EMPLOYMENT TRIBUNALS

Claimant: Mr A Razzaq

Respondent: Qiagen Limited & Others

Heard at: Manchester **On:** 3 February 2021 (in Chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: Not in attendance
Respondent: Not in attendance

JUDGMENT

The judgment of the Tribunal is that:

The claimant's application for relief from sanction following the striking out of his claims for non compliance with unless orders is refused.

REASONS

1. The claimant applies for in effect relief from sanction following the striking out of his claims for failure to comply with an Unless Order made on 21 April 2020. The claimant's grounds for applying are that he had technical issues which meant his information was received one minute after the deadline i.e. one minute past midnight on 13 May rather than received by midnight on 12 May.

2. The respondents say that the claimant had the responsibility of ensuring he complied by the deadline given, and that in any event he has not complied fully with the request for further and better particulars.

3. Both parties agreed that the decision as to whether to give the claimant relief from sanction could be made in chambers.

The Facts

4. There was a case management discussion on 16 December where, after considerable discussion, I set out the claimant's claims as I saw them on the basis of the discussion. At that point the claimant had said he had sent a 20 page addendum with his claim, however the Tribunal could not find any record of this and subsequently the claimant was never able to provide it. Accordingly, the claimant then had to apply to amend to include various claims. That amendment application was considered at the preliminary hearing case management on 21 April 2020 and they were allowed.

5. At that hearing on 21 April 2020 I made two Unless Orders at paragraph 25. One was regarding a disability impact statement, as follows:

> "I order that unless the claimant complies with the Case Management Order number 5.2 of the Case Management Orders given on 16 December 2019, by 12 May 2020, in that he provides to the respondent and the Tribunal a disability impact statement that is compliant with the requirements of the Equality Act as explained in 5.2 of the Case Management Orders, his claim will be struck out without further consideration or order or hearing in compliance with rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

6. Failure to provide further and better particulars, as follows:

> "I make an Unless Order that unless the claimant provides the further and better particulars ordered in the Case Managements Orders of 16 December 2019 by 12 May 2020 his claim will be struck out without consideration or order or hearing in respect of compliance with rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013."

7. The order on 16 December 2019 in relation to the disability impact statement was as set out as a standard order as follows:

> "The claimant must also, by 18 January 2020, provide the respondent with a witness statement which sets out the facts about the impairment(s), the effect on day-to-day activities during the relevant period and the length of time that effect has lasted or was likely to last at the relevant period. If medication was being taken the statement must indicate what the effect on the day-to-day activities would have been without the medication. The claimant is referred to the documents in the Further Guidance section for more information."

8. In respect of the further and better particulars, this said at (2):

> "(2) The claimant within 14 days, i.e. by 30 December, to provide further and better particulars in relation to each of the named individuals setting out when and how they discriminated against him and what was the nature of the discrimination, was it disability, and if so what type of disability, was it race, and if so in relation to which issues, was it religious issues, was it religious discrimination, and if so in relation to which issues, setting out what each person did specifically.

(3) Both parties within 13 days, i.e. by 30 December, to supply any information referred to above as 'to be confirmed'."

9. In respect of the second part, the two matters which needed to be confirmed by the claimant were at paragraph 15 and paragraph 17 of the Case Management Order as follows. Paragraph 15 was in relation to direct discrimination because of race and referred to the comparators the claimant relied on. Paragraph 17 was in relation to direct discrimination because of religion at 17(2) and again asked the claimant to state what comparators he relied on, or in effect to indicate in respect of both whether he only relied on hypothetical comparators.

10. The claimant had already attempted to comply with providing a disability impact statement, however this was inadequate as set out in paragraphs 4(1)-(3) on 21 April, where I gave the claimant further guidance on what should be included in a disability impact statement as the one submitted was inadequate. It was in the claimant's interest to provide a sufficient disability impact statement in order to further his case in establishing that he was a disabled person for the provisions of the Equality Act 2010.

11. In respect of the failure to provide further and better particulars, paragraph 4(4) sets out the claimant's failures in respect of providing the original further and better particulars ordered on 16 December. The claimant said the further and better particular answers were in his statement attached to the claim form, however it now appeared that it was not attached the claim form, and in the disability impact statement which he had served. I made it clear to the claimant that the further and better particulars needed to be in one document and to specifically answer the matters raised. It was not for the respondent or the Tribunal to have to delve into the further and better particulars and into different documents in order to guess the claimant's intentions.

12. The claimant did provide at one minute past midnight a further disability impact statement and further further and better particulars referring to the additional individually named respondents.

13. I struck out the claimant's claim as it had been submitted past the deadline of midnight on 12 May.

14. The claimant then applied for the Tribunal to look at this issue again and I have treated his application as a relief from sanction application as the claimant cannot avail himself of the reconsideration provisions of the rules as these only apply where an application is made within 14 days of the Unless Order being made.

The Law

15. Under rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 an Employment Judge or Tribunal has the power to make an Unless Order, namely an order stating that if it is not complied with the date specified the claim or response, or part of it, shall be dismissed without further order. A party whose claim or response has been dismissed as a result of an Unless Order may apply to the Tribunal in writing within 14 days of the date that the notice was notice was sent to have the order set aside (this is the Order of the Tribunal giving written notice to the parties confirming that the case has been dismissed – rule

13(1)), on the basis that it is in the interest of justice that the notice is set aside. Such an application can be decided on the basis of written representations.

16. **Wentworth-Wood v Maritime Transport Limited EAT [2016]** summarised the required approach in relation to Unless Orders. The first stage is the decision whether to impose an Unless Order, and if so on that terms which is to be taken in accordance with the overriding objective. Because of its drastic effect care should be taken in the decision to make an Unless Order and drafting its terms. The second stage is the decision to give notice under rule 38(1), at which stage the Tribunal is neither required nor permitted to reconsider whether the Unless Order should have been made but is required to form a view as to whether there has been material non compliance with the Unless Order. [**Need to put the date of the notice in the narrative above**] The third stage on an application under 38(2) is to decide whether it is in the interest of justice to set aside the Unless Order at which stage the Tribunal considers relief against sanction and can take into account a wide range of factors including the extent of non compliance and the proportionality of imposing the sanction. If an Unless Order is hopelessly ambiguous, that would lead to a consideration that the decision to strike out should be reconsidered.

17. In **Uwhubetine v The NHS Commission Board (England) EAT [2018]**, special care should be taken in deciding whether to make an Unless Order given that its terms cannot be revisited if and when non compliance is being considered. Where an EAT is determining whether there has been compliance with an Unless Order, and hence whether to give written notice as to whether the relevant pleading has been dismissed by the Unless Order taking effect, the EAT is not concerned at that point with revisiting the terms of the Order in order to decide whether it should have been made and in what terms, nor is it concerned with relief from sanction if there has been non compliance with the Order. It is a matter of whether or not there has been material non compliance which should be addressed as a qualitive rather than a quantitative test, and in a case of orders for further and better particulars the benchmark is whether the particulars have sufficiently enabled the relevant party or parties to know the case they must meet. No special formalities are required for the determination of the issue of non compliance with an Unless Order, although of course the EAT must comply with the overriding objective.

18. As rule 38(1) makes clear, the consequence of an Unless Order that is not complied with is the automatic dismissal of whole or part of the claim or response. No other act is necessary to effect the dismissal, and as noted in **Uwhubetine**, no time limit is prescribed for the EAT to issue any written notice confirming that the Unless Order has taken effect, but it ought to be dealt with quickly in order that any party who wishes to appeal or apply for relief from sanction can do so.

19. The ground on which an application to set aside will be considered is that it is in the interests of justice to do so, which is the same ground for reconsideration under rule 70, and accordingly the Tribunal should adopt a similar approach.

20. In **The Governing Body of St Albans Girls School v Neary [2009]** the Court of Appeal overruled previous authority in which the EAT had held that the Employment Tribunals were obliged to consider all of the nine factors formerly listed in CPR rule 3.9 on an application of relief from sanction for non compliance with an Order. It was said:

> "It's one thing to say the Employment Tribunal should apply the same general principles as are applied in the Civil Courts and quite another to say they are obliged to follow the letter of the CPR in all respects."

21. The Judge or Tribunal should just decide the application rationally and not capriciously, deciding on the basis of relevant factors and discarding irrelevant factors, demonstrating that the factors have been weighed affecting the proportionality of the sanction:

> "It must be possible to see that the Judge has asked himself whether in the circumstances the sanction had been just."

22. The onus is on the claimant to show that relevant matters have not been considered by the Judge.

23. Underhill J in **Thind v Salvesen Logistics Limited EAT [2009]** stated:

> "The Tribunal must decide whether it is right, in the interests of justice and the overriding objective, to grant relief to the party in default notwithstanding the breach of the Unless Order. That involves a broad assessment of what is in the interests of justice and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will in general include but may not be limited to the reason for the default, and in particular whether it is deliberate, the seriousness of the default, the prejudice to the other party, and whether a fair trial remains possible. The fact that an Unless Order has been made, which of course puts the party in question squarely on notice of the importance of complying with the Order and the consequences if he does not do so, will always be an important consideration. Unless Orders are an important part of the Tribunal's procedural armoury (albeit one not to be used lightly) and they must be taken very seriously. Their effectiveness will be undermined if Tribunals too readily set them aside but that is nevertheless no more than one consideration. No one factor is necessarily determinative of the course which the Tribunal should take. Each case will depend on its own facts."

24. Although he noted further that provided the Order itself has been made appropriately there is an important interest in Employment Tribunals enforcing compliance and it may well be just in such a case for a claim to be struck out even though a fair trial would still be possible.

25. In **Opara v Partnerships in Care Ltd EAT [2009]** the EAT said:

> "When a Tribunal is considering whether to grant relief against a sanction the main focus will be on the default itself:
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> (i) The magnitude of the default;
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> (ii) The explanation for the default;
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> (iii) The consequences of the default for the parties and the proceedings;

(iv) The consequences of imposing the sanction on the parties and the proceedings; and

(v) The promptness of the application to remedy the default."

26. In **Enamejewa v British Gas Trading Limited EAT [2014]** it was held that the Tribunal must, if it is just to do so, take into account events that have occurred since the making of the Order as well as the reason for which it was made. It is not however correct for a Tribunal to approach the application on the basis that the determinative question is whether or not it was wrong for the Unless Order to have been made in the first place. It was also made clear that the mere fact of the delay in complying with the Order is short is not of itself a reason for setting the Order aside, and the facts of **Enamejewa**, although the claimant was only eight minutes late in emailing his witness statement, this was held to be a significant and serious breach which "had the effect of automatically vacating the hearing date and so putting the innocent party, the employers, to significant and unnecessary expense and difficulty".

27. One of the overriding principles set out in **Marcan Shipping (London) Limited v Kefalas [2007] Court of Appeal** is that compliance with an Order need not be precise and exact; what matters is whether it is material or substantial and therefore much will depend on the actual wording of the Order. The purpose is for the other party to know the case it has to meet.

Conclusions

28. The main argument of the claimant in respect of relief from sanction is that due to technical problems he was one minute late with submitting his claim . As I was not aware of this at the time I decided that there had been non compliance with the Unless Order. It is proper that I consider whether or not there was compliance with the Unless Order. Whilst there is clearly case law which says the lateness or of the compliance is not a determinative factor, it has to be a relevant one. Accordingly, just on that basis I would give the claimant relief from sanction if he has otherwise materially complied with the orders made.

29. Accordingly, if I approach the matter as if he had complied with the time limit, I will then move on to consider the material compliance question in relation to both Unless Orders.

Disability Impact Statement

30. In relation to the disability impact statement, the claimant has still reverted to referring to hospital visits and hospital diagnosis rather than concentrating on, as I emphasised with him, the effect on day-to-day activity which whilst this could include matters that happened at work he had to refer to matters that happened in his normal day-to-day activities. The claimant has barely touched on this point.

31. In relation to the other matters which on 16 December he was advised had to be included in the disability impact statement, the claimant has not referred to his medication, nor has he referred to the relevant period and the length of time the effect has lasted or was likely to last.

32. An alternative approach to striking the claimant's disability discrimination claim out would have been to let matters progress to a preliminary hearing on disability status at which the claimant would struggle to establish his status due to the paucity of the information provided in his disability impact statement. This is in fact the reason why he was given a second chance to provide a disability impact statement, because his first impact statement fell foul of these inadequacies also.

33. The failure of the claimant to include the information regarding the length of time which I had highlighted to him was a potential weakness in his claim, and that is recorded, and that means that any hearing may have been subject to requests for last minute amendments, additional verbal evidence, and potentially a postponement. That is the reason why the disability impact statement exists, to be completed well in advance of any hearing. In fact the hearing on disability was due to take place on 21 April 2020 on the basis that the claimant would have complied with this aspect of the claim by 18 January 2020. As he had not done so, that hearing had to be converted to a case management hearing and a further hearing on disability status was listed for 12 October 2020, however by that time the claimant's claim had been struck out.

34. I find the claimant has failed to materially comply with the requirement to provide the relevant information in his disability impact statement.

Further and Better Particulars

35. The claimant had to provide further and better particulars in relation to each of his named individual respondents regarding which claims he brought against them and what part they played in relation to that. The claimant has produced a general timeline naming various parties at various times in relation to his application for flexible working. He does not mention whether this is disability discrimination, race discrimination, etc., and he refers in relation to the flexible work and the dismissal as being the responsibility of the five individual respondents, however he does not comply at all with the requirement in the case management Unless Order to say whether those claims are disability, what type of disability claim, whether there is any race or religious discrimination claim made in respect of them as well, and this is a truly relevant question because the flexible working request, whilst it was a disability claim, was also listed as a race discrimination claim, and there is no mention of whether that is pursued in respect of these individuals

36. In addition the claimant has not indicated any comparators in relation to his disability/race claim regarding the flexible work request even though he clearly refers to others being treated differently this were a matter simply of hypothetical comparators I would take a different view but there is material non compliance with the order for those specific further and better particulars.

37. Whilst there is material non compliance I have considered whether it would be fair to treat this as, by implication, an indication that only a disability claim in respect of the flexible working, (which was a reasonable adjustments claim), is pursued against the individual respondents; or, as an alternative to striking out the whole claim, strike out the claim against the individual respondents but leave the claim in place against the main respondent, taking into account that that would be more proportionate than striking out the whole of the claimant's claim.

38. However in the absence of a reasonable disability impact statement the claimant's disability discrimination claims would not be able to go ahead in any event. This would leave the race and religious beliefs claims which are hampered by the failure to name comparators. If I gave relief from sanction I would be asking the claimant to again comply with the same orders the unless orders were designed to elicit a meaningful response to .

39. Accordingly as there has been material non compliance and there appears other appropriate response I decline to give the claimant relief from sanction.

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Employment Judge Feeney

Date: 10 March 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

17 March 2021

FOR THE TRIBUNAL OFFICE