EMPLOYMENT TRIBUNALS

Claimant: **Ms Jojo Badjie**

Respondent: **Amber Residential Care Homes Ltd**

Heard at: **Southampton** **On:** **29 October 2021**

Before: **Employment Judge Dawson**

Representation
Claimant: **Mr Ezike, solicitor**
Respondent: **Ms Charalambous, litigation consultant**

JUDGMENT

1. The claimant's case has been automatically struck out pursuant to paragraph 4 of the order dated 18 November 2020.
2. Pursuant to rule 6 of the Employment Tribunals Rules of Procedure, the requirements;
    a. of rule 38(1) that the Tribunal shall give written notice to the parties and
    b. of rule 38 (2) that an application is made in writing

    are dispensed with.
3. The claimant's application under rule 38(2) Employment Tribunals Rules of Procedure is refused.
4. The claimant's application for an extension of time to comply with paragraph 4 of the order dated 18 November 2020 is refused.

REASONS

1. This hearing was listed by Employment Judge Gray on 18 November 2020. He directed that the hearing would be "to determine the Claimant's application to amend and then confirm the issues and deal with case

management as appropriate, including consideration or whether this is a case that would be suitable for an offer of judicial mediation."

2. However he also varied the terms of an unless order which had been made previously by Employment Judge Rayner.

3. The respondent contends that the claimant has not complied with the unless order and, therefore, the case has been automatically struck out as per paragraph 4 of the order of Employment Judge Gray dated 18 November 2020.

Issues

4. Having discussed matters with the parties, it was agreed that the first issue which I had to determine was whether or not there has been material non compliance with the unless order of Employment Judge Gray made on 18 November 2020. If I was against the claimant on that, her solicitor invited me to make an order extending time for compliance with the unless order or make an order under rule 38(2) Employment Tribunal Rules of Procedure.

Determination of whether the claim has been struck out.

Findings

5. On 24 January 2020, the claimant presented a claim form to the Tribunal. At box 8 she ticked, in box 8.1, that she had been discriminated against on the grounds of race and also ticked the box to say she was making another type of claim which the Employment Tribunal could deal with being harassment, bullying and less favourable treatment.

6. She attached to that claim form a witness statement which set out a number of complaints in 29 paragraphs but did not really illuminate the basis of her claim. She was instructed by Employment Judge Harper to provide further information. Although that order is not in the bundle before me, there is, at page 21 of the bundle, the claimant's response- which records that she was responding to the court's direction to provide confirmation of dates that have occurred in her previous statement and she did set out those dates.

7. An ET3 was entered and the matter came before Employment Judge Rayner on 2 September 2020 when the claimant did not attend and was not represented. She had, I note, sent in an agenda late on the evening of 1 September 2020. Judge Rayner considering that the case was lacking in clarity made an unless order in respect of further information. Her order was in the following terms:

> **Unless by the 14 days of date of the order the claimant**
>
> The claimant provides the following information to the employment tribunal within 14 days of receipt of the unless order for which is attached her claim will be struck out without further notice for a failure to actively pursue the claim:
> 1. for the claimant will provide an explanation of her failure to attend at the telephone case management hearing of 2 September 2020 ;
> 2. the claimant will provide further and better particulars of her harassment claim, identifying which acts or omissions referred to in her ET1 or the further particulars provided she says were acts of harassment and who she says committed the acts of harassment;

3. for the claimant will confirm that she is bringing a claim of direct discrimination in respect of her dismissal by the respondent, and will confirm whether or not she brings her claim on the basis of a hypothetical comparator or whether she is relying on Mr Jartar and/or Mr Yakuba as named comparators.

The claim will stand dismissed without further order.

8. The claimant then sent to the Tribunal a document entitled Originating Application which set out a significant amount of information and purported to make allegations of breach of contract, unlawful sex discrimination, breach of duty to make reasonable adjustments and victimisation.

9. On 24 September 2020, I directed that the claimant should state what that document was intended to be and whether she was intending to replace or amend her existing claim form and she replied on 29 September stating that she sought to amend the claim form and attached a schedule of loss.

10. The matter came before Employment Judge Gray on 18 November 2020 when the claimant was represented by counsel.

11. Employment Judge Gray made an order stating that "3. The claimant must write to the Tribunal and the other side by 9 December 2020, setting out the amendment application she makes, specifically stating what allegations she relies upon from her claim form and the legal basis for the complaint together with submissions on the questions the Tribunal has to consider when determining such an application (with reference to the case authority of **Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT** as appropriate). "

12. He then, in a separate paragraph, stated that the terms of the unless order made by Employment Judge Rayner dated 2 September 2020 were varied to apply to the above case management order so that "if the claimant fails to provide the information as directed in paragraph 3 above her claim will be struck out without further notice for a failure to actively pursue the claim".

13. It appears, therefore, that he did not consider that the case had already been struck out pursuant to Employment Judge Rayner's order and no submissions have been made to me to that effect today. It also appears from Employment Judge Gray's order that the claimant's representative consented to an order in the above terms (see both the statement "The Employment Judge made the following case management orders by CONSENT" and paragraph 35 of the Case Summary contained within the same document.)

14. Looking at the terms of Employment Judge Gray's order, it seems to me that it is likely that he understood the claimant would continue to be represented by legal representatives. Judge Gray recorded that the claimant had withdrawn her claim of race discrimination and dismissed that claim.

15. On 8 December 2020, the claimant sent a document headed further witness of the claimant. She stated in paragraph 2 "as regards to clarification sought by the respondent and as directed by Judge, I attach a bundle of 112 pages which sheds light on my complaint. I list below some salient pages and specific times that are relevant". She then set out a list of eleven points each

point referring to one or more pages of the bundle, a date and a brief summary of the thing being complained of. The claimant did not refer to the allegations in her claim form and she did not set out the legal basis for those complaints apart from the fact she did, immediately below the list, state "I cannot recount all other occasions of being harassed". She then went onto say "However I rely on the various related interactions set out in the bundle of some 112 pages". She did not set out submissions on the questions that the Tribunal must consider when considering her application.

Law

16. In terms of the law I must apply, there are three stages which the Tribunal must bear in mind when considering unless orders.

17. The first is the decision to impose unless order at all. The second is whether there has been material non compliance with the unless order and the third is whether it is in the interest of justice to set aside the unless order. At this stage I am only considering the second stage, namely whether there has been material non compliance.

18. In that respect I was referred to the case of *Uwhubetine and others v NHS Commission Board England and another UKEAT/0264/18/JOJ* particularly paragraphs 45 and 46

> [45] The starting point for the Tribunal engaged in that task is to consider the terms of the Order itself and whether what has happened complies with the Order or not. This may call for careful construction of the terms of the Order, both as to what the Order required and as to the scope of the Order in terms of the consequences of non-compliance, particularly in cases where there are multiple claims or multiple parties. If there is an ambiguity the approach should be facilitative rather than punitive, and any ambiguity should be resolved in favour of the party who was required to comply. However, what the Tribunal cannot do is redraft the Order or construe it to have a meaning that it will not bear, though its words should of course be construed in context.
>
> [46] Next, the test to be applied is as to whether there has been material non-compliance, that being a qualitative rather than a quantitative test. In a case where the Order required some further Particulars to be given, the benchmark is whether the Particulars have sufficiently enabled the other party or parties to know the case that they must meet. However, the Tribunal is not concerned with the legal or factual merits of the case advanced, but merely with whether sufficient Particulars have been given to meet that test.

19. I was also referred to *Johnson v Oldham Metropolitan Borough Council UKEAT/0095/13* and in particular, paragraph 7.

> [7] The phrase used by Pill LJ in Marcan was, ". . . any material respect": I would emphasise the word "material". It follows that compliance with an order need not be precise and exact. It is agreed by counsel before me that Employment Judge Feeney in adopting a test of substantial compliance therefore adopted one in accordance with the law. I would

make this comment however: "material" may be a better word than "substantial" in a case in which what is in issue is better particularisation of a claim or response. That is because it draws attention to the purpose for which compliance with the order is sought; that it is within a context. What is relevant, ie material, in such a case is whether the particulars given, if any are, enable the other party to know the case it has to meet or, it may be, enable the Employment Tribunal to understand what is being asserted. To use the word "substantial" runs the risk that it may indicate that a quantitative approach should be taken: thus, where 11 matters must be clear to enable a party to deal fairly with a claim, of which 9 have been provided but not 2, which remain necessary, compliance has not materially been provided because the purpose of seeking compliance has not been achieved in the context; the other party still cannot obtain a fair trial. To adopt a quantitative approach may erroneously lead the Judge in such a case to conclude that there had been sufficient compliance (9 out of 11) even if the further particulars remained necessary before a fair trial could take place. Substantial compliance has thus in my view to be understood as equivalent to material compliance not in a quantitative but in a qualitative sense.

Conclusions

20. In terms of my conclusions in this respect, it is not appropriate for me to enter into any debate as to whether the terms of the original unless were correct.

21. Having looked at the terms of Employment Judge Gray's I do not consider that that there has been material compliance.

22. The claimant has provided, on 8 December, a list of the events she wishes to complain about. However, although she has referred to eleven points, she still stated that she relies upon the various related interactions set out in a bundle of 112 pages. Therefore she has not set out the amendment application she makes in any comprehensible way. It is impossible to know which of the 112 pages the claimant relies upon and the respondent does not know the case it has to meet.

23. Further, the claimant has not referred to any allegations within her claim form, and she has not set out the legal basis for the complaint beyond a reference to harassment and she has not made any submissions on the questions for the Tribunal to consider when determining such an application.

24. Looking, in particular, at the test laid down in paragraph 46 of *Uwhubetine* it seems to me that the respondent would not properly understand the case against it as at 8 December and I do not find that there has been qualitative compliance with the unless order.

25. In those circumstances, I find that the case has been automatically struck out.

26. Moreover, without the amendment, it is impossible to know the case that the claimant is advancing. The amendment was proposed in response to Judge Rayner's direction for further details to be given. This is not a case where I could simply direct that the amendment be disallowed and the case proceed on the basis of the original pleading- even if that was an option open to me, which I do not consider it is at this stage. At this stage my decision can only be as to whether there has been material non-compliance with the unless order.

Application under Rule 38(2)

The reasons set out in the next part of this judgment were given following the delivery of the above reasons and having heard further argument.

27. This is the decision on the question of whether or not the unless order of Employment Judge Gray should be set aside pursuant to Rule 38(2) of the Tribunal Rules of Procedure.

28. At the outset of this part of the hearing, I asked the claimant whether he wished to proceed with an application under Rule 38(2) immediately or seek an adjournment (given that the requirements of Rule 38(1) had not been complied with by the Tribunal, in that no written notice had been sent out) and the claimant had not put in any evidence as to why she did not comply with the unless order. Moreover, the claimant had not complied with Rule 38(2) which required the application to be in writing. The claimant's solicitor invited me, nevertheless to go on to consider an application made by him, in the face of the Tribunal, for an extension of time for compliance with the unless order and/or an order under rule 38(2). He submitted that the document page 221 of the bundle effectively set out the application in any event.

29. The respondent agreed that I should waive any requirement for the application under rule 38(2) to be in writing.

30. I made an order under rule 6 of the Tribunal Rules waving the provisions of rule 38, because the parties were agreed that I should do so and because the document at page 221 seemed to me set out most of what the claimant would want to say in any event in a written application.

Law

31. Rule 38(2) of the Rules of Procedures states that a party whose claim has been dismissed may apply to have the order set aside on the basis that it is in the interest of justice to do so.

32. In *Thind v Salvesen Logistics Ltd* UKEAT/0487/09/DA, the Employment Appeal Tribunal stated "14…The tribunal must decide whether it is right, in the interests of justice and the overriding objective, to grant relief to the party in default notwithstanding the breach of the unless order. That involves a broad assessment of what is in the interests of justice, and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will generally include, but may not be limited to, the reason for the default, and in particular whether it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. The fact that an unless order has been made, which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration. Unless orders are an important part of the tribunal's procedural armoury (albeit one not to be used lightly), and they must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside. But that is nevertheless no more than one

consideration. No one factor is necessarily determinative of the course which the tribunal should take. Each case will depend on its own facts.".

33. Rule 5 of the Employment Tribunal Rules provides "The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired."

34. Rule 2 of the Employment Tribunal Rules provides as follows:

> **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—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (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.

Findings

35. In reaching my decision I have taken account of the following facts.

    a. There was clearly a lack of full compliance with the unless order of Employment Judge Rayner which is why the unless order was varied in the terms that it was by Employment Judge Gray.

    b. It must have been apparent to the claimant, who by that stage was represented, that she was being given another chance. Nevertheless, on the basis of my earlier determination, the claimant failed to comply with the unless order for a second time. That is a serious default.

    c. Notwithstanding the seriousness of the default, I take into account the fact that the claimant did make attempts to comply with both unless

orders in that she did submit a document in response to the unless order of Employment Judge Rayner and she did submit a document in response to the order of Employment Judge Gray. Moreover, as I set out earlier, she also attempted to comply with the earlier order of Employment Judge Harper.

d. I find that this is not a claimant who is wilfully or was wilfully disobeying Tribunal orders.

e. I suspect that had the claimant's solicitor put in a witness statement on her behalf, that statement she would have asserted that the claimant was doing best but simply did not fully understand what was required of her. For the purposes of this decision, therefore, I presume, in her favour, that was the case.

36. It seems to me that an important consideration in this case is the extent to which the unless order has now been complied with.

37. Initially it seemed to me that the document at page 221 might comply with the terms of Employment Judge Gray's order even though it did not set out the acts of less favourable treatment or harassment asserted in great detail. Paragraph 13 of that document contained the most useful summary of the case and, had the claimant been able to give proper particulars at this hearing of;

a. the alleged insubordination,
b. the change in the respondent's attitude and
c. the disciplinary hearing complained of,

I would have been minded to take the view that there had now been compliance with the unless order.

38. However, shortly before this hearing a list of issues was submitted by the claimant which set out slightly different allegations of unfavourable treatment in paragraph 6. That reads "did the respondent treat the claimant less favourably in comparison to the real comparators in relation to the following acts- failure to discipline staff for failing to give medication and non attendance on clients/leaving clients unattended. Failure to pick up calls"

39. When I asked the claimant's solicitor about the date of the disciplinary matter, I was referred to an incident on 2 October 2019 which the solicitor then clarified was the dismissal of the claimant for leaving a client unattended. The solicitor went onto say that the claimant's position was that there was not just one issue there were other reasons for the claim. He was unable to articulate what the other reasons were.

40. The claimant's solicitor was able to give one example of an occasion when the respondent refused calls from the claimant (which is what was meant by the reference to failure to pick up calls) but then he stated that there were other occasions - without being able to give particulars.

41. The claimant's solicitor told me that the claimant's position was that there were incidents which happened in March and September 2019 which

culminated in the disciplinary meeting in October and he referred to visits from the CQC, which he said led the respondent not treating the claimant as it would treat other staff members, but was unable to give any meaningful particularisation of that allegation. He made reference to the management being cold towards the claimant but was not able to give any particulars.

42. In short, the more I discussed the issues with the claimant's representative the more it became clear to me that there is still no clarity as to precisely what allegations the claimant is making or when the allegations occurred are alleged to have taken place.

Conclusion

43. I do not make any particular criticism of the claimant's solicitor who was no doubt doing his best in the circumstances, but his difficulty encapsulates the problem here, which is that one year and nine months after the claim was issued, it is still insufficiently clear as to what the claimant's claim is. It would be impossible to construct a list of issues at this hearing because the claimant and her representative are still not clear on the precise allegations of less favourable treatment or harassment that the claimant is making.

44. Had it been possible to construct a list of issues at this hearing and move the matter forward, it is very likely that I would have taken the view that it was appropriate to set aside the unless order under Rule 38(2). However, that was not possible, it was still not possible for the respondent to know the case it has to meet. If an order was made, now, under Rule 38(2) the respondent would be bound to incur significant further delay, cost and inconvenience because the Tribunal would need to have further hearings simply to understand what the claimant's case is. That is not only prejudicial to the respondent but also to other litigants because it means that this case takes up more than its fair share of resources.

45. I take account of the prejudice to the claimant if she is not granted relief, she is driven from the judgment seat and claims of discrimination should not be lightly struck out. However, the claimant has been given opportunity by Employment Judge Rayner and Employment Judge Gray to properly particularise her case. Even by the date of this hearing she had not taken that opportunity. Thus it seems to me that the prejudice is mitigated by the fact that the claimant has been given the opportunity to put her case in order.

46. As I have said above, this is not a case where I could simply disallow the amendment and reinstate the original claim, because of the lack of clarity in that claim.

47. I have also considered whether I should extend time under Rule 5 so that the claimant has a longer period to comply with Employment Judge Gray's unless order. I have concluded that, for the same reasons that it is not appropriate to grant relief under Rule 38(2), it is also not appropriate to grant relief under Rule 5 and in those circumstances, notwithstanding all that the claimant's representative has said this case remains struck out.

Employment Judge Dawson
Date: 8 November 2021

Judgment & reasons sent to parties: 3 December 2021

FOR THE TRIBUNAL OFFICE

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