



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Melissa Davies

**Respondent:** A Suman & Co Ltd

**Heard at:** Birmingham (remotely, by video (CVP))

**On:** 3 November 2021

**Before:** Employment Judge T Coghlin QC

## Appearances

**For the claimant:** Did not appear and was not represented

**For the respondent:** Mrs Carol Farrow, HR Consultant

## JUDGMENT

1. The claimant having failed to comply with the terms of the “unless” order contained in paragraph 7 of the Order of EJ Cookson which was sent to the parties on 5 July 2021, it is recorded that the claimant’s complaint of unfair dismissal stands dismissed.
2. The claimant’s claims are dismissed pursuant to rule 47 of the Employment Tribunal Rules of Procedure 2013.

# REASONS

## Introduction

1. Today's hearing was listed by order of EJ Cookson dated 5 July 2021 following a telephone preliminary hearing on 24 June 2021. The issues to be determined were:
  - a. whether the claimant was disabled at the relevant time;
  - b. any application to amend the claim; and
  - c. what if any further case management orders are appropriate.
2. As EJ Cookson said, the outline of the claim can be summarised as follows: "The claimant was employed by the respondent, a construction company, as an assistant accountant, between 12 and 22 October 2020. The claim form was presented on 8 January 2021 ... The claim is about why the claimant's employment was so short lived. The claimant says it was because of or related to her disability and the impact that it and the medication she takes impacted on her. The respondent denies the claims. It says that it was unaware of the claimant's disability and the reason for her dismissal was her performance."

## EJ Cookson's orders

3. At the hearing on 24 June 2021 EJ Cookson made various orders including setting down today's open preliminary hearing. These orders were explained to the parties (except where EJ Cookson explained that she made an order after the hearing of her own motion).
4. EJ Cookson made an "unless" order in the following terms at **paragraph 7** of her order: "Under section 108 of the Employment Rights Act 1996 claimants are not entitled to bring a complaint of unfair dismissal unless they were employed for two years or more except in certain specific circumstances which do not seem to apply in the claimant's case. UNLESS BY 19 July 2021 the claimant sets out the basis on which she claims that she is entitled to claim unfair dismissal notwithstanding that she does not have 2 years' service, her claim for unfair dismissal will stand dismissed without further order."

5. EJ Cookson ordered at **paragraph 10**: “If the claimant does wish to amend her claims and have that application considered at the hearing on 3 November 2021 she must set out the details of those claims to the Tribunal and the respondent by 29 July 2021. If she does not it will be entirely within the discretion of the employment judge conducting the preliminary hearing whether her application can be considered on that date.”
6. The respondent was then given until 12 August 2021 to provide amended grounds of resistance dealing with any such amendments.
7. EJ Cookson ordered at **paragraph 14**: “Although not discussed at the hearing and on my own volition, the claimant must by 12 August 2021 send to the respondent and the Tribunal a document setting out how much compensation for lost earnings or other losses she is claiming, including in relation to injury to feelings, and how the amount has been calculated. This is called a Schedule of Loss.”
8. At **paragraph 16** EJ Cookson ordered that the claimant must by 12 August 2021 provide the respondent with certain information about her alleged disability, such as how long she had had the impairment, what the effects of the impairment were on her ability to carry out day-to-day activities, what medical treatment the claimant had, and so on.
9. At **paragraph 17** EJ Cookson ordered that:

“The claimant must by 12 August 2021 send to the respondent:

  - 17.1 copies of the parts of her GP and other medical records that are relevant to whether she had the disability at the time of the events the claim is about. She may blank out anything that is clearly not relevant;
  - 17.2 any other evidence relevant to whether she had the disability at that time.”
10. At **paragraph 18** EJ Cookson made provision for the respondent to confirm by 26 August 2021 whether or not it accepts that the claimant was disabled at the relevant time.
11. At paragraphs 19 to 21 EJ Cookson gave orders for the parties to prepare for today’s preliminary hearing. In particular she ordered at **paragraph 19**: “Any documents relevant to the issue of the disability (in addition to the medical records above) and relevant to the question of amendment if appropriate, must be disclosed by each party to the other by sending a list of the documents and copies by 29 September 2021.”

**Events since EJ Cookson's order**

12. Except for two emails sent in identical terms on 13 and 21 October 2021, to which I shall return below, the claimant has not communicated with the tribunal since the hearing before EJ Cookson. She has not communicated with the respondent at all. She has not complied with any of the orders made by EJ Cookson.
13. The respondent has attempted to contact the claimant on various occasions. On 20 August 2021 Mrs Farrow, the respondent's representative, emailed the claimant reminding her of the orders made by EJ Cookson. She noted that the respondent had yet to receive a written record of EJ Cookson's order and assumed that the same would be true for the claimant. She asked for the claimant to replay and to provide the outstanding material (in particular in relation to amendments and the information and material related to disability) by no later than 23 August 2021. The claimant did not reply.
14. Mrs Farrow again emailed the claimant on 28 September 2021 and said: "Further to the orders set by Tribunal Judge Cookson on 24<sup>th</sup> June 2021, please find attached a copy of the Respondents documents for disclosure. I can confirm that a copy of the bundle/documents has also been posted to your home address. I look forward to receiving any documents that you may have in preparation for the 2<sup>nd</sup> preliminary hearing which is set for 3<sup>rd</sup> November 2021." Once again the claimant did not reply.
15. On 13 October 2021 Mrs Farrow wrote to the tribunal pointing out that the claimant had not complied with any of EJ Cookson's orders, and asked the tribunal for further directions. The tribunal wrote to the claimant the same day, asking for her response by 21 October 2021.
16. The claimant in fact replied by email the same day, 13 October 2021. She began by apologising for not having been in contact. She referred to a particular issue in her personal life (which it is not necessary for me to record in a public judgment, but which is known to both parties) and she said that she had had "many other personal issues since the last hearing. At the moment I am not in a position to follow any of the orders imposed by the judge. I simply do not have the time or energy." She referred to the effect of the personal issue on her and other members of her family. It seems that the claimant sent the email in precisely the same terms on 21 October 2021.

17. The claimant did not copy her email to the respondent, but the tribunal forwarded it to the respondent. Mrs Farrow replied by email to the tribunal and the claimant on 25 October 2021. She said that whilst the respondent was sympathetic to the claimant's personal situation, "we feel that the Claimant has had ample opportunity to notify the parties of this, and ask for additional time to comply. She failed to do this and has not responded to any of the emails/correspondence sent by the Respondent." Mrs Farrow asked for details of when the personal issue referred to by the claimant had arisen. She concluded "I would also like to ask, if the Claimant is actually confirming that she doesn't wish to proceed with tribunal matters." Once again the claimant did not respond, either to the respondent or to the tribunal.
18. Yesterday, 2 November 2021, Ms Ratcliffe, a colleague of Mrs Farrow's, sent an email to the claimant and the tribunal, attaching a case management agenda. Her email to the claimant bounced back. She also posted a copy of the case management agenda and bundle to the claimant by first class post. Mrs Farrow also emailed to the claimant a copy of the paginated bundle yesterday, and this time did not receive a bounce-back from the claimant.

### **Today's hearing**

19. The claimant did not attend today's hearing. The claimant had been sent a written notice of today's hearing by post on 5 July 2021. She also knew of the hearing from (1) having attended the hearing before EJ Cookson on 24 June 2021 when today's hearing was listed; (2) EJ Cookson's Orders dated 5 July 2021 which gave details of today's hearing; (3) the respondent's emails of 20 August 2021 and 2 November 2021 which referred to today's hearing.
20. The tribunal clerk attempted to contact her both by telephone and by email. The telephone call could not be connected (an automated message said "your call cannot be completed") and the email to the claimant bounced back with the message "the recipient's mailbox is full and can't accept messages now".

### **Decision**

21. I begin by recording that the complaint of unfair dismissal stands struck out by reason of the claimant's failure to comply with the "unless" order made by EJ Cookson. The

claimant made no attempt to comply with this order, and has put forward no reasons why her claim of unfair dismissal could be one that the tribunal has jurisdiction to consider, having regard to the statutory requirement that a person bringing a claim of unfair dismissal has two years' qualifying service in order to bring such a complaint.

22. That leaves the claimant's claim of disability discrimination. The respondent applied for this claim to be struck out or dismissed for non-compliance with tribunal orders and for the claimant's non-attendance today.

23. I have come to the conclusion that, the claimant having failed to attend today's hearing, it is appropriate to dismiss the claim under rule 47 of the 2013 Employment Tribunal Rules. In my judgment this course is appropriate and proportionate to take, in light of the following matters:

- a. I fully recognise that dismissing or striking out a claim is a draconian step, and I bear in mind that there is a public interest in discrimination claims being determined on their merits at trial.
- b. However the claimant's failure to comply with tribunal orders has been extensive and wholesale. Indeed she has not complied with any of the various orders made by EJ Cookson.
- c. The effect of those failures is that the claim is no further advanced. The respondent has had to incur time and cost in chasing the claimant for compliance, and she has failed to engage with the respondent.
- d. This is the claimant's case. The tribunal and the respondent are entitled to expect her to progress it.
- e. It is against that background that the claimant has failed to attend the hearing today, so that a necessary step in determining her claim, namely the question of disability, cannot be decided today as it was intended that it should be.
- f. The claimant has not applied for any extensions of time for compliance with the tribunal orders. She has not applied for a postponement of today's hearing. She has failed to communicate at all with either the respondent or the tribunal about

today's hearing. No excuse or explanation has been put forward for her non-compliance. No explanation has been given for her non-attendance today.

- g. I bear in mind also the explanation given by the claimant on 13 and 21 October 2021, namely that she has been suffering from personal difficulties. Given the nature of those difficulties, I am prepared to assume that they have indeed been a distraction and have taken up her time and energy, not least because (as her email implies) she has to care for family members who I am sure are also affected by the personal issues in question. However the claimant has put forward no information which in my judgment offers anything approaching a sufficient justification for the claimant's wholesale non-compliance with tribunal orders or indeed for her failure to communicate with both the tribunal (save for those two emails) and the respondent. She has not provided any detail of the effects of these matters on her ability to conduct litigation. She has not provided the clarification which the respondent reasonably requested in its email of 25 October 2021.
- h. I have considered alternatives to dismissing the claim. One might be to proceed with determining the question of disability in the claimant's absence, but given the absence of any medical evidence or evidence from the claimant to support her contention that she was disabled, the claimant would inevitably have failed to discharge her burden of proof on that question anyway.
- i. Another would be to postpone the hearing and for it either to be relisted for a (third) preliminary hearing or for the preliminary issue of disability to be determined at trial. Neither route in my view is appropriate, for a number of reasons.
  - i. First, there is no application to postpone, nor any grounds put forward to support such an application (and I note that had the claimant made such an application today and had it been opposed, she would have been required to show "exceptional circumstances" under rule 30A(2)(c) of the 2013 Employment Tribunal Rules, and at present I have seen none).
  - ii. Second, it is unlikely that a further preliminary hearing could be arranged in good time before the final hearing currently listed for June 2022.

- iii. Third, putting the matter of disability off to the final hearing would mean that there may be insufficient time to deal with other issues at that hearing, leading to the risk of the case going part-heard. Furthermore it would mean losing the potential efficiency which would be gained if the respondent were to succeed on the issue the question of disability at a preliminary stage.
- iv. Fourth, there is no indication that the claimant intends now to start to pursue the claim: she has not taken steps to do so up till now. When asked this question by the respondent in its email of 25 October 2021, she replied only with silence and a failure to attend today's hearing.
- v. Fifth, postponing this issue would inevitably put the respondent to further cost and inconvenience.
- vi. Sixth, postponing the issue would result in a delay in the determination of a preliminary question which, if resolved in the respondent's favour, would dispose of the claimant's claim against the respondent. Discrimination cases are important for claimants, but they are also serious matters for employers and individual decision-makers within employers who face allegations of discrimination: this is among the reasons why it is desirable for cases to be determined without unavoidable delay.
- vii. Seventh, given the claimant's conduct of the litigation to date, there is no warrant for allocating the further share of the tribunal's limited resources which would be required in order to accommodate a postponement of this issue.

24. Overall I am satisfied that the proportionate approach is to dismiss the claimant's claim.

25. Had the route of dismissal not been available, I would have struck the claim out on the ground of failures to comply with tribunal orders and on the ground that the claim has not actively been pursued (rules 37(1)(c) and (d) of the 2013 Employment Tribunal Rules), and weighing the same considerations that I have taken into account as I have described above in deciding to dismiss the claim.



**Employment Judge Coghlin QC  
3 November 2021**