



EMPLOYMENT TRIBUNALS

Claimant: Mr K Nottra
Respondent: Santander UK plc
On: 17 October 2022
Before: Employment Judge Ahmed (sitting alone)
At: Leicester

Representation

Claimant: Mr Edmund Beever of Counsel
Respondent: Mr Tom Perry of Counsel

JUDGMENT AT A PRELIMINARY HEARING

It is in the interests of justice to set aside the automatic dismissal of the Claim for failure to comply with an 'unless order' made on 23 September 2022. The Claimant is granted relief from sanctions and is therefore entitled to proceed with his claim. Case management Orders for the full hearing are given separately.

REASONS

1. This hearing was listed to determine whether the claimant should have relief from sanctions, that is to say whether the claim should be reinstated after it was automatically struck out for failure to comply with an 'unless order'.
2. The facts for the purposes of this hearing are not disputed unless otherwise stated.
3. In May 2019 the claimant issued proceedings for direct sex discrimination and disability discrimination. He has been legally represented at all material times.
4. The case management orders for the final hearing included an order for the parties to mutually exchange witness statements on or before 24 November 2021. The parties agreed to delay exchange to 12 September 2022.
5. When the September deadline approached the Claimant's solicitors sought to agree a further extension with the Respondent's representatives for exchange on 1 October 2022. That date was in fact a Saturday and the request was therefore considered to be a request for exchange on 3 October.

6. The Respondent's solicitors however did not agree to the further extension. They were concerned that such a late exchange would mean that their Counsel would not have sufficient time to prepare for the full merits hearing which was already listed for 5 days commencing 17 October 2022. They wrote to the claimant's representatives on 14 September to say that an extension was not agreed. Witness statements were not exchanged on that date. What was also outstanding was the Claimant's schedule of loss.

7. On 21 September 2022 the Respondent's solicitors wrote to the Tribunal and applied for an unless order under Rule 38 of the Employment Tribunal Rules of Procedure 2013 (the "2013 Rules") to force compliance with exchange of statements and for the Claimant to send his schedule of loss. The application was dealt with on paper by Employment Judge Clark who made an order on 23 September 2022 in the following terms:

"It is ordered that:

1. **Unless by 12 noon on Wednesday 28 September 2022** the Claimant complies with all the requirements in paragraph 2 or the requirement in paragraph 3 of this order, **the claimant's claim in its entirety will be struck out without need for further order.**

2. The first requirements for compliance with paragraph 1 are that the claimant (or someone acting on his behalf):

a. makes arrangements with the Respondent's representative for the mutual exchange of witness statements to be relied on at the final hearing and sends to the respondent those witness statements in accordance with those arrangements by the date set out above

and

b. sends to the respondent an updated schedule of loss.

OR

3. Makes a written application to postpone the final hearing with supporting evidence." [emphasis in the original]

8. On the morning of 28 September 2022 Ms Rehman, Solicitor for the Claimant, sent what she expected to be the final draft for checking by the Claimant. The draft was approved in good time for compliance with the Order. What happened then is explained in some detail in her witness statement of Ms Rehman. Ms Rehman did not attend this hearing to give evidence though she had intended to do so but was prevented by reason of a family emergency. It is unnecessary to go into the details of her statement save to say that with at least 10 minutes or so to spare Ms Rehman was ready to comply with the unless order.

9. Somewhat prematurely, at 11.52 instead of attempting to send the email she sent a text message to her supervising partner as follows:

"sitting pretty as all 3 statements done and draft email prepped. And it's not even 12 pm exchange time yet. IT issues slows me down but so happy it's done"

10. Ms Rehman then attempted to send the documents by email. Unfortunately she encountered IT difficulties and the email could not be sent by the deadline. At 12:01 the unless order took effect automatically and the claim was thereby struck out.

11. At 12:02 Ms Rehman was able to send an email in the following terms to the Respondent's solicitors:

"Please confirm whether you are in a position to exchange witness statements"

12. For the purposes of this application it is agreed that this email, regardless of the timing, did not comply with the unless order as it did not deal with paragraph 1 a. and b. of the Order.

13. At 12:17 Ms Rehman sent a further email to the Respondent's solicitors which included as an attachment the Claimant's witness statements and his schedule of loss. It is agreed that this email contained all the necessary information and had it been sent before 12.00 noon would have amounted to compliance.

THE LAW

14. Rule 38 of the Employment Tribunal Rules of Procedure 2013 (as amended) states:

" (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."

15. Thus the test in deciding whether to grant relief from sanctions under Rule 38(2) is whether it is "in the interests of justice to do so". The guidance as to how that test should be applied was set out by the EAT in **Thind v Salvesen Logistics Limited** [2010 UKEAT 0487/09/130]. In that case, Mr Justice Underhill (as he then was) stated 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."

CONCLUSIONS

The reason for the default

16. The primary reason for the default was the delay in sending the relevant email by the Claimant's legal representatives. Ultimately it was an IT problem occurring at a most unfortunate moment.

Seriousness of the default

17. Clearly all unless orders are important and any default is both serious and has serious consequences. The delay was however very short, some 17 minutes or so. I am satisfied that the failure to comply was not deliberate.

Prejudice to the other party

18. The only prejudice to the Respondent is that firstly, the final hearing had to be postponed and secondly, the Respondent has incurred additional costs by reason of the present application as well as the costs of the postponement.

19. Fortunately, alternative dates for listing were available in April 2023 and thus the delay in the case being re-listed is relatively short. There is no identified prejudice in re-listing for April 2023. As for the wasted costs that can be dealt by an appropriate application though it is confirmed that no such application is being pursued today.

Whether a fair trial remains possible

20. There is nothing to suggest that a fair hearing is no longer possible.

21. In all of the circumstances I consider it in the interests of justice to grant relief from sanctions and to reinstate the claim.

22. Case management orders for the hearing are given separately.

Employment Judge Ahmed

Date: 28 November 2022

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