EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Prof B Flyvbjerg	**v**	The Chancellor, Masters and Scholars of the University of Oxford

Heard at: Reading (by CVP) **On:** 20 December 2023

Before: Employment Judge Anstis (sitting alone)

Appearances
For the Claimant: Mr D Bunting (counsel)
For the Respondent: Ms A Beale (counsel)

ORDER

1. The claimant must pay £7,500 to the respondent in respect of costs.

2. On or before **26 January 2024** the claimant must provide to the tribunal written representations as to why any claim for financial losses other than injury to feelings and a basic award for unfair dismissal should not be struck out under rule 37(1)(b), (c) or (d) given what appears to be his failure to comply with disclosure obligations under the order dated 17 May 2023. Those written representations must address whether the claimant considers that any question of striking out can be dealt with on the papers or whether it requires a hearing.

3. On or before **9 February 2024** the respondent must write to the tribunal in response to the claimant's written representations. The respondent's response must include whether, in the light of those written representations, they consider that the claim set out above should be struck out and, if so, whether they consider this is a matter the tribunal can consider on the papers or whether it requires a hearing.

REASONS

INTRODUCTION

1. These written reasons are provided at the request of the respondent.

2. This is a hearing that should not have been necessary.

3. By an order dated 17 May 2023 the claimant was ordered to provide remedy disclosure on or before 17 July 2023. This was ahead of an intended judicial

mediation and with the possibility that the hearing listed for March 2024 would become a remedy rather than liability hearing. Mr Bunting is correct to say that at present this remains a liability hearing and no remedy hearing is listed.

4. There was no remedy disclosure from the claimant on or before 17 July 2023. Since then there has only been very limited remedy disclosure, on 11 October 2023. I do not think I am being premature in saying that the claimant has wholly failed to comply with the order.

5. On 26 October 2023 the respondent made a detailed application for specific disclosure. There are elements of this that go too far. However, much of it is concerned with basic disclosure that would be expected in a simple and relatively low-value unfair dismissal claim. This is a case in which the claimant is, I understand, seeking more than £3m in compensation and has been represented by solicitors throughout.

6. Subject perhaps to the scope of their application for specific disclosure, the respondent has acted entirely reasonably and responsibly in seeking remedy disclosure from the claimant. It should not have been necessary for them to do this. It is not the responsibility of one party to coax and urge another party to comply with a tribunal order.

7. There was a hearing on 20 November 2023 at which the position came to be considered. At that hearing I was willing to give the claimant a further opportunity for compliance with the order, albeit with a clear indication that continued non-compliance may give rise to a question of costs.

8. Given that, it was a surprise to learn today that the claimant has made no further progress in disclosure and nothing more had been disclosed. I cannot form a final view on this without proper evidence, but I record that as yet no good reason for this non-compliance has been given, and the overwhelming impression I am left with at this stage is that the claimant has simply not been bothered to properly consider or address the necessary disclosure.

9. Part of Mr Bunting's position was that disclosure failures did not disadvantage the respondent and, if anything, they disadvantaged the claimant. There may be something in that, but the reality is that if the claimant is seeking such substantial compensation the respondent is entitled to see the evidence that backs that up. Apart from anything else, it is relevant to the question of settlement, and I note that the failure has already spanned across an unsuccessful attempt at judicial mediation.

COSTS

10. The first substantive point to make is that I consider the respondent's case for costs in those circumstances to be overwhelming. The claimant has acted both unreasonably in his conduct of the claim and in breach of the tribunal order. The respondent has been put to cost because of this.

11. Mr Bunting reminds me that the tribunal is typically a jurisdiction in which costs awards are not made. I accept that, but the tribunal and other parties to a case are also entitled to expect that orders will be complied with. The case for costs is overwhelming, and I will exercise my discretion to award costs.

12. The respondent has now instructed London lawyers who are charging at top London rates. In principle I consider premium rates broadly justified in such a case as this, involving a claim of several million pounds. The costs schedule appears to relate entirely to the respondent's efforts to ensure that the claimant complied with the disclosure order. The headline figure for costs is stark: around £12,000. I think that is ultimately too much, but an award must be made and the award I make is £7,500. For the avoidance of doubt, this is the sum payable by the claimant and includes any VAT.

13. No representations were made about the claimant's means and so I have not taken his means into account in the costs award.

NON-COMPLIANCE WITH THE ORDER

14. There is then the question as to what must be done about the continued non-compliance with the order. I accept Mr Bunting's position that for so long as the March 2024 hearing remains liability-only this non-compliance does not endanger any hearing date. However, the ongoing non-compliance involves substantial prejudice to the respondent. They are not in any position to assess the claimant's schedule of loss and possible compensation without it. To not do anything on the basis that prejudice only accrues to the claimant is not an option.

15. I have found it very difficult to decide what the appropriate action is. Perhaps that is because such persistent cases of non-compliance are rare. Mr Bunting says that the claimant will provide disclosure by the end of January, but Ms Beale points out that the claimant has a poor record in this respect, and has already had multiple opportunities to comply with the order. Compliance by the end of January would be six months after the original deadline and eight months after the order was made. Her position is that this should be dealt with by way of an unless order, to cover the whole of the respondent's specific disclosure application, or at least substantial parts of it.

16. That is a tempting option, and in many ways would fit the circumstances of the non-compliance. The difficulty with it (and it is a difficulty that arose to a similar extent in the November hearing) is that I find it very difficult to see how to frame the unless order in an appropriate manner. It cannot cover the whole of the schedule of disclosure sought. I am reluctant to require the verification and full extent of the specific searches sought by the respondent. It could be supplemented by a statement recording that no documents exist in particular categories. However, even with that, in a claim of such potentially high value it seems inevitable that there will be arguments about whether there has been material compliance with an unless order no matter how it is framed. That may in turn lead to an application for relief from sanctions. An unless order would be

a long way from the end of the matter, and could generate two follow-up hearings.

17. I discussed with the parties whether this could be addressed by way of a notice to the claimant to show cause why his claim should not be struck out for failing to comply with the order. On the face of it, the claimant is in breach of the order, and his behaviour seems liable to also raise questions under rule 37(1)(b) and (d) as must as (c).

18. That is what I have decided to do, in the terms set out above. I have not made an order for specific disclosure. An appropriate order for disclosure in general terms was made on 17 May 2023 but has not been complied with. It is up to the claimant to remedy his non-compliance, and no doubt that will be a relevant matter if the question of striking out parts of the claim comes to be considered. However, it is not the end of the matter. Late compliance is not a complete answer to the claimant's previous non-compliance, and while it is a matter for him as to how he responds to the order, I indicated to the parties that representations that do not both explain what compliance has by then been achieved and give an explanation of the previous non-compliance are likely to be incomplete.

19. The terms of the order address striking out claims for financial loss excluding injury to feelings and a basic award for unfair dismissal. The parties agree that the disclosure failures are only relevant to financial losses and mitigation of those losses and so not affect any question of injury to feelings or a basic award.

20. It may be that on receipt of these representations the respondent considers that no question of striking out the relevant elements of the claim arises. If so, it seems very unlikely that the tribunal will wish to take the matter further of its own motion.

21. Both parties are to indicate whether they consider the question of striking out can be dealt with on the papers or requires a hearing. Given the possible value of the claim I indicated (but did not decide) that it appeared that this may well require a hearing, if it remained an issue between the parties. If a hearing is required it was contemplated (but not decided) that this may be incorporated into the hearing already listed for March 2024.

22. In summary, I considered that this "show cause" approach was preferable to an unless order because (i) it seemed only to require at most one hearing, rather than possibly two, and (ii) it enabled the tribunal to deal with any question of non-compliance with appropriate judicial discretion, rather than having an automatic sanction.

23. There may be a delay in promulgating this order and reasons over the Christmas and New Year period. However, the resulting order was discussed at length with the parties, and takes effect regardless of when this written order and reasons are promulgated to the parties. If either party consider that the written order does not properly express what was decided at the hearing they

must notify the tribunal and the other party of that within seven days of this written order and reasons being sent to them.

Employment Judge Anstis
Date: 21 December 2023

Order and Reasons

Sent to the parties on: 2/1/2024

N Gotecha
For the Tribunal Office

Recording and Transcription

If a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/