



EMPLOYMENT TRIBUNALS

Claimant: Mr R Critchley

Respondent: Jet2.com Limited

HELD AT: Manchester (CVP)

ON: 14th September 2023

BEFORE: Employment Judge Kathryn Gibson
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Ms Breslin, Counsel

JUDGMENT

Upon hearing the claimant and Counsel for the respondent, the claimant's application to have the Unless Order dated 14 March 2023 (sent to parties on 20 March 2023) set aside and his claim reinstated pursuant to Rule 38 (2) is not well founded and is dismissed.

REASONS

Background

1. The claimant filed a claim of unfair dismissal on 22nd December 2022.
2. A notice of hearing was sent to the parties dated 11th January 2023, containing the following orders which are relevant to this judgment -
 - a. By 22nd February 2023 the claimant must submit a schedule of loss and state whether he wished to be reinstated or re-engaged,
 - b. By 8th March 2023 the claimant must submit copies of all relevant documents,
 - c. By 22nd March 2023 the claimant must agree the bundle with the respondent and the respondent was to prepare the final hearing bundle,
 - d. By 5th April 2023 the claimant must send the respondent copies of his witness statements.
3. On 24th February 2023 the claimant sent to the respondent a payslip from his employment with the respondent dated 27th September 2022 and a payslip from his new employer dated 30th November 2022.

4. On 27th February 2023 a letter was sent to the parties requesting that they each indicate how many witnesses they intend to call, how long they suggest the hearing should be and whether remedy should be included in the final hearing, with a deadline for response of 6th March 2023.
5. On 7th March 2023 the claimant emailed the respondent indicating that he was struggling to comply with the orders due to work and personal commitments.
6. Also on 7th March 2023 the claimant emailed the Tribunal stating the following – *“hi can i ask would it be possible for me to submit written witness statements as my witnesses are unable to take part as they are working and they do not want to face repositions from the management yours thankfully Mr Raymond Critchley.”*
7. The claimant did not comply with the orders of 11th January 2023 or respond to the letter from the Tribunal dated 27th February 2023.

The Unless Order

8. On 10th March 2023 the respondent made an application for an Unless Order pursuant to Rule 38(1) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (Employment Tribunal Rules). This letter set out the steps that the respondent had taken in assisting the claimant to comply with the orders of 11th January 2023 and proposed the following new orders –
 - a. *“15 March 2023 – Claimant to confirm how many (if any) additional witnesses he will have at the final hearing,*
 - b. *17 March 2023 – Claimant to provide the Respondent with a full schedule of loss,*
 - c. *24 March 2023 – Claimant to provide the Respondent with his relevant documents, including in respect of his losses,*
 - d. *29 March 2023 – Respondent to prepare a draft final hearing bundle and share it with the Claimant,*
 - e. *31 March 2023 – Claimant to confirm that he agrees with contents of the final hearing bundle and / or provide any comments to the Respondent,*
 - f. *5 April 2023 – Respondent to send agreed final hearing bundle to the Claimant,*
 - g. *21 April 2023 – Parties to exchange witness statements.”*
9. The claimant emailed the Tribunal without copying in the respondent on 13th March 2023, stating the following – *“Hi this is Mr Raymond Critchley case number 5410305/2022 i would like to thank you for the email that was passed on from jet2 solicitors i have been trying to keep up with the dates but i am struggling as unlike jet2 i do not have a solicitor that i can just call on and i am having to do this on my own and with not being very up on solicitor speak i am struggling to understand what i have to do and i am having to get help where i can which is hard when i am working and caring for my wife and i do not appreciate the bulling tack ticks that jet2 are stopping to i am trying my best and i will hopefully be ready on the 2nd may all i am asking for is a bit of leeway to try and get things done yours thank fully Mr Raymond Critchley.”*
10. An Unless Order was sent to the parties on 20th March 2023, dated 14th March 2023, stating that the claim will be dismissed unless the claimant complies with the case management orders sent to the parties on 11th

January 2023 within 7 days of the Unless Order. The orders contained were as follows –

- a. *“The claimant must send to the respondent a document setting out how much compensation for lost earnings or other losses they are claiming and how the amount has been calculated. The document must give details of the claimant’s income since their employment ended. If the claimant has been dismissed and wants to be reinstated or re-engaged, they must say so.*
 - b. *The claimant must send to the respondent copies of all the documents he has relevant to the claim. This includes documents relevant to financial losses and what the claimant has done to find another job. Documents includes recordings, emails, text messages, social media and other electronic information. The claimant must send all relevant documents he has in his possession or control even if they do not support his case.*
 - c. **NB IF THE CLAIMANT HAS NO RELEVANT DOCUMENTS APART FROM THE ONES ALREADY PROVIDED BY THE RESPONDENT’S SOLICITORS, THEN HE MUST WRITE TO THE RESPONDENT TO STATE THAT.”**
11. On 20th March 2023 the claimant emailed the Tribunal without copying in the respondent stating the following – *“Thank you for your email i am now in the process of getting a solicitor to help me with my case as i have been struggling to do this on my own and will need a bit more time as i will need to get them to look at all the case notes i need a stay at this point yours thank fully Raymond Critchley.”*
 12. On 22nd March 2023 the Tribunal sent a letter to parties refusing the claimant’s application for a stay in proceedings, indicating that the claimant must comply with all previous orders made by 27th March 2023.
 13. Also on 22nd March 2023 the claimant emailed the Tribunal without copying in the respondent attaching a witness statement of Mr George Rigby and also stated the following – *“i am still trying to fill out the loss of earning form but do not understand it so it is taking me a little longer than it should yours thankfully Raymond Critchley case number 2410305/2022.”*

Order to strike out the claimant’s claim

14. On 28th March 2023 the respondent made an application by email for the claimant’s claim to be dismissed, on the basis that the claimant has failed to comply with the Unless Order, particularly in relation to the schedule of loss, due on 22nd February 2023. The letter outlined the steps that the respondent had taken to assist the claimant to comply with the order.
15. On 28th March 2023 the claimant emailed the Tribunal without copying in the respondent stating the following – *“case number 2410305/2022 i am writing in reply to the email i received from the jet2 solicitors i am not happy with the bullying tack ticks that they are stopping to in order to not have to face me at the tribunal i sent them two wage slips which clearly show how much i have lost out on and i am trying to figure out how to fill out the complicated form as i am not a solicitor i do not understand it i am stil waiting on my insurance solicitor to get on the case as there is a lot of paperwork that i have to copy and send to them as i only was told this week that i could use my home insurance for a solicitor can i not send them in an email the losses that i have*

endured due to the unfairer dismissal as i do not want to loose out on my only chance of getting justice for the wrong that jet2 have done to me yours hopefully Mr Raymond Critchley.”

16. Also on 28th March 2023 the claimant emailed the Tribunal without copying in the respondent stating the following – *“Case number 2410305/2022 I am writing this as I have been over all the emails that I have received and I have found that jet2 and there solicitor are pushing very hard to stop my case going to tribunal and are putting forward the case that I have not been following the Set rules yeti have been through all the paperwork that I have been sent and I have found that they have not stuck to the rules as they have quite conveniently left out the investigation and the disaplinary notes for George Rigby who was present but I have provided a witness statement from him and this is also evidence to go with the case so they are also guilty of not following the procedure and I do ot understand why they are so eager to stop this going to tribunal if they are 100%in the Wright and can I also ask that the two witnesses who ibelive to be the two people who did my dissaplinary and my appeal be taken off being the witnesses asthey were not present at the incident and that the two people who were actually present be asked to be on the tribunal I hope you will take this Into consideration yours hopefully Raymond Critchley.”*
17. The respondent submitted in their written submissions dated 7th September 2023 that the claimant had provided a partially completed schedule of loss to them on 28th March 2023.
18. On 30th March 2023 the Tribunal emailed parties striking out the claimants claim, on the basis that the claimant did not comply with the Unless Order by 27th March 2023. The letter further advised that the claimant must make an urgent application to the Tribunal if he wished to dispute that he was in breach or to claim relief from sanction – *“That application should state:
A)If the claimant believes that he had complied with the Unless Order, and had done so fully, he must explain why he so contends.
B)If the claimant accepts that he has not, or, in the alternative, if the Tribunal finds that he has not complied, if he is to seek relief from sanction so that his claims are reinstated, he must set out what steps he has taken, or will take, and when, to comply with the Tribunal’s orders.”*
19. On 30th March 2023 the claimant emailed the Tribunal without copying in the respondent stating the following – *“I have tried to reason with the tribunal and send the documents filled in the best that I could as at the time I did not have a Solicitor.I have this week engaged a Solicitor Arc Legal through my insurance company and am just waiting to see if they are willing to take my case on which they say they will not be able to tell me until Tuesday the 4 March so I would ask that I could have a further week to sort this matter out before you strike my claim out.”*
20. The respondent emailed the Tribunal on 11th April 2023 requesting that the dismissal judgement be issued, as they had not heard from the claimant since the Tribunal emailed on 30th March 2023 striking out the claimant’s claim.
21. On 11th April 2023 the claimant emailed the Tribunal without copying in the claimant stating the following – *“Case 2410305/22 I am writing this letter in response to the email you sent On the 11th April I did try to keep to the dates that were set out but as I was trying to deal with this case on my own and as I did not understand some of the solicitor speak I did miss some of the dates but I did contact the jet two solicitors to let them no that the only paperwork I*

had was what they sent to me I did send them the loss of earnings sheet filled in as best that I could and I did send them the witness statement that I got from one of the colleges that were involved in the incident but I did not receive this persons statements from his meetings which they have withheld I do not think that it is fair to not have my chance to plead my case and do not understand why if jet2 are 100% in the right why they are so eager to get the case thrown out I just want to have the chance to clear my name and maybe get my job back I hope you will give me the chance to do this yours thank fully Raymond CRITCHLEY.”

Application to set aside the Unless Order

22. The Tribunal wrote to both parties on 16th May 2023 confirming that the claim stands struck out and if the claimant is making an application for relief from sanction he must expressly so and make the application by 30th May 2023 and file a witness statement relating to the application by 13th June 2023.
23. On 16th May 2023 the claimant emailed the Tribunal and the respondent attaching the witness statement of Mr George Rigby and a schedule of loss, applying for the Tribunal to be reinstated.
24. On 1st June 2023 the respondent emailed the Tribunal opposing the application to have the claimant’s claim reinstated and setting out their position as to why.
25. On 11th July 2023 the Tribunal issued a notice of hearing for 14th September 2023, to consider the claimant’s application to have the order dismissing his claim set aside, under Rule 38(2) of the Employment Tribunal Rules of Procedure.
26. On 15th August 2023 the Tribunal emailed the claimant to confirm that he should liaise with the respondent’s solicitor regarding the preparation of the case, the bundle and also confirming that he is a witness.
27. The hearing took place on 14th September 2023, at which the claimant’s application to have the Unless Order dated 14th March 2023, received by parties on 20th March 2023, set aside was dismissed and his claim for unfair dismissal was not reinstated.
28. On 26th September 2023 the respondent requested written reasons in relation to the judgment, for completeness.

Hearing of 14th September 2023

29. The Tribunal was provided with and considered written submissions by the respondent, together with a bundle of authorities. The Tribunal also considered all email correspondence from both parties throughout this matter, all documents filed, previous notice of hearings and orders made.

Claimant’s submissions

30. The claimant explained that during his application for unfair dismissal he had been trying to deal with proceedings on his own as he did not have a solicitor. He said that he did not understand the legal jargon that was used.
31. He said that when he received the letter saying his case was being dismissed, he did not get the chance to respond.

32. The claimant said that the only statement he had was that of Mr George Rigby. He did not understand that he was also a witness and needed to file a statement of his own, as his understanding was a witness meant a witness to the incident that occurred. The claimant also explained that he was not planning on calling any witnesses as he did not believe he would be able to get anyone to attend.
33. He did not understand how to fill out the schedule of loss. He believed that the payslips would have enough. He submitted that he filled out what he could. However, he explained that the case was not about money for him, it was about fighting his corner and proving that he was unfairly dismissed.
34. The claimant explained that he believed he received an email stating that he should not contact the respondent directly and as such did not copy the respondent into emails. He could not locate the email he had received that evidenced this. When his attention was drawn to correspondence stating that he should copy in the respondent, he did say that he now remembered having received this.
35. The claimant said that he believed he was unfairly dismissed and he wanted to prove this. He explained that three people were involved in the incident and he was the only one who was dismissed.
36. The claimant submitted that he had not been given a fair chance to put his case during proceedings. He felt that he had tried his best to comply with the orders made.
37. His position was that the strike out order was unfair.

Respondent's submissions

38. Ms Breslin relied upon the written submissions made by the respondent and to the bundle of authorities, which will not be repeated, but will be summarised here.
39. Ms Breslin advanced the respondent's position, which was that the claimant had not complied with any orders made throughout proceedings.
40. The respondent's view was that the claimant had only partly complied, by providing two payslips on 24th February 2023 to the respondent. The claimant filed a statement from one witness on 22nd March 2023 directly with the Tribunal but did not send this to the respondent directly until 16th May 2023. The claimant filed a partially completed schedule of loss on 16th May 2023.
41. Ms Breslin outlined the assistance the respondent had provided and the time and expense that has been occurred, explaining that the respondent's solicitor has attempted to assist the claimant in progressing to trial on a number of occasions, which they felt has placed the burden of litigation on them.
42. Ms Breslin submitted that the orders made on 11th January 2023 were clear and they were set out in layman's terms. Disclosure was clear and there was a warning that the case could be struck out if parties did not comply.
43. The Unless Order sent out on 20th March 2023 Ms Breslin also argued was clear in setting out what the claimant needed to do and also contained a warning that the case would be dismissed if the claimant did not comply within 7 days.
44. Ms Breslin submitted that Unless Orders are an important tool in the Tribunal and they serve as a final warning that parties must comply. She argued that the absence of any good reason for not complying is a significant factor to be

- weighed. Ms Breslin relied upon the case of ***Morgan Motor Co Ltd v Morgan UKEAT/0128/15/DM***.
45. Ms Breslin referred to the claimant's submission, which was that he was a litigant in person and as such the Unless Order should be set aside because he was representing himself and did not understand the legal terms or rules. Ms Breslin relied upon ***Barton v Wright Hassall LLP [2018] 1 WLR 1119 (SC)***, explaining that being a litigant in person does not justify a lower standard of compliance with the rules and orders of the court. They are there to balance the interests of both parties and it is reasonable to expect compliance, unless what is expected is unclear. The rules of compliance have to be equally applied to each party. The claimant also did not provide evidence as to support why he was unable to comply.
 46. Ms Breslin also referred to the claimant's submission that he had been told not to copy in the respondent to emails to the Tribunal. Ms Breslin has not seen evidence of this.
 47. When considering whether it is in the interests of justice to set aside the Unless Order and whether a fair trial is possible, Ms Breslin submitted that the positions of both the claimant and respondent should be taken into consideration. Ms Breslin relied upon the case of ***Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327 (EAT)***, submitting that this case considers the time and money of the parties, the time of the Court, fairness to other litigants etc. Ms Breslin submitted that there has been prejudice to the respondent in this case, as the respondent has been the only party progressing litigation and has offered assistance to the claimant throughout proceedings.
 48. Ms Breslin also relied upon the case of ***Thind v Salvesen Logistics Ltd UKEAT/0487/09***, outlining the factors that must be taken into account when deciding whether it is in the interests of justice to set aside an Unless Order – these factors are laid out at paragraph 49 of this judgment.
 49. Ms Breslin submitted that the claimant had failed to provide a fully completed schedule of loss. The respondent had attempted to assist the claimant with this and had provided a template and links to guidance. Ms Breslin submitted that the claimant had received this document as he responded to the email on 22nd March 2023 about the same. Her view was that the claimant had been provided with everything he needed and that the claimant's submission that he did not understand what to do is not a good enough reason for noncompliance. The claimant also provided the partially completed schedule a day later than the Unless Order allowed for. It did not comply with the Unless Order and did not provide sufficient information for the respondent to understand the claimant's losses. Her view was that no justification was provided for this.
 50. Ms Breslin submitted that the claimant failed to provide any relevant documents and that the claimant's submissions that there are none cannot be correct. The respondent did not view the two payslips that were provided as representative of 'normal pay' and as such the claimant was requested to provide further payslips to the respondent and did not do so.
 51. The claimant also did not provide evidence that he looked for equally well paid employment.
 52. Ms Breslin argued that the claimant had a lot of time and multiple opportunities to comply with orders made and that fairness is about the respondent also, not just the claimant. The respondent had provided many

prompts to the claimant in relation to his need to comply with the orders. This has been at the expense of the respondent, who still does not understand the loss that the claimant has incurred. The respondent does not believe that the claimant will be able to comply with any orders made if the Unless Order is set aside, which would place the respondent in an unfair position.

53. Ms Breslin submitted that it is not in the interests of justice to reinstate the claimant's claim.

Relevant Law

54. **Rule 38 Employment Tribunal Rules of Procedure 2013 -**

(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.

55. 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***)

56. If a judge has decided that material compliance had not been achieved, the whole claim is automatically dismissed – no further decision is required.

57. 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.

58. 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”.

59. The Tribunal also refers to rule 92. Rule 92 provides that whenever a party corresponds with the Tribunal they must copy in the other side.

Conclusions

60. The Tribunal does not consider that it is in the interests of justice to set aside the Unless Order dated 14th March 2023, sent to parties on 20th March 2023.

61. The test that the Tribunal must apply is whether it is in the interests of justice to set aside the Unless Order. To do so the Tribunal considers the relevant factors in ***Thind*** –

62. *The reason for the default, and in particular whether it is deliberate –*

- a. The claimant's explanation for not complying with the Unless Order is that he is not a Solicitor and does not understand the legal jargon, the Tribunal Rules or the schedule of loss. He was also struggling to comply due to looking after his wife and working. The Tribunal finds that there is no good explanation for his position, nor has he provided any satisfactory evidence as to the reasons for his lack of compliance.
- b. The claimant had been provided with a notice of hearing on 11th January 2023 setting out clearly and in layman's terms what was expected of him and by when. He was sent a letter of 27th February 2023 by the Tribunal, which clearly requested information. Subsequent to not complying fully with these two documents, an Unless Order was made and sent to parties on 20th March 2023. The Tribunal finds that the contents of the Unless Order were again unambiguous.
- c. The claimant submitted two payslips that did not demonstrate 'normal pay' to the respondent on 24th February 2023, a witness statement of Mr George Rigby on 22nd March 2023 and an inadequately completed schedule of loss on 28th March 2023 – the day after the deadline set by the Unless Order.
- d. The claimant did not submit any other relevant documents, seek to fully complete the schedule of loss and at no time to the date of the hearing did he file his own witness statement.
- e. The Tribunal finds that the claimant has been given numerous opportunities to comply with the Unless Order, outlined throughout this judgment.
- f. The claimant had also been given guidance by the respondent's solicitors on a number of occasions throughout proceedings, which have not assisted his compliance.

63. *The seriousness of the default –*

- a. As explained at paragraph 62, the claimant has not complied with the Unless Order almost completely. He did not complete a schedule of loss fully, he did not file any relevant documents that he had.
- b. To the date of the hearing of 14th September 2023, the claimant had still not complied with the Unless Order, nor had he filed his own witness statement.

64. *The prejudice to the other party –*

- a. The Tribunal finds that there is prejudice to the other party. The respondent did not have a full understanding of the loss that the claimant was claiming.
- b. By the date of the hearing the respondent also did not understand the claimant's position due to a lack of witness statement by the claimant.
- c. The respondent had incurred expense through their solicitors, due to the time they had taken to provide guidance and prompting to the claimant in relation to complying with the orders made.
- d. It would be prejudicial to the respondent to give the claimant further opportunities in addition to the many already given to comply, when the respondent had complied with orders made and had been attempting to assist in driving the case forward to final hearing.
- e. On the basis of what has happened so far, there is a distinct possibility that the respondent would remain uncertain of the amount of loss the claimant is pursuing.
- f. 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.

65. *Whether a fair trial remains possible –*

- a. The Tribunal is not satisfied that a fair trial would be possible.
- b. It does not find that the claimant would be in a position to comply with any further orders made, given his position relating to the previous orders, particularly the schedule of loss, relevant documents and witness statements.
- c. The claimant has consistently failed to comply with the orders made and the Tribunal does not believe that further case management and further deadlines would assist matters.
- d. The respondent would also unfairly bear the burden of further costs and assisting the claimant in preparation for final hearing.

67. *The Tribunal considers the importance of Unless Orders and the interests of justice generally –*

- a. The Unless Order has been made to reinforce the seriousness of compliance and to encourage the claimant to comply by a set deadline, to enable this case to have progressed to final Hearing.
- b. The claimant's conduct has incurred additional work for the Tribunal and the administration and left the respondent unclear as to the exact nature of loss, the claimant's position and any disclosure. The claimant has also continued to breach rule 92 by not copying in the respondent to his emails to the Tribunal.
- c. The claimant has been given many opportunities to comply with the original order of 11th January 2023 and the Unless Order. To set aside the Unless Order in the circumstances discussed throughout this judgment would be prejudicial to the respondent and to other litigants within the Employment Tribunal.

68. For these reasons, the Tribunal finds that the claimant's application to set aside the Unless Order is not well founded and is dismissed.

Employment Judge Kathryn Gibson

23/10/2023

JUDGMENT SENT TO THE PARTIES ON

1 November 2023

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.