



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Ross Connor

**Respondent:** Boots Management Services Limited

**Heard at:** Nottingham                      **On:** Wednesday 1 October 2019

**Before:** Employment Judge Evans (sitting alone)

## **Representation**

**Claimant:** in person

**Respondent:** Ms Tunncliffe (Solicitor)

# JUDGMENT

- 1) The Claimant's Claim was struck out on 14 June 2019 by the unless order made by Employment Judge Blackwell on 31 May 2019.
- 2) That unless order is set aside on the basis that it is in the interests of justice to do so. The Claim will proceed to a full hearing.

# REASONS

## **The hearing on 1 October 2019 ("the Hearing")**

1. The parties were represented at the Hearing as set out above. The Respondent had prepared a bundle running to 124 pages. Shortly before the Hearing the Claimant for his part had sent a document headed "My statement" to the Tribunal and the Respondent.
2. In addition to these documents, I had regard to the documents included in the Tribunal's file.

## **The reason for the Hearing, the discussion at the beginning of the Hearing and the issues**

3. The immediate reason for the hearing on 1 October 2019 was an order made by Employment Judge Brittan on 13 June 2019, in response to an email sent to the Tribunal by the Claimant, that there should be a Preliminary Hearing to "discuss the way forward" and at which the Tribunal would consider whether the Claim should be struck out on the grounds that it had no reasonable prospect of success or a deposit order made on the grounds that it had little reasonable prospect of success.
4. Having reviewed the file prior to the Hearing it seemed to me, however, that, before anything else could be done, it would be necessary to consider whether the unless order made by Employment Judge Blackwell on 31 May 2019 ("the Unless Order") had been complied with.

5. There was then a discussion at the beginning of the Hearing. Ms Tunnicliff for the Respondent and the Claimant agreed that the matters which should be considered at the Hearing were as follows:
  - 5.1. Had the Claim been struck out as a result of the Unless Order?
  - 5.2. If so, should it be set aside?
  - 5.3. If the Claim had not been struck out, or if it was reinstated following an application by the Claimant, what case management orders were necessary for the Claim to progress towards a final hearing?
6. Ms Tunnicliff for the Respondent with commendable realism accepted that if in fact the Claim had not been struck out as a result of the Unless Order, or if that Unless Order were set aside, there would be no basis for me either to strike out the Claim or to make a deposit order. These issues were therefore not considered further at the Hearing.

**The Unless Order and the background to it**

7. The Claim was begun by an ET1 form received by the Tribunal on 19 July 2018. The Claimant had been employed by the Respondent as a driver delivering prescriptions from 1 May 2016 until 15 June 2018. The Claimant had not ticked any box at 8.1 (indicating which claim he pursued) but had written that his claim was of “bullying to make me leave”. He went on to explain at box 8.2 how he considered that he had been treated unfairly following a period of sickness absence, how he had refused to deliver prescriptions in his own car, and how he had resigned when threatened with disciplinary action.
8. The Respondent submitted a Response on 24 August 2018. It stated that the Claim was unclear, particulars were needed, but that the Claimant’s employment had ended by “voluntary resignation”.

*Preliminary Hearing on 19 November 2018 before Employment Judge Moore*

9. There was a Preliminary Hearing on 19 November 2018 before Employment Judge Moore by telephone. The claim was listed for a two day hearing on 11 and 12 March 2019. Employment Judge Moore set out the issues which she understood to arise as a result of the discussion which had taken place at the Preliminary Hearing in a Case Management Summary. The claims were identified as:
  - 9.1. Constructive unfair and wrongful dismissal, the conduct relied upon as breaching the term of trust and confidence being “a. Reducing the claimant’s shifts following a period of sick leave; and b. On or around 15 June 2018 requiring the claimant to deliver prescriptions in his own vehicle on the way home and then seeking to discipline him for refusing to do so”.
  - 9.2. Disability discrimination. This was said to be discrimination arising from disability. The thing said to arise in consequence of the Claimant’s disability was said to be “Taking leave from work due to mental health issues” and the unfavourable treatment was said to be “Reduce the claimant’s shifts”.
10. Employment Judge Moore made case management orders. These included orders requiring the Claimant to provide copies of his medical records to the Respondent and, also, to prepare a witness statement identifying his “physical or mental impairment” and setting out its effect on his ability to carry out normal day to day activities. It is clear that these orders, which are in the standard form which is very detailed, were not discussed at the preliminary hearing because Employment Judge Moore noted in the orders “This issue [i.e. the Disability issue] was not discussed with the parties but is made in accordance with the overriding objective and to ensure parties are prepared to deal with the issue of whether the claimant is a disabled person within the meaning of Section 6 of the Equality Act 2010 (“EQA”). Ms Tunnicliff confirmed at the Hearing that there had indeed been no discussion of the Disability issue or the orders relating to it at the preliminary hearing before Employment Judge Moore.

*Preliminary hearing on 5 February 2019 before Employment Judge Camp*

11. There was a further preliminary hearing before Employment Judge Camp on 5 February 2019, again by telephone. It appears that the preliminary hearing was listed because case management orders made by Employment Judge Moore had not been complied with. However, at paragraph (6) Employment Judge Camp noted in the case management summary sent to the parties following the preliminary hearing:

*What is important is that the claimant's true case is significantly different from the case the Employment Judge Moore thought he was bringing. Although she made the usual order requiring him to notify the tribunal if what she wrote about the claim in the written record of the previous preliminary hearing was wrong, he did not do so. As a result of this, the respondent and the claimant have been preparing for a final hearing of different cases.*

12. Employment Judge Camp went on to state that "I am concerned that even after this hearing, I may not have fully and accurately understood the claimant's case". He went on to record the Claimant's factual case as he understood it. He noted that the constructive unfair dismissal claim was "not so very different" but said that the disability discrimination claim had "changed a lot". He said he understood it to be a claim that the Respondent had failed in its duty to make "reasonable adjustments". He identified the PCP as "a tendency, during May and June 2018, to overload the claimant with work and unfairly to blame him if work did not get done".

13. Employment Judge Camp made case management orders to get the Claim to a final hearing running from 8 to 10 July 2018. Amongst the case management orders was one which stated:

*2.1 The claimant must write to the tribunal and the respondent's representatives within 21 days of the date this is sent to him and provide the following information:*

*2.1.1 Is what is set out in the case management summary section above about the case and the issues that arise accurate and complete in all important ways?*

*2.1.2 If not, how – in detail – is it inaccurate and/or incomplete?*

*The preliminary hearing on 31 May 2018 before Employment Judge Blackwell*

13. The Claimant did not comply with the case management orders Employment Judge Moore had made in relation to the issue of Disability. Nor did he comply with the orders of Employment Judge Camp as set out above. The Respondent raised this with the Tribunal and this resulted in a further preliminary hearing, again by telephone, being listed for 31 May 2019. The Claimant did not attend that hearing. Consequently Employment Judge Blackwell made an order in the following terms:

- 1. If by 4:00pm on Wednesday 14 June 2019 Mr Connor has not complied with the following, all of his claims will be struck out without further notice:-*
  - a. An explanation as to why he did not attend upon the case management discussion which was held on 31 May and;*
  - b. Why he has not complied with order 2 of Employment Judge Camp's orders sent to the parties on 11 February 2019 and;*
  - c. Why he has not complied with orders 5.2 and 5.3 of Employment Judge Moore's orders which were sent to the parties on 21 November 2018.*

14. On 7 June 2019 the Claimant sent an email in the following terms to the Tribunal:

*Hello I got a letter about not attending phone appointment. I've not been ignoring everyone. My best friend (like a sister) took her own life May 3<sup>rd</sup> and I've had a lot to*

*sort out funeral and heads a mess pushing my own mental health over edge so didn't want to exchange emails and get angry by the constant rubbish replies refusing to accept my mental health when you have all doctors notes etc  
We only buried her Monday just gone.  
Bereavement counselling is 6 months waiting list so I've shut self off a few times and this seems like a deliberate attempt to frustrate someone into giving up  
Suppose u need proof of what I'm saying here too so enclosed is a copy of her funeral programme. Hopefully a normal person will put things on levels and understand this shock. She was just 37*

### **The Law**

15. Rule 38 of the Employment Tribunals Rules of Procedure provides as follows:

#### **38 Unless orders**

*(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.*

*(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21.*

16. When deciding whether there has been compliance with an unless order, a Tribunal is not concerned with whether the order should have been made or whether it should have been made in the terms it was. The starting point is to consider the terms of the order itself and whether what has happened complies with the order or not (Uwhubetine and anor v NHS Commission Board England and ors EAT 0264/18). Partial compliance is insufficient.

17. Factors to consider in deciding whether to set aside an unless order under Rule 38(2) on the basis that it is in the interests of justice to do so will include the reason for the default, the seriousness of the default, the prejudice to the other party, and whether a fair trial is still possible.

18. Nothing in Rule 38 prevents a Tribunal from taking into account when deciding whether to set aside an unless order matters which have occurred after the making of the order (Enamejewa v British Gas Trading Ltd and anor EAT 0347/14).

### **The evidence and the submissions of the parties**

19. The Claimant's submissions could reasonably be summarised by his comment that "I'm going round in circles, I don't know what to do". The Claimant gave evidence under oath in relation to what he had done in relation to the Unless Order. In his evidence and submissions the Claimant:

- a. Accepted that the only communication he had sent to the Tribunal as a result of the Unless Order was the email of 7 June 2019;
- b. Accepted that he had not therefore explained why he had not complied with order 2 of the orders of Employment Judge Camp's or orders 5.2 and 5.3 of the orders of Employment Judge Moore;
- c. Said he had told the Tribunal in his email of 7 June 2019 that he did not know what to do about medical evidence;

- d. Explained that he had recently requested his medical records from his GP via a “data access request”;
- e. Explained that he did not understand why he was having to obtain or provide his medical records to the Respondent;
- f. Explained that the previous 12 months had been the “worst year” of his life. His best friend had killed herself. There were days when he had struggled to get out of bed or have a shower. He had not always read all his emails or replied to them although he thought he had generally dealt with emails relevant to the case. He had been prescribed sertraline but it had not worked for him so he had stopped taking it. He had had some counselling, but that had not helped either. He had found it difficult to follow what the counsellor had been saying. He had recent been prescribed hearing aids (which he was wearing at the Hearing);
- g. Overall, since the Claim had begun, he had been ill and had not understood what was required of him. He had not been able to attend the Preliminary Hearing before Employment Judge Blackwell on 31 May 2018 as a result of his friend’s death. He believed that fairness required that the Unless Order be set aside if his claim had been struck out.

20. Ms Tunnicliff chose not to cross-examine the Claimant on his oral evidence. Her submissions were short and to the point and may reasonably be summarised as follows:

- a. The Claimant had not complied with the Tribunal’s orders and that was what had led to the Claim being struck out as a result of the Unless Order.
- b. In light of the Claimant’s history of non-compliance, there was good reason that he might not comply with orders in the future either if the Unless Order were set aside.

### **Findings and conclusions in relation to the Unless Order**

*Has the Claim been struck out by the Unless Order?*

- 21. The Unless Order as set out at paragraph 13 above had three parts to it. The Claimant’s email of 7 June 2019 included information about why the Claimant had not attended the preliminary hearing before Employment Judge Blackwell on 31 May 2019. It explained that he had not attended because of the death of his friend whose funeral had been on 3 June 2019. The Claimant had therefore complied with order a. made by Employment Judge Blackwell.
- 22. The Claimant did not however in that email explain why he had not complied with order 2 of Employment Judge Camp of 11 February or orders 5.2 and 5.3 of Employment Judge Moore. The Claimant accepts that he sent no other communication to the Tribunal on or before 14 June 2019 (the deadline for compliance with the Unless Order). He did not therefore comply with orders b. and c. made by Employment Judge Blackwell. Consequently the Claim has been struck out by the Unless Order.

*Should the Unless Order be set aside*

- 23. The Claim was struck out not because the Claimant had failed to comply with the orders made by Employment Judge Moore and Employment Judge Camp but because he had failed to inform the Tribunal by 14 June 2019 why he had not complied with these orders.
- 24. The Claimant did not make his application for the Unless Order to be set aside within the 14 days specified by Rule 38(2). However, I have a discretion to extend that time limit pursuant to Rule 5 of the Employment Tribunals Rules of Procedure, and I extend the

time limit to the date of the Hearing. That is an extension of just over three months. I have exercised my discretion to extend time in this way taking account of the overriding objective set out in Rule 2 of the Employment Tribunals Rules of Procedure and taking into account: (1) the Claimant's mental ill health; (2) the fact that the Claimant is not (and has not been) represented in these proceedings; (3) the fact that I find that the Claimant has become significantly confused as to what was required of him in these proceedings and simply did not know what to do. This is reflected in his email of 12 June 2019; (4) the fact that such confusion has since the Unless Order been contributed to by correspondence sent to the Claimant by the Tribunal. In particular, on 13 June 2019 the Tribunal wrote to the Claimant stating that there would be an attended Preliminary Hearing to discuss whether all or part of his claim should be struck out on the grounds that it had no reasonable prospect of success. There was no suggestion in that letter that the Claim might be struck out before such hearing as a result of the Unless Order. The correspondence gave the Claimant the impression that outstanding matters would be dealt with at an attended Preliminary Hearing.

25. I find that the factual reasons for the Claimant not informing the Tribunal why he had failed to comply with the orders of Employment Judge Moore and Employment Judge Camp and so failing to comply with the Unless Order were as follows:

- a. The Claimant is unrepresented and wears hearing aids. The three previous Preliminary Hearings were all by telephone and not in person. I find that the Claimant has in these circumstances found it difficult to understand what was required of him in order to pursue his claim (and that indeed the Employment Judges have found it difficult to understand the Claimant, reflected in Employment Judge Camp's comment that he "may not have fully and accurately understood the claimant's case"). I find that generally he has not understood the case management orders made;
- b. Further, the case management orders made by Employment Judge Moore requiring the Claimant to provide copies of his medical records to the Respondent and, also, to prepare a witness statement as set out above, were not discussed or explained to the Claimant during the Preliminary Hearing last year. I find that the Claimant never understood what they required;
- c. A very close friend of the Claimant died on 3 May 2019 and her burial took place on 3 June 2019. I find that the Claimant suffers from poor mental health and this was exacerbated in the period from his friend's death up to and including the date for compliance with the Unless Order. I find his friend's death resulted in him not attending the Preliminary Hearing before Employment Judge Blackwell and being less able than normal to deal with his affairs generally during the period when he should have complied with the Unless Order;
- d. The Claimant did not pay sufficiently close attention to the terms of the Unless Order. He thought that it was sufficient for him to explain his non-attendance at the Preliminary Hearing on 31 May 2019 and this is what he did. The attention he paid to the details of the Unless Order was affected by Claimant's poor mental health exacerbated at the relevant time as set out above but in any event he did not understand its contents in light of his lack of understanding generally of what was required of him;
- e. In summary, therefore, the reasons for the failure to comply were that the Claimant, who is unrepresented, did not understand the case management orders made (particularly those relating to the issue of disability) and was suffering from poor mental health, exacerbated by the death of the friend just around the time he had to comply with the Unless Order.

26. I turn now to the question of whether it is in the interests of justice to set aside the Unless Order. I have taken account of factors including the following:

- a. The factual reasons for his failure to comply as set out above do not reflect culpable behaviour on the part of the Claimant. Of course he could have been more proactive in establishing what the orders required of him, but I find that his failure to be more proactive is for the purposes of an analysis of what the interests of justice require neutralised by his poor mental health;
  - b. The Unless Order did not strike out the Claim because of the failure to comply with the orders of Employment Judge Moore and Employment Judge Camp. Rather it struck it out because of the Claimant's failure to explain why he had not complied with their orders. I find that the seriousness and significance of this default is consequently limited;
  - c. I find that the prejudice to the Respondent if the Unless Order is set aside is very limited. It was not suggested in submissions that the Respondent will face any particular difficulties in defending the Claim as a result of the delay in it reaching a final hearing or that the delay will in any particular way make it more difficult for it to organise its evidence;
  - d. I find that a fair trial was still possible when the Unless Order struck out the Claim (and also as at the date of the Hearing). The issues and evidence in this case are not complicated. Indeed, the Respondent did not argue at the Hearing that a fair hearing was no longer possible.
27. Taking matters in the round, I conclude that it is in the interests of justice for the Unless Order striking out the Claim to be set aside. In reaching this conclusion I have given considerable weight to the fact that I find that the Claimant has never understood what the Tribunal required of him (in all the circumstances it would have been much better if the previous Preliminary Hearings had been in person and not by telephone) and that this has been a major factor in him failing to comply with the terms of the Unless Order during a period when he was suffering from mental ill health. (There is of course no implicit criticism of any of the Employment Judges who have previously conducted preliminary hearings in this conclusion – they would each have simply conducted the relevant hearing by telephone because it had been listed as a telephone hearing.)
28. The Claimant should note, however, that the fact that I have found he suffered from mental ill health during the relevant period does not amount to a finding that he was or is a person with a disability as defined by the Equality Act 2010.
29. The Unless Order striking out the Claim is therefore set aside. I have made further case management orders separately.

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Employment Judge Evans

Date: 28 October 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE