



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms T Broderick

**Respondent:** Royal Mail Group Limited

**Heard at:** London South via CVP **On:** 6 May 2021

**Before:** Employment Judge Khalil (sitting alone)

## **Appearances**

For the claimant: in person

For the respondent: Mr J McArdle, Legal Executive

## **JUDGMENT FOLLOWING AN OPEN PRELIMINARY HEARING WITH REASONS**

An application to postpone the Hearing was refused.

Following the claimant's non-compliance with the Unless Order dated (and sent to the parties on) 7 December 2020 on or before 22 January 2021, the claims stand dismissed.

## **Reasons**

### **Postponement application**

1. This Open Preliminary Hearing ('OPH') was to be heard by EJ Hyams-Parish on 7 December 2020 to deal with the Tribunal's jurisdiction (time) and whether or not the claimant was disabled at the material date.
2. At that hearing, Mr Neckles did not show because of a recurrence of double vision in his eyes.
3. EJ Hyams-Parish, in postponing the Hearing and reviewing the significant history of non-compliance and postponements, made it clear in paragraphs 4, 5 and 6 of his decision that there had been substantial leniency and accommodation and that the claimant could no longer continue to rely on

Mr Neckles' unavailability through ill-health to have proceedings postponed and Orders not complied with.

4. An Unless Order was made in relation to EJ Corrigan's Orders outstanding from 2 October 2020 in relation to the claimant's position on jurisdiction, why it is just and equitable to extend time and a Disability Impact Statement.
5. The reason for the purported non-compliance with that Unless Order (in time) is also related to Mr Neckles' double vision.
6. The OPH was then to be heard before EJ Martin on 18 February 2021 which focused on the purported non-compliance with the Unless Order but on which occasion Mr Neckles was not in a position to proceed.
7. That double vision has recurred on 5 April 2021, though this was not clear from the supporting fit note as that was dated 28 April 2021. It goes on to say Mr Neckles should refrain from work from 4 April 2021 to 10 June 2021 which does not assist in explaining why no application was made before this morning.
8. The claimant confirmed today she had taken no steps to secure alternative representation since December 2020 even if only to deal with the OPH. She has made some unsuccessful enquiries in the past.
9. Mr Neckles's postponement application is because he says whilst he was prepared to continue to work on the case despite his double vision recurrence, he suffered an infected tooth on 4 May 2021 which has exacerbated his double vision causing pain such that he cannot open his mouth to speak. Further, the claimant said she spoke to him this morning and he was in A&E. The claimant said she had not otherwise spoken to Mr Neckles since the last Hearing and since 7 December 2020, she believed she had had 1 telephone conversation.
10. The Tribunal received a picture of Mr Neckles' face but this was not indicative, certainly not conclusive of a swollen face. The Tribunal received a prescription for Metronidazole which the Tribunal understood to be an antibiotic. There was no evidence of any specific pain medication. There is no evidence of the actual reason for the dental visit. There is no medical evidence of its impact or effect on the claimant's double vision. There is no evidence of Mr Neckles's presence/attendance in A&E since this morning. There is no evidence of why another representative from his office cannot deal with the primary issue of the Unless Order compliance. The Tribunal, having made enquiries of listing, could not re-list a 3 hour or 1 day Hearing until 15 September 2021 at the earliest which would mean the Full Merits Hearing listed for 6 days in August would need to be vacated (or converted) and not be listed until 2022 which would be 4 years since the claim was issued. That would be not be in the overriding interest and prejudicial to the respondent because of the history of the case to date and the need for finality. The Tribunal also noted there had been no compliance with the Orders of Judge Martin on 18 February 2021 too.

11. Having regard to all of the above, the application is refused.

Non-Compliance with the Unless Order?

12. The terms of the Unless Order were unambiguous. The claimant was to comply with the Orders of EJ Corrigan made on 2 October 2020, sent to the parties on 9 October 2020:

*“By 12 October 2020, the Claimant is to provide the Respondent with the following information in writing in relation to her claims:*

*clarification as to whether it is conceded that events in 2015-6 are out of time*

*full particulars of what the Claimant relies on to say it is just and equitable to extend time in respect of those complaints that are out of time*

*Disability impact statement : On or before 12 October 2020 the Claimant shall provide the Respondent with an amended written statement explaining how her medical condition(s) affected her and her everyday life, including her ability to perform normal day-to-day activities, over the period relevant to her claim, and how it is said her medical condition(s) met the definition of disability in S. 6 and schedule 1 Equality Act 2010 at the relevant time. She should also include an explanation of any medication she has taken over the relevant period, or other treatment received, and how her condition(s) would have affected her if she had not had that medication/treatment.”*

13. It was accepted by Mr Neckles at the Hearing before EJ Martin on 18 February 2021 there had been non-compliance with the Unless Order (page 310 of the bundle).

14. The Respondent took the Tribunal to **Scottish Ambulance Service v Laing EATS/0038/12/BI** which is authority for the proposition that an Unless Order is a conditional Judgment – the Tribunal had already, in making the Unless Order, *“addressed the question of whether or not the deadly sword of strike out should fall on the party against whom the Order is sought and decided that unless a particular direction is complied with, it should”*

15. This is different to a Tribunal’s discretion under Rule 37 for example.

16. Thus the Tribunal is satisfied that there was non-compliance with the Unless Order by 22 January and the claim was thus automatically struck out after 4.00pm on 22 January 2021.

17. There has been no statement/assertion, as Ordered (paragraph 1 (a) of the Orders of EJ Martin on 18 February 2021) about whether the claimant's position is to the contrary.
18. In so far as the Tribunal ought to factor in that there was an application made to vary the terms of the Unless Order, 11 minutes before the deadline, the Tribunal noted, again, that there been no submission received to that effect. The Tribunal observes however that notwithstanding EJ Hyams-Parish's strong steer to the claimant to comply with the Unless Order as soon as possible and not rely on Mr Neckles' availability, nothing happened until 10 January 2021. The claimant said today in submissions she had been naïve in this regard. Mr Neckles' email (page 150) also evidenced no intention to comply with the Unless Order, as mis-read, until 25 January 2021. It was another high risk last minute strategy. His email also refers to his emails, because of his double vision, being overseen by his administration team. There is no explanation why the Order was not read correctly by that team sooner. There is also no evidence of how/whether double vision would cause Mr Neckles to mis-read a date. A Tribunal cannot, in these circumstances, make a medical assumption. There was no detail provided about what symptoms of Covid-19 were being experienced, or any supporting medical or testing evidence or why either were not available. The Tribunal thus does not grant an extension of time retrospectively.
19. In so far as the claimant was pre-empted to provide submissions on, in essence, a de-facto application under Rule 38 (2), the Tribunal considers that was an invitation to do so conditional on an the claim being confirmed as dismissed first under Rule 38 (1) for non-compliance. Further and in any event, there has been no such submission.
20. The Tribunal concludes that an application under Rule 38 (2) is thus not currently before the Tribunal. The claimant explained her father had had health issues and was severely disabled, the respondent addressed the Tribunal, for completeness, on significant prejudice too such that it would not be in the interests of justice but there is nothing more to say at this stage.
21. The claims stand dismissed for non-compliance with the Unless Order under Rule 38 (1).

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**Employment Judge Khalil**

**9 June 2021**

