# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| Mr R Godfrey | **v** | Natwest Markets PLC |

Heard at: Central London Employment Tribunal (via CVP)(V)[1] On: 26 April 2021

Before: Employment Judge Norris
Sitting with Members: Mr P Secher
Dr V Weerasinghe

Representation:
Claimant – Mr T Kibling, Counsel (Direct Access)
Respondent – Mr H Zovidavi, Counsel

# JUDGMENT – PRELIMINARY ISSUE

1. The listing for 26-28 April 2021 in this matter is vacated.
2. The Hearing (liability only) will now take place over four days between 23 and 26 November 2021.
3. The Respondent is permitted to rely on the evidence of Mr Muscatt at the reconvened Hearing. A variation to the Witness Order requiring Mr Muscatt to attend the Hearing on 24 and 25 November 2021 is made under separate cover.
4. The Respondent is ordered to pay £3,999.00 towards the Claimant's costs by no later than 24 May 2021.

# REASONS

1. This is a claim for disability discrimination, lodged by the Claimant on 31 December 2018. It has been the subject of several Preliminary Hearings (PHs) at which Case Management Orders were made. The Hearing listed for 26-28 April was adjourned after the first morning. Written reasons for the decisions made on that first morning were requested on behalf of the Respondent.

2. The most recent of the PHs, so far as is directly relevant for the purposes of this decision, was on 4-5 August 2020, before EJ Snelson. EJ Snelson made Orders in the usual terms for the provision of a schedule of loss and for disclosure by list and copy documents. The Respondent was ordered to supply the Claimant with a bundle by no later than 15 February 2021. The Orders continued:

[1] This has been a remote hearing which was consented to/not objected to by the parties.

> (8) On or before 1 March 2021 the parties shall exchange witness statements in the names of all witnesses (including the Claimant) whom they intend to call to give evidence at the hearing. Every witness statement shall:
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> (a) be typed in double line spacing;
> (b) be laid out in short, numbered paragraphs;
> (c) set out the relevant events in chronological order, with dates;
> (d) contain all the evidence which the witness is called to give;
> (e) exclude any matter not relevant to the issues to be determined;
> (f) state the source of any information not acquired at first hand;
> (g) be signed and dated.
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> At the hearing the parties shall produce four further copies of every witness statement exchanged pursuant to this direction. Except with the special permission of the Tribunal, no witness may be called at the hearing unless a statement in his/her name has been prepared and delivered to the opposing party in accordance with the above directions.

3. EJ Snelson also appended the usual notes at the foot of the Order confirming that pursuant to Rule 6 of the Rules of Procedure 2013, if an Order is not complied with, the Tribunal may take "such action as it considers just", which may include the awarding of costs. Further, he confirmed that the parties were at liberty to apply under Rule 29 to vary, suspend or set aside the Order. No such application was made by either party.

4. It is unclear when the case was listed for the three days starting on 26 April 2021, but at an open Preliminary Hearing before EJ Spencer on 1 February 2021, it was confirmed that it remained listed for those dates. EJ Spencer also noted: "If the particulars provided by the Claimant remain unclear, the Respondent may, no later than 16 February 2021, apply for an order for sequential (rather than simultaneous) exchange of witness statements"; this was a reference to particulars that she had ordered the Claimant to provide no later than 9 February. It appears that he did so and that they were not "unclear"; at any rate, there was no (further) application by the Respondent for sequential exchange of statements. Accordingly, the date for mutual exchange remained 1 March 2021.

5. On 19 April 2021, the Respondent's solicitor Mr Brown sent the Tribunal an email attaching the witness statements of the Claimant and his two witnesses, an agreed bundle of documents and the Claimant's "supplementary" bundle. There was no witness statement from the Respondent nor any suggestion that one was to be forthcoming.

6. However, on 23 March 2021, Mr Brown on behalf of the Respondent had made an application for a Witness Order for a Mr Muscatt, a former manager of the Respondent who had left the organisation in November 2019. It stated that Mr Muscatt had "…confirmed on 22 March 2021 that he will not attend the Hearing unless the Respondent agrees to compensate him for an arbitrarily high figure…". There was no discussion of any witness statement having been prepared by or for Mr Muscatt.

7. The Witness Order had been granted by Employment Judge Baty and sent to the Respondent on 20 April. In accordance with usual practice under Rule 32, neither the Respondent nor the Tribunal had copied in the Claimant to the correspondence associated with the Order, nor the Order itself. The Order required Mr Muscatt's attendance on 27 and 28 April, it being envisaged that the first day of the Hearing would be taken up by the panel reading in to the papers and the Claimant's evidence.

8. The Hearing began as listed shortly after 10.00 on 26 April 2021 via CVP. Just as the Hearing was starting on 26 April, the Tribunal panel received an email forwarded by the London Central main inbox and sent from the Claimant, attaching a cast list, chronology, case summary and a document entitled "application note", said to be "A note from the Claimant in

respect of the Respondent's application to rely on the witness statement of Luis Muscatt". This was followed, some minutes later, by an email from Mr Brown forwarding a message he had sent to Mr Kibling for the Claimant at 14.00 on 23 April (i.e. the working afternoon before the Hearing) attaching that witness statement and a copy of EJ Baty's Order.

9. After the hearing "ground rules" had been dealt with and the Tribunal had satisfied itself we had all relevant documents, we took the question of the late-served statement as a preliminary issue. There was no formal application by the Respondent before the Tribunal, nor was any of the *inter partes* correspondence exhibited, but extracts from what we conclude was the relevant documentation was contained in Mr Kibling's note and no challenge was made by the Respondent to the contents of those extracts.

10. In essence, it was Mr Kibling's contention that the statement of Mr Muscatt should be excluded entirely and, consequently, the Order for his attendance revoked. In the alternative, he asked that the Hearing be vacated and re-listed, with costs for the Claimant. The panel adjourned to read Mr Kibling's note, before returning to hear submissions from both Counsel and then deliberating on the decision in private once more. It is unnecessary to set out in great detail the content of Mr Kibling's note or the parties' oral submissions, but in summary, he said that the Respondent's (assumed) application was:

    a. In breach of EJ Snelson's Order;
    b. Contrary to well-established legal principles (in preventing tactical presentation of evidence or where the same would cause embarrassment or prejudice to a party);
    c. Contrary to Presidential Guidance, the overriding objective and CPR; and
    d. Prejudicial to the Claimant, if allowed.

11. The (main) reason why it was said the application would be prejudicial to the Claimant was on the basis that Mr Muscatt's statement asserts for the first time, on the working day before the Hearing that, among other points, the Claimant had "been asked to leave [the Respondent] because of issues with his honesty and reliability". It was asserted that the Claimant did not "voluntarily leave or resign" but was "pushed", and that this resulted from the Claimant on numerous occasions breaking trading limits imposed. Mr Muscatt further asserts that the Claimant lied to him personally and had lost the trust of "management". He states that a Mr Rad was the manager of the desk on which the Claimant worked at the time.

12. Mr Rad is not a witness who was being called by either party. Given the imminence of the Hearing, the Claimant had had no opportunity to call any evidence, whether from Mr Rad or anyone else, to rebut these assertions of his trustworthiness and the circumstances of his departure from the Respondent. The Respondent's pleaded case was that the Claimant had "resigned", without more. There was no reference at all in the final or indeed earlier iterations of the response to any alleged dishonesty or misconduct on the Claimant's part while he was employed by the Respondent. It has been consistently asserted by the Respondent that the reasons why he was not later re-employed was to do with the fact that he had been working outside the specific market for years, so his that knowledge and experience "began to atrophy" and his skills had fallen behind those to be found in candidates with up-to-date and real-time experience of the current market and relevant financial products.

13. Mr Muscatt asserts however that his lack of trust in the Claimant was at least part of the reason for not recommending the Claimant for a role in 2014 and that other individuals at the Respondent shared that mistrust. Again, the Claimant has had no opportunity to seek a statement from those named by Mr Muscatt, who included a Mr Balax. Further, at paragraph 8 of the revised grounds of resistance, it was asserted that Mr Muscatt had very limited (or no) knowledge of job applications made by the Claimant between 2017 and 2019, but (and it is unclear whether this is a typographical error) in his statement, Mr Muscatt confirms that he "had a say" in who was hired for one position in 2017 and that he discussed the Claimant's candidature with Mr Balax.

14. The panel was in agreement that it was clearly right that Mr Muscatt's evidence should be heard by the Tribunal. As asserted by the Respondent, that evidence is pivotal to its defence

of the case, because when looking at the complaints that have been permitted to proceed, Mr Muscatt is personally named as an alleged perpetrator, if not the only one, in them all. The prejudice to the Respondent of refusing the application would have been great and far outweighed the prejudice to the Claimant if the Tribunal allowed Mr Muscatt's evidence in. Our decision therefore came down to whether to push on with the Hearing as listed or to adjourn and allow the Claimant to consider his position in relation to any additional/rebuttal evidence well in advance of any reconvened dates.

15. Even if the answer from any witness approached by the Claimant is that they cannot remember because the evidence in question relates to events of 2017, 2014 or even earlier, it seemed to us to be in the interests of justice to allow the Claimant to try to locate them and to seek answers from them. Quite clearly, this could not have been done in a single working afternoon after service of Mr Muscatt's witness statement (when, we were told, Mr Kibling was attending hospital; we heard no further details of that) but before the virtual Hearing. We were not satisfied that the prejudice to the Claimant of the late submission could properly be countered merely by asking him supplemental questions in chief.

16. To the extent that "special permission" was required for reliance on Mr Muscatt's statement (pursuant to EJ Snelson's Order of 5 August 2020), the Respondent's position was that the Claimant would also require such permission for all his witness statements since they were also not exchanged in accordance therewith. It seemed to us, looking at the chronology set out in Mr Kibling's note (which, as noted above, contained extracts from the *inter partes* correspondence though we did not have the email exchanges themselves) that this completely missed the point, in addition to the Respondent being unable to draw our attention to any prejudice by the late service of the Claimant's statements. Non-compliance with Orders is not excused on a tit-for-tat basis.

17. The chronology in question was as follows:

    a. On Monday 15 March 2021, Mr Brown wrote to the Claimant saying he was "happy to exchange on Wednesday" (i.e. 17 March);
    b. On Tuesday 16 March he wrote again saying "I am now unlikely to be in a position to exchange statements tomorrow as suggested. Would you be agreeable to exchanging at 3pm on 26 March…?";
    c. As noted above, on 22 March it appears Mr Muscatt conveyed his refusal to attend the Hearing voluntarily and on 23 March, Mr Brown applied on behalf of the Respondent for a Witness Order compelling him to do so. He did not inform the Claimant of his communication – he was not obliged to do so, but clearly it should not have been a surprise to the Claimant given that he would surely have been expecting Mr Muscatt to attend in light of the "pivotal" nature of his evidence – and nor did Mr Brown make any reference to the now considerable delay in exchanging witness statements. As noted above, he made no reference to the fact that the witness statement for Mr Muscatt had not been finalised nor indeed did he refer to the Orders of EJs Snelson and Spencer. Victory House having been closed since mid-December, the administration and judiciary had no access to the physical file. It therefore seems unlikely that the full correspondence or prior Orders were before EJ Baty when he granted the Witness Order on 20 April;
    d. At 14.30 on 26 March, the Claimant emailed Mr Brown asking if he was ready to exchange or if he required more time. Mr Brown responded minutes later asking the Claimant to send his statements by return and saying, "I do not have any witness statements to exchange with you".
    e. On 9 April 2021, the Claimant emailed Mr Brown again and asked him to confirm (i) that the Respondent did not intend to call any witnesses, and (ii) that he would not make any application to call witnesses once the Claimant had provided his witness statements. Otherwise, the Claimant said, "you would be conducting litigation by ambush and not in accordance with the overriding objective".
    f. On 12 April 2021, Mr Brown responded: "I can confirm that at the date of this email the Respondent has no witnesses for the hearing and therefore no witness

statement(s) to exchange. However, I am unable to confirm that my client will not make any application after you provide me with your witness statements because I must reserve its position in case your statements contain evidence relating to, for example, complaints or alleged facts which have not been previously mentioned by you. In such a scenario my client may wish to apply for leave to admit evidence to deal with such specific matters. This is standard practice".

g. By email on 14 April, the Claimant reminded Mr Brown that the Respondent had sought sequential exchange at an earlier PH but had not been given it. Nonetheless, on 16 April he emailed his witness statements to both Mr Brown and to Mr Zovidavi, Counsel for the Respondent.
h. Mr Kibling sought by email and phone on 21 and 23 April to agree a provisional timetable for the Hearing with Mr Brown and/or Mr Zovidavi, without success. Notwithstanding the Respondent had by now received EJ Baty's Witness Order, Mr Kibling was not informed of the Respondent's intention to call Mr Muscatt or put on notice of the pending service of the witness statement, even in a phone call with Mr Zovidavi shortly before midday on 23 April, in which Mr Kibling specifically referred to the fact that he had never previously been involved in a case where the other side called no witnesses. Mr Zovidavi made no comment in response.

18. Mr Kibling posed a number of questions in his note, of which few, if any, were answered satisfactorily by the Respondent in the Hearing, as to the late service of Mr Muscatt's evidence and the lack of notice given of the Respondent's intentions in this regard. Mr Zovidavi informed the Tribunal that Mr Muscatt was co-operating "up until the day before the Witness Order was sought" (i.e. until 22 March 2021). He did not explain why, in that case, Mr Muscatt's witness statement was still in the process of being drafted, three weeks after the date that EJ Snelson had ordered for exchange, notwithstanding the intervening passage of some eight months and despite its brevity.

19. Mr Zovidavi was initially unable to confirm whether the person who was assisting Mr Muscatt in the drafting of his witness statement (the panel gathers this was Mr Brown) had read himself and/or shown to Mr Muscatt the Claimant's witness statements before Mr Muscatt's own statement was finalised. At the very least, the panel would have expected Mr Brown to be able to confirm categorically that he had not read or even opened the statement before Mr Muscatt's was completed, particularly when the Claimant's statements had also been forwarded directly to Mr Zovidavi at the same time as they were sent to Mr Brown; there was no need for Mr Brown to read them and every professional reason for him not to do so. He could not give that assurance, though during the Hearing he did forward the final version of Mr Muscatt's statement with tracked amendments from the first, to demonstrate that it had not been changed in response to receiving the statements from the Claimant.

20. The panel was also not satisfied with the assertion that the email from Mr Brown on 12 April 2021 was a straightforward and truthful exposition of the situation as it pertained to the Respondent on that date. It was, at best, disingenuous, at worst outright misleading. We do not accept that the first and second sentences should be read disjunctively. The message's clear implication was that the Respondent was not proposing to call any witnesses unless the Claimant's own statement(s) disclosed new complaints or alleged facts, in which case the Respondent would "apply for leave" to admit evidence in relation thereto. Mr Zovidavi accepted that no such application had been or was being made, the Claimant having disclosed no new complaints or alleged facts in his witness statements. The late service of Mr Muscatt's statement bore no correlation to the late service of the Claimant's statements whatsoever.

21. Accordingly, the Tribunal considered unanimously that it was just to award the Claimant the costs of Mr Kibling's attendance at the Hearing on 26 April 2021, pursuant to Rule 6 and/or Rule 76 of the ET Rules of Procedure 2013. The Respondent has not complied with EJ Snelson's Order. It would be disproportionate to strike out the response in whole or in part, or to bar or restrict its participation in the proceedings. We concluded, as we have said, that the prejudice to the Respondent of being unable to rely on Mr Muscatt's evidence was far

greater than that to the Claimant of allowing it; but we have considerable sympathy with the assertion that the manner in which it has gone about adducing it amounted to "litigation by ambush".

22. A costs order may be made where the Tribunal considers that either a party has acted unreasonably in the way that part of the proceedings have been conducted (Rule 76(1)(a)) and/or under Rule 76(2) (where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party). In the Tribunal's view, the Respondent's non-compliance with the Orders was unreasonable. It directly led to the necessity for the postponement of the Hearing, and with it, a delay of seven months, contrary to the overriding objective.

23. We accept that Mr Muscatt is no longer an employee of the Respondent, but he remained its employee until many months after the claim was lodged. The Respondent has been represented throughout and it must have been clear to all concerned that Mr Muscatt was its key and indeed, as it has transpired, only witness. It has had eight and a half months to take a witness statement from Mr Muscatt since the Order. We still do not know when that process began or why a comparatively short witness statement (five pages of double-line spaced evidence, excluding headers and footers and apparently finalised on only its second draft) could not have been completed and served until so late in the day.

24. That unreasonable non-compliance on the part of the Respondent has led to the Claimant incurring costs while legally represented on 26 April 2021. Those costs were agreed at the figure of £3,999.00 inclusive of VAT, and we made an order in that amount, payable within 28 days.

25. We made no order for the Claimant's loss of earnings, which was raised by the Claimant himself rather than by Mr Kibling on his behalf.

26. We also made no order for the remaining days of the Hearing, because we have extended it to four days, to take account of Mr Muscatt's attendance and a possible further witness for the Claimant. If the Respondent had complied with the Order of EJ Snelson on 1 March, or even been ready for mutual exchange on either of the later dates offered by Mr Brown on the Respondent's behalf, there would have been no ambush; the likely need for a fourth day to complete the Hearing would probably still have arisen such that the listed dates would have to be vacated; but that could have been dealt with by a short further telephone PH (Case Management) or even on the papers following a written application at no cost to the Claimant.

27. Limited Case Management Orders as to the production of further witness statements in the case are set out in a separate document. The potential consequences of non-attendance at the reconvened Hearing should be impressed on Mr Muscatt to the greatest extent possible. He should be reminded of the potential penalties for a failure to comply (a conviction and fine under the Employment Tribunals Act 1996, with the likely consequent professional ramifications). **All** witnesses who produce a witness statement are expected to attend a Hearing unless the other side indicates there is no challenge to their evidence, otherwise reduced, or no, weight may be given to their evidence; and no witness shall be permitted to give evidence without having served a witness statement in accordance with the Tribunal's Orders save in exceptional and unforeseen circumstances.

Employment Judge Norris
Date: 26 April 2021
JUDGMENT AND REASONS SENT TO THE PARTIES ON

27/04/2021.

FOR THE TRIBUNAL OFFICE