



EMPLOYMENT TRIBUNALS

Claimant: Miss N Carpenter
Respondent: Unipet International Ltd
By CVP
On: 18 November 2022
Before: Employment Judge Martin
Representation
Claimant: In person
Respondent: Mr Smith – Legal Executive

JUDGMENT

The judgment of the Tribunal is that the Claimant's claim was automatically struck on 20 October 2022 being the date of non-compliance with an unless order.

REASONS

1. This hearing was originally listed to hear the Claimant's application to amend her claim to include discriminatory unfair dismissal following the termination of her employment on 28 September 2021. Her claim to the Tribunal was presented on 6 May 2021.
2. The order listing this hearing also contained an unless order. This order required the Claimant to comply with the order of Employment Judge Khalil made on 6 May 2022. This order said:

"1. Further particulars from the claimant

1.1 On or before 27 May 2022, the claimant is to confirm in writing to the respondent:

- The nature/type of disability discrimination alleged
- Brief particulars of the alleged discrimination
- The dates of the alleged discrimination
- Who the claimant asserts was responsible?"

3. At a hearing before Employment Judge Fergusson on 29 September 2022 an unless order was made as follows:

Further information – unless order

5. Unless by 20 October 2022 the claimant provides the further information ordered at paragraph 1.1 of the Orders of Employment Judge Khalil made on 6 May 2022 the claim will stand dismissed without further order. The reasons for making this order were given orally during the hearing and are summarised below.

CASE SUMMARY

17. The claimant was employed by the respondent, a manufacturer in the pet food industry, as an operative from 6 January 2020 until her dismissal on 28 September 2021. Early conciliation started on 22 March 2021 and ended on 24 March 2021. The claim form was presented on 6 May 2021.

18. The claim is for disability discrimination, but the claim form did not identify the specific complaints. The claimant attached to her claim form a grievance outcome letter dated 27 April 2021. On 6 May 2022 Employment Judge Khalil made various orders at a case management hearing, including that the claimant provide further details of her claim by 27 May 2022.

19. The claimant identified the disability relied upon and provided a disability impact statement with medical evidence on 13 June 2022. She has confirmed the disability is “emotionally unstable personality disorder”. The respondent now accepts that the claimant was disabled by reason of that condition.

20. The claimant has not, however, complied with the order to clarify her complaints of disability discrimination. She has provided various handwritten documents, but they do not shed much light on the matter. The claimant has struggled to access help or advice. Fortunately, the claimant has recently secured the help of a pro bono solicitor, Mr Pullen, via the Kent Law Clinic. I am told Mr Pullen was unable to attend today’s hearing but is willing to help the claimant to clarify her claim, and I was reassured by Mr Smith for the respondent that Mr Pullen has confirmed he will take on the claimant’s case and intends to help in that way. It was therefore agreed that the claimant would be given a little more time to comply with the order, but if she does not do so this time the claim will be automatically struck out”.

4. The Respondent wrote to the Tribunal to explain that there had been material noncompliance with the unless order and as a result the case had been automatically struck out on the date of the noncompliance. I therefore had to consider whether there had been material non-compliance first, as if the claim had been automatically struck out, then there was no claim to amend.
5. The Claimant did provide a document in the form of a Scott Schedule within the stipulated time. However, this did not set out the type of discrimination, i.e. direct, indirect, arising etc and it was not possible to discern from the details provided what type of claim she was intending to bring. The Respondent

submitted that this was a material failure to comply, and it was not for it or the Tribunal to make a case for the Claimant. It was submitted that the original order for details by Judge Kahil was clear and unequivocal and that the unless order made by Judge Fergusson was equally clear and unequivocal.

6. It is of note that the Claimant has had the benefit of advice from both the Citizens Advice Bureau (following the hearing before Judge Khalil) and at the time of the hearing before Judge Fergusson from Kent Law Clinic. This is clearly referred to in the order making the unless order. I noted that the application to amend includes details of the type of claim the amendment was proposing to cover.
7. In coming to my decision, I considered the appropriateness of the unless order and concluded that it was entirely appropriate for it to be made. The Claimant had the opportunity to provide the details required and it was clear that she had not done so. The order gave clear reasons for making the unless order. It is important that a Claimant presents a case such that the Respondent can understand the case against it in order to be able to defend the case properly. The Tribunal also needs to know the case it has to decide.
8. The second stage in my reasoning was to consider whether what the Claimant had provided materially complied with the unless order. Clearly there was non-compliance as there was no indication of what type of discrimination was being alleged. I agree with the Respondent's submission that it is not for the Tribunal to decide this. I noted the advice the Claimant had received.
9. The Claimant explained how her mental health issues meant that she found it difficult to do things. She became quite emotional during the hearing, and it was evident that she found the process difficult. I expressed my sympathy for her medical condition. I explained the parameters of my discretion. I had to take account that she had legal advice at the time the order was made.
10. The Claimant had made no attempt to identify the type of disability discrimination she relied on. Had she done so, even if she was incorrect, then she would have materially complied with the order. As she did not, the unless order took effect on the date of non-compliance and her claim was automatically struck out on 20 October 2022.
11. The relevant statutory provision is s38 Employment Tribunal Rules of Procedure 2013:

Unless orders

38.—(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 shall give written 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 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.

12. In coming to this decision, I had regard to the following case law:

- a. **Royal Bank of Scotland v Abraham UKEAT/0305/09** - the whole of the claims subject to the unless order must be struck out even if there has only been a partial breach of the order. A material breach will trigger the automatic dismissal even if the defaulting party can show that they had attempted to comply wholly or in part with the order.
- b. **Wentworth-Wood v Maritime Transport Ltd UKEAT/0316/15** - three stages of consideration by a tribunal under r 38: firstly, a decision whether to impose an unless order and, if so, in what terms; secondly, a decision on whether there has or has not been material compliance with the unless order; and thirdly, if a party whose claim has been dismissed automatically for material non-compliance with an unless order applies for relief from sanctions, analysis of whether it would be in the interests of justice to overturn that dismissal.
- c. **Rogers v Department for Business, Industry & Skills UKEAT/0251/12** - an unless order, having draconian consequences, must record exactly what is going to happen if it is not complied with.'
- d. **Johnson v Oldham MBC UKEAT/0095/13** – Material non-compliance means that compliance with an order need not be precise and exact; what matters is whether it is material or substantial and, as to this, much will depend on the actual wording of the order.
- e. **Uwhubetine v NHS Commission Board England UKEAT/0264/18** - at the stage of judging whether there has been material non-compliance with an order, the tribunal must not consider its views on whether that order should have been made in the first place or whether, if breached, it will be appropriate to grant relief from sanctions from the consequences of a breach of the order.

13. I explained the reasons for my decision at the conclusion of the hearing. The Respondent asked for written reasons. I also explained that the Claimant could apply for relief from sanction within 14 days of receiving this judgment. The Claimant had difficulty in connecting and this was very stressful for her. I therefore suggested that if an application for relief from sanction was to be made then it was possible to deal with it on the papers if both parties consented.

Employment Judge Martin

Date: 18 November 2022