EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Miss S Moody	v	London Borough of Southwark

Heard at: London (South) (in public; by CVP) **On:** 25 September 2024

Before: Employment Judge Fredericks-Bowyer

Appearances
For the claimants: In Person
For the respondent: Mr S Wyeth (Counsel)

RELIEF FROM SANCTION

1. The unless order made against the respondent sent on 14 August 2024 is set aside.

2. The respondent is granted relief from sanction; the response is reinstated and treated as if never dismissed.

REASONS

1. This is the respondent's application for relief from sanction following the response being dismissed for non-compliance with an unless order. After hearing the application, I set aside the unless order. The response is reinstated. The claim continues defended.

2. I gave oral judgment at the hearing. These written reasons are produced at the claimant's request.

Procedural history

3. The claim was issued on 20 May 2023. The claimant worked as a higher level teaching assistant from 9 November 2013 to 16 December 2022. She advances claims of unfair dismissal, race discrimination, race harassment and victimisation.

4. The claims were discussed and clarified at a hearing before Employment Judge Craft on 5 March 2024. The question about whether or not the respondent would file an amended response is resolved at paragraph 8 of the resultant case management orders:-

> *"The respondent is permitted to serve an amended response, so as to arrive with the Tribunal and the claimant on or before **21 May 2024**, if so advised. The amended response will set out the respondent's factual assertions in connection with the claims as understood as a result of the discussions at this hearing and preparation of the Scott Schedule."*

5. This is not an instruction to file an amended response. It is permission to do so 'if so advised', with that permission time limited. The respondent would be unable to amend its response until it understood the claimant's claims, and to that end the claimant was ordered to confirm and serve a Scott Schedule by 9 April 2024.

6. The claimant did not serve the Scott Schedule until 1 May 2024, some three weeks after the deadline required. The respondent had not raised delay or non-compliance with the Tribunal. The claimant also lodged an application to amend the claim which is subject to separate determination outside of this hearing.

7. On 20 May 2024, the respondent's solicitors made an application to the Tribunal to extend the time to file a response. The e-mail says, relevantly (my underline for emphasis):-

> *"We write on behalf of the respondent and respectfully request an extension of 14 days to file an amended response following receival* [sic] *of the Scott Schedule which had been provided by the claimant later than anticipated.*
>
> *Upon receival* [sic] *of the Scott Schedule, we have had the chance to review and understand the allegations cited are lengthy and involve many members of staff, some of which are no longer employed by the respondent. This will lead to difficulties and delays for us when trying to obtain comments and confirming our client's instructions.*
>
> *We would be grateful for an extension of 14 days to allow us to provide a full and effective response…"*

8. There is, therefore, a change in circumstances compared to those before Judge Craft. The respondent plainly *'is so advised'* at this point; there is an amended response intended and the respondent's solicitor is applying to the Tribunal for an extension of time to file a specific document without caveat attached.

9. On 17 June 2024, Employment Judge Abbot gave the following response and directions:-

> *"In the interest of justice, extension of time for the amended response is granted to 25 June 2024.*
>
> *The respondent is to provide its comments on the claimant's application to amend by 7 July 2024…"*

10. The respondent's solicitors have submitted that this correspondence was not received by them. This was said in their original response to the unless order leading to the response being dismissed. It was then accepted that it was received, but submitted that this did not contain an order to do anything. In the hearing, Mr Wyeth accepted that the correspondence did, at least, make an order for comments to be provided on the application to amend the claim. Mr Wyeth submitted that the part about the extension of time only extended the time to file a response 'if so advised', and so there is permission given rather than a direction to do something.

11. There is then a gap in the bundle submitted by the respondent for this hearing, and correspondence is missing which is part of the important procedural history:-

    11.1. On 26 June 2024, the claimant's representative e-mailed the Tribunal to say that the amended response has not been received and there has been no contact or explanation about the delay. The respondent's solicitor was copied into that e-mail. There was no response from the solicitor.

    11.2. On 30 June 2024, the claimant provided information about the remedy being sought, and the e-mail sets out that information has been requested from the respondent but not received. The respondent's solicitor was copied into that e-mail. There was no response from the solicitor.

12. The respondent's solicitor made no other contact with the Tribunal to explain any delay, to confirm that there would not be an amended response after all, or apply for any extension.

13. The respondent did not comply with the direction to provide comments on the application to amend the claim by 7 July 2024. It did not, after the deadline, make any contact with the Tribunal.

14. On 22 July 2024, the claimant made an application for an unless order. The covering e-mail was copied to the respondent's solicitor. There was no response to the solicitor.

15. The application was referred to me on the papers. In my view, the respondent had not filed an amended response, despite having decided to do so, by 25 June 2024. It had not filed comments on the application to amend the claim as it had been directed. I could see that the respondent's solicitor had been copied into several e-mails, including one complaining that the respondent had not complied with a direction, and an application for an unless order. None of those e-mails had been replied to. There was no amended response, and no clear position on the application to amend the claim.

16. I made an unless order, which said, relevantly:-

> *"There is a final hearing listed to be heard in 6 months' time. The parties are still not clear on the scope of the claim and clarity must be achieved urgently. The respondent has not given any reason for the failure to comply, and it appears from the Tribunal file that the response may no longer be being actively pursued.*
>
> *In the circumstances, it is appropriate to make an unless order under Rule 38 Employment Tribunal Rules of Procedure 2013. I make the following order –*
>
> ***Unless by 4:00pm on Wednesday 14 August 2024, the respondent provides (1) its amended response, (2) its comments on the claimant's application to amend the claim, and (3) an explanation for the non-compliance with a Tribunal order, the claim shall be dismissed without further order…****".*

17. Unfortunately, that unless order was not sent to the parties until the afternoon of Wednesday 14 August 2024 and, despite the delay in it being sent, no-one sought to amend the deadline before it was sent. The upshot was that the respondent only had some 3 hours to comply with the three-part order. Even though, in my view, (1) and (2) should have been completed several weeks before the unless order was made, it clearly was not my intention to effectively deprive the respondent of the ability to comply with the unless order.

18. The respondent did not comply with the unless order. The response was automatically dismissed. The respondent's solicitor then made content to object to the order being made. Only then was I made aware of the delay in sending the order out. The respondent was required to make this application to set aside the unless order, and the application was heard in the hearing which had already been listed.

19. Confirmation of the application of sanction was sent to the parties on 2 September 2024. The application to set aside the unless order and for relief from sanction was sent by the respondent's solicitors on 13 September 2024. The application is in time.

20. In this hearing, I was assured that the respondent had not abandoned the defence to the claim. Even though it may have appeared so, I was told (and it was not disputed) that the respondent had been engaging throughout the period with the claimant and her claim on a without prejudice basis.

Relevant law

21. The test for setting aside an unless order and relief from sanction are set out at *Rule 38 (2) Employment Tribunal Rules of Procedure 2013*. It says –

> *"A party whose claim or response has been dismissed, in whole or in part, as a result of [an unless] 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."*

22. In *Wakeman v Boys and Maughan Solicitors and another [2024] EAT 39*, HHJ James Tayler provides a comprehensive summary of the law to be applied when considering an application under *rule 38(2)*. The saliant principles for the purposes of this particular application, are:-

    22.1. The decision should consider the overriding objective, emphasising proportionality of decisions made and seeking to avoid unnecessary formality.

    22.2. The factors to be weighed when considering the interests of justice generally include [*Minnoch and others v Interserve FM Ltd [2023] EAT 35* –

        22.2.1. The reason for the default – in particular whether it was deliberate,

        22.2.2. The seriousness of the default,

        22.2.3. Prejudice to the other party,

        22.2.4. Whether a fair trial remains possible.

    22.3. Unless orders are an important and serious case management tool which should not be easily set aside (*Thind v Salveson Logistics Ltd UKEAT/487/09/DA*).

Relief from sanction

23. The simple fact, with this application, is that the respondent had no realistic possibility of complying with the unless order once it was made due to the delay introduced by the late sending of the unless order. The unless order operated, completely unintentionally, as a strike out in all but name – and an effective strike out of which the respondent had no warning and no opportunity to address (as it would if a strike out warning was given). The nature of the sanction meant that it was applied before anyone was alerted to that very real and damaging unfairness.

24. In my judgment, the unless order should be set aside for that reason alone. It is not in the interests of justice or in accordance with the overriding objective to subject the respondent to the harshest sanction. This is plainly the sort of scenario where the order can be set aside without undermining the seriousness of the unless order regime, as is warned by *Thind*.

25. Considering the other generally relevant factors for completeness, I consider –

    25.1. The respondent's default was not deliberate, wither in terms of failing to comply with the unless order or in the events which led to the making of the order. Mr Wyeth described the respondent's silence in respect of the claim and failure to file an amended response as 'discourteous'. In my view, the conduct is some way beyond that. There has been a series of instances where best practice would indicate making contact with the Tribunal. The respondent's solicitor told the Tribunal that something would be done and requested a deadline. That deadline was not met. An explanation was only provided some two months later after the response had been dismissed. Managing in a case in that way is always

going to risk a serious adverse decision because it led me to conclude that the defence may have been abandoned. The respondent solicitor's conduct towards the Tribunal mirrored exactly that which an Employment Judge would see where there had been such an abandonment. That said, I accept that the default was a mistake caused by a combination of staff annual leave and other work pressures, including dealing with this claim on a without prejudice basis.

25.2. The default which led to the response being dismissed was not serious of the kind which would make this end result proportionate. It is important for clarity in the parties' position to be achieved and it is important for the parties to be ready for the final hearing. However, an amended response was provided by the time of this hearing and further finalisation of the response may need to be done in any event because the claimant then chose to apply to amend her claim. The respondent's conduct has not, in reality, alone delayed the setting of the issues in the claim because the application to amend the claim has contributed to that.

25.3. I accept that the claimant is prejudiced by a decision to set aside the unless order because, if it is not set aside, she is entitled to only have remedy determined without having to prove her case in a properly contested hearing. I accept that having to contest this claim where it is defended is likely to be more difficult with a significant impact upon her. This is, though, no different to what would have had to happen if the unless order was capable of being complied with (and I am satisfied that the respondent would have complied with the order if it had been able to do so).

25.4. A fair trial remains possible, and remains possible within the listed window. The issues can be clarified at the next hearing and the claim case managed to timetable it appropriately to final hearing. The conduct of the respondent does not undermine inherent fairness in the hearing or the process.

26. Considering, in the round, what is in the interests of justice and the balance of overall prejudice to one party compared to the other, it is overwhelmingly the case that it is in the interests of justice to set aside the unless order. Even leaving aside the perverse effect of the order introduced by its delayed sending, on balance, I consider that the order should be set aside having analysed the effect of the sanction through the authorities outlined above.

27. The unless order is set aside. Relief from sanction is granted. The claim continues and will be case managed to trial at the next hearing.

Employment Judge Fredericks-Bowyer
29 October 2024

Sent to the parties on:
15 November 2024
…….

For the Tribunal Office:

……..…….