

THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REF: 9763/19IT

CLAIMANT: David Hale

RESPONDENT: The Management Committee and the Trustees for the time
being of Morning Star House

JUDGMENT ON A PRELIMINARY HEARING

The judgment of the tribunal, which was announced at the conclusion of the Preliminary Hearing is that the claimant's claim is struck out because of his failure to comply with the Unless Order issued by the Tribunal on 13 December 2019. The tribunal's reasons are now given and set out below in this judgment.

CONSTITUTION OF TRIBUNAL

Employment Judge (sitting alone): Employment Judge Gamble

APPEARANCES:

The claimant was did not appear and was not represented.

The respondent was represented by Mr O Friel, Barrister at Law, instructed by Worthingtons Solicitors.

BACKGROUND

1. The claimant presented a claim of unfair dismissal, a claim for notice pay and a claim for breach of contract to the tribunal on 19 May 2019, following his dismissal on 20 February 2019. The claimant's claim was resisted by the respondent in a response which was presented to the tribunal on 14 August 2019.
2. The respondent's representative served Notices entitled "Request for Additional Information" and "Request for Discovery" on the claimant on 26 September 2019. The Notices required a response within 21 days (i.e. by 17 October 2019) otherwise the respondent's representative indicated that she would apply to the tribunal for an Order compelling replies and discovery. The

claimant did not respond to the respondent's representative's correspondence serving the Notices.

3. The claim was listed before me for a Case Management Discussion by telephone conference on 10 October 2019. The claimant did not respond when contacted on the telephone number he provided to the tribunal office and therefore did not part in that hearing. At that hearing, I was informed by the respondent's representative that she had served Notices on 26 September 2019 and that the claimant had not replied or served his own Notices. I made an order that the claimant was to serve any Notice seeking Discovery and/or Additional Information by 25 October 2019 and that each party was to respond to any Notice they had received by 8 November 2019.
4. I also ordered the parties to provide their witness statements by 13 December 2019 and I listed the case for hearing from 28 to 31 of January 2020.
5. The claimant did not comply with the Order compelling him to reply to the Notices which had been served on him. The respondent's representative made an application for an Unless Order on 27 November 2019, having informed the claimant in writing of her intention to do so if his replies and discovery were not received by close of business on 18 November 2019. The respondent's representative submitted that the information and documentation was required for the respondent to adequately prepare for the hearing and for the fair disposal of the case. The application was copied to the claimant as required by Rule 11(4) of the Industrial Tribunal Rules 2005 and he was informed of his right to set out his grounds of objection in writing to the office of the Industrial Tribunals within 7 days.
6. No correspondence was received from the claimant by the office of Industrial Tribunals in respect of the respondent's representative's application for an Unless Order.
7. A Case Management Discussion was arranged to consider the respondent's application for an Unless Order on 12 December 2019. This hearing which was listed before me, was conducted by telephone conference and the claimant did not respond when contacted on the telephone number provided to the tribunal office and therefore did not take part in that hearing. I was informed by the respondent's representative that she had received no communication from the claimant or objection from the claimant. Having considered the application for an Unless Order, and having taken account of the proximity of the scheduled hearing dates and that the claimant's witness statement was due on the date of that Case Management Discussion, I was satisfied that an Unless Order should issue to the claimant in the terms set out below.
8. An Unless Order was issued to the claimant on 13 December 2019, informing him that UNLESS he replied in writing to the tribunal office and the respondent's representative by 31 December 2019 providing:
 - (i) a full and satisfactory explanation for his failure to take part in the Case

Management Discussion on 10 October 2019;

- (ii) a full and satisfactory explanation for his failure to take part in the Case Management Discussion on 12 December 2019;
- (iii) full and complete replies to the respondent's Notice for Additional Information (a copy of which was enclosed);
- (iv) his witness statement and the witness statement of any other witness who would attend in support of his case;

his claim would be struck out without further notice to him.

9. That order was not complied with in any way by 31 December 2019 and the claimant did not seek an extension to comply with that order or to vary it or set it aside. Accordingly, as a result of the claimant's failure to comply with the Unless Order, the sanction in that Unless Order, which was the striking out of his claim, took effect.
10. On 2 January 2020, the respondent's representative requested that the claimant's claim be struck out without notice to him.
11. On 8 January 2020 the claimant sent a letter to the tribunal office informing the tribunal that he had been very unwell and he expressed a hope that the tribunal would allow him to continue with his case. He indicated that he intended to serve the outstanding documents in the course of the next seven days. Both items of correspondence were referred to me on 10 January 2020, before a dismissal Decision had been drawn up or issued. A further Case Management Discussion was conducted in person, before me, on 22 January 2020, to consider the correspondence which had been received. That Case Management Discussion was attended by the claimant and the respondent's representative. The claimant confirmed that his correspondence of 8 January 2020 could be shared with the respondent's representative and it was then provided to the respondent's representative. I confirmed at that hearing that I was treating the claimant's correspondence of 8 January 2020 as an application for relief against sanction. I ordered the claimant to provide details of his illness and the treatment he had received by 21 February 2020. At that hearing, the claimant informed me that he anticipated being in a position to comply with the outstanding Orders in the next two weeks. He was informed that, as he was seeking relief against sanction, it was in his interests to comply with the outstanding Orders and to provide medical evidence in support of his application as soon as possible. I arranged a further Case Management Discussion for 27 February 2020 to consider the arranging of a Pre Hearing Review, if the claimant's application was still opposed, once the medical evidence had been provided.
12. The Industrial Tribunals and Fair Employment Tribunal Rules 2020 came in to force on 27 January 2020. Rule 33 provides:

33.—(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 parties shall be given written notice 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.

13. On 21 February 2020, the claimant forwarded what he considered to be relevant extracts from his GP notes and records.
14. A Case Management Preliminary Hearing was conducted by me on 27 February 2020 by telephone conference. The claimant and the respondent's representative attended that Case Management Preliminary Hearing. The extracts from claimant's medical notes and records, which had been provided by the claimant, were considered at that hearing. Those extracts related to the period April to June 2019 and confirmed that he was discharged on 2 August 2019. Those extracts did not relate to the period of non-compliance with the Unless Order. The claimant informed me at that hearing that his difficulties were genuine and ongoing and he informed me of matters that were indicative of a crisis in his health. I listed a Preliminary Hearing to consider whether the claimant's claim should be struck out for non-compliance with the Unless Order or whether the Unless Order should be set aside or varied at 10 am on 20 April 2020. The tribunal was mindful of its obligations pursuant to ***Galo v Bombardier Aerospace [2016] NICA 25*** and directed the claimant to liaise with his GP and notify the tribunal and the respondent's representative if there was any issue regarding his fitness to attend that Preliminary Hearing and/or whether any reasonable adjustments or special arrangements were required. The claimant was informed that if he was pursuing an application in this regard, his application should be made in writing, and set out what measures he was seeking, supported by appropriate medical evidence, by 27 March 2020. The claimant informed me that his witness statement was 80% complete. He was informed that it was in his interests to complete and serve his witness statement and that if he was unable to serve the witness statement, he should consider serving as much of his witness statement as he had completed in advance of the Preliminary Hearing.
15. Due to the pandemic, and the subsequent closure of the tribunals' building on 27 March 2020, that hearing did not take place.
16. Following the reopening of the tribunals' building, a Review Case Management Preliminary Hearing was conducted before me by telephone conference on 22 September 2020. The claimant and the respondent's representative attended that hearing. The claimant informed me that he had still not served his witness statement. He informed me that he had obtained further medical evidence but had not forwarded it to the tribunal or to the respondent's representative. He asserted that he was unfit to attend the

Preliminary Hearing to consider the strike out of his claim and that his condition had deteriorated over the period of lockdown. He was asked to provide medical evidence from his GP or other medical professional confirming his unfitness and to attend and to provide an opinion as to when he would be fit to attend the hearing. He agreed to provide the further medical evidence which he had obtained to the tribunal and the respondent's representative. A further Case Management Preliminary Hearing was arranged for 3 November 2020 to consider any further medical information provided by the claimant.

17. On 2 November 2020, the respondent's representative emailed the tribunal office, copied to the claimant, to confirm that the claimant had still not provided Replies or his witness statement, in continuing breach of the Unless Order and that he had not served updated medical evidence to confirm his ongoing health difficulties and reiterated the respondent's application for strike out of the claimant's claim.
18. At 03:25 on 3 November 2020, the claimant sent an email to the tribunal office enclosing the items recorded at paragraphs 3 to 5 of the Record of Proceedings in respect of the Case Management Preliminary Hearing conducted on 3 November 2020. This further information did not confirm the claimant's diagnosis, his unfitness or provide details of when he would be fit to attend the Preliminary Hearing to consider the strike out of his claim. The email provided an update on the claimant's circumstances from the claimant's perspective and requested that the tribunal "put the case back until I'm in an area and position where I can safely continue this case."
19. A Case Management Preliminary Hearing took place by telephone conference on 3 November 2020. The claimant and the respondent's representative took part in that hearing. Having had regard to the principles in *Galo*, I arranged a further Preliminary Hearing after the elapse of 12 weeks to allow time for the claimant's health to improve. The claimant agreed that he would approach those who were treating him to obtain written confirmation of whether he was fit to attend a hearing and if he was not currently fit, when he was likely to be fit to attend a hearing. I considered that, if the matter was to proceed, a 'Ground Rules' hearing might be necessary and the claimant was again given the opportunity to discuss this with medical professionals and inform the tribunal if he was seeking reasonable adjustments. It was agreed that a further hearing would be arranged after 12 weeks and that this hearing would take place by telephone conference as the claimant indicated that he would find this easier at the present time.
20. The tribunals' building closed for a second time on 19 January 2021 to allow the completion of an updated Risk Assessment. A further Case Management Preliminary Hearing was arranged for 5 February 2021. It did not proceed as the claimant did not join the WebEx hearing at the scheduled time, after the WebEx invitation was sent to him. I was not satisfied that it had been established that the claimant had a suitable connection and equipment to allow him to participate by WebEx and I took account of the fact that it had previously been agreed with the claimant that the Case Management

Preliminary Hearing would take place by telephone conference. Accordingly, I directed the Administrative Secretariat to contact the claimant to ascertain his willingness and/or ability to participate in a WebEx hearing.

21. The Administrative Secretariat contacted the claimant, at my direction, and he confirmed that he was able to participate in a WebEx hearing.
22. On 20 April 2021, the respondent's representative emailed the tribunal, copied to the claimant, requesting that a Preliminary Hearing be convened in this case to consider the way forward, in particular the respondent's application for strike out of the claimant's claim on the basis of:
 - (i) the claimant's continued failure to comply with Unless Orders (sic) issued by the tribunal in December 2019;
 - (ii) the claimant's failure to provide updated medical evidence as previously ordered by the tribunal; and/or
 - (iii) the claimant's failure to actively pursue this case.

The respondent's representative contended that the application should proceed to be determined because a number of the respondent's witnesses were elderly and at least one had health difficulties and contending that the application was in accordance with the overriding objective and in achieving compliance with Article 6 of the ECHR.

23. A Case Management Preliminary Hearing was conducted by WebEx on 17 May 2021. The claimant did not join that hearing. The respondent's representative was in attendance at that hearing. I listed this Preliminary Hearing to consider whether the claimant's claim should be struck out for his non-compliance with the Unless Order which issued to the claimant on 13 December 2019 or whether the Unless Order should be varied or set aside.
24. This Preliminary Hearing was listed to commence at 10am. I delayed commencing the hearing until 10:15am, in case the claimant had been delayed. The claimant did not attend the hearing and no correspondence was received to explain his non-attendance. I am satisfied that the claimant had received notice of this hearing.

RELEVANT LAW

25. The Industrial Tribunals and Fair Employment Tribunal Rules provide:

Striking out

32.—(1) *At any stage of the proceedings, either on its own initiative or on the application of a party, a tribunal may strike out all or part of any claim or response on any of the following grounds—*

(a)...

(b)...

(c)for non-compliance with any of these Rules or with an order of the tribunal;

(d)that it has not been actively pursued;

(e)that the tribunal considers that it is no longer possible to have a fair hearing of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given the opportunity to make representations, either in writing or, if requested by the party or ordered by the tribunal, at a hearing.

(3) ...

Unless orders

33.—(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 parties shall be given written notice 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 will be as if no response had been presented, as set out in rule 19.

26. In ***Thind v Salvesen Logistics Ltd* UKEAT/0487/09** Underhill P, as he then was, set out the relevant factors to be considered by the tribunal in deciding whether to grant relief to a party in default of an order:

“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.”

THE ISSUE TO BE DETERMINED

27. The issue to be determined by the tribunal is whether the claimant's claim is struck out for his non-compliance with the Unless Order which issued to the claimant on 13 December 2019 or whether the Unless Order should be varied or set aside.

RESPONDENT'S SUBMISSIONS

28. Mr Friel informed the tribunal that, as at the date of this hearing, the claimant's witness statement had not been served and the outstanding replies had not been provided as required by the Unless Order.
29. Mr Friel, on behalf of the respondent, in reliance upon the authority of *Thind* above, submitted that:
- i. there was now a real prospect of forensic prejudice, as memories of the matters which were the subject of the claimant's claim would be fading and that this would affect the quality and reliability of the evidence;
 - ii. one of the respondent's witnesses is aged over 80, two of the respondent's witnesses are aged between 70 and 75, two of the respondent's witnesses are aged between 60 and 65;
 - iii. the respondent had been placed at a significant prejudice by the ongoing delay;
 - iv. the respondent had incurred considerable time and costs as this was now the ninth hearing in this matter;
 - v. the claimant had been put on firm notice of the effect of the Unless Order and of the listing of this hearing and had not engaged to comply with the Unless Order;
 - vi. no adequate reason for the default had been put forward by the claimant – in particular his asserted ill-health had not been substantiated with sufficient medical evidence for the relevant period;
 - vii. the claimant's default was very serious which had led to the granting of the Unless Order in the first place and he had still blatantly failed to comply with that order some 18 months later;
 - viii. the claimant had compounded his default with false promises when he had undertaken to provide documents within seven days (claimant's letter of 8 January 2020) and stated that he would be complying with outstanding orders within two weeks (Case Management Discussion dated 22 January 2020);
 - ix. Unless Orders are an important part of the tribunal's procedural armoury and they must be taken very seriously;
 - x. the ability to have a fair trial had been compromised by the ongoing delay;

xi. the claimant had failed to attend this Preliminary Hearing to make any positive case to support the setting aside or varying of the Unless Order; and

xii. when all factors are taken into account there was nothing to support the tribunal granting relief from the sanction of the Unless Order taking effect.

30. No positive case for the setting aside of the Unless Order was before the tribunal.

DECISION AND REASONS

31. Having carefully considered the factual circumstances set out above, the relevant statutory provisions, the relevant factors set out in ***Thind*** and the submissions made on behalf of the respondents, I confirm that the claimant's claim is struck out in light of the claimant's failure to comply with the Unless Order, notwithstanding the considerable latitude that has been shown to the claimant by this tribunal. I am satisfied that it is right, having taken account of the interests of justice, the overriding objective and the factors set out in ***Thind*** above, that the Unless Order issued to the claimant on 13 December 2019 is not varied or set aside. I am satisfied that the claimant has been placed squarely on notice, since 13 December 2019, of the importance of complying with that Order and the consequences if he did not do so. The ongoing default by the claimant is very serious and is material. I consider that the respondents have been prejudiced by the ongoing delay and the expense of representation at a number of hearings, which would not have been necessary if the claimant had complied with the orders of the tribunal. I am satisfied that in the absence of compliance with the Unless Order, through the provision of the claimant's replies and witness statement, the respondent cannot receive a fair hearing. The claimant's claim is therefore struck out.

Employment Judge:

Date and place of hearing: 17 June 2019, Adelaide House, Belfast.

Date decision recorded in register and issued to parties: