



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4106034/2019 (V) Preliminary Hearing by Cloud Video Platform on
11 January 2021

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Employment Judge: M A Macleod

Miss Ashleigh Reid

Claimant
In Person

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Sainsbury's Bank

Respondent
Represented by
Ms E Wheeler
Barrister

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claimant has not materially failed to comply with the terms of the Unless Order dated 12 December 2019, and accordingly that her claims may all proceed, and are not dismissed.

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REASONS

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1. The claimant in this case complains that she was unfairly dismissed, discriminated against on the grounds of disability and unlawfully deprived of pay by the respondent.
2. The respondent resists all claims made by the claimant.
3. A Preliminary Hearing was listed to take place on 11 January 2021 by Cloud Video Platform (CVP) in order to allow parties to participate in the hearing without requiring to travel to Edinburgh during the coronavirus pandemic.

The hearing proceeded smoothly without interruption, and each participant was able to see and hear each of the others.

4. The claimant appeared on her own behalf, and Ms Wheeler appeared for the respondent.
5. The purpose of the hearing was to determine whether or not the claimant had appropriately complied with an Unless Order issued by the Tribunal, to the extent that her claim should be struck out.
6. A bundle of productions was presented, electronically, to the Tribunal for use in this hearing.
7. It is appropriate to set out the background to this hearing, the submissions made by the parties and then the decision of the Tribunal.

Background

8. This case has endured rather a lengthy history, at least in part due to the restrictions imposed in consequence of the coronavirus pandemic, and a number of Preliminary Hearings have already taken place with a view to case management. The most recent of those Preliminary Hearings was convened by Employment Judge Meiklejohn, and the Note produced following that PH contained a useful summary both of the law and of the sequence of events which have led to this hearing.
9. The Tribunal issued an Unless Order to the claimant in the Note following PH on 18 December 2019 (75), in the following terms:

“ORDER TO PROVIDE DOCUMENTS

Employment Tribunals Rules of Procedure 2013

In accordance with the power set out in Rule 31 of the Employment Tribunals Rules of Procedure 2013 an Employment Judge ORDERS that:-

On or before 17 January 2020 you shall provide to Messrs Lewis Silkin LLP, King Charles House, Park End Street, Oxford OX1 1JD, with a copy to the Tribunal at the address shown in the enclosed letter, the information set out in the paragraphs below.

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UNLESS THIS ORDER IS COMPLIED WITH BY THE DATE SPECIFIED, THE CLAIM SHALL BE DISMISSED ON THE DATE OF NON COMPLIANCE WITHOUT FURTHER ORDER.

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1. A copy of the General Practitioner medical records for the relevant period demonstrating the background and history of your impairments.

2. A copy of a General Practitioner report, if available, showing the background and history of your impairments, together with a copy of any reports from specialist practitioners showing the background and history of your impairments.

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3. If so, please specify in what way these impairments have a substantial and long-term adverse effect on your ability to carry out normal day-to-day activities stating particularly which of the following activities are affected: ie

a. Mobility;

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b. Manual dexterity;

c. Physical co-ordination;

d. Continence;

e. Ability to lift, carry or otherwise move everyday objects;

f. Speech, hearing or eyesight;

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g. Memory or ability to concentrate, learn or understand; or

h. Perception of the risk of physical danger?

4. Please set out in as much detail as possible in respect of each of your conditions; its history, the date of first diagnosis, its progress, how it has

affected your ability to carry out normal day-to-day activities, and the prognosis for your condition.

- 5 *5. Please set out in as much detail as possible the impact of your condition upon your ability to carry out the duties of your employment with the respondent, setting out each of the main duties of your employment and how they have been affected.”*

10 *10. In response to this Order, the claimant presented copies of a selection of her GP medical records, some handwritten notes and a report from her GP (77ff), on approximately 17 January 2020.*

11. Upon receipt of this information and at the invitation of the Tribunal to comment, the respondent wrote to the Tribunal on 24 January 2020 (141/2) in the following terms:

15 *“In respect of the Claimant’s handwritten document, it is accepted that she does provide some information which goes to paragraphs 3 and 4 of the Order, but at no point has the Claimant specified what the main duties of her employment were and how they were affected by each of the medical conditions referred to. In our view it is therefore clear that paragraph 5 of the Order has not been complied with.*

20 *Regarding the assorted medical documents provided, these appear to comprise letters from specialists and out of hours services as well as referral letters to specialists, although a several documents are incomplete and missing pages. Therefore these documents appear to relate mostly to paragraph 2 of the Order. We do not believe that the Claimant has provided*
25 *a copy of her General Practitioner medical records for the relevant period, meaning that paragraph 1 of the Order has also not been complied with.*

As a result, we would request that the Tribunal now dismiss the Claimant’s claim, in line with the Order.”

12. The claimant then wrote to the Tribunal on 21 February 2020 in which she provided more information about her medical conditions and their effect upon her.

5 13. Following the Preliminary Hearing on 1 July 2020, which had been converted to a case management hearing owing to the exigencies of the pandemic, Employment Judge Meiklejohn directed that the case be listed again for a Preliminary Hearing in order to determine whether or not the claimant had failed to comply with the Unless Order, and if she had, whether that amounted to such non-compliance as to amount to dismissal
10 of the claim.

Submissions

14. For the respondent, Ms Wheeler made a concise oral submission. She confirmed that her application is made under Rule 38(1) of the Employment
15 Tribunals Rules of Procedure 2013. She referred, firstly, to the terms of the Unless Order, and noted that the date for compliance was 7 January 2020, the key date which the Tribunal required to focus upon.

15. She submitted that the terms of the Unless Order are clear and unambiguous. She observed that Employment Judge Meiklejohn had referred to the case of **Royal Bank of Scotland v Abraham**
20 **UKEAT/0305/09**, in which it was stated that partial compliance with an Unless Order is insufficient.

16. Ms Wheeler expressed “great sympathy” for the claimant, who, she appreciated, is faced with the difficult task of representing herself, and who has provided information in response to the Order. She submitted,
25 however, that the claimant had complied with the Order, but not fully.

17. She submitted that the claimant had failed to comply with the Unless Order in two material respects.

18. Firstly, she said that the claimant had made “substantial” disclosure of medical information (77-139), but that what was missing from the disclosure
30 was the day-to-day running GP notes, which would give the overview of the

claimant's appointments and medications. All the respondent now has, she said, were "snapshots" of the claimant's condition.

19. Secondly, she said that while there was more detail in the claimant's email of 21 February 2020, the impact of the conditions on the claimant's employment and the way she carried out her duties was still missing from the information provided. She pointed out that the Unless Order was very clear, that the information had to be submitted by 7 January 2020, and she was unable to see any reason why that information could not have been presented in time.

20. Ms Wheeler accepted that the email of 21 February gives details of the claimant's Ehlers Danloss Syndrome and her Attention Deficit Hyperactivity Disorder, no further detail was provided in relation to the other conditions relied upon by the claimant, namely anxiety and eating disorders. She also raised a concern that the claimant seems to be seeking to rely upon a number of other conditions as disabilities within the meaning of the 2010 Act, namely dyslexia, deafness and irritable bowel syndrome, and it would be inappropriate to include those conditions in this way at this stage in the proceedings.

21. She summarised the respondent's position as being that the claimant had been guilty of material non-compliance with the terms of paragraphs 1 and 5 of the Unless Order, and submitted that the case is not clear enough on this basis.

22. Ms Wheeler acknowledged that dismissing the claim would be a draconian step, but pointed out that there had been opportunities for some months before for the claimant to comply with the requests for information. She therefore submitted that in line with the Rules of Procedure and the case law the claim should be disallowed.

23. She went on to say that this should apply to the whole claim, which is referred to in paragraph 15, but in the alternative the disability discrimination claim should be dismissed.

24. The claimant responded with a short oral submission. She said that she was represented, at the start of this case, by David Hutchison of Messrs Dallas McMillan, solicitors, but that he withdrew “just before” 17 January 2020. She said that when she submitted the information, she had spoken to her GP, Dr Johnson, and from that conversation had understood that Mr Hutchison had been provided with the full GP records, and believed that he had, or would have, produced the full GP records to the respondent. As she put it, she was unaware, when she received the Tribunal order, that he had not done so.
25. The claimant said that she did provide a copy of the GP report which detailed the effects of her conditions, and understood that that complied with the Order. She said she also included some part of her GP records which she felt related to her conditions. She thought that the full GP records were already available to the respondent and to her solicitor. She apologised that her previous solicitor had not complied with the request.
26. Although there was a delay in producing the GP records which the claimant did provide, she said that the GP surgery took full responsibility for that delay. Her GP contacted her former solicitor in order to explain that the claimant had not been responsible for the delay, and requesting that he take up her representation again, but he declined to do so.
27. The claimant said that she had not fully understood the extent of the information to be produced, but sent on more information once she had realised this.
28. She became aware of the fact that the full GP records had not been produced at the PH before Employment Judge Meiklejohn on 1 July 2020.
29. She believed that the reports written by herself and her GP would be sufficient to comply with the Order. She sought to talk about the diagnoses and the effect upon her, but since she felt out of her depth she decided to take her GP’s advice about what she should include.

30. The claimant argued that there are two separate cases, unfair dismissal and disability discrimination, and that if the Tribunal were to find that the Unless Order had not been complied with, only the discrimination claim should be disallowed.

5 31. With regard to the information provided, she considers that her notes and the GP report cover the anxiety and eating disorders. So far as other conditions mentioned in the documents are concerned, the claimant assured the Tribunal that she was not trying to expand the claim or the conditions upon which she wished to rely as disabilities, but trying to explain
10 what difficulties she has.

32. She does not as yet have the full GP records but said that she would be able to obtain them from the surgery. She sent a mandate to her solicitors in order to obtain her file, and the full GP records were not included in the information she received from them in January 2020.

15 33. She explained that she has had some difficulties in obtaining information from the surgery, which is closed due to the pandemic, and therefore obtaining printed records has been impossible or very difficult for her.

20 34. Ms Wheeler responded to the claimant's submission. She observed that the claimant contends that she was not aware that her full records were not made available until she was told this at the PH in July. Mr Hutchison came off the record in this case in October 2019 (63), and the Unless Order was made in December 2019. By that date, she submitted, the claimant would, or should, have been aware that the full GP records had not been provided particularly once she received her file from the solicitors in January 2020. In
25 any event, the respondent wrote to the Tribunal on 24 January 2020, making clear that full disclosure had not taken place. She advised that the respondent would not be taking such a hard line if the records had been produced by February 2020.

Discussion and Decision

35. The Employment Tribunal's procedure is governed by the Rules of Procedure 2013, and reference requires to be made to the terms of Rule 38 in which Unless Orders are provided for.

36. In Rule 38(1), it is provided that *“An order may specify that if it is not
5 complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.”*

37. It should perhaps be pointed out, however, that Rule 38(2) provides that *“a
10 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
15 representations.”*

38. The issue for consideration by the Tribunal in this case, at this stage, is a straightforward one: has the claimant complied with the Unless Order of 12 December 2019 by the deadline of 7 January 2020?

39. The reason why the issue is straightforward is that the essence of an
20 Unless Order is different to that of a general case management order. The case of **Scottish Ambulance Service v Lainq UKEATS/0038/12/BI**, which was cited by the respondent, makes clear that an Unless Order is a conditional judgment (referring to **Uyanwa-Odu v Schools Offices Services Ltd UKEAT/0281/08**) which becomes a final determination of the proceedings if the party fails to comply with the underlying order. Lady
25 Smith, in **Lainq** (paragraph 35) confirmed that matters such as fair notice, remembering that strike out was a power that ought not to be readily exercised, considering proportionality and reaching a decision by the exercise of discretion are not relevant when considering whether or not an
30 Unless Order has been complied with.

40. The respondent also made reference to the case of **Royal Bank of Scotland plc v Abraham** UKEAT/0305/09/DM, as authority for the proposition that partial compliance with an Unless Order is insufficient to stave off strike out of the claim.

5 41. The Tribunal must therefore consider whether there has been a failure to comply with the Order in any material respect by the claimant.

42. The respondent accepts that there has been partial compliance with the Order, but says that paragraphs 1 and 5 have not been met with a sufficient response by the claimant.

10 43. Those paragraphs, for the avoidance of doubt, read:

1. *“A copy of the General Practitioner medical records for the relevant period demonstrating the background and history of your impairments...”*

15 5. *“Please set out in as much detail as possible the impact of your condition upon your ability to carry out the duties of your employment with the respondent, setting out each of the main duties of your employment and how they have been affected.”*

20 44. With regard to paragraph 1, the respondent’s argument is that the claimant did not produce the whole GP records, which would then enable them to make a full assessment of the day-to-day effects of her conditions upon the claimant.

45. What the claimant produced was not the whole GP records but substantial extracts from those records including records of appointments with her GP, reports and letters.

25 46. The claimant’s position is that she produced what she considered to be relevant. She also said that she does not possess the full GP records, which were sent to her solicitor, and she says that she did not know until July 2020 that the full records were not passed to the respondent.

47. This is a difficult matter to assess. The respondent challenges the claimant's version of events, arguing that she knew that the full records had not been passed to the respondent when they wrote to the Tribunal in January 2020 to advise that they had not received them. I consider that to be correct. The claimant has sought to blame her former solicitor for any failure to produce GP records, but they withdrew from acting for her in October 2019, well before the Unless Order was issued. The claimant at no stage contacted the respondent to establish whether or not her solicitor had actually produced those records to them, and indeed seems to have made an assumption to this effect.

48. The claimant has certainly produced medical information in response to the Order. She has produced a significant volume of documentation on which she wishes to rely in arguing that her medical conditions amount to disabilities under the Equality Act 2010. The Order did not call for her to produce her full GP records, but to produce records for the relevant period showing the background and history of her impairments.

49. I have come, with considerable hesitation, to the conclusion that the claimant has not been guilty of material non-compliance with the Unless Order. She has, in my judgment, made an effort to produce those records which she thought were relevant to showing the background and history of her impairments. She did not require to produce all of her GP records – the Order made clear that she had to produce records from the relevant period, and not from all periods of her life – and in my judgment she has made a reasonable, if not absolutely complete, response to the Order. I do not consider that there was a failure to comply with the Order in any material sense.

50. Whether those records do in fact show that background and history in such a way as to persuade the Tribunal that each of the conditions she relies upon were disabilities under the 2010 Act is a matter which would require to be explored at a Preliminary Hearing listed for that purpose.

51. With regard to paragraph 5, the claimant was required to present information which *“set out in as much detail as possible the impact of your condition upon your ability to carry out the duties of your employment with the respondent, setting out each of the main duties of your employment and how they have been affected.”*

52. The respondent, very fairly, accepted that this Order has been satisfied by the claimant’s presentation of information about her Ehlers Danloss Syndrome and her ADHD, but not in relation to her eating disorders or anxiety. The claimant’s position is that her handwritten response and her GP report covers these points.

53. The GP report states: *“She has a history of an eating disorder with intermittent starving and bingeing behaviour. This becomes worse when her anxiety levels are raised.”* (77).

54. The doctor goes on to relate that during the period from July to November 2018 the claimant suffered a number of illness, which, it was said, left her *“understandably anxious and low in mood”*, and went on:

“She had been finding her workplace very stressful leading up to this period of illness and this made it more difficult for her to try to consider a return to work. She felt she was more stressed in her work environment due to lack of support from her superiors and an unfortunate workplace culture with her colleagues. This led to a worsening of her anxiety and her eating disorder. In contrast she feels that the beauty pageant events she has attended in the past have been a supportive environment where she does not face any judgement or pressure to conform and she felt that this was a therapeutic environment for her. She felt that if she could cope with going to one of these events then she might be able to manage a return to work, however she continued to have further illness and the return to work was too stressful for her during this time.”

55. In her handwritten notes, the claimant refers to the impact which her eating disorder has had upon her, in the workplace (82), assuming that when colleagues spoke about being fat or being on diets they were referring to

her, which would have the effect that she would then alter her eating patterns. She said this caused her to struggle with anxiety.

56. Again, the issue for me to determine is not whether the claimant has provided sufficient information to allow the Tribunal to determine whether she meets the statutory definition of disability, but whether she has failed to comply with the Order at paragraph 5 in a material way.

57. While the information provided is relatively slim, and does not provide a great deal of detail, which is likely to have an impact on her ability to persuade the Tribunal as to her disability status, it is my assessment that the claimant has sought to provide information to try to show the effect of her conditions upon the work environment. She has, however, as the respondent observed, failed to set out the main duties of her employment, and to inform the Tribunal as to the impact on those duties of her condition. The information provided is very general in nature, and lacks detail.

58. She also provided a considerable amount of this information after the deadline of 7 January 2020 set down in the Unless Order. The respondent, again very reasonably, has said that if the Order had been (in their view) complied with by February, they would not seek the draconian outcome of dismissal of the claim.

59. The question for the Tribunal is whether or not the claimant has failed to comply with the Order in a material way, such as to attract the finding that her claim should be dismissed.

60. In my judgment, while her response is incomplete and desultory in relation to paragraph 5, it does not amount to such material non-compliance as to attract the draconian outcome of dismissal in this case. The claimant has provided a response to each of the headings in the Order, and the respondent accepts that paragraphs 2, 3 and 4 have been complied with. In my judgment, the claimant has (just) complied with paragraph 1 of the Order, and has partially complied with paragraph 5.

61. The extent of her failure to respond fully to the Order is in my judgment not so material as to compel me to find that the claim should be dismissed either in full or in part. I require to act in accordance with the interests of justice, and in my judgment, this is not a case which is sufficiently clear-cut
5 as to reach the point where the claimant should lose her right to pursue her claim of disability discrimination against the respondent.

62. What is in doubt is whether the claimant will be in a position, based on her responses to the Order, to persuade the Tribunal that she meets the definition of disability in relation to each of the four conditions upon which
10 she relies, or indeed to any of them. That is a matter for another day, and it seems to me that it is necessary that the next stage in these proceedings should be to decide whether a Preliminary Hearing in order to determine that question should be fixed, or the point reserved to the final hearing in the case.

15 63. At the conclusion of the Hearing, a short discussion took place with regard to directions for any further hearings, and in particular the full hearing in this case. Given that I have determined that the full claim should proceed. I have retained my notes on that discussion and they remain available, but it is necessary to determine whether a Preliminary Hearing is now required or
20 whether this case may be allocated to a Hearing on the Merits. Parties are asked to express their views on this within 14 days of receipt of this Judgment.

25 Employment Judge: Murdo Macleod
Date of Judgment: 26 January 2021
Entered in register: 26 January 2021
and copied to parties