EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4103132/2019

Held at Edinburgh on 12 September 2022

Employment Judge W A Meiklejohn

Miss L Kashina	**Claimant** **In person**
City of Edinburgh Council	**Respondent** **Represented by:** **Ms A Hood - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is the claimant's application under Rule 38(2) of the Employment Tribunal Rules of Procedure 2013 to set aside the decision to dismiss her claim is refused.

REASONS

1. This case came before me for a hearing to determine the application made by the claimant under Rule 38(2) of the Tribunal Rules to set aside the decision (of Employment Judge Jones) to dismiss her claim of unlawful deduction of wages . The circumstances in which that decision was taken are explained below.

2. The claimant participated in person. The respondent was represented by Ms Hood, Solicitor. Both sides provided bundles of documents. I refer to these by page number, prefixed by "C" in the case of the claimant and "R" in the case of the respondent.

Preliminary issue

3. In the outline submissions she provided in advance of the hearing, Ms Hood highlighted what appeared to be an administrative error on the part of the Tribunal in the letter dated 16 June 2022 (R141-142). That letter stated that *"the claimant is informed that her claim of unlawful deduction of wages has been dismissed in terms of Rule 38(2).*

4. The background to this was found in the Order made by the Employment Appeal Tribunal ("EAT") dated 27 April 2022 (R140). This was in the following terms-

"*The Tribunal orders that the Judgement of 2nd March 2021 be set aside and the case remitted to the Employment Tribunal with a direction that the Tribunal make an order under Rule 38 for dismissal of the claim for unlawful deductions."*

5. The *"Judgement of 2nd March 2021"* was a decision of EJ Jones (R134-135) dated 26 February 2021 and sent to the parties on 2 March 2021. That decision was to strike out the claim of unlawful deduction of wages under Rule 37 of the Tribunal Rules on the grounds of "*non compliance with an Order of the Tribunal in terms of rule 37(1)(c)".*

6. On 16 March 2021 the claimant submitted an application for reconsideration of that decision (R136-138). On 23 March 2021 the Tribunal wrote to the claimant (R139) stating that her application for reconsideration had been referred to EJ Jones. The letter continued –

"*Your application has been refused because the Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked.*

Although the Claimant did provide information in relation to her claim of unlawful deduction from wages by email after the date on which there was to be compliance with the Unless Order, that information did not comply with the terms of the Order."

7. The claimant then submitted her appeal to the EAT. The outcome was the Order referred to in paragraph 4 above. The Tribunal proceeded as directed and issued the letter of 16 June 2022 (R141-142). However, the reference in that letter to Rule 38(2) was incorrect. The letter should have referred to Rule 38(1).

8. Ms Hood invited me to deal with this under Rule 69. Rule 69 provides as follows –

"An Employment Judge may at any time correct any clerical mistake or other accidental slip or omission in any order, judgment or other document produced by a Tribunal. If such a correction is made, any published version of the document shall also be corrected. If any document is corrected under this rule, a copy of the corrected version, signed by the Judge, shall be sent to all the parties."

9. I considered that this was the correct way to deal with the matter. The claimant agreed and so I was able to proceed by consent of the parties under Rule 69. I have amended a copy of the Tribunal's letter of 16 June 2022 by substituting "38(1)" for "38(2)" and have signed this, and have directed that a copy of the corrected version be sent to the parties.

Procedural history

10. I set out the procedural history of the case in my Judgment following the preliminary hearing which took place on 29 January 2021 (R91-128). I will not repeat that here, and will refer only to what has happened since that date.

11. My Judgment contained an Order (the "Unless Order") in these terms –

"By virtue of the power to do so under Rules 29 and 38 of the Tribunal Rules 2013, I make the following Order –

Not later than 5.00pm on 19 February 2021 the claimant shall provide to the respondent and the Tribunal further and better particulars of her complaint of unlawful deduction of wages which comply with the following requirements –

(a) For each month between March 2017 and February 2019, the claimant shall state the amount which she alleges she has suffered by way of unlawful deduction of wages.

(b) For each amount so stated, the claimant shall provide an explanation of how that amount has been calculated by her.

(c) The claimant's explanation for each amount said by her to be an unlawful deduction of wages shall be expressed in clear and unambiguous terms such that it can be readily understood by the respondent and the Tribunal.

If this Order is not complied with by 5.00pm on 19 February 2021, the claimant's complaint of unlawful deduction of wages shall be dismissed without further order."

12. The claimant did not provide anything by way of compliance with the Unless Order prior to the deadline of 5.00pm on 19 February 2021. On 22 February 2021 the respondents' solicitor wrote to the Tribunal (R129) requesting that (a) the claim be dismissed without further order and (b) the preliminary hearing set down for 9 March 2021 be cancelled. That preliminary hearing had been fixed to deal with an application to amend made by the claimant.

13. The claimant sent an email to the Tribunal on 23 February 2021 (R130) in these terms –

"*my apologies to the respondent and the tribunal for the lateness in responding to the court order set out by judge Meiklejohn I attach the document of particulars that the respondent requested, I have also created a visual diagram that represents how i worked out my sums and visual representation of my incorrect shift pattern which I base my calculations on which i will submit to the tribunal and respondent as evidence by Monday 1st march 2021 in photographic form which sets out my working week, week by week from October 2017 to august 2019 in a diagram.*"

14. The claimant attached to her email a two page document (R132-134). This was virtually identical to the equivalent paragraphs in the Further and Better Particulars (R41-43) submitted by the claimant on 22 November 2019. The events described in paragraphs 4-7 above then ensued.

15. The claimant emailed the Tribunal on 20 June 2022 (R143) with her application under Rule 38(2) to have the dismissal of her claim set aside. That application (R144) was in these terms –

"*In response to the court order of a strike out under rule 38(2) I'm writing to the tribunal to request to have the court order set aside on the basis that it is in the interests of justice to do so as I believe my case has substance to be heard at a tribunal hearing, I require a hearing to be heard in front of a judge to present the reasons as to why my case should be reinstated*"

Rule 38

16. Rule 38 of the Employment Tribunal Rules of Procedure 2013 provides, so far as relevant, as follows –

"*(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…."

Evidence and findings in fact

17. I heard evidence from the claimant. She told me that she did not see the Order contained in my Judgment following the hearing on 29 January 2021. She read only the first few pages of the Judgment. There was a further hearing due to take place some four weeks later and she decided to read the Judgment in full nearer the date of that hearing.

18. Having read the first few pages (in which she would have seen that the respondent's applications for strike out under Rule 37 or, in the alternative, a deposit order under Rule 39 had been refused) the claimant thought she did not need to read any further. She said that an Order was usually separate (in this case it was set out at page 20 of the Judgment) or was flagged up in an email from the Tribunal. As soon as she received Ms Hood's email of 22 February 2021 she submitted her "*document of particulars".* This was her belated compliance with the Rule 38 Order.

19. The claimant said that she had been *"stupid"* and that she should have read every page of the Judgment. She accepted that (a) she knew she had to clarify the amount she was claiming and (b) it would have been sensible to check if the Tribunal had issued an Order. The claimant accepted that she knew she would be asked for a breakdown, otherwise she would not have

gone to the trouble of doing the spreadsheet. The claimant also accepted that she had, prior to the hearing on 29 January 2021, expressed her claim in a way that could not be understood by the Tribunal.

20. The claimant said that the material she had *"created"* comprised the spreadsheets contained in her bundle (C24-27). Unfortunately C24 was illegible but at the hearing the claimant provided a legible version. The main features of this were as follows –

(a) It was arranged on a weekly basis covering the period from week commencing 2 May 2016 to week commencing 25 March 2019.

(b) It contained the following column headings (with information in respect of each week under each heading) –

- Actual hours worked (weekday)
- Actual hours worked (weekend)
- Total actual hours worked
- Hours reported on HR rota (weekday)
- Hours reported on HR rota (weekend)
- Total hours reported on HR rota
- Hours worked/rota variance W.D.
- Hours worked/rota variance W.E.
- Hours worked eligible for overtime W.D.

- Hours worked eligible for overtime W.E.
- Hourly rate (weekday)
- Hourly rate (weekend)
- Overtime hourly bonus W.D.
- Overtime hourly bonus W.E.
- Unpaid wages

(I understood that *"W.D."* and "*W.E."* were abbreviations for weekday and weekend respectively).

(c) It showed a total of £9836.55.

21. The claimant also provided more legible versions of C25-27. The main features were as follows –

(a) The figures were again arranged on a weekly basis, covering more or less the same period.

(b) There were three column headings –

- Hours worked
- Hours reported on rota to HR
- Hours worked exceeding those reported to HR

(c) Below these column headings the claimant had set out the relevant numbers of hours on a daily basis for each week.

22. The claimant said that she had created these documents following the hearing on 29 January 2021. She had been assisted by an accountant. The documents were in existence at the time she emailed the Tribunal on 23 February 2021. She said that she had not submitted the spreadsheet documents at that time because she thought they would be gone through at the hearing on her application to amend. She thought the document she did submit (R132-133) would be sufficient.

23. The claimant's bundle contained two pages from her Statement of Employment Particulars (C5-6). She said that these confirmed her entitlement to overtime. The relevant paragraphs (under section 7 – Pay) were as follows –

"*The grade for the post is Grade 4, currently £16437 - £19067 (SCP 23 – SCP 33) per annum. Your base salary will be £16437 (SCP 23) per annum, pro-rated if part-time.*

In addition to your base salary you will receive £2831.36 in working time payments. The payments and the way they are calculated are contained in the Modernising Pay Handbook. Working Time Payments may change or stop if regular working patterns change….

Frequent overtime working is not encouraged. However, there may be occasions where overtime is required to meet the service requirements. The rules for overtime and public holiday working are explained in the Modernising Pay handbook."

24. The claimant's bundle also contained a number of documents which bore to relate to her working pattern (C7-12). The claimant's position was that, notwithstanding what these documents indicated, she had continued to work in accordance with her original working pattern. It is neither necessary nor appropriate for me to make any findings in relation to this, as it sits at the

heart of what would need to be decided at a final hearing on the merits of the case.

Submissions

25. Although Ms Hood had submitted her outline submissions to the Tribunal, copied to the claimant, in advance of the hearing, the claimant told me that she had not read these. This became apparent at the start of the hearing when the claimant required time to read the paragraphs within the outline submissions dealing with the preliminary issue. Accordingly, once the claimant's evidence was concluded, I adjourned the hearing to give the claimant an opportunity to read Ms Hood's outline submissions and to consider what she herself might want to say by way of submissions.

Claimant

26. The claimant acknowledged that she had made the mistake of not reading the Tribunal's Judgment thoroughly. She said that she had listened to what I said at the hearing on 29 January 2021 and that was why she had the spreadsheets made up.

27. The claimant questioned the respondent's assertion that they did not know what her claim was about. It was about the hours she had worked and not been paid for. She wanted her *"day in court"* and to get justice.

Respondent

28. In her outline submissions and under reference to ***Wentworth-Wood and others v Maritime Transport Ltd UKEAT/0316/15*** Ms Hood identified the three judicial decision points in relation to unless orders –

(a) Stage one - the decision to make the order and, if so, upon what terms.

(b) Stage two - the decision as to whether there has been material compliance with the order.

(c) Stage three - the decision on an application for relief from sanction under Rule 38(2).

29. Ms Hood referred to ***Polyclear Ltd v Wezowicz and others UKEAT/0183/20*** where HHJ Tayler said this (at paragraph 57) –

"*At stage three, providing the defaulting party makes the necessary application, a judicial determination is made as to whether it is in the interests of justice to grant relief from sanction. The mechanism by which relief is granted if the application under Rule 38(2) is granted, is by setting aside "the order", which must mean the original Unless Order, with the consequence that once the Unless Order has been set aside there cannot have been material non-compliance, and so the automatic strikeout is treated as not having occurred."*

30. Ms Hood referred to ***Thind v Salvesen Logistics Ltd UKEAT/0487/09*** where Underhill P (as he then was) said this (at paragraph 14) in relation to relief from sanction (the case predating the introduction of Rule 38) –

"*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 it 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."

31. In relation to the reason for the default, Ms Hood said that if the Tribunal accepted the claimant's explanation of the events that led her not to comply with the Unless Order, the respondent accepted that the default was not deliberate. However, the claimant's failure to read the Judgment was symbolic of the way she had conducted herself whilst pursuing her claim and went beyond a simple error on her part. The carelessness demonstrated a lack of regard for the time of the Tribunal or the respondent and her unwillingness to engage with her responsibility to adequately particularise her claim. The claimant had not provided any reasonable explanation for her failure to comply with the Unless Order.

32. Moving to the seriousness of the default, Ms Hood reminded me, under reference to ***Polyclear***, that the Tribunal was not required to revisit the finding at stage two that there had been non-compliance with the Unless Order. The position here was that there had been total non-compliance prior to the Unless Order deadline, and so the degree of non-compliance was significant.

33. Ms Hood referred to ***Hylton v Royal Mail Group Ltd UKEAT/0369/14***, quoting Langstaff P (at paragraph 22) –

"*It must usually be the case that, where a claim has been struck out because of a failure to provide such information but by the time of an application for relief the information has been supplied, a court will grant relief. The purpose of the orders would have been achieved. Again, as observed in* ***Johnson****, the approach should be facilitative rather than penal. That cannot, however,*

apply where there has been no compliance even at the stage of seeking relief from the order which was made. Orders are made to be observed."

34. Ms Hood pointed out that the document provided by the claimant on 23 February 2021 was almost word for word identical to part of her Further and Better Particulars of November 2019. No new calculations or explanation were provided. The claimant's belated response did not comply with the Unless Order. Ms Hood referred to what EJ Jones had said when deciding the application for reconsideration –

"*Although the claimant did provide information in relation to her claim of unlawful deduction from wages by email after the date on which there was to be compliance with the Unless Order, that information did not comply with the terms of the Order."*

35. Next addressing prejudice to the respondent, Ms Hood submitted that the Unless Order had been made against a background of the claimant having had numerous opportunities to articulate her claim. The Unless Order was her *"one final chance"* to do so. If the Unless Order were to be set aside, the respondent would still be in the position of not having fair notice of the claim against it. It was a local authority with budgetary constraints. It had already incurred significant expense as a result of the claim. There would be significant prejudice to the respondent if the Unless Order were to be set aside.

36. Turning finally to whether a fair trial remained possible, Ms Hood referred again to ***Hylton*** per Langstaff P (at paragraph 21) –

"*The purpose of case management orders is in general to secure, where that remains possible, that there should be a fair hearing of the allegations made by one party against the other. Where accusations have been made on a very generalised basis, as here, clarity of the accusations is needed. The respondent is entitled to know what acts it is being accused of, and the*

Tribunal cannot adjudicate properly unless that is the case. Unless and until that is done, it is difficult if not impossible to have a fair trial…."

37. Ms Hood also referred to ***Thind*** per Underhill P (at paragraph 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…."

38. Ms Hood argued that if the claimant was able to put her claim in a way that could meaningfully be understood by the respondent and the Tribunal, she would have done so already. The Unless Order had been her last chance to do so, yet she had chosen to resubmit a document which she had already provided, and which formed part of her previous failures to articulate her claim in a way that could be sensibly understood. The Unless Order had been clear and set out exactly what was required of the claimant. There was an important interest in the Tribunal enforcing compliance. It would not be in the interests of justice nor in line with the overriding objective to allow the claimant relief from sanction even if a fair trial remained possible.

39. Supplementing her outline submissions orally at the hearing, Ms Hood referred to the issue of seriousness of the default and accepted that the information provided by the claimant at the hearing (the legible versions of her spreadsheets) demonstrated some level of compliance with the Unless Order. However, it was not full compliance so that the purpose of the Order was achieved. The spreadsheets were not accompanied by an explanation of how the amounts were calculated, which was what paragraph (b) of the Order required. There was no expression in *"clear and unambiguous terms"* of each amount said to be an unlawful deduction as directed by paragraph (c) of the Order.

40. It was, Ms Hood submitted, not clear how Working Time Payments made to the claimant were reflected in her spreadsheets. The claimant's methodology

in calculating her hourly rate of pay was not clear. Even with the introduction of the spreadsheets, there remained significant default in compliance with the Unless Order. Further clarification would be required before the case could proceed to a full hearing. It was likely that the respondent would incur further time and expense in any process to clarify the claim.

Discussion

41. I began my deliberations by reminding myself that I was dealing with an application for relief from sanction under Rule 38(2). This was stage three of the judicial decision points identified in ***Polyclear.*** Was it in the interests of justice to set aside the Unless Order?

42. I approached this by considering the factors identified by Underhill P in ***Thind*** –

(a) The reason for the default.

(b) The seriousness of the default.

(c) The prejudice to the other party.

(d) Whether a fair trial remained possible.

Reason for the default

43. The reason for the default – the claimant's failure to comply with the Unless Order – was clear. She had not read it during the period of time allowed for compliance. The claimant described herself as *"stupid"* for not doing so. There was no suggestion of any external factor preventing the claimant from reading the Judgment containing the Unless Order.

44. I considered that Ms Hood was arguably being generous to the claimant when she said that if the Tribunal accepted her (ie the claimant's) explanation of why she did not comply with the Unless Order, the respondent accepted

that the default was not deliberate. On one view, for the default to be *"deliberate",* it would require the claimant to have read the Unless Order and then taken a conscious decision not to comply. The claimant had made no such conscious decision.

45. However, having read the first few pages of the Judgment, the claimant did take a conscious decision not to read the Judgment in full. She decided to read it in full nearer the date of the next hearing which had been set (for 9 March 2021) to deal with her application to amend. It seemed to me that this could fairly be described as foolish and careless. It was the wrong decision. It was disrespectful to the respondent and to the Tribunal. It was a decision no reasonable person, having the capacity and ability – as the claimant clearly did – to read the Judgment in full, would have taken.

46. I next considered the seriousness of the default. Ms Hood said that the Tribunal was not required to revisit the finding at stage two that there had been non-compliance with the Unless Order. I believed that was something of an over-simplification. In ***Polyclear*** HHJ Tayler said this (at paragraph 59) –

"*….I do not consider that at the stage three hearing the employment judge can determine of [if?] the stage two decision, that there had not been material compliance with the unless order, was incorrect. However, an important aspect of making the stage three decision is determining the extent to which there was an attempt at compliance with the unless order. The judge at stage three may conclude that the material non-compliance was extremely limited, and might, with the benefit of more relevant information and better argument, find it difficult to put their finger on precisely what the non-compliance was."*

47. I believed that I could not decide whether the interests of justice required the stage two decision - to dismiss the claim – to be set aside without revisiting that decision, at least to the extent of looking at it in the light of the information available to me, when considering the seriousness of the default.

I took into account that (a) there had been no compliance within the period provided for in the Unless Order and (b) there had been an attempt at compliance shortly after the end of that period.

48. The reason for the stage two decision was expressed briefly –

"*The claimant's claim of unlawful deduction of wages is struck out as she failed to comply with the Tribunal's Unless Order of the Judgment of 29 January 2021."*

49. It was not possible to determine from this whether the non-compliance was the claimant's failure to do anything within the prescribed period, or whether this also reflected the claimant's attempted compliance outwith that period. However, it was clear that the reconsideration decision (see paragraph 6 above) did take account of the information submitted by the claimant on 23 February 2021. EJ Jones found that this information *"did not comply with the terms of the Order".*

50. I considered that when looking at the seriousness of the default I should, in my assessment of whether the interests of justice required me to set aside the stage two decision, weigh in the balance –

(a) The claimant's failure to do anything before the deadline of 5.00pm on 19 February 2021 set out in the Unless Order.

(b) The fact that the claimant made an attempt to comply on 23 February 2021.

(c) The extent to which that attempt represented compliance with the Unless Order.

51. The claimant's failure to do anything before the deadline I set for compliance with the Unless Order was inexorably linked with the reason for her default.

She did not comply because she had not read the Order. That was a serious omission.

52. That omission was mitigated to some extent by the claimant taking action towards compliance as soon as she became aware of the Order, on receipt of Ms Hood's email of 22 February 2021. However, the action the claimant did take was inadequate. Her "*document of particulars"* was a re-submission of material which had already been found lacking in sufficient content to give fair notice to the respondent of the case it had to answer.

53. The difficulty for the respondent and the Tribunal in understanding what the claim was about was highlighted by EJ Young in his Note following the fourth preliminary hearing on 13 February 2020 – see paragraph 9 of my Judgment dated 1 February 2021. If the material previously provided by the claimant had been adequate, there would have been no reason for the Tribunal to issue the Orders of 8 April 2020 – see paragraph 11 of my last-mentioned Judgment. Accordingly it had been inappropriate for the claimant to resubmit material she had originally submitted in November 2019 in purported compliance with the Unless Order. There had been serious default by the claimant.

54. Moving on to the issue of prejudice to the respondent, I noted that the claimant's ET1 had been lodged on 23 March 2019. In the ensuing three and a half years there had been six Tribunal hearings. While the disposal of the case by the Employment Appeal Tribunal had necessarily taken some time, the claimant's difficulty in articulating her claim in a way that could sensibly be understood by the respondent and the Tribunal had contributed significantly to this timescale.

55. At paragraph 52 of my Judgment of 1 February 2021 I listed the nine opportunities the claimant had had to explain what her claim was about. At paragraph 64 of that Judgment I said that I had "*come to the view that the claimant should be allowed one final chance to explain what her claim is about".* Ms Hood was in effect saying that "*one final chance"* should mean

just that. The interests of justice did not require that the claimant should be given more latitude. To give the claimant more latitude would necessarily require the respondent to devote more time and expense to the case, which was to their prejudice. I considered that this was a powerful argument in favour of refusing the claimant's application.

56. I looked next at the issue of whether a fair trial remained possible. On the positive side (ie that a fair trial was still possible) there was documentation such as payslips and rotas which would assist the Tribunal in assessing the evidence at a final hearing. On the negative side, the Tribunal would be concerned with events which took place between March 2017 and February 2019 and the passage of time could make it more difficult for witnesses to recall those events. I came to the view that while the prospects of a fair trial had diminished with the amount of time which had elapsed, they had not entirely disappeared.

57. I reminded myself that Underhill P said in ***Thind*** that the fact that an unless order has been made "*will always be an important consideration".* Underhill P also referred to the fact that unless orders are *"not to be used lightly".* There will always be a context within which the order is made – see paragraph 55 above. The context here was that the claimant was saying that she had worked more hours that had been recorded by the respondent and that she was entitled to be paid (at overtime rate) in respect of those hours. She told me during the hearing on 29 January 2021 that she could provide a month by month breakdown of the underpayments. I framed the Unless Order in terms designed to give her the opportunity to do so.

58. I considered that the interests of justice required that I should look at the material the claimant had chosen to place before me to see if there was enough there to give the respondent fair notice of her claim. I reminded myself that this material had not been available to EJ Jones when she made the stage two decision and the subsequent reconsideration decision.

59. The spreadsheets submitted by the claimant were helpful in terms of drilling down to the level of detail that was required to gain an understanding of her claim. She had in effect provided a day by day record of the hours she claimed to have worked over a period which included the two years covered by the Unless Order. That went part of the way towards explaining her claim. What the spreadsheets did not do was to explain where the "*hourly rate"* and "*overtime hourly bonus"* figures came from. These omissions were reflected in Ms Hood's criticisms as described at paragraphs 39 and 40 above.

60. I reminded myself, as I had done when deciding to make the Unless Order, of the overriding objective set out in Rule 2 of the Tribunal Rules. Rule 2 provides as follows –

"*The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –*

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

61. I found it frustrating that the claimant seemed (a) potentially to have a statable argument that she had worked more hours than she had been paid for, but (b) incapable of articulating that argument in a way that could be understood by the respondent and the Tribunal. Of course, that argument might not prevail at the end of the day, but it was difficult to fathom why the claimant was unable to express it with greater clarity despite the number of opportunities she had had to do so.

62. That said, the claimant was the architect of the situation in which she now found herself. She accepted that she should have read in full the Judgment following the hearing on 29 January 2021. If she believed that the *"document of particulars"* attached to her email of 23 February 2021 amounted to belated compliance with the Unless Order, she had no valid basis for that belief. If it was inadequate when first provided in November 2019, it was inevitably still going to be inadequate in February 2021. If she had already prepared the spreadsheets following the hearing on 29 January 2021, why did she not provide these as part of her belated and purported compliance with the Unless Order?

63. I found that the claimant's explanation that she "*thought these would be gone through at the hearing on her application to amend"* was not adequate to justify her failure to provide the spreadsheets as part of her purported and belated compliance with the Unless Order. If the spreadsheets were necessary for the respondent and the Tribunal to understand her claim – and clearly they were – then, once she had read the Unless Order, the claimant should have appreciated that they would be required at the point of such compliance, ie on 23 February 2021.

64. Having regard to the overriding objective, I took into account that –

(a) The claimant was unrepresented. If she had been represented, legally or otherwise, it was reasonable to assume that her representative would have read the Judgment containing the Unless Order timeously. On the other hand, there had been no impediment which prevented the claimant

from doing so. Accordingly I did not believe that she had been disadvantaged in terms of her ability to read and understand the Unless Order.

(b) It did not seem to me that the issues in this case were particularly complex. If the claimant believed she had been underpaid, she should have been able to explain when and how this had occurred.

(c) Prior to the Unless Order, the Tribunal had shown flexibility by giving the claimant a number of opportunities to explain her case.

(d) There had been delay. A significant part, although not all, of that delay had been occasioned as a result of the claimant's inability to articulate her claim in a way that could sensibly be understood.

(e) There would be further expense to the respondent if the Unless Order was set aside, compared with the level of expense which would be incurred had it been complied with.

65. The question I had to answer was whether the interests of justice required me to set aside the decision to dismiss the claim under Rule 38(1). Taking all of the foregoing into account, I decided that they did not do so. I considered that the material points were that –

(a) The claimant had entirely failed to comply timeously with the Unless Order.

(b) That failure was due to her not having read the Judgment of 1 February 2021 in full as she should have done. There was no excuse for that.

(c) The claimant's attempt at belated compliance had not come close. She had simply resubmitted a document which had already been found wanting.

(d) The material which the claimant had provided for the hearing on 12 September 2022 was helpful but fell short of giving fair notice of her claim.

(e) The Unless Order was made in circumstances where there had been numerous opportunities for the claimant to give fair notice.

(f) It would be unfair to the respondent to give the claimant further latitude when she had already been given "*one final chance"* to articulate her claim.

Decision

66. Accordingly I decided that the interests of justice did not require me to set aside the decision to dismiss the claim.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 26 September 2022
Entered in register: 30 September 2022
and copied to parties