



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms V Nayar

v Digital Tech Support Ltd

RELIEF FROM SANCTION HEARING

Heard at: London South

On: 20 March 2017

Before: Employment Judge Elliott

Appearances:

For the Claimant: Mr J Braier, counsel

For the Respondent: Mr J Feeny, counsel

JUDGMENT

The claimant is given relief from strike out as a result of non-compliance with an Unless Order of 12 January 2017.

REASONS

1. This judgment was delivered orally on 20 March 2017. The respondent requested written reasons.
2. This is the fifth hearing in these proceedings. The history is set out the reasons to the Judgment given on 12 January 2017.
3. At the hearing on 12 January 2017 an Unless Order was made under Rule 38(1) of the Employment Tribunal Rules of Procedure 2013. As it was not complied with by the date specified, in that the particulars ordered were not provided to the respondent by 4pm on 2 February 2017, the claim stood dismissed without further order under the terms of Rule 38(1).

4. The claimant's solicitors' email of 9 February 2017 was treated as an application under Rule 38(2) to set aside the Unless Order on the basis that it is in the interests of justice to do so. The parties were asked under Rule 38(2) whether a hearing was required; the claimant requested a hearing.

The issue

5. The issue for this hearing was whether under Rule 38(2) to grant the claimant relief from the strike out of her claim.

Documents

6. I had a written submission from the claimant. I had a bundle of documents from the claimant of about 80 pages and authorities from both sides.
7. Both parties gave oral submissions and the claimant also had a written submission. The submissions are not replicated in full here but were fully considered even if not expressly referred to below.

Findings

8. This matter stems from the failure by the claimant to serve on the respondent by the date and time specified in the Unless Order, the particulars so ordered.
9. It is not in dispute that the work was done by the claimant's solicitors. The omission related to the service of the documents and the fact that the claimant's solicitors made contact with a firm of a similar name to the respondent's solicitors but not the correct firm.
10. The claimant did the substance of the work that was required by the Order of 12 January 2017. The only part that was not complied with was the service on the respondent. At the hearing on 12 January I urged the claimant not to leave this until the last minute, because of the severe consequences of non-compliance.
11. The claimant had instructed Mr Amit Patel of Atkinson Rose solicitors by Tuesday 17 January 2017. She had acted promptly in that regard after the hearing on 12 January. The terms of the retainer were not agreed until Tuesday 31 January, two weeks later. The claimant tells the tribunal (although there has been no formal evidence of such) that she was hospitalised in the meantime and had surgery and also had to put her solicitors in funds. This meant that the solicitors were dealing with the matter with very little time in hand. Counsel was instructed to draft the necessary documents.
12. The claimant's solicitors tried to comply with the Order and tried to serve on the respondent's solicitors the particulars they had drafted. They failed to serve the particulars because of a failure on their part to check the details of the

respondent's solicitors Sherrards who are clearly marked on the ET3 as a firm in West Sussex. They tried to serve another firm called Sherrards Law (based in St Albans and London), who unsurprisingly had never heard of the fee earner concerned.

13. The contact email address in the ET1 was alice@sherrardslaw.com. The claimant's representative a Ms Emma Hills, a paralegal, used this email address and received an undeliverable message at 14:56 hours. Service was being attempted with an hour of the deadline to go. Ms Hills tried to make contact by telephone, by searching for the telephone number via a google search. This is despite a telephone number appearing in section 8.5 of the ET3 (bundle page 21). I understand that it often be quicker to google than to look up a number in paperwork. The search brought up Sherrards Law rather than Sherrards Employment Law Solicitors (the respondent's solicitors). Ms Hills did not appreciate at the time that this was the wrong firm. Upon telephoning Sherrards Law she was told that no-one named Alice worked for them (as per the email address). The claimant's solicitor thought that the respondent's solicitors may have gone off record.
14. The claimant's solicitors, via Ms Hills and those by whom she is supervised, failed to take the very basic step of checking the contact information in the ET3. Service had been left effectively to the last minute. This inevitably ran a risk. And the task had been delegated to a paralegal when the consequences of non-compliance were severe. By 14:56 hours I agree that a courier was unlikely to have been able to serve the documents on time, but had matters not been left to the last minute this was another option. This, along with making the necessary checks of the ET3 and finding the information which was clearly there.
15. By the evening of 2 February 2017 Ms Hills found the correct firm of solicitors on line and sent an email to advice@sherrardslaw.com at 22:30 hours (bundle page 76). The time for compliance had already passed. The email was in any event sent back as undeliverable.
16. On Friday 3 February the claimant's solicitors sent the documents by first class post to the correct firm of solicitors acting for the R. Ms Bevis of the respondent's solicitors received the documents on Monday 6 February 2017.

The relevant law

17. Rule 38(2) of the Employment Tribunal Rules of Procedure 2013 provides that at a party whose claim....has been dismissed....as a result of such Order [an Unless 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 representation

18. The overriding objective in Rule 2 requires tribunals to seek to give effect to this objective by dealing with cases fairly and justly.
19. The EAT in ***Enamajewa v British Gas Trading Ltd EAT/0347/14*** makes clear that these applications are to be considered under Rule 38 and not under the powers for reconsideration under Rule 70. The EAT in that case said that the Judge is required to have in mind, if it is just to do so, factors which have occurred subsequent to the making of the Order as well as those which occurred before it was made (Mitting J at paragraph 18).
20. The EAT in ***Thind v Salvesen Logistics Ltd EAT/0487/09*** (Underhill P) held that while it is important for tribunals to enforce compliance with unless orders, in certain circumstances the interests of justice would be best served by granting relief to the party in default. Factors to be considered include the reason for the default, the seriousness of the default, the prejudice to the other party and whether a fair trial remains possible.
21. The respondent relied upon the decision of the EAT in ***Singh v Singh Trustees Representative EAT/0518/16*** (Eady J) which sets out at paragraph 15, three factors for consideration in relation to whether a fair trial remains possible. These are that a trial must take place within a reasonable time, with reasonable and proportionate preparatory work on both sides and a reasonable and proportionate share of judicial and administrative resources by the ET.

Submissions

22. I make it clear as above, that this is by no means a full replication of all the submissions I heard, which were fully considered.
23. It is submitted for the claimant that the respondent should have taken a sensible approach and not contested this application for relief and this would have avoided the time and cost of today and the case would have remained on track with a telephone preliminary hearing on 16 February 2017. It is also submitted that the respondent should have informed the claimant's solicitors that the email address was "defunct".
24. It is submitted that the default was not deliberate, there was every attempt to comply in time.
25. The respondent submits that the Unless Order was made in the first place because of defaults on the claimant's part. The respondent says that the breach is one of 4 days and this is material. There is culpability on the claimant's solicitors' part in not referring to the ET3 for the correct telephone number.

26. It is submitted that there is prejudice to the respondent in terms of the length of time that they will have to wait for a trial, when the claimant relies on facts and matters going back to August 2014 and she relies on conversations which are undocumented. The disability relied upon is memory loss and matters may not come to trial until 2 or 3 years after the events relied upon. The respondent submitted that given the history, the tribunal cannot be sure that the claimant will not default again.

Conclusions

27. There must be respect for and adherence to the Rules with which in this case the claimant did not comply. I have to consider the interests of justice. I have considered the reason for the default. It was because of a straightforward mistake as to the identity of the respondent's solicitors, it was not deliberate. This is not a case in which the Order of 12 January had been ignored or treated without seriousness. The claimant went to solicitors within a few days of the last hearing and her solicitors had done the work as ordered and were seeking to comply by serving it. I find in these circumstances that it is not a serious default.
28. Even though it was a straightforward mistake, I nevertheless find that it was a basic mistake that need not have been made without some equally straightforward checking of the ET3. I find that it is not the respondent's solicitors' obligation to inform the claimant's solicitors that an email address is not in use any more and it is not the respondent's solicitors' responsibility, however desirable, that they provide a means for emails to be redirected to another fee earner when someone leaves.
29. The responsibility in this situation clearly lay with the claimant and her solicitors who were fully aware of the risks of leaving matters to the last minute. They ran that risk and the consequence was a failure to comply with the Unless Order and the dismissal of the proceedings. The task had also been left in the hands of a non-qualified junior fee earner.
30. I have considered whether allowing the dismissal of the proceedings to stand without a hearing of all the evidence in what appears to be a heavily contested and disputed case, is in the interests of justice or results in a denial of natural justice. I have also considered in this context the overriding objective in Rule 2 of the Employment Tribunal Rules of Procedure 2013. This requires tribunals to seek to give effect to this objective to deal with cases fairly and justly whenever it exercises a power conferred by the Rules.
31. The case has not at the time of deciding this application, been listed for hearing. Therefore there remains plenty of time for both parties to make the necessary preparations for such a hearing. Efforts can be made by the tribunal

to find a vacant slot for the hearing so that the parties do not have to wait as long as they might otherwise.

32. I find that the interests of justice are not served by awarding compensation to the claimant on a default basis without a full consideration of the merits of the case.
33. I find that the balance of prejudice lies in favour of the claimant. Findings need to be made as to the reason for dismissal, whether it was because of or arose from the claimant's disability and whether the alleged acts of discrimination took place. Findings of fact need to be made on the part-time worker's claim and on holiday pay. If I were not to set aside the judgment the claimant would become entitled to a remedy on a default basis as if a response had never been filed and therefore a potential windfall on disputed and unproven matters.
34. In terms of the length of time and the fading of memories, I make the observation that the burden of proof on many of the matters relied upon lies with the claimant.
35. The issues are now from the claimant's side, identified and it is now a case of making the necessary orders for preparation for hearing and listing a hearing date which can be done at this hearing.
36. The claimant is given relief from sanction from the effect of non-compliance with the Unless Order.
37. The parties are reminded that in view of the history of this case, there is little if any room for future non-compliance with orders. The orders below were made by consent.
38. I expressed my gratitude to both counsel for the high standard of legal work and advocacy today.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within **four days**. It has been listed at London South Employment Tribunal, Croydon to start at 10am or so soon thereafter as possible on **11 December 2017**. The parties are to attend by 9.30 am. The hearing may go short, but this allocation is based on the on the claimant's intention to give evidence and call up to two further witnesses and the

respondent's intention to call at least two and possibly three witnesses. The time will be used for the tribunal to deliberate and give judgment if possible and for remedy if applicable.

The issues

2. There is a comprehensive list of issues drafted by counsel for the claimant. It requires some input from the respondent at paragraphs 3.4, 4.5, 5.1.2, 5.2.2, 5.3.2, 5.4.2, 5.5.2, 5.6.2, 5.7.2, 5.8.2, 6.3.2, 7.1.2, 7.2.2 7.3.2 and 7.4.2. The respondent is ordered below to amend the document to include those particulars.

Judicial mediation

3. I raised the possibility of this case being considered for an offer of judicial mediation. Both parties are legally represented and are in a position to advise their clients as to how the process operates. The parties will inform the tribunal within 14 days of service of the Schedule of Loss namely by **24 April 2017** as to whether they are interested in Judicial Mediation.
4. If both parties are so interested, they will receive further notification from or on behalf of the Regional Employment Judge.

Other matters

5. If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.
6. I made the following case management orders by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. **The list of issues/amended response**
 - 1.1. On or before **19 April 2017** the respondent is ordered to complete paragraphs 3.4, 4.5, 5.1.2, 5.2.2, 5.3.2, 5.4.2, 5.5.2, 5.6.2, 5.7.2, 5.8.2, 6.3.2, 7.1.2, 7.2.2 7.3.2 and 7.4.2 of the list of issues.
 - 1.2. This must be brief and the respondent is reminded that witness statements are the place to include the details. This will be treated as an amendment to the response and the purpose of this is to avoid further costs being incurred in this matter.

- 1.3. The list of issues is to be included in the hearing bundle in the pleadings section.

2. **Disclosure of documents related to disability**

- 2.1. On or before **15 May 2017** the claimant is ordered to disclose to the respondent by list and copy all medical records held by her GP and from any hospital consultants and/or hospital records, for the period from August 2014 to October 2015, including notes, whether manual or on computer, of attendances by the claimant, referrals to other medical or related experts, reports back from such experts, test results or other examinations or assessments. They must be related to the condition of memory loss. The claimant may disclose earlier medical records if she chooses to do so, the relevant period for consideration by the tribunal is August 2014 to October 2015.
- 2.2. For the avoidance of doubt, the claimant need only disclose medical records in relation to the condition of memory loss and information related to other conditions may be redacted from the disclosure.
- 2.3. On or before **15 May 2017** the claimant is to serve on the respondent with a copy to the tribunal a disability impact statement setting out the effect upon her condition on her ability to carry out normal day to day activities in the period from August 2014 to October 2015.
- 2.4. On or before **31 May 2017** the respondent is ordered to notify the claimant and the Tribunal whether, having considered the medical records and disability impact statement, it concedes that the claimant is or was at the material time a disabled person, identifying the disability and the period and/or the extent of any remaining dispute on these issues. It is not enough for the respondent to say simply that disability is “not admitted”.
- 2.5. If disability is not admitted, the parties have leave to apply to the tribunal for a further telephone preliminary hearing for further orders for expert reports if considered necessary and appropriate to any medical issue(s) remaining in dispute.

3. **Disclosure of documents**

- 3.1. The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before **15 May 2017**. This includes, from the claimant, documents relevant to all aspects of any remedy sought.
- 3.2. Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts applied to, all correspondence in writing or by email with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips from work secured since the dismissal, the terms and conditions of any new employment. The claimant told the tribunal that she is currently in employment.
- 3.3. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which

are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.

- 3.4. The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

4. Schedule of loss

- 4.1. The claimant is ordered to provide to the respondent and to the Tribunal, so as to arrive on or before **10 April 2017**, a properly itemised schedule of loss. The claimant is currently in employment.
- 4.2. The claimant is ordered to include information relevant to the receipt of any state benefits.

5. Bundle of documents

- 5.1. It is ordered that the claimant has primary responsibility for the creation of the single joint bundle of documents required for the hearing.
- 5.2. The claimant is ordered to provide to the respondent a full, indexed, page numbered bundle to arrive on or before **30 June 2017**.
- 5.3. The claimant is ordered to bring sufficient copies (at least five) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

6. Witness statements

- 6.1. It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
- 6.2. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.
- 6.3. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 6.4. If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 6.5. It is ordered that witness statements are exchanged so as to arrive on or before **13 November 2017**.

7. Cast list and chronology

- 7.1. The respondent is ordered to prepare a cast list, for use at the hearing. It must list, in alphabetical order of surname, the full name and job title of all the people from whom or about whom the Tribunal is likely to hear.

- 7.2. The claimant is ordered to prepare a short, neutral chronology for use at the hearing.
- 7.3. These documents should be agreed if possible. If they are not agreed, the party who created the document shall state within in the items which are not agreed. The parties do not have leave to submit separate documents.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Elliott

20 March 2017