



EMPLOYMENT TRIBUNALS

Claimant: Mrs CJ Donkin

Respondent: Fourstones Paper Mill Company Limited

JUDGMENT

Employment Tribunals Rules of Procedure 2013 – Rule 38(2)

The judgment of the Tribunal is that:

1. The Claimant's application to set aside the unless order of **30 November 2021**, as a result of which her claims were dismissed, is refused and the claims remain dismissed.

REASONS

Procedural history

1. The Claimant presented a Claim Form on **15 June 2021** in which she ticked the box indicating a claim of age discrimination. She did not tick the box claiming disability discrimination but referred in passing and very briefly in the body of the Claim Form to a sickness record and to anxiety/depression.
2. On **23 August 2021**, there was a telephone preliminary hearing before Employment Judge Shore. The Claimant did not attend that hearing. Judge Shore issued an 'unless order' for her to provide an explanation for her non-attendance. On **24 August 2021**, the Claimant emailed to say that she had not received any prior notification of the hearing.
3. Judge Shore also made a number of case management directions. He noted in paragraph 11 that the Claimant '*also seems to indicate a possible claim of*

disability discrimination'. Therefore, he directed her to state, by **20 September 2021**, whether she was pursuing any claim of disability discrimination (see paragraph 15 of the orders). If she confirmed that she was pursuing such a claim, Judge Shore then directed the Claimant to provide certain basic, and essential, information (see paragraphs 20 and 21). He set out that information in paragraphs 21.1 to 21.7, requiring the Claimant to provide it by **11 October 2021**. He also attached to the case management orders a series of tables, giving examples of how the information could be provided.

4. The final hearing of the claims was listed to be heard over two days on **16 and 17 December 2021**.
5. On **01 September 2021**, Judge Johnson reviewed the file and noted the Claimant's explanation for not attending the telephone preliminary hearing, which complied with the 'unless order'. He reminded the Claimant that she now needed to comply with Judge Shore's orders.
6. On **20 September 2021**, the Claimant emailed the tribunal with some information and with a breakdown of what compensation she was claiming. She had completed some of the tables attached to Judge Shore's orders. From what the Claimant set out in the tables, it could be seen that she indicated that she wished to pursue the following complaints:
 - a. A complaint of discrimination because of something arising in consequence of disability (section 15 EqA 2010) referring to the fact that her sickness record had been used in the redundancy selection exercise;
 - b. A complaint of failure to make reasonable adjustments (sections 20-21 EqA 2010), referring to a failure to make adjustments to her workload;
7. The Claimant did not address Judge Shore's directions in paragraph 20 and 21 of his orders, all of which concerned the important issue of whether the Claimant met the definition of disability under section 6 EqA 2010. On 07 October 2021, the Claimant emailed the Tribunal regarding 'section 22 of the Tribunal', to say that she was experiencing extreme difficulty in obtaining copies of medical records and any other relevant information from her doctor. The reference to 'section 22' was to paragraph 22 of Judge Shore's order, which directed the Claimant to provide, by **11 October 2021**, '*copies of the parts of her GP and other medical records that are relevant to whether she had the disability at the time of the events the claim is about and any other evidence relevant to whether she had the disability at that time*'. She sent a further email on **19 October 2021** to say she has had difficulty contacting the relevant person at the GP surgery.
8. On **21 October 2021**, the Respondent applied for the disability discrimination complaints to be struck out, or in the alternative, for a deposit order.

9. On **22 October 2021**, Judge Arullendran directed that there would be a preliminary hearing on 30 November 2021, to identify the claims and issues in advance of the final hearing commencing on **16 December 2021**.
10. On **03 November 2021**, Judge Loy directed the Claimant to comply with the outstanding orders, highlighting paragraphs 20, 21 and 22 by **17 November 2021**. This, in effect, extended the time given by Judge Shore by about 5 weeks.
11. On **18 November 2021**, the Respondent's solicitors wrote to say that they had not received any of the evidence or information directed by Judge Shore in paragraphs 20, 21 and 22 of the Order of **23 August 2021** and asked the Tribunal again to consider striking out the claim.
12. On **19 November 2021**, the Claimant sent some limited medical records covering a period of time from **22 October 2020** to **05 December 2020**. On **23 November 2021**, she emailed the tribunal to say that she was finding the process for the tribunal difficult and was unable to provide all her documentation in the timescale required. In other earlier correspondence, the Claimant explained that she was having to deal with the process in between shifts and that it was not easy to find the time because she was working.
13. On **23 November 2021**, Judge Arullendran directed that the Respondent's application for a strike out/deposit order would be discussed at the forthcoming preliminary hearing. She encouraged the Claimant to seek some legal advice.
14. On **24 November 2021**, the Claimant asked for the hearing to be postponed as she wished to prioritise looking after her parents who live next door to her. She said she was off work over the weekend and would try to get all the documentation to the Respondent. On **26 November 2021**, Judge Jeram asked the Claimant how long she was seeking and to say why she believed that period of time would assist her in advancing her claim. The Claimant replied in the evening of **26 November** to say that she would endeavour to get the documentation to the tribunal by **30 November 2021**, that she had a one-page scanner and worked from a lap top. She said she worked shifts at a call-centre and did not have much time off. In between calling on her parents and working she said she had little time to herself and to these issues.
15. As the Claimant did not say that she was still seeking a postponement or that she would not be available, the preliminary hearing proceeded on **30 November 2021**. It was heard by Judge Morris.
16. Judge Morris noted that the Claimant appeared to be extremely confused and anxious during the hearing and was upset throughout it. He recorded his observations in paragraph 10 of his orders. He expressed sympathy and understanding but noted that these were the Claimant's claims and that she had a duty to the Tribunal and the Respondent actively to progress the claims as best she could and that this needed to be afforded a degree of priority. He noted that the Claimant confirmed her understanding and acceptance of this.

17. It must be noted that this was now about two weeks before the final hearing of a complaint of disability discrimination and the basic and essential information ordered by Judge Shore back in August 2021 had not been provided. Therefore, Judge Morris made an unless order as follows:

a. Unless by 4pm on Monday **6 December 2021** (as specified in the orders at paragraphs 22 and 30 below) the claimant complies with those orders:

i. In respect of the order referred to at paragraph 22 below the claimant's complaint of disability discrimination will stand dismissed without further order;

ii. In respect of the order referred to at paragraph 30 below the entirety of the claimant's claim will stand dismissed without further order.

18. The reference to paragraph 22 was a direction to answer the questions set out by Judge Shore in paragraph 21.1 to 21.7 of his original orders (all relating to the issue of disability).

19. The reference to paragraph 30 was to a direction that the Claimant send the Respondent a copy of her witness statement by 4pm on Monday **06 December 2021**.

20. The Claimant did not comply with these orders by the date ordered. At 17:35 on **05 December 2021**, she emailed the Tribunal to say that her father had fallen and that they were waiting for an ambulance but she would endeavour to get the information to the tribunal. Under an hour later she emailed to say she had been asked to take her father to a walk-in clinic. She emailed again at 21.58 to say that they had been sent to A&E at the RVI and that her father was waiting to see a doctor. At 10.07am on **06 December 2021**, she emailed the Tribunal to ask for an extension of time to **07 December 2021** to get the documentation to the tribunal. The Claimant also referred to the fact that she did not finish her shift until 6.50 the day before. She said she would try to make the deadline. At 12.20 on **06 December 2021**, the claimant emailed again to say that, having spoken to a 'tribunal advisor' she was advised to request an extension of time. That application had not been seen by a judge until after expiry of the unless order.

21. The Claimant emailed again on **07 December 2021** at 17:08, saying 'below is what I am able to send so far in relation to what was initially requested'. She then listed a number of points by reference to paragraphs 21.1 to 21.7.

22. However, the information she provided in relation to 21.2 bore no relation to what she had been asked – which was to provide examples of the effects of her impairment on her ability to carry out normal day to day activities. The Claimant did not send a witness statement as she had been directed, nor did she send any more medical records relating to her depression/anxiety.

23. On **08 December 2021**, the tribunal wrote to the Claimant confirming that her claims were dismissed. The Claimant was informed that she could apply in writing to the Tribunal under Rule 38 to have the unless order set aside. The Claimant wrote on **21 December 2021** making that application.

Legal principles

24. Rule 38(1) of the Tribunal Rules 2013 provides that an order of the Tribunal may specify that, if it is not complied with by the date specified, the claim or part of it shall be dismissed without further order. Under rule 38(2) a party whose claim is dismissed as a result of such an order may apply to the Tribunal in writing to have the order set aside on the basis that it is in the interests of justice to do so. This is known as an application for relief from sanction. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.

25. There have been a number of cases in the EAT which have given guidance to Tribunals on the approach to be taken in applications for relief from sanction: Governing Body of **St Albans Girls School v Neary** [2010] IRLR 124; **Thind v Salveson Logistics** UKEAT/0487/09; **Opara v Partnerships in Care Ltd** (UKEAT/0368/09 **Hylton v Royal Mail Group Ltd** UKEAT/ 0369/14; **Enamejewa v British Gas Trading Ltd** UKEAT/0347/14; **Morgan Motor Company Ltd v Morgan** UKEAT/0128/15; **Singh v Singh (as representative of the Guru Nanak Gurdwara West Bromwich)** 2017 ICR D7.

26. Factors to consider are the reason and seriousness of the default, the explanation for it, the prejudice to the other party and whether a fair hearing is still possible. The tribunal may take account of facts that have happened since the unless order was made. There need be no compelling or special factor in order to obtain relief from sanction. Fundamentally, a tribunal is bound to determine applications for relief from sanction on the basis of what it considers to be in the interests of justice. This necessarily involves an exercise of judgement, which is to be exercised rationally, taking into account relevant factors and avoiding irrelevant factors. It involves a broad assessment of the particular case, balancing the relevant factors. It is ultimately a 'judgement call'.

Discussion and conclusion

27. There has been no request for a hearing to determine the application to set aside the unless order and I consider it appropriate to determine the application on the basis of the written representations made by the Claimant.

28. I am obliged to consider and determine this application on the basis of what I consider to be in the interests of justice. That requires me to exercise my judgement rationally, taking into account relevant factors and avoiding

irrelevant ones. The concept of ‘the Interest of justice’ means interest to both sides.

29. I considered first of all whether I remained satisfied that it was appropriate to issue the strike out judgment on **08 December 2021**.
30. I have noted that Ms Donkin was afforded extensions of time in order to comply with Judge Shore’s orders. She was sent reminders highlighting the particular parts of the orders which had to be addressed. She was encouraged to seek legal advice. She left it extremely late to obtain any kind of advice (noting in her email of **06 December 2021** that she had spoken to a tribunal adviser). The Claimant had failed to attend a preliminary hearing and had been issued with an unless order back in August 2021. Although she had missed the extension afforded by Judge Loy, the Claimant subsequently said that she was going to provide the information by **30 November 2021**. I am satisfied from my review of the file, the Claimant’s correspondence and representations that the Claimant did not prioritise this litigation. There is an abundance of references to her unavailability due to her working hours. Whilst I acknowledge the anxiety the Claimant has experienced, as noted by Judge Morris, she needed to give more attention to dealing with these proceedings.
31. Having considered the events before and following the order issued by Judge Morris, I remain satisfied that it was appropriate to issue the strike out order and the judgment striking the claims out. I now turn to consider whether it is in the interests of justice to set the order aside – and to revoke the judgment.
32. I concluded that it was not in the interests of justice to set that order aside – and therefore not in the interests of justice to allow relief from sanction.

The nature of the failure

33. I repeat what I say in paragraph 30 above. By the date of the preliminary hearing (**30 November**) there were only 11 working days before the final hearing. At the date of issuing the strike out judgment, there were only 5 working days with no sign of compliance by the Claimant in respect of two essential orders: one, to provide basic information in relation to her ability to carry out normal day to day activities, and the other to send to the Respondent her witness statement.
34. As a result of the earlier failings by the Claimant, Judge Morris had directed sequential exchange of statements. That was, I infer, because the critical evidence or information relating to the issue of disability was in the possession of the Claimant. It is important that the Respondent understood her case in advance of the hearing and be able to prepare for it. It would not have been fair to the Respondent to expect it to proceed to a hearing in such circumstances. Therefore, the Claimant’s non-compliance was serious. It was also significant in extent, having been granted an extension of time by the Tribunal and afforded

further periods of time for compliance. To proceed to the hearing in such circumstances – where the evidence to be given in statement form was entirely within the knowledge of the Claimant - was unfair and prejudicial to the Respondent.

The explanation for the failure

35. I have had regard to the Claimant's personal circumstances, which she relies on as explaining the failure to comply. There were two issues: firstly, her work and secondly, her parents. I sympathise with her on both counts. However, the fact that she works shifts is no satisfactory answer to a failure to provide the basis and essential information directed by Judge Shore, in respect of which she had many months to provide it. Further, admirable as it is that the Claimant devotes time to her elderly parents, I note that the very unfortunate incident regarding her father's fall happened on the day before Judge Morris's unless order had to be complied with. Bearing in mind that she acknowledged the importance of complying with orders at that preliminary hearing, and bearing in mind that in advance of the hearing she had said she hoped to provide the information by the date of the hearing, in my judgment, she ought not have left it so late to comply, especially so close to the final hearing and understanding the consequences. She cited in her email of 06 December the fact that she had finished work later than usual and did not take any breaks. That was a case of prioritising her work over the litigation. I recognise that times have been difficult for the Claimant and take note of what Judge Morris observed at the hearing. I have factored that in to the balancing exercise which I am obliged to undertake.

Prejudice to the Respondent

36. The Respondent still does not know what the Claimant's evidence is in relation to the adverse impact on day to day activities. It has experienced cost and delay. The longer time passes, the more difficult it is to address the factual issues. There would need to be a further preliminary case management hearing and further orders made, with further cost and delay and uncertainty as to whether the Claimant will comply with directions in the future. It is unlikely that the proceedings could be heard until the last quarter of the year. They have seen the Claimant be given extensions of time only for the required information not to materialise.

Fair hearing

37. Whilst I have had regard to the difficult circumstances faced by the Claimant I have also had regard to the whole picture. The Claimant's original complaint did not refer to disability discrimination at all. It was only with the proper assistance of the Tribunal that a disability discrimination claim was subsequently advanced. Accommodation was afforded to the Claimant by the Tribunal with extensions of time. Judge Morris explained sympathetically what was required. The Tribunal refused, rightly in my judgment, applications for

strike out preferring to give the Claimant further opportunities to provide what was directed.

38. There is a need to observe directions, particularly those key directions which are carefully explained and in respect of which reminders are sent and extensions afforded. Case management orders are an important feature of the administration of justice and they must be taken very seriously. Their effectiveness will be undermined if tribunals are too ready to overlook them and the interests of and administration of justice will be adversely affected. I have also had regard to the draconian nature of the strike out, prior to testing the complaints on their merits.
39. The Claimant may well ask, how can it be in the interest of justice to dismiss a complaint that has not been determined on its merits? I have considered this question carefully and concluded that although the result is draconian, the interests of justice to both parties in litigation and to the wider administration of justice is not served by setting aside an order in circumstances where I have concluded that the Claimant had left it very late to comply, had failed to comply on previous occasions despite extensions, had not given sufficient priority to the litigation and, even as at the date of her application to set aside has still not provided her witness statement or the basic information needed to establish disability. To set the order aside and revoke the judgment might be 'in the interests' of the Claimant – but that does not equate to the interests of justice. A respondent would also have a legitimate concern that it would not have a fair hearing going forward were the tribunal to revoke a judgment properly issued in these circumstances.
40. I am satisfied the Respondent could not have had a fair trial as of **08 December 2021**. I am also satisfied that a fair trial is still highly unlikely. The concept of a fair trial involves having a fair hearing within a reasonable period of time, with reasonable and proportionate preparatory work on both sides and the commitment of a reasonable and proportionate share of judicial and administrative resources by the Tribunal.
41. Considering the proceedings more broadly, I have little confidence that the Claimant will sufficiently prioritise the litigation, such that there is a significant risk of future failure to comply with orders. There has been no sign of the Claimant providing the necessary information as of **January 2022**.
42. Taking all the above factors into account, I do not consider it in the interests of justice to set aside the unless order. Accordingly, the claims remain dismissed.

Employment Judge Sweeney

6 January 2022