EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Dyda	**v**	**Torquay Boys Grammar School**

Heard at: Exeter by video **On**: 16 November 2020

Before: Employment Judge Smail

Appearances

For the Claimant: In person
For the Respondent: Mr Brown, Counsel
Interpreter: Ms A Teixeira-Vaz – Polish language

PRELIMINARY HEARING JUDGMENT

1. It is not in the interests of justice to revoke the effect of the unless order dated 25 September 2019 which ordered, inter alia, that unless by 15 January 2020 the Claimant provided to the Respondent by way of mutual exchange his witness statement in the matter limited to 3,500 words, his claim would stand dismissed without further order.

2. Accordingly, the claim remains dismissed.

3. The Respondent may, if so advised, make application for costs in this matter within 21 days of the promulgation of this judgment including the grounds for the application; a schedule of costs in proper county court format; and evidence that a detailed assessment of costs would be worthwhile in that there are grounds for believing that the Claimant has some assets.

4. If the Respondent makes such an application, the Claimant has a further three weeks to file evidence as to his means coupled with representations as to why he should not pay costs in this matter.

5. It is proposed that the decision on costs will be made on the papers, if application is made.

REASONS

1. This matter has a long procedural history by reason of repeated failures by the Claimant to comply with Tribunal orders. Employment Judge Maxwell made a detailed set of unless orders on 25 September 2019 one of them related to the Claimant's witness statement. At paragraph 3 of the order, Judge Maxwell wrote the following:

> "The Claimant should note then
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> 3.2 He must provide a witness statement containing his own evidence, the things he himself wishes to say in support of the claims".

2. The Claimant has maintained that the obligation to provide witness evidence relates to third party witnesses and not the parties themselves. That contention is untenable in the light of order 3.2 cited above. The Claimant still did not provide a witness statement in his own name in support of his application to revoke the effect of the unless order, once he had failed to comply with it by 15 January 2020.

The procedural history

3. By a claim form received on 14 September 2019, the Claimant brought claims of unfair dismissal, race discrimination, disability discrimination, a redundancy payment and notice pay against the Respondent, his former employer. The Claimant says he was employed as a Warden/Cleaner from 5 September 2005 until 10 July 2018.

4. The claim was defended in a response received on 22 October 2018. The Respondent contends that after an extended period of assessment the Respondents reasonably concluded that by reason of a knee injury the Claimant could not return to work as a Warden/Cleaner within a reasonable period. He was dismissed on the grounds of capability. An appeal upheld the decision to dismiss on 4 July 2018.

5. A telephone preliminary hearing was arranged in front of Regional Employment Judge Pirani on 7 February 2019. The Claimant without explanation or warning failed to attend. Case management orders were made relating to clarification of issues.

6. There was a preliminary hearing before Employment Judge Ford QC on 15 May 2019. The Claimant attended, issues were identified and at order 12, there was an order for witness statements. It provided:

> "Witness statements, including that of the Claimant, will be prepared and exchanged between the parties by 9 September 2019."

7. At paragraph 14, the following was ordered:

> "The witness statements should focus on the issues in the case. The Claimant's witness statement should include details of his attempts to find employment since he was dismissed by the Respondent and details of any earnings from other employment since his dismissal"

8. That made it clear that it was envisaged that the Claimant himself would provide a witness statement.

9. The matter came before Employment Judge Maxwell on 25 September 2019. In addition to the unless order in respect of witness statements he made unless orders in respect of disclosure; confirmation of an intention to attend a 4 day hearing that had been fixed for 11-14 May 2020 and in respect of any other additional documents. The precise terms of the unless order in respect of the witness statement and the clarification order are cited above.

10. Employment Judge Maxwell's reasons set out the full history of the proceedings at paragraphs 8 to 31. I adopt those paragraphs in this judgment.

> "Procedural History
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> 8. A telephone case management preliminary hearing ("TCMPH") took place on 7 February 2019. Despite notice of this hearing having been sent in the usual way, without warning or explanation the Claimant failed to attend. REJ Pirani ordered him to provide an explanation for his non-attendance and further information about his claim.
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> 9. On 7 March 2019, the Claimant provided some further information about his claim, including that he relied upon osteoarthritis of the knee for the purposes of being a disabled person within the meaning of the Equality Act 2010. No explanation was given for his non-attendance at the TCMPH.
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> 10. On 25 March 2019, the Tribunal (EJ Roper) wrote to the Claimant indicating that it was considering striking out the claim because of non-compliance with the orders made by EJ Pirani and because it had not been actively pursued.
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> 11. The Claimant sent further emails on 1 and 8 April 2019, variously saying he did not know what was required of him and accusing the Respondent and its legal representatives of wrongdoing.
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> 12. By a letter of 9 April 2019 (EJ Roper) the claim was not struck out, although the Claimant was warned of the importance of complying with Tribunal orders.
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> 13. An in-person preliminary hearing took place on 15 May 2019 before EJ Ford QC. The claims were clarified and directions given (disability impact statement, medical evidence, amended defence, disclosure, agreed bundle and exchange of witness statements) to prepare for a final hearing on 23, 24, 25 and 26 September 2019.
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> 14. On 28 May 2019, the Claimant provided an impact statement (by way of a short email).

15. On 10 June 2019 (2 weeks late) the Claimant sent medical records (an extract from his GP notes, short report on the knee and copy Med3s).

16. The Respondent sought and was granted an extension of time to confirm its position on disability, file an amended response and document list.

17. By an email of 25 June 2019, the Respondent filed an amended response (conceding disability), sent its list of documents to the Claimant and said it looked forward to receiving his list.

18. On 26 June 2019, the Respondent asked the Claimant to provide his list of documents.

19. Copies of the Respondent's documents were sent to the Claimant on 27 June 2019.

20. By an email of 28 June 2019, the Claimant requested additional documents and further information from the Respondent.

21. On 9 August 2019, the Claimant emailed the Respondent and Tribunal chasing a response to his request of 28 June 2019.

22. On 12 August 2019, the Respondent replied to the Claimant, providing for each request either the further information sought, or an explanation of why it disputed the relevance of that request. The Respondent also said Claimant had still not complied with the Tribunal order to provide his own list of documents and asked for this by 19 August 2019, or else it would apply for a strike out.

23. On 30 August 2019, the Respondent applied for strike out or in the alternative, an unless order. The grounds were the Claimant's non-compliance with case management orders and it now being too late to prepare for the listed final hearing.

24. In reply on 5 September 2019, the Claimant objected to a strike out. He said he had not realised he was required to provide a list of documents. He attached a list of documents and copies.

25. By a letter of 11 September 2019, the Tribunal (EJ Livesey) postponed the final hearing, on the ground that it was by then too late for the case to be ready, and 25 September 2019 (one of the days of what should have been the final hearing) would instead be used to hear the Respondent's strike out application.

26. On 12 September 2019, the Claimant requested an order from the Tribunal for the Respondent to provide further information and additional documents. This was largely a repetition of his request made on 28 June 2019.

27. On 14 September 2019, the Tribunal (EJ Roper) required the Respondent to confirm by return whether it consented to provide the information requested by the Claimant.

28. On 17 September 2019, the Respondent replied to the Tribunal attaching a

copy of its email to the Claimant of 12 August 2019 as setting out its position (i.e. what it had supplied and its reasons for not going further).

29. On 18 September 2019, the Claimant sent an email to the Tribunal saying it was not clear to him whether the parties were required to attend in Court on 25 September 2019 and asking for confirmation. This email was not replied to by the Tribunal or copied to the Respondent.

30. On 24 September 2019:

    30.1. the Claimant wrote arguing that the Respondent's application should be dismissed;

    30.2. the Tribunal (REJ Pirani) responded that the matter remained listed for hearing in person on 25 September;

    30.3. the Claimant said it was now too late for him to attend a hearing on 25 September as he was in Poland caring for a child, he sought postponement and conversion to a telephone hearing;

    30.4. the Respondent commented that the hearing had been listed some time ago, the Claimant was on notice of it, his position unreasonable, costs had been incurred and the hearing should proceed.

31. In the early hours of 25 September 2019, the Claimant sent an email complaining of the Tribunal's failure to respond to his email on 18 September 2019, saying this released him from responsibility for non-attendance, citing his understanding of English being poor and saying the Respondent's solicitor should not discriminate against him on this ground."

11. That caused Employment Judge Maxwell to make the following observation:

> "Whether wilfully or through inadvertence, the Claimant has been a difficult and uncooperative litigant. He has failed to comply with Tribunal orders. Whilst he appears to understand when the Tribunal has ordered the Respondent to do something, this breaks down when he is the one who is required to act. The Claimant also makes repeated and unnecessary allegations of bad faith, not only against the Respondent but also its lawyers; he can make these points at a final hearing to the extent that they are relevant, but simply repeating them in correspondence serves no purpose, save to obstruct cooperation between the parties.

12. In that same preliminary hearing Employment Judge Maxwell rejected an application by the Respondent to have the matter struck out for serial procedural failures, instead he opted for the lesser sanction of making unless orders.

13. The matter came before Employment Judge Maxwell again on 11 December 2019. There was a dispute about compliance with disclosure obligations. Again, Employment Judge Maxwell declined to strike out the Claimant's claim, finding him on that occasion not to have been materially in breach of the unless orders relating to disclosure. That hearing of course predated the expiry of the obligation to serve the witness statements on 15 January 2020.

14. The Claimant did serve one witness statement, it was from his partner. It was a short statement. His partner gave some evidence about the physical fitness of Mr and Mrs Antrobus who I infer were employed by the Respondent. She expressed the view that they were more disabled than her partner. She said she was surprised when her partner was dismissed for alleged inability to work.

15. By email dated 16 January 2020, addressed to the Tribunal but copied in to the Claimant, the Respondent's solicitors made clear their position that the Claimant had failed to serve a witness statement in his own name as was required and they pointed out that he was in material breach of the unless order and applied for a strike out.

16. A letter sent by the Tribunal pointed out to the Claimant that on the face of it he was in breach of the order but he was at liberty to apply for relief under Rule 38 paragraph 2.

17. The Claimant made such an application for relief in a long and detailed email written in English of a perfectly good standard, sufficient for anyone to understand. He, once again, stated his position that the obligation for service of a witness statement does not apply to a party but only to a third party witness. He submitted he had complied with the obligation to serve a witness statement namely that of his partner and otherwise he would rely on medical evidence.

The present hearing

18. The hearing then was arranged before me today. Today is a Monday; on Friday, the last working day before today, the Tribunal received notification from the Claimant that he might struggle with connectivity issues. He could only connect by way of phone he said and he predicted difficulties. I sent out a message asking him perhaps to borrow a computer or a tablet in which he could make more meaningful participation. In the event when I opened up the CVP hearing today he was connected but I could not see him and I could not hear him.

19. I could see a wall at the Claimant's end but no one in front of it. I concede to being sceptical of the Claimant's inability to participate, given the history of proceedings. The Claimant was on-line. I could see a picture of a wall. I do not understand why he was not in front of the wall. Ultimately, the Claimant was able to type on the chat line as described in the paragraph below. If he was connected by chat text, how was he not connected otherwise?

20. After a while, we received a message in Polish on the text chat that runs alongside the CVP video. It was to the effect of 'what's happening?'. We established that it was possible to communicate with the Claimant by the written chat line. We had the invaluable assistance of Ms Teixeira-Vaz, the court appointed interpreter who translated the Claimant's messages into English and sent interpreted messages in Polish. She has provided a

translation for the Tribunal file. The translation is of the chat line messages that were sent. The messages sent on my behalf contained the gist of what was intended to be communicated. A mode of communication being established, I decided to proceed. The Claimant could seek to explain over the text chat why he still had not provided a witness statement. The Claimant made a series of representations, and the Tribunal made a series of responses - including questions - in return, whereby the Claimant's position and the Tribunal's position was made clear.

21. Before me, the Claimant reiterated the same position. He submitted that he was under no obligation to serve a witness statement in his own name but only to serve a witness statement from any third party witnesses. I directed him to the relevant paragraphs of the unless order dated 25 September 2019 and suggested to him that there could be no misinterpretation of those orders. There was no basis for his position that he did not himself have to provide a witness statement. Indeed, the orders of Employment Judge Ford QC made the same crystal clear. His position that he was not under such an obligation was untenable.

22. There was still no statement prepared by him today. There was no statement from him in support of his application to revoke the effect of the unless order and there was no witness statement available today.

23. I have concluded that the Claimant's position not to provide a witness statement was a deliberate and calculated one and one about which he did not care whether it was in breach of the Tribunal orders or not. There is no other interpretation of the Tribunal orders that he was required to provide a witness statement. He deliberately has not done so. In those circumstances it is not possible for me to find a basis for saying it is in the interests of justice to revoke the effect of the unless order.

24. This is a complicated case in which it is essential that there is a full statement of evidence from the Claimant in support of his claims. A fair process cannot happen without this. The Claimant in submission today pointed to his claim form as being a substitute witness statement. I reject that suggestion; the particulars of claim are very sparse in terms of detail. The Tribunal would require far more than is contained in the particulars of claim.

25. In the chat he also represented that this was the first time it had been made clear to him that he himself needed to provide a witness statement. I reject that. It is clear from the Tribunal orders that precede today that the position was made crystal clear to him.

26. In my judgment, a combination of the Claimant's intentional position not to comply with Tribunal orders and the need for a witness statement to hold a fair hearing, force me to conclude that it is not in the interests of justice to revoke the effect of the unless order dated 25 September 2019. If the Claimant wished to pursue a claim before the Tribunal, he had to play by the rules.

27. In the chat, having communicated my decision, the Claimant has suggested that he is the victim of discrimination because no allowance has been made for his Polish language and his understanding of the position as a Polish person. I regard that position as entirely bogus. The Tribunal orders are crystal clear. I have seen from emails sent in by the Claimant that he has a perfectly good understanding of English sufficient to understand the Tribunal orders. If he were in any doubt as to the meaning of the Orders, he should have sought assistance. He will not have been in any doubt, however.

28. Rather like Employment Judge Maxwell, I have formed the impression that the Claimant simply does not wish to cooperate with the process. I infer, further, that actually he does not want to bring this claim. Actions speak louder than words, sometimes.

29. Accordingly, I do not revoke the effect of the unless order. The claim remains dismissed.

Costs

30. The Respondent has applied for £48,000 worth of costs. There clearly is a basis for an application for costs. There has not been a proper schedule of costs in CPR compliant fashion. Such must be created if the Respondents wish to pursue costs. They indicate they want a detailed assessment. I have asked that they make preliminary enquiry that the Claimant is likely to have some means with which to pay any award of costs. Otherwise, future proceedings in this regard are a waste of time and will incur further unrecovered costs. If the Tribunal is required to hold a detailed assessment, that in turn will involve significant amount of Tribunal time. The Respondent, via its counsel, indicated they understood that it is only worth pursuing costs if there is some prospect of recovery. Accordingly, I have made the procedural orders relating to costs in the terms that they are at the top of this judgment.

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Employment Judge Smail

Date: 30 November 2020……..