EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105931/2019

Held in Glasgow on 12 March 2020

Employment Judge R Gall

Mr DJ Morgan	**Claimant** **In Person**
Poundland Ltd	**Respondent** **Represented by:** **Mr J Anderson - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the application by the claimant in terms of Rule 38 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 is unsuccessful.

REASONS

1. This was a hearing set down in terms of Rule 38 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, specifically Rule 38 (2).

2. The circumstances were that an Unless Order had been issued by the Tribunal requiring compliance within 28 days of date of its issue. Compliance had not occurred within that time. A letter had been issued by the Tribunal in terms of Rule 38 (1) giving notice confirming that due to non-compliance by the date specified, the case was dismissed without further Order. That had resulted in an application by the claimant in terms of Rule 38 (2) seeking to have the Order set aside on the basis that it was in the interests of justice so to do.

3. I heard no evidence at this PH. The claimant put forward his position in support of the case being permitted to proceed by the application being

granted. The respondents replied opposing the application. The claimant then replied to the submissions for the respondents. There was insufficient time to consider the respective submissions and to return to deliver an Oral Judgment. I confirmed to parties that I would consider the application and opposition as had been spoken to and would issue a written Judgment.

4. Prior to commencement of hearing from parties, I explained to the claimant the Overriding Objective in terms of the Rules and in particular that I would, in implement of that Rule, seek to ensure that as far as practicable parties were on an equal footing. I explained that it was for the claimant to put forward any points he wished to make in support of this application, but that I would perhaps explore some areas with him during any submission which he might make, to try to ensure that I had relevant information to assist with determination of the application.

5. I enquired of the claimant whether there were any documents which he wished to present in support of his position. I mentioned medical reports, for instance. I raised this as I knew that the case was one in which discrimination was alleged, the protected characteristic being disability. The claimant had no such medical reports or records available. He did not seek time to enable any such reports to be before the Tribunal.

6. The facts which led to the issue of the Unless Order were fully narrated in the Judgment of the Tribunal issued on 13 November 2019, following upon a Preliminary Hearing ("PH") which had been held on 7 October 2019. References in this Judgment to that earlier Judgment of the Tribunal will see the earlier Judgment referred to as the November Judgment.

7. The Order issued as an Unless Order was in terms which reflected an earlier direction to the claimant to provide information. That earlier requirement had been discussed at a case management PH held on 20 June 2019. The case management PH was attended by the claimant. The note following it was dated 3 July 2019, being sent to parties on 5 July 2019. At paragraph 4 of that note questions were set out by the Employment Judge for the claimant to answer. There was discussion at this case management PH as to why

specification of the claim was required. The respondent was given a period of 14 days from receipt of the information from the claimant to consider it and, if required, provide a response or possible amendment to form ET3. Dates for hearing were set down. The dates of hearing were to be 7, 8, 9 and 10 October 2019. Witness statements were to be prepared and exchanged by 16 September 2019.

8. No response was ever received from the claimant to these questions in the direction. He sought an extension of time for compliance. He did that on the last day for compliance, 22 July, saying that he had been "unable to finish it on time due to work and health". He sought an extension for compliance to "no later than 29 July 2019". That extension was granted.

9. There was no however no follow up contact from the claimant. The Tribunal wrote to him on 30 July 2019 requiring compliance by 6 August 2019.

10. The claimant wrote to the Tribunal on 30 July, in the evening. That communication however did not reply to the Order.

11. On 2 August the Tribunal wrote to both parties reminding them of their respective obligations in terms of the note. The claimant was directed to comply by 6 August 2019 with the respondents directed to comply by 9 August 2019, their obligation being to produce documentation.

12. Neither party had complied by 12 August. On that date the Tribunal wrote to parties saying that if there was no compliance by 19 August a strike out warning letter would potentially be issued.

13. On 12 August the respondents applied for an Unless Order, the terms proposed being in line with the obligation already imposed upon the claimant to provide information following the case management PH. The application proposed a compliance date of 19 August. The Tribunal sought comments from the claimant by 21 August.

14. The claimant sent an email to the Tribunal on 19 August. That email is set out in the November Judgment at paragraph 13. Essentially the claimant said that the Order in June 2019 was complicated and compliance was taking a

significant amount of time and effort. He said that he was still in process of completing the document. He went on to say that in his view it was "*on the boundary of being unreasonable"* to be able to have completed the document by the time specified and that this had been exceptionally difficult. He referred to the number of matters he required to detail, however said he believed that he was now doing what he had been asked to do. He explained that his new employer required a significant element of travel in the job with time being spent away from home. When that occurred, he said there was no possibility of continuing with the document. He said that on the days off which he had he "put all my time into completing the document required." He explained further about difficulties in completing the document due to his work commitments. He went on to say that a symptom of his depression was that he had struggled greatly with deadline dates and cut-off dates. He had withdrawn from studies at Open University as a result. He raised an issue with the documents the respondents had passed to him. He then said: –

"I have planned time off work to complete my Personal Statement for the case by 16th September and will have been able to scan in all the documents required to make the bundle for the hearing on the week I have planned to take off work."

15. The application for an Unless Order was not granted at this point. In light of the continuing failure to reply to the direction issued at the case management PH, the Tribunal sent a strike out warning to the claimant. If he wished to dispute the step of strike out being taken, he was to set out his reasons by 27 August.

16. On 27 August the claimant sent an email to the Tribunal. He said that in his view postponement of the case with revised compliance dates for all Orders made at the case management PH was appropriate.

17. In support of this, he referred to his new employment and the demands of that and to the extent of work which meeting what he referred to as the Orders required. He said that his mental health still had a significant effect on every-day tasks despite it being improved but had a restrictive effect in being able

to fulfil the Orders set. It had been extremely difficult, he wrote, going over all the instances of discrimination, this leading to him doing small parts at a time when he could. He said that it was not in the interests of justice to penalise a claimant who had managed to secure other form of employment *"where they have been restricted in completing the Orders due to the nature of work and type of contract with the new employer. I have now built up enough holidays to take time off to complete the Orders set and hasn't* (sic) *previously been possible as I have needed to work for the money to cover basic living costs that without* (sic) *would result in homelessness."*

18. A PH was set down in relation to possible strike out. In the letter of 30 August from the Tribunal confirming that this would occur, the Tribunal directed that the claimant should provide such specification as he was able to in compliance with the Order, with any reasonable adjustments being discussed at the PH. This was followed up by a letter from the Tribunal of 9 September confirming that the PH would take place on the first day of the hearing previously listed, i.e. 7 October, with the full hearing being postponed. There was no further contact from the claimant with the Tribunal prior to 7 October.

19. At the PH in relation to strike out of the claim, on 7 October, the claimant did not appear. He did not contact the Tribunal beforehand. The Tribunal was unable to make contact with the claimant on the morning of the PH despite attempts to make contact, so had no information as to any issue with attendance. Arguments were advanced by the respondents in favour of the application. The Tribunal decided, for reasons explained in the November Judgment, that an Unless Order would be issued rather than strike out taking place.

20. As mentioned above, the November Judgment was dated and sent to parties on 13 November 2019. 28 days were given for compliance with the Unless Order. Compliance was therefore required by 11 December 2019. There had been no compliance by that time and no contact from the claimant with the Tribunal. As can be seen from the above, the last contact from the claimant prior to that had been on 27 August 2019.

21. In those circumstances, having regard to the terms of Rule 38 (1) the claim came to an end.

22. At 23:16 on 15 December the claimant emailed a document which was his response to the Unless Order of the Tribunal. By that time, however, his claim had come to an end due to non-compliance with the Unless Order within the time specified for compliance.

23. By letter from the Tribunal of 16 January 2020, the claimant was notified that his case was at an end as he had not complied with the Unless Order within the timeframe given for compliance. His attention was drawn to the terms of Rule 38 (2) which give him the right to write to the Tribunal seeking that the Order be set aside on the basis that it was in the interests of justice so to do. The claimant made that application by email of 30 January 2020.

Submissions for the claimant

24. Mr Morgan commenced his submission by stating that the biggest effect his disability had upon him was in the keeping to deadlines. He had had to drop out of his Open University course because of that.

25. In his view the Unless Order issued by the Tribunal was the harshest type of Order possible. He acknowledged, when I raised it with him, that strike out could have been the decision of the Tribunal. That would have brought his claim to end there and then.

26. On 7 October, Mr Morgan explained, anxiety and panic had prevented him attending. His situation was so bad that he could not do anything other than work and go to bed. He had a consultation with a psychiatrist on 15 October he initially said, although he later corrected this date to become 9 October. At that consultation, his treatment had been altered. His drugs were augmented. He saw some improvement in his symptoms during the first week of November. In December however things had deteriorated once more. That was when he required to reply to the Unless Order.

27. I confirmed once more with Mr Morgan that he did not have with him any medical records or support for the health situation he had outlined. He

confirmed that he had a letter of appointment with a psychiatrist but not any medical report or information.

28. I asked Mr Morgan what the improvement to which he had referred involved. He said that he had been able to get up and do washings and to make meals but otherwise had been in bed. He had to force himself to get up prior to this. He been unable to function in normal fashion during December. He had not been working, due partly to illness and also as the nature of his work as a stock taker was limited in December.

29. Mr Morgan referred to the Equal Treatment Bench Book and its comment that reasonable adjustments should be made to remove barriers for parties. He said that the Unless Order was a barrier as was the deadline. He had struggled with it and it should therefore be set aside as a reasonable adjustment.

30. He also referred to Rule 2 and the overriding objective and its requirement that, where practicable, unnecessary formality was avoided. He said that the Unless Order was unnecessary formality. The terms of the Order were quite involved. He required to put his claim into different sections rather than simply set out what had happened. He believed that he should be able simply to detail what had happened and, once facts were found, the allegations could then be put into particular categories such as direct discrimination or indirect discrimination. He said that there was overlap between the different elements.

31. It was also Mr Morgan's view that the respondents were in breach of the Order made at the case management PH as they had not submitted any comments. Compliance by the respondents involved a response being made to the information from the claimant. I said that one view might be that, with compliance being required by 11 December, and that not having happened, the case had come to an end. The respondents did not, on this view, require to respond to the document submitted by Mr Morgan on 15 December. I raised this with him so that he had the opportunity to comment upon this point. He said that he was still awaiting documents from the respondents which had been something raised at the initial case management PH and which they had

been ordered to give to him. It was Mr Morgan's position that he was not initially able to meet the terms of the Unless Order. He had been severely disabled. He was only now able to realise and to accept the extent of his disability.

32. I emphasised that Mr Morgan should inform me of anything which he regarded as being relevant to the decision I had to make. I explained that I would hear from Mr Anderson and then return to Mr Morgan for any comments he might have. Mr Morgan confirmed that he had given me his points.

Submissions for the respondents

33. Mr Anderson referred to the history to the case. He had the benefit of having been present at the initial case management PH and also at the application for strike out heard on 7 October, that then being the subject of the November Judgment.

34. The claimant had had a full opportunity to participate at the case management PH, said Mr Anderson. The Orders which were to be made (and subsequently were made in the note) and the reasons for those orders being made were explained to him.

35. After that PH the claimant had sought an extension of time from the Tribunal for submission of his answers to the questions raised. He sought a further extension, the time for response having been extended from 3 July to 22 July and then again to 29 July. This demonstrated that the claimant was aware of the ability to apply for such extensions.

36. The claimant had not however responded by 29 July. The Tribunal itself then extended the deadline until 6th August. A reply was received from the claimant but that did not supply the information sought. The deadline was further extended to 9 August. That led then, in the absence of any response, to the application for the Unless Order.

37. It was relevant, Mr Anderson submitted, for the Tribunal to keep in mind that the way of dealing with the case had been set out at the case management PH. Statements were to be prepared. A full hearing had been set down.

38. The claimant had then sent an email of 19 August which was set out in full in paragraph 13 of the November Judgment. What was important was that he had given in that email the purported reasons for non-compliance. He said that it was unreasonable to require him to complete the information. This was as he was travelling in his new job and was only at home for 8 hours in the day. The context was however non-compliance. The circumstances were that two extensions had been granted to the claimant. It was significant that it was only later in the email that he referred to depression. His principal reason for non-compliance appeared to be the work commitments which he had. He said that he would complete the information by 16 September, taking time off work to do that. Ultimately no document was received by 16 September, or indeed after that.

39. In response to the strike out warning of 20 August, the claimant emailed the Tribunal on 27 August seeking postponement of the hearing set down for October. He referred once more to his new employment and then to health issues. He said that he was taking holidays to be able to respond. This was however the last occasion on which the Tribunal had heard from the claimant.

40. The strike out hearing was set down. That was intimated on 9 September as being set for 7 October, the first day of hearing being converted into a PH on strike out. The claimant had not appeared at the PH on 7 October.

41. The November Judgment had refused the application for strike out, taking the view that the issue of an Unless Order was more proportionate. It was said expressly however to be the claimant's final chance.

42. Whilst Mr Anderson recognised the provisions of the overriding objective, and also recognised that the claimant was unrepresented and was not a lawyer, he said that leniency was close to running out at time of issue of the Unless Order. The history to the case showed the defaults which had occurred. That was relevant to the application made in terms of Rule 38 (2).

43. Mr Anderson said that it was important to keep in mind that this was not re-litigation of whether the Unless Order should have been made. In his view the points which the claimant made in many instances sought to do that. The

correct approach was however, said Mr Anderson, to look at the application for relief from sanction. The application of the interests of justice test should be to that application.

44. The Tribunal had a broad discretion, Mr Anderson submitted. It could take account of the reason for delay, the extent of non-compliance, whether non-compliance was ongoing and whether a fair hearing was still possible. The latter point had been raised in consideration of the application for strike out. The position was slightly different now given the issue of the Unless Order.

45. Granting the application would, Mr Anderson submitted, take the matter beyond the latitude afforded to party litigants. There would be real prejudice to the respondents if the application was granted.

46. The application had been made on the 14th day, the last day permitted under Rule 38. It did not however set out the grounds on which it was made. The respondents had no fair notice of that. Accordingly, when anything was said today by the claimant, particularly as to the medical background, the respondents had no fair notice of that. Equally the claimant had supplied no documentary back-up for the position he set out. It was difficult therefore to respond, said Mr Anderson. In that regard the Tribunal might wish to keep in mind, he submitted, the emails which the claimant had sent at an earlier stage explaining his non-compliance. They had very heavily emphasised work-related matters, not disability-related elements.

47. Turning to the prejudice to the respondents, Mr Anderson said that existed at the earlier stage but was more significant now. The respondents had ongoing expenses. The case should have been dealt with at the hearing in October. The sole reason for expenses, certainly since that time, was the claimant's default. Whilst on occasion an award of expenses might offset or cure that, in this instance the claimant was not regarded as having funds likely to be able to meet any expenses. Whilst the prejudice was mainly financial, this had continued and had deepened.

48. Notably, there been no explanation from the claimant as to why purported compliance had taken place on 15 December rather than prior to the required date of 11 December.

49. The Tribunal required to consider the explanation put forward by the claimant and to have regard to the interests of justice. The mere fact that the delay was only a matter of days was not of particular relevance, Mr Anderson submitted.

50. Mr Anderson then turned to the document which the claimant had submitted on 15 December. He said that that did not comply with the Unless Order. If the Tribunal accepted that has been the case, then allowing the claim to proceed did not take matters much further forward in that the information required was not before the Tribunal. Specification would be required. There would largely be a replication of the earlier situation. There had, after all, been the request for answers to questions following the case management PH and then the Unless orders. The claimant had been in "*last chance saloon*". He had failed to take that chance.

51. Looking at the response which the claimant had submitted on 15 December there remained lack of dates and specification in the details put forward to support the claim of constructive unfair dismissal.

52. It was unclear whether the claimant was founding upon depression and anxiety as his disability or depression, anxiety and personality disorder.

53. In relation to the direct discrimination claim, there was no specification of the incidents, the dates, those involved, the witnesses, the comparators with their names and why it was that the claimant regarded any actions taken as being due to his disability. He had, for instance, referred to all other employees as being comparators. The Order had not been complied with.

54. In relation to the indirect discrimination claim and the claim of failure to make reasonable adjustments, again the order had not been met. The PCP had only been set out an extremely broad detail. The respondents required to know the PCP to which the claimant referred. That could not be ascertained from this document.

55. The claim of victimisation was confusing as now set out, said Mr Anderson. It referred to an ACAS Early Conciliation Certificate ("ECC") issued in November 2018. That was not however the ECC relied upon in the claim. Some of the matters said to have been detriments to which the claimant had been subjected because of doing the protected act had in fact occurred prior to the alleged protected act.

56. In short, the respondents did not have a basis of understanding the case brought against them. That was also so in relation to the claim of harassment.

57. In relation to holiday pay, there simply seemed to be a dispute between the claimant and the respondents, although it was unclear as to how the claimant had arrived at the sum which he said was due.

58. The interests of justice would not therefore have been met if the application was to be granted, Mr Anderson said. He urged the Tribunal to take that view even in circumstances where the claimant was a party litigant. He had had a number of chances and the interests of justice did not require that a further chance be given to him.

59. The Tribunal had sought thus far to manage the case and the issues proportionately. Orders had been made in fulfilment of that. The claimant had not however met those orders, including ultimately the Unless Order.

60. Even if a fair trial was possible in the view of the Tribunal, it was not in the interests of justice to grant the claimant's application. The purpose of the orders, including those at the case management PH, not been achieved.

61. I raised with Mr Anderson whether the respondents' position was that even had the response as ultimately tendered been tendered in time, the Unless Order had not been met. Mr Anderson confirmed that that was indeed the position of the respondents. Material compliance, and certainly not compliance in the strictest sense, had not been achieved.

Reply from the claimant

62. Mr Morgan replied briefly. Prior to him so doing, I asked whether he wished 5 minutes to gather his thoughts. He confirmed that he would proceed to make his comments there and then, however.

63. Mr Morgan said that his mental health varied from day to day. Anxiety could kick in even when he thought he might be okay. Complying with dates and deadlines was the hardest element of day-to-day activity. He had planned to be at the PH on 7 October. Anxiety and panic had taken over however. He was not functioning. He then improved but had deteriorated.

64. In relation to Mr Anderson's criticisms of the terms of the response made, Mr Morgan said that he was affected by anxiety and depression. He believed that his then manager was of the view that personality disorder was involved. He therefore saw it as relevant to refer to that as a possible perception.

65. Although he had referred to every employee, there were only 4 employees, Mr Morgan said. He then altered that saying that there were between 4 and 10 employees. Mr Morgan said that the document tendered on 15 December required to be read together with form ET1 and the agenda return. He urged the Tribunal not to adopt a course involving unnecessary formality. He had completed the document to the best of his knowledge and ability. He believed he had done what was asked. If asked to do the exercise again he did not know what he would or could do differently.

66. I raised with Mr Morgan one of the critical elements, as I saw it, that being why the response to the Unless Order had been submitted out of time. I wanted to be clear as to any element he wished to advance as a reason for that. He referred again to his health and to his new job. He said that he would be lucky to get one day a week when he was able to function properly. In the 28 day period therefore he would be likely only to have about 4 or 5 days when he was functioning fully. He could not go through the document in one stretch. It required regular breaks. Doing the work required on the document compounded the effects of his illness. In his view it was still completely possible to have a fair trial. He had also suffered loss through time and money

being spent with time being taken off work. He believed that the case should proceed with his application being granted.

The issue

67. The issue for the Tribunal was whether to allow relief against the sanction of automatic dismissal for non-compliance with the Unless Order.

Applicable law

68. As set out above, the terms of Rule 38 lead to automatic dismissal in the event that an Unless Order is not met. There is provision however for an application to be made by the party whose case has been automatically dismissed in terms of Rule 38. That application is for the setting aside of the Order on the basis that it is in the interests of justice so to do.

69. Although no cases were referred to in submissions for either party, there are some relevant authorities.

70. The case of ***Thind v Salvesen Logistics Ltd EAT 0487/09*** confirmed that in applying the interests of justice, a Tribunal should have regard to factors such as the reason for the default, the seriousness of the default, the prejudice to other party and whether a fair trial remains possible. It emphasised that it was important for Tribunals to enforce compliance with Unless Orders, going on to say that in certain circumstances granting relief to the party in default would be in the interests of justice.

71. It would be relevant to consider whether default was deliberate or through oversight. Prejudice caused by default would be of significance.

72. Other relevant cases are ***Hylton v Royal Mail Group Ltd EAT 0369/14***, ***Enamejewa v British Gas Trading Ltd and another EAT 0347/14*** and ***Morgan Motor Co Ltd v Morgan EAT 0128/15***. A further relevant case is that of ***Singh v Singh 2017 ICR D7***.

73. Principles can be extracted from those cases. It is for the claimant to provide evidence to satisfy the Tribunal that it is in the interests of justice for the application to be granted. It is relevant to have regard to the fact, if it has

occurred, that information has been provided by the time of the application although failure to respond to an Unless Order has led to automatic strike-out. There does not require to be some "compelling explanation" or "special factor" in order for relief to be granted. The date of determination of whether a fair trial is possible is when the claim was automatically struck out by reason of failure to comply with the Unless Order. Determination of the question involves application of discretion by the Tribunal. The interests of justice require to be paramount. Assessing whether granting the application is in the interests of justice involves exercise of judgment which must be carried out in a rational rather than capricious way. Account must be taken of all relevant factors with irrelevant factors being avoided. A broad assessment of what is in the interests of justice was required, involving a balancing exercise. It is ultimately what was referred to in *Singh v Singh* as a "judgment call".

Discussion and decision

74. In assessing the question of whether it was in the interests of justice to allow to the application, there were two principal factors which weighed in my mind in favour of potentially granting the application. Those were the health of the claimant and the fact that he was an unrepresented party advancing a case in a relatively technical area of law, that of discrimination in particular.

75. A claim of discrimination involves a claimant in identifying the particular type of discrimination which is said to be involved. A claimant also requires to set out, with sufficient clarity to give fair notice to the respondent, the elements which are relied upon in support of the claim. Those are not just the facts of the claim but elements such as are required to meet the tests under the Equality Act 2010. Comparators, PCPs and, although not relevant in this case, the "something arising in consequence of disability" in terms of a Section 15 claim, together with identification of detriments, less favourable treatment or substantial disadvantage, are all elements in the claim which required to be set out. The precision with which those elements are detailed may vary, depending upon whether the claim is being set out by a legally qualified representative or not. The information however requires to be there, one way or another.

76. In relation to health, although I have not heard evidence and have not seen medical evidence in support of the precise health circumstances of the claimant, it is in general terms within judicial knowledge that depression can be extremely debilitating. It can lead to an inability to tackle matters, sometimes of quite a basic nature. Depression is however what might be referred to as a "spectrum" illness. It is of significance that I had no medical reports records available to assist me in assessment of the extent and impact of depression and anxiety upon the claimant Mr Morgan.

77. In fairness to the respondents, it was not said by Mr Anderson that a fair trial was not possible when the claim was struck out. He pointed rather to the default on the part of the claimant and to the history to the claim leading ultimately to the issue of Unless Orders and the failure to meet those. He pointed to the response, submitted late, and to issues which existed with it in that it did not, he said, meet the terms of the Order.

78. The rules provide for Unless Order is to be issued. They stipulate the sanction for non-compliance. That is set out in clear terms within the Order itself when it is issued. Similarly, the time limit for compliance is clearly set out in the Unless Order.

79. There is the "safety net" of ability for a party to seek relief from the sanction. Unless Orders and the sanction flowing from non-compliance with such an Order are there for a reason. In this case the Unless Order followed the requirement being set out for the claimant to provide the information following upon the case management PH in June. The claimant sought and was granted extensions to supply the information. He highlighted at the end of August that he was taking time off work to enable the order from the case management PH to be met. That did not occur however. Equally there was no contact from the claimant at any time after August to explain the absence of substantive information or to seek a further extension of time. Any such application might have been supported by medical evidence. When the claimant had sought earlier extensions of time he had referred, in large part, to the pressures of his new job. I do not seek to underestimate those. Nevertheless, the holiday which the claimant referred to in his email of 27

August as being the opportunity for him to finalise his reply to the request for information after the case management PH, did not see any response being submitted by him. No contact was made by the claimant with the Tribunal explaining that he had been unable to reply as he had anticipated, whether due to work demands, health issues or any other reason.

80. At this hearing, I was very concerned at the absence of detailed explanation for the failure to comply with the Unless Order. The reason appeared to be pressure of the claimant's new employment and the claimant's health. There was, as mentioned, no medical evidence supporting extent of the health issue affecting the claimant at this point. I appreciate that he said he had difficulty with deadlines. Failure to meet deadlines is certainly part of the history in the case. The claimant was however aware of the ability to seek an extension of any time period permitted to him. He had done that on earlier occasions. He did not say that he had been unable to work, or that he had been hospitalised for example, during the time permitted for compliance with Unless Order. He did not say that work demands prevented him from responding in that time.

81. The claimant presents as an intelligent individual. He studied through the Open University. He did not say that he did not understand or appreciate that there was a time limit for compliance with the Unless Order. He did not say that he did not understand the consequences of failing to meet its terms within the time limit stipulated. The time limit and consequences of default are in any event made very plain in the Order itself. It is made clear that if compliance does not occur by the time specified the claim is at an end. He was aware of the possibility of seeking an extension of time for compliance with an Order. He had taken that step previously. No such application was received in relation to the Unless Order. The claimant had earlier stated that he was working on his response to the direction given at the case management PH. He had planned holidays to enable him to deal with that. Nothing however appeared. He did not say that he could not contact the Tribunal around or after 7 October or on receipt of the Unless Order. He might have done so to explain any problem with attendance, responding to the earlier direction or, ultimately, the Unless Order. He might have sought that the time for

compliance be varied, explaining any relevant background. There was no explanation of non-attendance. There was no reaction to the November Judgment and the Unless order within it being received by him. He did not say at this hearing, for clarity, that he had not received it. There was no contact of any type.

82. I received no clarification of why it had not been possible to comply by 11 December, yet it was possible to submit the response on 15 December. I appreciated that Mr Morgan's position was that illness had affected him and that compliance with deadlines was an issue for him. He had been under obligation to supply the information since the PH in June. Extensions of time had been sought and granted to him. No information had been forthcoming. Work had been advanced as a significant reason for earlier failure to provide the information required. The claimant had said he would able to supply it as result of holidays taken in September. It was not said by the claimant either in correspondence or at this PH that he had been unable to take the planned holiday or that something had happened preventing the holiday being used to address the requirement to provide specification of his claim. No medical information was before me supporting an inability to reply within the time frame given for compliance.

83. The claimant presented a coherent argument in support of his application. He answered any questions in way which confirmed he had understood them and which provided relevant information.

84. I was conscious that I was considering the absence of response to the Unless Order and the consequent automatic strike out. The Unless Order was not peremptorily issued, however. The response was received 4 days late. The extent of the default had to be seen in light of the earlier history, in my view.

85. The extent of compliance with the terms of the Order was also an aspect to be considered, setting to one side for that purpose the fact that the response was late.

86. The reply was extensive. It did provide some detail. I was conscious that the claimant is not represented or legally trained. Nevertheless, he has clearly

familiarised himself with the Tribunal Rules and the principles involved in bringing a claim of this type.

87. I did not regard it as appropriate to apply too strict a standard to the "compliance point". Even allowing for that degree of latitude, however, I did not see the response as meeting the Unless Order or even materially meeting it. The Order is set out in terms which seek replies to specific questions which would provide information to meet the requirements of fair notice. It is not, for example, simply said "provide full details of your claim in terms of Section 13 of the Equality Act 2010". Notwithstanding that, there is a distinct lack of detail on the elements specified in the Order as requiring to be addressed. Some of those were referred to by Mr Anderson in his submission above. Even being generous to Mr Morgan and looking to read the reply in conjunction with form ET1, I do not regard the reply as providing the relevant information. Had it been a reply at an earlier point, say in July or August, there might well have been the opportunity to seek and obtain clarification. That might have led to sufficient fair notice being given. Things have moved beyond that point, however, and the response is issued, following upon the history to this case, in circumstances where an Unless Order was issued and then not met.

88. Mr Morgan referred to the fact that the respondents had not met a direction at the case management PH. Meeting that direction was not possible however insofar as it required a response to be given by the respondents to the information provided by the claimant. This was as the claimant had not provided any information until 15 December. By that time his claim had come to an end. Documentation was to be provided by the respondents. That, it appears had not happened. The claimant did not say however that this lack of documentation had been what had precluded him from meeting the Order or was what had led to him submitting his response late. He had not, in fact been prevented from responding by any failure to supply documentation in that he had responded, this on 15 December. Further, he did not say that any "deficiency" in the detail in the reply was due to absence of documentation from the respondents.

89. I am very much aware of the severe consequences for Mr Morgan's claim if I do not grant his application. His claim will continue to be at an end. That said, it does not follow that it is in the interests of justice to allow the claim to proceed. There must be factors other than sympathy which make that the appropriate course. The onus is on the claimant as I see it, to persuade the Tribunal to grant his application, albeit the bar has to be set at a reasonable level.

90. The starting point was that the Unless Order had not been met, with automatic strike out of the claim following. I had regard to the interests of justice in my consideration of whether to allow the application by Mr Morgan. I weighed up the reason for the delay as advanced and spoken to by Mr Morgan. I had regard to extent and seriousness of the default. I did not regard the reason for the failure to meet the time period given for compliance as being clear or convincing. The absence of medical information to support Mr Morgan's position was of particular concern. This was underlined as an issue given his own correspondence around August emphasising work commitments as presenting him with substantial difficulty in compliance with the directions given.

91. Further, the response provided late did not represent compliance with the Order in my view. Again, I was not convinced that clearer and better information to comply with Order was not something which was reasonably possible on the part of Mr Morgan, from what I heard from him at this hearing.

92. Those were the reasons which weighed heavily in my decision to refuse the application.

93. For clarity, I recognised that the respondents would, if relief from sanction was granted, be involved in expense and indeed had incurred expense. That would be unfortunate from their point of view. Had I been convinced that the other elements, the reason for default and seriousness of default supported the application being permitted in the interests of justice, I would not have regarded the prejudice to the respondents though the application being permitted to be such as to lead to refusal of the application. I was of the same

view in relation to the factor of whether a fair trial was possible. I regarded that as being possible. Whether taken singly or together, consideration of those elements would not have led me to refuse the application.

94. It is what I regard as the lack of cogent or reasonable explanation for the delay which leads to the conclusion I have reached. In my view the context of the Unless Order being issued is important. There was a history of time periods being given for compliance and extensions at the request of the claimant on occasions being granted. There is no satisfactory explanation in my view such that granting relief from sanctions is in the interests of justice. I have also kept in mind my concern with the level of default as outlined above.

95. The case remains at an end, therefore.

Employment Judge:	R Gall
Date of Judgement:	01 April 2020
Entered in Register,	
Copied to Parties:	01 April 2020