EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000039/2022

Held via Cloud Video Platform (CVP) in Glasgow on 31 July 2023

Employment Judge W A Meiklejohn
Tribunal Member Ms J Ward
Tribunal Member Mr G McKay

Mr D Morgan — **Claimant**

Solicitor

Orridge & Company Ltd — **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's application under Rule 38(2) of the Employment Tribunal Rules of Procedure 2013 to have the Unless Order made by the Tribunal (with which the claimant was found not to have complied, resulting in his claim being dismissed) set aside is refused.

REASONS

1. This Judgment records the decision we reached after deliberations, conducted by means of the Cloud Video Platform ("CVP"), on 31 July 2023. The circumstances in which we came to deliberate are explained in the paragraphs which follow.

Background

2. Within our Judgment dated 24 February 2023 and sent to the parties on 27 February 2023 (the "February 2023 Judgment"), we issued an Unless Order

under Rule 38(1) of the Tribunal Rules (the "Order"), the terms of which we set out below, with which the claimant was required to comply by 5.00pm on 6 April 2023.

3. By our Judgment dated 5 May 2023 and sent to the parties on 15 May 2023 (the "May 2023 Judgment"), we determined that the claimant had failed to comply with the Order and by that Judgment we gave written notice to the claimant under Rule 38(1) that his claim was dismissed.

4. On 29 May 2023 the claimant sent an email to the Tribunal headed *"Application for Reconsideration".* By their email of 2 June 2023, the respondent's solicitors argued that this had been submitted outwith the 14 day period provided for in Rule 71 of the Tribunal Rules.

5. These emails were referred to me, and I directed that the Tribunal should write to the parties (a) inviting the respondent to agree that the claimant's application was not out of time as his email bore to have been sent to the Tribunal at 23.59 on 29 May 2023 and (b) seeking clarification from the claimant that he was making an application for reconsideration, as opposed to an application under Rule 38(2) of the Tribunal Rules. The Tribunal wrote to the parties regarding these points on 7 June 2023.

6. By email dated 9 June 2023, the respondent's solicitors conceded that the claimant's application was not out of time.

7. By email dated 14 June 2023, the claimant stated *"It would be under Rule 2 of the Overriding Objective to apply the most relevant to the case given the points I have made as well as the history of this case."*

8. After conferring with the Members, I directed that the Tribunal should write to the parties (a) advising that the claimant's "Application for Reconsideration" would be treated as an application under Rule 38(2) of the Tribunal Rules, (b) requiring the claimant to provide the document which had been embedded in his email of 6 April 2023, (c) requiring the parties to provide written representations within 14 days and (d) intimating that the Tribunal would then determine the claimant's Rule 38(2) application on the basis of those

representations, without a hearing. The Tribunal wrote to the parties to this effect on 21 June 2023.

9. The parties both responded on 5 July 2023. I then arranged to meet with the Members by CVP on 31 July 2023 which was the earliest mutually suitable date.

Rule 38(2)

10. This provides as follows -

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.

The Order

11. Given that we consider below the extent to which a document submitted by the claimant complied with the Order, we set out the terms of the Order here –

(a) By virtue of its powers to do so under Rules 29, 31 and 38 of the Employment Tribunal Rules of Procedure 2013 the Tribunal orders the claimant to provide to the respondent (copied to the Tribunal), not later than 6 April 2023, the following documents and information -

(i) The basis upon which the claimant says he was an employee of the respondent with reference, if appropriate, to any contractual information.

(ii) (Having regard to section 43B(1)(d) of the Employment Rights Act 1996) the information which the claimant says he disclosed which, in his reasonable opinion, showed or tended to show that the health or safety of any individual had been, or was likely to be, endangered; in complying with this Order the claimant must

specify to whom he made the disclosure and what he said to that person.

(Hi) In respect of the monetary claims of failure to pay expenses, failure to pay wages and failure to pay holiday pay brought by the claimant, details of (1) how much is claimed, (2) what is the basis of the claim and (3) how the amount is calculated.

(iv) In respect of all of his claims, a Schedule of Loss detailing all of the sums sought by him in relation to the claims which he has brought against the respondent.

(v) A witness statement containing all of the evidence in chief which the claimant wishes to present to the Tribunal on his own behalf; this must be typewritten and arranged in short, numbered paragraphs.

(b) if this Order is not complied with by 5.00pm on 6 April 2023, the claimant's complaints of unfair dismissal, automatically unfair dismissal, detriment, failure to pay expenses, failure to pay wages and failure to pay holiday pay shall be dismissed without further Order.

Claimants representations

12. The claimant's response to the Tribunal's direction to provide written representations was an email sent on 5 July 2023. This contained no text but had an attachment entitled *"Claimant Personal Statementdocx".* When opened, this attachment was actually a document headed *"Claimant Witness Statement - Mr Darren Morgan".* We consider the content of this below.

Respondent's representations

13. The respondent's solicitors provided their response to the Tribunal's direction in an email dated 5 July 2023. In this it was argued that, in sending an email with an inaccessible link one minute before the deadline, the claimant had been in material non-compliance with the Order. He had failed to provide the ordered information by the time specified. The effect of the Order was that

his claims were automatically dismissed because of his material non-compliance.

14. The respondent's solicitors also argued that the claimant had failed substantively to comply with the Order. They expressed this argument in these terms -

"While the claimant's personal statement addresses the matters of him being an employee (required at paragraph 2(a)(i) of the order, dealt with at [1] to [5] of his personal statement) and the whistleblowing complaint (required at paragraph 2(a)(H) of the order, dealt with at [20] to [34] of his personal statement), the Claimant has failed to provide the entirety of the information ordered. In particular, the Claimant has provided no details as to the monetary claims (required at paragraph 2(a)(iii) of the order) and no schedule of loss (required at paragraph 2(a)(iv) of the order). "

15. The respondent's solicitors referred to ***Wentworth-Wood and others v Maritime Transport Ltd UKEAT/0316/15, Royal Bank of Scotland v Abraham UKEAT/0305/09*** and ***Minnoch and others v Interservefm Ltd and others [2023] EAT 35.*** Under reference to ***Minnoch,*** they argued that (a) the claimant's non-compliance was deliberate and wilful, having regard to his prior unreasonable conduct, (b) the claimant had not been prejudiced by the procedure adopted by the Tribunal and (c) the respondent would suffer prejudice because (i) the claimant's failure to provide sufficient information meant a fair trial was not possible and (ii) it was not in the interests of justice to permit the claimant to continue arguing his case when he had taken a wilfully disobedient approach to his claim.

Overriding objective

16. We reminded ourselves of the terms of Rule 2 **(Overriding objective)** of the Tribunal Rules. This provides as follows -

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Review of case law

17. We noted a number of decisions of the Employment Appeal Tribunal which we considered relevant to the issue before us. In ***Royal Bank of Scotland v Abraham UKEAT/0305/09*** Ansell J said this (at paragraph 28) -

"It seems to me, therefore, that once, in this case, Employment Judge Willans had determined that there was partial non-compliance, the automatic order, which had been made previously in February and had not been appealed or reviewed, came into effect."

18. In ***Thind v Salvesen Logistics Ltd UKEAT/0487/09*** Underhill P (as he then was) said this (at paragraph 14) in relation to relief from sanction (the case predating the introduction of Rule 38) -

"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 it 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."

19. In ***Hylton v Royal Mail Group Ltd UKEAT/0369/14*** Langstaff P (as he then was) said this (at paragraph 22) -

7t 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, the 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. "

20. In ***Wentworth-Wood*** Richardson J said this -

"4. Rule 38 clarifies Employment Tribunal procedure concerning Unless Orders. The Employment Tribunal, usually the Employment Judge alone, is potentially involved at three stages, each involving different legal tests.

5. Firstly, there is the decision whether to impose an Unless Order and if soIn what terms....

6. Secondly, there is the decision to give notice under Rule 38(1)….

7. Thirdly, if the party concerned applies under Rule 38(2), the Employment Tribunal will decide whether it is in the interests of justice to set the Order aside. This is not the same as asking whether it was in the interests of justice to make the Order in the first place. It is the stage of the procedure at which the Employment Tribunal considers relief against sanction, and it can take into account a wide range of factors, including the extent of non-compliance and the proportionality of imposing the sanction. …"

21. In ***Polyclear Ltd v Wezowicz UKEAT/0183/20*** Tayler HHJ said this (at paragraph 57) -

"At stage three, providing the defaulting party makes the necessary application, a judicial determination is made as to whether it is in the interests of justice to grant relief from sanction. The mechanism by which relief is granted if the application under Rule 38(2) is granted, is by setting aside "the order", which must mean the original Unless Order, with the consequence that once the Unless Order has been set aside there cannot have been material non-compliance, and so the automatic strike out is treated as not having occurred. "

22. Tayler HHJ also said this (at paragraph 59) -

"….I do not consider that at the stage three hearing the employment judge can determine of [if?] the stage two decision, that there had not been material compliance with the unless order, was incorrect. However, an important aspect of making the stage three decision is determining the extent to which there was an attempt at compliance with the unless order. The judge at stage three may conclude that the material non-compliance was extremely limited, and might, with the benefit of more relevant information and better argument, find it difficult to put their finger on precisely what the non-compliance was. "

23. In ***Minnoch*** Tayler HHJ reviewed the authorities on unless orders and (at paragraph 33) set out the key points applicable at each of the three stages. He said this about stage three -

"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"

Discussion

24. We considered the terms of the document the claimant submitted with his email of 5 July 2023 and the extent to which this, had it been submitted timeously, would have constituted compliance with the Order. We did this by reference to the numbered paragraphs in the Order.

Paragraph (a)(i)

25. This related to employment status. It was addressed at paragraphs 1-5 and 14 of the claimant's document. We believed that the claimant had provided sufficient information.

Paragraph (a)(ii)

26. This related to the claimant's protected disclosure. It was addressed at paragraphs 20-34 of the claimant's document. We believed that the claimant had provided sufficient information.

Paragraph (a)(iii)

27. This related to the claimant's monetary claims. This was addressed at paragraphs 6-12 and 15-18 of the claimant's document. While the claimant did refer to expenses, wages and holidays, he did not provide any details of how much was claimed, the basis upon which it was claimed, and how it was calculated. The claimant had not provided sufficient information. We noted that there was no reference in the claimant's document to his being unable to supply the required information by reason of non-compliance by the respondent with the terms of our orders within the Judgment issued on 27 February 2023 so far as applicable to them (production of work schedules etc).

Paragraph (a)(iv)

28. This related to a schedule of loss. The claimant did not comply with this.

Paragraph (a)(v)

29. This related to provision by the claimant of a witness statement containing all of the claimant's evidence in chief. The claimant's document bore to be a witness statement. It was lacking in detail as to the claimant's monetary claims, but we regarded it as sufficient to amount to compliance with this aspect of the Order.

30. We found that the claimant's document, had it been provided timeously, would have constituted partial compliance with the Order. We then considered the factors relevant to whether it was in the interests of justice to grant the claimant's application under Rule 38(2).

Reason for the default

31. We were satisfied that the main reason for the claimant's failure to provide his document timeously was the fact that he delayed until literally the last minute before taking action to comply. We have described what happened within our May 2023 Judgment (at paragraphs 9-12 and 23-24) and so we will not repeat that here.

32. This was not the first time that the claimant left compliance with the Tribunal's requirements of him until the deadline was imminent. He responded to a strike out warning at 23.59 on the last date for doing so. We also noted that he submitted (a) his *"Application for Reconsideration"* at 23.59 on last day of the 14 day period within which and application for reconsideration (or an application under Rule 38(2)) could be made and (b) his response to our direction to provide written representations in relation to his Rule 38(2) application at 23.55 on the date by which they were required.

33. Compliance with an order or direction of the Tribunal at the last moment was still compliance. However, by leaving things until so close to the deadline, the claimant was taking a risk. We had nothing from the claimant to suggest that he had been unable to send his email on 6 April 2023 earlier than 23.59. It seemed to us that this was a deliberate act on the part of the claimant.

Seriousness of the default

34. We found that there were two aspects to this. Firstly, by not submitting anything which could be accessed by the respondent and the Tribunal before the deadline in the Order, the claimant had failed completely to comply with the terms of the Order. That was a significant default.

35. Secondly, the claimant's document did not meet all of the requirements of the Order. His document was in the form of his witness statement. That met the specific requirement of the Order at paragraph (a)(v). However, the contents of the witness statement did not address all of the matters covered by the Order. It was not apparent that the claimant had made any effort to adapt his witness statement to do so.

36. Underlying the Order was the need to give the respondent fair notice of the claims brought by the claimant, and the quantification of those claims. The claimant's document did so only partially. We found that the aspects of non-compliance (see paragraphs 27 and 28 above) were material, constituted failure to give fair notice, and amounted to serious default in compliance with the Order.

Prejudice to the other party

37. We noted the points made by the respondent's solicitors (see paragraph 15 above). It seemed to us that there was prejudice to the respondent by incurring cost in a process where the claimant was failing to do all that he had been ordered to do by the Tribunal. Despite the Order, there remained areas where information required to give fair notice of the claims and their quantification had not been provided.

Whether a fair trial remains possible

38. We believed that, as matters stood, a fair trial was not possible. The claimant had not provided key information which was needed to have an adequate understanding of his monetary claims. We reminded ourselves that, per ***Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327,*** it was not a matter of whether a fair trial remained possible in absolute terms.

Other factors?

39. We took account of the fact that the Order had been made. It was necessary because the claimant did not do what he was directed to do by Employment Judge Doherty following the preliminary hearing on 23 November 2022. We said in our February 2023 Judgment that there had been *"deliberate and persistent disregard by the claimant of required procedural steps".* This was behaviour inconsistent with the overriding objective (see paragraph 16 above) because the claimant was not co-operating with the Tribunal.

40. It seemed to us that the attitude demonstrated by the claimant which caused us to make that comment had persisted in his approach to compliance with the Order. We did not believe that his failure to comply with aspects of the Order was in any sense inadvertent or accidental.

Decision

41. We reminded ourselves that the question we had to answer in the context of an application under Rule 38(2) was whether it was in the interests of justice to set aside the Order. Per ***Minnoch,*** this was a ***"broad*** assessment" having

regard to *"factors which may be material".* That did not mean (per ***Wentworth-Wood)*** that we should revisit the decision to make the Order in the first place, but we could take account of the proportionality of imposing the Order. It also did not mean (per ***Polyclear)*** that we should consider whether our stage two decision, to give notice to the claimant under Rule 38(1), was incorrect.

42. We believed that we should look at what, if anything, the claimant had done by way of compliance with the Order. The only step he had taken was to provide the document headed *"Claimant Witness Statement - Mr Darren Morgan".* Because the attachment description was identical in the claimant's emails of 6 April 2023 and 5 July 2023, we understood that it was this same document which had been (a) provided by the claimant to the respondent's solicitors shortly after the deadline in the Order and (b) provided to us as the claimant's representations in compliance with our direction of 21 June 2023.

43. We were satisfied that, if it had been provided timeously, this document would have partially complied with the Order. We took note of what Langstaff P said in ***Hylton*** (see paragraph 19 above). Late compliance with an unless order was a factor pointing towards granting relief from sanction under Rule 38(2).

44. That took us to what Tayler HHJ said in ***Polyclear*** (see paragraph 22 above). We should look at the extent of any attempt at compliance. Here, the document relied on by the claimant had been provided to the respondent, but after the deadline in the Order. If it had been in time, it would have represented partial compliance with the Order. However, this was not a case where we found it difficult to put our finger on precisely what the non-compliance was. On the contrary, we were able to identify the nature and extent of the non-compliance (see paragraphs 27 and 28 above).

45. We found that there had been deliberate and material non-compliance by the claimant. We were in no doubt that issuing the Order had been proportionate, given the claimant's conduct (see paragraph 39 above). The claimant's non-compliance caused prejudice to the respondent and meant that, as matters stood, a fair trial was not possible.

46. In these circumstances, we decided that it would not be in the interests of justice to set the Order aside, and that the claimant's application under Rule 38(2) should be refused.

Employment Judge: **W A Meiklejohn**
Date of Judgment: **04 August 2023**
Entered in register: **09 August 2023**
and copied to parties

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