EMPLOYMENT TRIBUNALS

Claimant: Ms C Mensah

Respondent: Axis Cleaning & Support Services Ltd

REASONS FOR JUDGMENT ON STRIKE OUT

1. The claims for disability discrimination were struck out with immediate effect due to the claimant's failure to comply with the case management order dated 8 December 2020 and Unless Order dated 30 March 2021.

2. An order was made on 8 June 2021 by Employment Judge Daniels that "Provided that further and better particulars of the disability discrimination claim are provided to the respondent in writing and to the Employment Tribunal **within 14 days** of this Order (such that the prior Order for further particulars is substantially complied with) the strike out order above shall be set aside and the claims may proceed as if the disability claim was never struck out. This is because it would be in the interests of justice and in accordance with the overriding objective to do so.

3. The respondent sought written reasons for this judgment. Detailed submissions were made in that letter which were carefully considered. The respondent also drew attention to some relevant case law and made helpful further oral submissions. The claimant's representative (a non-legal rep) opposed the application.

4. The claim is helpfully summarised in the case management order of Judge Lang dated 8 December 2021. Various orders were made on that date but had not been fully complied with by the claimant. The respondent applied to strike out the claims for breach of a Tribunal Order and the Unless Order of Employment Judge Lewis dated 30 March 2021 and opposed any relief from sanctions.

Relevant legal provisions

The CPR 3.9

5. The correct approach to applications for relief from sanctions in the High Court takes place against the background of the revision of the Rules of Civil Procedure (CPR) 3.9. The old rule required the court to consider all the circumstances, including nine particular matters.

6. The revised rule abandoned mention of the nine matters, but not the need to consider all the circumstances. It makes particular mention of two factors, the efficient conduct of the litigation at proportionate cost and the need to have rules etc complied with.

7. The test in Rule 38(2) of the Employment Tribunal Rules for setting aside a strike out following an unless order is whether *"it is in the interests of justice"* to set it aside.

8. That test had been considered, under the old ET Rules, in ***Governing Body of St Alban's Girls' School v. Neary*** **[2010] IRLR 124**. The case involved a review after a strike out consequent upon a failure to provide particulars. The test was whether it was in the interests of justice to set aside the order. The EJ held that it was not. The EAT held that as he had failed to take into account the nine factors to be considered under (old) CPR 3.9 the EJ's reasoning displayed an error of law.

9. The Court of Appeal (CA) held that it was the EAT's approach which was in error. The ET Rules referred to the overriding objective, but did not incorporate CPR 3.9. The CA held that it was appropriate to require the ET to adopt the same general approach to such matters as the High Court, but not to require compliance with the specific terms of the CPR. The CA pointed out that all cases are fact sensitive and at the heart of any decision on such a matter would be the proportionality of the draconian sanction of strike out on the facts of the case.

10. One touchstone that the CA has referred to in other cases is the impact of the default upon the prospect of having a fair trial (on the dates originally listed).

11. Whilst the respondent sought to rely upon **Neary**, in this case, the Court of Appeal's updated guidance, in the case of **Denton v TH White [2014] EWCA Civ 906,** provides a three-stage (updated) approach to addressing applications for relief from sanctions:

    11.1 The court should identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order;

    11.2 The court should consider why the default occurred; and

    11.3 The court should evaluate all of the circumstances of the case so as to deal with the case justly.

The seriousness and significance of any failure to comply

12. It is largely a matter of judicial discretion as to whether a breach is serious or significant. The failure to comply with an unless is order may be indicative of a serious and significant breach, but the court should not focus solely upon the breach of the unless order. The court should also consider the underlying breach (**British Gas Trading Ltd v Oak Cash and Carry Ltd [2016] EWCA Civ 153)**.

13. The Court in **Denton v TH White [2014],** suggested the following approach in relation to the first stage of the test:

> *"If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater important." (paragraph 28*).

Why the default occurred

14. Should the court be satisfied that a serious and significant breach has occurred, it should proceed to consider the reasons why.

15. The Court of Appeal in the case of **Andrew Mitchell MP v News Group Newspapers Limited [2013] EWCA Civ 1537** listed a number of scenarios that may be considered good reasons for a serious and significant breach:

a) If a party, or his solicitor, suffered from a debilitating illness or was involved in an accident (paragraph 41);

b) If "later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal" (paragraph 41); and

c) That "good reasons are likely to arise from circumstances outside the control of the party in default" (paragraph 43).

16. The Civil Procedure Rule 3.9(1) specifically details two factors that the court must consider when addressing all of the circumstances of the case:

> *"On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –*
>
> *(a) For litigation to be conducted efficiently and at proportionate cost; and*
>
> *(b) To enforce compliance with rules, practice directions and orders*."

17. The Court of Appeal in **Denton v TH White [2014]** was of the view that the draftsmen specifically outlined these two factors in the rule as they are of particular importance (paragraph 32). The court also listed a number of additional factors to be considered:

    17.1 Whether the sanction imposed is proportionate to the breach;

    17.2 Whether an application for relief from sanctions was made promptly; and

    17.3 Other past or current breaches of the rules, practice directions or court orders.

18. It has also been repeatedly recognised by the Tribunal that discrimination claims ought to be heard on their merits unless there is a very good reason not to do so (see, for example, **Anyanwu & South Bank Student Union [2001] ICR 391**). That principle appears to have influenced the Court of Appeal's reluctance to endorse strike-out orders.

19. By way of example in **Abegaze v Shrewsbury College of Arts & Technology [2010] IRLR 238,** having succeeded on liability in his complaint of unlawful racial discrimination against the College, Dr Abegaze still had not brought the case on for a remedy hearing six years later. The Tribunal finally struck the claim out, holding that a fair trial was no longer possible and the EAT dismissed his appeal. The Court of Appeal took a different view. A proportionate order would have been an unless order, coupled with the automatic sanction of strike-out under ET rule 13(2), subject to an application for relief from sanction

Conclusions in this case

20. When dealing with the first question of the degree of seriousness and significance of the failure to comply with the original order and the unless order I noted the following points.

21. First, whilst the respondent sought to characterise the breach as a serious and significant one, I was not convinced of the soundness of this contention. It appeared to me that the claimant had complied at least in part with a number of the parts of the request for further information. This is self-evident from the respondents' application which asked for more detail but did not suggest a complete breach or anything like that. It was correct to say that there were still some material gaps in the answers and that this might prejudice the respondent, if not addressed. However, I did not consider this to be a full breach of the Order but a partial breach only.

22. In any event, I went on to carefully consider the reasons for breach and did not treat this as enough to grant relief.

23. In considering why the breach occurred there appeared to be a number of important factors to take into account.

24. The clear reality of the situation was that the claimant had had a significant stroke on 31st of May 2019 which had led to a substantial period in hospital. The medical report dated 1 July 2019 on discharge from Cape Town Enfield multidisciplinary team referred expressly to a number of significant difficulties the claimant was experiencing after her stroke. This included the reduced ability to read, possibly reduced working memory; that she was able only really to write single words and her name and address at that time, that her writing was substantially affected and the stroke had led to a difficulty in expressing complex ideas and communicating. The claimant was also placed on five different types of medication to manage her condition.

25. Second, at the previous preliminary hearing before Judge Lang the claimant had also experienced what appeared to be significant language difficulties in corresponding in dealing with the matter. English was not apparently her first language and she had also requested an interpreter for dealing with hearings. This will have inevitably compounded her difficulties. Her language difficulties had led to various orders being made at the previous preliminary hearing in order to give the claimant more time to address the issues.

26. Thirdly, I also take into account that the claimant appeared to be not legally represented and to have had limited knowledge of the law in this area. Her medical advice was that she struggled to deal with complex issues and so dealing with a very complex area of law like disability discrimination and trying to explain her case more fully in that context when she apparently even had difficulties in writing more than single words or short sentences must have been a real struggle for her. I took into account the great complexity of the questions that the claimant was being asked to answer in the unless order which, from the basis of the communications I had seen, would be a very difficult task for her to complete. In one sense, it would not be an exaggeration to query whether the task she had been given was somewhat beyond her limited capabilities.

27. Fourthly, I also note the duty on the tribunal as a public service provided to make reasonable adjustments to accommodate people with disabilities (or other special needs). The court service must be accessible to all users and not apply a gold standard (or the same standard for every user despite their needs) and assume that users will have to find a way to get over any health or language difficulties. In the circumstances there appeared to be very clear and sound reasons why the claimant had had such difficulty in answering the unless order and in providing a part response only.

28. I also then looked at other circumstances of the case source to deal with the case justly.

29. I took into account the fact that there appeared to be a strong likelihood of her establishing status as a disabled person and a potential case to answer by the respondents from the ET1 in relation to the merits of the case for disability discrimination. This did not appear to be a case which had no reasonable prospect of success or which was quite obviously weak on the papers.

30. I also note that the tribunal was unable to list the hearing anyway until February 2022 and so some further delay in the case management steps did not appear to be prejudicial to the respondents wish for a timely hearing of the case.

31. While noting the respondent's points about the availability of witnesses and one witness having sadly passed away this was not an issue affected by the claimant's actions-the hearing was delayed wholly or mainly due to Covid 19 and court availability not the claimant's delay.

32. In circumstances where giving the claimant more time to provide the further particulars would allow the respondent to know the case being put and would not lead to a delay in the hearing of the case any prejudice to the respondent was significantly reduced.

33. It was not suggested nor did I conclude that no fair trial was possible as a result of the breach. There was no basis for any such suggestion. This was also important.

34. I also took into account 14 years of service of the claimant in employment of the respondent and a potentially substantial claim that she may have for compensation if her case was successful.

35. It appeared to me that if the case was struck out this would cause very severe prejudice to the claimant and prevent her from being bringing her claim but that any prejudice to the respondent of giving the claimant some more time to comply with the unless order was very limited.

36. There were very good reasons on these particular facts why the claimant was struggling to comply with tribunal deadlines. The claimant was recovering from a serious stroke and lived on her own and her husband was only rarely at the property and so she was really in a difficult position with little access to help and still suffering from the long-term effects of her stroke.

37. Further, I note that the option was not given by the Tribunal previously of a lesser sanction than strike-out, in particular an unless order or an order for costs, if the claimant did not comply nor were the reasons for automatic strike out clear. Nor was any facility provided to hear from the party in breach as to why the breach had arisen. The strike out was automatic here and made without the benefit of very important context that may well have been unknown to the Tribunal.

38. In all the circumstances there are compelling reasons why it was in the interests of justice to grant the application for relief and to grant the order made.

39. It would have been highly disproportionate to endorse the draconian sanction of strike out on the facts of the case and it was not in the interests of justice to do so.

40. Relief from sanctions was therefore granted as per the order.

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Employment Judge Daniels

21 October 2021

Sent to the parties on:

3 November 2021

For the Tribunal: