EMPLOYMENT TRIBUNALS

Claimant: **Mr. M. Ahmed**

Respondent: **KDDI Europe Limited**

RECORD OF A PRELIMINARY HEARING

Heard at: **East London Hearing Centre (in private; by Cloud Video Platform)**

On: **10 September 2024**

Before: **Tribunal Judge Ross acting as Employment Judge**

Appearances
For the Claimant: Mr. Ahmed in person
For the Respondent: Mr. L. Davidson, Counsel

CASE MANAGEMENT ORDERS

1. The Claimant had failed to comply with the Unless Order contained at Paragraph 14 of the case management order made on 14 March 2024.

2. The Claimant's application for relief from the sanction is dismissed.

3. The Respondent's application for costs is dismissed.

4. The full merits hearing listed on 15, 16, 17, 18 and 22 October 2024 is vacated.

Useful information

5. All judgments (apart for judgments under Rule 52) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the Claimants and Respondents.

6. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here: *https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/*

7. The Employment Tribunals Rules of Procedure are here: *https://www.gov.uk/government/publications/employment-tribunal-procedure-rules*

8. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: *https://www.gov.uk/appeal-employment-appeal-tribunal*

9. Employment Tribunals (England and Wales) Presidential Guidance on remote and in-person hearings is here:

   https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PG-Remote-and-In-Person-Hearings-1.pdf

WRITTEN REASONS

The Proceedings

10. The background facts and the issues in this case are set out in the Case Summaries prepared after the Preliminary Hearings on 15 May 2023 and 14 March 2024, and in the updated Skeleton Argument of the Respondent. For the purpose of these Reasons, the following chronology is sufficient.

11. The ET1 Claim form was presented on 21 October 2022.

12. On 10 February 2023, by letter, Employment Judge Massarella directed that the Claimant provide further particulars of the complaints. The Claimant did not comply with the direction.

13. On 15 May 2023, at a Preliminary Hearing (private), Employment Judge Buchanan attempted to produce a list of issues with the assistance of the parties, and made case management orders up to the final hearing. This included an order for witness statement evidence to be served by 27 November 2023. This included that the statements should have paragraph numbers and should be signed, and that the Claimant's statement should address the facts in issue and provide evidence of the remedy sought.

14. Furthermore, at this hearing, the Claimant volunteered to provide disclosure in the form of bank statements, which were requested by the Respondent. The Respondent's case was that the Claimant was likely to be working in a second job, which they alleged to be a breach of the employment contract. In fact, the Claimant failed to provide this documentary evidence.

15. On the 2 October 2023, the Claimant filed various documents with the Tribunal by email. This included an untitled document giving his account of certain events and anonymous witness testimony (which consisted of two tickbox forms). It also indicated that he did not consider that he needed to give disclosure in advance of the final hearing.

16. The Respondent applied for an unless order and an order for specific disclosure.

17. On 14 March 2024, at a further Preliminary Hearing (private), Employment Judge Brannan drew up the the final List of Issues. In addition, he made the following orders:

    17.1. An unless order requiring the witness statement to be provided by 10 May 2024, and which provided the sanction of dismissal;

    17.2. An order requiring the Claimant to disclose the relevant bank statements by 28 March 2024 (having failed to do so voluntarily as he had agreed).

18. On 28 March 2024, the Claimant failed to provide the required bank statements.

19. On 29 March 2024, an email from Claimant to the Tribunal and the Respondent stated that he was unable to continue with his Claim. The Respondent followed up with emails to check if he was withdrawing the Claim.

20. On 22 April 2024, the Respondent made a further application for an unless order, but this time in respect of the bank statements sought. This application was superceded by events.

21. By 10 May 2024, the Claimant had not filed or served any witness statement.

22. On 13 May 2024, the Respondent informed the Tribunal that the Claim had been dismissed because of a failure to comply with Unless Order and applied for the case to be listed for a costs application.

23. Despite the letters of the Tribunal and the Respondent up to that point, the Claimant had not responded to say whether he was proposing to withdraw his claim.

24. On 24 June 2024, at the direction of Employment Judge Crosfill, it was ordered that the Claimant was to confirm whether he intended to withdraw or whether the had served his witness statements; and if not, whether he intended to apply for relief from sanction pursuant to Rule 38(2) of the ET Rules of Procedure.

25. On 24 June 2024, by his response, the Claimant stated that he did file witness statement evidence but that it was anonymous; and he applied for relief from sanction pursuant to Rule 38(2) Rules of Procedure, if required. He also proposed to bring a claim in the High Court.

26. Each party filed a Skeleton Argument for this Preliminary Hearing. The Respondent's Skeleton Argument was updated to respond to the allegations in the application for relief from sanction, which, in particular, alleged that the case management order of Employment Judge Brannan was tainted by bias. The Respondent prepared a hearing bundle, which was relied upon at the hearing.

The Issues

27. From the Skeleton Arguments provided by the parties for this hearing and from the documents on the file, the issues that the Tribunal had to determine at this Preliminary Hearing were as follows:

    (1) Whether the Claimant had complied with the "unless order" made on 14 March 2024;

    (2) If not, whether the Claimant's application for relief from sanction under Rule 38(2) should be allowed;

    (3) Whether the Claimant should be ordered to pay all or part of the costs claimed by the Respondent.

Relevant Law

28. Rule 2 of the Employment Tribunal Rules of Procedure 2013 as amended ("ET Rules") provides:

    Overriding objective
    2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
    (a) ensuring that the parties are on an equal footing;
    (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
    (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
    (d) avoiding delay, so far as compatible with proper consideration of the issues; and
    (e) saving expense.
    A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

29. Rule 38 provides (so far as is relevant):
    Unless orders

    38.—(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.

30. In *Wentworth-Wood v Maritime Transport Ltd* (unreported) 3 October 2016 Judge David Richardson considered the potential judicial decisions that may be made in respect of an unless order:

"4. Rule 38 clarifies employment tribunal procedure concerning unless orders. The employment tribunal, usually the employment judge alone, is potentially involved at three stages, each involving different legal tests.
"5. Firstly, there is the decision whether to impose an unless order and if so in what terms …

"6. Secondly, there is the decision to give notice under rule 38(1) … The decision to give notice simply requires the employment tribunal to form a view as to whether there has been material non-compliance with the order …

"7. Thirdly, if the party concerned applies under rule 38(2), the employment tribunal will decide whether it is in the interests of justice to set the order aside …

"8. At each of these stages there will be a decision for the purposes of section 21(1) of the Employment Tribunals Act 1996 ; so there may be an appeal to the Employment Appeal Tribunal on a question of law. They are, however, separate decisions taken at different times under different legal criteria. An appeal against one is not an appeal against another; and the time for lodging appeals will run from different dates. This point must be kept carefully in mind by any party considering an appeal …"

31. In *Minnoch v InterserveFM Ltd* [2023] EAT 35; [2023] ICR 861, the EAT considered the authorities on the 3 stages identified by Richardson LJ: imposition of the sanction of the unless order; the notice required by r38(1); and the discretion to grant relief from sanctions. In particular, paragraphs 22, 25 and 29 are of relevance. The summary, expertly provided by Judge Tayler at paragraph 33, draws the threads together and is worth setting out in full:

"*Stage 1—making an unless order*
33.1 care should be taken in making an unless order because of the draconian consequence of material non-compliance—unless orders are not just another type of workaday case management order

33.2 it is rarely a good idea to convert a previous general case management order into an unless order—careful consideration should be given to whether it will be fit for purpose as an unless order

33.3 an unless order should be drafted so that it will be easy to determine whether there has, or has not, been material compliance

33.4 an unless order should be drafted so that the consequence of material non-compliance is clear—it need not necessarily result in the strike out of the entire

claim—an unless order can be drafted so that failure to comply with it, or part of it, results in part of the claim being struck out

33.5 although not specifically provided for by rule 38 of the ET Rules, an order could provide for a lesser sanction than strike out on non-compliance, such as a claimant being limited to reliance on the material set out in the claim form if additional information is not provided

33.6 if a party is required to do more than one thing by an unless order, careful thought should be given to the consequence of partial compliance—particular care should be taken before making an order that will result in the dismissal of all claims if there is anything that falls short of full material compliance with all parts of the order

Stage 2—giving notice of non-compliance

33.7 at this stage the employment tribunal is giving notice of whether there has been compliance—it is not concerned with revisiting the terms of the order

33.8 particularly if there has been some asserted attempt at compliance, careful thought should be given to whether an opportunity should be given for submissions, in writing or at a hearing, before the decision is taken

33.9 the question is whether there has been material compliance

33.10 the test is qualitative rather than quantitative

33.11 the approach should be facilitative rather than punitive

33.12 any ambiguity in the drafting of the order should be resolved in favour of the party who was required to comply

Stage 3—relief from sanction

33.13 this involves a broad assessment of what is in the interests of justice

33.14 the factors which may be material to that assessment will vary considerably according to the circumstances of the case

33.15 they generally include:

33.15.1 the reason for the default—in particular whether it was deliberate

33.15.2 the seriousness of the default

33.15.3 prejudice to the other party

33.1 whether a fair trial remains possible

33.16 each case will depend on its own facts."

32. Counsel's Skeleton Argument assumed that the Tribunal was to consider only the third stage at this Preliminary Hearing. But, in my judgment, the Tribunal was required to reach a decision at stage 2 (whether there had been material compliance) and, only if required, at stage 3 (whether relief from sanction should be granted).

Issue (1) Was there compliance with the unless order?

33. I have directed myself to the guidance in the above cases, particularly the helpful summary in Minnoch at Paragraph 33.

34. I have carefully considered Paragraphs 13-14 of the case management order made on 14 March 2024 by Employment Judge Brannan. These are not ambiguous. Paragraph 14 contains a clear unless order. Moreover, it is apparent from that order that the Judge explained to the Claimant the date by which a witness statement must be provided and the consequence of non-compliance.

35. I was informed by Counsel, and I accepted, that the documents at pp 117-118, 119, and 120 of the Bundle, were before Judge Brannan at the hearing on 14 March 2024. It is implicit in his case management orders that he had decided that these were not the witness statements from the Claimant; in other words, he concluded that the Claimant had not complied with the orders made on 15 May 2023 requiring the Claimant to serve and file witness statements by 27 November 2023.

36. I have concluded, taking account of all the evidence and submissions, that the Claimant failed to comply with the unless order made on 14 March 2024, because he failed to provide his own witness statement to either the Respondent or the Tribunal.

37. I agreed with Judge Brannan that the document at pages 117-118 did not materially comply with the case management order of 15 May 2023. This document was not a witness statement; and the order of May 2023 had set out the requirements for a witness statement. The document at pp117-118 was not in numbered paragraphs, it was not signed, it made no reference to remedy, and it did not set out in logical order the facts which the Claimant wanted to tell the Tribunal (that is, it did not set out his case on the factual matters in the final list of issues made at the hearing before Judge Brannan).

38. Moreover, at the hearing on 14 March 2024, Judge Brannan had explained to the Claimant what was required for his witness statement and when it must be provided.

39. At the hearing today, the Claimant admitted that he had filed no witness statement since the hearing on 14 March 2024.

40. I concluded that there had been non-compliance with the unless order, and the sanction of dismissal had taken effect.

Issue (2) Whether relief from sanction should be granted?

41. I directed myself to the guidance at Paragraph 33.13 – 33.16 in *Minnoch*, set out above. I reminded myself that in deciding whether to granting the application for relief made under Rule 38(2) of the ET Rules of Procedure, I need to make a broad assessment of what is in the interests of justice.

42. Generally, the interests of justice require a fair hearing of each parties' case, and an opportunity for each party to put their case.

43. The factors that weighed in the Claimant's favour were:

    44.1. Unless relief from sanction was ordered, the Claim and all the complaints within it remain dismissed and the Claimant has no chance to put his evidence before the Tribunal. This is the most penal of sanctions. However, this is one factor but it cannot be a trump card for the Claimant, because otherwise there would be little point in making unless orders and the requirement in Rule 38(2) that the Tribunal must consider the interests of justice on an application for relief.

    44.2. The Claimant did provide some factual evidence relevant to some issues in the document at pages 117-118.

    44.3. Some reasons for his default were given in the Claimant's Skeleton Argument (although, as I explained, these were not good reasons even if genuinely held).

45. On this issue, I preferred the Respondent's arguments. I decided to refuse the application for relief. Although I took into consideration the Claimant's failure to comply with the unless order, this was just one factor considered and it had limited weight. Other factors I weighed in favour of refusal were as follows:

    45.1. The reasons for default alleged were weak:

        45.1.1. Alleged bias by Employment Judge Brannan was raised. However, the orders of EJ Brannan had never been challenged or appealed (whether on this basis or any other). Moreover, Judge Brannan had explained at the outset of the hearing his previous employment at the Respondent's solicitors, and the Claimant had consented to him continuing to hear the case at that Preliminary Hearing.

        45.1.2. The Claimant alleged that his mental health had been a factor and that he had been unwell. He relied on screen shots of medication sent to the Tribunal on 2 October 2023. These showed that he was taking Sertraline 100mg, which is an anti-depressant, and that he had taken it for two years. However, he adduced no medical evidence to explain why his mental impairment or the medication prescribed to improve depressive symptoms had made him unable to file a witness statement after 14 March 24 and before 10 May 2024, a period of 8 weeks.

45.2. I noted the relative seriousness of the default. The case management order of May 2023 provided for witness statement evidence by November 2023; and this time limit was then extended to 10 May 2024, with Judge Brannan providing an explanation of what the Claimant was required to do.

45.3. The Claimant was still in default, and had not produced a witness statement. The trial was due to commence in about 5 weeks.

45.4. The failure to provide a witness statement was likely to have caused prejudice to the Respondent. There cannot be a fair hearing unless the case of each party is set out in witness statement evidence. This is particularly so in this case, where the claim form contains very limited detail (even if more detail is particularised in the list of issues). The documents provided on 2 October 2023 contained little detail, and gave no detail about some of the complaints in List of Issues such as those concerning the Claimant's grievance.

45.5. The Claimant had shown a pattern of non-compliance with earlier directions and orders and a lack of co-op with the Tribunal and the Respondent; there was a consistent failure by the Claimant to work to further the overriding objective and to be facilitative. One example was his agreement to provide bank statements and then his failure to do so, including a failure to respond to requests by the Respondent's solicitor and a failure to comply with the order for disclosure.

45.6. I noted the submissions made by the Claimant at this hearing. I recognised that it is stressful for any litigant in person to be at a hearing, even if it was a hearing by video; and I recognised that English was not the Claimant's first language. But at this hearing, the Claimant demonstrated a limited ability to co-operate and to listen to the Tribunal. Amongst other statements, he threatened that he would go to the High Court and complained could not call anonymous witnesses (which he should have known was incorrect – see the case summary provided by Judge Brannan).

45.7. Given the history of this Claim, it pointed to it being unlikely that the Claimant would comply with a fresh case management order to file a witness statement.

45.8. If relief were granted, it was likely that the final hearing would need to be adjourned, if the Claimant continued to fail to comply with the order to provide a witness statement; and there were other parties in the list waiting for hearing date who were likely to be affected if Tribunal resources and time were wasted in this way.

45.9. The Respondent was entitled to finality in litigation. This meant finality to the costs, time, and inconvenience brought about by defending this Claim.

Issue (3) The Application for Costs

44. The Respondent's application for costs was dismissed for reasons given orally at the hearing.

Summary

45. The Claim has been dismissed and relief from sanction has been refused. This brings the Claim to an end. The full merits hearing is no longer required. The hearing listed to commence on 15 October 2024 is vacated and the parties should not attend.

46. The written reasons set out above were provided at the request of the Claimant. Also, he was informed that any appeal should be made to the Employment Appeal Tribunal, and informed that he should seek advice and make inquiries about the procedure and the applicable time limit for presenting the appeal.

Tribunal Judge Ross acting as an Employment Judge
Dated: 11 September 2024