Case Number: 2600173/2017

EMPLOYMENT TRIBUNALS

Claimant: Dr K Von Haeften

Respondent: University of Leicester

Heard at: Leicester

On: Wednesday 1 November 2017

Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: In person
Respondent: Mr J Chegwidden of Counsel

JUDGMENT

1. Upon the application of the Respondent, the "unless" order made by this Judge on 23 August 2017 is revoked. Thus, the Respondent can continue to defend the claim.

2. The case will now be heard by Employment Judge Macmillan at the **Leicester Hearing Centre, 5a New Walk, Leicester LE1 6TE** on **Thursday 18 and Friday 19 January 2018** commencing at **10 am**.

REASONS

1. On 23 August 2017 this Judge, having had no involvement in this case prior thereto, made what is known as an unless order requiring that the Respondent provide documents as requested by the Claimant to the latter by 4 pm on 29 August 2017.

2. As to why I made the unless order has to be seen in the context. Essentially, this case had been listed on the 17 July for hearing on 31 August - 1 September 2017 at Leicester. Prior thereto, it had a previous listing which, in judicial parlance, had to be pulled for lack of a Judge. Directions had been long

since issued in relation to the Hearing. There is no doubt that as at 3 July 2017, those had in the main been complied with so that there was a bundle which had been prepared by the Respondent's solicitors and witness statements had been exchanged.

3. What the Claimant wanted as at 3 July was an un-redacted document which he cross-referenced to one of the witness statements he had received from the Respondent . He did not specify in that email what the document was.

4. Another Judge asked that the Respondent comment upon the email. The reply of 18 July from the partner with conduct of the case for the Respondent's solicitors (Ms E Smith) opined that the document was not relevant to the issues.

5. On 17 August 2017, the Claimant provided more detail as to what he wanted. First, the unredacted report which had been issued by the Respondent in March 2016: he gave the full title. That disclosed to him had been heavily redacted. Similarly he had been disclosed redacted minutes of a meeting on 17 March 2016 but required an un-redacted copy.

6. The request was put before me on 23 August 2017. The hearing was of course now imminent. I took the view that the way to deal with this, and on the basis that it is for the tribunal Judge to decide what is relevant and necessary, was to make an unless order for the Respondent to provide the un-redacted documents. Thus, inter alia what I stated was:

> "... *Given the imminence of the hearing, the Respondent will provide to the Claimant unredacted copies of the documents he has requested. If it does not do so* ***by 4pm on 29th August 2017****, the response will be struck out ...*"

7. Other than a reference to Miss Smith's letter of 18 July, I did not specifically refer to the Claimant's email of 17 August. However, Ms Smith would surely have made the connection. Nevertheless I am with Counsel, and apropos the authority to which he refers, namely ***Mace -v- Ponders End International Ltd [2014] UKEAT/0491/13*** per HHJ Richardson, that perhaps what I said was not clear enough. Additionally or in the alternative in any event I am going to give the relief from sanction as requested by the Respondent. The reason why they seek relief from sanction is that my order in the sense of what the Claimant wanted was not complied with by the due deadline. As to why, I have of course read the statement that has been put before me today by the Respondent's solicitors from David Maton, who is a solicitor in the Employment Team.

8. I take it short. In summary, he had taken over conduct of the case from Ms Smith at this time; but only for a very short period because she was on leave. He got my unless order via a secretary mid afternoon on Friday 23 August 2017; that is of course the same day as I issued it because of the urgency of the situation. He then acted promptly, in that he got from the University the un-redacted minutes of the meeting of 17 March 2016 and sent them to the Claimant. He thought that was what he was being asked to provide because he had seen the Claimant's email of 3 July. But he did not see that of 17 August. These things can happen. He thought he had complied with the order. Cross referencing to the index for the trial bundle item 6 is indeed those minutes.

9. But there is no item in that index for the March 2016 document. Thus having not seen the 17th August e-mail , albeit it is not disputed in may have been

in the file but was overlooked because of the urgency of the situation, in the context this was an understandable error by a solicitor in circumstances where there has previously been compliance by the Respondent with the tribunal's orders: In other words, no dragging of feet; no history of non-compliance.

10. So, if my unless order stood, that is to say if it was sufficiently perfected, the net result would be that the Respondent would be stood out from the justice seat in terms of it having a viable defence to the essentially unfair dismissal claim of the Claimant.

11. Finally, I remind myself of the jurisprudence; the settled dicta as to the approach to be taken to an application for relief from sanction , remains that of the Honourable Mr Justice Underhill as he then was in ***Thind -v- Salveson Logistics Ltd [UKEAT/0487/09]*** per his paragraph 14.

12. Applying the same, the reason for the default was not deliberate. How serious is it? Well, it is one document in a very substantial bundle of other documents and when in fact that document had not previously been seen as relevant by the Respondent and so it was not indexed and thus in the trial bundle. As to whether it is relevant is of course a matter for the judge at the Hearing. The prejudice to the Claimant is that he is stood out from the advantage of being able to say "Oh well, they failed to comply with the order now I get judgment". But I balance that, as of course it is a balancing exercise, against the prejudice to the Respondent of being stood out from being able to defend where there are triable issues and, as I have already said, no history of default in terms of directions.

13. The final point is does a fair trial remain possible? Of course it does. The witnesses are still available; the documentation is there; and memories remain fresh. I have heard no evidence to the contrary.

14. For those reasons, I have therefore decided that it is in the interests of justice (which is the appropriate test that I must adopt pursuant to Rule 38(2) of the 2013 Tribunal Rules of Procedure) to grant relief from sanction. Accordingly, if my unless Order was valid, I revoke it.

The way forward

15. This case should have been consolidated with that of Mr S Thornton (2600359/17); they are absolutely on all fours. Suffice it to say that Employment Judge Macmillan heard the case of Thornton on 29 August 2017. His judgment and reasons were published to the parties on 21 September 2017. At paragraph 3 of that judgment, he made plain as to why these cases should have been consolidated. Alas they had not been which is of course no fault of his.

16. Given the facts in that case are on all fours with that of Dr Von Haeften and given that Judge Macmillan has clearly dealt with matters in a thorough way and it is not suggested that he will be biased against the Claimant in this case, I have concluded that it is appropriate that he should now hear Dr Von Haeften's case. I should add that the Dr was actually present throughout Mr Thornton's case and gave evidence for him.

19. That is my decision, which simply leaves me list the case before Employment Judge Macmillan and of course I have given the date in the judgment part of this decision. No other directions are needed.

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Employment Judge P Britton

Date: 8 November 2017
JUDGMENT SENT TO THE PARTIES ON

05 December 2017

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FOR THE TRIBUNAL OFFICE