Case No: 1404613/2019
(CVP)

EMPLOYMENT TRIBUNALS

Claimant: Mr M Scovell

Respondent: Mr G Untulis

Heard at: **Bristol (by CVP in public)** **On:** **22 June 2020**

Before: **Employment Judge Midgley**

Representation
Claimant: Did not attend
Respondent: Mrs G Patch, solicitor

JUDGMENT

1. The claimant failed to comply with the terms of the Unless Order dated 6 May 2020. The claimant's claims were therefore struck out by administrative process on 14 May 2020. (The Employment Judge reconsidered his Direction dated 15 June 2020, which indicated that the claims were permitted to proceed, and set it aside, it being in the interest of justice to do so.)

2. The claimant's application for relief from sanction in respect of the strike out of his claims as detailed in paragraph 1 above, contained in his email of 14 May 2020, is granted.

3. The claimant's application for the hearing listed on 22 June 2020 to be adjourned is dismissed because it is not in the interest of justice to postpone the hearing.

4. The claimant's claims for breach of contract (notice period), unlawful deduction of wages and accrued but untaken annual leave are not well founded and are dismissed.

REASONS

The hearing was conducted by the parties attending by video conference Kinley Cloud Video Platform. It was held in public with the Judge sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not possible in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020 and it was in accordance with the overriding objective to do so.

The claims

1. By a claim form presented on 21 October 2019, the claimant who was born on 26 October 1967, brought claims for breach of contract (unpaid notice pay), holiday pay and arrears of pay. The respondent defended all of the claims.

2. The claimant was engaged by the respondent as a Valet between 6 August 2019 and 11 September 2019. The Respondent is a sole trader who carries operates a vehicle valeting service for Mercedes Benz.

3. The claimant alleges that he was employed by the respondent; the respondent avers that he was engaged as a self-employed contractor. The claimant alleges that his employment came to an end suddenly in September 2019 following persistent efforts to obtain a contract of employment and the claimant's consistent complaints that he was being underpaid for his wages.

4. The respondent avers that the claimant was paid as agreed, but agrees that his employment was terminated on 11 September, arguing that was the result of an incident during which the claimant had damaged a vehicle that he was valeting. The respondent asserts that the total cost of repairs was in the region of £1600, and at the point of termination the claimant was owed approximately £405 by way of wages and accrued holiday pay.

Procedure, evidence and hearing

5. The case was listed for a final hearing on 6 May 2020 but, in accordance with the Revised Presidential Guidance issued on 23 March 2020, was converted to a telephone case management hearing.

6. On 5 May 2020, the claimant exchanged emails with the respondent's representative, Mrs Patch, regarding the inclusion of some of the claimant's documents in the agreed bundle. During that email exchange Mrs Patch reminded the claimant of the case management hearing the following day. There was a further exchange of emails between Mrs Patch and the claimant on the morning of 6 May 2020 prior to the case management hearing itself.

7. Despite his awareness of the hearing, the claimant did not attend the

hearing or notify the tribunal or the respondent that he was or would be unable to do so. In consequence the hearing took place in his absence.

8. At the time of the telephone case management hearing, the bundle had been agreed, running to approximately 20 pages, and the respondent had prepared two witness statements which it had sent to the claimant. The claimant had not sent his witness statement to the respondent.

9. Amongst the directions that I consequently made at the telephone case management hearing were the following:

   9.1. The respondent should send a counter schedule of loss, setting out its calculations of the claimant's daily rate of pay, his final payment and any deductions from it to the claimant by 20 May 2020;

   9.2. By 27 May 2020, the claimant was to write to the respondent, responding to the counter schedule, identifying whether he agreed with the calculations within it and, if not, setting out the nature of the dispute and the basis of his calculations;

   9.3. Witness statements were to be exchanged by 12 June 2020.

10. Given the claimant's awareness of the hearing and his failure to attend or provide an explanation for that failure prior to the hearing itself, I made an Unless Order requiring the claimant by 13 May 2020 to write to "the Tribunal and the respondent providing an explanation for his non-attendance at the telephone case management hearing on 6 May 2019 [sic]" and to indicate "whether he still pursued his claims", failing which his claim would be struck out.

11. The Claimant did not comply with the terms of the Unless Order. No communication was received by the respondent or the Tribunal from the Claimant on 13 May 2020.

12. On 14 May 2020, the respondent sought confirmation that the claims have been struck out. On the same day, the claimant sent an email to the Tribunal stating that "I believe I had an emails from you saying that the meeting would be conducted buy telephone can you please look into this matter as I have know had an email to say that I didn't attend it I do wish to clear this matter up." [Sic]

13. On 21 May 2020 the respondent's representative emailed the tribunal requesting that a judge should consider its application for the claim to be struck out on the basis that the claimant had failed to comply with the terms of the Unless Order.

14. On 11 June 2020, the respondent sent a counter schedule of loss to the claimant in satisfaction of the directions that had been made at the telephone case management on 6 May 2020. The respondent had delayed in sending the counter schedule on the grounds that it believed that the claimant's claim would have been struck out for failure to comply with the Unless Order, and it was reluctant to incur additional cost unnecessarily. The respondent reminded the claimant that he should reply to the counter schedule within seven days,

as directed in the case management order.

15. The claimant did not comply with the case management orders and had not done so at the time of the hearing on 22 June. In particular, he failed to respond to the counter schedule of loss or to send a witness statement to the respondent.

16. On approximately the 13th June 2020 the claimant emailed the Tribunal but failed to copy his email to the respondent. In that communication, which he stated was "in relation to my ongoing case with Mr Untulis," the claimant provided an account which was akin to a witness statement in relation to the disputed events of the claim, and ended by stating "can you please give me a time to be at Bristol as I don't think the time is on the email. The final hearing was relisted for three hours on June 22 before Employment Judge Midgley."

17. On 14 June 2020, the case was referred to me. In a direction issued on 15 June 2020 to the parties I directed that all correspondence sent to the Tribunal must be copied to the other party, that the claimant's explanation in his email dated 14 May [2020] was accepted and the case would proceed to a hearing on 22 June 2020. The claimant was directed to comply with case management orders in the summary dated 6 May 2020, a copy of which was attached to the direction for the parties' reference. It was unclear at that stage whether the claimant's email of 13 June 2020 was intended to stand as his witness statement or not, and further, the claimant had still not complied with the obligation to comment upon the counter schedule of loss.

18. On 22 June 2020, the hearing commenced at 10am via the Kinley Cloud Video Platform ("CVP"). Prior to the hearing I was provided with the following documents in electronic form - an agreed bundle of 55 pages, and statements from the following on behalf of the Respondent:

    18.1. Mr Glyn Untulis, the Respondent;

    18.2. Mr Callum Snook, a valet engaged by the Respondent;

    18.3. Mr Michael Webb, a valet engaged by the Respondent.

19. Mrs Patch joined the video hearing without difficulty. Mr Untulis sought to join but had some difficulties with connection; they were resolved following a short adjournment with the assistant of the clerk, Miss Baber.

20. The claimant connected to the CVP platform at 10am but disconnected whenever he was permitted to enter the video hearing. Miss Baber contacted the claimant directly by telephone at approximately 10.15am. He stated that he had been walking outside and had poor signal but would be able to return home within 5 minutes and would try to reconnect at that time, when it was hoped that his Internet connection would be more stable and he would have sufficient bandwidth to facilitate his connection to the CVP hearing.

21. At approximately 10.25am Miss Baber called the claimant directly on his mobile phone. At that time, he stated that he would be unable to participate in the hearing as he was having "difficulties with his girlfriend" and he asked whether the hearing could take place at a later time. The claimant provided no

explanation as to what sort of difficulties he was encountering, why they would prevent his participation in the hearing or when or how they might be resolved. He did not explain why he had initially suggested that he had been out walking, although I accept that the two matters may be connected.

22. In those circumstances I concluded that it was appropriate to address three matters:

22.1. first, to determine whether the claimant's claim should have been struck out in accordance with the Unless Order made on 6 May 2020, a course which the respondent encouraged me to consider as a preliminary point;

22.2. secondly, if the claim should have been struck out on the 13 May 2020, whether I should treat the claimant's email of 14 May 2020 as an application for relief from sanction pursuant to Rule 38(2); and

22.3. finally, if that application were to be granted, to consider the claimant's application for an adjournment as it was expressed to Miss Baber in accordance with Rule 30A.

23. I heard submissions from Mrs Patch for the respondent. In summary, she argued that the claimant's claim was necessarily struck out on 13 May 2020 as an automatic process as the claimant had failed materially to comply with the terms of the unless order made on 6 May 2020. In relation to the issue of relief from sanction, she stated that the claimant had failed to provide any or any adequate explanation for his failure to comply with the terms of the Unless Order, and that there would be significant prejudice to the respondent if the claim were not struck out given the claimant's persistent failure to comply with case management orders and the consequent costs that the respondent had incurred in preparing for the hearing. Finally she argued that it was not in the interest of justice for the adjournment to be granted given the significant risk that the claimant would continue to fail to comply with case management directions, and the real risk that the respondent's witnesses, who were self-employed valeters may either no longer be in contact with the respondent or available to give evidence at any reconvened hearing, or indeed may be affected by the Covid 19 pandemic.

The Law

24. The test to be applied by a tribunal when determining whether or not an Unless Order has been complied with is whether there has been material non-compliance (see Marcan Shipping (London) Ltd v Kefalas [2007] 3 All ER 365)

25. When considering whether there has been material non-compliance, the tribunal should bear in mind, as the authorities highlight, the risk that if the tribunal were to strike out a claim "that it was "perfectly possible to litigate" and in respect of which "no further particulars were required", on account of failure to comply with an Order … that would amount to taking a penal rather than a facilitative approach" (see Johnson v Oldham Metropolitan Borough Council UKEAT/0095/13/JOJ at [4] and [5])" – quoted in Ijomah v Nottinghamshire Health NHS Foundation Trust at [26].)

26. I remind myself of the guidance offered by the EAT in Ijomah at [74] that "an Unless Order should not be a punitive instrument, and, in particular, should not have the effect of depriving a party of a claim (or defence) which is properly pleaded and perfectly capable of being fairly litigated. If, nevertheless, an Unless Order has been made which, unambiguously, does have that effect, tying the hands of the Judge who considers the compliance issue at stage two, it may be susceptible to an application for relief from sanctions, to the extent necessary to mitigate that effect at stage 3."

27. While it is important for tribunals to enforce compliance with unless orders, in certain circumstances the interests of justice would best be served by granting relief to the party in default. Factors to be considered include the reason for the default, the seriousness of the default, the prejudice to the other party and whether a fair trial remains possible (see Thind v Salvasen Logistics Ltd UKEAT to the 0487/09.) The determination of that question necessarily requires that the tribunal should exercise its judgement, and must do so rationally, not capriciously, taking into account all relevant factors and avoiding irrelevant factors (see Singh v Singh (as representative of the Guru Nanak Gurdwara West Bromwich) [2017] ICR D7, EAT.)

28. Rule of the Employment Tribunal Rules 30A provides as follows:

30A.—

(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.

(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—

(a) all other parties consent to the postponement and—

(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or

(ii) it is otherwise in accordance with the overriding objective;

(b) the application was necessitated by an act or omission of another party or the Tribunal; or

(c) there are exceptional circumstances.

(4) For the purposes of this rule—

(a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;

(b) "exceptional circumstances" may include ill health relating to an existing long term health condition or disability.

Conclusions

29. I consider first the question of whether the claimant's claim should have been struck out as a consequence of his failure to comply with the Unless Order of 6 May 2020. In my judgment, the clear and ordinary construction of the language of the Unless Order of 6 May 2020 was as that by 13 May 2020 the claimant had a threefold task to complete:

    29.1. first, the claimant had to provide an explanation for his failure to attend the hearing on 6 May 2020,

    29.2. secondly, the claimant had to indicate whether he continued to pursue his claims, and

    29.3. finally, he had to write to the respondent and the tribunal addressing each of the two matters at 28.1 and 28.2 above.

30. The claimant failed to comply with any of those three requirements within the permitted timescale. The consequence of that matter is that the claimant's claims should have been struck out with effect from 14 May 2020. I therefore exercise my case management powers under Rule 72 to reconsider the direction of the 15 June 2020 by which I permitted the claims to proceed to hearing. The necessary consequence of the sequence of events and the clear construction of the wording of the Unless Order was that the claims were struck out as an administrative process on 14 May 2020.

31. In those circumstances, it is appropriate to consider the nature and effect of the claimant's email of 14 May 2020. In my view that email may reasonably be treated as an application for relief from sanctions, pursuant to Rule 38(2). The email was in writing and was received within 14 days of the claim being dismissed for non-compliance with the Unless Order.

32. Construing the words in the email as might be permitted where it is drafted by a litigant in person, it may be understood to suggest that the claimant believed that the hearing would be conducted by telephone (and that he would be called by the tribunal) but nevertheless the claimant continued to pursue his claim – "I wish to clear this matter up".

33. Applying the factors in Thind; it would appear that the reason for the default was a misunderstanding on the claimant's part as to whether he was to be called by the tribunal or whether he should call the tribunal in order to participate in the hearing. Secondly, that default was not an overly serious one, being one of which many litigants in person have made, and, addressing the issue of the prejudice to the respondent and whether a fair trial was still possible, there was little prejudice to the respondent given that the parties had prepared a bundle and the respondent had prepared witness statements and ensured that its witnesses attended the hearing. Whilst the claimant had not prepared a formal witness statement, his account was easily to be understood and derived from the narrative in the claim form and documents contained within the bundle. The respondent was therefore able to understand his case and to meet it through documentary and testimonial evidence of its own.

34. There was little prejudice to the respondent in permitting the application for relief from sanctions given that it was ready for the hearing in any event and therefore the hearing would not need to be delayed. In those circumstances in my judgement it was in the interest of justice to grant the claimant's application for relief from sanctions.

35. That decision necessarily leads to consideration of whether the claimant's application for an adjournment should be granted. Therehere is significant force in the respondent's arguments that it would not be in the interests of justice to permit the application for an adjournment in the circumstances of this case. The reasons for that are as follows:

35.1. First, the claimant has failed to attend to previously listed court hearings; the first on the 6 May 2020 and the second today. In respect of each of those hearings the claimant had sufficient notice and was fully aware of the hearing and the need for his participation.

35.2. Secondly, insofar as the claimant provided any explanation for his failure to attend the first hearing at all, it was generally unsatisfactory given the fact that the respondent's representative, Mrs Patch, had reminded the claimant of the hearing both on the day prior to the hearing and on the day of the hearing itself. The claimant did not raise with her any query as to how he could or should participate. The claimant did not contact the Tribunal on 6 May 2020 to suggest that he was unable to participate or that he believed the Tribunal should be calling him. It was clear that he was content to allow the hearing to continue without his participation, or if he was not, he was not prepared to take any steps to remedy that.

35.3. Turning to today's hearing, the claimant initially gave an explanation that he was unable to participate in the hearing because (by implication) he had a poor Wi-Fi signal as he was walking outside. I pause to observe that it cannot be appropriate for an individual participating in a court hearing to be walking in a public space whilst simultaneously participating in the hearing and giving the evidence and arguments the attention that they require. Subsequently, the claimant suggested that he was unwilling to participate in the hearing, or unable to do so, because of "problems with his girlfriend". He did not articulate what those problems were, when they arose or why they precluded him from participating in the hearing, nor did he indicate when they might be resolved. It was not an explanation which the claimant willingly offered to the Tribunal, rather the Tribunal had to make contact with the claimant and elicit it from him.

35.4. Thirdly, the claimant not only had a history of failing to attend listed hearings, but also of failing to comply with case management directions in relation to them. The claimant had not produced a witness statement for the hearing, and whilst that shortcoming was not insurmountable, the claimant had simultaneously failed to comply with an order requiring him to clarify the basis of the sums that he claimed by commenting on the respondent's counter schedule. Whilst of course those matters would serve primarily to undermine the claimant's ability to pursue his claims effectively, nevertheless they also created an element of prejudice to the

respondent because it was not clear prior to the hearing whether the claimant was seeking to argue that he had not damaged a vehicle, such that the cost of repairs could not be deducted from his wages, or whether he was seeking to argue that he had but there was no prior agreement for any cost of damage to be set off against his wages. Equally, it was not entirely clear how he calculated the claim for holiday pay.

35.5. Finally, in my judgement, there is real force in the respondent's argument, judged against those circumstances, that if the hearing were relisted the claimant would fail to comply with any orders made in respect of it and would be unlikely to attend it with the result that the respondent would incur further costs unnecessarily in relation to a claim which the claimant appeared to be unwilling to substantiate by giving evidence and answering questions in cross examination.

36. Those matters must be assessed against the prevailing circumstances of the effect of the Covid-19 pandemic upon the backlog of Tribunal claims to be heard and the available resources to hear them. There is a real risk, as Mrs Patch suggests, that if the claim were adjourned, it would not be relisted for a significant period of time, with the result that the respondent's witnesses, two of whom are self-employed valeters, may no longer be employed by the respondent or contactable by him, or may have become ill such that they could not give evidence in any event. Furthermore, those matters compound the issue of the ability of witnesses to recall events that occurred in between August and September 2019. Further, as discussed above, it is foeseeable that the Claimant fail to attend that hearing.

37. My judgment, therefore, is that the Claimant has not shown exceptional circumstances as required by Rule 30A(2) and it is not in the interest of justice for this hearing to be postponed, and therefore it must proceed as listed.

38. I read the bundle and the statements prior to the hearing commencing. In my view, it was necessary to hear evidence to clarify the precise damage caused to the vehicle to reconcile that with the evidence relied upon by the respondent to establish the damage purported to have been caused to the vehicle, given that the damage was said to have occurred in September 2019 and the invoices were dated November 2019.

39. Mr Untulis therefore affirmed and gave evidence and answered questions from me concerning the two-month delay between the damage to the vehicle in question and the invoices in respect of its repair. Mr Untulis told me, and I accept, that it is his practice to inform any individual whom he engages that the cost of any damage to a vehicle which they were cleaning would be deducted from the wages, and secondly Mercedes' practice is to arrange for any damaged to be collected from the respondent's premises and transported to a depot to await repair. There may be a delay of six weeks to two months between the vehicle being collected for repair and the invoice in respect of that repair being sent to the contractor in question.

40. I therefore found on the balance of probabilities first, that the claimant had been told by Mr Untulis that if damage was caused to a vehicle by him Mr Untulis would deduct the cost of repairs from his wages; secondly, that the

claimant was responsible for the damage to the Mercedes in question (registration number WD69 FFL), and finally that the cost of repairing that damage was £1095.37. The respondent was therefore entitled to make the deduction from the claimant's wages in his final salary payment with the result that no wages were owed to the claimant for notice pay, unpaid wages or accrued but untaken annual leave. In that regard I accepted the respondent's calculations for each element of the claimant's entitlement to notice pay, wages and accrued but untaken annual leave.

41. In those circumstances it is unnecessary for me to determine the issue of employment status, given that I have found that the term permitting the respondent to make deductions from the Claimant's wages was drawn to his attention prior to the deduction being made. As the cost of repairs far exceeds the claimant's claims for wages, notice pay and annual leave (were he entitled to it), those findings are sufficient to determine the claims.

42. The claimant's claims are not well founded and are dismissed.

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Employment Judge Midgley

Date: 22 June 2020
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