



EMPLOYMENT TRIBUNALS

Claimant: Mr E Paltarackas

Respondent: Frederickson International Ltd

Heard at: Croydon **On:** 24/1/2020

Before: Employment Judge Wright

Representation:

Claimant: In person

Respondent: Mr J Cook - counsel

JUDGMENT AT PRELIMINARY HEARING

The respondent's application that the whole claim stood dismissed in accordance with Rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) succeeded. It was not in the interests of justice to set aside the Order.

The claimant requested written reasons in accordance with Rule 62(3) of the Rules.

1. The respondent made an application regarding the Unless Order dated 1/7/2019 saying that it had not been materially complied with. As a result, the respondent's contention was that the whole claim was regarded as

- dismissed under Rule 38 of the Rules. The respondent said, once an unless order has been granted, the issue for the Tribunal is not whether or not it should have been granted or what its terms are; but whether or not there has been non-compliance in any material respect.
2. There was a preliminary hearing on 5/3/2019 at which Orders were made. The Tribunal understands and would expect, that an explanation would have been made to the claimant in terms of what was required in respect of further particulars of his claim. The Order, which was sent to the parties on 15/3/2019 set out in writing what was required at paragraphs 1-10. The claimant was to comply with those paragraphs by 30/4/2019.
 3. This is the claimant's claim and he made allegations of discrimination in his claim form dated 15/7/2018. As such, this was not an unreasonable timeframe or task for him to complete. On 30/4/2019 the claimant emailed the Tribunal and asked for an extension of time until 7/5/2019. He then purported to comply with the Order on 8/5/2019. The respondent took the view the particulars the claimant had provided did not comply with the order and applied for a strike out of the claim or in the alternative an Unless Order on 15/5/2019. It repeated that request on 12/6/2019.
 4. This led to Employment Judge Truscott QC (who conducted the preliminary hearing on 5/3/2019) to issue an Unless Order on 1/7/2019 which was sent to the parties on 11/7/2019. The terms of that Unless Order were:

'Unless by the 31/7/2019 the claimant complies with the ORDER dated 5/3/2019 the claim will stand dismissed without further order.'
 5. The claimant was given until 31/7/2019 to comply with the Unless Order as a further preliminary hearing was listed for 27/8/2019 to determine claims which had been presented out of time. It is also to be noted that the claimant was aware from 15/5/2019 that the respondent was not satisfied with the particulars he provided on 8/5/2019 and why that was the case.
 6. The claimant purported to comply with the unless order on the 31/7/2019 at 23:57.
 7. The respondent remained unsatisfied with the particulars the claimant had provided and it set out its position on 20/8/2019. The preliminary hearing listed for 27/8/2019 was postponed due to lack of judicial resources.
 8. It is the respondent's case that the claim stands dismissed as per the Unless Order as there was a material failure to comply with it. The Tribunal finds that to be the case. There is no specificity in the details

- provided by the claimant as per the terms of the Order of 5/3/2019. Individuals were not identified. Dates were not given. Sections were missed out, for example, the indirect discrimination claim simply refers to the details given in the direct discrimination section. No provision criterion or practice is identified as per the terms of the Order. Under Victimisation the protected act(s) are not identified. The respondent is entitled to know what case the claimant brings and what it has to answer. It is also entitled to have that information as early as possible in the proceedings.
9. The claimant on 23/1/2020 served some documents upon the respondent and Tribunal (noting what the respondent says about that being a further example of non-compliance with the Order of 5/3/2019 in respect of failure to disclose relevant documents in accordance with the Order and the failure of the claimant to provide a witness statement dealing with the out of time aspects). These documents included an email dated 9/12/2013.
 10. Putting aside the out of time issue, that email refers to an incident on 4/12/2013, it identifies the individual alleged discriminator, it sets out what the claimant says happened. This incident is referred to in the ET1, but not in the further particulars the claimant provided. The email contains all of the information the claimant needed to further particularise this allegation, apart from expressly saying how this was less favourable treatment, although that is implied and so it would not be difficult to say what the less favourable treatment was. The claimant said he obtained his personnel file from the respondent under a data subject access request and he referred to notes of an investigation meeting which it contained and other evidence. If the claimant had this information and has had it for some time, the allegations could have been particularised and he could then have materially complied with the Unless Order. He did not do so and the Unless Order takes effect.
 11. The Tribunal then turned to an application that the Unless Order be set aside on the basis that it is in the interests of justice to do so; so as to amount to a relief from the sanction of the Order. The factors to be considered are: the reasons for the default; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible.
 12. The Tribunal is aware of the draconian nature of the Unless Order, particularly one issued in these terms. The Tribunal is not permitted however, to revisit the terms of the Unless Order, which was not the subject of an appeal or reconsideration application. Employment Judge Truscott QC, having conducted the preliminary hearing, determined an Unless Order, a very serious step to take, was necessary in this case.
 13. In respect of the reason for the default, the claimant relies upon his health issues. The only evidence which the Tribunal had before it, apart from the

information that the claimant was too unwell to work between 17/5/2017 and 8/2/2018 was the Occupational Health report dated 14/3/2018 (which is now nearly two years old). The Tribunal appreciates the claimant has referred to being able to provide medical records, yet he is aware, having made two postponement applications and seen the respondent's response, that if he is relying upon health issues, he needs to provide the evidence. It is not enough to state that it can be obtained.

14. The Occupational Health report deals mainly with the claimant's progress upon his return to work and his future status (page 74). The comment on his condition at that time is:

'he is now physically well and is keeping fit; his sleep pattern varies but he feels that he can cope with this. He does occasionally suffer with low mood as he feels lonely as he has few friends and no family close by, however in general he copes well with this. He told me he has had no suicidal thought for over 6 months and has taken part in three talking therapy sessions since September to explore his thoughts and low moods and has had a beneficial effect of these.'

15. The Tribunal understands that since then the claimant has lost his job and takes into account the statement he made at the hearing about his health conditions. The Tribunal also appreciates that his health may well have deteriorated since this report, but at the risk of repetition, there is not up-to-date evidence before it.
16. The Tribunal also appreciates that the claimant's first language is not English and that he asks to be excused for this. There is no need to excuse him, but allowances have been made in this respect.
17. On the seriousness of the default there is: the time that has lapsed since the claim was presented; the information which was given at the preliminary hearing in terms of what the claimant needed to do to particularise his claims; and the attempts he made to do so. The situation remains however that as at late-January 2020, the respondent is still not clear about the allegations which it faces and is required to answer or defend.
18. That leads onto the prejudice to the respondent. The closure of the Tolworth office (where the claimant worked), although nothing to do with the claimant, is a factor to consider. That office closed over a period of time from May 2018 to February 2019. Had the claim been properly particularised, the respondent would have been in a better position, before some of the relevant staff left as redundant. Had individuals been identified, it could have discussed the claim with them and made

- arrangements to contact them in respect of the claim. The events referred to are very historic, using the email of 9/12/2013 as an example, that refers to an event, six years ago. The time limit for bring a claim in respect of an unlawful discriminatory act is three months. That is a very short time-limit and among the reasons for that are that discrimination claims should be determined promptly, before memories fade and staff move on.
19. Even a delay of a two or three years does affect the cogency of the evidence. This is not a case where the respondent has been able to identify its witnesses and to take their proof of evidence to preserve it for a future hearing date. The reason it has been unable to do so is that the claims have not been particularised. This does cause significant prejudice for the respondent.
 20. The same considerations apply to whether a fair trial is still possible. It is not the fault of either party, but it is a fact that any final hearing listed in Croydon, would be late in 2020 or possibly in 2021. One preliminary hearing in this case has already been postponed due to lack of judicial resources and the other at the claimant's request. It has already been noted, now in January 2020, the Tribunal is considering a claim form presented in July 2018, which still has not been properly particularised, dealing with events going back to May 2012 (according to the ET1 claim form).
 21. The Tribunal does have sympathy for the claimant in these circumstances but is obliged to apply the Rules and to follow precedent authorities. For those reasons, the Tribunal finds that it is not in the interests of justice to set aside the Unless Order so as to grant relief from sanctions.

Employment Judge Wright

24/1/2020

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the

hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.