EMPLOYMENT TRIBUNALS

Claimant	and	Respondents
Mr A Sheikh		**G4S Secure Solutions (UK) Limited**

JUDGMENT ON RECONSIDERATION

Upon the Claimant's application under Rule 71 (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) ("Rules") to reconsider the decision to strike out the claim for failure to comply with an Unless Order, the application to reconsider is refused under Rule 72(1) as there is no reasonable prospect of the decision being varied or revoked.

REASONS

Introduction

1. The Claimant worked as a Security Shift Supervisor between 13 August and 11 November 2019. His claim, in which he brought complaints of unfair dismissal, disability discrimination and a failure to pay notice, was presented on 23 January 2020.

2. The matter was the subject of a Preliminary Hearing (Case Management) (PHCM) on 17 June 2020. The Claimant did not attend. Orders were made in his absence, with which he did not comply. A full merits Hearing starting on 10 September 2020 had to be converted to a further PHCM and the Hearing relisted for 3-5 March 2021. The Claimant did attend this PHCM and was therefore fully aware of the directions made.

3. However, thereafter the Claimant still did not comply with the directions in relation to exchange of documents and/or witness statements. The latter was due to be completed by 18 January but the Claimant neither produced his statement(s) nor replied to the Respondent's suggestion to extend the deadline. The Claimant's correspondence in February 2021, in reply to the Tribunal's order for him to state the cause of the delay, cited the unforeseen unavailability of his witnesses, his own illness with COVID and the fact that the Tribunal's messages had been going into his junk email box.

4. The first day of the March 2021 Hearing was again converted to a PHCM, which once more the Claimant did not attend. The Respondent's application for an Unless Order was granted. Specifically, the Claimant was ordered to send to the Respondent by 4 pm on 24 March 2021 the witness statements on which he intended to rely, and expressly this was to include "as a minimum" a witness statement by the Claimant himself, since, it was noted, he would be giving evidence in the case.

5. The Claimant did not comply with the Unless Order. Although he served a single witness statement on 21 March 2021 (i.e. by the date and time specified in the Unless Order), it was not his own but for a Mr Quyum. He did not reply to the Respondent's chasing email of 23 March 2021 asking whether he would be providing a statement. On 26 March 2021, the claim was accordingly struck out and judgment to that effect was sent to the parties three days later.

Application for reconsideration

6. On 12 April 2021, Mr Brown, solicitor, emailed the Tribunal on behalf of the Claimant attaching an application (partly still in draft, on the face of it) for reconsideration. Ms Pimenta, the Respondent's representative, replied later that day setting out her objection to the application. Most regrettably, the application and objection thereto were not referred to Employment Judge Norris until 8 November 2021, following a chasing email from Mr Brown on 31 October 2021. The application is being treated alternatively as one of relief from sanction (the striking out of the claim).

Rules

7. The relevant Rules for this application read as follows:

RECONSIDERATION OF JUDGMENTS

70. Principles

A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

71. Application

Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72. Process

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can

be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

8. The task before the Tribunal is to consider whether reconsideration of the decision is in the interests of justice. Where the Employment Judge considers there is no reasonable prospect of the decision being varied or revoked, under Rule 72, the application shall be refused.

Conclusions

9. The application mistakenly asserts i) that the Claimant was ordered to send his witness statement(s) to the Respondent by 4 pm on 24 July 2021 and ii) that he did serve a witness statement from a Mr Naveed Osman. In fact, as noted above i) the date for compliance was 24 March 2021 and ii) the only statement he did serve by then was for Mr Quyum. The Tribunal notes that the purported dates of service of both the statements of Mr Osman and the Claimant have been left blank on the first page of the application.

10. The Claimant relies on a number of points in the reconsideration application as having prevented him from complying with the Tribunal's orders in a timely fashion or at all. In summary:

    a) He relies on a Diagnostic Assessment Report dated 11 November 2015 in which it was concluded the Claimant has Specific Learning Difficulty dyslexia and says that if he had been in attendance at the PHCM on 3 March he would have been able to explain the difficulties in conducting his claim;
    b) He contracted COVID on dates which have again been left blank (but must have been prior to 23 February 2021 because that was when he told the Tribunal he had had it;
    c) Correspondence about the PHCM on 3 March went into his junk email box;

d) The Claimant attended the funeral of "a close relative" (relationship not specified) on 23 March 2021 and was still in a distressed emotional state on 24 March. He had not appreciated he needed to submit a witness statement for himself. It took him until 26 March to serve his own witness statement because he was "still distraught from the death of his relative".
e) The Claimant was able to serve Mr Quyum's statement on 23 March because he was only forwarding what he had been sent;
f) The Claimant's witness statement was served only two days after the date for compliance expired; the claim was in a position to proceed;
g) The Claimant had been unrepresented throughout.

11. The Claimant has given no (or no good) explanation for his failure to attend the hearing on 3 March 2021. Indeed, he should have expected that to be the first day of the full Hearing, because he was present at the PHCM in September 2020 when it had been listed, and a summary was sent out afterwards.

12. As of 23 February the Claimant had (on his own account) very recently discovered correspondence from the Tribunal in his junk mail box and had replied to it. The Respondent's submission is well-made that this should have prompted him to check thereafter once he knew that it might go into junk, even assuming he did not properly mark it as "not junk" once he realised it had previously. He has still not explained why he did not reply at all to the Respondent's communications about exchange of statements.

13. It is also noted that the context of the Claimant's dyslexia assessment in November 2015 was that he had referred himself to the assessor in his second year of a BA Business Studies at the University of Hertfordshire, having encountered challenges while in his first year and with a family background of dyslexia. The report observes that he had found studying for his BTec courses less pressured than taking GCSEs because there were no exams, just course work.

14. In the circumstances, the Claimant's failure to produce his witness statement between the PHCM on 10 September 2020 and the deadline of 18 January 2021 is not adequately explained by his dyslexia. He was given more than four months to complete a witness statement. By the revised date of 24 March 2021, as set out in the Unless Order, that period had been extended to six months.

15. The Claimant had not suggested at any stage before 12 April that his dyslexia might have prevented him from preparing it. Indeed, it is noteworthy that he did apparently then produce it on 26 March 2021. If it is the case that he had not started drafting it until after the funeral of his "close relative" on 23 March 2021, it appears that he required only three days to complete it. The same point applies to his status as a litigant in person.

16. Further, the basis for the non-compliance is inconsistent and incoherent. Either the Claimant did not appreciate at all that he had to produce statements by a deadline (in which case the fact that he did produce one for Mr Quyum on 23 March is inexplicable) or he did appreciate it but failed to

comply with repeated Orders without good reason. The Tribunal's experience is that sometimes unrepresented parties do not appreciate that they are witnesses in their own cause and it was for that reason that the position (that the Claimant's exchange of statements was expressly to contain at a minimum his own, since he would be giving evidence at the Hearing) was made very clear in the Unless Order.

17. The Tribunal considers that the Claimant did know he had to produce a statement; his dyslexia, COVID, unrepresented status and the death of his relative had no material impact on either his understanding of that fact or his ability to comply with the requirement in a timely manner following repeated opportunities to do so; and he has not given any good reason why he failed to take very seriously the Unless Order that was made or apply to vary it in advance if he knew he would be unable to comply.

18. There is a need for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with rules and orders. The Claimant's breaches in repeatedly failing to produce disclosure ordered and/or statements (without which the trial could not proceed) have been serious and significant. The Respondent has been put to expense in repeatedly attending hearings to attempt to manage and progress the case in the face of the Claimant's defaults and even though the Claimant himself has chosen not to attend those hearings despite being aware they were taking place; and the Respondent appears to have sought throughout to co-operate with the Claimant and with the Tribunal in accordance with the overriding objective.

19. By contrast, the Claimant has not co-operated. He has been given flexibility in accordance with the overriding objective - by way of repeated extensions and postponements - but has not taken advantage of it. The Respondent is right to note that not only has its time and resources been spent in endeavouring to bring the matter to a Hearing, but also so have those of the Tribunal itself; and this has been at a time when restrictions resulting from the pandemic and the rising backlog of cases have meant that the Claimant's failure to co-operate has been particularly egregious, given that his Hearing dates could not be offered to other parties.

20. The question of whether a fair Hearing is still possible is one factor in what is in the interests of justice. It is not the only factor. Other factors include the reason for the default and in particular whether it is deliberate; the seriousness of the default; and the prejudice to the other party. All of these factors weigh against the Claimant for the reasons set out above and accordingly against affording him relief from sanction.

21. In the circumstances, the application is refused as there is no reasonable prospect of the decision being varied or revoked.

Employment Judge Norris
Date: 19 November 2021
JUDGMENT SENT TO THE PARTIES ON

Case No: 2200277/2020

22 November 2021

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FOR THE TRIBUNAL OFFICE