



EMPLOYMENT TRIBUNALS

Claimant

Mrs N Leeks

Respondent

v The Royal Wolverhampton NHS
Trust

JUDGMENT AT OPEN PRELIMINARY HEARING BY CVP

Heard at: Birmingham (By CVP)

On: 8 June 2021

Before: Employment Judge Lloyd

Appearances

For the Claimant: In person

For the Respondents: Mr B Frew, Counsel

JUDGMENT

The claimant's claims shall stand as struck out in their entirety with effect from 4.00pm on 5 May 2021, by operation of the tribunal's Unless Order made on 21 April 2021.

I order that the claimant shall pay the respondent's costs in the sum of £750.00.

REASONS

Background Facts

1. On 21 April 2021, at a preliminary hearing by telephone, Employment Judge Dimbylow ordered that the claimant must write to the tribunal and the respondent by 4.00pm on 5 May 2021 with the following information; namely:
 - 1.1 A detailed reply to the respondent's request for further information dated the 12th of August 2020, and that unless the claimant complied with that order the whole claim will be struck out forthwith and without further order.
2. The background of the claimant's claims is set out by Employment Judge Dimbylow in the order of the 21st of April 2021.

3. The issues facing the claimant were identified at paragraph 3 of the order, which is to be found at page 99 of the bundle produced for this hearing. Those issues of themselves presented a difficult position for the claimant to address. However, it is clear at this hearing that the position is made even more acute for the claimant, in the circumstances of the Unless Order made on the 21 April last.
4. At page 100 of the bundle, which is page 7 of the said order it can be seen that the substance of the unless order made by E J Dimbylow was to the effect that by 4:00 PM on the 5th of May 2021 the claimant was ordered to reply to the respondents request for further information dated the 12th of August 2020. Unless that deadline was complied with then the whole claim shall be struck out without further order.
5. On that basis, paragraph 3 of the general order has been overtaken by the event of the claimant's failure to comply with the terms of the Unless Order. It is clear at this hearing that the claimant knows that she has failed to meet the terms of the Unless Order because she has sought a one-month extension of the compliance term of the order. That has not been agreed by the respondent. Neither does the tribunal conclude that an extension can fairly be given in the circumstances. The respondent has over a long period of time attempted unsuccessfully to persuade the claimant to provide the further detail it needs fairly to understand and to respond to the claim that she has presented.
6. I am satisfied that the claimant knows full well that she has persistently failed to provide the information which the respondent seeks. She has spoken extensively at this hearing about what she perceives to be her compliance with the respondent's request. However, the plain fact is that she has failed to give the specific information which the respondent properly requires to make sense of the claim that she advances.
7. The tribunal fully appreciates that the enforcement of an unless order cannot be taken lightly; it is a potentially draconian penalty for a party. However, there is a history to these proceedings which raises a matter of fairness and justice which cannot be ignored. Such history includes E J Dimbylow's withdrawal of an earlier strike out warning, despite persistent failure by the claimant. That was a just means of offering some incentive to her to provide the further particulars. However, it transpired to be a concession by the tribunal made in vain. The claimant has failed to respond to any encouragement or prospective sanction to provide the particulars repeatedly requested from her. She has had ample opportunity to explain her case clearly and in detail, but she has failed to do so. The request for further information, at page 41 of the bundle, is lengthy but it is fair, clear, and patently necessary. It is necessary for these claims to go forward at all. On that basis the claimant's failure to meet the Unless Order after a lengthy period of persuasion to provide clarification of the precise nature of her claim, fully supports the need for an automatic strike out.

Law and Procedure

8. Rule 38 of the Employment Tribunal Rules gives tribunals the power to make "unless orders". Rule 38(1) provides that: "An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order.
9. A tribunal may only strike out a whole case if a claimant has not complied with an Unless Order, if the Order unambiguously states this will be the consequence of non-compliance (**Ijomah v Nottinghamshire Healthcare NHS Foundation Trust UKEAT /0289/19/ RN**).

Findings

10. Unless Orders are not intended to be punitive. This Order is not punitive in my view. It is a reasonable response by the tribunal to the claimant's repeated failures to cooperate and supply information to enable the respondent to exercise its right to respond to and defend the claims she seeks to advance.
11. From the outset the respondent did not understand the claims that the claimant was advancing. They looked to the claimant to give some further detail of all aspects of the claim that she claimed entitled her to damages from the respondent: arising from *inter alia* disability, religion, past whistleblowing, and her alleged victimisation.
12. The claimant was reminded on successive occasions, that the respondent required that information, and she has repeatedly failed to provide it. It was an entirely reasonable request for the respondent to make and could straightforwardly have been complied with by the claimant.
13. That was the background against which Judge Dimbylow considered case management at the preliminary hearing by telephone of the 21st of April 2021. He concluded, properly, that if the claimant failed to provide the information by a specified date, namely 4:00pm 5 May 2021 then the case should be struck out because it could not practicably proceed without the further clarification.
14. It is clear to me at this hearing that the claimant acknowledges that she has not provided all the information, because she has asked for an extension of time to provide it. The respondent has declined to agree to any such extension. So does the tribunal. There is no fair basis on which an extension can be justified in all the circumstances. I am satisfied that the respondent has done everything it reasonably can to understand the claimant's claims and to obtain from the claimant the information that facilitates a proper understanding. Counsel for the respondent fairly submits that all the claimant has provided in response to the reasonable request has been a continuation of the "diatribe", she has relied upon which began with her particulars of claim.
15. It cannot be that she was medically unfit to meet the deadline; simply she declined to meet it. This hearing is the fifth time she has attended the tribunal. She has known that she has had to meet the order and simply she has not done so.
16. The stark reality is that the claimant's claims have no reasonable prospect of success. However, I have no need to make that finding here. This case must fail anyway by its automatic strike out for the claimant's non-compliance with the Unless Order of Employment Judge Dimbylow. The order has been breached and it is indeed an automatic strike out. It is effectively a wholesale failure following an already lengthy history of non-compliance by the claimant.
17. The claimant presented a claim that quite obviously required a lot more detail to be supplied to allow the respondent as a matter of fairness and justice to know precisely the nature of the allegations it had to meet. The respondent is a publicly funded NHS body which has been constrained to expend further legal fees from precious resources, in seeking to deal with this claim which the claimant has persistently neglected if not refused, to explain with any precision at all. The respondent and the tribunal have asked repeatedly. Ultimately Employment Judge Dimbylow took a proper and procedurally consistent step in an effort to progress the proceedings fairly by making the Unless Order. Sadly, Judge Dymbylow's making of an unless order was not successful in progressing the case.
18. What the claimant has said at this hearing is not acceptable or correct. She did not provide the information needed to enable this claim fairly to be met by the respondent. Judge Dimbylow could not have been clearer in the action he took on 21 April 2021.

Conclusion

19. The submissions which Counsel, Mr Frew, makes at this hearing are accepted. The task of this tribunal is to consider whether the effect of the Unless Order and the claimant's failure to comply with it – which failure I accept there was – has brought about the automatic strike out of the entirety of the claimant's proceedings.
20. It has and it does. The claimant has signally failed to comply with the Unless Order. Indeed, the fact that the claimant herself has sought an extension of time (but which she now seems to deny she has) demonstrates that she has earlier acknowledged that she had not provided any or all of what had been requested. On no basis can it now be fair or just that she is granted even more time to provide information which has been persistently not forthcoming.
21. The claimant's proceedings are struck out in their entirety.

Costs

22. The respondent has made an application for its costs in this hearing.
23. I accept that the claimant's conduct of the proceedings has been patently unreasonable. The tribunal is entitled to consider an award of costs to the respondent under rule 76(1) of the Tribunal Rules of Procedures.
24. The claimant was given a costs warning by the respondent and was invited to withdraw before 12.00 noon on 4 June 2021. She declined to do so.
25. To say the least, the respondent's application for costs in the total sum of £750 is, to use Counsel's term, "mild". I have engaged with the claimant about her means. She is able to apply for work. I am not satisfied from what she says that she and her household are in any way acutely impecunious. She is I find reasonably able to pay costs to the respondent in the sum of £750.
26. I order her to pay costs in that amount to the respondent.

Signed electronically by Employment Judge B Lloyd

Signed and Dated 11 June 2021