JB1

EMPLOYMENT TRIBUNALS

Claimant: Mr S Guedj

Respondent: Societe Generale (London Branch)

Heard at: London Central **On:** 2 February 2017

Before: Employment Judge Goodman

Representation
Claimant: Miss C Darwin, Counsel
Respondent: Mr E Capewell, Counsel

JUDGMENT having been sent to the parties on 2 February 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. Today's Preliminary Hearing was listed because it was clear from correspondence and requests for unless orders that there was concern about compliance with the timetable.

2. This is a claim for unfair dismissal both under Section 98 of the Employment Rights Act 1996 and in respect of allegations of whistleblowing.

3. The respondent has conceded liability on the unfair dismissal claim, but the whistleblowing case remains live and is listed for hearing on 15-23 May.

4. At the outset of this case, automatic directions were given by letter. At the first Preliminary Hearing on 16 September the case management timetable was reset. It is of note that at that stage the schedule of loss had not been served pursuant to earlier order.

5. There was then a further Preliminary Hearing on 7 November. The matter today has been the extent to which orders made at that were not complied with until after delay, some as late as yesterday. Today the decisions the Tribunals is asked by the Respondent to make are (1) whether, in respect of a new timetable of directions agreed by the parties' counsel this morning, I should attach to all those orders an unless provision, so as to strike out the claim without further order if the claimant does not comply with any of them on time, and (2) an order of costs to be paid by the claimant to the respondent on the basis that the claimant's conduct has been unreasonable.

6. The conduct of the claim to date has been reviewed in detail today, using a bundle of the inter partes correspondence. Summarising, the first item complained of was delay in serving the schedule of Loss: it was not served as ordered under postal directions. There was then an order at the first Preliminary Hearing on 16 September that it should be served by 7 October. It was not in fact served until 16 October, which was by then ten days late on the reset timetable.

7. Even then, the respondent complains, it was only very recently that the claimant also provided the documents relating to mitigation of loss and supporting the loss claimed by schedule which were the subject of the initial order; even after the schedule was served on 16 October they had to spend weeks chasing before they were sent.

8. The next focus of dissatisfaction on the part of the respondent was in respect for a request for further and better particulars. This was served towards the end of August. Some promises made by the claimant that they would comply; an order was made on 16 September (I acknowledge that until an order was made the claimant had no obligation to respond to them, but he did have notice of the questions and time to get his client's

instructions and did not object that the information was not necessary). The order was that they do so by 7 October, but these had to be chased again and again. A further order in respect of further particulars was made at the hearing before Judge Auerbach on 7 November. This focused more narrowly on whether the claimant had identified the grounds for his reasonable belief that there had been a breach of legal obligation in respect of the disclosures. The order made was that he give the gist of that, and the respondent's complaint is that although he purported to do so in December, there was no substantive compliance until 27 January, and even that is brief and devoid of detail, though the Respondent accepts that it is now compliant.

9. The third matter of which they complain is in respect of the list of issues. At the hearing before Judge Glennie in September, there were alternative and competing lists, but it looked as if the parties might agree them, and they were ordered to send the Tribunal an agreed list by 31 October. It is clear from the correspondence that the respondent could get nowhere with the claimant's solicitor by that date; the claimant seemed to attach no urgency to it at all.

10. Without reciting lists of all dates there is a clear picture of the respondent trying to keep case preparation up to time, sometimes by setting its own deadlines when things ought to be done, when they had gone over the ordered time, then when they are not done, by saying that unless it was done by a further date they will write to the Tribunal seeking an unless order. On three occasions now the Respondent has had to escalate a matter to the point of writing a letter to the Tribunal asking for an unless order, at which point there is then some compliance by the Claimant.

Unless Orders

11. I deal first with the application that I should attach unless orders to the future case management directions.

12. The claimant has represented that I do not have the power to do this because it is too general, that there has to be detail given of what is breached, and that a blanket application would leave the claimant having to

apply for relief from sanction however small the default; also it would be unfair to make the penalty unilateral – it should apply to the respondent.

13. The respondent bases its case on the overall progress of the case to date, where in their representation everything has been done late, nothing has been done except under threat of an unless order, and then at the last minute.

14. It seems to me that this is not a case where there should be a prospective unless order. That is fraught with difficulty, because the claimant may meet genuine difficulty in complying with an order, and it leaves untouched the position of what should happen if the respondent is in part responsible for some lack of compliance. Striking out is a last resort where it is still possible to have a fair trial. However it should be made clear to the parties that it is established to this Tribunal that the claimant's solicitors, for whatever reason – and save for the consecutive sickness of unspecified length in December no reasons for delays have been given - have been very slow to comply, have on a number of occasions said that they will comply by a particular day and then have not, and there was even an episode where the respondent's solicitor sought to discuss case progress on the telephone with the claimant's solicitor, even then after booking a time, and being put off on several occasions, was still not able to have the discussion. That reflects behaviour that is hard to understand and seems almost deliberately obstructive. The claimant's solicitors should be aware that if there is any further want of compliance with the timetable which they have now agreed it is likely, unless there is a very good reason indeed, that the claims will be struck out for want of compliance. In making such an order the overall prejudice to each party and whether it was still possible to have a fair hearing will have to be considered. I simply point out to the parties, but particularly to the claimant's solicitor, that the timetable is now very tight, in that there is to be a hearing in May, and the parties have not yet begun the process of disclosure (save in relation to quantum) and that any further want of timely compliance jeopardises proper preparation for hearing and will be viewed very strictly.

The Application for Costs

15. The Employment Tribunal Rules 2013 provide:

> "76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a)a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b)any claim or response had no reasonable prospect of success.
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party……
>
> 77. A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

16. The respondent argues that the claimant has been substantially in want of compliance, that as a result they have been put to substantial additional expense, that there has been a long pattern of such behaviour, and the excuses offered are inadequate.

17. In a letter to the Tribunal, the claimant's solicitor said that he had some difficulty taking instructions, because the claimant was now travelling looking for work, and it was not always easy to contact him. Secondly, that he and his assistant had had illness over an unspecified period (but it appears to be in December) when they may not have been in the office together. They also point to the inequality of arms, in that the respondent has been able to instruct a large and well resourced firm while the

claimant has to rely his own resources. The respondent replies that the claimant was very well paid by them (£290,000 per annum in salary and fixed bonus, according to the claimant's schedule of loss), and that he is a sophisticated man who would without relying on his legal advisers be able, for example, to say, if asked, what legal obligation he had in mind when making the protected disclosures about financial conduct that he alleged, and that he has instructed specialist solicitors and specialist counsel.

18. The claimant cites **Yerrakalva v Barnsley Metropolitan Borough Council**. They argue from this first of all that is a matter which should generally be left to the conclusion of the case, when the Tribunal can take a much broader overview of whether there has been unreasonable conduct. The respondent points out that the Rules permit an application for costs at any time, and in respect of part of the proceedings rather than the whole.

19. The claimant points out that costs are the exception in the Employment Tribunal. Under the rules it has to be unreasonable conduct, and then there must be an exercise of discretion, which should be sparingly exercised because costs orders may bar access to justice, and this claim concerns whistleblowing, which is a matter of public, as well as individual, importance.

20. I am must consider the overriding objective, not just in putting the parties on an equal footing, but also avoiding delay, saving expense, and dealing with cases in ways proportionate to the complexity and importance of the issues.

21. In my view the following are relevant. Firstly, it seems that throughout this case the claimant has been very slow to comply with orders and appears only to have done so under pressure from the respondent and on several occasions only after the Tribunal has been asked to make an unless order. Sometimes the respondent has been pushing quite early, for example with regard to Further and Better Particulars and the claimant might be not at fault in that respect, but nevertheless they have automatic directions, and direction from two Preliminary Hearings, yet it was still the case that of the orders made on 7 November, there was compliance in the first by 15 December, and in the second on the 27th January; both of those should

have been done by 18 November. In respect of the third, in a matter which was outstanding from 7 November, only on 2 February, that is, yesterday.

22. It is also clear from reading the correspondence, that the respondent has always been given promises and dates which have then not been kept, or only at the last minute, and it has been necessary to make applications for unless orders to obtain compliance. Had this Preliminary Hearing not been in the list, I very much doubt the claimant would have complied on 27 January or on 2 February.

23. I conclude firstly that the claimant has acted unreasonably in the conduct of these proceedings. From time to time it happens that claimants and their solicitors are not able to comply with orders, for good reason, bad reason, or no reason, but these failures of compliance are so consistent and regular that they go well beyond the normal course of litigation. The claimant has been reluctant to take any steps ordered unless under threat of being struck out.

24. Secondly, looking at it overall, making an order that the claimant pay costs would provide an effective incentive to compliance on time in future, which is essential if the hearing date is to be met in May. A costs order, carrying with it the threat of another costs order if the defaults are repeated, may be a more proportionate way of achieving that result than by attaching unless orders to any or all of the directions now agreed for future conduct. The claimant's solicitor would be aware that if an order has already been made, the Tribunal will cut him less slack on any future date.

25. I have regard to the inequality of arms, and I am aware that the claimant's solicitor is dealing with a far smaller team than the respondent, but nevertheless, there seems no good reason why he could not have discussed matters with his client, by email if they were in time zones too different for a telephone call to obtain any information that was needed. This was not particularly extensive.

26. It also reasonable that the respondent should not go to the considerable expense of a disclosure exercise without knowing the basis of the protected

disclosures claim, in case it had to be repeated if further information was to come to light.

27. I bear in mind too that having conceded liability in the section 98 unfair dismissal claim, the Respondent may be anxious to settle it without incurring the costs of a long hearing, and it is reasonable that they should know what the disclosure claim is, and what the mitigation case is, so they can take a view of whether to negotiate on that. The schedule of loss claims a compensatory award of £2,499,940, and in whistleblowing the award is uncapped. It is proportionate that they want orders to be complied with on time so they can prepare to defend the claim properly, and take a view on the costs of doing so.

28. When I come to look at what costs should be awarded, and bearing in mind that although causation need not be precise, the costs have to be linked to the default, in broad terms a fair outcome would be that the claimant should pay the costs of this Preliminary Hearing, on the basis that had there been reasonable compliance the respondent's threats of unless orders from time to time would have been all in a day's work in the preparation of contentious litigation, but that to have a third Preliminary Hearing tips the limit, and is a result of unreasonable conduct. The respondent's apprehension that a hearing was needed to get compliance both now and in future was reasonable given the claimant's conduct so far.

29. At this stage I paused to hear further representations from the parties about the appropriate amount of costs. The respondent has produced a schedule showing Counsel's brief fee for the day is £2,500, and points out that this an uncapped public interest disclosure case which justifies using someone of greater seniority. There is a claim for preparation for the hearing of something in the order of £5,000, split between a partner charged at 6.8 hours at £450 an hour, and a junior associate for 7.4 hours at £266 an hour.

30. The respondent says that this includes preparation of a detailed letter to the claimant and tribunal on 31 January about why there needed to be a Preliminary Hearing, after the claimant suggested that having now complied

it did not need to go ahead; preparation of instructions to counsel; liaison with the client, and of a bundle of three hundred pages.

31. The claimant says that the correspondence bundle is not of great complexity and did not need a legal mind to prepare it, and that a six page letter is not fourteen hours work.

32. I bear in mind in assessing costs the need for that to be proportionate to the value of what is claimed. Value is substantial in this case. Nevertheless, the issues of this Preliminary Hearing were limited to procedural compliance, and could have been presented by someone of less seniority, though Ms Darwin's presentation was very effective. I also take into account that a cost award is exceptional. A great deal of the work in getting parties to comply with case management orders is (regrettably) normal preparation for a hearing. I have to look at what is both exceptional and related to the claimant's solicitors default. I bear in mind too that for a solicitor who is immersed in the case and has been writing about it over several months, it will not take a great deal of time to set out a summary of why there still needs to be a Preliminary Hearing, extensive preparation for that is not required, though of course it still takes care.

33. Bearing these points in mind, it is fair between the parties and proportionate to make an order that the claimant pay the respondent's costs in the sum of £2,000. This reflects a fair part of Counsel's brief, and some time to prepare her instructions and immediate correspondence. I recognise it is not a full indemnity for the respondent, but consider that if they required very senior people to prepare Counsel's instructions that was special treatment for their client, a Rolls Royce level of service.

Employment Judge Goodman
17 February 2017