Case Number: 1304471/2015

EMPLOYMENT TRIBUNALS

Claimant Respondent

Miss S Bi v E-Act

(A company limited by guarantee co. no. 06526376)

JUDGMENT

1 It is not in the interests of justice to set aside the Unless Order issued on 12 December 2018 (and the rule 38 notice of dismissal of 8 January 2019). For the avoidance of any doubt this claim remains dismissed.

REASONS

1 This hearing was listed to consider if an unless order having been issued and not complied with should be set aside. The background is set out in my Order of 18 July 2019 which also sets out the procedure to be adopted in such circumstances. I thus do not repeat that here. Neither party has disputed the approach I suggested there or the rationale I gave why this application should be considered on the papers (so the hearing was heard as promptly as possible). Both parties were given the opportunity to provide written representations which the claimant took up.

2 On receipt of the notice of hearing the claimant sought to clarify if the parties were to be present, the notice of the hearing having impliedly suggested they were. I made it clear by a letter of 26 September 2019 my order took precedence over (any ambiguity in) the notice of hearing.

3 Notwithstanding that clarification the claimant attended the tribunal today. My clerk attended upon her and I am told explained to her that the order of 18 July 2019 made clear the hearing was listed for a hearing without the parties present and showed a copy of the order to her.

Background

4 As I did not set out the background to this claim in the order of 18 July 2019 I do so now but only so far as it is relevant.

5 This claim was presented on 11 November 2015 and concerns events that occurred between 14 and 23 September 2015.

6 By two judgments of the Employment Tribunal both chaired by Judge Cocks respectively dated 22 March and 4 October 2017 the tribunal dismissed all the claimant's claims other than :-

6.1 a complaint that an agency contract assigning her to work at the first respondent Academy had been terminated by reason of her making a protected disclosure, and

6.2 that also constituted victimisation on the basis she had made an assertion the Academy was anti-Muslim.

7 A remedy hearing was listed on 14 & 15 June 2018 and the parties ordered to obtain a joint expert report relating to the psychiatric conditions the claimant claims she suffered,

her medical history, any psychiatric injuries, treatment she received and her then, present condition.

8 From what I subsequently discerned the expert was sent a joint instruction on 3 May 2018 in advance of the remedy hearing including amongst other matters an agreed list of questions.

9 The respondent sought disclosure of the claimant's medical records which the claimant objected to on the basis she did not want her medical notes or the joint expert report to be made available to the public. The claimant also sought the remedy hearing take place in private.

10 The claimant sent a copy of her medical records to the joint expert on 29 May but the expert did not receive the same as they were sent electronically. It was suggested that was due to the size of the file but irrespective of the reason for that the claimant emailed them again on 7 June.

11 By virtue of those matters and the respondent maintaining its application for a copy of the claimant's full medical records to be disclosed to it, on 11 June 2015 the remedy hearing was postponed and converted to a case management hearing to be held on 14 June.

12 In the agenda lodged for that hearing by the claimant identified the losses she was claiming as financial loss, future loss(es), injury to feelings, stigma damages and psychiatric injury.

13 At that case management hearing which came before me on 14 June, having explained matters to the claimant she agreed to disclose her medical records and I made an order that she return by 21 June 2018 a form of consent (that was to be supplied to her by the respondent). I also listed a further remedy hearing on basis of the claimant's availability on 15-17 January 2019 (as she was due to be studying in the United States at Yale University in the latter part of 2018).

14 On 23 October 2018 the respondent sought an unless order setting out its grounds for doing so. The claimant was asked for her comments and responded by a letter of 4 December where her address was given as Yale University. Within her response she thanked the Employment Tribunal for its patience given the delay in her responding due to being at Yale University as part of her PhD studies. She stated there had been errors in the consent form that she had asked the respondent to remedy and for which no response had been received until after she arrived at Yale, four months after the order had been made and thus the delay was down to the respondent. She stated she had tried to do her best to prevent the delays by providing the medical records to the respondent and expert, that the unless order should not be granted because the delay arose from the respondent's failure to address matters before she went to Yale (by which means she mitigating her losses by studying to further her career), that as a litigant in person she would be prejudiced and that it was disproportionate to deny her the right to bring a fundamental claim, namely for psychiatric damage.

15 By an email of the following day (5 December 2018) the claimant wrote to the Tribunal seeking that all correspondence be sent to her via email or if in hard copy, via an address in Birmingham.

16 Also on 5 December the respondent repeated its application relaying that the claimant could have amended the consent form herself, when the form had been sent to her and

the claimant asked to provide the consent (14 & 22 June, 27 September and 5 October 2018), that whilst the claimant had written to the expert's directly she had not informed the respondent of that or copied them in, the claimant had still failed to comply, the obligation was not onerous in that she merely needed to supply the completed form, the reason for the request was to ensure the information the claimant had provided was complete, that

both parties had access to the same documents and the documents supplied to the experts appeared to be incomplete.

17 On 12 December I directed an order be issued that unless by 19 December 2018 the claimant complied with paragraph (2) of the order of 14 June 2018 (namely that she return the form of consent) the claim would stand dismissed without further order. My reasons for doing so were relayed in that order:

17.1 Having explained the position to the claimant at the hearing on 14 June 2018 she had agreed to provide the consent referred to,

17.2 she accepted she had not done so,

17.3 the explanations she provides do not address the non-compliance, it was for her to provide this,

17.4 the provision of the medical records do not address this and the respondent needs to be able to identify all relevant docs have been provided, and

17.5 a fair hearing was at risk as a result of non-compliance.

18 The unless order was not complied with so notice of dismissal pursuant to rule 38 of Employment Tribunal Rules of Procedure 2013 (*the 2013 Rules*) was issued at 12:13 on 8 January 2019.

19 By an email timed at 14:58 on 8 January 2019 the claimant asserted that she had been told by the tribunal staff that the whole claim had been struck out and not just the psychiatric injury claim which is what she said *she thought it had meant* and that the whole claim should not be dismissed on the bases :-

19.1 she had been working on her PhD thesis and had not been able to check her emails regularly,

19.2 she thought the unless order applied to the psychiatric injury claim only and not the whole claim because the unless order arose out of an issue with the medical notes which was directly related to the psychiatric injury claim, and

19.3 she did not understand the whole claim had been dismissed because the unless order had not been complied with until she rang the tribunal.

20 She stated that she was being penalised for misunderstanding that the unless order related to the whole claim whereas she saw the claim as multiple heads of loss and she was trying to mitigate her loss by working on her thesis.

21 Her email was not actioned by the tribunal staff before 31 January when the claimant again wrote to the tribunal again giving a Yale University email address for correspondence (having by that time returned to the United States) and repeating it was unreasonable to dismiss the whole claim and the multiple heads of compensation she was claiming when provision of her medical notes related to her psychiatric injury award only.

22 The respondent was asked for comments by the Tribunal on 27 February and replied on 6 March 2019 repeating much of what I relay above but also stating if the claimant did not understand the effect of the order it was for her to check. It also rejected the idea that a psychiatric injury complaint was separate and stated that the medical evidence was pertinent to other aspects of her complaint. Further the respondent argued the claimant did not assert that she had not received the unless order and therefore chose to deliberately (I read this as consciously) not comply or to relay to the Employment Tribunal or respondent that she did not wish to pursue the psychiatric injury complaint.

23 By a letter of 13 March 2019 the claimant wrote to rebut the respondent's submissions stating that the remedy hearing was not dependant on the provision of the medical records as they stemmed only form her psychiatric loss head of claim, she disputed the

failure was a deliberate breach and pointed out the respondent had only sought the medical notes after she had made a psychiatric injury head of loss.

24 Those representations were given to me and on considering the same I made my order of 18 July amongst other matters directing any written representations be lodged by 23 August 2019.

25 On 17 July 2019 the claimant wrote to the Employment Tribunal seeking that a remedy hearing be listed and seeking to rely upon new evidence. The former is dependent on my determination here. The latter an appeal point (given Employment Judge Cocks has now retired and so that would be unlikely to be capable of a reconsideration).

26 On 21 August 2019 the claimant lodged her representations. She argued the consent form included errors, her mindset on leaving for Yale was to focus on her studies to mitigate her loss and she still believed the unless order solely related to the psychiatric injury claim. She referred me to *St Albans Girls' School v Neary [2009] EWCA Civ 1190* and the factors listed in CPR 3.9(1) making submissions on the various (old) CPR 3.9 factors and arguing the strike out of the whole of the case was unjust.

27 As an aside I should record that the claimant has now received her doctorate and also the offer of a role as a lecturer from SOAS in social anthropology.

The Law

28 The 2013 Rules provide (so far as relevant) as follows:

> ***"Overriding objective***
>
> *2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall cooperate generally with each other and with the Tribunal.*

Unless orders

38 (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 shall give written 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 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.

(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21.

29 In *Blockbuster Entertainment Ltd v James [2006] IRLR 630* the CA albeit in a case concerning rule 87 of the 2004 Employment Tribunal Rules of Procedure *(2004 Rules)* held that the power to strike out was a *"draconic power not to be too readily exercised".* Sedley LJ continued:

> *"5. … The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in Arrow Nominees v Blackledge [2000] 2 BCLC 167 and of the EAT in De Keyser Ltd v Wilson [2001] IRLR 324, Bolch v Chipman [2004] IRLR 140 and Weir Valves v Armitage [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal."*

30 Whilst the question before me is not whether to strike out but to grant relief those factors are relevant matters to consider.

31 The EAT in *Weir Valves* said this:-

> *"13. What are the principles on which the Employment Tribunal should act in deciding whether to strike out in a case such as this, where there has been a breach of a direction?*
>
> *14. Where the unreasonable conduct which the Employment Tribunal is considering involves no breach of a court order, the crucial and decisive question will generally be whether a fair trial of the issues is still possible: De Keyser Ltd v Wilson [2001] IRLR 324, at paragraphs 24 to 25 applying Logicrose Ltd v Southend United Football Club Ltd (Times, 5 March 1998) and Arrow Nominees v Blackledge [2000] 2 Butterworths Company Law Cases, 167. De Keyser Ltd v Wilson was recently followed and applied in Bolch v Chipman [2003] EAT 19 May, a decision which has been starred and is likely to be reported: see pages 21-22.*

15. Even if a fair trial as a whole is not possible, the question of remedy must still be considered so as to ensure that the effect of a debarral order does not exceed what is proportionate: see Bolch v Chipman at pages 23-25. For example, it may still be entirely just to allow a defaulting party to take some part in a question of compensation which he is liable to pay: see page 25.

16. Those principles apply where there is no disobedience to an order. What if there is a court order and there has been disobedience to it? This is an additional consideration. The principles which we have set out above do not apply in the same way. The Tribunal must be able to impose a sanction where there has been wilful disobedience to an order: see De Keyser v Wilson at paragraph 25, Bolch v Chipman at page 22.

17. But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been cause and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."

32 The claimant refers me albeit not by name but by the citation to *Neary v Governing Body of St Albans Girls School [2010] ICR 473.* That of course was not only a case under the 2004 Rules but also on the now superseded version of CPR 3.9. The latest version of which provides as follows:

"3.9 On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with the rules, practice directions and orders."

33 In *Neary* Lady Justice Smith reviewed the authorities. She concluded that Parliament had deliberately not incorporated CPR 3.9 into tribunal practice; and that while a Judge in the civil courts when considering relief from sanctions is under a positive duty to consider all the CPR 3.9 factors the same is not true of an Employment Judge, though he must of course consider all the relevant factors, and avoid considering irrelevant ones, and might find the CPR checklist to be helpful. She said:

"52. I do not consider that the same detailed requirements are to be expected of an employment judge considering an application for a review of a sanction. Of course, the judge must consider all the relevant factors and must avoid considering any irrelevant ones. He might well find the list in CPR r 3.9(1) to be a helpful checklist, although he would be well advised to remember that, in the instant case, that list might not cover everything relevant. But he is not under any duty expressly to set out his views on every one of those factors. His decision must comply with the basic requirements as set out in English v Emery Reimbold & Strick [2002] 1 WLR 2409. Litigants are entitled to know why they have won or lost and appellate courts must be able to see whether or not the judge has erred. In a case of this kind, it seems to me that the basic requirements are that

the judge must make clear the facts that he has regarded as relevant. He must say enough for the reason for his decision to be understood by a person who knows the background. In a case where the draconian sanction of strike-out has been imposed, it will be necessary for the judge to demonstrate that he has weighed the factors affecting proportionality and reached a tenable decision about it. That does not mean that he must use any particular form of words. Any requirement for a particular form of words leads readily to the adoption of them as a mantra. But it must be possible to see that the judge has asked himself whether in the circumstances the sanction had been just."

34 In *Thind v Salvesen Logistics Ltd EAT/487/09* the then President of the EAT, Mr Justice Underhill welcomed the decision in *Neary* commenting the law was *'much more straightforward'* in the light of *Neary* and the law prior to that *'had become undesirably technical and involved'.* Underhill P went on to summarise the law:

> *'14. The tribunal must decide whether it is right to the party in default notwithstanding the breach of the unless order. That involves a broad assessment of what is in the interests of justice, and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will generally include, but may not be limited to, the reason for the default, and in particular whether it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. The fact that an unless order has been made, which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration. Unless orders are an important part of the tribunal's procedural armoury (albeit one not to be used lightly) and they must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside. But that is nevertheless no more than one consideration. No one factor is necessarily determinative of the course which the tribunal should take. Each case will depend on its own facts.'*

35 That is highly relevant because LJ Underhill was a member of the drafting committee for the 2013 Rules .

36 One of the first cases on the 2013 Rules was *Morgan Motor Company Ltd v Morgan UKEAT/0128/15* where the claimant was granted relief from the dismissal of his claim for non-compliance with an unless order. The EAT again approved the approach in *Neary* and *Thind* and identified the material factors to be weighed will vary considerably, but that they would generally include:-

36.1 the reason for the default and whether it was deliberate,

36.2 the prejudice to the other party,

36.3 whether a fair trial remained possible, and when considering that question the ET should consider whether that should be assessed as at the date of the relief from sanction application rather than the date on which the sanction was applied.

36.4 if an unless order had been made that was also said to be an important consideration (as was the policy objective behind unless orders) but that would only be one such consideration,

36.5 the importance of finality in litigation.

36.6 and when considering if alternative sanctions were appropriate the ET would need to take account of whether such an award should be made whether or not relief from sanction was granted.

37 Part of dealing with a case justly is having regard to the impact of it on the resources of tribunals, to ensure that one case does not does not exhaust a disproportionate share of them, and so deprive other cases of time, or delay the start of them. Again per Smith LJ in *Neary:-*

> *"64. … The overriding objective requires that the management of the case should result in the case being dealt with justly as between both parties. It also requires the judge to consider the appropriate use of the resources of the court or tribunal. It is entirely within the overriding objective for a judge to take the view that enough is enough. That stage will more readily be reached in a case of deliberate and persistent failure to comply than one where there is some excuse for it. …"*

38 That point was repeated by Langstaff P in *Harris v Academies Enterprise Trust* UKEAT/0097/14:-

> *"33. … justice is not simply a question of the court reaching a decision that may be fair as between the parties in sense of fairly resolving the issues; it also involves delivering justice within a reasonable time. Indeed, that is guaranteed by Article 6 of the [ECHR]. It must also have regard to cost. Even if the Employment Tribunal is not in the same position as the civil courts because there is no cost-shifting regime, it was designed as a cost-free forum in so far as party-and-party costs were concerned. That is true of most Tribunals; it is a particular feature of most Tribunals. I would accept, too, that overall justice means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. If a case drags on for weeks, the consequence is that other cases, which also deserve to be heard quickly and without due cost, are adjourned or simply are not allotted a date for hearing."*

My Conclusions

39 Whilst the explanation the claimant gives for the default is that she was studying at Yale this does not adequately address why she did not lodge the completed consent form, as I had ordered and more significantly, as she had agreed to do at the hearing on 14 June 2018. At no point does she seek to argue that was not done. Irrespective of the error on the form the claimant could have remedied that had she chosen to do so and at no point has she engaged substantively with why she has not.

40 It would also have been a relatively simple matter for her to provide the consent form at any point after it was sent to her. She does not address why she could not do so other than being busy studying at Yale, yet prior to the issue of the unless order was able to respond in detail to correspondence on 4 (& 5 December 2018). She did not say in those letters she would not be able to comply or why not, or that the revised consent form was still defective. Instead she explained why she had not done so at that time and that the unless order should not be issued for the reasons given. Hence, she did not address if and why she was unable to do so thereafter.

41 Whilst this application was made promptly the failure of the claimant to explain the reason she did not comply after the unless order was issued (and her whereabouts and

thus the pressure of work she was under at the relevant time) set against the speed with which she did respond after receipt of the order merely highlight her failure to comply.

42 That is reinforced by the delay the claimant's failure to provide the information having agreed to do so caused, and her failure to expressly inform the tribunal of her implicit change of view concerning the consent. That again would have been a simple matter for her and her failure to do so and the ease with which she could have done so are matters I need to take into account.

43 The claimant also had an opportunity to make representations before the unless order was issued, did so and the points she raises concerning her understanding and the discrete issue of psychiatric loss were not raised.

44 An unless order having been issued I am duty bound to consider the policy objectives behind the enforcement of sanctions were highlighted by the Supreme Court in *HRH Prince Al Saud v Apex Global Management* [*2014] 1 WLR 4495 (the Global Torch)*:

> *"23. … Once a court order is disobeyed the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect they ought to have and, if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach for presenting or resisting the claim and if disobedience continues notwithstanding the imposition of the sanction, the enforcement of the sanction is almost inevitable, essentially for the same reasons."*

45 Having never sought to argue she had not agreed to provide the form of consent and/or that she had not received the unless order I find her failure to comply was informed in the sense she made a decision not to do so and therefore that must have been, at least in that sense that she had knowledge of what was expected and the unless order, deliberate.

46 Whilst the claimant seeks to draw a distinction between the psychiatric injury and other complaints there is no such distinction on the face of the unless order which states *"the claim will stand dismissed without further order".* I acknowledge she is not a lawyer but she successfully pursued this claim, is clearly a highly intelligent person with a Doctorate who has studied at one of the world's most prestigious universities. Nor does she relay what steps she took to check if her view was correct, either with the tribunal, respondent or to obtain advice. I find there was no reasonable basis for the claimant to form that view.

47 If she considered the medical records related merely to a psychiatric injury complaint she does not explain why she did not indicate that to the tribunal or respondent at any point until after the unless order had expired and specifically in her email of 4 December 2018. Not only was it her responsibility to do so, it would that have been a simple matter for her to do so. Her failure to do so and the ease with which she could have done so are again matters I need to take into account.

48 Contrary to what the claimant asserts, her psychiatric injury claim is not in my judgment a discrete issue; the medical evidence is pertinent generally to the other awards the

claimant seeks given her medical position may potentially have an affect her losses including any injury to feelings award.

49 However, also of relevance is that by the time of the hearing on 14 June 2018 the respondent had already raised a deeper issue concerning if the claimant had failed to disclose all her medical records to the expert. That was one of the bases on which the records were sought. That being so the extent of the medical records provided (if so, the relevance of the records not disclosed (if any), if so, why they were incomplete and effect(s) of that (if any)) were live issues that the claimant's withdrawal of part of her claim would not obviate.

50 The claimant's failure to provide that consent continues and in my judgment is prejudicial to the respondent.

51 The effect of the claimant's failure was that the claim was in no sense ready to be heard in January 2019 despite that hearing being listed based on her availability. That was not the first time the remedy hearing had to be postponed that had also arisen in relation to the hearing listed on 14 & 15 June 2018 where the claimant had failed to provide the medical records to the respondent or a consent. Thus, two tribunal hearings have been vacated as a result of the claimant's failure. There has thus been a waste of precious tribunal hearing time and delay in relation to a claim that is now 4 years old.

52 The claimant's failure to provide that consent or to engage with that issue at all leads me to conclude based on the evidence currently before me that even if I granted this application that on balance the claimant would not provide that consent, her failure to comply with the unless order being at least partial support for that, as is the postponement of the hearing last year. Accordingly, in my judgment a fair trial of the remedy issue is and was not possible.

53 Notwithstanding the draconian nature of the dismissal of her entire claim to the claimant, she has implicitly changed her position on providing the consent, has not given a rationale for that so I am unable to weigh that in the balance against the relative ease that she could have provided that consent (notwithstanding her studies). She failed to expressly inform the Tribunal and/or respondent of her change of mind and does not dispute she received the unless order. I have to weigh in the balance what I found above was her informed failure to comply with a Tribunal order and the need for parties to respect Tribunal orders with the other matters she raises including her explanation concerning her (mis)understanding of the nature of the unless order. I also need to have regard that that issue was not raised prior to the unless order's expiry despite the representations she

made regarding it and nor does she address how she formed that view or what steps she took to check if her view was correct.

54 The dismissal of part of the claimant's claim would not in my judgment address the prejudice to the respondent that continues as a result of the claimant's failure to provide the consent that I relay above.

55 Notwithstanding the arguments the claimant raises and draconian nature of the sanction, placing all the relevant matters in the balance, it is not in the interests of justice that the Unless Order issued on 12 December 2018 (and the rule 38 notice of dismissal of 8 January 2019) should be set aside. For the avoidance of any doubt I record that this claim remains dismissed.

EMPLOYMENT JUDGE PERRY

DATED: 04/11/2019