



EMPLOYMENT TRIBUNALS

Claimants: Mr A Parker

Respondent: Ashfield Effluent Services Limited

Heard at: Midlands (East)

on: 7 May 2021

Appearances

For the claimant: Mr Egan

For the respondent: Mr Wilkinson – counsel

JUDGMENT

The claim is struck out in its entirety as at 5 March 2021

Confirmation of dismissal of the claim: Rule 38

1. The claimant failed to attend a preliminary hearing on 4 February 2021. Employment Judge Adkinson set the case down for today's attended preliminary hearing to determine the claimant's employment status and made the following order pursuant to rule 38 of the Rules of Procedure:

*“Para 2; The claimant must comply with the directions in paragraph 23 below by the deadline given in that paragraph. **If he does not then his claim will be struck out without further order.**”*

*Para 23 By **4 March 2021** each party must send to the other copies of all documents relevant to the issues to be determined at the preliminary hearing. If the party has no documents, then it should instead send notice in writing to the other party confirming that is the case instead.”*

2. The claimant did not attend today's hearing. Mr Egan attended on his behalf and provided an unsigned witness statement from the claimant setting out his evidence in respect of his employment status. Mr Egan advised the Tribunal that the claimant was not well, that he was suffering with anxiety however he had no instructions to make an application to postpone the hearing. No medical evidence was submitted and there was no satisfactory explanation for the failure to provide any. The respondent had not been warned that the claimant would not be attending.

3. Before dealing with the issue of employment status, there was a further issue that needed to be dealt with first and that was the claimant's compliance with the Unless Order of the 4 February 2021.
4. The respondent had written into the Tribunal complaining that the claimant had failed to comply in that he had disclosed some of his documents after 4 March 2021, over a month later, under cover of a letter dated 6 April 2021. Employment Judge Butler had on the 28 April 2021, informed the parties that the issue of any non-compliance with the Unless Order would be addressed at the outset of today's hearing. The claimant does not argue that he did not have reasonable notice of the intention to deal with that issue today.
5. The Tribunal therefore addressed that matter first and heard submissions from both parties.

Submissions

The claimant

6. Mr Egan confirmed that the claimant had disclosed back statements dating back 6 years and time sheets, under cover of a letter dated 6 April 2021. He did not dispute that those are relevant documents as defined by the terms of the Unless Order.
7. Mr Egan stated that he had been informed by the claimant that the claimant had attempted to obtain the bank statements but due to "technical issues" he had difficulty accessing them online, that he had made multiple requests to the bank and eventually went into the bank in person and received the statements on the 5 April 2021. He had statements for the previous 12 months in his possession by the 4 March but elected not to disclose those because he felt they would not be of assistance without earlier statements to compare them with.
8. The timesheets the claimant had disclosed, were relevant Mr Egan explained because they were evidence of the hours he had worked and he had used those timesheets to generate the invoices he would then submit to the respondent. Mr Egan did not assert therefore that these documents were not relevant documents within the terms of the Unless Order. Mr Egan informed the Tribunal that the claimant had told him that the timesheets were stored in a facility his family owned and due to a family dispute, he could not obtain them until, somewhat coincidentally, they had also come into the claimant's possession also on the 5 April 2021.
9. Mr Egan informed the Tribunal that he was relaying what he had been told by the claimant, but he could not verify that information.
10. Mr Egan provided no explanation for the failure of the claimant to provide any documents in support of the alleged difficulties obtaining copies of the documents.

11. Mr Egan did not seek to explain why the claimant had not addressed these alleged difficulties in his witness statement or in a separate statement.
12. It was open to the claimant to apply to vary the Unless Order before 4 March 2021, if he was having genuine difficulties obtaining the relevant documents, he did not do so and nor was there any application to postpone today's hearing.

The respondent

13. The respondent asserted that there was a failure to comply with the Unless Order. It was clear the matter was going to be dealt with today, Mr Egan accepted the claimant had 12 months bank statements in his possession by 4 March 2021 but had not disclosed those. Mr Egan's explanation is not evidence and it is possible but not probable that all the timesheets and bank statements were produced on the same day i.e. 5 April 2021.
14. Mr Wilkinson accepts that although not expressly limited in this way, that the obligation on the claimant with respect to disclosure, was limited to documents within his possession or control.

The decision

15. It was explained to the parties at today's hearing that it is not open to this Tribunal to reconsider whether the Unless Order should have been made, the only issue for this Tribunal is whether there has been material noncompliance with it and if there has, the sanction of strike out has already taken effect as at 5 March 2021.
16. It is not in dispute that the claimant was on notice that the issue of compliance would be dealt with today.
17. Mr Egan accepts that relevant documents, timesheets and bank statements were not disclosed by the claimant by 4 March 2021. They were not disclosed until over one month later.
18. Mr Egan informs the Tribunal that they were not within the claimant's possession or control. Control covers documents that a party has a right to take possession of, to inspect or to take copies of.
19. Mr Egan seeks to argue that the documents were not in the claimant's control because of technical difficulties and a family dispute; the information he was able to provide was very limited and as he confirmed, he was not able to verify it.
20. There was no evidence provided by the claimant to support his assertion that the documents were not in his control by the 4 March 2021. Although he produced a witness statement to address the employment status issue today, he does not comment within that statement on this issue of compliance with the Unless Order. There were no documents produced from the bank, no letters or emails evidencing the difficulties, the date the

statements were provided or indeed what steps he took and when, to obtain the documents.

21. The Tribunal find it unlikely on a balance of probabilities, that the documents all became available on the same date i.e. on the 5 April 2021.
22. Mr Egan accepts that the claimant was in possession of at least some of the bank statements but elected not to disclose those, he considered them of limited assistance or relevance without the rest of the statements, and that is the extent of his explanation for not at least disclosing those. Even if of limited assistance without the full suite of statements, they were included within the documents the claimant would later disclose as relevant documents and thus it cannot be said were not relevant.
23. The Tribunal does not accept the evidence that the claimant was not in possession or control of the timesheets and bank statements. Mr Egan was merely relaying what he had been told and confirmed that he could not verify the information he had been given. The claimant elected not to deal with this issue in his statement without any explanation for his failure to do so and provided no supporting evidence. The claimant has not persuaded the Tribunal on a balance of probabilities, that he did not have possession or control of those documents which it is accepted were relevant, as at 4 March 2021.
24. There has been material noncompliance with the Unless Order and the claim was struck out on the 5 March 2021.
25. Mr Egan explained that he had taken instructions from the claimant during an adjournment while the Tribunal considered the submissions and before it gave its decision, and would not be applying today for relief from sanction however the claimant intended to apply in writing with supporting evidence.
26. I repeat what I said at the hearing; the claimant may apply to have the order set aside under rule 38 (2) however he must ensure that he complies with the rules and rule 38 (2) and 92. As part of any application to have the order set aside under rule 38 (2), the claimant will need to provide a detailed explanation of why he did not comply and may wish to provide supporting evidence. He should also explain why he failed to provide that evidence at today's hearing.
27. If the claimant does make such an application, there is no guarantee that it will be successful, it will depend on whether the Tribunal decides that it is in the interests of justice to set aside the order.

**Employment Judge Broughton
7 May 2021**