Case No: 1307328/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	AND	**Respondent**
Mr N Lacey		West Midlands Fire & Rescue Authority

ORDER OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham (remotely, via CVP)

ON 29 September 2021

BEFORE EMPLOYMENT JUDGE Dimbylow

Representation
For the claimant: Mr M Hay, Counsel
For the respondent: Mr P Keith, Counsel

This preliminary hearing took place against the background of the coronavirus pandemic; and was conducted remotely by video platform in accordance with safe practice and guidelines.

ORDERS having been sent to the parties on 30 September 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim, its background and issues. These have been defined elsewhere in previous orders, and there is no need for me to repeat them here. Various orders for the just disposal of the final hearing have been made and it was due to take place over a period of 10 days commencing on 1 November 2021. Originally, today had been fixed for an ADR hearing to take place. However, the claimant wrote to the tribunal on 23 September 2021 asking for the response to be struck out as there was a breach of an unless order. The respondent replied on 24 September indicating that there was no such breach. In correspondence, the claimant sought to convert the ADR hearing to a remedy and costs hearing. The claimant submitted a bundle of documents in support of the application on 27 September 2021. The respondent sent in a bundle of documents for the ADR hearing, its position statement and its 2 witness statements on 28 September 2021. A decision was made by the tribunal that the issue of whether or not the respondent had complied with the unless order could not be dealt with on the papers and therefore the ADR hearing was cancelled and in its place this preliminary was fixed instead to determine the issue. It was listed for 3 hours, and

I had another case immediately following. The parties were extremely desirous of knowing the outcome of the hearing today and both parties signified that if they lost there would be an appeal against my decision.

2. The issue. The purpose of today's hearing was to establish if the respondent had fallen foul of an unless order (the Order) made by my colleague Employment Judge Harding on 21 July 2021. If it had, then the response would be struck out. The Order is in 2 parts. The first part is a requirement for the respondent to give an explanation for what might be described as past problems with the respondent's behavior in the litigation, and the second part calls for the service of the respondent's witness statements.

3. At the start of the hearing today, Mr Hay told me that he would be applying to me to adjourn the 10 day hearing, whatever the outcome, because he was no longer available to conduct the case on the days already fixed, as he had taken on another case. I pointed out that the backlog of cases was such that it could not be relisted until November 2022 at the earliest.

4. The law on Unless Orders.

4.1 "Unless orders", which had long been used in the civil courts, were introduced in the Employment Tribunal via Rule 13 of the 2004 Tribunal Rules of Procedure 2004 which dealt with compliance with orders and practice directions. Rule 13 (1) provided that non-compliance with an order etc might lead to the making of a costs or preparation time order, or an order for the striking out of the whole or part of the claim or response (etc). Rule 13 (2) provided that:

> "An order may also provide that unless the order is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or Hearing."

4.2 The 2004 Rules were superseded by the Employment Tribunals Rules of Procedure 2013 which now provide (so far as is relevant):

> **"Overriding objective**
>
> 2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to

further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Unless orders

38 (1) 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.

(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.

(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21.

5. The evidence. I received no oral evidence. The claimant was present in this virtual hearing. The parties relied on submissions made orally. The parties submitted various documents to me; most of them described in paragraph 1 above, and others were added during the hearing; but there was no agreed bundle.

6. The submissions. Mr Hay went first and submitted that there was a material failure by the respondent on both parts of the Order. In respect of the 1st part, he submitted that I should find there was a failure by the respondent to give the appropriate detail that was envisaged by the Order. It was the 2nd part upon which Mr Hay focused most. He drew my attention to the case of Consignia v Sealy [2002] CA ICR 1193, which he submitted was authority for the proposition that the time for "presenting" a complaint was when it arrived. Therefore, it was when the claimant received the statements which counted. He also cited the case of Matthew and others v Sedman and others [2021] Supreme Court, neutral citation UKSC 19. He submitted that midnight was part of the commencement of the new day, and negligence had arisen when advisers had missed a midnight deadline. He also made submissions that the word "midnight" should be interpreted as the commencement of the new day, as defined in Wikipedia.

7. Mr Keith submitted that the case of Consignia was not relevant as the Order that I was considering had not referred to "presentation", and it was therefore not a good analogy. There was no requirement for the explanation called for in part 1 of the Order to be "acceptable." It was meaningful and adequate. The explanation had been given and that was enough. He submitted that the main argument was over part 2 of the Order. Both parts had been complied with.

8. My conclusions and reasons. I find and conclude that there has been compliance with the first part of the Order. The issue raised by the claimant was the adequacy of the explanation and the quality of it. There was no suggestion that the time for compliance had not been met. I conclude it is rather "thin" on explanation; but I find that it is sufficient to comply with the Rules of the tribunal, and there is no need for me to go beyond that and revisit the terms of the Order. Notwithstanding any deficiencies perceived by the claimant I conclude they are

not sufficient to be regarded as material breaches. I cannot give the Order the gloss that Mr Hay wants me to apply to it, and to suggest that there was a finer form of response that was required. I conclude that much of the claimant's argument today was about punishing the respondent for its behavior in the litigation previously. Of course, it is open to the claimant to make an application for costs, if so advised, on account of that conduct.

9. The second part of the order was more difficult initially in the analysis and there was quite considerable debate in the submissions on how Microsoft and other modern media suppliers of information deal with the timing of communications. The Order of Judge Harding was for the respondent to "send" to the claimant its witness statements by 1 September 2021. There was an argument as to whether they were sent to the proper address. Mr Sahota, the solicitor for the respondent, sent them at 23.59.59 on 1 September directly to the claimant. This is discourteous to the claimant's solicitor; but shortly afterwards they were sent by Mr Sahota to the claimant's solicitor. What I have to determine is whether there was a material breach of the order by the respondent's representative. The claimant's submissions were that they went after midnight and were received after midnight. However, I cannot go beyond the documents that I have before me. I appear to have all the relevant information. I am conscious of the fact that I have to think carefully about any ambiguity that arises in this sort of case. I find and conclude that I should try to facilitate the parties dealing with the proceedings rather than punish them. There is authority for the proposition that any ambiguity should be resolved in favor of the party who was required to comply with the order and that derives from the case of Uwhubetine and Another v NHS Commissioner Board England and Others UKEAT 0264/18.

10. The standard to be applied is whether the particulars provided by the respondent have sufficiently enabled the claimant to know the case he must meet. The statements were served on the claimant. He has clearly known the strengths and weaknesses in the case that he has to meet for some weeks. I am not concerned at this stage with any detailed argument about the legal or factual merits of the case advanced by either party, especially as I have not seen the claimant's witness statement. Moreover, I am more concerned with whether sufficient particulars have been given by the respondent. I know that partial compliance with an unless order is insufficient. However, I find and conclude that Mr Sahota sent the statements in compliance with the Order at 23.59.59 on 1 September 2021. I was presented with a copy of the email concerned, and the claimant did not suggest there was any fraud or deception in its production. The receipt of them was later, either at midnight or a minute later. I cannot alter the terms of and revisit the Order to give them the meaning the claimant desires as to the time for service. On the face of the documents before me there is no material breach of either part of the Order by the respondent. Therefore, there is no requirement for the Tribunal to give notice to say the response is struck out. This is just fair and proportionate.

11. At the start of the hearing I did canvas with the parties whether they wanted me to deal with what is regarded as the second and the third limbs of the test involving any application for relief from sanctions if the response was struck out. Mr Hay was very much against that and I went with his view on this. I didn't need to do that in any event given my findings. He said at an early stage of the hearing today that the claimant would go to the EAT if I went against him, and later he confirmed that was going to happen after I gave my decision. I explained that if it helped the parties, my very provisional view was that if I had been asked

to deal with the issue of relief from sanction, in the event that I had found for the claimant on the 1st part of the analysis, then I would have to take into account the balance of prejudice. Here, I repeat myself somewhat, in that the claimant knows the case he has to meet at the trial, he has a trial date which is only a few weeks away, he has yet to serve his witness statement, and there would be prejudice to the respondent if it was shut out at this stage. Had I been required to undertake the balancing exercise, the balance of prejudice was against the respondent and it is likely I would have exercised my discretion in a way which went in favor of the respondent and granted relief from sanction.

12. The claimant's application for a stay of proceedings. Mr Hay then submitted an application for a stay of the proceedings to pursue an appeal to the EAT against my decision. He also submitted he had spoken to the claimant who had "considerable reservations" about today and the position that he is left in, in terms of the date for the trial because: "It is no good turning up with your hands in your pockets if you are not in a position to proceed." He submitted that the claimant's witness statement was not ready.

13. Mr Keith opposed the application for a stay. He submitted that the application reflected the claimant's position, in that his case was weak and he now wanted to avoid a trial. This was his one big chance and was keen to grab onto it, but it had failed. There was no justice in putting the hearing off. The whole point now was to press on with the trial; and it would be unfair on everybody to put it off for at least another year.

14. I rejected the application, as it was just, fair and proportionate to do so. The overriding objective would not be served if the application was granted, especially over the delay in getting cases heard at the moment. It would be a year before it could be relisted. I also took into account that the claimant had been in a position of advantage in having known the witness evidence of the respondent for about a month. He could have prepared and served his witness statement or at least prepared it and not served it pending the outcome of today's hearing. However, rather surprisingly, he had made a positive decision not to do either of these things. I rejected the stay application at this stage. There was a notable change of position on the part of the claimant. Where earlier in the day he was submitting that he was prejudiced because he couldn't go ahead with the hearing because of the conduct of the respondent; and then not wanting to go ahead because his witness statement was not ready. There was a notable tension and conflict in the arguments put forward by the claimant.

15. We then discussed the timing for service of the claimant's witness statement. The Order of Judge Harding was that in the event that respondent complied with the witness statements order, then the claimant had to present his witness statement straightaway. Mr Keith agreed not to press for that order to be complied with immediately, and the parties agreed and consented to amend it to 4pm on Friday 1 October 2021.

16. Mr Hay requested full written reasons as the claimant would be taking the case to the EAT, and I indicated that I would provide them as soon as it was possible.

Signed by Employment Judge Dimbylow
On 9 November 2021