



EMPLOYMENT TRIBUNALS

Claimant: Mrs F Nadeem

Respondent: Rotherham Metropolitan Borough Council

Heard at: Hull (in chambers without parties) **On:** 13 September 2023

Before: Employment Judge Miller

RESERVED JUDGMENT

The claimant's application to set aside the dismissal of her claim following non-compliance with the Unless Order made on 14 July 2023 is refused. The claimant's claim remains dismissed.

REASONS

1. This case has a complex procedural history concluding with a decision that the claimant's claim was dismissed following material non-compliance with an Unless Order I made on 14 July 2023. The claimant 'appealed' to the Tribunal against that decision on 4 September 2023 and I treat that email as an application under rule 38(2) of the Employment Tribunal Rules of Procedure to have my original Unless Order set aside. The claimant did not copy the respondent into her application, but for reasons set out below I consider that I can nonetheless deal with the claimant's application.
2. I set out the chronology of this case in a table.

22/9/20	Effective date of termination of the claimant's employment
14/12/22	Start of early conciliation with ACAS (Day A)
25/1/23	End of early conciliation with ACAS (Day B)
30/1/23	Claimant submitted her ET1 claim form. The claimant ticked the boxes for unfair dismissal and Disability Discrimination. The entirety of the detail of her claim in box 8.2 was: "Unfair dismissal

	Planned operation on the 12/08/2022 with a recovery period of 2 months and post operation complications!"
24/3/23	The claimant's claim was served on the respondent. The respondent had until 21 April to submit their response. The hearing was listed for a preliminary hearing in private for case management on 24 May 2023.
6/4/23	<p>The respondent submitted their ET3 response form. This said (typos in the original)</p> <p>"The Respondent will defend all claims brought against it.</p> <p>1. The Claimant alleges she was dismissed on 20/9/2022</p> <p>2 The Et1 claim form was received by the Tribunal on 30/1/23</p> <p>3 The Respondent was sent the claim form on 24/3/23</p> <p>4 The claim has been brought out of time and should not proceed.</p> <p>5 The Claimant had until 19/12/22 to submit her claim she has missed the deadline by over 6 weeks.</p> <p>6 Further the Et1 does not contain any details of her claim.</p> <p>6 The Respondent requests the claim should be struck out as it is out of time".</p>
10/5/23	<p>EJ Maidment wrote to the claimant as follows:</p> <p>"Upon a review of the file Employment Judge Maidment directs the Claimant to provide to the Tribunal and the respondent details of the basis of her claims of unfair dismissal and disability discrimination.</p> <p>Please let me have your reply by 17 May 2023".</p> <p>The email to which this letter was attached included the following note "Please note that whenever you email or write to the Tribunal you must copy your correspondence to the other said at the same time. The only exception is when you are asking for a witness order". This appears to be a standard part of the covering email as it appears on correspondence to parties throughout the file.</p>
14/5/23	The claimant sent an email to the Tribunal (not the respondent) with 21 pages of attached photographs of information predominantly about her health, but also including letters about tax, her claim for benefits and a letter from her bank. The claimant did not explain anything about her claim.

15/5/23	The claimant sent an email to the Tribunal (but not the respondent) with one 4 page attachment which appears to be the letter dismissing her from her employment. The claimant did not explain anything about her claim
19/5/23	The respondent requested that the preliminary hearing be postponed as the claimant had not provided the information required by EJ Maidment on 10/5/23. It is not clear if the Tribunal responded to that email.
24/5/23	<p>EJ Rogerson held the preliminary hearing in private. The claimant did not initially attend but following enquiries from the clerk, attended at 10.30. It is recorded in the case management orders of EJ Rogerson that “Her explanation for not joining the hearing at the scheduled time was that she had not received notice of the hearing”.</p> <p>EJ Rogerson made the following orders:</p> <p>“1 . Employment Judge Rogerson considers that the Claimant’s complaint of unfair dismissal has little reasonable prospect of success.</p> <p>2. The Claimant is ORDERED to pay a deposit of £20 by 23 June 2023 as a condition of being permitted to continue to advance that complaint.</p> <p>3. Employment Judge Rogerson considers that the Claimant’s complaint of direct disability discrimination has little reasonable prospect of success.</p> <p>4. The Claimant is ORDERED to pay a deposit of £20 by 23 June 2023 as a condition of being permitted to continue to advance that complaint.</p> <p>5. The Judge has had regard to any information available as to the Claimant’s ability to comply with the order in determining the amount of the deposit.</p> <p>6. If the deposits are paid and the claims continue the case management orders set out below must be complied with”.</p> <p>Paragraphs 11 and 12 of the Case Management Orders says:</p> <p>“11. If the Claimant pays the deposit and loses the claims for the reasons I have identified in this order, not only will she lose the deposit, but she is at much greater risk of having to pay some or all of the Respondent’s legal costs.</p> <p>12. The following case management orders are made on the assumption the deposits orders for both claims are paid in time”. (Bold in the original)</p>

	<p>Paragraph 82 of the case management orders says</p> <p>“I suggested that the claimant seeks some advice because she appears not to understand how the law applies to the claims she is bringing. She mentioned the name of a firm she has already contacted who she will see before she makes any decision about paying the deposit”.</p> <p>Finally, in respect of this hearing, I note that the claimant said she was relying on the impairments of Chronic Back Pain, Sciatica and Plantar Fasciitis as being the cause of her disability. There is no reference to any mental impairments. The claimant was employed as a social worker for 12 years.</p>
5/6/23	<p>The case management orders were sent to the parties together with detailed instructions about where and how to pay the deposit. The instructions were:</p> <p>“7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.</p> <p>8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.</p> <p>9. Payment must be made to the address on the tear-off slip below.</p> <p>10. An acknowledgment of payment will not be issued, unless requested”.</p> <p>The address referred to is</p> <p>HMCTS Finance Support Centre</p> <p>Temple Quay House</p> <p>2 The Square</p> <p>Bristol</p> <p>BS1 6DG</p>
9/6/23	<p>One payment of £20 was made by the claimant by Postal Order to the Bristol Finance Centre. An email confirming this was sent to the Leeds Employment Tribunal the same day.</p>
23/6/23	<p>This is the last date for payment of the deposit</p>
27/6/23	<p>A clerk at the Leeds Employment Tribunal sent an email to the Bristol Finance Centre asking for confirmation of payment of deposit by the claimant. The finance centre replied to say that</p>

	<p>one payment for £20 had been received on 9 June 2023.</p> <p>The claimant sent to the Tribunal and the respondent an email with some attachments about upcoming medical appointments.</p>
29/6/23	<p>The file was referred to EJ Bright who asked a clerk to check if the claimant had made one or two payments of £20 as it was unclear from the correspondence on file at that time.</p>
6/7/23	<p>Bristol Finance Centre replied to the Leeds Employment Tribunal and confirmed that only one Postal Order for £20 had been received in this case and that the claimant had signed a slip indicating that she was sending them one payment of £20</p>
7/7/23	<p>EJ Bright wrote to the claimant as follows:</p> <p>“Employment Judge Bright notes that you have only paid a deposit in respect of one of the complaints identified in the deposit order made by Employment Judge Rogerson.</p> <p>Please write to the Employment Tribunal immediately, to say whether you have paid the deposit to be able to proceed with your discrimination complaint or to be able to proceed with your unfair dismissal complaint. The complaint for which you have not paid the deposit will be automatically struck out.”</p> <p>The claimant replied later the same day to the Tribunal and the Respondent as follows “I confirm that I have paid for the deposit as requested. Please refer to below”.</p> <p>The claimant attached a picture of a Postal Order dated 8 June 2023 and proof of postage to “Building name: PIP; Postcode: WV98 1AD”</p>
12/7/23	<p>The respondent wrote to the Tribunal as follows:</p> <p>“Following your letter to the Claimant dated 7th July, we have yet to receive confirmation that she has paid the remaining deposit order made by Judge Rogerson in order to pursue her discrimination complaint. Has the Tribunal had any such confirmation from Mrs Nadeem?</p> <p>We are also concerned that we have not received any further and better particulars from the Claimant which means that at the moment we are unable to send an amended response as per the directions by the 21st July”.</p>
14/7/23	<p>The file was referred to me and I made an unless order. The full order is appended to these reasons.</p> <p>The claimant replied the same day to the Tribunal and the Respondent saying “I have attached a copy of the postal order, and to confirm this is on its way to you as soon as possible”.</p>

	Attached were photos of receipt for a postal order dated 14/7/23, the postal order for £20 payable to Employment Tribunals and proof of postage to LS1 5ES. (This is the postcode for the Leeds Employment Tribunal Office)
19/7/23	A clerk at the Leeds Employment Tribunal wrote to Bristol Finance office to ask if a second Postal Order had been received. Bristol Finance Office replied the same day confirming that only one payment received on 9 June 2023.
20/7/23	A Legal Officer wrote to the claimant to remind her about compliance with her obligation to provide information about her disability as set out in paragraph 22 of EJ Rogerson's Orders. It is not directly relevant to the deposit order issue, but is relevant to the claimant's compliance with orders generally. A clerk at Leeds ET asked Bristol Finance Office if the second deposit Postal Order has been received.
21/7/23	<p>The respondent wrote to the tribunal to say they had not received the ordered further information form the claimant (again I conclude this relates to information about the claimant's disability) and that they were not clear which claims the Claimant wanted to pursue. The Respondent requested confirmation that the claims had been dismissed. A £20 Postal Order arrived from the claimant at the Leeds Tribunal Office. A clerk at the Leeds Employment Tribunal forwarded the Postal Order to Bristol Finance Office.</p> <p>The claimant wrote to the Tribunal and the respondent that evening as follows:</p> <p>"I am writing to both parties to inform you that I have sent the requested information as required, if you would like me to re-send this please let me know so that you can continue ie to proceed ?"</p>
27/7/23	EJ Ayre asked the administration in the Leeds Employment Tribunal to check again with Bristol Finance office as to whether the second deposit had been received.
1/8/23	Bristol Finance Office confirmed to a clerk at the Leeds Employment Tribunal that they had not received a further Postal Order.
3/8/23	The respondent wrote to the Tribunal and the Claimant submitting that the claim should be dismissed as the claimant had not detailed which claim she was pursuing and nor had she provided any further details of her claim.
4//8/23	<p>EJ Ayre wrote to the claimant as follows:</p> <p>"The above case file has been referred to Employment Judge Ayre who has asked me to write to you with the following -</p>

	<p>Please ask the Claimant to send a copy of her further and better particulars to the Tribunal by return, with a copy to the respondent”.</p> <p>It is not clear what information this refers to.</p>
<p>17/8/23</p>	<p>The claimant sent the Tribunal and the Respondent a copy of her then current fit note.</p> <p>Bristol Finance Office wrote to a clerk at the Leeds Employment Tribunal confirming that they had still not received any further payment from the claimant.</p>
<p>23/8/23</p>	<p>The claimant was sent notification that her claims had been dismissed in accordance with Rule 38 as follows:</p> <p>“Further to the Unless Order sent to the parties on 14 July 2023, Employment Judge Bright directs us to notify the parties that because the Order was not complied with by 4pm, 21 July 2023 the claim has been dismissed under Rule 38.</p> <p>The judge considers that there was no material compliance with the Unless Order because the claimant has failed to identify the complaint she wishes to pursue in relation to the deposit order paid 9 June 2023.</p> <p>The claimant's second postal order dated 14 July 2023 was in any event posted to the incorrect address and was sent after the deadline for payment of the deposit”.</p>
<p>4/9/23</p>	<p>The claimant sent an email to the Tribunal (not the respondent) as follows:</p> <p>“I would like to appeal this decision, as I have sent both deposit orders as requested,</p> <p>Please refer to the above attachments,</p> <p>Therefore I would like to proceed with the case,</p> <p>I have been informed by your colleague Linda, that the case hearing on the 6,7,8,</p> <p>At Sheffield combined court will not be heard ,</p> <p>If you would like to discuss this further please let me know,”</p> <p>The attachments were:</p> <p>A picture of the postal order for £20 dated 8 June 2023</p>

	A picture of a Postal Order for £20 dated 14 July 2023
	A picture of a receipt for a Postal Order dated 14 July 2023.

3. I now set out the relevant law. Firstly, I consider Unless Orders.
4. Rule 38 Employment Tribunal Rules of Procedure 2013 says:
 - (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.
5. The effect of a failure to comply with the terms of the unless order is that the claim stands dismissed without further order. Compliance means material compliance. Compliance with the order need not be precise and exact, but the test is whether the unless order has achieved its purpose. (*Johnson v Oldham Metropolitan Borough Council* UKEAT/0095/13/JOJ; UKEAT/0132/13/JOJ)
6. If a judge has decided that material compliance had not been achieved, the whole claim is automatically dismissed – no further decision is required.
7. A claimant whose claim has been struck out under rule 38 (1) can apply under rule 38(2) to have the order set aside. That refers to the original Unless Order. The application must be made within 14 days of the notice that the claim has been dismissed is sent. The test of whether the original Unless order should be set aside is whether it is in the interests of justice to do so.
8. In *Thind v Salvesen Logistics Ltd* UKEAT/0487/09/DA, the EAT provided guidance about the matters to be considered when deciding whether it is in the interests of justice to set aside an Unless Order.

“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". (My emphasis)

9. I also refer, in respect of the Unless Order, to rules 92 and 6. Rule 92 provides that whenever a party corresponds with the Tribunal they must copy in the other side. Rule 6 gives me the power, as far as is relevant, to waive or vary compliance with any of the rules.
10. I consider now the rules relating to deposit orders. Rule 39 says, as far as is relevant:
 - “(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
 - (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
 - (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
 - (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
11. The purpose of a deposit order is, as EJ Rogerson observed, to give the claimant pause to consider the merits of her claim and take a decision whether she wants to pursue it.
12. Much like with an Unless Order, once time for paying the deposit has passed, the claim or argument is struck out automatically. The judge has no discretion. A claimant can apply to vary or revoke a deposit order under rule 29 or appeal against a deposit order; or request a reconsideration of, or appeal against, the decision to strike out the claim.

Conclusions

13. First, I address the fact that the respondent has not had notice of the claimant's application. There has been a delay in me considering this application because of my availability. It is only now, being 14 September

2023, that it has come to my attention that the claimant did not copy in the respondent to her application.

14. I could either refuse to consider the application and direct the claimant to copy the respondent, or I could waive the requirement under rule 6. In my judgment, it is proportionate to waive the requirement and consider the claimant's application notwithstanding that the respondent has not had notice. For reasons that will become apparent, the respondent will not obviously be prejudiced by that and inviting comment from the respondent before making my decision will further substantially delay matters. Alternatively, if I returned the application to the claimant now and asked her to serve it on the respondent, her application would be out of time and that would cause prejudice to the claimant. On balance, it is proportionate to consider the matter now.
15. In my judgment, the decision to continue with the application in these circumstances is a case management decision under rule 29 and the respondent may apply for a reconsideration of that decision on receipt of this decision if they wish.
16. Now I consider whether it is in the interests of justice to vary or set aside the Unless Order I made on 14 July 2023.
17. I have set out the chronology in detail. The purposes of the Unless Order that I made were as follows:
 - a. To explain to the claimant as clearly and as simply as possible what was required of her and by when.
 - b. To bring a resolution to what appeared to be a circular and intractable problem.
18. As set out in my order, the claimant had been given numerous opportunities to explain which claim she wanted to pursue. I conclude that the claimant was also given the opportunity to pay the second deposit order. I do not say that that payment would have been acceptable, or amounted to compliance with the deposit order, but it is very clear that the fact that the claimant said she had made further payment was not being ignored. Had the claimant made a second payment to the Bristol Finance Office and asked for a variation or reconsideration of the deposit order terms that would have been considered.
19. I have reviewed the orders of EJ Rogerson. In my view, it is clear that a total payment of £40 was required. However, giving the claimant the benefit of the doubt, it is just about possible to misinterpret the orders so that the claimant might think only one payment of £20 was required. I should be clear that this is a generous interpretation – in reality it is clear.
20. Even if, however, the claimant did misunderstand what she was required to do, it had been made very clear by EJ Bright in her letter of 7 July that the claimant had only paid the deposit for one of her claims to continue and that she needed to specify which claim she was pursuing.

21. The claimant's response to that is very difficult to understand. She said only that she had paid the deposit, even though there was evidence of only one payment provided, and she sent the Tribunal proof of postage (of something) to the wrong place. It is hard to see how EJ Bright could have been clearer.
22. I made the unless order on 14 July. The claimant responded to that and it was apparent that she finally understood that a second deposit was required to be paid had she wanted to pursue both claims. The only conclusion that can be drawn from that correspondence was that the claimant intended to pursue both claims. This did not amount to material compliance with the Unless Order, the terms of which are clear. The claimant was (being generous) implying that she intended to pursue both claims. This was not an option that was open to her at this point, because she had not paid the deposit for both claims.
23. The claimant did not say anything in her correspondence of 14 July 2023 that could in any sense be interpreted as a request to vary the deposit order. The claimant did not give any explanation as to why she had only sent one payment, had not responded meaningfully to EJ Bright and was not responding meaningfully to the Unless Order.
24. In any event, the payment that the claimant did eventually send was sent to the wrong place, in contradiction of the clear instructions about deposit order she had sent and had managed to partially comply with.
25. The Tribunal at Leeds had received the payment (albeit that that was not the correct recipient) on 21 July 2023. This was almost a month after the original deadline for paying the deposit set out in the Orders of EJ Rogerson. There was a further delay before it arrived at Bristol, although this is not the claimant's fault (save that had she sent it to the correct place in the first place, there would have been no internal delays). By 17 August 2023 the Bristol Finance Office had still not received the payment of deposit.
26. The test for me to apply is whether it is in the interests of justice to set aside the Unless Order. I consider first the questions in *Thind*.
27. The reason for the default, and in particular whether it is deliberate.
28. The claimant has provided no explanation at all for not complying with the deposit order, the subsequent reminders or the Unless Order. I *suspect* (although this is nothing more than supposition) that the claimant misunderstood. However, even if she did, there is no good explanation for that misunderstanding. The claimant was an experienced professional who must have been used to dealing with much more complex information than this, and there is no evidence of any mental health or cognitive impairments.
29. The seriousness of the default.
30. The default is complete. The claimant has completely failed to provide the information requested in the Unless Order. She implied an answer to a

different question. Whether intentionally or otherwise, the claimant does not appear to treat these proceedings, or her obligations in them, particularly seriously.

31. The prejudice to the other party.
32. The prejudice to the other party is substantial. As things stand, the respondent does not know which of her two potential claims the claimant is bringing. The claimant has indicated an intention to pursue both claims, but there has still not been effective (even if late) compliance with the deposit order. Had the claimant applied to vary the deposit order, there would need to be a further hearing to determine if the late payment of the second Postal Order to the wrong address could be treated as compliance with the deposit order and, if not, which of the claims should continue. On the basis of what has happened so far, there is a distinct possibility that the respondent would remain uncertain which claim(s) the claimant was pursuing. In any event, the respondent would need to incur further costs and effort in addressing these further interim steps and the final hearing would be substantially delayed from when it was originally to be heard. This will have an impact on the evidence to be presented to the Tribunal
33. Whether a fair trial remains possible.
34. In reality, all other things being equal, a fair trial would be possible if the claimant did finally comply with the orders to either pay the correct deposit (subject to a successful application to vary the Deposit Order which has not actually been made) or specify which claim is to go ahead in a reasonable time. Although I have no confidence on the evidence I have seen, that this would happen, this is not a significant factor in my decision. Similarly, although the claimant has consistently failed to provide other information (i.e. details of her claim and information about her disability), this could in all likelihood be overcome by further case management so these other problems do not have any material impact on my decision.
35. I also consider the importance of Unless Orders and the interests of justice generally.
36. In my judgment, this is a classic case where an Unless Order has been used as a last resort to clarify outstanding matters and move things on or bring the case to a close. The claimant's conduct has incurred substantial additional work for the Tribunal and the administration and left the respondent unclear as to what case she is actually bringing. Unless Orders are not made lightly, and neither was this one. If I were to set aside the Unless Order, the parties and the Tribunal would be back at square one: none the wiser as to which case was going forward and with inevitable further delay and confusion.
37. This is prejudicial to the respondent and to other users of the Tribunal system. The claimant has been afforded many opportunities to clarify which claim she is bringing and, potentially, even to have late payment of deposit considered. Therefore, the prejudice to the claimant is outweighed by the prejudice to the respondent and other users of the Tribunal

38. For these reasons, the claimant's application to set aside the unless order dated 14 July 2023 is refused and her claim remains dismissed.

Employment Judge Miller

Date: 14 September 2023

Appendix – Unless Order dated 14 July 2023

Claimant

Mrs F Nadeem

Respondent

V

Rotherham metropolitan
borough council

Dear Madam,

ACKNOWLEDGMENT OF CORRESPONDENCE

Employment Tribunals Rules of Procedure 2013

I refer to your letter dated 7 July 2023. Upon a review of the file Employment Judge Miller directs as follows.

"You have made claims to the Employment Tribunal that you were unfairly dismissed and that you were subject to direct discrimination because of your disability. On 24 May 2023 Employment Judge Rogerson decided that both of those claims had little reasonable prospects of success. Employment Judge Rogerson ordered that you must pay a deposit of £20 by 23 June 2023 to continue with your claim of unfair dismissal and a deposit of £20 by 23 June 2023 to continue with your claim of Direct Discrimination. This means that if you wished to continue with both claims, you needed to pay a total of £40. You have only paid £20. On 7 July 2023 Employment Judge Bright directed you to inform the Tribunal immediately to say whether you had paid the deposit to continue your unfair dismissal claim, or your disability discrimination claim. On 7 July 2023 you wrote to the Tribunal and stated

"Thank you for your email today. I confirm that I have paid for the deposit as requested".

You attached photographs of a postal order for £20 and a proof of postage. You have not indicated which of your two claims you have paid the deposit for.

You appear to have been given numerous opportunities to provide details of your claim and comply with orders but you have consistently delayed in doing so or have failed to do so. Each communication you have sent about your claim appears to add confusion rather than clarity. It is not possible for the tribunal to guess which claim you wish to pursue but it is important that the claim is progressed or brought to an end. I therefore make the following UNLESS order:

Unless, by 4 pm on 21 July 2023 the claimant informs the Tribunal and the respondent which of the claims of either unfair dismissal or direct disability discrimination the claimant has paid the deposit for and which she is not pursuing, ALL of her claims will stand dismissed without further order".