EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Taylor and Mr G Taylor	v	Edlington Town Council

Heard at: Sheffield **On**: Friday 16 August 2024

Before: Employment Judge James

Representation

For the Claimants: In person

For the Respondent: Ms Z Hussain, solicitor

JUDGMENT

(1) The claimants failed to materially comply with the Unless Order dated 19 March 2024, resulting in the dismissal of their claims.
(2) It is in the interests of justice to set aside the order dismissing the claims; the claims will now proceed to a final hearing.

REASONS

The issues

1. This hearing is concerned with the question as to whether or not the unless order made by Employment Judge Davies on 19 March 2024 was materially complied with by the claimants. If there was not material compliance, the claim should be struck out, and remain so, unless the tribunal decides that the dismissal should be set aside in the interests of justice.

The proceedings and relevant background

2. Mrs Taylor's employment commenced on 1 September 1998. Her employment ended on 20 September 2023. She was employed to provide caretaking/cleaning duties at the Grainger Centre in Edlington. Her claim is for unfair dismissal.

3. Mr Taylor also makes a claim for unfair dismissal. His work related to the Edlington Sports Pavilion changing rooms and kitchen.

4. The council defends the claims, on the basis that the dismissals were fair, by reason of redundancy.

5. ACAS early conciliation took place between 27 September and 30 October 2023. The claim form was received by the tribunal on 17 November 2023. The claim was sent to the council on 7 December 2023. The council's response should have been received by 4 January 2024.

6. The letter sending the ET1 form made standard case management directions for a standard track case. These included the provision of a schedule of loss by 18 January 2024; exchange of relevant documents on 1 February 2024; the preparation by the respondent of an agreed bundle of documents for the hearing by 15 February 2024; and the exchange of witness statements on 29 February 2024. One hard and one electronic copy of the file of documents and witness statements was to be sent to the tribunal by 18 March 2024.

7. The letter also gave notice of the hearing by video link on 28 March 2024.

8. The respondent made an application to extend time to submit the response form on 15 January 2024. The explanation given was that the documents did not arrive until after the Christmas holidays had started and were delivered to the wrong address. The town clerk, Ms Malone, then failed to notice the date that the response should have been completed and sent to the tribunal.

9. Unfortunately, there was then a delay in the tribunal dealing with the application to extend time. The application was granted by Employment Judge Davies on 11 March 2024. In a separate letter also dated and sent 11 March 2024, the orders were varied. Mr and Mrs Taylor were to send all relevant documents to the council by 15 March 2024; send their witness statements by the same date; and to write to the tribunal also on 15 March 2024, to confirm that this had been done. The file would then be considered by an Employment Judge to see if the claim should be struck out or not. Employment Judge Davies also ordered that, assuming the order was complied with, the additional documents were to be added to the end of the current bundle; and PDF copies of the hearing file and witness statements were to be uploaded to the tribunal's document upload centre by 22 March 2024. These were then to be used at the hearing.

10. The order was not complied with. Employment Judge Davies therefore made an unless order on 19 March 2024. This ordered that by 25 March 2024, Mrs Taylor must send all her evidence and her witness statements (including one for herself) to the Council as ordered by Employment Judge Davies on 11 March 2024; and to write to the tribunal and the council to confirm that she had done so. Failing that, her claim would be struck out without further order. A similar order was made in relation to Mr Taylor.

11. On 20 March 2024, Ms Mullen wrote to the tribunal complaining that the orders had not been complied with. The relevance of certain documents and character references was questioned; and it was alleged that a witness statement from a Mr Wayne Cross was not authentic. An application was made to 'strike out' these documents/statements.

12. Also on 20 March 2024, Mrs Taylor emailed the tribunal (without copying the Council) stating: '*Every thing has been forwarded to the other party as well as yourselfs (sic)*'.

13. Ms Mullen then wrote to the tribunal on 26 March 2024, alleging that the unless orders had not been complied with, and in particular, in relation to the provision of witness statements from the claimants. On 26 March 2024, Employment Judge Shepherd postponed the hearing due to take place on 28 March 2024 and ordered that the claim be relisted for a public preliminary hearing, in person, to determine whether the claimants had complied with the unless order. Notice of hearing was sent on 26 March 2024, with the hearing listed to take place on 29 May 2024. The hearing could not go ahead on that day because of a shortage of judges to hear cases on that particular day. It has since been relisted to today's date.

The hearing

14. The tribunal considered the issues in two stages at this hearing. First, the question of material compliance; second, if the claims were dismissed in line with the unless order terms, whether the dismissals should be set aside in the interests of justice.

15. In relation to each of those issues, the tribunal heard from Ms Hussain, and then from Mr and Mrs Taylor.

Material compliance

16. This issue required consideration of whether Mr and Mrs Taylor, by 25 March 2024, had, as ordered by Employment Judge Davies:

(1) sent all their evidence and witness statements (including for themselves) to the Council as ordered on 11 March 2024; and

(2) written to the Tribunal and the Council to confirm that they had done so?

17. Ms Hussain, for the Council, accepted that documents relied on by the claimants had been sent, although the relevance of many of those documents is questioned. She stated that to her knowledge however, no email had ever been received, in line with (2) above. As to (1), she asserted that no witness statement had been received by the Council from the claimants. In an email dated 26 March from the Council to the tribunal, with a copy to the claimant, the respondent had stated that no witness statement had been received from the claimants, and that they were in breach of the unless order.

18. Mrs Taylor, for the claimants, stated that a joint witness statement had been prepared and signed by them both, and that she understood that her daughter, who helped her with emails, had sent that to the Council, together with the other documents they rely on. She did not dispute that an email had not been sent, complying with part (2) of the order. An adjournment was granted during the hearing in order for the claimant to see if she could find the email attaching the witness statement and/or the witness statement itself. She was not able to do so. The tribunal therefore proceeded on the basis that part (1) of the order had not been complied with, in relation to the provision of witness statements. The Judge notes that an email attaching a

two-page joint witness statement has since been forwarded to the tribunal. That was not on the hard copy of the employment tribunal's file and the respondent has not had a chance to comment on that email or the attached document. In light of the decision which was reached at the hearing, the tribunal does not consider it necessary to consider that email further, save to note that it was in any event sent on 20 May 2024, nearly two months late.

19. On the basis of the submissions, Employment Judge James determined, for the reasons set out below, that there had not been material compliance with the order. The claimant's claims were therefore struck out, subject to the claimants' right to apply for the order dismissing the claims to be set aside. The Judge asked the claimants whether they wished to make such an application. They confirmed that they did. The tribunal then heard submissions, first from the claimants, then from Ms Hussain.

20. On behalf of the respondent, Ms Hussain submitted the following in relation to the factors identified by Underhill J in the ***Thind*** case. First, in relation to the suggestion that witness statements had been sent, that the tribunal should treat that assertion with some scepticism. Second, that the default was a serious one. The claimants had been given a number of opportunities to provide a witness statement, first in compliance with the initial orders, second in line with the variation order made by Employment Judge Davies, and third, following the sending of the Unless Order. Although the claimant says that her mind was on other things at the time because she was caring for her brother, who has since died, she was still able to send at the relevant time, copies of documents relied on, and witness statements in the form of 'character references' from a number of individuals. Third, as to the question of prejudice, the respondents had fully set out their own case in lengthy witness statements, and to allow the claimant now to produce a witness statement would put in jeopardy the fairness of the hearing. Ms Hussain further submitted that a fair trial was no longer possible in the circumstances.

21. Mrs Taylor confirmed that it was her understanding that a joint witness statement prepared by her and Mr Taylor had been sent to the tribunal and to the Council. She also referred to the personal difficulties she suffered around the time when the unless order should have been complied with, as result of caring for her brother who died the following month.

22. Taking into account their submissions, the order dismissing the claim was set aside, for the reasons, and on the basis, set out below. A final hearing was listed.

Relevant law

Unless Orders

23. The relevant parts of Rule 38 provide:

> *(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.*

24. This rule now contains, in para (2), its own form of challenge to an unless order, which should be used rather than Rule 70 (reconsideration of judgments): *Enamejewa v British Gas Trading Ltd* ***UKEAT/0347/14*** *(17 April 2015, unreported)*. In *Enamejewa*, Mitting J (citing the judgment of Underhill J, as he then was, in *Thind v Salvesen Logistics Ltd* ***UKEAT/0487/09*** *(13 January 2010, unreported)*) set out the four principal factors that should be considered by a tribunal. These are:

    (1) the reason for default (in particular, whether or not deliberate);

    (2) the seriousness of the default;

    (3) any prejudice to the other party;

    (4) whether a fair trial remains possible.

25. At paragraph 14, Underhill J stated:

> *… The law in this area had become undesirably technical and involved. It had also, I might note in passing, caused considerable concern in Scotland, where the CPR has of course no application. The law as it now stands is much more straightforward. 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.*** *[This tribunal's emphasis]*

26. In *Uwhubetine v NHS Commissioning Board England* ***UKEAT/0264/18*** *(23 April 2019, unreported)* Judge Auerbach reviewed this area and gave the following guidance:

> *(1) Under r 38 there are three stages: (i) the making of the unless order; (ii) the question whether it has been complied with; and (iii) the determination of any application under r 38(2) to have the order set aside*

on the basis that it is in the interests of justice to do so. Each of these is subject to a separate right of appeal.

(2) In dealing with (ii) (compliance) the ET is not to revisit the terms of the order and/or relief from sanctions.

(3) In so dealing, the ET may need to construe the order (with any ambiguity being exercised in favour of the party subject to the order) and may do so in context but it may not redraft the order or give it a construction it cannot bear (a distinction not a million miles from that traditionally applied by a court asked to enforce a restraint of trade clause).

(4) The test is whether there has been material compliance, which is a qualitative, not a quantitative, matter, eg whether sufficient further information has been given for the other side to understand the claim.

(5) There is no set procedure for the ET to adopt. An EJ may do it on the papers, invite written submissions or hold a hearing; the test is fairness and the overriding objective. However, if the decision is that there has not been compliance, the ET must issue a written notice to the parties, because this then activates the right of a party under r 38(2) to apply for set-aside or relief from sanctions. Moreover, if a question of compliance arises it must be dealt with first by the ET before going on to anything else.

(6) In making an order, an ET must be specific as to its requirements and the consequences of non-compliance. Although the term 'Scott Schedule' is regularly used, it has no intrinsic, magic meaning and ultimately the question is whether the order was sufficiently clear.

27. Under the rule on relief from sanctions in para (2), the fact that the party was vulnerable may be a relevant factor, but it is still necessary for the ET to apply the 'interests of justice' test even-handedly, considering also any prejudice to the other party and the possibility of a fair trial: *Bi v E-ACT* ***[2023] IRLR 498***, EAT. In addition to this specific rule, where the applicant is disabled the ET may also have to consider reasonable adjustments if relevant: *Bryce v Trident Group Security Ltd* ***[2022] EAT 137*** (8 February 2022, unreported), applying *Rackham v NHS Professionals Ltd* ***UKEAT/0110/15*** (16 December 2015, unreported) and *Heal v University of Oxford* ***UKEAT/0070/19***, ***[2020] ICR 1294*** (see further para **[2798]** below).

Conclusions

Material compliance

28. The Judge concluded that there had not been material compliance with the terms of the Unless Order. In particular, a signed witness statement from the claimants had not been provided to the tribunal; nor had an email been sent, confirming that the claimants had complied with the terms of the Order. It was, in the circumstances, the lack of a signed witness statement from the claimant that was the most concerning to the Judge. Had it simply been the second part of the order that was not complied with, it was unlikely that this hearing would have been listed.

29. Preparing and providing witness statements prior to a hearing is an essential part of the preparation that parties in England and Wales are required to

undertake in standard track cases in the Employment Tribunals, including claims for unfair dismissal. Exchange of witness statements enables both parties to understand what the witness evidence will be, prior to the hearing, consider whether any further relevant witness evidence or documentary evidence is required, and prepare questions to ask the witnesses prior to the hearing. Exchange may also assist settlement negotiations, if there are any. Exchange of witness statements should save time at the final hearing, since oral evidence in chief is no longer required, and it should be possible for cross examination to be more focused.

30. On the basis of the information before the Judge at this hearing, no witness statement had been provided, by 25 March 2024; and no witness statement had been provided since. A screenshot of an email has since been provided to the tribunal, attaching a joint witness statement from the claimants, the judge did not consider it necessary to reconsider this decision, given the decision on the relief from sanction. In any event, the 'statement' is dated 12 May, is brief and was sent on 20 May 2024. It still does not amount to material compliance.

31. Since there had not been material compliance with the terms of the unless order, the claims are struck out. The claimant's have the right to apply under rule 38(2) for that order to be set aside. The claimants made that application verbally, at the hearing.

Should the order dismissing the claim be set aside?

32. In relation to the factors identified by Underhill J in the ***Thind*** case, the tribunal notes the following. As to the reason for the default, Mr and Mrs Taylor had ample opportunity to send the witness statement in after 26 March 2024, when they were put on notice that one had not been received. It appeared to the tribunal on the basis of the information before it on 16 August, that this opportunity had not been taken at all, to put their own witness statement before the tribunal. Whilst the Judge noted what was said about Mrs Taylor's brother, all that was required was an email or a letter sending a witness statement. Mr Mrs Taylor should have been able to do so. They were able to send a number of documents, together with 'character references' from a number of individuals.

33. As to the seriousness of the default, the default is a serious one, for the reasons already given in relation to the question of material compliance. The claimants were given three opportunities to provide witness evidence. They failed to do so on each occasion, in line with the orders made.

34. As to the prejudice to the respondent, of setting aside the order, the tribunal concluded that any potential prejudice could be mitigated by allowing the claimant to rely only on what is asserted in the claim form itself for their evidence in chief.

35. In arriving at that conclusion, the Judge noted that in an unfair dismissal case, the burden is on the respondent to prove the reason for dismissal. Assuming the respondent can do so, then in line with the principles set out in the case of *Williams v Compair Maxam Ltd* ***[1982] IRLR 83***, and subsequent cases, in a redundancy dismissal case, a tribunal will normally consider the following questions: (1) the warning/consultation process; (2) the selection process, including questions relating to the selection pool, the selection

criteria and the application of those criteria to the people in the pool; and (3) the question of suitable alternative employment. Those matters should be looked at, regardless of the evidence in chief of the claimants. In any event, it is clear from their claim forms that they question whether the real reason for their dismissals was redundancy; and it can be implied from what is said, that they are arguing that they were not warned or consulted prior to the meetings that took place, informing them that they were being made redundant.

36. The Judge also notes the prejudice to the respondent of the original hearing being adjourned, and the time and or costs associated with this hearing, to consider compliance with the Unless Order. On the other hand, if the dismissal of the claims is set aside, all that needs to be done is for the case to be relisted for a further hearing. The bundle has been prepared, as has the respondent's witness statements.

37. As for the final question, as to whether or not a fair trial remains possible, the judge is consent that subject to the claimants being restricted in evidence in chief to what is set out in the claim form, and on the basis of the issues that will be before the tribunal in any event (see paragraph 35 above), that a fair trial can still take place. The bundle has been prepared, as has all of the witness evidence that can be relied on.

38. In arriving at the conclusion as to whether or not the claim should remain struck out, the Judge found this to be a finely balanced decision. However, the Judge decided, on balance, that it was in the interests of justice in this case for the order dismissing the claim to be set aside, and for the case to proceed to a final hearing, so a decision can be made on the merits. For the reasons set out above, no further case management orders need to be made. The Judge was satisfied that it was possible to set a date for the final hearing today, and on the basis that the claimants are restricted in terms of their own evidence in chief, to the content of the claim form, that the respondent will not be prejudiced - other than having to continue to defend the claim. Further, the Judge was satisfied that a fair trial is still possible, on this basis.

Employment Judge James
North East Region

Dated 19 August 2024

Sent to the parties on:

18 September 2024

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For the Tribunals Office

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