EMPLOYMENT TRIBUNALS

Claimant: **Mr G Alimi**

Respondent: **Stratford Advice Arcade**

Heard at: **East London Hearing Centre**

On: **2 September 2022**

Before: **Employment Judge Burgher**

Appearances

For the Claimant: **Ms M Duncan Brown (Counsel)**
For the Respondent: **Mr P Lockley (Counsel)**

JUDGMENT having been sent to the parties on 7 September 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant's instructing solicitor Ms Florence Hodge made an application for relief from sanctions on 18 October 2021 and I was required to consider the Claimant's application pursuant to rule 38 of the Employment Tribunal rules. Rule 38 states:

> ***"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."*

2. I heard clear and structured oral submissions from Ms Duncan Brown for the Claimant and forceful submissions from Mr Lockley on behalf the Respondent. His submissions were supplemented by the carefully drafted written submissions.

3. The thrust of the Claimant's application was that he has brought important claims including whistleblowing in his claim submitted on 18 May 2019. Ms Duncan Brown emphasised that several of the initial delays in the progression of this case were caused by the Respondent and the illness of the Respondent's instructing solicitors affecting the progress of the case during 2020.

4. Ms Duncan Brown stated that in around January 2021 the Claimant suffered a pulmonary embolism as a result of a large blood clot in his lungs and this that led to ongoing bleeding and tiredness symptoms. The Claimant still suffers from the effect of Covid 19 and has long Covid

5. The Claimant contends that the effect condition was that he required extensions of time to Tribunal orders which were from time to time granted and initially agreed to. The Claimant was hoping to comply with Tribunal orders to get medical evidence from his hospital but stated that due to Covid, inefficiencies and absence of staff such documents were not forthcoming.

6. By letter 29 July 2021 the Respondent sought to apply to strike out the Claimant's claim, due to non-compliance by the Claimant to provide relevant medical documentation. A preliminary hearing was held on 2 August 2021 before Employment Judge Russell. The Claimant did not attend and was not represented at that hearing. Employment Judge Russell was persuaded that it was appropriate to make an unless order, in view of the Claimant's non-compliance to provide the medical information. The unless order stated:

> *"unless by 16 August the Claimant serves the Respondent, and the tribunal, copies of his GP records for the period from 1 January 2020 to date the claim shall stand dismissed without that order."*

7. The order was sent to the parties on 6 August 2021. It stating that any order may be varied or revoked an application by the party or by the judge and his or her own volition.

8. The Claimant's solicitors were unable to provide the relevant documentation by 16 August 2021. Ms Duncan Brown highlighted that this was over the summer period, it was still during the period of Covid, and that there was great difficulty in contacting and accessing the required records. However, there was no prior application made by the Claimant's solicitors for further time, or for the unless order to be varied in view of the stated difficulties.

9. The Claimant was able to provide some documentation on 18 August 2021. However, this was not in substantial compliance with the order of Employment Judge Russell. There was no reference to GP records for the period from January 2020 to December 2020 which was significant requirement in the unless order. Therefore, as at the date of the provision of further information there was still non compliance with the unless order.

10. The matter was considered by Employment Judge Russell on 4 September 2021 and she concluded that the order had not been complied with and that the deadline had been missed to provide information. She stated that if the Claimant

wished to avoid a strike out an application for relief from sanctions must be made. No application for relief from sanctions was made immediately following this letter.

11. The Claimant was sent a further letter from the Tribunal, this time from Regional Employment Judge Taylor dated 6 September 2021. REJ Taylor confirmed that the Claimant's claim had been dismissed due to non-compliance with the unless order and that the further hearing which was to have taken place on 7 September would not take place.

12. There was also a letter from the Tribunal on 29 September 2021 again repeating that the unless order was made and the reasons for it.

13. It is relevant that neither within 14 days of 4 September, 6 September or 29 September 2021 did the Claimant's solicitors make any application for relief of sanctions. I mentioned these dates because the first point Mr Lockley raised was the jurisdiction of the Tribunal to consider the application for relief from sanctions at all. He stated that I did not have jurisdiction to consider the application for relief at all as the Claimant had not made an application to set aside within 14 days as required by rule 38(2) of the Tribunal rules.

14. Ms Duncan Brown made forceful and persuasive submissions about the matters that led up to the issuing of the unless order but there was total absence of information that Ms Duncan Brown was able to advance in relation to the tardiness in relation to the relief from sanctions application or the Claimant and his instructing solicitors failing to engaging with the clear seriousness of the unless order and the requirements that were imposed upon them to ensure that an appropriate application was made to set aside.

15. Ms Duncan Brown submitted that the Claimant was in a position, as at 7 September 2021, to participate in proceedings and attend the planned hearing. However, Ms Duncan Brown did not provide me with any information or any submissions to allow me to exercise my discretion to extend the time limit pursuant to rule 5 of the Employment Tribunal rules and as such there was no justifiable basis for me to do so.

16. Therefore, I was not persuaded that I had jurisdiction to consider the application for relief from sanctions and I was compelled to agree with Mr Lockley that no reason at all had been provided by the Claimant as to the why he could not have applied within 14 days.

17. I therefore do not I have jurisdiction to consider the application for relief from sanctions and set aside the dismissal judgment. It has been made out of the time limit and there is no explanation why.

18. Further, if I was able to consider the substantive application even now there is material non compliance. Mr Lockley referred me to the case of **Amey Services Ltd v Bate** UKEAT/0082/17/JOJ at where HHJ Barklem stated at paragraph 21 that in the absence of a finding that there had been material compliance with the unless order it was not open for a judge to find relief from sanctions was justified. In these circumstances I would have refused to grant relief from sanctions and would not have

considered it to be in the interests of justice to do so.

19. The Claimant's application for relief from sanctions is therefore refused.

Costs

20. Following giving up my decision in relation to relief from sanctions Mr Lockley applied for costs on behalf the Respondent. He made his application for costs, amounting to £6621, pursuant to rule 76 at of the Tribunal rules. Rule 76 states:

> *"76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a)a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b)any claim or response had no reasonable prospect of success.*
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.*
>
> *(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the Respondent to pay the costs incurred as a result of the postponement or adjournment if—*
>
> *(a)the Claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the Respondent not less than 7 days before the hearing; and*
>
> *(b)the postponement or adjournment of that hearing has been caused by the Respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the Claimant was dismissed or of comparable or suitable employment.*
>
> *(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.*
>
> *(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing."*

21. I had regard to the structured approach set out in the case of Millan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise at paragraphs 52:

> *"There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in Rule 40(3); but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule 41, the tribunal has the option of ordering the paying party to pay an amount to be determined by way of*

detailed assessment in a county court."

22. I therefore considered the following steps:

a. Has the putative paying party behaved in the manner proscribed by the rules?

b. If so, it must then exercise its discretion as to whether or not it is appropriate to make a costs order, (it may take into account ability to pay in making that decision).

c. If I decides that a costs order should be made, I must decide what amount should be paid or whether the matter should be referred for assessment, (again the Tribunal may take into account the paying party's ability to pay).

23. Mr Lockley submitted that the Claimant was unreasonable and his management of the case, in failing to comply with case management orders, failing to attend the preliminary hearing and repeated failure to provide medical evidence. Mr Lockley also stated that the Claimant was unreasonable in relation to the application for the relief from sanctions and in the way in which the application was made in breach of ET rule 92 in not copying the Respondent. This resulted in further avoidable delay in resolving the matter.

24. The Claimant gave evidence that he believed that the Respondent was at fault in relation to several matters of non-compliance with orders.

25. When considering costs, I do not accept Ms Duncan Brown's submission which was that there was no jurisdiction in that it is not the usual process to award costs in the Employment Tribunal.

Conclusions

26. I did not consider it was necessary to determine who was at fault for earlier non compliance as it was clear to me that there was illness in respect of people involved and the pandemic impacted on that. In these circumstances I do not consider that the Claimant was unreasonable in the conduct of litigation up to the unless order being granted.

27. I take a different view in relation to the costs of responding to the application for relief from sanctions. I consider that the timing of the application, the lack of reasons for the delay in applying and the failure to copy the Respondent into the application amounted to unreasonable conduct in the litigation and failure to comply with ET Rules.

28. I am mindful of the fact that this was not the conduct the Claimant individually but the conduct of his legal representatives but the Claimant is liable for their conduct and to the extent that they have acted unreasonably he is also liable.

29. The Respondent is a small organisation with severe financial constraints and it

was not reasonable for the Claimant to put it to the further expense of dealing with an application to which there was no jurisdiction given the tardiness in which was presented, I have found this was unreasonable and not made in accordance with Tribunal rule 92

30. I therefore considered it is appropriate exercise my discretion to order the Claimant to pay an amount towards the Respondent's additional costs that have been incurred to address the application to set aside the dismissal judgment.

31. When considering the amount of costs, the Respondent claimed approximately £4000, including Counsel's fees specifically for addressing the application for relief from sanctions.

32. I considered the Claimant's means. He gave evidence that he has no income, he relies on the income of his wife who is a cleaner, he is not able to receive benefits, he jointly owns a proper with his wife of 20 years which is a freehold property and they pay a mortgage of about £600 - £700 a month.

33. On basis of the information for me I consider that the Claimant will have equity within his jointly owned house for which cost could be payable and conclude that it is appropriate to exercise my discretion to order the Claimant to pay £400 costs to the Respondent which is approximately 10% of the costs incurred in respect of the failings.

34. The extent to which the costs are the fault of the Claimant's solicitors is a matter that he will have to take up with his solicitors separately but for the purposes of this claim the Claimant is ordered to pay the Respondent £400 as a contribution towards its cost.

Employment Judge Burgher

19 October 2022