



## EMPLOYMENT TRIBUNALS

Claimant

**Mr. Z. Malik**

v

Respondent

**Birmingham City Council**

**Heard at: Birmingham On: 1 & 2 February 2022**

**Before: Employment Judge Wedderspoon**

**Members  
Ms. Outwin  
Mr. Sharma**

**Representation:**

**Claimant: In Person**

**Respondents: Ms. Hodgetts, Counsel**

## JUDGMENT

1. The claimant's application to strike out the respondent's ET3 is refused.
2. A restricted reporting order is in place for the individual to be named as Q.

## REASONS

### Strike out

1. By claim forms 17 February 2017 and 8 December 2017 the claimant pursues claims of race discrimination, victimisation and constructive unfair dismissal.
2. Employment Judge Lloyd made an unless order sent to the parties 18 October 2017 stating "*Unless by 20 October 2017 the respondent provide details set out in the claimant's email of 9 October 2017 the response will stand dismissed without further order.*" The claimant's email dated 9 October 2017 was sent to the respondent and the Tribunal seeking a "subject access request". "I am making a formal request to have all correspondence/electronic transmission that Birmingham City Council have received and/or released to all Birmingham City Council employees/departments and received and/or released to any external bodies about me between the period 2 January 2016 and 19 July 2017. This includes but not exclusively any correspondence that my name or address has referenced; any officer communication from Birmingham City Council to any external body; any communication from any external body to Birmingham City Council, any communication from elected members (councillors) to Birmingham City Council, any communication from

Birmingham City Council to elected members and any other individuals and/or organisations referencing my name in any such capacity.”

The claimant’s application

3. The claimant states that prior to the unless order being made, Employment Judge Dean had ordered disclosure in April 2017 and Employment Judge Antis had ordered disclosure on 8 September 2017. The orders were clear but the respondent failed to provide the documents in a reasonable period and he asserts documentation referred to in paragraph 53 of this submission dated 13 September 2019 remains outstanding (page 1611 to 1612).
4. This documentation includes page 53 (a)the complaints against me alleged my Councillor Kennedy to have been made by members of the community; (b)correspondence/investigation notes from K. Creavin re complaints alleged by Councillor Kennedy (c)The outcome of the internal investigation in V. Lawrence’s complaint which referenced me and the ET1 submitted with regard to this complaint (d)the outcome of the internal investigation into complaint made by Eleanor Gordon which referenced me (e)copy of the PDR assessment carried out by me in relation to Josie Davis (f)PDR by me for assistant manager Chris Taylor (g)documents referred to by Josie Davis to the effect that I gave him an A while requiring him to “undergo training to improve his performance;” (h)any correspondence/notes/records said to have been relayed by Josies Davis to Q alleging homophobic remarks said to have been made by me (i)My PDR conducted by Nick Price in or around March 2015 (j)my appraisal conducted by Q in March/April 2016; (k)notes/record of any conversations between Q and Dean Treasure referencing me and the issues I complained of.
5. The claimant stated that the respondent was in breach of clearly worded orders. Further he contended that it was a deliberate breach and there had been very late disclosure as late as last Friday before the final hearing.
6. The claimant stated that he was disadvantaged in having a fair trial in the case in the absence of this material. He alleged that some of the material was relevant to credibility of himself and the respondent’s witnesses. He alleged that with the documentary evidence he would be able to establish his credibility or lack of credibility from some of the respondent’s witnesses.
7. The claimant drew the Tribunal’s attention to the remarks of Mr. Justice Underhill as he was then at paragraph 36 of the case of **Thind v Salvesen Logistics Limited UKEAT/0487/09** held that all these cases turn on their own facts.
8. The claimant was critical of the respondent’s general disclosure. The dignity at work documentation was not provided to the claimant until 2 December 2017 following his resignation on 27 November 2017. He had received heavily redacted documentation which had only appeared unredacted in very recent disclosure. Some documentation had not appeared until Friday a few days before the start of the final hearing on Tuesday. He had only received a paper bundle last Wednesday. He was unable to work on the

electronic bundle supplied before. He emphasised that he could not have a fair hearing in the absence of the documentation.

The respondent's submission

9. The respondent resisted the application. Its case is that there was no breach of the unless order. A SAR response was given on 19 October 2017 at page 1235. Alternatively, that any breach would not impede a fair hearing of the case. First the respondent directed the Tribunal to the limited nature of the unless order and it was restricted in terms of time and category of documents to be disclosed. It did not concern general disclosure. Secondly the respondent referred the Tribunal to the order of Employment Judge Antis dated 8 September 2017 at page 122 who had identified at paragraph 8 the extent of the of the claim made by the claimant namely (a) matters arising after late 2015 or early 2016 (the exact date appears unclear but this seems to relate to the date of his transfer to Netchells, which he gives as 1 November 2015 (b)complaints of race or religious discrimination and (c)his treatment of the six named managers.
10. Dealing with the documents sought the respondent submitted as follows :-  
(a)"the complaints against me alleged my Councillor Kennedy to have been made by members of the community" there was no document about complaints against the claimant by Councillor Kennedy to have been made by members of the community; this was a misunderstanding by the claimant. The respondent had disclosed a document at page 669 which is from Councillor Kennedy referring to complaints by others.
11. In respect of (b)correspondence/investigation notes from K. Creavin re complaints alleged by Councillor Kennedy. It was submitted that there is a fair amount of material in the bundle including pages 1611 emails and internal correspondence at page 767.
12. In regard to (c)The outcome of the internal investigation in V. Lawrence's complaint which referenced me and the ET1 submitted with regard to this complaint, the respondent submitted that there is an unredacted version at page 1641; albeit late, document have now been provided. Last Friday the unredacted version was provided. Pages 1643, 1645 and 1646 are relevant to these matters.
13. In respect of (d)the outcome of the internal investigation into complaint made by Eleanor Gordon which referenced me, it was submitted that these documents fell outside of the scope of the order because these dated back to April 2015; the claimant's case relates to matters from the autumn of 2015.
14. In regard to (e)copy of the PDR assessment carried out by me in relation to Josie Davis, and (f)PDR by me for assistant manager Chris Taylor and (g)documents referred to by Josie Davis to the effect that I gave him an A while requiring him to "undergo training to improve his performance;" and (i)My PDR conducted by Nick Price in or around March 2015 the respondent's case is that this does not fall within the scope of the SAR and

its absence is not relevant to determine the issues in this case. If it exists as an abundance of caution the respondent will disclose it.

15. In respect of (h) any correspondence/notes/records said to have been relayed by Josies Davis to Q alleging homophobic remarks said to have been made by me, the respondent submits that these are in the bundle at page 813. They are referred to in the witness statement of Ms. Davies at paragraph 18 and any queries the claimant can raise in questioning.
16. In respect of (j) my appraisal conducted by Q in March/April 2016; this can be found in the additional bundle unredacted.
17. (k) notes/record of any conversations between Q and Dean Treasure referencing me and the issues I complained of, the respondent submits documents are included at pages 564 to 565.
18. The respondent submits there was no breach of the unless order. If there was it was inadvertent. There has been significant compliance and a fair trial remains possible. The respondent noted that the claimant had recently disclosed in his additional bundle a document dating back to 2009.
19. Following hearing submissions, overnight the respondent provided further disclosure of 43 pages of documentation. This includes documents taking back to 2012 concerning performance issues and PDRs from 2014 to 2015 of Jodie Davis and Chris Taylor; the incomplete appraisal of the claimant and further conversations with Mr. Jamieson via email. The respondent was not convinced any of the documents were relevant to the issues that the Tribunal needed to determine but disclosed the documents because the claimant wanted them and by reason of its continuing duty of disclosure.

#### The Law

20. Pursuant to Rule 38 of Schedule 1 of the 2013 Rules, an unless 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 notice. Relief can be granted for such a sanction in the interests of justice under (2).
21. In the case of **Thind v Salvesen Logistics Limited** (also referred to in the case of **Morgan Mortor Company Limited v Charles Morgan UKEAT/0128/15**) guidance was given by the EAT of the approach to be taken by the ET when faced with a breach of an unless order and granting relief.
22. At paragraph 14 of the judgment it is stated *“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 interest 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 categorized. 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."*

23. The Tribunal also considers the overriding objective. A relevant factor in respect of the interests of justice is proportionality.

#### Conclusions

24. The Tribunal concludes that there has been breach of the unless order. The respondent did not fully comply with the unless order by 20 October 2017 disclosing all the documents requested within the limited period of time namely from Autumn 2015 until early 2016. However, the Tribunal notes that the unless order appears to have provided the respondent only two days for compliance.
25. The Tribunal finds that the breach was inadvertent. Some realism needs to be applied. The bundle stands at over 1600 pages. There has been a significant amount of disclosure provided by both sides; some of which on both sides has been late. Both parties are aware of their continuing duty to disclose documentation.
26. The Tribunal concludes that the breach has been inadvertent and not deliberate. The respondent did attempt to answer the SAR and before and since the making of the unless order, there has been significant compliance with the requested documentation as at today's date. It is regretful that some documentation has only been provided in redacted form last Friday and in fact today but nevertheless it has been provided. In so far as the claimant says that there is prejudice he will be given time further time within the listed hearing to familiarise himself with the material and provide a supplemental witness statement to comment on the documents.
27. The Tribunal finds that a fair trial is possible. The Tribunal considers the position of the fairness of the trial at today's date when it will hear all the evidence and not on a historical basis of what the position was when the unless order was made. For various reasons including the successful appeal by the claimant to the EAT there has been delay in hearing this application. Employment Judge Algazy ordered that the strike out application should be dealt with on the first day of the trial hearing which has been delayed to this week.
28. The majority of the documents have now been disclosed to the claimant. The missing PDRs from the bundle have now been provided to the claimant

but the Tribunal is unpersuaded that in the absence of these documents that the claimant cannot have a fair trial.

29. The claimant's case is that he requires these documents because they are important for credibility issues. The Tribunal is not persuaded by this argument. The claimant at trial has the opportunity to cross examine the respondent's witnesses. The Tribunal will have the opportunity to hear the evidence and weigh up credibility. If the respondent seeks to rely upon incomplete documentation the claimant is entitled to request the Tribunal to draw adverse inferences. The claimant is not prejudiced.
30. Further it would not be proportionate taking into account the serious nature of the allegations made in the case to strike out the respondent's defense to the claim. It disputes the allegations and puts the claimant to proof. In the interests of justice, the claims should be heard by the Tribunal with the available evidence.

Restricted reporting order

31. The respondent made an application to anonymise a witness in the case Q at trial and on the record and also to make a restrictive reporting order in respect of Q until further order. Employment Judge Dimbylow had already ordered anonymisation of the witness to be known at Q but in the light of the claimant's additional bundle of documents which had the individual's name throughout it was requested in the interests of justice that there should be a restricted reporting order.
32. The claimant had no objections to this application and stated he did not want anyone to be upset.
33. Naming a person in the course of a public hearing can interfere with the article 8 right of respect to private life and in the case of **Clift v Slough Borough Council (2011) 1 WLR 1774** it was held that this includes a right to protection of reputation.
34. Rule 50 gives a wide discretion to the Tribunal to make orders concerning privacy in the hearing including a restricted reporting order in the interests of justice. Although the default position is that there should be open justice, there was a balancing exercise to take account of including the right of the private life of a witness. Press can attend a hearing and have access to bundle of documents which at present includes express reference to the individual's name. There was no objection to the application and a concession by the claimant that naming the individual has or would cause upset/distress. The individual was not a party to the claim.
35. Applying the overriding objective and taking account of the need for a public hearing and the rights of the individual's private life, the Tribunal determined that the individual should continue to be anonymised throughout the hearing

and on the record and also there should be a restricted reporting order including on the record.

**Employment Judge Wedderspoon**

02 February 2022

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