



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr I Rodriguez  
**Respondent:** CDS (Superstores International) Limited  
**Before:** Employment Judge Victoria Butler (on the papers)  
**On:** 12 July 2021

## JUDGMENT

The Claimant's application for relief from sanction under rule 38(2) of the Employment Tribunal Rules of Procedure 2013 is refused.

## REASONS

### Background

1. The Claimant presented his claim to the Tribunal on 18 March 2020 following a period of early conciliation between 3 February 2020 and 3 March 2020. He claims disability discrimination (and possibly unfair dismissal) albeit the precise basis on which he makes the claim was not verified prior to the claim being dismissed.

### Previous preliminary hearings

2. The case was subject to a closed telephone preliminary hearing ("PH") before Employment Judge Faulkner ("EJ Faulkner") on 25 June 2020. EJ Faulkner produced a substantial record of that hearing during which he clearly spent considerable time and effort attempting to clarify the Claimant's claim given that he is a litigant in person. He also made various orders to progress the matter.
3. EJ Faulkner listed the case for an open PH on 18 December 2020 to determine whether the Claimant was a disabled person at the material time for the purposes of the Equality Act 2010 ("EQA").

4. The case was subject to a second PH before me on 27 November 2020 and I recorded the following in my case management summary:

*“2.....EJ Faulkner identified that the Claimant seems to pursue claims of failure to make reasonable adjustments and harassment related to disability. He also gave the Claimant opportunity to put forward the basis of an unfair dismissal claim, subject to any objection from the Respondent and/or an application to amend his claim.*

3. At the PH, EJ Faulkner ordered the Claimant to provide the following:

- *(1) Further particulars of the three allegations relied on in support of his disability discrimination claim (by 7 August 2020);*
- *(2) Further particulars of what he says was the reason for his dismissal and how that arose from his disabilities (by 7 August 2020);*
- *(3) A summary of why he says his dismissal was unfair (7 August 2020); and*
- *(4) Copies of medical records relating to his disabilities and an impact statement (21 August 2020).*

4. *The Claimant had seemingly failed to comply with the orders, save a letter to the Tribunal dated 1 August 2020 in which he explained that the Respondent dismissed him after producing a GP report (dated 18 December 2019) confirming a recommendation that he is fitted with a pace maker. He also provided a copy of that report. Other than that, no further information had been forthcoming to satisfy the above orders.*

5. *The Respondent wrote to the Tribunal on 21 August 2020 making an application for the Claimant's claim be struck out for failure to comply with orders 1-3 above and, because in the absence of further particularisation, the claim has no reasonable prospect of success.*

6. *The Respondent wrote again on 2 October 2020 asking for an urgent case management hearing to discuss the following: the issuing of an Unless Order because the Claimant had failed to provide an impact statement; a variation to the existing case management orders; and, to consider its strike-out application.*

7. *The Claimant wrote to the Tribunal again (received 13 November 2020) explaining that he cannot write out another impact statement because he 'feels fine/OK in good health'. He confirmed again that he was dismissed after producing the report from his GP.”*

5. In my summary, I explained to the Claimant again what is required to determine if he was a disabled person for the purposes of the EQA and repeated EJ Faulkner's explanation of what was required from him in terms of an impact statement. I also included guidance on what are considered normal day-to-day activities:

*"8. During the hearing, we established that the Claimant no longer relies on the impairments of a bad back and anaemia. The three impairments that he continues to rely on are heart failure, kidney failure and type 2 diabetes.*

*9. The Claimant has provided a copy of all relevant medical records to the Respondent. I explored with him why he had failed to provide an impact statement. It was the Claimant's belief that by providing the medical report from his GP dated 18 December 2019 he had complied with the order. He said he was unable to provide an additional impact statement because he was taking medication and felt well. As such, there are no adverse effects.*

*10. I took the time to explain to the Claimant what is required to determine if he was a disabled person at the material time and repeat the key elements below.*

*11. A person has a disability for the purposes of the EQA if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.*

*12. The effects of any impairment should be considered as if the Claimant was not taking his medication – so what would they be if he was not taking it?*

*13. The EQA guidance on what are considered normal day-to-day activities is as follows:*

*"In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern."*

*14. The effects of the impairment and the question of whether the Claimant is a disabled person needs to be assessed at the relevant time*

– i.e. at the time of the acts of discrimination about which he now complains.

15. I explained the purpose of the impact statement and that the Claimant must address how his impairments affected his ability to carry out normal day-to-day activities and, in respect of those impairments, what the effect would be without medication. To assist, I repeat the explanation given by EJ Faulkner of what it is the Claimant needs to set out:

- i. The ordinary activities of daily life that he was unable to do, or could only do with difficulty, as a result of each impairment or the impairments taken together;
- ii. A list of all the medication he was taking during the relevant period;
- iii. If he is able to do so, how his ability to carry out normal day-to-day activities would have been affected if he had not been taking any medical information;
- iv. By March 2019, for how long he had experienced the adverse effects of the impairments; and
- v. Whether those adverse effects were experienced in the same way throughout the relevant period or whether the effects fluctuated – if they did fluctuate, the statement should briefly describe how.

16. However, given that the Claimant says he feels well when taking his medication, he should focus primarily on how the impairments would affect him without medication.”

6. The Respondent requested that the hearing on 18 December 2020 be retained to hear its application to strike out the claim which I declined. I gave the Claimant further opportunity to comply with EJ Faulkner’s orders but made clear the consequences if he failed to comply on a second occasion and noted the following:

“26. I declined to retain the preliminary hearing on 18 December 2020 in the list to hear the Respondent’s application to strike out the claim. Mr Mahboob for the Respondent was concerned that the Claimant was being given a third bite of the cherry to provide essential details of his claim. However, I was mindful of the following: the Claimant is a litigant in person, he has complied with the order to provide his medical records and thought he had complied with the remaining orders. He has by no means wilfully disregarded EJ Faulkner’s orders and has attempted to comply.

27. I have, however, issued the Claimant with Unless Orders in respect of the provision of an impact statement and the further particulars of his claim. The Claimant understands that if he fails to comply with the orders below, his claim will be struck out with further order.

7. I went on to make the following unless orders:

***“Further particulars***

2.1 Unless by 8 January 2021 the Claimant provides the following further particulars of his claim, his claim will be struck out without further order:

2.2 ***In relation to the allegation that Ray Munroe refused to allow the Claimant to return to work:***

2.2.1 *when this happened;*

2.2.2 *In relation to each such occasion a summary of what happened, whether there were any witnesses to what happened and if so, who they were;*

2.2.3 *What substantial disadvantage(s) the Claimant was put at, as a result of Mr Munroe refusing to allow him to return to work, compared with people who are not disabled; and*

2.2.4 *What steps the Claimant says it would have been reasonable for the Respondent to take to avoid the disadvantage(s).*

2.3 ***In relation to the Claimant’s dismissal:***

2.3.1 *What the Claimant says was the reason for his dismissal; and*

2.3.2 *How that arose from his disability or disabilities.*

2.3.3 *Also, in relation to his dismissal, a summary of why the Claimant says his dismissal was unfair.*

2.4 *The Respondent has until 29 January 2021 to amend its Response and file a copy, along with the Claimant’s further particulars, with the Tribunal.*

***2.Disability issue***

3.1 Unless by 8 January 2021 the Claimant provides the Respondent with an impact statement (as described at paragraphs 14 and 15 above) his claim will be struck out without further order.

- 3.2 *The Claimant is referred to the part of the Presidential Guidance issued on General Case Management, referred to above, that relates to disability.*
- 3.3 *The Respondent must by **29 January 2021** inform the Tribunal and the Claimant of the extent to which the disability issue is conceded, and if it is not conceded in full, the reasons why.”*

8. Thereafter, the Claimant provided a further impact statement on 2 December 2020 which described the medication he takes. Regrettably, the detail required by my order was missing, more particularly in respect of the impact on day-to-day activities and how long he had suffered from the impairments. He simply explained the following in respect of each impairment:

- i. Heart problems -- he would die if he did not take his tablets
- ii. Cholesterol -- he would have a heart attack without his tablets
- iii. Diabetes - if he did not take his tablets he would have '*serious health problems/death*'.

9. The Claimant also sent further correspondence by post and e-mail dated 15 December 2020 attempting to address the further particulars in relation to the allegation that Mr Munroe refused to allow him to return to work and in regard to his dismissal. Again, the requisite detail was lacking. He explains that '*I wanted to return to work, but Mr Munro kept telling me to get a Fit note from my Doctor, so I could not return to work....I appealed to Mr Munroe's Range college (sic), but it was a waste of time.....the dismissal letter from The Range, because I was recommended a Heart pace-maker by my Doctor*'.<sup>1</sup> However, he fails to set out when this happened, whether there were any witnesses, what disadvantage he was put to compared with people who are not disabled and what steps the Respondent should reasonably have taken to avoid the disadvantage.

10. The Claimant briefly addresses the further particulars in respect of his dismissal, albeit does not provide a summary of why he says it was unfair.

11. On 26 January 2021, the Respondent wrote to the Tribunal setting out why the Claimant had failed to comply with my orders. On review, I agreed with its assessment and dismissed the claim on 16 February 2021.

### **The Claimant's application for relief from sanction**

12. By letter dated 28 February 2021, received by the Tribunal on 5 March 2021, the Claimant made an application for relief from sanction. He said that the

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<sup>1</sup> NB: he goes on to explain how he was asked to carry out duties outside his job description but that relates to an allegation on which he no longer relies.

documents he had provided were “*enough proof*” and provided the following reasons in support of his application:

- he had had a very difficult time because of covid-19;
- he had problems getting doctors/consultants appointments for information etc;
- he could not get legal advice from the Citizens Advice Bureau because it was closed consequent of the covid-19 pandemic;
- he could not afford legal representation;
- he had suffered problems with his computer and no computer shops were open as he lived in a Tier 4 area; and
- his email had not been working.

13. The Respondent was given opportunity to comment on the Claimant’s application before I determined it. In summary, the Respondent resisted the application and said the Claimant had provided no adequate reasoning to explain his failure to comply with the terms of my Orders and further, attached various emails in which it states it went to “*great lengths to make it clear to the claimant what steps he needed to take in order to advance his claim*” when there was no obligation on its part to do so.

14. The Claimant has not requested a hearing and I have determined the application based on both parties’ written representations.

### **The law**

15. The test that I am required to consider is whether it is in the interests of justice to have the order set aside. Rule 38(2) provides:

*“(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.”*

16. In certain circumstances the interests of justice would best be served by granting relief to the party in default. Factors to consider include the reason for the default, the seriousness of the default, the prejudice to the other party and whether a fair trial remains possible – ***Thind v Salvesen Logistics EAT 0487/09***.

17. In ***Enamejewa v British Gas Trading Ltd and anor EAT 0347/14*** Mr Justice Mitting clarified that, when considering an application for relief against sanctions, the focus of the tribunal can go wider than simply the reason and circumstances prevailing at the time the unless order was originally issued.

*“Of course, the reasons for making an unless order in the first place are highly relevant factors. But it does not follow that the focus of the Tribunal is confined only to such factors. Nothing in Rule 38 prohibits an Employment Judge considering whether or not to revoke or set aside an unless order from taking into account events which have occurred subsequent to the making of the order. And there is no reason of principle why that should be so. Something that has occurred subsequent to the making of an unless order can make it in the interests of justice that the unless order should be revoked.”*

### **Deliberations**

18. I am mindful that the Claimant is a litigant in person and has perhaps struggled with the requirements of him to date. However, I am equally mindful that both EJ Faulkner and I spent considerable time explaining matters to him at the PHs and what was required to ensure compliance with the orders. We also set out clearly what was required in writing, so he had records for reference.
19. Turning to the breaches of the unless orders, the Claimant has attempted to comply with the orders - he has not by any means wilfully disregarded them – but compliance in part is insufficient to comply with their terms.
20. I have considered the seriousness of the default and whilst I have every sympathy with the Claimant, his failure to provide the requisite information has placed the Respondent in a position where it is not able to decide if it accepts that he is a disabled person for the purposes of the EQA, nor does it fully understand the claim advanced, and therefore, is not in a position to properly defend it.
21. The Claimant has explained why he was unable to comply with the orders citing the difficulties he has experienced during the covid-19 pandemic including lack of access to legal and medical advisors, alongside issues with IT. However, I do not accept that they are adequate reasons as I explain below.

### *Disability*

22. Dealing with the disability issue first, the Claimant has had access to his medical records for some time and has provided a copy to the Respondent. Accordingly, he had the information before him, especially in relation to dates, to allow him to provide any information in respect of his impairments that he was unable to recall himself.
23. Turning to normal day-to-day activities, I set out in writing what they are to assist. The Claimant does not require legal or medical advice to explain how



his impairments affected them - only he can describe this, but he has failed to do so with the requisite detail.

*The allegation against Mr Munroe*

24. In respect of the further particulars about Mr Munroe's alleged refusal to him to allow him to return to work, the Claimant failed to say when this happened, whether there were any witnesses, what substantial disadvantage he was put to and what steps the he says it would have been reasonable for the Respondent to take to avoid the disadvantage.
25. This information is entirely within the Claimant's knowledge and the aforementioned issues in respect of covid-19 and IT issues do not prevent him recalling and recording that information for the Tribunal and the Respondent.

*IT difficulties*

26. The Claimant explains that one of the reasons he was unable to comply with the orders was due to difficulties with his IT. However, I do not accept that this was a barrier to him providing the required information - he could have done so in writing by post. In any event, the Claimant has corresponded in both writing and email to the Tribunal in his attempts to comply with the orders, so he was clearly able to correspond.

**Conclusions**

27. The Claimant has been given several bites of the cherry to clarify his claim with assistance from both the Tribunal and the Respondent. However, he has still failed to provide the requisite detail and the Respondent remains in a position where it does not know the claim against it some sixteen months after it was issued. The Claimant has been unable to provide this information to date despite the guidance and assistance received and I am not satisfied that even if the Claimant were given a further opportunity to provide it, he would be able to. Notably, he has not attempted to comply with the order fully within his application for relief from sanction which would have been a further opportunity for him to do so.
28. The interests of justice include delivering justice within a reasonable time and at reasonable cost. It must be served to both parties and the Respondent has already been prejudiced by the Claimant's failure to comply with the orders. There has been a substantial delay in progressing the case in the absence of clarity from the Claimant and I am satisfied that the prejudice to the Respondent outweighs any prejudice to the Claimant given the substantial passage of time since his dismissal. It has already incurred the costs of attending two PHs but is no further forward in its understanding of the case it is required to defend.

29. The Claimant has failed to provide any adequate or satisfactory submission to persuade me that it would be in the interests of justice to set the orders aside and therefore his application for relief from sanction is refused.

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Employment Judge Victoria Butler

Date: 16 July 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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