



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112400/2021

5

Held via Written Submissions on 18 May 2022

Employment Judge R Gall

10 **Mr G Madden**

**Claimant
In Person**

15 **Waracle Limited**

**First Respondent
Represented by:
Mrs D Reynolds -
Solicitor**

20 **Cathcart Associates Ltd**

**Second Respondent
Represented by:
Mrs D Reynolds -
Solicitor**

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the dismissal of the claim which occurred automatically following failure by the claimant to comply with an Unless Order issued on 28 March 2022 stands, the Order not being set aside, it not being in the interests of justice so to do. The claim will remain dismissed.

30

REASONS

35

1. This is a claim of disability, the protected characteristic upon which the claimant relies being disability. At present the respondents do not accept on the information before them that the claimant was disabled at the relevant time. They also say that they did not have actual or “constructive” knowledge of disability. The conditions which the claimant sets out as affecting him and which he maintains constituted disabilities at the relevant time are Charcot Marie Tooth disease and depression and anxiety.

2. The claimant was in a working relationship with the respondents. The precise nature of that relationship and the party with whom any liability may rest has yet to be determined. The working relationship was for the period between 19 July 2021 and 14 September 2021. That is therefore the relevant time in relation to the allegations of discrimination.
5
3. The claimant clearly has health issues. During the currency of this litigation he has been in hospital from time to time. He has, however, been able to communicate by email with the Tribunal and respondents whilst in hospital.
4. For a claim based on disability as the protected characteristic to proceed, the claimant requires to have been disabled as that term is detailed in the Equality Act 2010 (“the 2010 Act”) at the time when discrimination is said to have occurred. The definition of disability in terms of the 2010 Act is a legal one rather than a medical one. It involves specific considerations as Section 6 of the 2010 Act provides. Someone can be regarded as disabled for other purposes or under other provisions. That, however, does not mean that disability in terms of the 2010 Act follows. The conditions which the claimant refers to as affecting him are not conditions which mean that he is automatically regarded as disabled for the purposes of the 2010 Act.
10
15
5. It has been explained to the claimant in correspondence that the onus is on him to persuade the respondents that he was disabled at the relevant time, failing which to persuade the Tribunal of that at a Preliminary Hearing (“PH”) which would potentially be arranged for that to be decided. Exhibition therefore of relevant medical records pertaining to the relevant time and provision of information as to the impact of the conditions on his ability to carry out normal day-to-day activities would be of significance and indeed of fundamental importance.
20
25
6. Unless Orders were issued by the Tribunal on 28 March 2022. Those are detailed below. There was a build up to the issue of Unless Orders. That is now set out.

Lead Up to Unless Orders

7. A PH held for case management purposes took place on 17 January 2022. Orders were issued requiring information to be provided by the claimant. The claimant was to provide any medical information upon which he intended to rely to establish that at the relevant time he was a disabled person in terms of the 2010 Act by the conditions upon which he relied in that regard, those being as set out above. In terms of the Order he was also to provide, summarising the information detailed in the Order as being required, an “impact statement”. The Order further required that he confirm the basis on which he asserted that the respondents knew or ought to have known that he was a disabled person in relation to the conditions relied upon by him. The date for compliance was 7 February 2022.
8. The information was not provided by the claimant by the date specified. Information was to an extent then provided by the claimant on 9 February. That comprised some information from his GP, information regarding a hospital admission at an earlier time, confirmation that he received personal independence payment and that he was a “blue badge” holder. There was no information supplied in answer to the other elements of the Order. The only information as to impact on the claimant’s ability to carry out normal day-to-day activities was a comment by the GP in a letter of 22 May 2017 that walking could be “*very difficult and painful*”.
9. The respondents had sought an Unless Order That was on 9 February, prior to receipt of the claimant’s email of that date. In the circumstances where some information had been received from the claimant the application for an Unless Order was refused.
10. The respondents reviewed the information from the claimant and renewed their application for an Unless Order on 18 February. This was on the basis that the information provided by the claimant did not meet the Order issued. That application was also refused. The claimant was however reminded of the terms of the Order originally issued. His response was reflected in the letter from the Tribunal of 23 February. It was stated that it did not appear that the

information submitted by him met the Order. He was informed of the requirement to meet the Order within 14 days and also to provide information as to the identity of the line manager with whom he said he had spoken as to his medical position, when that was said to have happened and what medical information was said to have been given by the claimant to the line manager at that point.

5

11. The claimant emailed the Tribunal on 8 March stating that he had been in hospital. He said he was due to have foot surgery. He had, he said, requested a letter from his GP and would ask a family member to collect that for the Tribunal.

10

12. By email of 9 March the claimant sent on a letter from his GP of 1 March 2022. That read:-

“This patient has requested a letter from ourselves regarding his current health. Graham has a history of depression and anxiety symptoms and has been seen at hospital with panic attacks in the past. He is currently suffering from low mood and anxiety. He suffers from charcot marie tooth syndrome and this affects his confidence.

15

He feels that this can cause some difficulties when he is going to take part in video calls and sometimes feel (sic) unable to turn the video camera on.”

20

13. In its reply of 9 March the Tribunal noted that the claimant was in hospital and that it was unclear for how long that would be the case. It noted that he was able to communicate from the hospital and well enough so to do. It underlined that the factual information required in terms of the Order had not been fully supplied and stated that this information as to be supplied within 7 days or, if that was not possible, that was to be explained, particularly when the information still sought was something within the claimant’s own knowledge. The claimant’s reply of 10 March expressed confusion saying that he believed he had *“provided all medical information within the allocated time period”*.

25

14. In a full email of 11 March, the Tribunal detailed the elements in the Order which remained unaddressed by the claimant. It sought to assist by posing

30

questions which might be addressed by the claimant. It stated that a reply was required within 10 days.

15. There was no reply from the claimant within that time. The Unless Orders were therefore issued on 28 March 2022.

5 **The Unless Orders**

16. The Unless Orders were in the following terms:-

“Within 21 days of the date of this Order being sent to parties the claimant will provide the following information or details-

1. *Copies of any medical notes, reports, occupational health assessments and other evidence which he intends to rely on to establish that, at the relevant times, he was a disabled person for the purposes of S6 of the Equality Act 2010 as a result of Charcot Marie Tooth disease and depression and anxiety. In the event that he wishes to provide any medical reports/records from his GP, but cannot provide those within 21 days of this Order, he will confirm within the 21 day period the date on which he has requested such reports/records and seek an extension of time within which to provide them.*
2. *A statement confirming the dates between which it is alleged he was a disabled person in relation to each condition and to address, by specific reference to Schedule 1 of the Equality Act 2010 and any relevant provision of any statutory guidance or Code of Practice, what the effect of the alleged disability was on his ability to carry out normal day to day activities at the time of the alleged discriminatory treatment. The statement should include the details of what the impact would be on the claimant’s ability to carry out normal day to day activities if he were not taking measures (including in particular medical treatment and the use of a prosthesis or other aid) to treat or correct each condition relied upon.*
3. *A statement confirming the basis upon which he asserts that the respondent knew or ought to have known that he was a disabled*

5 *person in relation to each of the physical or mental impairments relied upon at the material times. Insofar as that may be said to have occurred by way of a conversation with a line manager, he will state who that line manager was, when (to the best of his recollection) that conversation was and the information (recalled as accurately as he can) which he states he gave to his line manager.”*

17. Compliance was required by 18 April given that the Unless Order was dated 28 March 2022. For clarity, the Unless Order was emailed to parties on 28 March 2022.
- 10 18. No reply was received from the claimant and by letter of 20 April 2022 the Tribunal wrote to parties in terms of Rule 38 of the Employment Tribunals (Rules of Constitution & Procedure) Regulations 2013 confirming that the claim had been dismissed.

Application by the claimant in terms of Rule 38 (2)

- 15 19. On 20 April 2022, having received the letter of that date from the Tribunal referred to above, the claimant wrote to the Tribunal. He said:-

“I very respectfully ask for this order to be set aside as I was in hospital on the 28 March doped up on morphine where I remained for 7 days.

20 *I am still heavily medicated and on a wheelchair permanently with my foot in a “moon boot”.*

I think it is in the interest of justice that I be granted just a few extra days to comply with the order to compensate for the days I missed due being in hospital undergoing serious surgery.

25 *I think it would be very harsh and painfully ironic that a disability discrimination case is thrown out because I missed a deadline due to receiving medical treatment for my disability.*

I can provide all the information by the end of the week, That includes details of the medical procedure I had recently.

For now I have attached two pictures as evidence of recent events.”

20. The content of reply and the pictures sent did not meet the terms of the Order.

21. The Tribunal confirmed to the parties, however, that it was treating this correspondence from the claimant as an application that the Order be set
5 aside. Such an application is possible in terms of Rule 38 as, in effect, an application for relief from sanctions.

Submissions

22. Parties were invited to provide any submissions and to state if they wished a hearing, It was confirmed that if no hearing was sought then the application
10 would be dealt with without a hearing. Neither party sought a hearing. The claimant did not comment upon that matter. Th respondents confirmed that they were content that the application be dealt with on the papers.

Submissions for the claimant

23. The claimant sent two emails to the Tribunal. Those were dated 4 and 5 May.
15 The email of 4 May said the claimant believed the issue to be consideration of his claim or not on the basis that he was late to supply medical information. He reiterated the position as to his recent surgery. He attached medical information. Insofar as that had not previously been sent to the Tribunal, it included a photograph of what appeared to be medication, and also a picture
20 of a medical form from the claimant’s GP. The date on that form was difficult to read and could not be definitively determined. It referred to someone, presumably the claimant, having *“Dropfoot, foot and toe deformities (hammer toes), muscle weakness, fatigue & neuropathic pain. All contribute to difficulty walking i.e. walking to bus stops/train stations is too far.”*

24. The email from the claimant of 5 May repeated that he had been in hospital and said that this was a valid excuse for being late. It was one of, if not the best, reason for being late, the claimant said. He referred to documents produced by him as showing that he had *“a peripheral neuropathy, several
25 foot and toe deformities, foot drop, a heart condition caused by a heart attack, high blood pressure, depression, anxiety and panic attacks so severe that I
30*

5 *have been hospitalised several times*” He went on to say that he had had a carer day and night for 10 years. He said he was not doing fantastically well on his best day, had had serious surgery, a one week hospital stay and had been taking strong opioid painkillers. He had a reasonable excuse for missing the deadline, he said. His position was that it was in the interests of justice for his claim to be permitted to proceed.

Submissions for the respondents

- 10 25. The respondents sent in submissions on 5 May 2022. They narrated the history to the claim. They highlighted the attempts made to obtain information from the claimant on medical matters. An impact statement had been sought from him. Information on how it was that he said the respondents were aware of his disabilities had also been sought. Orders had been issued. Some medical information had been received. The other elements of information had not been provided, whether in response to the initial Orders, in response to correspondence or in response to the Unless Orders.
- 15
- 20 26. The respondents highlighted that the areas where information had not been provided despite the Orders, involved matters within the knowledge of the claimant. It was true that he had been in hospital. He had remained able to communicate however and had communicated. The required information had not however been provided.
- 25 27. There had been various opportunities given to the claimant to provide the information in question. He had said that he would provide that information. It had not however appeared.
28. No compelling reason had been provided for setting aside of the Order, the respondents said. Medical treatment and hospitalisation had been referred to. Numerous chances had been given to the claimant to supply the information and he had not done this. It appeared, in fact, that the claim was not being actively pursued. The Judgment dismissing the claim should not be set aside.

Applicable Law

29. In terms of Rule 38 (2) an application of this type can result in the Order being set aside if the Tribunal considers it to be in the interests of justice so to proceed.
- 5 30. There are various cases which have considered such applications. Those relevant as the Tribunal regards it are *Wentworth-Wood v Maritime Transport Limited* [2016] UKEAT/0316/15, *Kier Highways Limited v Cunning* [2018] UKEAT/0008/18 ("*Kier Highways*"), *Thind v Salvesen Logistics Ltd* [2010] UKEAT/0487/09 ("*Thind*"), *Enamejewa v British Gas Trading Limited* [2015] UKEAT/0347/14, *Singh v Singh (as representative of the Guru Nanak Gurdwara West Bromwich)* 2017 ICR D7, *Morgan Motor Co Ltd v Morgan* EAT 0128/15 ("*Morgan*") and *Polyclear Ltd v Wezowicz and Others* 2022 ICR 175.
- 10
31. Those cases give guidance as to the principles which an Employment Tribunal should keep in mind in considering whether it is in the interests of justice to set aside the Order in this scenario. *Thind* says that the factors "*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 is possible.*" *Morgan* confirms that there does not require to be a "*compelling explanation*" or "*special factor*" for relief to be granted.
- 15
- 20
32. In the cases the significance of an Unless Order is also underlined, together with, in my words, the importance of it having teeth. Nevertheless, the terms of Rule 38 (2) and decided cases make it clear that relief from sanctions can appropriately be given if it is considered by the Employment Tribunal that it is in the interests of justice for that to occur.
- 25

Discussion and Decision

33. The Unless Orders had been issued in the terms set out above. In response, some medical information had been supplied by the claimant. It appeared to be that his position was that what was supplied comprised what he had been
- 30

asked to provide – the medical information upon which he relied in order to establish that he was, at the relevant time, disabled in terms of the 2010 Act. The Orders and correspondence, and ultimately the Unless Orders, required information beyond medical information, however. A statement as to impact of the medical conditions upon the claimant’s ability to carry out normal day-to-day activities was required. Information as to the basis for his assertion that that the respondents were aware of his disabilities was required. There has been no information upon those matters in reply to Orders, including specifically the Unless Orders.

5
10 34. In my conclusion there has not been material compliance with the Unless Order and the claim had therefore properly therefore come to an end.

35. Occasionally in that situation and in the context of seeking to have that Order set aside a party will supply information late. The claimant certainly supplied slightly fuller medical information than he previously had. He did not however address the other elements in the Orders and Unless Order.

15
20 36. Whilst the claimant provided information as to his hospital Stay, he remained able to communicate and did in fact communicate substantively with the Tribunal during that time. What he had been ordered to provide , an impact statement and specification of a discussion he had referred to as having taken place, were matters which, in my view, could have been addressed by him. He was required to address them in terms of the Unless Order. He did not do so, however. He gave no reason why the questions remained unanswered, other than his reference to being hospitalised, in pain and on medication. I do not seek to belittle those matters. Clearly the claimant’s position was very
25 unfortunate. I do not doubt that he was having a difficult time. He was however communicating as mentioned. He was not being asked to obtain papers or information from third parties. He had been given substantial time prior to issue of the Unless Orders. The absence of reply to those aspects of the Unless Order has persisted. No information has been submitted at time of this
30 Judgment.

37. I considered the prejudice to parties if, on the one hand the Order is not set aside and if, on the other hand, it is.
38. Certainly if it is not set aside the claimant is denied the ability to make a claim. He is, however, unfortunately the author of his own misfortune in that he is in this situation by reason of not having replied to Orders and specifically an Unless Order.
39. If the Order is set aside the respondents will suffer prejudice. They will be facing a claim which they would not otherwise face if the Order is not set aside.
40. The prejudice to the claimant through the Order not being set aside is greater, in my view, that that to the respondents if the Order is set aside.
41. That, however, is not enough, in my judgment, to tip the balance in favour of setting aside the Order.
42. The claimant has, over a period of time and specifically in face of an Unless Order, failed to reply with the information which he was ordered to provide. That information is known to him in that it is as to the impact of the conditions upon which he seeks to reply as disabilities under the 2010 Act. It is also information as to a conversation with someone to whom he says he spoke about his medical conditions.
43. I am sympathetic to the health issues by which the claimant is affected and keep in mind his recent hospitalisation. As mentioned above, however, an Unless Order when issued requires to be met. It is quite clear from its terms that if it is not complied with then the case will be dismissed without further order.
44. An Unless Order can be set aside if it is considered to be in the interests of justice for that to be the case. The unfortunate position of a claimant in not being able to pursue his/her claim will not, of itself, be enough to warrant setting aside the Unless Order.
45. In this Judgment I have kept in mind the purpose and effect of an Unless Order, the terms of Rule 38 (2) and the relevant guidance from decided cases

as detailed above. I have had consideration of the interests of justice at the forefront of my mind.

5 46. The claimant has not explained why he did not answer the Unless Order by providing the required information. I have given careful consideration to the situation and have sought to balance the competing interests of each party and to keep in mind at all times the interests of justice.

47. Having carefully considered the facts and circumstances of this case and the respective submissions by each party, I am not persuaded that setting aside the Order is in the interests of justice. The claim therefore remains dismissed.

10

Employment Judge: Robert Gall
Date of Judgment: 20 May 2022
Entered in register: 23 May 2022
and copied to parties

15