



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Bahad  
**Respondents:** HSBC Bank Plc  
**Heard at:** East London Hearing Centre (by CVP)  
**On:** 18 June 2024  
**Before:** Employment Judge Park  
**Members:** Ms J Houzer  
Ms R Hewitt

## Appearances

**Claimant:** Did not attend  
**Respondent:** Mr S Purnell (counsel)

# JUDGMENT

1. The claimant did not comply with the terms of the unless order dated 11 June 2024, as amended on 14 June 2024.
2. Under rule 38 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the claim is dismissed.

# REASONS

The judgement and the reasons were given orally at the hearing. However, as the claimant did not attend I have decided to also provide the reasons in writing.

## Procedural Background

1. This case has been ongoing since 2020. The claimant submitted his claim on 14 May 2020. It was subsequently struck out at a preliminary hearing held on 18 September 2020. The claimant appealed that judgment to the Employment Appeal Tribunal and was partially successful. He was able to proceed with race and religious discrimination.

2. The case was listed for a final hearing lasting 4 days to start on 18 June 2024 (today). The date for the hearing had been set at a preliminary hearing that was held on 7 November 2022. After that hearing the parties agreed the list of issues. This was finalised by June 2023.
3. The parties were required to comply with the following orders:
  - 3.1. by 16 June 2023 disclose all documents relevant to the issues;
  - 3.2. by 28 July 2023 agree the contents of the bundle of documents for use at the hearing; and
  - 3.3. by 23 October 2023 exchange witness statements.

#### Preliminary Hearing on 11 June 2024

4. From late 2023 various issues have arisen regarding compliance with directions. The claimant said that the respondent had not disclosed all relevant documents and made a number of applications for disclosure, which were all refused. Witness statements had not been exchanged. The respondent repeatedly sought to agree with the claimant revised dates to exchange witness statements but the claimant refused to agree any timetable to do so.
5. The respondent prepared a bundle. The claimant did not accept it was a final bundle as he said the respondent needed to disclose further documents. The respondent had also sent its witness statements to the claimant on 24 May 2024. These were password protected and the respondent informed the claimant that they would release the password once he confirmed he was ready to exchange and sent his statement.
6. A preliminary hearing was arranged by video on 11 June 2024 to discuss outstanding case management issues. The claimant had also made an application to postpone the hearing. He said it should not take place until the second half of 2025. He had given various reasons for this.
7. The claimant had requested a postponement of the preliminary hearing which had been refused. The claimant did not attend the preliminary hearing. The preliminary hearing went ahead in the claimant's absence.
8. At that hearing Employment Judge Ross made an unless order as follows:
  - 8.1. Unless by 2pm on Friday 14 June 2024 the claimant provides a witness statement to the respondent, his claim shall be dismissed without further order. (paragraph 9 of the Order)
  - 8.2. The claimant should send this witness statement to the respondent's solicitor (Ms Stephen), copied to the Tribunal. (paragraph 10 of the Order).
9. The reasons for the unless order were set out by Employment Judge Ross in some detail in his record of the preliminary hearing. The order was sent to the claimant the same day (11 June 2024).

10. At the same hearing the claimant's applications to postpone the preliminary hearing, final hearing and application to amend the list of issues, application for further disclosure and application to revoke other case management orders were also considered. These were all dismissed.
11. On 12 June 2024 the claimant made an application to vary the case management orders and again applied to postpone the final hearing. He included some additional medical evidence with that application.
12. That application was also considered by Employment Judge Ross. The application to postpone the hearing was dismissed as was the application to revoke the orders. The unless order was varied so the time for compliance was extended to 8am on Monday 17 June 2024. This was sent to the parties on 14 June 2024.

Events of 17 June 2024 onwards

13. At 7.34am on 17 June 2024 the claimant sent an email to Ms Stephens (the respondent's solicitor). This had an attachment the claimant said was his statement. This was password protected and he did not provide the password. The claimant said he was "*I haven't had chance to do proof read and any corrections. I am busy this morning, we will exchange password later today*"
14. Ms Stephens responded at 7.53am. She explained to the claimant that the order said that he needed to provide his statement by 8am and he needed to release the password or a non-protected statement by 8am, at which point she would release the respondent's password.
15. The claimant responded at 7.55am saying he was not aware of that and he would send the password as soon as possible. Ms Stephens responded at 7.58am saying he needed to send the password in the next 3 minutes.
16. Ms Stephens wrote to the Tribunal, copying in the claimant, at 8.39am explaining the claimant had not complied with the unless order as he had not provided an accessible copy of his statement by 8am.
17. At 8.48am the claimant wrote to the Tribunal and said it was not clear that he had to send without a password. He said he had sent an application to the Tribunal to allow time to exchange passwords. The claimant did not in fact make an application to vary the unless order. He made an application to do the following:
  - 17.1. convert the final hearing to judicial mediation;
  - 17.2. shorten the length of the final hearing to two days if the judicial mediation did not succeed; and
  - 17.3. that only his initials were used rather than his full name in any judgment.
18. The claimant did not provide the respondent with the password. He did not do it by 8am. Neither did he send the respondent the password at any point

on 17 June 2024 or on 18 June 2024 before the commencement of the hearing.

19. The claimant also did not send the statement to the Employment Tribunal. The Employment Tribunal had not been copied into the first email at 7.34am. The claimant did not send the Tribunal the statement, either password protected or non-protected, at any point on 17 June 2024 or before the hearing started on 18 June 2024.
20. The hearing started today. It was due to start at 10am by video. The claimant did not attend at the outset. Attempts were made to contact the claimant and an email was sent to advise him that if he did not attend by 10.30am the hearing would go ahead in his absence. The claimant still did not attend.
21. We heard representations from the respondent before reaching our decision.

### **Issues to be determined and the law**

22. At this point the sole issue to be determined is whether the claimant's claim should be dismissed in accordance with rule 38 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 for non-compliance with an unless order.

23. Rule 38(1) states:

*"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."*

24. Rule 38(2) states:

*"A party whose claim or response has been dismissed, in whole or 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."*

25. In **Wentworth-Wood & Others v Maritime Transport Limited UKEAT/0316/15/JOJ** the Employment Appeal Tribunal set out the different decisions to be made relating to unless orders as follows:

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 so in what terms. ....*

6. *Secondly, there is the decision to give notice under Rule 38(1). ... The decision to give notice simply requires the Employment Tribunal to form a view as to whether there has been material non-compliance with the Order ...*

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. ...*

8. *At each of these stages there will be a decision for the purposes of section 21(1) of the Employment Tribunals Act 1996; so there may be an appeal to the Employment Appeal Tribunal on a question of law. They are, however, separate decisions taken at different times under different legal criteria. An appeal against one is not an appeal against another; and the time for lodging appeals will run from different dates. This point must be kept carefully in mind by any party considering an appeal.*
26. To summarise, there are three separate stages with an unless order. These are making the order, deciding if there has been compliance and issuing a notice of dismissal and application for relief to set aside the order. Each stage is separate.
27. When an unless order has been made the Tribunal has no discretion about whether to dismiss a claim or response where the order has not been complied with in any material respect. Therefore, the only issue for the Tribunal to consider is whether there has been material compliance with the order. In **Mr A Minnoch and Others v Interserve Ltd and others 2023 EAT 35** the EAT summarised the correct approach as follows:
- “33.7 at this stage the employment tribunal is giving notice of whether there has been compliance – it is not concerned with revisiting the terms of the order*
- 33.8. particularly if there has been some asserted attempt at compliance, careful thought should be given to whether an opportunity should be given for submissions, in writing or at a hearing, before the decision is taken*
- 33.9. the question is whether there has been material compliance*
- 33.10. the test is qualitative rather than quantitative*
- 33.11. the approach should be facilitative rather than punitive*
- 33.12. any ambiguity in the drafting of the order should be resolved in favour of the party who was required to comply”*
28. This approach was revisited in the recent case of **Bauhaus Educational Services Limited v Mr O Elemide 2023 EAT 161**. The background to this case is very similar to the current case so we have set this out in more detail. An unless order was made that the claimant serve his statement on both the respondent and the Tribunal by a certain date. The claimant served his statement on the Tribunal but not on the respondent. When the respondent flagged up the lack of compliance the claimant sent his statement. This was some time after the date for compliance under the unless order but before the hearing. The Tribunal did not issue a notice dismissing the claim. This decision was appealed by the respondent. The EAT concluded as follows:
- “(a) this order is clear: it requires one step which was either done or it was not, service of the witness statement on the Respondent’s representatives. (b) As a matter of fact – and there is no dispute about this – the witness statement was not served in time on the Respondent’s representatives. It seems to me perfectly clear that the only correct conclusion that could be reached is that the Claimant had not*

*complied with the Unless Order because he failed to comply with the requirement to serve his witness statement on the Respondent's representative. I have to say that there was an error of law on the part of the EJ in reaching the conclusion that the Claimant had complied with the terms of the Unless Order by providing the witness statement to the ET"*

The EAT overturned the decision of Employment Tribunal and the claim was struck out, but with the claimant having the opportunity to apply for relief from sanction.

## **Discussion and conclusion**

29. When making the decision on whether to issue notice of dismissal under section 38(1) Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 neither of the following are relevant:
  - 29.1. the procedural history of this case; or
  - 29.2. the current point of proceedings, including the fact that the final hearing was due to start today.
30. The only matters for us to take into account are the terms of the unless order and whether or not there has been material compliance.
31. The order required the claimant to serve his witness statement on the respondent and the Tribunal by 8am on Monday 17 June 2024. The order was clear and unambiguous. There was a one thing that the claimant needed to do. The order had also been amended already to allow an extension of time for the claimant to comply.
32. The relevant findings of fact on what happened are as follows:
  - 32.1. The claimant sent a pdf document to the respondent before 8am. It was password protected and he did not provide the password therefore the respondent could not read the statement.
  - 32.2. The claimant said he would provide the password later. The respondent asked him to provide the password by 8am. He did not do so.
  - 32.3. In fact the claimant did not provide the respondent with the password at any point before the hearing was due to start at 10am on 18 June 2024.
  - 32.4. At no point did the claimant send the witness statement to the Employment Tribunal, which he was also required to do by 8am on 17 June 2024.
33. The claimant has not complied with the terms of the unless order. He did not provide the respondent and the Employment Tribunal with his witness statement by the deadline. Provision of a statement to just the respondent but password protected is not material compliance.
34. As noted above some of the facts of this case are very similar to that of **Bauhaus Educational Services Limited v Mr O Elemide 2023 EAT 161**.

**Case No: 3201321/2020**

The terms of the unless order were almost identical, in that the claimant was required to serve his witness statement on both the respondent and the Employment Tribunal. The EAT found that the notice of dismissal ought to have been issued because the claimant did not serve the statement on the respondent, just the Tribunal. In the current case the claimant's non-compliance is greater in following respects:

- 34.1. Although he purported to serve the statement on the respondent he did not do so in any meaningful sense as the statement could not be accessed and read without the password.
  - 34.2. The claimant did not make any attempt to rectify the situation once this error was flagged up. On the contrary he said he would provide the password but failed to do so.
35. Following the reasoning in **Bauhaus Educational Services Limited v Mr O Elemide 2023 EAT 161** the only possible conclusion is that the claimant has not complied with the unless order and notice of dismissal must be issued.

**Employment Judge Park**  
**Dated: 18 June 2024**