



EMPLOYMENT TRIBUNALS

Claimant: Mrs Z Amri-Khellaf

Respondent: Evergreen Homecare Services Ltd (formerly SureCare Barnet Ltd)

Heard at: Watford (hybrid hearing) **On:** 29 July 2021

Before: Employment Judge C H O'Rourke

Representation

Claimant: Mr Feld - paralegal
Respondent: Ms Egan – counsel

AMENDED JUDGMENT

The Claimant's claims of unfair dismissal, for 'other payments'/unlawful deduction from wages and breach of contract in respect of pay in lieu of notice are dismissed, subject to Rule 38(1) of the Tribunal's Rules of Procedure 2013, for non-compliance with the 'Unless' Order of 15 June 2021.

REASONS

1. I heard oral submissions from both parties.
2. The original Case Management Order (CMO) of 26 March 2021 [B1] was the standard, pro-forma order issued to all litigants who bring routine claims of unfair dismissal, of which this is one.
3. It, amongst other matters, ordered that the Claimant, by 26 April 2021 '*set out in writing what remedy the Tribunal is being asked to award. The Claimant shall send a copy to the Respondent. The Claimant shall (my emphasis) include any evidence and documentation supporting what is claimed and how it is calculated. The Claimant shall also include information about what steps the Claimant has taken to reduce any loss (including any earnings or benefits received from new employment).*'
4. The Claimant did not comply, in general terms, with this and other requirements of the CMO and therefore, on 15 June 2021,

Employment Judge Lewis issued a Rule 38 'Unless' order [B5] that '*Unless (the) Claimant by 22 June 2021 complies in full with the first case management order of 28.3.21 the claim may be struck out without a hearing.*' It was subsequently decided that this matter would be determined at the outset of the substantive hearing, listed for today.

5. An 'unless' order is a draconian measure, but it is intended to be such and is generally only issued after several opportunities have been given to a party to comply with previous orders, which is the case here. I note the Respondent solicitor's letter of 29 April 2021 [C11], applying for a Rule 30 CMO, failing compliance with which the claim be struck out. That letter set out precisely what was required of the Claimant, in particular in respect of remedy, stating, in reference to the ET1 [A1] that '*In particular it failed to state the start date of the employment, when the employment ended, the job the claimant did, the number of hours she worked, how much she was paid, her take-home pay and crucially where she found another job, when it started and how much she was earning?*' (particularly so as it was a matter of dispute between the parties as to the start date of employment with the Respondent, her rates of pay and hours worked).
6. A further application was made by the Respondent, on 6 May 2021 [C16], reiterating a continued failure by the Claimant to comply with the CMO in respect of remedy and stating '*Clearly if we do not know what the claimant is seeking by way of remedy, or the documents supporting her claim and calculations, we are not able to begin to attempt to agree a list of issues for the hearing.*' A further letter to the Claimant's then representative, on 10 May 2021 [C18], stated that the writer was '*particularly concerned that your client has failed to comply with the direction that she provide to (sic) my client with details of the remedy she is seeking in this action she has commenced, and supported her claims with calculations and documents.*'
7. Those applications were further pursued by the Respondent, by letter of 19 May 2021 [C19], again emphasising what was required of the Claimant and which resulted in the 'Unless' order.
8. Rule 38(1) states 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. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.'
9. The case of **Scottish Ambulance Service v Laing EATS 0038/12** indicated that where there is non-compliance with an 'unless' order in 'any material respect', a tribunal has no discretion as to whether or not the claim or response should be dismissed. The EAT observed that, '*in such a case, the tribunal has already 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'. It is merely for me to decide whether the requirements of the CMO are clear: they are, such CMOs are issued to thousands of litigants in person every year and complied with and in this case, the Claimant also had the additional 'guidance' as to what was required, in the Respondent's correspondence. Also, I should consider whether the terms of the 'Unless' order are clear and, again, they are, essentially 'comply in full or risk being struck out' (also, as stated, taking into account the contemporaneous correspondence from the Respondent). The final question is whether there has been material non-compliance by the Claimant, which is a qualitative, as opposed to a quantitative test. Partial compliance is not enough. I cannot, as suggested by the Claimant's representative, take into account factors such as her being (at least for some of the time) a litigant-in-person, but '*doing her best*', or her assertions as to her health and the alleged effect it had upon her ability to progress this matter, or assertions as to any alleged non-compliance with the CMO by the Respondent.

10. The non-compliance complained of relates to evidence as to remedy. While the Claimant provided an email on 21 June 2021 (the day before the strike-out deadline) [C23], purporting to comply with the 'Unless' order, the Respondent asserts that she did not, for the following reasons:
 - a. She provided none of the requested documentary evidence to support the assertions she made as to remedy, such as:
 - i. evidence of her earnings with the Claimant, particularly as her rate of pay and hours of work were in dispute, such as contractual documentation, pay slips, work rotas, bank statements etc. While the Claimant's representative asserted, in this Hearing that she may not have done so because of alleged PAYE irregularities by the Respondent that is not a valid reason for her not to comply with the requirement for disclosure;
 - ii. documentary evidence in respect of her efforts to find alternative employment and having, as she stated in her email, found such employment, documentary evidence as to when that employment commenced. She seemed not to be claiming for loss of earnings from the commencement of that new employment, so provided that was the case, she would not be required to provide details of earnings in that new role. It is noted, in this respect that the reason the Respondent relied upon for dismissing the Claimant was that she was allegedly assisting a competitor of the Respondent and with which competitor she allegedly then subsequently took up employment. Accordingly, therefore, it is asserted by the Respondent that her failure to provide this information is a deliberate decision on her part, to attempt to disguise her actions while still employed by the Respondent.

- b. Even without the issue of documentary evidence, the claims she makes in her email as to the remedy she is due are vague and calculations are not provided, such as the reference to ‘a *payment of £650.00 for loss of earnings due to me (sic) able to do reduced working hours*’. What hours, when and at what rate of pay in entirely unclear.
11. Conclusion. Accordingly, I am satisfied that there has been material non-compliance with the ‘Unless’ order and therefore the Claimant’s claims of unfair dismissal, for ‘other payments’/unlawful deductions from wages and breach of contract in respect of pay in lieu of notice are dismissed.

Employment Judge O’Rourke

Date: 29 July 2021
Re-dated 16 August 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
9th September 2021

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THY

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FOR THE TRIBUNAL OFFICE