EMPLOYMENT TRIBUNALS

Claimant: S Wakeman

Respondents: Boys and Maughan Solicitors (1)
A Baker (2)

Heard at: London South Employment Tribunal

On: 9 March 2022

Before: Employment Judge L Burge

Appearances
For the Claimant: E Banton, Counsel
For the Respondents: T Brown, Counsel

OPEN PRELIMINARY HEARING
RESERVED JUDGMENT

It is the Judgment of the Tribunal that:

1. The Claimant's applications for the Unless Order of 5 May 2021 to be varied or set aside and, if not, for relief from sanction are refused;

2. As the Claimant failed to comply with the Unless Order of 5 May 2021 under Rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the claim stands as struck out; and

3. The Claimant's application for anonymity under Rule 50 is refused.

REASONS

Background

1. The Claimant was employed as a Solicitor by the First Respondent from 23 October 2017 until 16 May 2019 when he was dismissed. The Claimant brought a claim on 13 September 2019 for automatic unfair dismissal, age and sex discrimination or harassment, notice pay, holiday pay and "other payments".

The hearing

2. This one day Preliminary Hearing was listed by EJ Manley during a Preliminary Hearing held on 18 October 2021 to decide:

   (I) Whether the unless order of EJ Wright of 5 May 2021 should be varied or set aside;

   (II) If not, whether to grant relief from sanction to the claimant to allow the claim to proceed;

   (III) If the claim is allowed to proceed, whether the claimant's application of 4 June 2021 to strike out the response should be granted; and

   (IV) If the claim is allowed to proceed, what case management orders should be made. These include an outstanding request for specific disclosure, a final list of issues to be agreed and the usual orders to prepare and list for final hearing.

3. By letter dated 8 January 2022 the Claimant had also made an application for an anonymisation order under Rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules").

4. I heard witness evidence and submissions on issues I and II. The Claimant provided two witness statements with annexes and a bundle of 351 pages. The Respondent provided three witness statements with annexes and a bundle of 382 pages. The Claimant gave evidence on his own behalf and Matthew Champ (Partner at the First Respondent) gave evidence on behalf of the Respondents. I am grateful to both Ms Banton and Mr Brown for the comprehensive skeleton arguments and oral submissions on issues I and II. Ms Banton provided 5 authorities. Counsel also provided oral submissions in relation to the Rule 50 application.

Findings of Fact

5. The Claimant is an experienced Solicitor who worked for the First Respondent as a Civil Litigator. He also had conduct of Employment Tribunal proceedings.

6. The Claimant did not allow the Respondents to communicate with him via email.

7. At a Preliminary Hearing on 5 March 2020 where both parties were present and represented by Counsel, Employment Judge Freer agreed the dates of the final hearing with the parties (14 – 18 September 2020) and gave Case Management Orders including that:

"On or before 17 April 2020, the parties shall prepare and exchange a list of all documents which are or have been in their respective power, possession or control…"; and

"On or before 01 May 2020, a party may make any request of the other party for the production of documents on that party's list and those documents shall be supplied by a way of copies within seven days of the request.".

8. EJ Freer also Ordered that by 3 July 2020, there "shall be a simultaneous exchange of witness statements". The written Order was not sent out to the parties until 1 September 2020 (the "Case Management Order").

9. The covid pandemic began towards the end of March 2020. The Claimant and Respondents' ability to scan and copy documents was adversely affected. The Claimant gave evidence that he had made a number of telephone enquiries about scanning/copying but had been unable to get through. The Tribunal rejects this evidence as unlikely that over the course of the year the Claimant would have been unable to secure assistance from reprographics companies.

10. The parties exchanged lists of documents on 24/25 April 2020. The Respondents provided most of the copies of the documents contained in its list of documents but did not provide those documents that the Claimant already had possession of. There were some other documents that the Claimant wanted the Respondents to disclose. The Claimant did not provide any copies of his disclosure documents, despite being repeatedly asked to do so by the Respondents. The Claimant gave evidence to the Tribunal that he had understood their requests for copies of their disclosure to mean copies of the list itself (that he had already given them). This is not credible from an experienced civil litigator who undertook employment litigation.

11. On 20 May 2020 the First Respondent made an application to the Tribunal for an unless order as the Claimant had failed to provide copies of the documents contained in his disclosure list. In the emailed application the First Respondent said that as the Claimant did not have an email address a hard copy of the application would be sent to him.

12. On 23 June 2020 the Claimant applied for an extension of time for exchange of witness statements to 21 days before the final hearing. On 24 June 2020 the Respondents replied that they were content for exchange of witness statement to be postponed to 3 August 2020.

13. In August 2020 the Respondents filed their witness statements with the Tribunal.

14. The 14 – 18 September 2020 hearing dates were vacated due to lack of judicial resource.

15. From May 2020 to December 2020 the Respondents chased the Tribunal for an unless order. Mr Champ accepted in cross examination that some of the chasing emails were not copied to the Claimant as they should have been by virtue of Rule 92.

16. On 7 December 2020 EJ Balogun made an unless order that in accordance with the 1 September 2020 Case Management Order, unless by 30 December 2020 the Claimant sends to the Respondents disclosure of documents and witness statements all claims will stand dismissed without further order (the "First Unless Order").

17. On 28 December 2020 the Claimant made an application for the First Unless Order to be set aside as, in summary, it was delivered late and he had not had sight of the Respondents' application requesting it.

18. On 11 March 2021 EJ Wright gave judgment that as the Claimant had failed to comply with the First Unless Order the claims stood as struck out.

19. On 15 April 2021 the Claimant made an application that the 11 March 2021 Judgment be revoked as the Tribunal had not considered his application dated 28 December 2020. On 7 May 2021 the Tribunal rescinded the Judgment and re-made the Unless Order. In this "Second Unless Order" EJ Wright ordered that unless by 21 May 2021 the Claimant sent the Respondents disclosure of documents and witness statements in accordance with the case management order sent to the parties on 1 September 2020, all claims would stand dismissed without further order.

20. On 19 May 2021, two days prior to the deadline, the Claimant provided the Respondent with his disclosure by CD.

21. On 21 May 2021 the Claimant applied to the Tribunal for the Second Unless Order to be set aside, require the Respondents to give specific disclosure and to regularise the position between the parties in relation to witness statements. The basis on which the Claimant sought for the Second Unless Order to be set aside was that the Respondents had previously failed to comply with their obligation to copy him in under Rule 92, he had not had an opportunity to make representations, it was in the interests of justice as the Respondents' disclosure was not complete. The Claimant said that the requirement for him to provide witness statements was an error of law because he had made an application on 23 June 2020 requesting an extension of time to submit his witness statement and that it was contrary to the overriding objective to order that witness statements be provided when the Respondents had agreed to an extension of time, the Respondents had not served witness statements, the Respondents had not prepared the final bundle and he would need to refer to page numbers in the bundle.

22. On 4 June 2021 the Claimant applied for the Respondents' response to be struck out on the grounds that its disclosure was incomplete.

23. The parties have, throughout these proceedings, engaged in acrimonious correspondence. They did not agree on the documents to be used at this hearing and so each produced their own bundle.

24. The Claimant did not, and still has not, provided the Tribunal or the Respondents with his witness statement.

The Law

25. The Rules provide:

"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."

26. In *Thind v Salvesen Logistics Ltd* UKEAT/0487/09/DA Underhill J observed at paragraph 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."*

27. Mr Brown referred the Tribunal to *Enamejewa v British Gas Trading Ltd and Centrica PLC* EAT 0347/14 wherein it was held that nothing in rule 38 prohibits an employment judge in considering whether or not to revoke or set aside an unless order from taking into account events which have occurred subsequent to the making of the order.

28. Mr Brown also referred to *Morgan Motor Co Ltd v Morgan* EAT 0128/15; *Singh v Singh* [2017] ICR D7: Whether a fair trial remains possible should generally be judged at the date of the sanction and not at the date of a hearing seeking relief from sanctions, otherwise a party in default can always make good the default and argue that a fair trial is now possible.

29. Ms Banton provided the Tribunal with the authority of *Uwhubetine and Njoku v NHS Commission Board England and others* [2019] UKEAT/0264/18/JOJ which is

authority that ambiguity in the terms of the order should be resolved in the favour of the Claimant.

30. Ms Banton provided the Tribunal with the following authorities *Z v Finland - 22009/93*, [1997] ECHR 10, *Campbell v MGN* [2004] 2 AC 457 HL, *TYU v ILA Spa Ltd* [2022] IRLR 126m *Uwhubetine and Njoku v NHS Commission Board England and others* [2019] and *Santander UK plc and others v Bharaj* [2021].

Conclusions

31. The Second Unless Order was made against an extensive history. The Case Management Order had been communicated to the parties at the Preliminary Hearing on 5 March 2020 where the Claimant, an experienced civil litigator Solicitor who conducted employment litigation, and his Counsel, were present. The Judgment arising from the First Unless Order had been rescinded upon the Claimant's application that he did not have enough notice and because he had not been copied into the Respondents' communications. While the Claimant seeks to rely on the Respondents' Rule 92 failures in relation to the Second Unless Order, this is not justified. The Judgment arising from the First Unless Order had properly been rescinded for that reason, the historic failure does not taint the making of the Second Unless Order. When the Second Unless Order was made the Claimant was in breach of the Case Management Order as he had not provided the Respondent with copies of his disclosure documents nor his witness statement.

32. The Claimant's evidence that he did not understand that the Respondents wanted copies of the documents themselves rather than a copy of the list of documents (that they already had) is rejected. He was an experienced litigator and would have known that the Respondents were asking for copies of his documents. The Second Unless Order gave the Claimant until 21 May 2021 to provide his disclosure and his witness statement. The Claimant had provided his list of documents on 24 April 2020 and finally provided copies of the documents contained therein over a year later on 19 May 2021, two days before the expiry of the Second Unless Order. The Respondents had filed their witness statements with the Tribunal in August 2020. The Claimant did not, however, provide a witness statement and so was in breach of the Second Unless Order.

33. The Claimant wanted an Order that witness statements were to be exchanged 21 days, or 6 weeks, before the final hearing. Ms Banton submitted that this was a usual Order in many Employment Tribunal proceedings. However, it was not what had been ordered in these proceedings. The parties had until 3 July 2020 to exchange statements. EJ Balogun then gave a new deadline in the First Unless Order of 30 December 2020 and then the Second Unless Order gave the Claimant until 21 May 2021 failing which his claim would be automatically struck out. The Claimant was put squarely on notice of the importance of complying with the order and the consequences if he did not do so. This is an important consideration. The Claimant has not demonstrated to me that it is in the interests of justice to vary or revoke the Second Unless Order taking into account the history of the proceedings prior to the making of the Second Unless Order. He knew what he had to do and he did not do it.

34. Further, the Claimant has not demonstrated to me that it is in the interests of justice to revoke or vary the Second Unless Order because of events that have transpired after the making of it. *Enamejewa* gives examples were given of where there has been a power cut or where a claimant is prevented by a sudden incapacity and that in those sorts of circumstances it is difficult to conceive that it would not be in the interests of justice to revoke the unless order and to give a claimant additional time. This claim is far from this type of situation. Having regard to the reasons why the Claimant did not adhere to the deadline, it is not the case, for example, that the Claimant sought to argue that he was unable to adhere due to a medical condition. It is notable that the Claimant still, some 10 months after the expiry of the Second Unless Order, has not provided a witness statement. It is not accepted that the Claimant could not provide a witness statement before the final bundle was agreed. Even if he did not have everything, he had the vast majority of the Respondents' disclosure in May 2020. He had his own documentation. He did not provide his disclosure documents until 19 May 2021 so, of course, the Respondents could not have prepared the agreed paginated final hearing bundle prior to that date. The Claimant could have drafted his witness statement without the final hearing bundle page numbers in it and inserted page numbers at a later date. If there was further disclosure from the Respondents at a later stage he could have then applied to the Tribunal to serve a further witness statement if that further disclosure showed something that he had not known about before. As an experienced litigator the Claimant would have known this.

35. Turning to the question of whether to grant relief from sanction to the Claimant to allow the claim to proceed, I have in mind 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. As explained above, I have not accepted that the Claimant has provided a valid reason for the default. He made the deliberate decision not to comply with the Second Unless Order. He wanted further disclosure from the Respondents, he wanted a deadline of 21 days (or 6 weeks) prior to trial but in this case that was not what the Employment Judges had ordered. Unless Orders are an important part of the tribunal's procedural armoury. The Claimant did not take it seriously, if he had done he would have complied with it.

36. Not providing a witness statement is a serious default. At the date of the sanction, 21 May 2021, as a result of his default a fair trial did not remain possible. The Claimant's employment had ended on 16 May 2019. The Claimant had finally provided his disclosure documents two years later but he still had not provided his witness statement. The hearing had originally been listed to take place in September 2020 and while it was stood down for lack of judicial resource it could not have gone ahead anyway due to the Claimant not adhering to the deadlines. There were difficulties caused by the pandemic. Offices up and down the country were closed for long periods but parties up and down the country managed to progress claims and adhere to Tribunal deadlines. The Claimant knew about the First Unless Order and did not proceed to meet its deadline. He adhered to one of the deadlines of the Second Unless Order, but not in relation to his witness statement. By then the prejudice to the Respondents was too great in having to defend a claim where the Claimant wilfully failed to adhere to Tribunal deadlines.

37. The Claimant's applications are refused. The Second Unless Order therefore stands and as the Claimant did not comply with the requirement to produce a witness statement his claim automatically stood dismissed. The Tribunal therefore does not need to goon to consider issues III and IV.

The Claimant's Application for an Anonymity Order

38. Rule 50 provides:

> ***"Privacy and restrictions on disclosure***
>
> ***50.****—(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.*
>
> *(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.*
> *(3) Such orders may include—*
>
> *(a)an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;*
> *(b)an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;*
> *(c)an order for measures preventing witnesses at a public hearing being identifiable by members of the public;*
> *(d)a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.*
>
> *(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.*
> *(5) Where an order is made under paragraph (3)(d) above—*
>
> *(a)it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;*
> *(b)it shall specify the duration of the order;*
> *(c)the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and*
> *(d)the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.*
>
> *(6)"Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998."*

39. The Claimant applied for an Anonymity Order by letter dated 8 January 2022 under Rule 50 because he says he has a medical condition and publication of this private information would cause him harm or risk of harm in his career/from employers and would be stigmatising. However, I do not accept that the Claimant provided clear and cogent evidence that this was the case.

40. Ms Banton submitted that the evidence in this case would address the Claimant's medical/health information and such information constitutes private information, *Z v*

Finland - 22009/93, [1997] ECHR 10 (at §95). *Campbell v MGN* [2004] 2 AC 457 HL held that the Article 8 right to privacy is engaged in principle if, in respect of the facts, the person in question had a reasonable expectation of privacy.

41. Mr Brown submitted that there is no disability discrimination claim before the Tribunal. Having regard to the principle of open justice, anonymisation of the Claimant is disproportionate to what little (if any) engagement there will be with the facts of Claimant's health. In Mr Brown's view it was likely that the Claimant was simply seeking to avoid identification as the Claimant in this claim because his conduct (which would become public as part of the hearing) does not reflect well on a solicitor.

42. Rule 50(2) provides that in considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression. Departing from this principle of open justice is therefore the exception rather than the rule and it is for the Claimant to show why the exception should be granted in this case.

43. Ms Banton referred me to *TYU v ILA Spa Ltd* [2022] IRLR 126 wherein the EAT held that an Anonymity Order could be made in favour of an individual where the unfair dismissal judgment had indicated that she was suspected of dishonesty and intimidating behaviour in the workplace. However, in the present case the Claimant's medical condition is not relevant to whether or not the Second Unless Order should be varied and to whether relief from sanction should be granted. There has been no need to refer to the Claimant's medical condition when considering those questions. The Preliminary Hearing was a public hearing, although no member of the public was present. The Claimant's medical condition was only relevant to the application for anonymity and for that determination to be made I need not refer to the actual condition itself. Given this protection, anonymity is not necessary.

44. I conclude that the Claimant has not shown why this case should be an exception to the principle of open justice and so his application under Rule 50 fails.

EJ L Burge

11 March 2022

Sent to the parties on:
23 March 2022

For the Tribunal Office:

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