EMPLOYMENT TRIBUNALS

Claimant: **Ms T Munir**

Respondent: **RMR Electrical Solutions Limited**

JUDGMENT

The Respondent's application for relief from sanction under rule 38(2) of the Employment Tribunal Rules of Procedure 2013 is refused.

REASONS

Background

1. The claimant presented her claim to the Tribunal on 5 March 2020 following periods of early conciliation between 21 January 2020 and 6 February 2020, and on 3 March 2020.

2. The claimant's claims were for unfair dismissal; wrongful dismissal; unauthorised deductions from wages; failure to pay holiday pay; failure to provide written reasons for dismissal; and, failure to provide written particulars of employment.

3. She initially claimed harassment and direct discrimination (based on the protected characteristic of sex) and breach of contract in respect of a loan repayment, but these claims were subsequently withdrawn. The respondent's director and representative, Mr R Rose, was named as a second respondent but was dismissed on withdrawal of the discrimination claims.

4. The respondent submitted its defence on 1 May 2020 and was clearly drafted with the benefit of legal/professional assistance.

Previous preliminary hearings

5. The case was subject to a closed preliminary hearing before Employment Judge Adkinson ("EJ Adkinson") on 4 June 2020. EJ Adkinson noted that against the background of the claim, there was an allegation by the claimant of domestic violence and the family court had made a non-molestation order in her favour against Mr Rose. There was also an outstanding allegation proceeding before the criminal courts that he (Mr Rose) had breached the order. Accordingly, EJ Adkinson put in place the following special measures in respect of the final hearing;

> *"The claimant shall be screened from Mr Rose throughout the hearing; and*
>
> *If Mr Rose represents the first respondent, he will not be allowed to ask questions of the claimant directly. He must instead ask them through the judge. He agreed he would send a list of questions for the judge. If the first respondent is represented then this direction will be unnecessary".*

6. EJ Adkinson made the special measures subject to the following orders:

> "*The claimant shall be screened from Mr Rose at all times during the hearing, and shall not be questioned personally by Mr Rose (though she may be questioned by the respondent's representative (if not Mr Rose) or by the judge putting Mr Rose's questions to her.*
>
> *If Mr Rose is representing the first respondent at the final hearing and he wishes to ask questions of the claimant, he must write them out and send them to the tribunal so that they arrive on the working day before the final hearing (and not before that day) by noon. He is not obliged to send them to the claimant and the tribunal must not forward them to the claimant unless directed to do so by an Employment Judge…*"

7. Thereafter, he made case management orders in relation to disclosure, the final hearing bundle and exchange of witness statements.

8. On 8 June 2020, Mr Rose wrote to the tribunal requesting special measures himself. In particular, he asked for permission not to be present in the same building as the claimant. The application was considered by me and I concluded that it was not proportionate to make the additional measures as requested.

9. A further closed preliminary hearing was conducted by Employment Judge Britton ("EJ Britton") on 19 August 2020 to discuss the arrangements for the final hearing. The respondent failed to attend. EJ Britton issued an unless order in the following terms:

> "*the respondent having failed to take part today, unless it provides a convincing explanation for the non-appearance in writing within seven*

days of the publication of this order, the response will be struck out for want of prosecution".

10. EJ Britton also granted the respondent's application that Mr Rose would not be present in the same building as the claimant as follows:

> *"The respondent's application that Mr Rose be permitted to not be present in the same building as the claimant is granted. Instead he will participate via the cloud video platform. To that end he must confirm he has access to the Internet when providing his explanation for why the response should not be struck out. For the avoidance of doubt, the restrictions on his questioning as per the special measures ordered by Employment Judge Adkinson at the telephone case management hearing (TCMPH) on 4 June 2020 as set out at paragraph 12 and as published on the same day still apply. The claimant and her representative will still attend the actual hearing at Leicester as the claimant is not sufficiently confident to participate remotely……"*

11. EJ Britton also varied the date for preparation of the final hearing bundle to Friday, 25 September 2020 and the date for exchange of witness statements remained 23 October 2020.

12. The respondent complied with the terms of the unless order providing an explanation for his non-attendance at the hearing by email on 2 September 2020.

Case management orders

13. The respondent failed to comply with its disclosure obligations in respect of two letters dated 17 October 2019 and 22 November 2019, both of which are referred to in its defence. The claimant requested an unless order in respect of their disclosure, along with an order for specific disclosure of their metadata and various bank statements.

14. The application was placed before Employment Judge Heap who declined to make an unless order, but made orders for copies to be disclosed within seven days, along with a screenshot of the 'properties' section of the Word documents showing when the letters were created and last modified.

15. The respondent failed to comply with the orders and, on 23 October 2020, the claimant made an application for an unless order. The application was considered by Employment Judge Jeram ("EJ Jeram") on 30 October 2020 who made the following orders;

> *"Unless by 4pm Monday, 9 November 2020, the respondent sends to the claimant's legal representative and the tribunal a copy of the*

respondent's letter to the claimant dated 17 October 2019, its response to the claimant's claim of unfair dismissal, failure to provide written reasons and notice pay shall stand dismissed, without further order

Unless by 4pm Monday, 9 November 2020, the respondent sends to the claimant's legal representative and the tribunal a copy of the respondent's letter to the claimant dated 22 November, its response to the claimant's claims of unfair dismissal, failure to provide written reasons and notice pay shall stand dismissed, without further order".

16. EJ Jeram declined to make disclosure of the metadata and bank statements subject to an unless order, but directed that the respondent's failure to provide the same would be considered at the commencement of the final hearing and whether the defence should be struck out in accordance with rule 37(1)(b), (c) or (e) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

17. Additionally, EJ Jeram ordered the claimant to send a copy of the final hearing bundle to the respondent on 11 November 2020 and the parties to exchange witness statements on 16 November 2020. She also confirmed that:

"*the other provisions made at paragraphs 37 to 41 of the orders of EJ Adkinson remain unaffected by this order*".

18. The respondent disclosed the two letters, but failed to disclose the metadata. It also failed to comply with the order to exchange witness statements. Accordingly, on 17 November 2020, the claimant made a further application for an unless order that the respondent serves its witness statement/s by 4pm on the same date.

19. The respondent responded to the application, essentially saying that he could not afford legal representation, nor did he understand the tribunal rules. It was not possible for him (Mr Rose) to meet all deadlines set by the tribunal because the claimant had made several other allegations and filed multiple court cases against him which he had to prepare for, as well as carrying out his day job.

20. The application was placed before EJ Adkinson who made the following unless order on 19 November 2020:

"Employment Judge Adkinson orders that the respondent must send written statements of all witnesses who propose to give evidence to the claimant and confirm to the tribunal it has done so by no later than 20 November 2020 at 1pm. If the respondent does not do so, then the response will be struck out and the respondent treated as having not presented a response to the claim, and the hearing commencing on 23 November 2020 will proceed on the basis that it is assessing compensation. The respondent

should note that if Mr Rose wishes to give evidence about what happened to the tribunal, he is a witness and must produce a witness statement accordingly….."

21. On 20 November 2020, Mr Rose emailed the tribunal attaching a copy of his witness statement, but failed to confirm that he had copied it to the claimant. The file was placed before Employment Judge Clark who confirmed that the response had been dismissed because the respondent had failed to comply fully with the terms of the unless order. He noted that:

> "*Employment Judge Adkinson's order contains two elements. The first was for the respondent to send any witness statements to be relied on to the claimant. The second was to confirm to the tribunal it had done so. Both had to be completed by the date and time stated. The sending of a witness statement to the tribunal does not confirm that the same has been sent to the claimant. The respondent is therefore in breach of the terms of the unless order and the sanctions indicated by Employment Judge Adkinson that would automatically follow have now engaged…..The hearing on Monday 23 November will therefore proceed on that basis unless and until an application for relief under rule 38(2) is made and granted. Any such application will have to be made in writing to the tribunal, copied to the claimant's representative and considered at the commencement of the hearing on Monday".*

The hearing on 23 November 2020

22. The hearing proceeded before me on 23 November 2020. Mr Rose for the respondent attended the tribunal premises in clear breach of EJ Britton's order that he would participate via CVP. I declined to allow him to attend in person, but allowed him time to return home to join by CVP at a later start time of 12pm.

23. Mr Rose joined via CVP, but not until 12:42pm, well after the hearing had commenced. He did not make an application for relief from sanction, despite confirming that he had been informed of, and understood, his right to do so. Accordingly, the response remained dismissed.

24. Mr Rose also failed to provide any questions for me to ask of the claimant in breach of EJ Adkinson's order made on 4 June 2020, nor did he make an application for an adjournment to allow him to comply with the order to provide such questions. Accordingly, I declined to allow the Respondent to participate in the hearing. I explained to Mr Rose why I had decided on that course of action.

25. Whilst a respondent should not typically be debarred from participating in a remedy hearing, I considered the respondent's action in, firstly, attending the premises in breach of an order and, secondly, failing to comply with the special

measures ordered (and of which he had been reminded on several occasions), amounted to exceptional circumstances so as to justify excluding it (*Office Equipment Systems v Hughes [2018] EWCA Civ 1842*).

26. I gave judgement in the claimant's favour and awarded compensation. My judgement was sent to the parties on 2 December 2020.

The Respondent's application for relief from sanction

27. On 2 December 2020, the respondent made its application for relief from sanction. Mr Rose apologised for failure to comply with the unless order dated 19 November 2020 and stated:

> "*Although these are separate matters, they did affect my efforts to defend the claims brought forward by the claimant.*
>
> *The claimant had filed multiple vexation allegations to the criminal court, family court and tribunal court. I am exhausted from all of this as well as daily workload.*
>
> *I am asking please can you consider giving me the opportunity to have a fair trial because there is no doubt the claimant has misled the tribunal with the evidence provided by her legal representative".*

28. Mr Rose said that he was unaware that he was not to attend the tribunal premises on 23 November 2020. He also said that during the hearing itself, I had put him on mute so he could listen and take notes, but in fact, he could not hear the proceedings at all. At no point did he alert the Tribunal that he was having any difficulty hearing. Further, I also checked with him at various points that he understood why the respondent was prevented from taking part in the hearing, his right to apply for relief from sanctions, and the judgment on remedy. Mr Rose confirmed his understanding of the same and did not assert that he was unable to hear.

29. As part of the application, Mr Rose provides some evidence about loans and repayment of the same in the context of his personal relationship with the claimant. However, he provides no explanation as to why the claimant was not paid the national minimum wage, nor any evidence that the claimant consented to a deduction from her wages.

30. The claimant submitted a lengthy objection to the respondent's application on 18 December 2020.

The law

31. The test that I am required to consider is whether it is in the interests of justice to have the order set aside. Rule 38(2) provides:

> *"(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations."*

32. In certain circumstances the interests of justice would best be served by granting relief to the party in default. Factors to consider include the reason for the default, the seriousness of the default, the prejudice to the other party and whether a fair trial remains possible – ***Thind v Salvesen Logistics EAT 0487/09***.

33. In ***Enamejewa v British Gas Trading Ltd and anor EAT 0347/14*** Mr Justice Mitting clarified that, when considering an application for relief against sanctions, the focus of the tribunal can go wider than simply the reason and circumstances prevailing at the time the unless order was originally issued.

> *"Of course, the reasons for making an unless order in the first place are highly relevant factors. But it does not follow that the focus of the Tribunal is confined only to such factors. Nothing in Rule 38 prohibits an Employment Judge considering whether or not to revoke or set aside an unless order from taking into account events which have occurred subsequent to the making of the order. And there is no reason of principle why that should be so. Something that has occurred subsequent to the making of an unless order can make it in the interests of justice that the unless order should be revoked."*

Deliberations

34. The respondent has not requested a hearing so I have determined the application based on both parties' written representations.

35. Mr Rose submits that he failed to comply with the terms of the unless order because he was exhausted consequent of multiple proceedings against him, alongside his daily work. This is not a satisfactory explanation. Whilst Mr Rose may have multiple proceedings issued against him, this does not permit him to pick and choose which proceedings he engages with (or not), and when.

36. I consider that Mr Rose has participated in these tribunal proceedings to suit. He has continually failed to comply with orders and has only seen fit to engage on an occasional basis, most typically when the Response was at risk of being dismissed.

37. Turning to the breach of the unless order itself, Mr Rose complied with it partly by sending his witness statement to the claimant. However, this was not apparent from Mr Rose's e-mail to the tribunal attaching a copy of his statement. The e-mail was not copied to the claimant, nor did it confirm that the statement had been sent to her under separate cover. Compliance in part is not sufficient to comply with its terms.

38. I am mindful of the wider circumstances in play at the time the unless order was made. The respondent had continually failed to comply with the orders of the tribunal, hence the unless order to disclose any witness statements on the last working day prior to the final hearing. Whilst failure to advise the tribunal that the respondent had sent its witness statement to the claimant is not in itself necessarily serious, the fact of continual non-compliance with orders is serious and undermines the overriding objective of the tribunal to deal with cases fairly and justly.

Prejudice to the respondent

39. In deliberating the prejudice to the respondent of being unable to defend the claims, I have considered the respondent's conduct of the proceedings, alongside the merits of its defence.

40. As set out above, the respondent has engaged in these proceedings to suit and has persistently breached orders of the tribunal.

41. The merits of the defence are relevant in the context of prejudice to the parties should the order be set-aside and the case re-heard. At the hearing on 23 November 2020, I had sight of both parties' witness statements, along with a bundle of documents incorporating documents produced by tmihe respondent. I tested the claimant's evidence before giving judgment in her favour.

42. I am satisfied that even if the respondent was given further opportunity to defend the claim, the defence would still fail and the respondent would be in the same position it finds itself in now.

43. I base my conclusion in this regard on the following: In response to the claimant's claim of unfair dismissal, the respondent asserts in its defence that the claimant was invited to a disciplinary hearing to discuss the following allegations:

- *"Unauthorised absence from work and failure to contact the claimant's line manager;*

- *Industrial espionage in relation to the transferring of business calls to a third-party company for business profits;*

- *Loss of trust and confidence;*

- *Deletion of company sensitive information and data with lack of reasonable justification; and*

- *Failure to fulfil duties within the role, namely the claimant failing to answer the phone and diverting business calls to the second respondent".*

44. It says that the Claimant was invited to the disciplinary hearing was by way of letter dated 17 October 2019, but she failed to attend. The hearing proceeded in her absence and the decision to dismiss her was confirmed in writing on 22 November 2019. It denied all other heads of claim, save the failure to provide written particulars of employment.

45. The respondent was ordered to provide the metadata/properties of the letters referred to above to establish that they were indeed produced at the time, and not subsequently to support the respondent's defence. It has failed to produce this information to date, with no explanation.

46. In Mr Rose's brief witness statement submitted on 20 November 2020, the respondent's story changes. He says that:

> *"on 17 October 2019, the claimant used my fingerprints to access my mobile phone whilst I was asleep. The claimant and her daughter both accused me of being unfaithful. Out of spite the claimant deleted the company files on QuickBooks accountancy software. She was given a letter of dismissal the same day…"*

47. This is inconsistent with the original defence and no additional letter of dismissal dated 17 October 2020 has been adduced.

48. In respect of the pay claims, Mr Rose failed to advance any evidence in the respondent's defence at all.

49. At the hearing on 23 November 2020, having regard to all the material before me, I was satisfied that the claims were well-founded. The respondent has not produced any further evidence or submission to persuade me that its defence has any merit. The documents attached to the respondent's application take it no further in its defence of the wages or holiday pay claims and were in fact considered by me at the hearing. Accordingly, the defence will likely fail again and the respondent will be in the same position if the case was re-heard. It will, therefore, suffer little prejudice if the order is not set aside.

Prejudice to the claimant

50. The prejudice to the claimant, on the other hand, would be considerable. She has faultlessly complied with the tribunal's orders and her claims have succeeded. If she is deprived of the existing judgement she would be obliged to spend more time and money attending a further hearing and would face considerable delay and uncertainty. The interests of justice include delivering justice within a reasonable time and at reasonable cost and this would not be achieved if the respondent were permitted another bite of the cherry.

Conclusions

51. The hearing in this matter has already taken place, the claimant's evidence tested and judgement delivered. The respondent was given numerous opportunities to comply with the tribunal's orders and to participate in the hearing. It consistently failed to cooperate with the proceedings up to and including attendance at the hearing on 23 November 2020 – and, even at the time of this application orders for disclosure remain outstanding.

52. The interests of justice must be served to both parties and the claimant has already been prejudiced by the respondent's continual failure to comply with the orders. Given that the respondent has still not complied with all the tribunal's orders to date, failed to comply with the full terms of the unless order and has failed to provide any adequate or satisfactory submission to persuade me that it would be in the interests of justice to set the order aside, the respondent's application for relief from sanction is refused.

Employment Judge Victoria Butler

Date: 18 February 2021

JUDGMENT SENT TO THE PARTIES ON

19 February 2021

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FOR THE TRIBUNAL OFFICE