EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106915/2017 Review Hearing at Edinburgh on 26 June 2019

Employment Judge: M A Macleod

Kathleen Dykes	Claimant Represented by Mr S Healey Solicitor
Whitbread Group PLC	Respondent Represented by Mr P Bownes Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's application to revoke the dismissal of the claimant's claim with effect from 11 January 2019 is refused.

REASONS

1. Following a Judgment issued by the Employment Tribunal on 24 January 2019, in which the claimant's claim was dismissed with effect from 11 January 2019 in terms of Rule 38(1) of the Employment Tribunal Rules of

Procedure 2013, an application was made on behalf of the claimant for "reconsideration" of that Judgment, by email dated 7 February 2019.

2. That application was opposed by the respondent.

3. A hearing was fixed to take place on 26 June 2019 in order to determine this application. Mr Healey, solicitor, appeared for the claimant, and Mr Bownes, solicitor, appeared for the respondent.

4. A joint bundle of productions was placed before the Tribunal for its assistance in this hearing.

5. Before recording the submissions made by each party at the hearing, it is appropriate to set out the basis for the application made.

Application and Objection

6. The application, by the claimant's then newly-instructed agents, is produced at 42/3 of the bundle of productions.

7. It was accepted that there had been significant delays in the progression of the case, but they submitted that there were exceptional circumstances relating to the case, in relation to the claimant's mental health.

8. It was submitted that the claimant suffers from Bipolar Affective Disorder, which causes her to have a chaotic lifestyle. She experiences psychotic episodes giving rise to extreme anxiety, and she experiences an altered reality at such times, seeing and hearing things which are not there. Stress triggers a deterioration in her condition. The agents also observed that the claimant's intermittent contact with them and her difficulty in complying timeously with requests for action to be taken by her seemed to accord with the evidence of her chaotic lifestyle.

9. It was submitted that the Tribunal had power, under the reconsideration provisions within the Rules of Procedure, to revoke its judgment, and it was therefore invited to do so. The test is that it is in the interests of justice, in line with Rule 2 (the overriding objective). The Tribunal is entitled to take into account the claimant's mental illness.

10. The claimant's agents stated that the delays which have occurred in this case related to the claimant's challenging circumstances, both in relation to her poor mental health and with regard to her family concerns.

11. Applying the test within Rule 70, it was submitted that the balance of prejudice fell very heavily upon the claimant, whose case was now at an end, whereas the respondent would face no prejudice other than having to defend a claim which they were already expecting and preparing to defend; the strike out arises through delays resultant from the claimant's poor mental health. The claimant's case at its highest is a stateable case of unfair dismissal. Immediately upon becoming aware of the error, steps were taken to rectify it. To deal with the matter justly requires the claimant to be given the opportunity to ventilate her claim, which can only be done if the reconsideration is granted.

12. By email dated 20 February 2019, Mr Bownes, solicitor for the respondent, opposed the application (48/9).

13. Firstly, it was submitted that the application was not one for review of the Judgment under Rule 38, as it should have been, and such an application would now be out of time.

14. Secondly, the claimant's representatives suggested that the medical records were not previously provided due to concerns regarding the claimant's right to a private life. The respondent suggested that this was a wholly unacceptable explanation and entirely ignored the fact that the claimant had been ordered to disclose such records. As a result, it confirmed that the disclosure orders had been wilfully ignored.

15. Thirdly, Mr Bownes observed that having reviewed the records themselves, it was apparent that the request for production of the records was only made by the claimant to the hospital on 18 January 2019, after the date for compliance; that in any event the assessments of the claimant in November and December 2018 and January 2019 showed no symptoms on her part; and that the claimant was able to discuss her Tribunal claim with her

medical team in November and December 2018 but took no steps to comply with the Tribunal order.

16. The respondent's position was that there is no evidence of any medical impediment to compliance by virtue of the claimant's health, and that she repeatedly raised her Tribunal claim with her treating clinicians without making any effort at the same time to comply with the Order. Simply leaving things too late is no excuse, let alone a good excuse.

17. Mr Bownes referred the Tribunal to the case of **Morgan Motor Company Limited v Charles Morgan UKEAT/0128/15**, and directed my attention to paragraph 41 of that Judgment in particular.

18. He invited the Tribunal to refuse the application and to sustain the Judgment following non-compliance with the Unless Order.

The Claimant's Evidence

19. The claimant gave evidence on her own account. She explained that the reason why she had been unable to comply with the Order was that she was under great pressure at home caring for a premature baby, her priority being to keep the baby well and to stay well herself. Her baby was born on 28 June 2018. The claimant herself suffers from Bipolar Disorder type 1.

20. She said that her life at the time when the order was issued was "painful", having taken a long time to recover from the caesarean section operation carried out as an emergency, and that having moved in with her mother, she was getting through each day as it came. She was under the care of health visitors, community midwives, her GP, Community Psychiatric Nurses and Social Work. At the time the Unless Order was issued, she had moved back to her own Council flat, and was having difficulties in dispute with the Council to make the property suitable for the baby.

21. She described herself as "physically, mentally, emotionally unable to take on more stress at this time". She had to prioritise.

22. Under cross-examination, the claimant asserted that she had done as much as she could in the circumstances to comply with the order, but that she knew that the rules on confidentiality had been changed recently and that the doctors did not themselves fully understand the impact of those rules on them.

Submissions

23. For the claimant, Mr Healey adopted the written submissions made in the application by the claimant.

24. He pointed out that the Order (24) required the claimant to disclose all documents "within her possession". The documents she did not provide in response were not within her possession. A letter was written to the Tribunal on 10 January providing information, and in his submission that complied with the strict terms of the Order, in that only those documents then within the claimant's possession required to be provided, and they were. This, he submitted, should be persuasive. If the respondent is able to rely upon a strict reading of the authorities, the claimant should be allowed to rely upon a strict reading of the Order itself.

25. The test, he said, was whether it is in the interests of justice to allow the application. The claimant was in a bad place at the relevant time. He understood that the Unless Order was to give her a final chance, but she had been in a bad place for a long time. She was unable to take more stress, and therefore had to prioritise. He did not think too much should be made of that – it was not that she did not care about the order. She attended at this hearing notwithstanding another important matter to which she had to attend later that day.

26. He then submitted that if the Tribunal did not accept his primary submission, the Order has now been complied with. Now that she had solicitors acting for her, the "train can be put back on the tracks".

27. The reason for the delay between November 2018 and January 2019 was in order to allow Mr Healey to be allowed to represent the claimant, via the

ABWAR system. Funding was only in place from 4 January 2019, and on 10 January the claimant's representatives acted and provided the information in her possession at that date.

28. For the respondent, Mr Bownes observed that the argument now put forward by the claimant – that there has been, in fact, no non-compliance with the Order – is not the basis upon which the application for review was made, nor the appeal to the Employment Appeal Tribunal. On 7 March (50), the claimant accepted that there had been non-compliance in respect of the Order.

29. Any application for reconsideration needs to be made within 14 days, and it would be well out of time.

30. The entire context of the case, he said, is important. The only reason that the documents were not in the claimant's possession were that they had not been asked for. We know that they were available, he said, because there has now been very full disclosure. It was made clear to the claimant that she had to comply with the Order, and that it was her last chance.

31. He adopted the extensive written submissions put forward on behalf of the respondent on 8 February 2019.

32. The claimant was able to discuss the Tribunal proceedings with her medical team and had ample opportunities to ask for her records, and her failure is the reason for the non-compliance.

33. The respondent's position overall in this case is that it would not be in the interests of justice to allow the claim to continue, no progress having been made since February 2018. He did accept that the respondent has now received disclosure in line with the Order.

34. He submitted that the respondent would in fact be prejudiced were the application to review to be granted, as the claimant has not attended the

workplace for 2 years and 3 months, and the memory of the witnesses must be affected by the passage of time.

35. Mr Bownes noted that the claimant insists that this case is important, but submitted that this was "clearly not" the case, as the claimant had failed to address the matters, and the point has been passed where she should be allowed to continue with the claim.

36. Mr Healey made a brief additional submission in which he confirmed that he had contacted Mr Bownes two days before this hearing to give notice that he would be making the argument about the wording of the Order.

37. He also confirmed that proceedings in the EAT have been sisted pending the outcome of this hearing.

Discussion and Decision

38. This case has a long history, and has suffered a number of interruptions in its progress through the Tribunal system due to the difficulties endured in securing compliance with orders by the claimant.

39. The issue before me now is whether the Judgment issued following non-compliance with the Unless Order should be revoked in the interests of justice.

40. The claimant essentially relies upon two grounds in this application: firstly, that she did in fact comply with the strict terms of the Unless Order, by producing all documents which were then in her possession; and secondly, due to the considerable difficulties in her personal life from which she has suffered over the time during which she was subject to the Unless Order.

41. Dealing with the first issue first, it appears to me that this is not an argument intended to assist the Tribunal. The claimant was advised, in the clearest possible terms, what documents she required to produce, and that the consequences were very serious for her in the event that she did not produce those documents. Her solicitors stated in an email to the Tribunal on 7 March 2019 that "It is accepted that there was non-compliance but only

insofar as paragraph 1 of the schedule to the Order is concerned". Mr Healey now adopts a different position on behalf of the claimant.

42. It is quite correct that the Unless Order itself stated that the claimant should provide to Mr Bownes and to the Tribunal "copies of all documents within your possession which fall within the description set out in the attached schedule". That schedule included GP records. Mr Healey now seeks to argue that she did comply with the Order, because at the date of compliance she did not possess those records.

43. In my judgment, this is not an argument with any merit. A party to whom such an order is issued must be aware that the purpose of the order is to require them to ingather the information so that at the date of compliance it is within their possession. Otherwise, it would be a simple matter to avoid the need to comply with the order by making no effort to secure the records sought. In light of what was said to the claimant in the Judgment accompanying the Unless Order, dated 23 November 2018, in which a clear warning was given to the claimant that she was being given the final opportunity to comply with an Order which itself had been outstanding for many months, she could have been in no doubt that she was obliged to obtain those records.

44. Had she obtained those records within the timescale required, they would have been within her possession at the date for compliance.

45. In any event, when a party is ordered to produce documents, the phrase "within your possession" does no more than express a simple fact – that a party may only produce documents which are within their possession. Of itself, however, it is my view that it is quite disingenuous to argue that failing to obtain those records should of itself alleviate the claimant of her obligation to comply. It was clear to the claimant that she required to obtain and produce her medical records. That had been clear for some time. I consider the efforts she made under the second part of this decision.

46. The second issue, then, is whether the reason for the claimant's failure to comply within the timescale should be regarded as sufficient to persuade the Tribunal to revoke its decision to strike out her claim.

47. On the claimant's side, a number of points are made. It is said she did comply with the Order, but I have already rejected that argument.

48. It is also said that she has now complied with the Order, which is true.

49. It is said that there was a request to vary the terms of the Unless Order, and again this is true. On 22 January 2019, the claimant's solicitor wrote to the Tribunal to make application to vary the terms of the order to allow compliance by 15 February 2019. It should be noted, however, that that request came after the date on which compliance was finally required.

50. It is said that the claimant's medical and social background are of relevance to the failure to comply with the Order. The claimant was diagnosed some years ago with type 1 bipolar disorder, a condition for which she receives regular treatment and input from her GP, her Community Psychiatric Nurse and her social worker. She gave birth to a baby prematurely on 28 June by emergency caesarean section, which has had ongoing physical effects. She has been in dispute with the Council about the accommodation in which she resided. She described herself as "physically, mentally, emotionally" unable to take on more stress at this time, and therefore she had to prioritise.

51. It is said that the claimant was only able to access the assistance of solicitors after a delay during which legal aid funding had to be applied for and secured.

52. It is said that the balance of prejudice would fall much heavier upon the claimant if she were not allowed to proceed with the case, than if it would upon the respondent if the case were revived.

53. For the respondent a number of points were made by Mr Bownes.

54. Mr Bownes pointed out that the claimant was able to discuss her case with the mental health team on 5 November 2018 (59), but did not ask for her records then.

55. He said that she first asked about the records on 7 January 2019 when speaking to the CPN, which was too late in the day.

56. Mr Bownes argued at length that it would not be in the interests of justice to allow the claim to be revived because of the claimant's failures throughout the process in complying with the Orders of the Tribunal. He pointed out that a party cannot simply stop an Unless Order by making an application to vary it, and after the date of non-compliance an application to vary can have no effect.

57. He argued that the balance of prejudice would fall heavier upon the respondent than upon the claimant if the decision were made against the respondent.

58. Having reflected upon these arguments put forward by both parties, I recognise that it is necessary for me to consider what the reason for non-compliance actually was in this case. It is important, however, only to consider the non-compliance with the Unless Order, rather than any issues arising out of the original orders issued in February 2018.

59. The information I have is that the claimant has suffered for a number of years with a condition of bipolar disorder, for which she receives strong anti-depressant medication and regular treatment from her GP and her CPN in particular. Her personal circumstances over the past 18 months have apparently been somewhat chaotic, in that she has been in accommodation she considers unsuitable to bring up two infant children, has required to move in with her mother for support, has been in regular contact with a social worker and has other proceedings ongoing in relation to her children which have taken up her energy to the extent that she found herself unable to cope with further stress at the point when the Unless Order was issued.

60. This is important information, and to a large extent her medical and social circumstances are not disputed by the respondent. The claimant has, until the start of 2019, sought to represent herself before this Tribunal. Whenever she has attended, she has appeared to be slightly fragile but able to deal with the proceedings, and has demonstrated a clear understanding of what she has been told by the Tribunal. It was quite clear to me that when she was told that the Unless Order was to be her final chance, and that she would be given an extended period for compliance to take account of the Christmas and New Year period, she understood that and indeed acted with some relief.

61. On the other hand, it is known that she attended her medical advisers in November, following the issue of the Unless Order, and did not ask them about the records, notwithstanding the clear message she had been given about the need to obtain those records as soon as possible. Being in regular contact with her GP gives rise to the question of why she did not find it possible to ask for her records at any stage before she contacted her CPN on 7 January 2018. It is apparent that she had sought legal advice prior to that date, and while it is not known, nor appropriate to be known, by the Tribunal what advice she sought and received, it is inconceivable that she was unable to raise with her legal advisers the fact that an Unless Order had been granted and needed to be answered.

62. The Tribunal does not issue Unless Orders lightly. It is recognised, particularly where a claimant may have personal difficulties, that the effect of non-compliance is draconian; at the same time, compliance with Tribunal Orders is a fundamental requirement of parties engaged in litigation before the Tribunal. The Unless Order was only issued after lengthy attempts had been made to secure the claimant's cooperation with the Orders of the Tribunal. Some latitude must be given to unrepresented claimants whose understanding of complex legal proceedings is inevitably limited. However, that latitude must have boundaries before a Tribunal is guilty of indulgence towards them.

63. The interests of justice therefore require me to consider the claimant's perspective upon this matter, but at the same time to reflect upon the respondent's position as well. The respondent has been entirely innocent in this process, waiting for compliance which only came after the point when an Unless Order deadline had come and gone. It is, as Mr Bownes pointed out, now more than two and a half years since the claimant was last at work with the respondent, and the effect upon the memories of witnesses can only be detrimental. This cannot be in the interests of justice, in my judgment.

64. It is accordingly my judgment that the explanation given by the claimant for her failure to secure the GP records by the deadline of 10 January 2019 is inadequate to persuade me to revoke the Judgment dismissing the claim with effect from 11 January 2019. While the effect of this is very severe upon the claimant, she was well aware in November 2018 that she was facing her last opportunity to comply. No request was made to vary the terms of the order or the deadline by her solicitors when they wrote to the Tribunal on 10 January. The claimant had every opportunity to contact her GP when the Unless Order was received, and for reasons which are entirely unclear to me, failed to do so until 7 January 2019, when it was patently too late to secure timely compliance with the Order.

65. While it is clear that the claimant has endured and continues to endure personal difficulties which have blighted her life, for which considerable sympathy is owed, the interests of justice demand that the Judgment dismissing the claim with effect from 11 January 2019 should not be revoked or varied. The balance of prejudice lies with the respondent in the event that a long running claim, whose progress has been held up by the claimant's failure to engage with the Tribunal's orders, would continue with little prospect of achieving a final hearing for some months yet. There must be finality in litigation. Had there been good reasons clearly advanced by the claimant for her failure to comply with the Unless Order, the Tribunal may have been persuaded to allow the claim to continue, but in the circumstances before me no such reasons have been put forward.

66. As a result, it is my decision that the claimant's application to revoke the Judgment dismissing the claimant's claim with effect from 11 January 2019 should be refused.

Date of Judgment: 20 August 2019
Employment Judge: Murdo Macleod
Entered Into the Register: 23 August 2019
And Copied to Parties