EMPLOYMENT TRIBUNALS

Claimant: Mr. T Chirgwin

Respondent: Ministry of Defence

Heard at: Birmingham (by CVP) **On:** 6 January 2023

Before: Employment Judge Meichen

Appearances
For the claimant: in person
For the respondent: Mr D Bayne, counsel

JUDGMENT

The unless order made on 5 October 2022 should not be set aside and therefore the claimant's disability discrimination claim remains dismissed.

REASONS

Introduction

1. By consent between the parties I determined the claimant's application for relief from sanction at the hearing on 6 January 2023. The issue for me to determine was whether an unless order made by me on 5 October 2022 should be set aside on the basis that it is in the interests of justice to do so. I decided that the order should not be set aside. I gave summary oral reasons for the decision. The claimant requested written reasons and so the following reasons are provided.

The law

2. Rule 38 of the Employment Tribunal Rules of Procedure relevantly provides as follows:

   (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.

3. An application under Rule 38(2) is commonly called an application for relief against sanctions.

4. In Thind v Salvesen Logistics Ltd EAT 0487/09 the EAT held that the factors to be considered in this type of application will generally include, but may not be limited to, the reason for the default, and in particular whether it was deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. No single factor is necessarily determinative. Each case will depend on its facts and it should not be assumed that relief will normally be granted. The EAT also recognised that unless orders are an important part of the tribunal's powers and must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside.

5. In Hylton v Royal Mail Group Ltd EAT 0369/14 the EAT explained that in an application for relief from sanctions it was for the claimant to provide evidence to satisfy the tribunal that it was in the interests of justice for his or her claim to be allowed to proceed. The EAT considered that the approach of tribunals should be facilitative rather than penal — where a claim has been struck out because of a failure to provide information but by the time of an application for relief the information has been supplied, it may well be appropriate to grant relief. Equally, the EAT in Hylton said that orders are made to be observed and it quoted from Thind as follows:

   "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. …"

6. In Enamejewa v British Gas Trading Ltd EAT 0347/14 Mr Justice Mitting said that events which have occurred subsequent to the making of the unless order can be taken into account when considering whether the unless order should be revoked.

7. There does not need to be some 'compelling explanation' or 'special factor' in order to obtain relief from the sanction, although the absence of a compelling explanation or special factor might make the enforcement of the sanction "almost inevitable". It is important to weigh in the balance the importance of compliance with the unless order. See Morgan Motor Co Ltd v Morgan EAT 0128/15.

8. In Morgan the EAT also discussed the first instance Judge's approach of considering whether a fair trial was possible at the date of the reconsideration hearing - by which time there had been material compliance with the unless

order - rather than at the date of the original imposition of the sanction. HHJ Eady said:

"The question must be whether it was in the interests of justice to look at the question at that time rather than when the sanction had in fact had been applied. The difficulty with the ET's approach is that it leaves the assessment open-ended: the party in breach can later seek to make good the default and argue that a fair trial is now possible. Given the importance of finality in litigation, is such a liberal approach in the interests of justice? ….. I do not go so far as to say that only one approach would be possible when seeking to answer that question. I can see that it might be arguable that the ET is entitled to consider it at the later date - the date of the reconsideration - testing that as against the interests of justice. What I do say, however, is that the ET must consider whether it is right to look at this question at the later date. That is not simply a matter of asking whether the further delay arose from some specific conduct on the party seeking the relief from sanction (although that might well be relevant) or merely whether that further delay has rendered such a fair trial now impossible. The ET must also ask whether it is appropriate to adopt that approach given the original default and bearing in mind the importance of finality in litigation."

9. In Singh v Singh (as representative of the Guru Nanak Gurdwara West Bromwich) 2017 ICR D7, EAT HHJ Eady further explained the considerations in an application under r.38(2). The starting point is that the tribunal is bound to determine such applications on the basis of what it considers to be in the interests of justice. The tribunal should take into account all relevant factors and avoid irrelevant factors. What factors to take into account will depend upon the particular circumstances of the case; what is required is a broad assessment of what is in the interests of justice. This is a balancing exercise which is essentially an art, not a science.

Chronology of relevant events

10. I discussed the chronology of relevant events with the parties at the start of the hearing and reviewed the relevant paperwork. I find the following has taken place:

    10.1 The claimant submitted his ET1 claim form on 4 October 2021. The claimant claimed disability discrimination, among other matters.

    10.2 The respondent submitted an ET3 response form on 3 November 2021. The response did not admit that the claimant was disabled but said the position would be reviewed following receipt of a statement and supporting medical evidence.

    10.3 On 22 December 2021 Legal Officer Metcalfe issued a case management order relevant to the claimant's disability claim. That order required the claimant to do two things by 2 February 2022. The first was to provide medical evidence and other evidence which the claimant may rely on to show he was disabled. The second was to provide *"a witness*

statement (or statements) dealing by specific reference to The Equality Act Schedule 1 and any relevant provision of any statutory guidance or Code of Practice with the effect of the alleged disability on the ability of the claimant to carry out normal day to day activities at the relevant time." This order attached relevant information as to the meaning of disability and provided links for the claimant to access helpful resources on disability and case management issues. The purpose behind this order (and the other similar orders which I explain below) was important; it was to enable the tribunal to resolve the question of whether the claimant was disabled within the meaning of the Equality Act ("the disability question"). This is a significant element of the disability discrimination complaint which the claimant had presented.

10.4 The claimant did not respond to Legal Officer Metcalfe's order by 2 February. When the respondent corresponded with the claimant about this in early February he said he had not received a copy of the order. It is unclear why the claimant did not receive a copy as it seems to have been sent to him. In any event, the respondent promptly (I think on or around 3 February) sent a further copy of the order to the claimant. The respondent proposed that the claimant be given an extension to 16 March to comply with the order but the claimant did not respond to that proposal.

10.5 On 15 February the claimant complied with the first part of the Legal Officer's order. He sent a copy of his medical evidence to the respondent and the tribunal. The claimant also sent other evidence he wished to rely on to show he had a disability. This included a statement he submitted in support of his application for ill health retirement, information he submitted in support of an appeal against an improvement warning, an application to the DWP for a PIP and information he submitted in support of a bullying complaint, Obviously these were all pre-existing documents rather than anything the claimant had created for his tribunal claim. The claimant did not comply with the second part of the Legal Officer's order to provide a statement on disability and he did not offer any explanation as to why not.

10.6 On 23 February the respondent asked the claimant where the statement was. They suggested the claimant could provide it by 16 March and said they would not object to any further reasonable extension. The claimant did not respond to that.

10.7 The case then came before EJ Wedderspoon for a case management preliminary hearing on 21 March 2022. She recorded that the claimant had already sent medical information to the respondent. She ordered the claimant to provide information in writing about his disability. She set out very specifically the questions the claimant had to answer at paragraph 6 of her order. The claimant was given until 25 April 2022 to provide the information. At paragraph 21 of her order EJ Wedderspoon recorded that the claimant had not yet provided a statement on disability and that was why she made the order that she did.

10.8 On 5 April the claimant wrote to the tribunal to request an extension of

time to prepare the disability statement. He said he had been compiling the statement but had tested positive for covid and had not been able to use the computer much. On 27 April the respondent wrote to the claimant pointing out that it had not received his statement but would agree to a 2 week extension to 9 May. The claimant responded and said that he would be continuing his work on the statement that week.

10.9 On 11 May the respondent wrote to the tribunal explaining that the claimant had still not provided a disability statement. The respondent requested an unless order.

10.10 On 16 June Legal Officer Singh directed that the claimant should respond to the respondent's application by 20 June. The claimant did not respond.

10.11 On 14 September the respondent applied for strike out.

10.12 On 26 September the claimant objected to the strike out application. In that document the claimant set out his belief that the other evidence he had submitted along with his medical evidence complied with the order to provide a statement on disability.

10.13 The tribunal directed that the respondent's application for strike out should be considered at the forthcoming preliminary hearing.

10.14 The preliminary hearing came before me on 5 October. The claimant had still not provided a disability statement. The respondent did not pursue its application for strike out. The respondent applied for an unless order and I granted that application. In my order I recorded the following relevant information:

"The claimant had chosen not to comply with EJ Wedderspoon's order and a significant amount of time had passed since it should have been complied with. There had been no application to vary, reconsider or appeal against EJ Wedderspoon's order and parties are not entitled to choose which case management orders they comply with. I have made it clear to the claimant that he is expected to comply with all case management orders made by the tribunal so that the case is properly prepared for final hearing. This is in his best interests. I have also made it clear that all the claimant needs to do is provide a statement which answers all the points set out at paragraph 6 of EJ Wedderspoon's order. It will not be acceptable for the claimant to simply refer to other documents but he can use the information in other documents. The other statements the claimant has prepared can still be put before the tribunal at a later date and considered if appropriate".

10.15 I made the following order at the hearing on 5 October: "*On the application of the respondent and having considered any representations made by the parties, I therefore order that unless by 28 October 2022 the claimant complies with paragraph 6 of EJ Wedderspoon's order the complaint of disability discrimination will stand dismissed without further*

order."

10.16 The claimant attended the hearing on 5 October and agreed to provide a statement by 28 October. He did not indicate there may be any issue with him providing a statement within that time frame. What was required to comply, the importance of complying and the consequences if the claimant did not comply were all clearly explained to the claimant at the hearing. The claimant was given 23 days to provide the statement. This took into account the claimant's health, the fact he may be disabled and that things may take longer for him than a person without his disability. Ordinarily I would not have given more than 14 days to provide the statement in the circumstances.

10.17 The claimant did not comply with the unless order. He did not contact the tribunal or the respondent to explain any difficulties he may have been having prior to the expiry of the time limit for compliance. The claimant did not apply for any variation of the unless order before 28 October.

10.18 On 3 November the claimant wrote to the tribunal to retrospectively request an extension of time to comply with the unless order. In that email he explained the reasons why he said he not been able to comply. These were firstly that he had his covid vaccination on 10 October and this had caused an adverse reaction. Secondly the claimant explained he had other tasks that he had had to complete. These were as follows: applying for a new vehicle under the Motability scheme as his existing lease was coming to an end, applying for hardship grants with energy supplies and a water company and helping a disabled friend with a complex PIP application.

10.19 On 16 November the claimant provided a disability statement. This was more than 9 months after the statement should originally been provided.

10.20 On 13 December the tribunal wrote to give notice that the disability discrimination complaint had been dismissed.

10.21 On 27 December the claimant applied for reasons and for the dismissal of his disability claim to be reconsidered. It was agreed today that this should be treated as an application for relief from sanction under rule 38(2).

11. Two matters raised in the claimant's application of 27 December should be addressed immediately:

11.1 Firstly the claimant said that at the hearing on 5 October I had used the phrase "disability impact statement" which he was unfamiliar with. As a result he appeared to be suggesting that he had not known what was expected of him. On reflection the claimant accepted this was not right. This is because I had explained at the hearing and explicitly recorded at paragraphs 1 and 4 of my order what was meant by a disability impact statement and what was expected of the claimant – i.e. simply to provide a statement which answers all the points set out at paragraph 6 of EJ Wedderspoon's order.

11.2 Secondly the claimant re-emphasised his point that he considered that the relevant information had been provided as part of the evidence he submitted on 15 February and he "wanted to use the statements already provided". However the claimant also acknowledged that this point had been discussed at the hearing on 5 October and I had made it clear, in the claimant's own words, that a "a new statement must be created". I note this was also the view that EJ Wedderspoon took and the issue here is that the claimant did not comply either with Judge Wedderspoon's order or the unless order which were both made after the claimant submitted the documentary evidence which he wished to rely on. However, given the emphasis placed by the claimant on the other evidence he submitted on 15 February I ensured that evidence was before me for today's hearing so I could consider it and take it into account. The claimant confirmed that the evidence he was referring to was in the supplementary bundle for today's hearing at pages 352 – 394.

Conclusion

12. I explained the nature of the decision which I had to take today and I heard from both sides as to the what they considered the relevant factors were. I considered that the most relevant factors were these:

12.1 The importance of complying with unless orders, and the interest in the employment tribunal enforcing compliance.

12.2 The importance of finality in litigation.

12.3 The chronology set out above shows in my view that the claimant has persistently failed over a lengthy period of around 9 months to comply with the tribunal's orders to provide a disability statement.

12.4 The claimant has not demonstrated that he had any good reason for failing to comply with the unless order:

12.4.1 The claimant did not provide any medical evidence to substantiate his contention that he was ill following his covid vaccination on 10 October. Today, the claimant told me that he had been incapacitated for a period of "1 to 2 weeks" from 10 October. In my view, this does not provide an adequate explanation as to why the claimant could not complete his statement between 5 October and 28 October. It did not need to be a lengthy or complex document and the claimant had said earlier in the year that he had been working on the statement so it should have been partially prepared anyway.

12.4.2 The claimant's own explanation to the tribunal made it clear that he had focused on other tasks rather than complying with the unless order. I explored this further with the claimant today. There did not appear to be any pressing reason why the claimant had to prioritise any of these other tasks over complying with the unless order. At one

stage the claimant simply said the unless order had not been on his mind, which suggests he had not been attaching sufficient importance to the order. In respect of the car lease the documents the claimant provided showed that his lease did not expire until 17 November, yet the claimant told me he had spent time in October applying for a new vehicle, visiting the dealership and so on when he could have spent time finalising his statement. Regarding the hardship grants the claimant told me he was in debt but he did not say anything to indicate these applications could not have waited until after he completed his disability statement. Finally, although it is laudable that the claimant wished to help his friend with her PIP application this is in my view a clear example of something that should not have taken precedence over the claimant complying with the unless order.

12.5 In light of the above I was driven to the view that the claimant's failure to comply with the unless order was deliberate and contumelious. This was demonstrated by his failure to comply with 3 orders from the tribunal to provide the statement, the lack of any reasonable explanation for any of the failures (including my conclusion on 5 October that the claimant had chosen not to comply with Judge Wedderspoon's order) and the fact that the claimant had prioritised other tasks ahead of complying with the unless order. I also considered the claimant's consistently expressed belief that he thought he did not need to comply with the order because he believed the relevant information was contained within the evidence he provided on 15 February. This has been a thread throughout my discussions with the claimant over the last two hearings and it is apparent from the paperwork too. It appears to me that the claimant has maintained this incorrect view even after the unless order was made and it was spelt out to the claimant at the hearing on 5 October that he must comply with all orders of the tribunal, whether or not he agreed with them. This raises the concern that the claimant might not comply with future orders of the tribunal if he disagrees with them.

12.6 The claimant's failure to comply was in my judgment extremely serious. It came against a background of non-compliance with two earlier orders. It was made abundantly clear to the claimant on 5 October that he was already in the last chance saloon. The claimant still did not comply and there was no attempt at even partial compliance; this was a wholesale failure to comply. Furthermore, the claimant had, again for no good reason, failed to explain any problems he was having or apply for an extension until after the time limit for compliance had expired.

12.7 The claimant did not in my view act promptly to comply with the order after the time limit had passed. Again there has been no cogent or reasonable explanation from the claimant as to why it took him from 28 October to 16 November to provide the statement.

12.8 Even the claimant's statement of 16 November is not in my view a straightforward attempt to provide a disability impact statement, albeit it

does contain relevant information. As had been made clear to him at the hearing on 5 October all the claimant had to do was provide a statement which answered the 8 questions set out at paragraph 6 of EJ Wedderspoon's order. The claimant records in his application of 27 December that I had told him that he should not just paste parts of other documents to create the statement. However, the statement provided by the claimant is far too long (30 pages) and the claimant has cut and pasted large parts of other documents. It appears to me that the claimant has taken the opportunity to try and establish that the relevant information was in the documents he submitted back in February. This makes the statement harder to read and understand than if the claimant had straightforwardly answered the specific questions posed.

12.9 In my view it is clear that the respondent has been prejudiced by the claimant's failure to comply with the orders to provide a disability statement. In particular, the claimant's failure has caused delay and increased costs as is apparent from the chronology outlined above. It could be argued that the claimant faces prejudice if his disability claim is dismissed as he will not have the chance to pursue a claim which is important to him. However I do not consider that to be a weighty factor when the claimant has so plainly brought this situation upon himself by repeatedly failing to comply with the tribunal's orders.

13. I have also weighed in the balance the question of whether a fair trial is still possible. I found this was the most finely balanced factor. I acknowledge that the claimant provided some relevant evidence as to whether he is disabled in February. However this does not mean he was entitled not to comply with the order to provide a statement. In the end I reached the following conclusions on this factor:

13.1 I considered firstly the question of when this should be assessed. It seemed to me to be more appropriate to assess at the time the sanction was applied. The claimant's default was serious and deliberate as explained above. The claimant had only sought to make good the default at a very late stage after failing to comply with 3 separate orders and more than 9 months after he should have first complied. The claimant had not acted promptly even after the unless order expired. The unless order was not and was not intended to be open ended. The delay including the delay after the unless order expired has been either unexplained or inadequately explained. By the time of the hearing to determine the relief from sanction application more than 11 months had passed since the claimant should have first provided a disability statement and the disability question had still not been resolved. Even at that stage further steps would need to be taken before there could be a fair trial, in particular the respondent would need to consider and set out their position on disability. This was solely down to the claimant's default. In these circumstances the importance of finality in litigation and the interests of justice dictate in my view that the question should be assessed at the time the sanction was applied.

13.2 I next considered whether a fair trial was possible at the time the sanction

was imposed. I found it was not. Although the claimant had provided documentary evidence from which I acknowledge it is possible to extract relevant information about the disability question this is not the same as providing a statement. An important part of the litigation process is that parties set out their case in a statement so that the tribunal and the other side understand their position. It is particularly important in order to ensure fairness for a respondent to understand the case they have to meet. The disability question is an important part of the case the claimant has presented. It is not acceptable or fair for a party simply to serve documents and say that the relevant information can be found within them. If disability was not conceded then the claimant would likely have to give evidence. Without a statement the respondent and the tribunal would not know what he was going to say. This would be unfair.

14. I concluded that that the most relevant factors identified above very clearly weighed against the grant of relief from sanction. As I said I found the fair trial point was more finely balanced than the other factors but even if I had adopted a more liberal approach and concluded that this question should be assessed from the date of the hearing to consider the claimant's application for relief and/or a fair trial was still possible that would not in my view have amounted to a basis for granting relief. This was because in the circumstances of this case the seriousness and weight of the other factors meant that it would not be in the interests of justice to set the order aside in any event. I therefore refused the claimant's application for relief against sanction.

Employment Judge Meichen

12.1.23