



EMPLOYMENT TRIBUNALS

Claimant: Miss D Alexander

Respondent: ATL Fulfilment Limited

JUDGMENT

1. The claimant made application under rule 38(2) of the employment Tribunal rules of Procedure 2013 to have the dismissal of her claim for non-compliance with an Unless Order set aside. That application is dismissed.
2. All complaints in this claim are dismissed.

REASONS

Relevant Background.

1. By claim form presented on 2 November 2021, the claimant raised the complaints of unfair (constructive) dismissal, disability discrimination and other complaints related to alleged protected disclosures.
2. On 21 December 2021, the respondent presented a response to those complaints. It did not admit that the claimant had a disability (or ever notified the respondent of her disability) and it denied liability in all complaints.
3. The case was listed for a preliminary hearing for case management purposes on 6 May 2022. The claimant was unable to attend this hearing. It was postponed and relisted to take place on 27 September 2022. Dates for a final hearing had also been provided to the parties, being 6,7 and 8 March 2023.
4. A Case Management Summary and Case Management Orders (CMOs) were sent to the parties after the Preliminary Hearing on 27 September 2022 (PH). Coincidentally, I was also the Judge at that hearing.
5. Considerable time was spent at the PH going through the claimant's complaints. It was not clear from the information provided in the claim form what

the particular complaints were. Annexed to the Case Management Orders sent to the parties after the PH, was a draft list of complaints and issues. The parties (and particularly the claimant) were told to expect this and that there were important details that the claimant had to provide as she had been unable to do so at the PH itself.

6. During the PH, the claimant told me that she was in the process of obtaining legal advice and assistance. With this in mind I allowed the claimant a period of 42 days from the date that she received the CMO's to add the further detail required. I explained that would provide the claimant with time to obtain that advice and for her advisers to then work on providing the further particulars.
7. Further details were required about:-
 - a. The reasons for the claimant's resignation
 - b. The alleged protected disclosures
 - c. The detriments she says she was subjected to because she made protected disclosures
 - d. Allegations of harassments (protected characteristic, disability).
8. The CMOs required various other actions by the parties including a requirement for the claimant to provide her relevant medical records and a statement in which she provided evidence about the impact that her claimed disability had on her ("Impact Statement"). These steps were explained during the PH and the requirements set out in clear terms in the CMOs sent to the parties on 30 September 2022.
9. By letter dated 7 November 2022, the respondent's solicitors wrote to the Tribunal about various matters but one of which was to make application for an Unless Order. They set out in their letter the information that they had, and had not, received from the claimant and why she was in breach of the Case Management Orders made at the PH.
10. The claimant replied by email dated 14 November 2022, in which the claimant effectively said:-
 - a. As far as she was concerned she had complied with all orders
 - b. That she had spoken to someone at the Tribunal who told her they did not have a problem with what had been sent over.
 - c. She had sent some witness statements but with no names as these were not needed until January.
 - d. That although the respondent could not see dates on medical reports, the Tribunal said they could.
 - e. That the claimant's GP had said it is for the solicitors to request the medical records and she had sent the respondent's solicitors a contact number for her GP surgery.

11. I refer to aspects of this reply, later in this decision.

12. I decided to issue an Unless Order. This was sent to the parties on 16 November 2023. The Unless Order provided another long period of time for compliance (15 January 2023). This long period of time for compliance was chosen, again to give the claimant plenty of time to comply and receive appropriate advice. It also recognised that the Christmas and New Year break might cause some delay for the claimant.

13. The terms of the Unless Order were set out clearly. In summary, the claimant was required:-

- a. To provide her medical records
- b. To provide an Impact Statement
- c. To provide the additional information about her complaints by reference to the List of Issues.

14. The terms of the Unless Order also set out the reasons why I had decided to issue the Order and the consequences of her not doing so (being dismissal of her claim).

15. Alongside the Unless Order the Tribunal wrote to the parties on 17 November 2022 (in accordance with my instructions).

16. The letter from the Tribunal

- a. Converted the final hearing to a preliminary hearing. It was clear by then that the case would not be ready for a final hearing in March 2023. The first of the final hearing dates was to be a preliminary hearing at which applications made by the respondent for strike out of the claim (or some of it) and/or deposit orders, would be heard in addition to consideration of any further case management orders.
- b. Provided the claimant with further instruction about obtaining her GP medical records
- c. Emphasised the need to comply with the Unless Orders to avoid the claim being struck out. I note particularly the following extracts:

“In her email dated 14 November 2022 the claimant has stated that she was told by her GP medical practice that the request for medical information should come from solicitors. The claimant has not instructed solicitors. The respondent’s solicitors are not required to request the claimant’s medical records.

The claimant must obtain all medical records herself. She is entitled to receive these although may be required to pay a fee. She must do this as a matter of urgency. An Unless Order requires that she provide her relevant medical records and an impact statement by 15 January 2023. If she does not do so by this date then her complaints under the Equality Act 2010 will be struck out.

The Case Management Orders required the claimant to provide more information about her claim. According to the respondent's solicitor she has not done so. An Unless Order requires that she provide this detail by 15 January 2023. If she does not do so then her claim will be struck out."

- d. This letter also noted again the claimant's stated intention to obtain legal advice and that the period for compliance with the Unless Order built in time for the claimant to do that.

17. On 11 January 2023 (3 days before the date by which the claimant was required to comply with the Unless Order) the claimant wrote to state as follows:-

"Hi I'm contacting you in regards to my disability impact statement and my medical records. I have been asking for my records since October 2022. I received a text on 21 December 2022 from the surgery. I can provide evidence of this. I then received another text on 9 January. My disability impact statement will be with you before the 15th. And I am hoping you will receive my medical records before then. I am waiting for a 3rd party company whom my doctor's surgery use, to send my medical records by email which I will then forward on to yourselves. The reason for the delay I have been told is due to NHS shortages."

18. On 14 January 2023 (a day before the date by which the claimant was required to comply with the Unless Order) the claimant wrote to the Tribunal enclosing her Impact Statement and stating that she had obtained permission from her GP so that the Tribunal and the respondent's solicitors may apply to access her medical records. She did not provide those records as required by the CMOs or the Unless Order. Crucially the claimant did not provide the further details of the complaints even though she had been ordered to do so by the CMOs and the Unless Order.

19. On 18 January 2023, the respondent's solicitors wrote to the Tribunal (with a copy to the claimant) to raise the issue of non-compliance.

20. On 1 February 2023, the Claimant's sister emailed the Tribunal to state that she would be representing the claimant.

21. On 6 February 2023, the Tribunal wrote to the parties pursuant to Rule 38(1) of the Employment Tribunal Rules of Procedure 2013 (“Rules”) giving written notice to the parties of dismissal of the claimant’s claim.
22. On the same day, 6 February 2023, the claimant’s sister wrote to the Tribunal asking for information about how the Unless Order had been breached, as access to medical records and an Impact Statement had been provided.
23. The Tribunal wrote to the claimant and her sister on 28 February 2023, noting that the email would be treated as an application under Rule 38(2) of the Rules to have the order dismissing the claim, set aside. The claimant/her sister was also provided with a further 7 days to provide further information to support the application. The full wording of Rule 38 was set out in the Tribunal’s letter, which included the terms of 38(2) thereby notifying the claimant of her right to request a hearing.
24. By email from the claimant’s sister dated 6 March 2023 the claimant provided some of the further details that she had initially been asked for in the PH of 27 September 2022, then ordered to provide by 7 November 2022 and then the subject of an Unless Order requiring compliance by 15 January 2023.
25. By letter dated 10 March 2023, the respondent’s solicitors responded to the application to have the order dismissing the claim set aside. In this letter:-
 - a. The respondent’s solicitors summarised the history referred to above, noting the opportunities that the claimant had to comply, the time given for compliance and the occasions when the claimant was given clear guidance as to (1) what she must do and (2) the consequences of not complying with the Orders.
 - b. The respondent’s solicitors also noted (correctly) that on 6 March information was provided in an attempt to comply with the orders but no information was provided which explained the reasons for non-compliance.

Material non-compliance.

26. I am satisfied that as of 15 January 2023, there was material non-compliance with the terms of the Unless Order. Quite simply, the details that the claimant was required to provide (see 7 above) had not been provided.
27. It is also relevant to note that the details provided on 6 March 2023 also leave several questions outstanding. For example, the claimant was required to provide details about alleged detrimental treatment by responding to the following:

*“Claimant to provide details of any allegation of detrimental treatment.
Details must include (1) The Name of the Person who treated her*

detrimentally (2) the date or approximate date of the detrimental treatment (3) where it happened (4) what happened.

28. The details provided by the claimant do include alleged incidents on 6 April 2021, details of who was involved and what was said. However the information provided by the claimant on 6 March 2023 also include “*There has been further derogatory comments made by Andrew Lewis in respect of my children’s father and the fact that I took leave that was granted by Tony Allen all this added to my mental health declining and causing my anxiety to worsen to the point I have had to seek alternative therapy.*” These details prompt questions particularly about what was said, when it was said, the link to the alleged protected disclosures (or possibly the claimed disability).
29. Similar concerns arise with other particulars provided in relation to the allegations that protected disclosures were made, allegations of harassment (protected characteristic, disability) and the alleged breaches which made the claimant to resign and claim constructive dismissal.

The Law

30. Rule 38 of the Employment Tribunal Rules of Procedure 2013 (“Rules”) states 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.

31. I note the following extracts from the Judgment of the Employment Appeal Tribunal (EAT) in the case of **Hylton v. Royal Mail Group Limited (UKEAT/0369/14)**.

*“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 accusation 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. As observed in **Johnson v Oldham**, parties are entitled to know the case against them.*

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. As was said by Underhill J (as he was) in the case of **Thind v Salvesen Logistics Ltd** [2010] UKEAT/0487/09, every case turns on its own facts, and it should not be thought to be usual that relief will be granted from the effect of an unless order (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. ...”

32. I also note the EAT’s judgment in **Polyclear Limited v. Wezowicz** **UKEAT/0183/20** including the distinction made between circumstances where a party is attempting to engage in the Tribunal process and ones where there is no such attempt.

33. I have considered the most recent EAT decision on Unless Orders and applications for relief from sanctions, being **Minnoch and Others v. Interservefm Limited and Others** [2023] EAT 35 and I note the listed “key points” when considering applications for relief from sanctions (at 33 of the judgment):

Stage 3 - Relief from sanction

33.13. *this involves a broad assessment of what is in the interests of justice*

33.14. *the factors which may be material to that assessment will vary considerably according to the circumstances of the case*

33.15. *they generally include:*

33.15.1. *the reason for the default - in particular whether it was deliberate*

33.15.2. *the seriousness of the default*

33.15.3. *prejudice to the other party*

33.15.4. *whether a fair trial remains possible*

33.16. *each case will depend on its own facts*

Conclusions

34. I have decided that it is not in the interests of justice to overturn the dismissal of the claim because of the material non-compliance with the terms of the Unless Order made on 16 November 2022.

35. In reaching this decision I have taken the following into account.

- a. The time allowed to the claimant to comply with the terms of the Unless Order; time that took into account her particular circumstances and statement that she was in the process of obtaining legal advice.
- b. The fact that she left it until the day before the date for compliance with the terms of the Unless Order, to provide information which complied with part of the Unless Order only (the delivery of the Impact Statement and a means of accessing medical records). The claimant knew, from 27 September 2022, the steps she had to take. There is inevitably some jeopardy in leaving matters until the last moment.
- c. The default was serious. It meant that the respondent did not know (other than in general terms) what was being alleged against it. Without further clarity, a fair trial would not have been possible.
- d. The respondent has been prejudiced by the claimant's ongoing failure to comply with case management orders, including the Unless Order. The claimant makes very serious allegations against the respondent and its operations. Examples of the generalised allegations in the claim form is as follows: *"There's loads I have got on them with pictures of the state of the warehouse and where dirty tables where they was doing covid test on" "I find it absolutely disgusting how they run their family run business and speak and treat their employees.. profits before people. This over 2 years has affected my mental health..."*
- e. The respondent is intent on responding to those allegations but has been unable to do so fully. Instead it has been obliged to incur costs and resources in trying to obtain details behind the serious but generalised allegations. These serious but generalised allegations have been with the respondent; from the issue and service of the claim form in November 2021. The absence of specificity is bound to have prejudiced the respondent.
- f. Some 7 weeks after the date for compliance with the Unless Order, the claimant provided some of the details she was required to provide (see 24 above). However these details are insufficient. Further case management would be required; the claimant would have to provide more information before a fair trial was possible. This would involve another preliminary hearing; resulting in more costs and delay.

- g. On 6 March 2023, the claimant provided some of the required details about her complaints, but she did not then (and has not since) provided any explanation for her non-compliance.
- h. I am unimpressed with some of the claimant's representations in her email to the Tribunal dated 14 November 2022 (paragraph 10 above) particularly those comments about what the claimant claims to have been told by the Tribunal staff (that a member of the Tribunal told her that there was not a problem with what information she had sent over and that the Tribunal could see the dates of medical reports.) I simply do not believe that the claimant received that information from the Tribunal.
36. In deciding what is in the interests of justice, I have also taken in to account the need for confidence and respect in the Employment Tribunals and their processes. I am concerned that a reasonable respondent in this position would lose that confidence and respect if I decided to provide the claimant with a further opportunity to advance her claim. The respondent is aware of the steps taken and time allowed to the claimant, all of which have tried to ensure as far as reasonable possible, that she is on an equal footing with the represented respondent. She has been provided with every reasonable opportunity to advance her claim. She has not taken that opportunity to any sufficient extent and instead the respondent has been in the position, from November 2021 of having the most serious (but largely unspecified) allegations against it.
37. I am mindful of the possibility of persevering in case management, of allowing the claimant's application for relief from sanctions and of listing the case for another Preliminary Hearing so that a further attempt can be made to obtain the required additional details of the complaints; to put the respondent in the position where it understands exactly what is being alleged. If those steps are taken then a fair trial may be possible.
38. However, even if a fair trial remains possible at a future date, when considering the circumstances of this litigation as a whole, I have decided that this is one of those cases (as envisaged by Underhill LJ in **Thind** – see paragraph 31 above) where there is an important interest in enforcing compliance. It is in the interests of justice and in accordance with the overriding objective, to dismiss the claimant's application.

Employment Judge **Leach**

Date: 15 June 2023

JUDGMENT SENT TO THE PARTIES ON

22 June 2023

AND ENTERED IN THE REGISTER

2414342/21

FOR THE TRIBUNAL OFFICE