

# THE INDUSTRIAL TRIBUNALS

CASE REF: 4265/17

**CLAIMANT:** Niall Morton

**RESPONDENTS:**

1. Royal Mail Group Limited
2. David Hoey
3. Aaron Chapman
4. Paul Sweeney

## DECISION

The decision of the tribunal is that the claimant's claims, and each of them, to the tribunal are struck out, pursuant to Rule 13(2) of the Rules of Procedure contained in Schedule 1 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005, on the grounds that the claimant has failed to comply with the Unless Order of the tribunal, dated 28 June 2018, requiring him to provide to the respondent's solicitor by 5.00 pm on 26 July 2018:-

- (i) replies to paragraphs 1, 2, 3, 4, 5, 11, 12, 13, 14, 15, 16 and 17 of the respondents' Notice for Additional Information dated 28 September 2017, as amended by letter of the respondent's representative dated 27 April 2018;
- (ii) the signed and dated witness statements of the claimant and any witness he wishes to call; and
- (iii) the claimant's schedule of loss.

**Constitution of Tribunal:**

**Employment Judge:** Employment Judge Drennan QC

### Reasons

1. At a Case Management Discussion on 27 June 2018, as set out in the record of proceedings, dated 28 June 2018, I made an Unless Order against the claimant, pursuant to Rule 13(2) of the Rules of Procedure contained in Schedule 1 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (the Rules of Procedure), requiring the claimant to provide to the respondents' representative by 5.00 pm on 26 July 2018:-

- (i) replies to paragraphs 1, 2, 3, 4, 5, 11, 12,13, 14, 15, 16 and 17 of the respondents' Notice for Additional Information, dated 28 September 2017 as amended by letter of the respondents' representative dated 27 April 2018.
- (ii) A signed and dated witness statements of the claimant and any witness he wishes to call.
- (iii) The claimant's schedule of loss setting out all financial loss claimed by the claimant, including in particular, the nature and amount of any such loss claimed and how that sum was made up.

A copy of the respondents' Notice for Additional Information, dated 28 September 2017, the respondents' representative letter to the claimant dated 27 April 2018 and the record of proceedings to the Case Management Discussion of 27 April 2018, dated 2 May 2018 were attached to the said Order. A copy of the record of proceedings held on 27 June 2018, dated 28 June 2018 and the said Unless Order were sent by the tribunal to the claimant in a letter dated 28 June 2018.

As stated above, the said Unless Order was made pursuant to Rule 13(2) of the Rules of Procedure, which provides:-

*“A decision or Order may also provide that unless a decision or Order is complied with the tribunal or chairman may make a decision striking out the claim or, as the case maybe, the response, on the date of non-compliance without further consideration of the proceedings of the need to give notice under Rule 19 or hold a Pre-Hearing Review or a hearing under Rule 26”.*

2. For the purposes of this decision, I refer to paragraphs 3-5 of the said record of proceedings:-

*“3. At paragraph 3 of the record of proceedings, dated 2 May 2018, the claimant was required to reply by 25 May 2018 to the previous Notices for Additional Information and/or Discovery and Inspection served on the claimant by the respondents. The claimant confirmed at this hearing that he had no further relevant documents to be provided by way of discovery to the respondents' representative on foot of the said order made by the tribunal in reply to the respondents' previous Notices for Discovery. However, the claimant, despite the tribunal's orders, has not replied to the respondents' Notices for Additional Information, dated 28 September 2017, as amended, in a letter dated 27 April 2018; where the respondents' representative confirmed to the claimant that in relation to the respondents' Notice for Additional Information, dated 28 September 2017, he could disregard questions at paragraphs 6-10 of the Notice as they related to issues which no longer form part of his claim, which was apparent from the enclosed statement of legal and factual issues which was agreed between the parties and lodged with the tribunal on 19 January 2018.*

4. *Therefore, as a consequence, in relation to the respondents' Notice for Additional Information dated 28 September 2017, the claimant has failed to provide any reply to paragraphs 1, 2, 3, 4, 5, 11, 12, 13, 14,*

15, 16 and 17. The claimant did not provide any good reason why the said Replies had not been given by him, despite the previous orders of the tribunal. I explained to him that it was essential for him to provide replies, as appropriate, to the said paragraphs of the said Notice to enable the respondents to properly prepare their defence to the claimant's claims and that, in the absence of such replies, a fair trial of this matter was not possible. In addition to the failure of the claimant to provide Replies to the said Notice for Additional Information, as outlined above, the claimant had also been ordered to provide a **signed and dated** witness statement to the respondents' representative of any witness statement which he or any witness he wished to call by 22 June 2018. Again, the claimant has failed to comply with the tribunal's Order in circumstances where it had been agreed, and I so ordered, that the witness statement procedure would apply to the giving of evidence by the parties at the substantive hearing. In addition, the claimant has also failed to provide a schedule of his financial loss 22 June 2018, as ordered by the tribunal, as set out in paragraph 7 of the record of proceedings dated 2 May 2018. Again, the claimant was unable to provide a good reason why the tribunal's said Orders has not been complied with.

5. In the circumstances, I decided that it was appropriate in the circumstances to make an Unless Order requiring the claimant to reply to each of the said paragraphs of the said Notice for Additional Information, dated 27 September 2017 and to provide to the respondents' representative the claimant's witness statement and any witness statement of any other witness whom he wishes to call, together with his schedule of loss. I explained to the claimant that if he failed to comply with the said Unless Order then the tribunal may strike out his claims to the tribunal. I emphasised therefore to him the importance of complying with the said Unless Order. In the circumstances, it was agreed, that the date for compliance with the said Unless Order would be **26 July 2018**. Clearly, if the claimant fails to comply with the said Unless Order, in whole or in part, then the tribunal must be so informed by the respondents' representative as a matter of urgency. In those circumstances, I will consider what further Order or Decision is appropriate in the circumstances arising out of any such failure. The claimant must understand that, although he is a litigant in person, the tribunal requires him to comply with the said Orders and, in these circumstances, I urged the claimant to obtain such assistance as he was able to obtain from the Labour Relations Agency and/or advice, if possible, from his trade union or other relevant person or a body whom may be able to assist him in these matters. A copy of the said Unless Order, as referred to above will be sent to the claimant and the respondents' representative with this record of proceedings.

3. In a recent decision, recorded in the register and issued to parties on 9 January 2018, in the case of **Thomas Cuthbert v Tesco Stores Limited**, I have reviewed the relevant principles in relation to the striking out of a claimant's claim in this jurisdiction, where there has been a failure to comply with an Unless Order. In the circumstances, it is not necessary to set out in detail what I stated in the

**Cuthbert** decision. However, I have had regard to what I stated in the said review; but, in particular, I refer to paragraph 3.2 of the decision, where I stated:-

*“.... Therefore, in this jurisdiction, the tribunal has always had a discretion whether to strike out a claim for non-compliance with an Unless Order. In Great Britain, under the 2004 Rules, considerable case law grew up in relation to the ability of a tribunal to allow an application for relief from sanction on striking out the claimant’s claim, and the circumstances in which the tribunal should do so (see further the decision of the Court of Appeal in the case of **Governing Body of St Alban’s Girls’ School and Another v Neary [2009] EWCA Civ 1190** and the decision of the Employment Appeal Tribunal in the case of **Thind v Salvesen Logistics Limited [2010] UKEAT/0847/09**).*

....

*In the **Thind** case Underhill P (as he then was), stated, at paragraph 14 that the clarification brought about by the Court of Appeal in the Neary case was welcome as the law in this area had “become undesirably technical and involved”. He also stated that:-*

*“The law as it now stands is much more straightforward. The tribunal must decide whether it has the right, in the interests of justice and the overriding objective, to grant relief to the party and default notwithstanding the breach of the Unless Order. That involves a broad assessment of what is in the interests of justice, 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 also 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.*

*Further at paragraph 36 Underhill P went on to state:-*

*“I wish to close by emphasising, in case this judgment was referred to in other cases, that as I have already observed, all these cases turn on their own facts. I certainly would not wish it to be thought that it would be usual for leave 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 case for a claim*

*to be struck out even though a fair tribunal would remain possible.....”*

4. At all times, when making the said Unless Order, I was aware and took into account that the claimant was now a litigant in person, after his previous solicitors, came off record on 20 March 2018. However, it is also necessary to consider the following dicta in this context.

As Girvan LJ said in ***Magill v Ulster Independent Clinic and Others [2010] NICA 33 (a personal injury case)***:-

*“.... a personal litigant cannot have an unfair advantage against represented parties by seeking to rely on any experience or lack of proper appreciation of what the law requires. The application of legal principles poses a duty on the Court to examine cases objectively without fear or favour to any party, represented or unrepresented. While Courts are conscious of the difficulties faced by a personal litigant representing herself and will strive to enable that person to present her case as well as they can, strict dates of objective fairness and justice preclude the Court from anyway distorting the rules or requirements of due process because one party is unrepresented.”*

Girvan LJ in ***Peiffer v Castlederg High School and Western Education and Library Board [2008] NICA 49***, an Employment Tribunal case, stated:-

*“When parties before the tribunal appear in person, without then legal representation, the lack of legal experience and the part of an unrepresented person may lead to the pursuit of irrelevancies and unnecessary proceedings. Whilst tribunals must give some latitude to personal litigants who may be struggling in a complex field must also be aware that the other parties will suffer from delay, incur increased costs, be exposed to unstructured times of relevant cross-examination. While we must have sympathy for a tribunal faced with such a situation the tribunal remains under the same duty to ensure that the overriding objective and Regulation 3 are pursued.”*

In ***Jones v Longley [2016] EWHC 1309***, Master Matthews stated that

*“Although at the margins a personal litigant may be offered a little more leeway than a party who is legally represented, there are no special rules for litigants in persons as compared with those litigants who are represented.”*

The above case law was approved by Horner J in ***Smith and Hughes v Black and Persons Unknown [2016] NICH 16***.

5. Since the making of the said Unless Order, the claimant has not applied to the tribunal for any relief from sanction and/or made any application to extend time and/or set aside and/or amend the said Unless Order. In accordance with the tribunal’s Direction, as set out in the record of proceedings, dated 28 June 2018, the respondents’ representative, by letter dated 27 July 2018, made an application for the claimant’s claims to be struck out, by reason of the failure of the claimant to comply with the said Unless Order on 26 July 2018. As set out previously, the tribunal has a discretion, to strike out a claim, pursuant to Rule 13(2), in the event of any such failure, without further consideration of the proceedings or the need to

give notice under Rule 19, to hold a Pre-Hearing Review or a hearing under Rule 26.

6. Applying the principles and guidance set out in the legal authorities, as referred to previously in this decision, I have come to the conclusion, that the claims of the claimant must be struck out, in the exercise of my discretion, pursuant to Rule 13(2) of the said Rules of Procedure. In doing so, I have taken into account the claimant is a litigant in person. Prior to the making of the Unless Order I made it clear at the Case Management Discussion on 27 June 2018, as set out in the said record of proceedings, dated 28 June 2018, to the claimant the necessity for him to fully comply with the terms of the said Unless Order. He has totally failed to do so and has not provided any good reason for not doing so. It is also to be noted the said Order, having been fully explained to him at the Case Management Discussion, was consented to by the claimant. I continue to be satisfied that the Replies to the said Notice are required to be made by the claimant to enable the respondents' representative to properly prepare the respondents' defence. In particular, they are an essential part of the respondents' preparation of its defence to the said claims so the respondents know the case that has to be met by them; but also to enable the issues to be identified for determination by the tribunal at any substantive hearing. The said replies have been outstanding since 19 October 2017. I recognise that, prior to the 20 March 2017, the claimant was represented by solicitors. The claimant at a Case Management Discussion on 27 April 2018, as set out in the record of proceedings, was given until 25 May 2018 to provide replies to the said notice. He did not do so, in relation to the paragraphs of the said notice, the subject matter of the Unless Order, which still remained outstanding at the Case Management Discussion on 27 June 2018. In the circumstances, I gave a four week period, on foot of the Unless Order, to reply. Despite the said extension of time, the claimant has failed to provide any reply to the said paragraphs of the Notice. The substantive hearing is presently listed for **17-21 September 2018** and, as previously ordered by the tribunal, evidence is required to be given by the parties in accordance with the witness statement procedure. Again, the claimant, for no good reason, has failed to provide his witness statement or the witness statements of any of the witnesses whom he wishes to call. Having regard to the terms of the overriding objective, the interests of the justice and the requirement for litigation to be conducted efficiently I have decided it is appropriate, in the circumstances, for the reasons set out above, to strike out the claimant's claims in each of them to the tribunal, pursuant to Rule 13(2) of the Rules of Procedure, without further consideration of the proceedings as the need to give notice or hold any further hearing.

**Employment Judge:**

**Date decision recorded in register and issued to parties:**