



EMPLOYMENT TRIBUNALS

Claimant

R Godfrey

Respondent

Department for Environmental
Food and Rural Affairs

Heard at: London Central

On: 30 November 2023

Before: Employment Judge Lewis

Representation

For the Claimant: Represented himself

For the Respondent: Mr M Paulin, Counsel

RESERVED JUDGMENT

Introduction

1. The claimant brought various claims for disability discrimination. He says he has two disabilities: (1) Autism spectrum disorder / ADHD (2) Depression. He explained that anxiety and depression can be a feature of both conditions, as well as his specific period of depression. The respondent did not admit that the claimant has these legal disabilities and it had wanted some information to enable it to make a decision.
2. The purpose of today's hearing was to decide whether any of the claims have been automatically struck out for non-compliance with the Unless Order made by EJ Davidson on 25 April 2023 and if so, whether I should grant 'relief from sanction' ie reinstate the claims and allow them to continue.
3. There was an agreed electronic trial bundle of 116 pages. Over the lunch break, the claimant provided an excel sheet which visually illustrated his allegation that all his PCPs applied to all his disadvantages.

4. The Unless Order seeks what is for a litigant in person, a complex set of information. The difficulty with this kind of Unless Order is to decide what constitutes non-compliance. An answer which is not well-drafted may still be an answer.
5. The claimant provided his answer on 12 May 2023, the deadline in the Unless Order under the heading 'Particularisation of Issues'. At the same time, he applied for a variation to some elements of the Order. He provided Impact Statements to the respondent on 2 May 2023 and to the tribunal on 12 May 2023.
6. I gave my decision on disability status and direct discrimination during the preliminary hearing, but I reserved my decision on the other matters. This letter sets out everything. I have started with disability status as the claims all depend on that.

Paragraphs of the Unless Order

Disability status: Paragraphs 10 - 11

7. The claimant did provide Impact Statements. These were ordered to cover the period April 2021 – August 2022, but there is no requirement that the statements state in terms that that is the period covered. There is nothing in the Statements which says they relate exclusively to some other period. The Impact Statement on depression says it had started more than 12 months prior to March 2022. The Impact Statement on autism/ADHD has no dates because it is a lifelong condition. I think this would amount to sufficiently comply with the Unless Order.
8. The Unless Order says the Statement should include 'whether the claimant is taking measures including medication'. One way of reading that is that he only needs to mention measures if he is taking them. It does not say 'whether or not'. The Impact Statement on depression does state the claimant was taking corrective measures, ie 'medical treatment such as a course of psychotherapy'. It could be more detailed, but it does provide an answer. In relation to autism, the claimant was not taking any medication or measures and so he did not mention them. A cautious lawyer might have read the Unless Order to mean the claimant should have stated 'I was not taking measures for autism' but I think there is sufficient ambiguity for a litigant in person not to be in non-compliance.
9. For these reasons, I consider the claimant complied with paragraph 10 of the Unless Order.
10. I also note that the Order says 'should' as opposed to 'must' for those two details, whereas it says 'must' elsewhere. The word 'should' is ambiguous because it can mean 'must' or 'ought', the latter being less mandatory.

11. Paragraph 11 requires the claimant to send any medical or other evidence on which he intends to rely to show he had a disability. So a failure to send such evidence would, at worst, mean he was not permitted to provide medical evidence or other evidence in support, although I find the term 'other evidence' to be too wide in scope to have meaning.
12. The claimant did not provide any medical evidence, so under the terms of the Unless Order he would not be permitted to rely on any evidence he did not provide with his Particularisation and Impact Statements.
13. On that point, however, I grant limited relief from sanction. My reasons are my general comments on relief from sanction below plus the following additional factors. When the claimant provided his Particularisation on 12 May 2023 and therefore before the compliance deadline, he asked to vary Order 11 because the respondent has medical records in its possession. Indeed, I can see from the bundle that the respondent's solicitors had not sent the main OH report to claimant until 8 November 2023, despite him asking for it earlier. The claimant also told me he has a letter diagnosing him with level 1 Aspergers which he says he showed OH and OH relied on. He also told me that he had a couple of short letters about his psychotherapy. He mentioned psychotherapy in his Particularisation and it would be helpful for the tribunal and the respondent to see those letters. I therefore allow him to rely on the OH reports and also any existing letters regarding his psychotherapy and his Aspergers diagnosis which he or the respondent have in their possession, and on any other relevant medical evidence which is in the respondent's possession.

Indirect discrimination: paragraph 1

14. On 15 November 2022, EJ Murphy recorded 3 PCPs at paragraph 3.4 of his case management letter, ie
 - 14.1. Applying criticism to individuals who worse clothes selected for their sameness
 - 14.2. Applying criticism for failing to make consistently good eye contact
 - 14.3. Applying criticism for abrasiveness in communications, written email or oral.
15. The claimant was required to set out any further PCPs on which he intends to rely. In his Particularisation, he set out a list of 11 PCPs, which he says are relevant to both disabilities. I therefore consider that he has complied with paragraph 1 of the Unless Order.

Paragraph 2

16. In relation to each PCP, the claimant was required to set out what particular disadvantage that PCP placed people at. The claimant's response was 'see impact particulars'. By this he meant his Impact Statement in relation to each of his disabilities.

17. The Impact Statements only talk about the impact on him, but being generous, it could be inferred that he meant that as indicative of the disadvantage for others with his disability.
18. The Impact Statements do not explicitly link the described effects of each disability (assuming these are the disadvantages) to each PCP, but the claimant is saying that all the disadvantages belong to each of the provisions, criteria and practices and his words, being in the plural, can be interpreted as meaning that. So, to take one example, I can see that the claimant is saying failure to set out role duties and activities [PCP 3] places autistic people at a disadvantage because they are isolated at work; find it difficult to deal with change and contradiction; need more time to master complex systems; find it hard to assess boundaries etc., and PCP 3 puts people with depression at a disadvantage because they cannot focus on tasks and are unable to communicate clearly.
19. Not all these 'disadvantages' are well expressed and some might be described as rather the effects of the disabilities. The claimant may not be able to show that each of the disadvantages arises from each PCP. But the Unless Order simply requires an answer, not necessarily a good answer, and in any event, this an area which experienced lawyers often struggle to express clearly.
20. It is true that the 'disadvantages' have to be isolated from the surrounding narrative text in the Particularisation. But litigants in person often express things that way when providing particulars. The Unless Order says the claimant must 'set out the disadvantage', and that is essentially what he does, even if it is incorporated into wider text. The claimant is a litigant in person and I believe that his Particularisation essentially provides what the Unless Order requires.
21. If I am wrong about that and the claimant has failed to comply with the Unless Order, I grant relief from sanction for the general reasons set out below and also these factors: the claimant has tried to answer; he believed he had answered; it should be pretty clear to the respondent who is legally represented as to what he is saying. Final clarification can be pinned down with the help of a Judge at the next preliminary hearing.

Direct discrimination: paragraph 3

22. The claimant has answered this. It is the matters which are expressed as PCPs 5 – 9, ie
 - 22.1. Being loaned across teams
 - 22.2. Being provided with up to four line managers and/or that did not align with pastoral manager
 - 22.3. Providing confusing teams and indeterminate situations
 - 22.4. HR failing to engage in a timely or meaningful way
 - 22.5. HR leadership and leadership ignoring the issue when flagged including an informal complaint..

Discrimination arising from disability: paragraphs 4 and 5

23. The claimant was ordered to identify the 'something' and then state what unfavourable treatment was caused by that 'something'.
24. The claimant identified the alleged unfavourable treatment (I do not think anything should be made of the fact that he mistakenly calls it 'less favourable treatment') as all the matters listed in the PCPs. From speaking to him at the hearing, I think the claimant did not understand the concept of unfavourable treatment 'because of something arising'. However, his particulars did itemise treatment, so paragraph 5 of the Unless Order is therefore complied with.
25. For the 'something', the claimant referred to his Impact Statements. This 'identifies' the 'something', even if it is not 'identified' in a way which a lawyer would like. I believe the claimant has technically complied with paragraph 4 of the Unless Order.
26. What the claimant has put into his Particularisation amounts to saying the reason the employer did each of PCPs 1 – 10 and 10b was because of all of the effects of his disabilities as set out in the Impact Statements. I am not sure that is necessarily what the claimant means to say, because as I say, the claimant did not at the point of writing his particulars understand the legal definition. However, it is what he has said, and it therefore complies with the Unless Order. I have made suggestions regarding how to go forward with this in the accompanying case management letter.
27. After I explained the meaning of section 15 to the claimant today, with an analogy (being dismissed for disability-related sickness, the 'something' being the sickness caused by disability), the claimant clarified that he was saying:
- 27.1. The respondent transferred him to other teams because it became irritated with his inability to deal with his frustration and difficulties. The frustration arose because of the difficulties of his disabilities as described in his Impact Statements. Arguably this is sufficiently covered by his Particularisation to the Unless Order, but if not, I would allow grant relief from sanction.
- 27.2. As described in paragraph 15 of his ET1 statement, he felt that his low score on the two roles in the Green Finance Team and his lack of success was due to 'something arising from his autism disability', ie an EOI selection method which did not make clear to him what was wanted. This was spotted by EJ Hodgson in his case management letter, but possibly forgotten by the claimant when he provided his Particularisation for the Unless Order. As, the claimant did not refer to this matter in his Particularisation, under the terms of the Order, this claim is dismissed. However, I grant relief from sanction because of my general comments on relief from sanction and because in this case, section 15 is very difficult to understand, employment lawyers often get it wrong, and anyway paragraph 15 of the ET1 was already pretty clear about the nature of this claim.

Failure to make reasonable adjustments: paragraphs 6 - 8

28. The claimant did provide a list of PCPs, ie the same list as for the indirect discrimination claim. So paragraph 6 of the Unless Order is complied with.
29. For the nature of his disadvantage, the claimant refers to his Impact Statements. Again, he does not identify the disadvantage in relation to each PCP, but he tells me he meant that each PCP has each disadvantage. He gave his answer in the plural and given that he is a litigant in person and may not therefore be as precise in his wording as lawyers, I would consider that paragraph 7 was therefore complied with.
30. Regarding paragraph 8, ie 'in relation to each PCP and associated disadvantage .. what steps does the claimant suggest it would have been reasonable for the respondent to take', the claimant refers to the OH workplace adjustment reports and medical evidence. He does not set out himself what they say the steps (adjustments) should have been. The question is, does reference to an external document satisfy the Unless Order? Has the claimant identified the steps? I would say that indirectly, he has, at least in relation to steps set out in the OH report which the respondent has and is a specific document or documents. As employment lawyers, we know that what the Unless Order wants is the claimant to repeat the recommendations in his Particularisation, but the claimant as a litigant in person understood that reference to a document in the respondent's possession was sufficient. I think that did amount to compliance with the Order. I think the reference to any further adjustments in 'medical evidence' is too vague and not in compliance with the Order.
31. I elicited from the claimant exactly what the steps suggested in the OH report were. From memory, these were:
- 31.1. Not having multiple line managers
 - 31.2. Having a clear Job Description
 - 31.3. HR available for the claimant to engage with
 - 31.4. Having a line manager who is able to provide direction and alleviate stress
32. If I am wrong and reference to the OH workplace adjustment reports is not sufficient for compliance, I would grant relief from sanction on this point for the general reasons below and also because the claimant believed what he said was sufficiently clear and that the relevant document or documents was in the respondent's possession.

Relief from sanction: general points

33. There are a few items where, as explained above, I gave the claimant the benefit of the doubt in deciding he had complied with the Order. There are other items where I would say he had not complied with the Order. In both cases, I considered whether, if he had not complied with the Order, I should

nevertheless allow him to continue with the relevant claim. The technical phrase for this is 'relief from sanction'.

34. There were a number of general factors to take into account. My starting point was that an Unless Order was made. It was made because the claimant was not complying with deadlines on previous Orders and did not appear to be fully engaging with the case. An employer does need to know what case it is facing and should not have to continually struggle to find out what it is. An Unless Order put the claimant firmly on notice that he must now provide certain information and that he would not be allowed to pursue claims if he did not. It undermines Unless Orders if the tribunal too readily ignores that they have not been complied with.
35. On the other hand, the claimant obviously had made an attempt to answer all the questions in the Unless Order, even if he did not always get it right, and on item 11, he asked the tribunal to vary the Order prior to the deadline. Although the tribunal had not yet responded to his request, so the deadline for the Unless Order stood, the claimant did have a logic for asking to vary, ie that the respondent had the OH reports itself.
36. The claimant had not complied with Orders prior to the Unless Order, but the picture is complex. The 15 November 2022 preliminary hearing was cut short because of technical difficulties with sound. The result of that was that the Employment Judge ordered the claimant to provide information about his claim by 6 December 2022. Had the hearing not been cut short, it may well be that the Judge would have been able to elicit the claim verbally with the claimant, which would have avoided subsequent difficulties. The deadline was extended to 13 January 2023 at the respondent's suggestion because the claimant had not complied. Then at a preliminary hearing on 27 February 2023 which the claimant was unable to attend, the deadline was extended again to 27 March 2023. The claimant had notified the tribunal a few days before that he was unwell, but that notification had not been looked at by a Judge prior to 27 March 2023. Then at a further preliminary hearing on 25 April 2023, the claimant accepted he still had not complied or engaged with the respondent but he confirmed that nevertheless he wanted to pursue his claim. The Unless Order was then made.
37. Looked at from one point of view, the claimant was given a number of chances to provide the information but did not do so. On the other hand, the claimant did attend two of the three preliminary hearings, as well as the one today. He did give a few days notice that he could not attend the one which he did not attend. He was unwell with depression at that time and had been off work for about a month. He was also hesitant to push his case because he was moved several times and kept hoping that the case would not prejudice his new work situation. I am conscious that I do not have the finer details and dates of the claimant's health difficulties, but I accept he was unwell as he says.
38. The claimant is a litigant in person. He was faced with an Order for particulars which in my experience, the vast majority of litigants in person find

difficult to answer in a way which lawyers expect. This is why Employment Judges so often spend time at case management preliminary hearings talking the claims through with litigants in person, rather than sending them away to comply with detailed Orders. This helps both sides understand the case from the outset. Because of a combination of the problematic technology and the claimant's illness, Employment Judges here did not have early opportunities to step in and help.

39. As at the date of any partial default, ie the date the claimant provided particulars which were in part inadequate, it was still possible to have a fair trial. No hearing dates had yet been set. Although matters were a few years old, that is not unusual in discrimination cases, many of which go back even further. The claimant had provided sufficient information for it to be possible to see what he was getting at and what the essential issues would be.
40. While the claimant has fallen short in a few areas, it was not deliberate. He was trying to explain himself.
41. I believe overall it is in the interests of justice to allow the claim to proceed. The hearing has to go ahead anyway to deal with the direct discrimination claim and the harassment claims which I shall deal with below. This covers a great deal of the same factual ground. I do not feel it is in the interests of justice for the claimant in these circumstances to be prevented from having his case fully decided because, as a litigant in person, he was unable to frame his information in the correct technical way required by the legal definitions.

Harassment claim

42. Mr Paulin agreed that the claimant included harassment in his original claim. The claimant referred to harassment in the last line of paragraph 18 of his Particulars of Claim and the respondent pleaded to it in its Response.
43. No particulars in relation to the harassment claim were ordered in the Unless Order, so this claim is unaffected by the Unless Order.

Law

44. I will not set out the law in full here, but I read the guidance in Minnoch and ors v Interserve FM Ltd [2023] ICR 861, EAT and Thind v Salvesen Logistics Ltd EAT/0487/09. I accept the test is qualitative rather than quantitative, the approach should be facilitative rather than punitive, and any ambiguity in the drafting should be resolved in favour of the party being required to comply. I also accept that the fact that an Unless Order has been made, putting the claimant squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration.

Employment Judge Lewis
30th Nov 2023

Judgment and Reasons sent to the parties on:

01/12/2023

For the Tribunal Office