



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T K Brian

**Respondent:** Accrol Papers Limited

**Heard at:** Manchester

**On:** 8 September 2020

**Before:** Employment Judge Sharkett

**REPRESENTATION:**

**Claimant:** In person

**Respondent:** Mrs Swann - solicitor

## JUDGMENT

### Rule 38

The judgment of the Tribunal is that the claimant's application under Rule 38(2) to have the striking out of his claim for non compliance with an unless order varied or set aside fails.

### Reasons

This was a Hearing to consider:

- (1) Whether the Claimant was pursuing an application for re-instatement of his claim of constructive unfair dismissal; if so,
- (2) Whether the application had been properly made in accordance with the Employment Tribunal Constitution and Rules of Procedure 2013; if so
- (3) Whether it would be in the interests of Justice to re-instate the claim of constructive unfair dismissal.

In preparation for the hearing today the respondent has produced a bundle of documents containing the documents relevant to this application.

### **Background and Findings of Fact**

- 1 The claimant submitted his claim of constructive unfair dismissal on 21 September 2017. Around the same time the claimant issued a personal injury claim against the Respondent who then requested a stay of the claim in the employment tribunal. The claimant did not respond to the requests for his comments from the employment tribunal and on 19 January 2019 REJ Parkin, noting the claimant's continued failure to respond, subsequently stayed proceedings for 12 months pending the outcome of the personal injury claim.
- 2 In November 2018 the claimant asked for the stay of his claim for constructive unfair dismissal be lifted so that it could proceed to a hearing. The respondent explained that as a result of the claimant's failure to engage with the respondent's insurers the file on the personal injury claim had been closed, although the limitation period had not yet expired.
- 3 A Preliminary Hearing was held on 25 February 2019 where case management orders were made by Employment Judge Holmes. The claimant was ordered to provide further particulars of his claim and produce a Schedule of loss no later than 15 April 2019.
- 4 At the preliminary hearing Employment Judge Holmes explained in detail to the claimant, the Tribunal procedure, the claimant's claim and what the claimant was required to do. In order to assist the claimant in producing the further information needed the Respondent agreed that they would resend the documents already disclosed to the claimant because he had left these documents in a bag that had been stolen.
- 5 The claimant did not comply with the order to provide further information of his claim or serve a schedule of loss on the respondent or the Tribunal by 15 April 2019.
- 6 By letter of 30 April 2019, the respondent complained of the claimant's failure and asked that the Tribunal make an Unless Order requiring the claimant to comply with the orders of the Tribunal or have his claim struck out.
- 7 The claimant was afforded an opportunity to show reason why an Unless Order should not be made and was given further time to provide the information asked of him. The claimant failed to answer the question asked of him by the Tribunal and an Unless Order was ultimately made requiring him to comply with the order to provide further information of his claim by 12 August 2019.
- 8 Whilst the claim was automatically struck out on 12 August when the claimant failed to provide the information required, on 16<sup>th</sup> August the claimant was asked to explain to the Tribunal why he had not complied with the Unless Order. The claimant replied that he had struggled to get help with his claim but was seeing someone on 26 August 2019.

- 9 The claimant did not provide the further information of his claim and the same was formally notified as being struck out on 21 September 2019. Along with the notification that his claim had been struck out the claimant was also advised that if he wished to apply to have his case re-instated he would need to make an application to the Tribunal. He was told that if he intended to do this he would need to include in his application an explanation of why he had not complied with the orders of the Tribunal; when he would do so and; why his case should be permitted to proceed.
- 10 Whilst on 27 September 2019 the claimant indicated that he wished to have his case re-instated he did not provide any of the information he was asked to provide in having his application considered.
- 11 By letter of 24 October 2019, the Tribunal wrote again to the claimant asking if he was applying to have his case re-instated and by letter of 8 January 2020 the Tribunal wrote again to advise him that he would need to prepare a witness statement in support of his application explaining why he had not complied with the case management orders and when he would do so. The tribunal asked for this information by 31 January 2020. The claimant did not provide the information but did inform that Tribunal by email that he had thrown his documents away.
- 12 A further letter was sent to the claimant on 1 February setting out what the claimant needed to provide. On 6 March 2020, the claimant was again asked to provide a witness statement in support of his application.
- 13 The file was reviewed by Employment Judge Franey who considered that the communications the claimant had sent to the Tribunal were what the claimant intended to produce in support of his application and a Preliminary Hearing was listed for 1 April 2020 to consider the case on the basis of the limited information provided. This hearing was then postponed by REJ Parkin in light of the Covid 19 pandemic. The Hearing today has been convened by telephone in light of the continuing requirements for social distancing.
- 14 I have heard submissions from Mrs Swann for the respondent who strongly opposes the claimant's application on the basis that it is not properly made in accordance with Rule 38(2) and that he had failed to copy the limited information he had provided to the respondent. Mrs Swann submitted that any decision should be based on regard for the interests of both parties and not just the claimant. Mrs Swann reminded me of the chronology of this claim and the many opportunities the claimant had been given to comply with the case management orders and various requests for information. Mrs Swann submits that the claimant knew what the Unless Order meant and that the respondent had reminded the claimant of what he needed to do before the 12<sup>th</sup> August 2019.
- 15 Mrs Swann drew my attention to the significant amount of time that had passed since this claim was commenced in 2017; she submitted that the respondent would be significantly disadvantaged if the application was to succeed as the memory of witnesses would surely have faded since 2016

which is when the acts complained of date back to. She further submitted that the reason for the delay lay firmly with the claimant because he had issued a personal injury claim against the respondent that he then failed to pursue. Mrs Swann submits that the Tribunal can have no confidence that the claimant will comply with the requirements of the case management orders or that he will produce a witness statement.

- 16 The claimant submitted that he did not know what he needed to do, that he had struggled to get help but that he would now be able to borrow money from his new employer in order to get legal advice and pay it back out of his wages. He did not provide any evidence that his employer had agreed to providing such a loan. Alternatively he submitted his car loan was due to be paid off in a few months so he may be able to afford to pay for advice himself. In answer to my question he has not identified a representative and has not sought to take advantage of the 30 minutes free advice he told me he would be able to get. The claimant asked for a chance to take legal advice so that he could prove the disgusting behaviour he had been subjected to

## The Law

- 17 Rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 states that:

“(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 should give 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 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. Where a response is dismissed under this rule the effect shall be as if no response has been presented as set out in rule 21.”

- 18 Where there is non-compliance with an Unless Order in any material respect the Tribunal has no discretion as to whether or not the claim or response should be struck out. It is automatically struck out as the date of non-compliance and there is no requirement for a further order to be addressed to a party against whom the Unless Order was made (**Markham Shipping (London) Ltd v Kefalas & Another [2007] Court of Appeal**), although in many circumstances as a matter of courtesy and to assist an unrepresented claimant or respondent the Tribunal will advise them of the situation and also intimate what actions they can take in response to it.
- 19 Compliance need not be precise and exact (**Markham Shipping** above) and in **Johnson v Oldham Metropolitan Borough Council EAT [2013]** Mr Justice Langstaff held that the test of “substantial compliance” adopted by the Employment Judge was in accordance with the law but stated that “material”

is a better word than “substantial” because it draws attention to the purpose for which compliance with the order is sought.

- 20 Before the date for compliance with the Unless Order expires the Order can be revisited under rule 29 and varied, suspended or set aside if necessary in the interests of justice.
- 21 However, once dismissal for non-compliance has taken effect the relevant party has the right to apply to the Tribunal in writing within 14 days of the date the notice of dismissal was sent to the parties to have the Order set aside on the basis that it is in the interests of justice to do so (rule 38(2)). Factors to be considered include the reason for the default, the seriousness of the default, the prejudice to the other party and whether a fair trial remains possible. This matter can be determined on the basis of written representations only unless a party requests a hearing. In this case because of the lack of engagement by the claimant, REJ Parkin decided that a hearing was necessary.

### **Application and secondary findings**

- 22 In reaching my decision I have carefully considered the background to this case and the submissions of both parties. During the course of this hearing I have also explained in detail what the claimant would need to do in respect of complying with the orders of the tribunal and the legal test that would be applied in a case of constructive unfair dismissal. The claimant maintains that he believes that he has done everything required of him and that he was unaware of the need to do more, for example by providing a witness statement in support of the application before the Tribunal today.
- 23 The claimant has persistently failed to comply with the case management orders which still remain outstanding today. He has made no effort to address his mind to how or when he intends to provide the further information about his claim or comply with any of the other case management orders that were made in February 2019. He has provided no satisfactory explanation for why he has failed to produce the information he was asked for in relation to this hearing, claiming he was unaware that he needed to do anything. I do not accept that to be the case as I find that the correspondence from Employment Tribunal is in the simplest and clearest of terms and has been repeated on more than one occasion. The claimant had also been directed to numerous sources of further advice and guidance but he has clearly not accessed any of the help and guidance available despite him having access to a computer as is evidenced by email correspondence from him.
- 24 He has said today that he can now afford to obtain legal advice and wants to pursue his claim so that he can show how badly he was treated by the respondent. He mentioned being able to obtain a free 30 minute appointment with a solicitor but was unable to explain why he had not done so before today. He did not seem to take on board any of the procedural and legal matters than I had explained to him in the hearing as had Employment Judge Holmes in the hearing of 25 February 2019.

- 25 I find that the claimant's failure to provide the information of his claim has resulted in the respondent being unable to know the case it has to answer and identify and obtain appropriate witness evidence. Despite being aware that this information was needed and his failure to provide it was the reason his claim was struck out, the claimant has still not provided this information nor given any indication of when he will provide it. Indeed he has confirmed to the Tribunal that he has destroyed the papers relating to his claim. He has also confirmed that he has not availed himself of the free legal advice he has identified he is able to obtain nor made any appointment to do so. His submissions about how he now intended to obtain legal advice were vague and lacked any detail. The claimant has a long history of failing to engage in the Tribunal process and that this continues to be the case is evidenced by his failure to acknowledge the need to provide the information that has been requested that he provide for this hearing.
- 26 In the circumstances I am not satisfied that if the claim was to be re-instated the claimant would engage with the process and comply with orders of the Tribunal. I further find that the claimant's failure to comply with the case management order to provide further information about his claim has placed the respondent at a significant disadvantage. I make this finding because the basis of the claimant's claim relates to incidents dating back from 2016. The delay that has been caused as a result of the claimant's failures has a real potential to impact on the ability of the witnesses to reliably recollect alleged events and thus prejudice the respondent.
- 27 Whilst I accept that the refusal of the claimant's application will result in him being unable to pursue his claim, for the reasons set out above I do not consider it is in the interests of justice to allow the application.
- 28 The application is refused and the claimant's claim stands struck out.

Employment Judge Sharkett  
Date: 9 September 2020

JUDGMENT SENT TO THE PARTIES ON  
14 September 2020

FOR THE TRIBUNAL OFFICE

**Note**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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