EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111592/19 (P)

Held on 2 November 2020

Employment Judge J M Hendry

Mr M McGilvray	**Claimant Represented by Mr S Smith, Solicitor**
Beam Suntory UK Ltd	**Respondent Represented by Ms J Wright, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal does not strike out the claims for disability discrimination made by the claimant (case 4111592/19) on the grounds that there was substantial compliance with the Unless Order dated 22 September 2020.

REASONS

1. This Judgment follows an application by the Respondent's agents to give effect to an Unless Order granted by the Tribunal on the 22 September 2020. I set out the background to the matter.

Background

2. The claimant raised a claim against the respondent company in October 2019. The claims were defended.

3. A preliminary hearing took place by telephone conference call on 10 February 2020 to discuss case management issues. The claimant was at this time represented by his father Mr McGilvray Senior.

4. Following the hearing a Note was issued and sent to parties on 20 February. That Note included Orders for the claimant to provide Better and Further Particulars of the complaint of disability discrimination. Information was provided on 12 March but it was difficult to follow. Following a further case management discussion that took place further Orders were made on 16 July requiring the better particularisation of the claims made under the Equality Act within 14 days. An extension of two weeks was requested on the 30 July and granted.

5. An email was received by the Tribunal on the 14 August from Messrs Livingstone Brown indicating they were instructed. They had agreed to represent the claimant and had received initial funding from the Scottish Legal Aid Board. They required further finding and sought a further extension of 28 days. This was granted on the 18 August.

6. By the 22 September no Better and Further Particulars had been received. The Tribunal issued an 'Unless Order' requiring the information by the 7 October.

7. No response was received in compliance with the Order until the 8 October when detailed Further Particulars were tendered with an explanation that they were to be sent on the 7 October in compliance with the order but that the solicitors had what were described as technical difficulties with their server which had delated the submission.

8. The respondent's solicitors by email dated 13 October took the view that there had not been compliance with the order and that the claims required to be stuck out. The claimant's solicitors argued that there had been substantial compliance and should not be struck out. They referred the Tribunal to the

cases of ***Marcan Shipping (London) v Keflas and Ano (2007) WLR 1864 CA*** and Johnson v Oldham Metropolitan Borough Council ET0095/13. The agents argued that there was no practical difference in submitting the information the day after the order had expired pointing to the fact that they could have submitted it up until just before midnight the previous day.

9. They narrated the circumstances around the various orders and extensions and that there had been an initial delay occasioned by having to obtain the claimant's medical records. It was explained that the solicitor dealing with the matter was working from home due to the Pandemic and that the server 'went down' unexpectedly for some hours on the 7 October. They indicated that there had been no lack of care in preparing the particulars which were full and detailed. The late submission was unintentional. The respondent's agents declined to make further submissions.

Discussion and Decision

10. There have been considerable delays in this case which are no doubt frustrating to the respondent company and their lawyers. These delays are perhaps in part understandable given the fact that the claimant was not initially legally represented and the preparation of pleadings, although attempted by Mr McGilvray Senior, is no easy task without legal assistance. It was hoped that the instruction of professional representatives would have put matters back on track. What is disappointing is that the Tribunal was not kept appraised of the continuing difficulties being experienced by the claimant's legal representatives nor was it asked to vary the Unless Order which by the beginning of October should have been looming in the minds of the solicitors. No extension was requested and if, given the problems experienced with the server, a request for an extension of even 24 hours had been made it would have been likely to have been treated sympathetically.

11. In the present case the terms of the order were clear. Lady Smith in the case of ***Scottish Ambulance Service v Laing EATS 0038/12*** reminded Tribunals that issues such as proportionality which are elements of any decision under

Rule 37 (then Rule 18(7) were not relevant as the Unless Order was a conditional judgment.

12. I noted that the words used by the Court of Appeal in the ***Marcan*** case to which I was referred and followed in the ***Johnson*** case by the EAT as requiring there to be material non-compliance before the full rigours of the order are imposed. That case involved the EAT overturning a decision of the Employment Judge not to strike out claims on the basis that an Unless Order had not been complied with. The matter turned on deficiencies in that response which was to provide proper particulars of the claims being made. *The President Mr Justice Langstaff put the matter in this way:*

> *"The phrase used by Pill LJ in **Marcan** was, "..any material respect": I would emphasise the word "material". It follows that compliance with an order need not be precise and exact. It is agreed by counsel before me that Employment Judge Feeney in adopting a test of substantial compliance therefore adopted one in accordance with the law. I would make this comment however: "material" may be a better word than "substantial" in a case in which what is in issue is better particularisation of a claim or response. That is because it draws attention to the purpose for which compliance with the order is sought; that it is within a context. What is relevant, i.e. material, in such a case is whether the particulars given, if any are, enable the other party to know the case it has to meet or, it may be, enable the Employment Tribunal to understand what is being asserted."*

13. The narrow issue in this case is whether lodging the Particulars at 8.42 a.m on the 8 October is to be regarded as material non-compliance with the order which requires the Particulars to be lodged before midnight on the 7 October. One argument is that the Tribunal should look at the prevailing situation at midnight on the 7 October when the order is to be fulfilled. At midnight on that day there was no performance material or otherwise.

14. With some hesitation I do not endorse that possible argument. I look at the context and the reason why the Order was made in the first place. I consider first of all the Particulars which were lodged and which seem to provide a full response to the terms of the Order setting out the claims being advanced and providing notice of those claims to the respondent. The time within which an

Order is to be fulfilled is in general a material matter but one that has to be judged in context. I take account of the fact that the Particulars were in fact received just before what can be described as the usual time for the start of the business day at nine a.m. There was no material prejudice occasioned by this short delay of a few hours from the passing of the deadline and nor would this delay occasion any further lack of progress. There was, as the claimant's solicitors submit, no practical difference in lodging the papers just prior to midnight and lodging them early the next morning.

15. In these unusual circumstances I accept that there was no material non-compliance with the Order dated 22 September.

Employment Judge **James Hendry**

Date of Judgement **3 November 2020**

Date sent to parties **3 November 2020**