



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Sayeed  
**Respondent:** Department for Work and Pensions  
**Heard at:** Manchester Employment Tribunal  
**On:** 07 February 2023  
**Before:** Employment Judge Mark Butler

## Appearances

For the claimant: Did not attend  
For the respondent: Mr S Tibbitts (Counsel)

## DECISION AT PRELIMINARY HEARING

The claimant's application to set aside the dismissal of his claim consequent to non-compliance with unless orders, pursuant to Rule 38(2) of the Employment Tribunal Rules of Procedure, is refused.

## REASONS

### Claimant's non-attendance at today's hearing

1. Today's hearing was listed to determine the claimant's application to set aside the dismissal of his claim following a failure to comply with two unless orders. This was an application made pursuant to Rule 38(2) of the Employment Tribunal Rules of Procedure.
2. The claimant was informed of the date of this hearing (following a postponement of the hearing that was listed to take place on 16 December 2022) by a letter sent by email to the claimant and the respondent dated 08 December 2022, at 16.04. In that letter it is explained that:

"The hearing has been relisted on 07/02/2023 at 10:00 am. The hearing will be heard at Manchester Employment Tribunals, Alexandra House, 14 –22 The Parsonage, Manchester M3 2JA."

3. Within the tribunal's letter of 08 December 2022, it also explained that the hearing of 08 December 2022 had been postponed and that the claimant was still being required to send to the respondent any evidence on which he was seeking to rely on at this Preliminary Hearing by the deadline of 09 December 2022. This letter also explained to the claimant that he must now also send his evidence to the tribunal at the same time as sending it to the respondent. This was instead of bringing two copies of his evidence to the hearing.
4. I am satisfied that the claimant received the email with the 08 December 2022 letter attached. He replied directly to that email, on 08 December 2022 at 18.09. And he forwarded his response to the respondent on 12 December at 17.39. For the avoidance of doubt, in both his response to the tribunal and the forwarding of his response to the respondent, the tribunal's letter is contained in the email trail. There is no doubt given this that the claimant received the letter and had been provided with today's listing date.
5. In the claimant's reply to the tribunals letter, the claimant responded directly to the part of the letter that referenced a need to provide his evidence. He wrote:

"I also request that last date to submit evidence relied upon as directed in September 2022 be extended to 25 January 2023 as my medical condition is deteriorated during last months..."
6. Furthermore, the claimant sent to the tribunal on Friday 03 February 2023 a completed case management agenda. This followed the instructions at the head of the agenda, to send to the tribunal and the other party a completed agenda no later than 2 days before the preliminary hearing. This must have been in preparation for today's hearing. This would not have been sent by the claimant if he did not have knowledge of today.
7. In the circumstances outlined above, it is implausible that the claimant was not aware of the hearing due to take place today.
8. The claimant was not in attendance at the tribunal building any time before 10am today. I asked my clerk to contact the claimant, using the telephone number the tribunal had on file, to find out whether there was a reason behind his delayed attendance. The claimant explained to my clerk that he was not attending today as he was not aware of the hearing. On enquiry, the claimant also explained that he would not be able to attend the tribunal for a delayed start to proceedings, should that be granted.
9. It is simply implausible that the claimant did not have notice of today's hearing. The claimant was not going to be in attendance. The hearing proceeded in the claimant's absence.
10. I have recorded the history of proceedings in this case, below, before turning to determining the application itself.

History of Proceedings

11. The claimant presented his claim form on 10 August 2020.
12. This case was initially listed for a Preliminary Hearing to take place on 28 June 2021.
13. On 25 June 2021 (3 days before the listed Preliminary Hearing), the claimant applied to postpone the hearing. He cited the reason being that he was awaiting legal advice. And that he had been informed that the hearing may be postponed in any event due to a lack of judicial resource
14. The respondent objected to the claimant's application for postponement. However, the hearing was postponed by Employment Judge Leach.
15. The Preliminary Hearing was re-listed to be heard on 25 August 2021.
16. There was no communication by the claimant with the tribunal in advance of this hearing. However, one of the clerks managed to make contact with the claimant at 14.49 on 25 August 2021. She emailed Employment Judge Benson, who was conducting the hearing, to inform her that the claimant had explained to her that he was self-isolating and that he was not going to attend the hearing. This was followed up by an email from the claimant at 14.59, where he explained that the dial in codes arrived late, that he was severely ill and cannot speak properly, and had no representation for this hearing.
17. EJ Benson, having discussed the matter with the respondent's representative at the hearing, decided to postpone this hearing. It was to be re-listed to take place on 07 October 2021.
18. On 27 August 2021, the Employment Judge Benson actioned the following letter to be sent to the claimant:

Employment Judge Benson directs the claimant is also ordered to write to the employment tribunal within 7 days of the date of this letter with a full explanation and supporting evidence of the reason for his non-attendance.

19. There was no response by the claimant to this direction from EJ Benson. He did not provide the explanation or supporting evidence as directed by EJ Benson.
20. The hearing listed for 07 October 2021 was postponed by the tribunal due to a lack of judicial resources.
21. On 07 October 2021, the respondent's representative sought from the claimant the information that the tribunal had directed that he provides. The claimant replied on 07 October 2021 explaining that "I will send you a copy". It does not appear that, despite this email from the claimant to the respondent, that an explanation or supporting evidence was sent to the respondent by the claimant.
22. A further reminder that the information requested by the Tribunal was outstanding was sent by the respondent to the claimant by email dated 15 November 2021.

23. EJ Benson again actioned a letter to be sent to the parties, this time on 07 February 2022. It stated:

Employment Judge Benson has directed me to write to the claimant to advise him to provide a copy of the email which he sent to the Tribunal on 21 August 2021 advising that he would be unable to attend the preliminary hearing listed for 25 August 2021. The claimant is to provide this by 14 February 2022.

24. The Preliminary Hearing was again re-listed, this time to be heard on 14 April 2022. This was sent to the parties on 07 February 2022.
25. Following further non-compliance with the direction of EJ Benson, the respondent again referenced the claimant's failure to comply with EJ Benson's directions in an email dated 15 February 2022. This email repeated a strike out/deposit order application that had been contained in an earlier document.
26. On 24 February 2022, EJ Leach issued the claimant with a strike out warning. On the basis that the claim was not being actively pursued. Specifically, it referenced that the claimant did not attend the Preliminary Hearing on 25 August 2021, and, in essence, a failure to comply with the directions of EJ Benson.
27. The claimant replied to this strike out warning on 24 February 2022, by email at 16.32. He referenced his ill health and testing positive for Covid19 at the time of the Preliminary Hearing (although this does not explain why he could not attend the Preliminary Hearing that was taking place by telephone), and that he had sent medical records by post to the tribunal. For the avoidance of doubt, the tribunal has no record of having received such documents from the claimant at any point. The claimant references other unfortunate events, for which I have great sympathy for, but they do not explain why he did not attend the hearing on 25 August 2021.
28. The Preliminary Hearing was again re-listed, this time to take place on 14 April 2022. The claimant did not attend this hearing. The claimant informed the tribunal by email 1 hour before that hearing that he was not attending due to a power cut and that his mobile was not sufficiently charged to allow him to participate. The claimant at this stage provided no supporting evidence. This was the second Preliminary Hearing that had not been attended by the claimant, with no evidence to support why he was not attending. Both Preliminary Hearings (this one and that of 25 August 2021) were attended by the respondent.
29. At the hearing of 14 April 2022, I listed a further preliminary hearing to take place on 20 July 2022. In advance of that hearing the claimant was directed to produce a table explaining his claim, as at that time his claims remained unclear. He was directed to provide this by 05 May 2022.
30. I also made the claimant subject to two unless orders. The first was in relation to evidence that explained his non-attendance at the preliminary hearing of 25 August 2021 (repeating the two previous directions of EJ Benson). The second related to specific evidence to support his non-attendance at the Preliminary Hearing on 14 April 2022. He was to comply with both by 05 May 2022.

31. The claimant did not comply with the unless orders as directed. His claim was dismissed without further order from that point onwards. The dismissal of the claim took place on 15 June 2022, confirmation of which was sent to the parties on 17 June 2022.
32. On 22 June 2022, the claimant emailed the tribunal and asked the tribunal for a form to apply for the decision to be reconsidered. I replied to the claimant by letter dated 07 July 2022. The following was explained to the claimant:

There is no form for the claimant to fill in. What the claimant will need to do is write into the tribunal seeking to apply to set aside the decision to dismiss his claim pursuant to rule 38(2), as it is in the interests of justice to do so. The claimant will need to explain why he has not complied with the unless orders and produce evidence to support what he is saying. It is only if the claimant can establish that it is in the interests of justice to set aside the decision to dismiss his case for non-compliance with an unless order that this will happen. However, I note that the claimant emailed the employment tribunal on 06 May 2022 explaining that he had not received the Case Management Orders, in which the unless orders were contained. However, he had received these on 06 May 2022 at the latest, as it was sent to him by the respondent's representative. On 11 May 2022, the claimant emailed the employment tribunal to explain that he now was in receipt of the Case Management Orders. He explained various medical matters, which was not supported by any evidence, and explained that he would require 14 days to submit the required information. As of 05 July 2022, when I write this email, the claimant has still not sent the information and evidence that was required from him in order to comply with the unless orders (at paragraphs 22 and 23 of the Case Management Orders), this will need to be addressed. It is a matter for the claimant as to whether he makes this application. And any such application will be considered should it be received. Rule 38 does require an application to be made within 14 days of the date that the notice was sent to him. However, as he did contact the tribunal with a view to seeking reconsideration of the decision, but was unsure how to go about it, I am restarting the 14 days to make this application from the date that this email was sent to him.

33. The claimant made his application to set aside the dismissal of his claim on 20 July 2022. Although this was outside of the 14 days deadline to make an application, to the benefit of the claimant, his application was taken to have been made on 22 June 2022, when he first gave an indication of his intention. This appeared the most just and fair approach in these circumstances. Consequently, the claimant's email of 20 July 2022 was treated as an application made by the claimant within 14 days to have the dismissal of his claim set aside, pursuant to Rule 38(2) of the ET Rules of Procedure. The claimant requested a hearing. It was for him to establish that it was in the interests of justice to have dismissal of his claim set aside.
34. The claimant received a notice of hearing, under cover of letter dated 26 Sept 2022. I refer this as the 'set-aside hearing'. The set-aside hearing was initially listed for 01 November 2022. The claimant was informed that he must send to

the respondent all the evidence on which he relies on, at least 7 days before that hearing AND bring copies of his evidence to the tribunal.

35. The claimant applied for the set-aside hearing to be postponed on 28 October 2022. He explained that he was not aware of the hearing date and had a medical appointment on 01 November 2022. The claimant attached his appointment card to that email. This hearing was postponed and re-listed for 16 December 2022.
36. On 07 December 2022, the claimant made another application for postponement of the now re-listed set-aside hearing. This hearing was postponed in circumstances where the claimant was attending a medical appointment in London. The letter dated 08 December 2022, referred to in paragraphs 2-4 of this document, was sent to the parties.
37. The claimant had an extension of time granted to him to submit relevant evidence to be considered at this hearing by 03 February 2023. The claimant did not send any evidence supporting his application to the respondent. Nor has he sent any evidence supporting his application to the tribunal.

#### Decision

38. The claimant was not in attendance today, in circumstances where I am satisfied that he had knowledge of today's hearing. He has made no application to postpone today's hearing. In those circumstances, the hearing proceeded in the claimant's absence.
39. I record here that the claimant has not presented any documents or evidence for the tribunal to consider. Not only has the claimant failed to provide any evidence as to why it would be in the interests of justice to set aside the dismissal of his claim, I also note that he has still not provided any of the documents which were the subject of the unless order, despite those being required to be complied with some 9 months ago. And there is no evidence to support that compliance was not possible, for reasons outside of the claimant's control.
40. I remind myself that it is for the claimant to establish that it is in the interests of justice to set aside the dismissal of his claim for having failed to comply with the unless orders, contained in the Case Management Orders following the preliminary hearing on 14 April 2022.
41. I have had sight of the respondent's skeleton argument in this matter, and I have considered the authority handed up to me at the beginning of today's hearing, namely **Thind v Salvesen Logistics Limited UKEAT/0487/09/DA**.
42. The respondent has been prejudiced throughout these proceedings. They have gone to some cost to attend hearings that the claimant has not attended. There have been three hearings, including today, where that has happened. And it is still in a position where it does not yet understand the claims brought by the claimant. And this is in circumstances where the claim form was presented some 30 months ago.

43. The claimant has persistently been in breach of directions from the tribunal. And does not appear to have taken steps to remedy breaches where these are raised with the claimant.
44. There has been no explanation by the claimant as to why he could not comply with the unless orders. I have some sympathy with the claimant, as it appears that he is unwell. However, this does not explain his inability to comply with those orders.
45. The claimant has been able to supply some evidence to support applications for postponement. He has been well enough to construct these emails and gather that evidence. He has been attending at a specialist and at other medical practitioners. The claimant therefore must be well enough to engage with professional persons. He is not so unwell that he could not have engaged with the relevant persons to gather that required to comply with the unless orders.
46. In these circumstances, the claimant has not established that it would be in the interests to set aside the dismissal of his claim, in circumstances where he never complied with the terms of two unless orders. His application to set aside the dismissal pursuant to Rule 38(2) of the ET Rules of Procedure is therefore refused.

Employment Judge Butler  
07 February 2023

Sent to the parties on:

15 February 2023  
For the Tribunal Office: