

IN THE EMPLOYMENT TRIBUNAL

BETWEEN:

Case N° 22 of 2018

JACQUELINE FRANCES GORLEY

Claimant

-and-

CENTURION ADMINISTRATION LIMITED

Respondent

Dated this 23rd day of October 2019

DECISION

On the 17th day of September 2019, application was made by the Claimant for this Tribunal to strike out the Response filed by the Respondent on the grounds that the Respondent had failed to comply with this Tribunal's order of the 25th day of March 2019, in that a director of the Respondent had failed to file within 28 days of the date of the Order a signed statement explaining various issues with regard to disclosure, and also failed to exchange witness statements with the Claimant by the 30th day of June 2019. The Claimant's application to strike out was in the event dismissed but pursuant to Rule 62(2)(a) of the Employment Tribunal (Constitution and Procedure) Rules 2016, I did make an order that the sum of £6,150.50 be paid by the Respondent to the Claimant within 28 days of the date of the hearing. Payment should therefore have been made by close of business on the 15th October 2019.

At 6.44 pm on the 17th October 2019, the Claimant's solicitor, Mr Nicholas Gomez of Charles A Gomez & Co, wrote to the secretary to the Tribunal stating that the Respondent had failed to comply with the Tribunal's order of the 17th September 2019, in that it had by the 15th October 2019 failed to pay the £6,150.50 ordered. Mr Gomez attached to the e-mail an application notice for an unless order, which was supported by a witness statement with two exhibits attached. The application notice requested that an unless order be made requiring the Respondent to pay the sum ordered by noon on the 21st October 2019, and in default that the Respondent's Response be struck out. Mr Gomez further requested that the matter be determined on the papers in order to save unnecessary costs and delaying the matter further.

On the 18th October 2019, the Respondent's solicitor, Mr Thomas Hillman of FBP solicitors, wrote to the Secretary a lengthy e-mail setting out the Respondent's submissions with regard to the application for an unless order and attached a witness statement from a David Wood, the accounts manager of the Respondent, setting out the facts with regard to the payment of the

£6,150.50 in question. In his e-mail Mr Hillman refers to Mr Gomez, at the time of writing the e-mail, having confirmed to him (Mr Hillman) that the monies in question had been received and that in the circumstances the Claimant was withdrawing the application for an unless order; Mr Hillman therefore applying for a wasted cost order under Rule 66(1)(a) of the Employment Tribunal (Constitution and Procedure) Rules 2016.

I believe, but have not actually seen the e-mail, that subsequent to Mr Hillman's e-mail, Mr Gomez wrote to the secretary of the Tribunal confirming the withdrawal of the unless order application. Consequently, the only matter for me to decide on with regard to this unfortunate sequence of events is whether I should grant Mr Hillman's application for a wasted cost order. As both parties have requested that the Tribunal deal with this matter on the papers I will do so.

The evidence put before me by both parties has not been contested and would appear to be as follows; namely:-

- (i) as stated above, the order made on the 17th September 2019 required payment of £6,150.50 by the Respondent to the Claimant within 28 days of the hearing;
- (ii) on the 3rd October 2019, Mr Wood was requested by a director of the Respondent company to make the payment in accordance with the Order;
- (iii) on the 14th October 2019, Mr Wood confirmed with a staff member of Charles A Gomez & Co their client account details;
- (iv) on the morning of the 15th October 2019, a bank transfer was made from the Respondent's account at Jyske Bank to the clients account of Charles A Gomez & Co for the amount in question;
- (v) as stated above, at 18.44 hrs on the 17th October 2019, Mr Gomez wrote to the secretary of the Tribunal making the application for the unless s order;
- (vi) at 19.06 hrs on the 17th October 2019, Mr Hillman wrote to Mr Gomez requesting him (Mr Gomez) to check the clients account as payment had been made on the 15th October 2019;
- (vii) that same evening of the 17th October 2019, Mr Gomez informed Mr Hillman that the monies had not been received in the clients account and that he was not withdrawing the unless order application;
- (viii) on the 18th October 2019, Mr Hillman submitted proof of the transfer made by the Respondent to Charles A Gomez & Co clients account and invited Mr Gomez to withdraw the application for an unless order;

- (ix) at 11.46 hrs on the 18th October 2019, Mr Gomez confirmed to Mr Hillman that (a) the monies had not been received and (b) the Claimant was not withdrawing the application;
- (x) at around 12.30 hrs on the 18th October 2019, Jyske Bank confirmed to Mr Wood that the monies had left the bank on the 15th October 2019 and that the bank had not received any notices reporting a problem;
- (xi) on the 18th October 2019, Mr Hillman drafted and Mr Wood signed his witness statement attaching two exhibits; and
- (xii) at some point after this that same day Mr Gomez confirmed to Mr Hillman that the monies had arrived in their clients account and that they were withdrawing the application for an unless order.

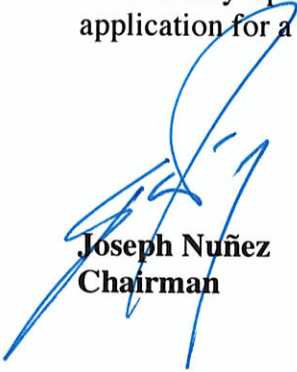
I take on board from all of the above that neither party comes out with any credit from this affair.

On the part of the Respondent, I fail to understand why it left it until virtually the last possible moment to make the transfer knowing that, as Mr Wood admits in his statement, “as a swift payment it certainly should have been in the account within 24 hours” but there was no certainty that this would be the case, and that the order was for payment within 28 days and not to make a transfer within 28 days. Clearly the order was not complied with since the account of Charles A Gomez & Co did not receive the monies (ie payment) on the 15th October 2019. It was unnecessary and reckless of the Respondent to wait until the 15th October to effect the transfer, especially as it should have been very clear to the Respondent from events earlier on this year that the Claimant would be looking to exploit tardiness in complying with this Tribunal’s orders.

On the part of the Claimant, I am somewhat dismayed at the stance adopted on the 17th and 18th October 2019. I would have thought that counsel would have enquired from Mr Hillman as to the location of the monies in question before submitting the application for an unless order to the secretary. Moreover, when Mr Hillman, firstly, informed Mr Gomez that the transfer had been made on the 15th October 2019, and secondly, provided Mr Gomez with proof of the transfer, I would have expected counsel to have taken Mr Hillman’s word at face value upon seeing the transfer document and, at the very least, agreed that in the circumstances, and without necessarily withdrawing the application, the secretary of the Tribunal should be asked to leave the application pending for a day or two to see if the monies reached the clients account. This would not have prejudiced the Claimant and would not have resulted in the Respondent having to file the witness statement of Mr Wood. An application for an unless order is a serious step to take and should be treated accordingly and not as some sort of tactical manoeuvre, which is what appears to be the case here.

DECISION

Although I have much sympathy for Mr Hillman's submissions, it seems to me that at the end of the day the Respondent, through its own actions, left itself totally open to what occurred, however unfortunate that may be. The application for a wasted costs order is refused.

A handwritten signature in blue ink, appearing to be 'Joseph Nuñez', written over the printed name.

**Joseph Nuñez
Chairman**