



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106707/20

Held by consideration of written submissions on 31 August 2021

Employment Judge: R Gall

Mr M Leonard

**Claimant
Representing himself**

BT PLC

**Respondents
Represented by:
Ms A Ruffle
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Judgment of the Tribunal is that the responses by the claimant to the Unless Order dated 7 May 2021 and sent to parties on 28 May 2021 meet that Order. The claim brought by the claimant has not therefore been automatically ended and will proceed.

REASONS

1. This Judgment is in relation to the claim brought by Mr Leonard. That claim was combined with 2 other claims. One, that brought by Mr Baird, case 4106738/20, has come to an end. The other case, brought by Mr Ferguson, is proceeding.
2. The case brought by Mr Leonard proceeded to a case management Preliminary Hearing ("PH") on 6 May 2021.

3. At that time, there was concern on the part of the respondents that there was inadequate specification by Mr Leonard of his remaining claim, that of unfair dismissal. He had confirmed withdrawal of his claim of discrimination.
4. There had been an earlier PH on 14 January 2021. Orders had been made at that time. At the PH on 6 May 2021, for reasons set out in the Judgment following thereupon, the Order issued was issued on an Unless basis. Accordingly, the Order stated that Mr Leonard required to do various things and that if he did not within the time given for compliance, his claim would be dismissed without further order.
5. It is appropriate to set out the Order issued on the Unless basis. It was in the following terms:-

“By 17 June 2021 Mr Leonard will detail to both the Employment Tribunal, and the respondents:-

- (1) Why it is that he says his dismissal was unfair in terms of the Employment Rights Act 1996.*
- (2) Which provisions of the ACAS Code of Practice it is that he alleges the respondents have failed to comply with and what those failures are said to have been.*
- (3) What it is that he asks the Employment Tribunal to award him if he succeeds in his claim of unfair dismissal.*
- (4) If he seeks a financial award, in addition to specifying that and the amount he seeks, he will set out how the sum which he seeks is calculated.*
- (5) Whether he has obtained a new job since dismissal by the respondents and, if so, when he started that new job and what income he has received from it.*
- (6) If he has not obtained a new job since dismissal, he will provide details of any applications made by him trying to find a new job and also whether he obtained an interview for any such possible new job.*

(7) *Any government benefit he has received since his employment with the respondents ended.”*

Compliance with the Unless Orders

6. Unfortunately, although the terms of the Unless Order had been discussed at the PH on 6 May and were detailed in a Judgment signed on 7 May, the Judgment was only sent to parties on 28 May due to administrative issues.
7. In the interim Mr Leonard had submitted information to the Tribunal. He did this by emails sent on 12 and 25 May. The email of 12 May did not have a case reference on it and so did not make its way to be linked up with the other cases papers.
8. Compliance was required by 17 June in terms of the Order. After that date the file was referred to an Employment Judge in light of the approaching PH. It was scheduled for 7 July. That Employment Judge had viewed the position from the file as being that Mr Leonard's claim was at an end. He had reached that conclusion as he was under the impression that Mr Leonard had not replied to various elements of the Unless Order. This was as the email of 12 May from Mr Leonard was not something of which he was aware.
9. Now that both emails from Mr Leonard have been located and can be considered, the question arises as to whether there has been compliance or not with the Unless Orders.
10. It is possible for there to be a hearing on that matter. I canvassed both parties. Neither requested a hearing. Both submitted written representations. Each had the opportunity to comment on the submissions of the other. I decided that the assessment of compliance or otherwise with the Unless Order would be undertaken having regard to the Order issued, the 2 responses to it and to the written representations of the parties.
11. I was satisfied that it was in the interests of justice to proceed in this manner. I bore in mind that Mr Leonard has learning difficulties and found it hard to express himself verbally. He is representing himself, although he is consulting

with his fellow claimant, Mr Ferguson. For clarity, there was no Unless Order issued on relation to Mr Ferguson. The delay involved in a hearing taking place to consider the question of compliance with the Order also weighed in my conclusion that I should consider the written representations rather than set down a hearing. The fact neither of the parties responded seeking a hearing when asked the question was a further factor. I was also satisfied that each party had had the chance to make their representations in support of their respective positions.

12. In assessing whether compliance with an Unless Order has occurred, an Employment Tribunal requires to consider the question of whether there has been material non-compliance with the Order or not. Compliance does not require to be precise and exact. That is confirmed in *Johnson v Oldham Metropolitan Borough Council* EAT 0095/13. The test is a qualitative one rather than a quantitative one. The terms of the Unless Order as issued must be kept in mind. The Employment Tribunal cannot at the time of assessing whether compliance has occurred, in effect reconsider the Order or revisit the position which existed at the time it was issued and assess whether or not it should have been issued at all, or whether it ought to have been issued in the terms in which it was. The case of *Uwhubetine and anor v NHS Commission Board England and ors* EAT 0264/18 confirms this. It is also not for the Employment Tribunal to assess whether the details of the response to an Unless Order are factually correct or legally sustainable. Those are matters for a different day. *Uwhubetine* also states that the approach is to be facilitative. Where there is ambiguity as to compliance, that should be resolved in favour of the person who is to comply.
13. Partial compliance with an unless order is not sufficient. That is confirmed in *Royal Bank of Scotland v Abraham* 0305/09.
14. If compliance has not occurred, then it is possible that relief from sanctions may be given. The case of particular relevance in this area is *Thind v Salvesen Logistics Ltd* EAT 0487/09. In that case, the EAT decision stated that compliance with Unless Orders was of importance, however a Tribunal should consider the interests of justice and the overriding objective when it considered possible relief from sanctions. *Thind* was applied in *Polyclear Ltd v Wezowicz*

and ors EAT 0183/20. There, the Employment Appeal Tribunal held that it was important to consider the attempt made to meet the Order and to analyse how far short of material compliance that had been. Factors which would properly be considered in considering the question of whether relief from sanctions was to be given were said to include, but not to be limited to, the reason for the default. Particular consideration should be given to whether the failure was deliberate or not. Regard should also be had to the seriousness of the default. It was proper to consider the prejudice to the other party and also whether a fair trial is still possible. Each case will depend on its facts.

15. In this case, although there was thought to have been an issue as to receipt of any response from Mr Leonard to a substantial part of the Order, it transpired that there were in fact 2 replies from Mr Leonard. One bore to be his schedule of loss with associated information. The other dealt with breaches he alleged of the ACAS Code. It mentioned within it the view he held as to his dismissal having been unfair. It set out, as I read it, why it was that he regarded his dismissal as being unfair.
16. An Unless Order not being met leads to the most severe consequence. The claim is dismissed without further procedure or order.
17. In my view, in assessing a response to an Unless Order, it is relevant to keep that mind. It is also relevant as I see it, to have regard to the party who is being asked to comply with an Unless Order. Issuing such an Order should not be a “back door” method of ending a claim. If the person seeking to comply with an Unless Order is a party litigant, that should properly be kept in mind in considering the response and whether there has been compliance with an Unless Order. The test is whether there has been material non-compliance with the Order.
18. If therefore there has been material compliance with the Order, then the Order falls to be regarded as having been met. I do not see the exercise which I had to undertake as involving fine scrutiny of the reply to the Order. The approach is to be facilitative, as mentioned above in *Uwhubertine*. Certainly a cursory or

dismissive, brief response might be seen as not addressing the Order. That, however, is not what Mr Leonard tendered in reply to the Order.

19. In considering the position I also reminded myself that it is not for me to determine if Mr Leonard is correct in his position in the replies he has submitted. What matters is whether there has or has not been material non-compliance with the Unless Order.
20. I have concluded that the response to the Unless Order is not material non-compliance with the Unless Orders made. The claims are not therefore automatically struck out.
21. I have come to this view keeping in mind that the objective in the Order was to obtain details of (1) the breaches of the ACAS Code which Mr Leonard said had occurred, (2) why it was that he said his dismissal was unfair and (3) what it was he said the Tribunal should award, if he did indeed seek financial compensation, with details of what he had done to mitigate his loss.
22. The document Mr Leonard submitted on 12 May states in the introduction that he will “*explain what ACAS guidelines I believe the respondents have broken and why I feel I have been unfairly dismissed.*”
23. It is true that both elements are dealt with in a composite manner by Mr Leonard. He does however, in my view, give notice of the elements of the ACAS Code he says were breached and why he says his dismissal was unfair. He refers to there being a lack of consistency. He mentions the circumstances of a different employee who he says faced “the same charge” but who received a different outcome. He says that the respondents did not act consistently, and highlights the ACAS Code with its provision that employers should act consistently. Mr Leonard could have given the name of the employee to whom he refers. What he says is that he will do so “*at the courts request*”. It seemed to me that this is something which might be taken up with a request by the respondents for those details to be provided by Mr Leonard. In my view it would be appropriate that the information is given. I do not see, however, that an initial failure to supply this information in response to the Order, means that material non-compliance has occurred.

24. Throughout his response to the Order, Mr Leonard links together what he regards as the requirements of the ACAS Code and what he says actually happened. In addition to the point mentioned, he says, for example, that he was not told of the basis of the problem and so was not able to provide a full response when challenged. The point is perhaps not elegantly set out. It is not as full by way of giving fair notice as respondent might wish it to be. Those are matters, however, which can potentially be picked up and be made the subject of requests for further particulars or Orders to provide those. Keeping in mind Mr Leonard being a party litigant and the test of material non-compliance, I am content that material compliance with the Order has occurred.
25. I also read the reply to the Order from Mr Leonard as providing information in relation to what he says were breaches of the ACAS code, such that material compliance with the Order has occurred.
26. Turning to the information given as to remedy sought, Mr Leonard provides what he states to be a Schedule of Loss. It is clear to me that he seeks a financial award if successful.
27. Mr Leonard has broken down the financial sum which he seeks. He has not accurately reflected the way in which a basic award is calculated. He would not however be the first unrepresented claimant so to do. The basic award is something which is relatively readily calculated by those dealing with claims regularly. I do not think it can be said that the respondents are prejudiced by the claimant's inaccuracy in this calculation.
28. In relation to the compensatory element, Mr Leonard states that he "*was seeking work for a period of two months before securing a new permanent job*". He seeks payment of what he says he would have earned for the respondents in that two month period.
29. He also seeks payment in respect of statutory rights, an uplift for alleged failure to follow the ACAS Code and an amount in respect of what he says was a failure to provide him with a statement of terms and conditions. The latter element is something which an Employment Tribunal must award if the facts establish such a failure in circumstances where a relevant claim has been successful.

30. It is clear that Mr Leonard seeks a financial award. It is clear he has obtained another job, within 2 months of the his dismissal. He does not seek on-going loss. Presumably (and I accept it is a presumption) his salary from his new job exceeds that which he earned with the respondents. His claim is certainly limited to the 2 month period.
31. There is no information as to government benefit, if any, which he received during his period of unemployment for 2 months between jobs. In my view this is a relatively minor omission in responding to the Order. The information in question can be supplied between now and the hearing. I do not see Mr Leonard as flouting the Order by not giving that information. I do not see it as material non-compliance for that information not to be provided when compliance or otherwise to a material extent is determined by consideration of the response in both emails and documents from Mr Leonard.
32. In saying all of the above, I accept that there can be valid criticism made of Mr Leonard for not ticking every element of every box in the Unless Order. In my view, however, there has not been material non-compliance with the Unless Order. There has not been partial compliance with an Unless Order in my view.
33. In those circumstances and for those reasons, the view to which I came was that the Unless Order had been met to the extent that the claim was not dismissed under Rule 38 without further Order.
34. If I am wrong in that conclusion, I am persuaded that it is appropriate to grant relief from sanctions. I regard there as having been a diligent attempt to meet the Order. I do not see, what in that circumstance would be, the failure to comply with the Unless Order as deliberate. The extent of default is not serious. I do not see there as being prejudice to the respondents, other than an element of delay. A fair trial remains possible as I see it.
35. I set out my opinion as to relief from sanctions for clarity and for convenience of parties, so that they are aware of that.
36. I understand there to be a case management PH set down for 16 September in the claim brought by Mr Ferguson. I believe that the claim brought by Mr

Leonard can be set down to become part of the elements considered at that PH. The 2 cases were combined at the PH on 6 May.

Employment Judge: Robert Gall
Date of Judgment: 01 September 2021
Entered in register: 01 September 2021
and copied to parties