Case Number: 2207301/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mrs B A Rojha		**Zinc Media Group Plc**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 3 December 2021**

BEFORE: Employment Judge A M Snelson

On hearing Mrs N Walker, solicitor, on behalf of the Respondents;
And there being no appearance or representation by or on behalf of the Claimant;

The Tribunal determines that:

(1) The Claimant's applications for the Orders made on 31 March and 11 October 2021 to be set aside are refused.
(2) On the Respondents' application, the Claimant is ordered to pay a contribution towards their costs in the proceedings in the sum of £3,975.

REASONS

Introduction

1 By her claim form presented on 23 November 2020 the Claimant claimed a redundancy payment and complained of unfair dismissal, racial discrimination and unauthorised deductions from wages. In subsequent correspondence she explained that the first claim was for an enhanced, contractual redundancy payment. The Respondents resisted all elements of her case in their response form presented, in time, on 14 January 2021. Although there was an administrative delay in the Tribunal formally serving the response form on the Claimant, she received a copy of it on 14 January 2021.

2 The matter was listed before me on 31 March 2021 for a preliminary hearing for case management, held by telephone. The Claimant received due notice of the hearing but did not attend. She was contacted by Mrs Walker, solicitor for the Respondents, but explained that she would not be attending because she had not

had confirmation from the Tribunal that the response form had been received and accepted. She said that the hearing should be postponed. I saw no reason to postpone. I proceeded to give case management directions to ensure that the final hearing, already listed for 3 November 2021, would be properly prepared. In the commentary accompanying my order, I explained why I had elected not to postpone the hearing, offered a preliminary analysis of the claims and the issues to which they seemed to give rise and provided some guidance to assist the Claimant in the further conduct of her case. I included the observation that the Tribunal's directions must be complied with and that the (standard form) 'Notes' at the foot of order, warning of the possible consequences of non-compliance, mean what they say. Separately, I also made two deposit orders, giving reasons.

3 The case management order of 31 March 2021 included directions for the Claimant, by 23 April 2021, to provide further particulars of the discrimination and unauthorised deductions from wages claims (para (3)) and to deliver an itemised statement of all remedies claimed (para (4)).

4 For reasons best known to herself, the Claimant did nothing whatsoever to comply with the case management and deposit orders made on 31 March 2021. Instead, she sent copious correspondence at inordinate length, complaining that the Tribunal had somehow been wrong, or even exceeded its powers, in listing the hearing on that date and in making the orders it had made. Mrs Walker wrote to her on 29 April 2021 pointing out that she was in breach of the order and inviting her to put the matter right without delay. Her constructive intervention did not receive a constructive response.

5 Among the Claimant's communications was an exceedingly lengthy letter of 12 May 2021 applying for the case management and deposit orders made on 31 March 2021 to be set aside on the ground that the hearing on that day had been improperly listed contrary to law and that she had not been "in a position to participate" in that hearing. She raised no challenge then (or at any later time) to the detail of the case management order or its uncontroversial aims of ensuring that the issues in dispute were clarified and the evidence prepared to ensure a just and orderly hearing on the merits.

6 Regrettably, the letter of 12 May was not referred to me. The Tribunal was (and is) understaffed and struggling to deal with enormous volumes of work and this was far from being a unique administrative oversight.

7 The Tribunal having been made aware that the Claimant was in breach of the order of 31 March 2021, a further preliminary hearing for case management was listed to be held by telephone on 11 October. The Claimant wrote to object, arguing that (a) the Tribunal had made an order on 31 March and further orders were not needed and (b) the order of 31 March was invalid in any event. She also said that she was not available on 11 November. When it was pointed out to her that the listed date was 11 October, she stated, very shortly before the hearing, that that date was also not "conducive" but gave no reason. There was no formal postponement application, for which cogent grounds would have been necessary.

8 The Claimant did not attend on 11 October 2021. Mrs Walker did attend on behalf of the Respondents. I was satisfied that it was right and necessary to proceed. Having heard from Mrs Walker I made an unless order in respect of paras (3) and (4) of the order of 31 March, with a compliance date of 29 October 2021. I also listed a preliminary hearing in public for 3 December, for the purposes of which I directed the Respondents to deliver written representations by 19 November and the Claimant to respond by 26 November. In an accompanying commentary I drew attention, for the Claimant's benefit, to the wording of the unless order and stressed in no uncertain terms that it meant what it said.

9 Following the hearing on 11 October 2021 the Claimant sent further hostile correspondence to the Tribunal challenging the unless order. One message, dated 15 October, applied for it to be set aside on (among others) the ground that the validity of the 31 March order was itself under challenge, both in the Tribunal and in the EAT. Consistent with her earlier correspondence, she signalled no intention whatsoever to comply with the Tribunal's case management directions, basing herself entirely on the settled conviction that they were somehow unlawful or at least lacking in legal validity.

10 I caused a letter to be sent to the Claimant on 1 November, which explained that the fact that she had sought to challenge a direction of the Tribunal would not in itself excuse her from complying with it.

11 By a letter of 8 November 2021 Mrs Walker pointed out that there had been no compliance with the unless order and made a costs application against the Claimant, asking that it be considered at the public hearing reserved for 3 December 2021.

12 Satisfied that the Claimant had wholly failed to comply with the unless order (she has never contended otherwise), I caused a letter to be sent to the parties on 17 November 2021 confirming that the claim had been struck out. I also gave directions requiring the Respondents to state with clarity the factual and legal bases on which costs were sought and the sum claimed and required any other application (by either party) to be duly formulated in writing no later than 26 November 2021.

13 By a letter dated 23 November 2021 Mrs Walker set out the grounds for her costs application. Those grounds were further elaborated in written submissions dated 1 December 2021, sent to the Tribunal and the Claimant.

14 By an email of 1 December 2021 the Claimant made a fresh application for the orders made on 31 March and 11 October 2021 to be set aside and for the proceedings, including the costs application, to be stayed pending determination of her appeal(s) to the EAT. She explained that her central argument was that she was not in breach of the Tribunal's orders because (as was her right) she had applied for them to be set aside. She did not engage with the inconvenient point (spelled out in terms in the Tribunal's email of 1 November 2021) that an order did not cease to bind the parties simply because one or the other (or both) disagreed with it and had raised a challenge to it. Again, her message contained no acknowledgement of the legitimate purpose of the orders (namely to clarify the

dispute and facilitate its orderly management), let alone any hint of willingness to co-operate with the Respondents or the Tribunal to see that purpose achieved.

15 The hearing on 3 December 2021 was conducted in public, by video conference call. The Claimant did not attend. Mrs Walker appeared on behalf of the Respondents. Having heard her submissions I decided, unnecessarily perhaps, to give the Claimant the opportunity to make representations in writing on the subject of her means. I was mindful of the fact that she was unrepresented and might be unaware that that was a matter to which the Tribunal was entitled to have regard. Accordingly, I directed that she should be permitted to file concise representations on her means no later than 10 December 2021, and that the Respondents should have the chance to respond no later than 17 December 2021. The Claimant did not take up the opportunity offered to her.

The law – setting aside under rules 29 and 38(2)

16 The Employment Tribunals Rules of Procedure 2013 ('the 2013 Rules'), rule 29 contains a general power to make and set aside case management orders. Rule 38(1) enacts the specific power to make unless orders and requires the Tribunal to send written notice to the parties where a claim or response has been struck out pursuant to one. By rule 38(2) it is provided that:

> **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.**

17 In *Thind v Salvesen Logistics Ltd* UKEAT/0487/09 the EAT (Underhill J, President, sitting alone) considered an appeal against a refusal of an Employment Judge to review a judgment striking out a claim pursuant to an unless order. As to the approach to be taken to such applications, the learned judge said this (judgment, para 14):

> **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.**

At the end of his judgment, he added this (para 36):

> **I certainly would not wish it to be thought that it will be usual for relief to be granted from the effect of an unless order. Provided that the order itself has been appropriately made, there is an important interest in employment tribunals enforcing compliance, and it may well be just in such a case for a claim to be struck out even though a fair trial would remain possible.**

18 Although the 2013 Rules introduced, under rule 38(2), a self-contained procedure for applying to set aside unless orders, the principles explained in *Thind* continue to be applicable and correspond closely with those developed in the High Court jurisprudence on relief from sanctions (see *eg Morgan Motor Company Ltd v Morgan* UKEAT/0128/15, paras 12-19 (HHJ Eady QC, sitting alone)).

The law – costs

19 The power to make costs awards is contained in rule 76 of the Employment Tribunals Rules of Procedure 2013, the material parts of which are the following:

> **(1) A Tribunal may make a costs order … , and shall consider whether to do so, where it considers that –**
>
> **(a) a party … 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 …**
>
> **(2) A Tribunal may also make such an order where a party has been in breach of any order …**

As the authorities explain, the rule poses two questions: first, whether the Tribunal has power to make an order; second, if so, whether the discretion should be exercised.

20 Once an Employment Tribunal is satisfied that the relevant tests under rule 76 have been satisfied, the Tribunal's discretion to make a costs award against a party is wide and unfettered: see *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78 CA.

21 I am mindful of the fact that orders for costs in this jurisdiction are, and always have been, exceptional. Employment Tribunals exist to provide informal, accessible justice for all in employment disputes. I recognise that, if Tribunals resorted to making costs orders with undue liberality, the effect might well be to put aggrieved persons, particularly those of modest means, in fear of invoking the important statutory protections which the law affords them. It would be contrary to the purpose of the Tribunals if parties to disputes declined to exercise their right to bring (or contest) proceedings as a result of unfair economic pressure. On the other hand, I also bear in mind that, when our rules of procedure were revised in 2001, the Tribunal was for the first time not merely permitted, but obliged, to consider making a costs order where any of the prescribed conditions (vexatiousness, abusiveness etc) was fulfilled, and a new and wider criterion of unreasonableness was added. It seems to me that these innovations, preserved in subsequent revisions of the rules, indicate a policy on the part of the legislature to encourage Tribunals to exercise their costs powers where unmeritorious cases are pursued or where the manner in which litigation is conducted is improper or unreasonable.

Conclusions – setting aside under rules 29 and 38(2)

22 I have reminded myself of the entire history summarised above. I interpret the Claimant's correspondence of 12 May and 15 October 2021 as containing applications under the 2013 Rules, rule 29 to set aside one or both of the Orders of 31 March and 11 October 2021. I treat the email of 1 December 2021 as containing an application, made just within the 14-day time limit, under rule 38(2). The applications of 12 May and 15 October having been superseded by that of 1 December, I will deal with the latter as the sole 'live' application.

23 It is regrettable that the application of 12 May 2021 was overlooked. That said, the Claimant suffered no material prejudice thereby. The application was entirely groundless. The Tribunal was obviously entitled to hold the hearing on 31 March and to proceed in the Claimant's absence (she having manifestly been, despite her claims to the contrary, "in a position" to participate) and to make the orders it made. Moreover, had she not chosen, without good cause, to absent herself from the hearing on 11 October, she would have been in a position to draw attention to the application of 12 May and seek an adjudication upon it. If that application had been pressed on 11 October, I would unhesitatingly have dismissed it and made the unless order which I did in fact make.

24 Turning to the application of 15 October 2021, seeking the setting aside of the orders of 31 March and 11 October, I find no fresh merit in the Claimant's case. The application brought nothing new to the dispute other than the argument that the orders should be set aside and the proceedings stayed because an appeal was underway. To state the obvious, the mere fact that an appeal has been launched does not entitle a party to have the Tribunal's orders set aside or the first-instance proceedings brought to a shuddering halt. And the problem for the Claimant is compounded by the fact that her appeal seeks to challenge routine case management decisions – notoriously difficult territory for any would-be appellant. (I note that, on the sift, HHJ Tayler has concluded that the appeal appears to be free of merit and, very recently, the Claimant's application to postpone her rule 3(10) challenge has been refused by HHJ Auerbach.) In the circumstances, I see no possible ground in the 15 October application for setting aside either of my orders. I should add that, had the Claimant signalled, in the application of 15 October or in any response to the Tribunal's letter of 1 November, *any* preparedness to comply with the 31 March order, paras (3) and (4), I would have been willing to consider varying the unless order if need were shown, for example by means of a short, final extension of the compliance date. But given her apparently unshakable determination to defy Tribunal's authority and maintain her incomprehensible technical arguments, such a step would, in my view, have been entirely futile.

25 As for the application of 1 December 2021, this adds nothing of substance to the prior applications. It spells out, perhaps with greater clarity than before, the absurd reasoning on which the Claimant relies as justifying her refusal to comply with the Tribunal's orders. It contains not the slightest suggestion of a willingness to provide the information sought by the order of 31 March. Would it be in the

interests of justice and in accordance with the overriding objective[1] to set aside the unless order? In my judgment, the only possible answer is no, for a number of reasons. First, the breach was clear and deliberate. Second, it was wholly unjustified and no remotely sensible excuse or explanation is given for it. Third, the context (a history of wilful, sustained non-compliance resulting in the Draconic and unusual measure of an unless order) itself argues against granting relief. Fourth, even now, the Claimant maintains a stance of implacable hostility to the Tribunal's attempts to manage the case in a considered and proportionate manner. This raises a real question as to the possibility of a fair hearing at any time. Fifth, even if a fair hearing were in principle possible, granting the application would leave the Respondents in jeopardy and exposed to additional risk and costs for many months to come. That risk would extend to the feelings and reputations of flesh-and-blood people who are, or may be, accused of serious acts of discrimination.

26 Given the conclusion just stated, the application made on 1 December 2021 to set aside the order of 31 March becomes arguably academic. For the avoidance of doubt, however, I refuse that application in any event, on the grounds on which (as explained in para 23 above) I would have refused the application of 12 May had it been placed before me when it was received.

27 For all of these reasons, I refuse the applications to set aside the orders of 31 March and 11 October 2021 are refused. The result is that the striking-out order stands. Subject to the matter of costs, to which I next turn, the entire proceedings[2] are, and remain, at an end.

Conclusions - costs

28 The costs application is based on two grounds, namely that the Claimant has conducted the proceedings in an unreasonable way and that she has been in breach of orders made by the Tribunal. As to the second ground, I need only say that, despite her bizarre insistence to the contrary, she has flagrantly and wilfully breached the orders of 31 March and 11 October 2021 and eschewed countless opportunities to remedy those breaches. As to the first, this is, in my view, as plain a case of unreasonable conduct of litigation as could be imagined. As a consequence of her behaviour, the case, now 15 months old, has made no progress whatsoever. She has put the Respondents to utterly unreasonable inconvenience and expense and placed a burden upon the Tribunal (a hard-pressed public service) out of all proportion to her claims. Besides her deep misconceptions as to how the Tribunal's procedural rules operate, she offers no explanation, let alone mitigation, for her conduct. On any view, the Respondents establish the grounds on which they rely. It follows that I have jurisdiction to make a costs order.

29 Should I exercise that jurisdiction? I have come to the conclusion that I should. This is a particularly bad case of abuse of the Tribunal's process. It is also,

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[1] See the 2013 Rules, rule 2.

[2] Technically, certain elements of the claim ought to have been struck out at an earlier point, the Claimant having failed to pay the deposits to which I have referred, but the formality of preparing the appropriate judgments was overlooked. In view of my decision on the current applications, nothing turns on this.

as I have said, unexplained. I am troubled that the Claimant's behaviour has been irrational to the point of appearing quite senseless. That is worrying. But I am not offered any medical explanation for it and it is not my place to speculate in that area. I can only treat it as exemplifying objective unreasonableness of the highest order, for which no excuse or apology is advanced. On this analysis, the very unusual sanction of a costs order is entirely justified.

30 What is the appropriate costs award? I am satisfied that the sum claimed, representing the entirety of the Respondents' costs incurred after 6 May 2021 (by which date the Claimant had received the order made on 31 March 2021), should be awarded. The Claimant's conduct has been entirely unreasonable throughout. No explanation or mitigation is put forward. The figure sought, £3,975, is exceedingly modest. And the Claimant has provided no information about her means (which might, or might not, have argued for a reduction in the sum awarded).

Outcome

31 For the reasons given the applications to set aside the orders made on 31 March and 11 October 2021 are refused and the Claimant is ordered to pay a contribution to the Respondents' costs in the sum of £3,975.[3]

32 I regret the delay in providing my decision, which is the result of extreme pressure of work and the need to give attention to more pressing cases.

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EMPLOYMENT JUDGE – Snelson
01/03/2022

Reasons entered in the Register and copies sent to the parties on : 01/03/2022

for Office of the Tribunals

[3] No VAT is payable on the award: Mrs Walker asked only for the net sum.