

EMPLOYMENT TRIBUNALS

Claimant: Mr Alexander Richards

Respondent: Ashfield District Council

RECORD OF A PRELIMINARY HEARING

Heard at: Nottingham **On:** 28 June 2024

Before: Employment Judge Omambala KC

Appearances

For the claimant: In person

For the respondent: Mr M McBride, Solicitor, Freeths LLP

JUDGMENT

(1) The Claimant's application to set aside the dismissal of his claims following non-compliance with the Unless Order dated 17 October 2023 is granted;

(2) The following Unless Order is made:

Unless by the 26th of July 2024 the Claimant sends to the Respondent copies of all the documents he has that are relevant to the issues in this case, all his claims will be automatically dismissed without further order.

REASONS

1. This was an open preliminary hearing to consider the Claimant's application for relief from sanction made by email dated 27 December 2023.
2. The Claimant was accompanied to the hearing by his partner, Ms S Webb who assisted him in the presentation of his submissions.
3. The Respondent was represented by Mr McBride who is familiar with this matter.

4. The Tribunal was provided with a 164 page agreed bundle of procedurally relevant documents, prepared by the Respondent in accordance with directions given by letter 13 February 2024.
5. An oral ex tempore judgment was given at the conclusion of the hearing. These written reasons are final reasons for making this Order and, to the extent that there is any difference, supersede that oral judgment.

Background

6. There is a lengthy procedural history to this case but by way of summary, the Claimant filed a claim form dated 16 August 2022 in which he raised largely unparticularised allegations of race and disability discrimination and harassment [p.13-24]. The Respondent requested further particulars of his claims by letter dated 12 September 2022. The Claimant provided particulars on 1 November 2022 in the form of a brief narrative statement. The Respondent applied for an Unless order on 10 November 2022 because the Claimant had failed to properly comply with the employment tribunal's order to provide particulars and the basis of his claim remained unclear.
7. Following a preliminary case management hearing before the Regional Judge on 26 November 2022 where his claims were discussed, the Claimant was ordered to set out his claims in a Scott Schedule. The Claimant did this on 16 January 2023. The Respondent responded to the Schedule on 13 February 2023 highlighting its deficiencies and omissions. On 21 February 2023, a three hour preliminary hearing before Employment Judge Heap explored the Claimant's claims in detail and the Claimant was ordered to provide further information about the factual basis of his claims. The Claimant served a further Scott Schedule on 21 March 2023. The Respondent considered it remained deficient and by letter dated 30 March 2023 applied to have the Claimant's case struck out for non-compliance with Employment Judge Heap's order.
8. A third preliminary hearing took place on 6 June 2023 before Employment Judge Clarke. Some of the Claimant's claims were struck out and deposit orders were made in respect of the remaining eighteen claims. The Claimant paid a deposit in respect of seventeen of the eighteen claims but did not specify which claim he did not wish to pursue. On 11 August 2023 the Respondent emailed the Claimant seeking clarification but he did not respond. Further case management correspondence to the Claimant dated 6, 21 September 2023 did not receive a response. On 27 September 2023 the Claimant responded to a letter of 26 September [p.136-137] asking the Respondent to contact the Tribunal to obtain this information [p.138].
9. On 17 October 2023 Employment Judge Adkinson considered this case on the papers and made an Unless Order [p.140-141]. The Claimant was required to confirm in writing to the Respondent and the Tribunal which claims he had paid a deposit order in relation to. Failure to comply with the order would mean his complaints of direct race and disability discrimination and harassment related to race and disability would be dismissed without further order.

10. Employment Judge Adkinson also ordered the Claimant to send to the Respondent copies of all documents that he has that are relevant to the issues in the case no later than 14 days from when the Tribunal sent the Order to the parties. If he failed to do so all of his claims would be dismissed without further order.
11. The Claimant complied with the first limb of the Unless Order on 23 October 2023. He did not comply with the second limb of the Unless Order. Instead, he wrote to the Tribunal on 4 November 2023 to say that *“in the last preliminary hearing it was discussed that all the evidence which I rely upon has already been submitted. The only evidence which had not been released was from the Respondent...”* The Respondent wrote to the Tribunal by letter dated 7 November 2023 confirming that the Claimant had failed to comply [p.147-148]. On 12 December 2023, Employment Judge Adkinson directed that the Tribunal office write to the Claimant stating, *“the Claimant has therefore not complied with the order I made and has not complied with Employment Judge Clarke’s order. Disclosure is a cornerstone of a fair process. The Claimant has not complied with the unless order and his claims are therefore struck out pursuant to that unless order.”* [p.150-151] The letter advised the Claimant that if he wished to seek relief from the strike out then he should make his application promptly.
12. The Claimant applied for relief from sanction by letter dated 27 December 2023. He relied on 5 points:-
 - That he had complied with all the requirements of the process in providing multiple Scott Schedules to the court;
 - He had asked for a single judge to be allocated to his case to avoid misconstruction;
 - He had complied with the unless order insofar as it related to the Deposit order payments;
 - He had submitted all his evidence to the Tribunal and the Respondent at the first preliminary hearing and the only outstanding evidence were audio recordings of meetings with the Respondent referred to in his Scott Schedules which he could no longer access and which the Respondent refused to release to him;
 - The process was causing great distress to his mental health as the Respondent was seeking to gain the upper hand by having his claims dismissed via technicalities and loopholes.
12. By letter dated 3 January 2024, the Respondent opposed the Claimant’s application for relief from sanction.

This Hearing

13. The Tribunal heard brief oral evidence from the Claimant. Mr McBride had the opportunity to ask him questions.
14. The Claimant made his submissions with assistance from Ms Webb. The Tribunal is grateful to her. The focus of the Claimant’s submissions was that a deterioration in his mental health had prevented him from engaging fully with

the Tribunal process and had hampered his understanding of what was required of him and when. He said he had received a diagnosis of depression and anxiety about 10 months ago which had seriously affected his ability to cope. He described being, *“completely exhausted and stressed out with the process and struggling to have to look through documents he had already sent into the Respondent and which he knew they had.”* He told the Tribunal that he had declined anti-depressant medication and tried to find other ways to manage his condition. He had taken a course of beta blockers and undergone at least two 12 week blocks of talking therapy. He said that he was currently awaiting a re-referral for further talking therapy.

15. The Claimant submitted that he did not want to give up his claims and asked for a further opportunity to comply. When asked, he said that he would be able to provide further copies of the documents he had previously provided although he pointed out the costs of him doing so would be difficult. Ms Webb indicated that she would be assisting the Claimant in preparing for his hearing.
16. On behalf of the Respondent Mr McBride submitted that this was a case of a serious failure to comply with an unless order by a Claimant who had a history of not complying with Tribunal orders. He asked the Tribunal to note that the Respondent is a public authority and that it had been put to significant cost in pressing the Claimant to follow the Tribunal’s orders and directions. He expressed concern that if the Claimant were granted relief from sanction his claim would not run smoothly and highlighted that it is likely that any hearing date would be more than three years after the incidents complained about.
17. In response to questions from the Tribunal Mr McBride confirmed that although one witness had left the Respondent’s employment no one had indicated an unwillingness to attend to give evidence to assist the Respondent.

The Law

18. The relevant provisions are to be found in rule 38 of Schedule 1 of the Employment Tribunals Constitution and Rules of Procedure 2013. The Tribunal reminded itself that determination of an application for relief from sanction involves a broad assessment of what is in the interests of justice. Relevant factors include the reason for the default, whether it was deliberate, the seriousness of the default, whether there is prejudice to the opposing party and whether a fair trial remains possible.
19. The Tribunal placed weight on the fact that an unless order had been made and that such orders ought to be taken seriously. It notes that the effectiveness of unless orders will be undermined if they are too readily set aside.
20. Further, it is not for this Tribunal to revisit earlier Tribunal decisions to grant an order and that there has been material non-compliance.
21. The onus is on the Claimant to provide evidence to satisfy the Tribunal that it is in the interests of justice for his claims to proceed. However, there does not

need to be some “compelling explanation” or “special factor” in order to obtain relief from sanction.

22. The Claimant has failed to comply with the unless order. The Tribunal does not accept that the Claimant has complied with the unless order because he may have sent relevant documents to the Tribunal and to the Respondent at an earlier stage in the proceedings.
23. Nonetheless the fact that the Claimant had sent documents which he considered to be relevant to the Respondent and to the Tribunal is an indication that he was not seeking to wilfully disrupt or thwart the disclosure process.
24. In considering whether his default was deliberate the Tribunal has had regard to the fact that the Claimant has been a litigant in person for most of the case management process. It also considers that his mental health condition may have affected his ability to understand and engage with the litigation process and on occasions to have impaired his judgment. These are factors which tend to suggest that the Claimant’s default was not deliberate and wilful.
25. Further, whilst any failure to comply with a Tribunal order is serious, the Claimant has disclosed much of the material he seeks to rely on to the Respondent and the Respondent has access to the recordings of the meetings he attended with them that he cannot now produce because they are stored on a device which is now broken. These factors militate against the Claimant being entirely deprived of the opportunity to present his case. Ultimately, he bears the burden of proving his claims by producing relevant evidence. The Respondent must know what the case is that it is being asked to meet. In the circumstances of this case, it cannot be said that the Claimant’s default means that it does not know what that case is. It has not been suggested that a fair trial is not possible.
26. The Tribunal carefully considered the prejudice to the Respondent were it to allow this application. It weighed carefully the Respondent’s submission that it was in the interests of both parties as well as the saving of public resources to allow this matter to end. It noted the stated impact on the Claimant’s mental health.
27. On balance, the Tribunal has concluded that it is in the interests of justice to grant the Claimant the relief from sanction he seeks. The Respondent’s interests are protected by the making of a new unless order giving the Claimant a further opportunity to provide the documents he wishes to rely on by **26 July 2024**. He is very clear that further non-compliance will be looked on very seriously indeed by the Tribunal.
28. The Respondent is required to take no steps and need not incur any additional costs until there has been compliance. In the event that there is compliance this case will be listed for a further case management hearing in person so that a new timetable of preparations for a final hearing can be agreed. This

seemed to the Tribunal to be a fair and proportionate response to the issues raised on this application.

Employment Judge Omambala KC

Date signed: 28 June 2024

Sent to the parties on:

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For the Tribunal Office:

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