EMPLOYMENT TRIBUNALS

Claimant: Mr T Jackson

Respondent: Swiss Re Management Limited

Heard at: London South (by video) **On:** 19 January 2022

Before: Employment Judge C H O'Rourke

Representation
Claimant: Mr Pullen – legal advice centre
Respondent: Mr Elwell-Sutton - solicitor

RESERVED PRELIMINARY HEARING JUDGMENT

1. The Claimants' application for relief from the sanction of strike out of his claim is granted and the Judgment of 4 December 2020, dismissing his claim, is set aside.

2. The claim will proceed to hearing, as per the separate case management orders of same date.

REASONS

Background and Issues

1. The Claimant made an application on 15 February 2021, subject to Rule 38(2) of the Tribunal's Rules of Procedure 2013, to set aside a judgment of 4 December 2020, striking out his claim, following non-compliance with an 'unless' order of 10 January 2020.

2. Chronology.

   a. January 2019 - the Claimant states he was unfairly dismissed.

   b. 15 June 2019 - he subsequently brought that claim [1]. He stated that he had provided an additional document with the ET1, setting out the particulars of claim and which is described as

'ET_Claim_Jackson_SwissRe_statement.rtf' in an acknowledgment email from the Tribunal [14]. The ET1 itself sets out no such grounds. Neither the Tribunal nor the Claimant have been able to locate this additional document. The Claimant states that he prepared on a borrowed computer, to which he no longer has access.

c. Unknown Date - the at-the-time unrepresented Respondent filed a response [16] (for which there is a letter of acceptance by the Tribunal dated 10 October 2019 [30]). That response denied unfair dismissal and asserted that the claim disclosed no particulars as to why the dismissal might have been unfair. The Claimant asserts that the copy of the ET3 sent to him by the Tribunal was missing every second page, to include page 4 [19], which sets out the Respondent's resistance to the claim and the afore-mentioned assertion that the claim disclosed no particulars as why the dismissal was unfair.

d. 15 August 2019 - standard directions were issued, with a hearing listed, for one day, on 10 January 2020.

e. 30 August 2019 – a copy of the ET3 is noted as received by the Tribunal on that date [25].

f. 16 December 2019 - the Claimant is directed by the Tribunal, in an undated letter (but sent on that date), to provide further and better particulars of his claim, by 23 December.

g. 23 December 2019 - the Claimant responded, asserting that he had only just seen the letter, as the email enclosing it had gone to his 'junk mail box'. He said that he had not received the Notice of Listing and asked to be phoned by the Tribunal '*to advise on what you require of me'*.

h. 7 January 2020 – following an exchange of emails between the Claimant, Respondent and the Tribunal, the already listed hearing was converted to a case management hearing (but which was, apparently, subsequently cancelled).

i. 10 January 2020 – an 'unless' order is made, requiring the Claimant to provide further and better particulars of his claim, by 24 January, to both the Tribunal and the Respondent (my emphasis) [35].

j. 23 January 2020 – the Claimant writes to the Tribunal (only), providing details of his claim, asserting procedural and substantive unfairness [58].

k. (mid-March 2020 – first COVID lockdown ordered.)

l. 3 May 2020 – the Claimant writes to the Tribunal, enquiring as to the claim's '*current status'*, asserting that he had complied with the 'unless' order.

m. 14 May 2020 – a telephone case management hearing is held, at which the Claimant attends, but the Respondent does not [37]. A final hearing is listed for 10 December 2020. The Order sets out the basis of his

unfair dismissal claim, alleging procedural and substantive unfairness. It also ordered that the Claimant provide a further copy of his response to the 'unless' order, to the Respondent, as it had not been copied to them. He does so on 21 May 2020 (the date ordered by the Tribunal) [82].

n. 19 June 2020 – the Respondent solicitors write, confirming their recent instruction. They submit that the 'unless' order has not been complied with, as whatever response the Claimant may have sent to the Tribunal, he did not send such to the Respondent, also, as ordered. Accordingly, therefore, they submit, the Claim stands as dismissed, without further order.

o. 5 August 2020 – the Tribunal writes to state that it considers that there has been substantial compliance with the 'unless' order, effectively, therefore, declining to dismiss the claim [45].

p. 12 August 2020 – the Respondent applies for reconsideration of that decision/judgment and a hearing is listed to hear that application.

q. 4 December 2020 – following a video hearing, at which both parties attend (the Claimant also now represented), it is found by the Tribunal that the Claimant did fail to comply with the 'unless' order and that therefore his claim stand as dismissed, with effect 24 January 2020. Judgment is sent to the parties on 2 February 2020.

r. 15 February 2021 – the Claimant applies for set aside of the judgment, subject to Rule 38(2) [61], to which the Respondent objects [75].

s. 11 June 2021 – the Tribunal informs the parties that a preliminary hearing will be listed, in due course.

t. 7 December 2021 – the Claimant writes to the Tribunal expressing concern about the delay in progressing his application.

u. 29 December 2021 – the Tribunal lists this Hearing.

The Law

3. Rule 38(2) states that:

'*a party whose claim or response has been dismissed, in whole or part, as a result of such an order* (an unless order) *may apply to the Tribunal in writing, within 14 days of the date the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so …'*.

4. I was referred to several authorities, as follows:

a. **Thind v Salvesen Logistics Ltd [2009] UKEAT 0487** which indicated that relevant factors were the reason for and seriousness of the default, the prejudice to the other party and whether a fair trial remained possible.

b. **Morgan Motor Company Limited v Morgan [2015] UKEAT 0128** stated that there does not need to be some 'compelling explanation' or 'special factor' in order to obtain relief from sanction.

c. **Polyclear Ltd v Wezowicz and ors [2020] UKEAT 0183** – the degree of attempt at compliance with the 'unless' order is a relevant factor in determining relief from sanction.

The Evidence and Findings

5. I heard evidence from the Claimant and submissions from both representatives.

6. Attempted Compliance with the Unless Order. By writing to the Tribunal on 23 January 2020, setting out basic details of his claim, the Claimant did attempt compliance with the Order. He clearly did not, however, as found in the hearing of 4 December 2020, dismissing his claim, materially comply with the order, as he did not copy that response to the Claimant. When it was pointed out to him at the hearing of 14 May 2020 that he had not so complied, he copied the response to the Respondent, by the date ordered at that hearing. I consider, therefore that the Claimant has made real effort to attempt belated compliance.

7. Seriousness of the Default. Another, perhaps less-pressurised, Tribunal might have noticed that the Claimant's response had not been copied to the Respondent and done so, therefore, of its own accord, pointing that failure out to the Claimant and reminding him of the need to routinely copy correspondence sent to the Tribunal, to the other side (even when not specifically ordered to). Surprisingly, the Respondent (then unrepresented, as was the Claimant) made no reaction to the Claimant's failure to comply with the unless order, when it should have been clear to them, by late January 2020 that he had not done so, by perhaps writing to the Tribunal, asking for confirmation of dismissal of the claim. Instead, the Claimant, unaware at that point of his non-compliance, chases the Tribunal on 3 May 2020, as to the progress of his claim. That results in a case management hearing, at which the Respondent fails, without explanation (then or now), to attend. I don't consider, therefore, up to that point that the default is of such a serious nature as to prejudice the Respondent, or prevent a fair hearing. The default was easily remediable, by either the Respondent asserting that the claim should be dismissed (thus alerting the Claimant to his default), or by their attendance at the subsequent case management hearing and was, in any event, remedied by 21 May 2020, three months after issue of the unless order. That date is, of course, now some year and nine months past.

8. Reason for the Default. The reason is the Claimant's admitted failure to properly follow the instructions in the 'unless' order. While he is clearly an educated and intelligent man, he was unrepresented at the time and unfamiliar with Tribunal proceedings and the failure to copy the other parties into correspondence with the Tribunal is a common one among litigants in person. When pointed out to him, he did comply. The reason for the default arising at all, stemming from the need to issue the 'unless' order, was that the Tribunal clearly failed to properly process the Claimant's claim. It is clear that he did provide an additional document which set out the basis of his claim,

with his ET1, but that the Tribunal failed to process it properly and send it to the Respondent. As a consequence, the Respondent (rightly) considered that there were no particulars of claim and complained of such. No explanation was provided, or was apparent from the Tribunal file, as to why there are two ET3s in the bundle, one 'received' dated, the other not, but it appears entirely plausible that the copy sent to the Claimant was incorrectly photocopied, missing every second page, again a failure by the Tribunal. While it might be considered that receiving such a document would have prompted the Claimant's enquiry, it didn't and I am satisfied that, being a litigant in person, with no previous experience of such paperwork, it was not unreasonable for him to consider that all was well. Had this catalogue of failures not occurred it is quite possible that there would have no reason for an 'unless' order, at all. I don't consider, therefore that the Claimant bears full responsibility for his non-compliance.

9. Possibility of Fair Trial. There has been considerable delay in this case. Unfortunately, for reasons of lack of resources, much of that delay was caused by the Tribunal. The initial failure to properly process the claim and response meant that the first six months of the claim's progress were wasted. A further six months then passed with no reaction by either the Tribunal or the Respondent to the Claimant's failure to comply with the 'unless' order and this period may have gone on even longer had the Claimant not chased progress. In the latter half of 2020 there is progress, by addressing the 'unless' order compliance issue, with the claim dismissed by the end of that year. It then takes two months for that judgment to be issued, after which, in response to the Claimant's application to set it aside, it takes almost a year before the hearing is listed. Very little of this delay is down to the Claimant (albeit that he allowed 2021 to go by without chasing the Tribunal for a hearing date) and therefore I don't consider that it can be in the interests of justice for him to be prevented from now bringing his claim. I don't consider that a fair trial is impossible in this case. Based on what is set out in the case management order of 14 May 2020, this is a 'bog standard' unfair dismissal claim. The Claimant alleges that he was not given appropriate warning of the nature of the meeting at which he was dismissed; not advised of the right to be accompanied and not provided in advance with the evidence to be used against him. All of those issues should be readily evidenced by the disclosure of correspondence by the Respondent to that effect, or, as the case may be, if there is no such correspondence, a failure to provide evidence on these points. In the latter event that would almost certainly lead to a finding of procedural unfairness and breach of the ACAS Code, with possible *Polkey* arguments by the Respondent. The Claimant also alleges that he was not given the chance to respond to the case against him and routinely, in such cases, provision of the notes of any such meetings would provide evidence on that issue. In the absence of notes, some witness evidence may be necessary from the Respondent and in any event, witness evidence would be necessary as to the rationale for the dismissal decision. The Respondent has not said that the relevant decision-maker is no longer employed by them, or if not that he or she cannot be located and persuaded to give evidence, or, if necessary, be subject to a witness order. There was also an appeal in this case, meaning that another decision-maker was involved, who could also give evidence as to the initial decision. While far from ideal, I don't consider, in a three year or so timeframe, particularly if the Respondent has correspondence and meeting notes to prompt witnesses' memories that it will

be impossible to have a fair trial, particularly if, as will be urged upon the Tribunal administration, this case can be listed as soon as is feasibly possible.

10. Prejudice to either party. While there clearly is prejudice to the Respondent in having to defend themselves against this claim after more than three years, I don't consider, bearing in mind my findings above as to the possibility of a fair trial that such prejudice outweighs the prejudice to the Claimant in not being able to bring his claim in any form.

11. Conclusion. The Claimant's application is therefore granted and the judgment dismissing the claim is set aside. I have made separate case management orders of the same date.

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Employment Judge O'Rourke

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Date: 1 February 2022