



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondents

Mr E Ukwu

**(1) Local Pensions Partnership
(2) Mr Greg Smith
(3) Mr Bharat Shah
(4) Ms Susan Christine Martin
(5) Mr Michael O'Higgins
(6) Local Pensions Partnership
Investment Limited
(7) Mr Andrew Fox
(8) Ms Jaqui Self**

HELD AT: London South
Before: Employment Judge Freer

ON: 08 October 2019

Appearances

For the Claimant: In person
For the Respondents: Mr D Bickford, Solicitor

RESERVED JUDGMENT

It is the judgment of the Tribunal that the Claimant's application to set aside the dismissal of his claims by an Unless Order dated 15 November 2018 is refused.

REASONS

1. This is the Claimant's application to set aside the dismissal of his claims following non-compliance with an Unless Order sent to the parties on 21 November 2018.

The history of proceedings

2. The Claimant was employed by the First Respondent as Head of Governance. He is a qualified Solicitor.
3. By a claim presented to the Tribunal on 09 October 2017 the Claimant claimed unfair dismissal, disability discrimination, victimisation and 'whistle

- blowing' detriments in employment.
4. A request for further and better particulars was served on the Claimant by the Respondents on 02 January 2018.
 5. There was a Case Management Preliminary Hearing that took place on 28 March 2018 and the resulting order was sent to the parties on the same date.
 6. At that hearing the Claimant was represented by Counsel.
 7. The Case Management Order listed the matter for a full-merits hearing for fifteen days commencing on 11 November 2019. Due to the lack of detail in the claim form and the resulting inability for all eight Respondents to respond fully to the claims, the Respondents were ordered to serve an amended request for further and better particulars by 18 April 2018 and the Claimant was ordered to reply by 27 June 2018. The Order contained a warning that an Unless Order may be made and a failure to comply will result in the claim or response being struck out on the date of non-compliance.
 8. The Respondents sent the request to the Claimant on 09 April 2018.
 9. The Claimant did not respond substantially to any part of that request. The Tribunal wrote a letter to the Claimant on 18 September 2018 requiring him to explain the default or an unless order would be made. It was explained again that this request was to enable the Respondents to understand the claims made against them.
 10. No reply was received. An Unless Order was made on 15 November 2018 and sent to the Claimant on 21 November 2018, by e-mail and post, stating that the Claim would be dismissed without further order if there was no response within seven days from the date of the Order.
 11. No reply or any correspondence was received by the Tribunal from the Claimant and therefore the provisions of the Unless Order took effect and the claim was dismissed.
 12. The Claimant wrote to the Tribunal by e-mail dated 05 December 2018 stating: "The Claimant did not see the Unless Order which was sent on 21 November 2018 as a result of his condition after major surgery" and requesting that the Tribunal stay proceedings until he recovers.
 13. The Claimant wrote further to the Tribunal by e-mail on 21 February 2019 stating: "I am currently unable to participate in Tribunal proceedings due to medical reasons. I have had a serious setback in my recovery from surgery and was instructed by my surgeon to avoid work/physical activities which impact the areas I was operated on . . .".
 14. A letter was sent by the Tribunal to the parties on 14 May 2019 setting out the instructions of Employment Judge Crosfill, which states: "An Unless Order was made by Regional Employment Judge Hildebrand on 15 November 2018. That required the Claimant to provide further and better particulars of his case by 22 November 2018. The Claimant has not and nor does he claim to have

complied with that order. As a consequence, the claims presently stand as struck out. The Claimant's correspondence shall be treated as an application under Rule 38(2) of the Employment Tribunal Rules of Procedure. The matter will be listed for a hearing to determine the Claimant's application".

15. As a result, this hearing was listed.

Application to record proceedings

16. At the outset of this hearing the Claimant applied to record the Tribunal hearing. That application was refused. The Claimant submitted in support a Statement of Fitness for Work from his GP dated 24 June 2019 some three months before this hearing. That statement focuses on workplace adjustments and states: "right shoulder surgery november 2018 – patient is right handed – patient will require work based adjustments as hand note taking can trigger worsening of pain thus unable to note take and patient states would prefer to record and then type up meetings to discuss with employer".
17. Upon discussion the Claimant acknowledged that there was nothing in making the recording that would assist him with the hearing itself. However, he argued that it would assist him with any potential appeal. The Tribunal considered that it was not in accordance with the overriding objective nor any duty on the Tribunal to make reasonable adjustments for any recording of proceedings to be made by the Claimant. This hearing was by way of very short oral evidence of the Claimant and oral submissions only. On any appeal, the Tribunal's reasons are the findings of fact and the Tribunal's notes of evidence are the official record of proceedings. There is an inherent and undesirable risk associated with any unsecure and unverifiable digital recording of proceedings being in the public domain. Importantly, as acknowledged by the Claimant, there was nothing in a recording made at the current hearing that would assist the Claimant in his engagement and representation during it.

The substantive application

18. It is first noted that the Claimant did not reply to the request for further and better particulars or the correspondence from the Tribunal warning of an Unless Order, but he was however able to communicate regularly by e-mail to the Respondents' lawyers. Indeed, in a response to an email from the Claimant dated 23 October 2018, the Respondents' solicitor stated: "Thank you for your immediate response. It is a shame that you do not feel able to respond to orders from the Employment Tribunal with the same alacrity or, indeed, at all to recent orders/correspondence concerning the claim you are currently pursuing".
19. During the period up to the making of the Unless Order the Claimant could have succinctly informed the Tribunal of any medical or other difficulties he was having in complying with the Order and attaching any medical evidence in support as appropriate. However, given the extent of the e-mail traffic with the Respondents' solicitor it would appear difficult to explain why he was not

- able to do so.
20. The Claimant had an operation to his shoulder on 06 November 2018 under general anaesthetic. The operation was to the rotator cuff of his right shoulder. The Claimant was admitted to day-care and returned home after the operation on the same day. He argued that it was a very difficult period, he had his arm in a sling, was unable to shower for ten days and was in bed most of the day. The Claimant argued that he could not use his computer to log in. He argued that he could send e-mails from his ipad without accessing e-mails received. He contended that it was not possible to do daily tasks with his left hand.
 21. The Claimant argues that the first time he saw the Tribunal order was when he received an email from the Respondent to the Tribunal dated 29 November 2018 into which he was copied, highlighting his failure to comply with the Order.
 22. The Claimant wrote to the Tribunal by e-mail dated 05 December 2018, referred to above, to which he attached two letters by Mr D H Yanni, Consultant Orthopaedic and Hand Surgeon, dated 27 September 2018 (setting out the medical issue to the Claimant's GP) and 03 October 2018 (giving the Claimant details of the hospital admission date). In a separate e-mail of the same date the Claimant provided three Statements of Fitness to Work from assessments made by his GP on 16 October 2018, 06 November 2018 and 14 November 2018. These statements simply confirm that the Claimant was not fit to work due to surgery on his shoulder.
 23. The e-mail from the Claimant to the Tribunal dated 21 February 2019 attached a further letter from Mr Yanni, which is a 'to whom it may concern' letter stating that: "Rehabilitation will take some time before everything settles down. It is my recommendation that you adapt your physical/work activities to a level appropriate to your symptoms".
 24. The Claimant argued that during the time the Unless Order was sent to him he was not checking his post or his e-mails. His wife had lost her mother and was doing everything at the time for the family and therefore could not reasonably assist in that regard. There was no evidence in support. The Claimant argued that he underestimated the impact of general anaesthetic. He argued that unless you have been through the process you do not realise that medication is in your system for months afterwards.
 25. No argument was raised by the Claimant either in writing at the time, or at this hearing, that he did not have time to comply with the order before it became effective. Had the Claimant communicated with the Tribunal at the time about the period for compliance it is likely to have had a empathetic reception.
 26. The Claimant stated that he first checked his emails on or around 05 December 2018 and wrote to the Tribunal as soon as he could. The Claimant stated that, as a lawyer, he was aware of the seriousness of the situation.
 27. When it was put to the Claimant in cross-examination whether he could point

to any evidence that shows he was not able to open post or open computer e-mails he replied that it was common sense and referred to the medical evidence that confirmed that he could not work and that he was not able to have full use of his arm.

Decision

28. Rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

“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. The ground on which an application to set aside will be considered is that it is in the interests of justice to do so.
30. The circumstances in advance of the Unless Order were such that the Claimant was able to converse with the Respondents’ lawyers up until late October 2018. The letter of Mr Yanni dated 27 September 2018 confirms that he had previously seen the Claimant in the Summer of that year and considered at that time “the coast was clear” and the treatment had “worked wonders”. There was therefore no evidence of any medical impediment to the Claimant complying with the general terms of the Tribunal Case Management Order, or with the Tribunal request for an explanation for his non-compliance.
31. The Claimant was informed in advance by the terms of the Tribunal Case Management Order sent to the parties on 13 April 2018 that an Unless Order may be made upon non-compliance with any of the Tribunal directions. More specifically the Claimant was informed by the correspondence from the Tribunal dated 18 September 2018 that, if the Claimant did not explain the failure to comply with the order for further and better particulars, an Unless Order would follow.
32. The Claimant did not respond to the Tribunal communication even though he was able to send detailed e-mails to the Respondents’ lawyers at that time and beyond.
33. Even after the Tribunal deadline had passed, the Claimant failed to inform the Tribunal of his impending operation or subsequently to provide the letter by Mr

- Yanni dated 27 September 2018 in support of any reason for why he was not able to respond in detail to the Tribunal's request, which at that stage was simply to explain why he had not complied with the initial Order.
34. The Claimant was and most certainly should have been aware of the seriousness of the situation.
 35. Therefore, when the Unless Order was made, the fault lay wholly and squarely with the Claimant.
 36. The Claimant was told on 18 September 2018, well in advance of the surgery that an Unless Order was imminent if he failed to respond. In those circumstances there was a greater responsibility on the Claimant to put processes in place to monitor post and incoming e-mails from the Tribunal. The Tribunal concludes that despite the oral evidence of the Claimant to the contrary, this was not an onerous task. The Tribunal finds the Claimant's oral evidence on his complete inability to monitor his post and e-mail to be implausible. There was no medical evidence to support the Claimant's contention that he could not open post, or turn on his computer and access e-mails, or any other similar tasks. There was also no compelling evidence as to why the Claimant could not be assisted to do these simple and extremely time-light tasks once a day.
 37. Those steps are very different from full-time work tasks anticipated by the contemporaneous Fitness for Work Statements and the later letter from Mr Yanni in February 2019, so far as that may be relevant to the circumstances prevailing at the time.
 38. The Claimant's verbal account of the effects of his surgery on his capacity to monitor and respond to communications from the Tribunal two weeks after the surgery was undertaken was not supported by any material medical evidence, even though the Claimant had advance notice of this hearing and it also being his application.
 39. Even at the time of this hearing the Claimant has not produced any substantive response to the request for further and better particulars in support of his application. There are eight Respondents. None fully know the claims against them at the date of this hearing, two years after the claim was presented.
 40. This matter was listed for a fifteen-day hearing which was vacated once the terms of the Unless Order took effect. A case of that length would not be re-listed, even if done at the date the order took effect or at the date of this hearing, until into 2021 on a claim that commenced in 2017. Indeed, as there is an anticipated slight increase in judicial resources, that projection remains around the same at the time this decision is sent to the parties. The capability to have a fair hearing has been seriously impeded, not least with regard to the inevitable adverse effect on the recollection of events by individual Respondents and their witnesses who still do not know the full details of the claims.

41. It is the interests of justice for the parties to comply with Tribunal orders, to keep engaged with and appropriately manage the Tribunal process. It is also in accordance with the overriding objective to have finality of litigation through the use of Unless Orders.
42. The Tribunal concludes having considered all the relevant matters that the Claimant's health circumstance was not a sufficient reason for not engaging with the Tribunal as required. The default by the Claimant was and remains substantial. The prejudice to the Respondents in setting aside the strike out is also substantial. After weighing all the factors affecting the proportionality of the sanction, it is the decision of the Tribunal that the sanction of dismissing the claims was just, it is not in the interests of justice to restore the proceedings and the Claimant's application is refused.

Employment Judge Freer

Date: 20 March 2020