and it seems inconceivable that he would not have checked it before now to know about this hearing today. Again, I have checked the file and it was sent to the Claimant's correct email address.
10. Given the history of this matter and the fact that I am satisfied that the Claimant was notified well in advance of the hearing today of the date, time and location I can only conclude that he has made the conscious decision not to attend. Therefore, it would be fruitless to postpone the hearing to another date when it appears likely that the exact same situation would occur. That would not be in accordance with the overriding objective.
11. I have therefore gone on to consider the matter in the Claimant's absence. The only explanation that I have from the Claimant about non-compliance is set out in the telephone note made by the experienced clerk who spoke with him on 26th July 2019. That note was to the effect that the Claimant had told the clerk that he was very angry to receive the Unless Order because the Respondent had not sent him the timesheets which had been Ordered to be sent by Employment Judge Britton and so he was not able to comply with the Unless Order. The issue of the timesheets was in fact only one part of the Unless Order and the Claimant did not provide either at that time or at any other any explanation as to why he could not comply with the remainder of it¹.
12. I have seen for myself from electronic documentation provided by Mr. Bunting that four emails were sent to the Claimant by the Respondent's solicitors on 21st June 2019 – that being the date for compliance set by paragraph 2.1 of Employment Judge Britton's Orders – attaching the required timesheets. I have checked the email address that they were sent to and that accords precisely with both the email address set out in the Claim Form and the email address which the Claimant has used to correspond with the Tribunal. It is not therefore accurate to say that the Respondent had not complied with the Orders of Employment Judge Britton so that the Claimant could not in turn comply with paragraph 2.2. I accept the Respondent's position that he has not complied and indeed the Claimant has not suggested at any point to the contrary.
13. That takes us therefore to the question of whether the Claimant was able to comply with the Unless Order. As indicated above, Employment Judge Batten explored the possibility that some glitch had occurred given the volume of emails sent which might have seen the Claimant not having received them or otherwise him being unable to access or open them (see again paragraph 5 to Annex A of the Orders sent to the parties on 2nd August 2019). If that was the case, then today was the Claimant's opportunity to say so but he has not attended and as I have observed it seems to me that he has made a conscious decision not to do so. In the absence of his attendance and explanation here, I cannot therefore assume that the reason for the Claimant's non-compliance (and I have found that there was

¹ I acknowledge, however, as identified by Employment Judge Batten that the Claimant could not have complied with the part of the Unless Order which referred to paragraph 3.2 of the earlier Orders made by Employment Judge Britton as that should have referred to paragraph 3.1 with 3.2 being a step to be taken by the Respondent.

non-compliance) was either for the reasons suggested by Employment Judge Batten or for some other unidentified reason.

14. It simply appears to me that this has all the hallmarks of a claim that is not and has not been actively pursued by the Claimant. I remind myself in this regard that there was a prior history of non-compliance with Orders which led in part to the making of the Unless Order in the first place. There is similarly the failure of the Claimant to attend both this Preliminary hearing and that before Employment Judge Batten.
15. It follows that it is difficult to discern without hearing from the Claimant what, if anything, prevented him from complying with the terms of the Unless Order and it is equally difficult to conclude anything other than this was part of a general pattern of inaction in dealing with the claim.

CONCLUSIONS

16. The question under Rule 38(2) of the Regulations is whether it is in the interests of justice to set the Unless Order aside. In considering that question I am required to take into account the reasons for default; the seriousness of the default, the prejudice to the other party and whether a fair trial remains possible (see **Thind v Salvesen Logistics Ltd EAT 0487/09**). I deal with each of those questions in turn.
17. Firstly, I deal with the reasons for default. I can deal with that in short order given that the Claimant has provided no explanation other than the suggestion that the Respondent had not complied with the relevant part of one of the Orders of Employment Judge Britton and I have found that not to be the case. Equally, that does not explain the reason for his failure to comply with the remainder of it. There is therefore no good reason on the basis of the information before me for non-compliance.
18. Turning then to the seriousness of the default, the Claimant has not complied or attempted to comply with any part of the Unless Order. Whilst I accept that he could not comply with paragraph 3.2 of the original Orders because that was a step for the Respondent to take, he has not complied with any other part of it and it is something of a wholesale failure to comply.
19. I also take into account the prejudice to the Respondent and the question of whether a fair trial remains possible which to some extent go hand in hand. There is clear prejudice to the Respondent if the Unless Order is set aside as it will need to continue to expend time and monies defending a claim which I am far from convinced that the Claimant actually seeks to prosecute. It appears entirely possible that there will be further default, further applications for Unless Orders and a continuation of the existing cycle that will serve nothing other than to incur additional and unnecessary time and costs. That is not in accordance with the overriding objective. That in turn leads into the question of whether a fair hearing remains possible. I am far from convinced that it does on the basis that, again, I am equally far from convinced that there is now any real active pursuit of this case by the Claimant.

20. For all of those reasons, it is not in the interests of justice to set aside the Unless Order made on 18th July 2019 and the Claimant's non-compliance with that Order rendered the claim dismissed with effect from 2nd August 2019.

Employment Judge Heap

Date: 26th September 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE