



EMPLOYMENT TRIBUNALS

Claimant: Ms Megan Speakman

**Respondents: (1) Goodsir Commercial Limited
(2) Mr P Goodsir**

Heard at: Central London

On: 7 February 2022

**Before: EJ Isaacson and Members Ms E Ali and Ms C Bryson
Representation**

Claimant: Mr W Brown, solicitor

Respondents: Ms L Amartey, counsel

JUDGMENT

The claimant's application to set aside dismissal of her claim following non – compliance with the Unless Order dated 22 December 2021 is refused. The claim remains dismissed.

REASONS

Background

1. By a claim form presented on 13th May 2019, the Claimant brought a claim of indirect sex discrimination against the Respondents. She was employed by the First Respondent, a Property Management company, from 28th August 2017 to 3rd March 2019 as Office Manager/Team Secretary. Her employment terminated at the end of her maternity leave after the Claimant had requested to return to work part time. The Respondents' case is that the Claimant's position was redundant at this point and they could not find an alternative part time role in the company.
2. The Claimant claimed that the Respondents did apply a PCP, the requirement to work full-time, which places women at a particular disadvantage compared to men because of childcare requirements; and that she was placed at that disadvantage. The Claimant had not included a complaint of pregnancy/maternity discrimination and/or "other payments" in the original claim form.
3. The claim was case managed by Employment Judge Norris on 28th July 2021.

4. At the case management hearing EJ Norris made the following order for disclosure:

'a. The parties are to complete disclosure by no later than 8 September 2021 by sending each other a list of documents and a copy of anything that is on their list that they know the other parties do not have (including, from the Claimant, all relevant documents as to remedy) relevant to the issues listed below. This includes documents relevant to financial losses and injury to feelings. "Documents" includes recordings, emails, text messages, social media and other electronic information. You must send all relevant documents you have in your possession or control even if they do not support your case. A document is in your control if you could reasonably be expected to obtain a copy by asking somebody else for it.'
5. On the 12 October 2021 EJ Norris ordered that the claimant must produce by 19 October 2021 copies of the acas certificates and an explanation for any discrepancy in the numbers cited.
6. On 25 October 2021 EJ Norris made an unless order for a skeleton argument to set out why the claimant argued she has complied with early conciliation and listed the matter for an open preliminary hearing;

to consider whether the Claimant has complied with her obligations in relation to Rule 12(1)(c) (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) and section 18A(4) Employment Tribunals Act 1996 and if she has not, whether the claim should be struck out because the Tribunal does not have jurisdiction to hear it.
7. Shortly before the deadline the unless order was complied with.
8. At the hearing EJ Nicklin decided the Claimant made an error in relation to the ACAS Early Conciliation reference numbers on the ET1 claim form and that it was not in the interests of justice to reject the claim. The claim form was therefore validly accepted.
9. On 22 December 2021 EJ Nicklin gave a reserved judgment including an unless order.
10. The basis for the order was that the parties were both directed to complete disclosure no later than 8th September 2021 in order for a hearing bundle to be prepared by 6th October 2021 and witness statements to be exchanged by 24th November 2021. The Claimant was also ordered to prepare a schedule of loss, although there was no date included within the order dated 28th July 2021.
11. At the date of the hearing on 6th December 2021, the Claimant had still not complied with its disclosure obligations under the order dated 28th July 2021. This meant that the parties had been unable to progress matters further towards preparation of a bundle and witness statements. At the end of the hearing on 6th December, the Claimant's representative conceded that it was well within the tribunal's powers in the circumstances of this case to make an unless order in respect of the non-compliance. Whilst the Claimant has no doubt been waiting for the hearing on 6th December and the determination of the application since that hearing, there was no good reason advanced for the non-compliance with the disclosure order which was due on 8th September 2021. Accordingly,

having regard to the overriding objective and the need to avoid delay and the postponement of the hearing presently listed for 7th and 8th February 2022, EJ Nicklin decided to make an unless order in respect of that non-compliance, pursuant to Rule 38 of the tribunal's Rules of Procedure.

12. Whilst no specific date was provided for the schedule of loss in the original order, there was also no good reason why this has not been provided by this point. The Claimant was professionally represented, and a schedule of loss was plainly required in good time before a final hearing in order for the Respondents to know what is being claimed and, where possible, for dispute resolution to occur. It was therefore in accordance with the overriding objective for the schedule of loss to also be subject to the unless order, particularly given the very short amount of time remaining before the final hearing.
13. Given the limited amount of time before the final hearing and there having been significant delay in the case progression owing to the non-compliance by the Claimant, it was appropriate to allow only a short period for compliance with the unless order.
14. The unless order stated:

'UNLESS ORDER Employment Tribunals Rules of Procedure Rule 38

UNLESS, by 5pm Thursday 6th January 2022, the Claimant:

1. *complies with paragraph (3)(a) of the order of Employment Judge Norris dated 28th July 2021 (disclosure of documents); and*
2. *sends to the Respondents' representative a completed schedule of loss on which the Claimant intends to rely at the final hearing*

then the claim will stand dismissed without further order. For the avoidance of doubt, the Claimant must comply with both parts of this unless order to be deemed to have complied with it. '

15. There were also further case management orders.

Today's hearing

16. Today's hearing was meant to be the start of a two days final merits hearing before a full panel.
17. Following representations made by the respondents' counsel, and after the claimant's solicitor conceded, it became clear that the claimant had not in fact complied with the unless orders of EJ Nicklin dated 22 December 2021 and therefore the claim should automatically have been dismissed.
18. Although written notice of dismissal had not been sent to the parties I confirmed that as the unless order was automatic the claim was currently dismissed and the claimant had to apply for relief from the sanction under rule 38 (2), to have the order set aside on the basis that it was in the

interests of justice to do so.

19. The claimant made the application to set aside the order and both parties had an opportunity to address the Tribunal.

The law

20. Rule 38 provides:

'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.'

21. Rule 38(1) makes clear, the consequence of an unless order that is not complied with is the automatic dismissal of the whole or part of the claim or response: no other act is necessary to effect the dismissal.
22. Rule 38, however, unlike r 13(2) of the 2004 Rules, provides its own relief from sanction by requiring the tribunal to notify the parties of the fact of dismissal once it has occurred and enabling the affected party to apply to set the order aside within 14 days.
23. The ground on which an application to set aside will be considered is that it is in the interests of justice to do so.
24. The question of material non-compliance is to be addressed as a qualitative rather than a quantitative test.
25. Underhill J, the then President of the EAT, in ***Thind v Salvesen Logistics Ltd UKEAT/0487/09, [2010] All ER (D) 05 (Sep)*** stated (at para 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."

26. He also noted (at para 36):

'... Provided that the order itself has been appropriately made, there is an important interest in employment tribunals enforcing compliance, and it may well be just in such a case for a claim to be struck out even though a fair trial would remain possible. ..."

Submissions

27. The respondents counsel argued that the claimant had flagrantly breached a number of tribunal orders and had only complied with the unless order dated 25 October 2021 last minute. The proceedings were littered with non compliance. The claimant conceded the unless dated 22 December 2021 had not been complied with. There was no reasonable explanation for the delay. The claimant was represented throughout by a solicitor. The claimant only sent text messages at 10.35 on 6 February 2022, which related to the period in January 2019. Further emails about universal credit were only sent shortly before the hearing. The respondents had been chasing for the claimant's survey from Direct Line regarding statistics on whether women still the primary childcarers and only received that before the hearing. The claimant had not provided a calculation of her losses to date and had not sent any documents relating to her income from self-employment. It was not possible to have a fair hearing as the respondent still didn't know the claimant's full case and what remedy she was claiming. The respondent would be prejudiced if the matter was adjourned for a further hearing.

28. The claimant's solicitor did not provide any explanation for not complying with the order but arguing that the claimant's case of indirect discrimination was serious and should be heard. The respondents had never stated in writing that the claimant could not return full time to work until her dismissal letter in March 2019. The parties were ready to go ahead and both witnesses could be heard in the time allotted.

Applying the law to the facts

29. The tribunal looked at the chronology of events leading up to today's hearing. It was clear that the claimant was represented throughout but failed to comply with the tribunal orders. Tribunal orders need to be complied with and within the time scales set.

30. Both parties are entitled to know the case that is being presented and the defense. The respondents were still not clear as to the claimant's claim at this late stage as the claimant had only just disclosed a number of text messages which may require the respondent to call further evidence and take further instructions. The claimant had only just disclosed the survey with statistics on childcaring. The claimant had today produced a breakdown of earnings but with no explanation or calculation of her losses to date. The email regarding universal credit was confusing. There were no documents from the claimant regarding her earnings from self-employment. The tribunal could not see how a fair trial could go ahead with all this late and incomplete disclosure. Any further adjournment would mean further costs and delays to the parties and to the tribunal.
31. The claimant and her solicitor had given no explanation for the default in complying with the unless order. Although there was no evidence the default had been deliberate the chronology of events suggest that the claimant did not take the timetables set out in the various orders seriously. The claimant appeared to take the view as long as things were done last minute it would not matter.
32. The claimant had been warned in previous case management hearings, in correspondence from the tribunal and in the unless orders the consequences of non-compliance.
33. Although the claimant would be prejudiced by not having the dismissal withdrawn and therefore not being able to proceed with her claim, the only reason the claim had been dismissed was because the claimant had not complied with the unless order. EJ Norris had very carefully set out what was required for disclosure. There could be no doubt what was required to be disclosed including text messages and information regarding her losses, including mitigation. The claimant was represented throughout. Had the claimant complied with the orders her claim would be proceeding today. If the tribunal did set aside the order then the respondent would be prejudiced by having to take further instructions and possibly obtain further witness evidence and statistics and incur further time and money in the process. The hearing would have to be adjourned and relisted.
34. It is with some regret the tribunal finds that it is not in the interests of justice in this case to exercise its discretion to have the order set aside. Therefore, the claim remains dismissed.

Employment Judge Isaacson

7 February 2022

Date _____

JUDGMENT SENT TO THE PARTIES ON

8 February 2022

.....
FOR THE TRIBUNAL OFFICE