



EMPLOYMENT TRIBUNALS

Claimant:
Mr D Pearson and Others

v

Respondent:
British Airways Plc

Heard at: Reading

On: 22 May 2018

Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: Ms R Hodgkin (Counsel)

For the Respondent: Ms M Tutin (Counsel)

JUDGMENT

The claimants' complaints have been struck out due to the operation of order made by the employment tribunal and sent to the parties on 10 October 2017. It is not in the interests of justice to grant relief pursuant to rule 38 (2) or to reconsider the judgment pursuant to rule 70 of the Employment Rules of Procedure 2013.

REASONS

1. In a claim form which was presented to the employment tribunal on 3 February 2017, the Claimants made a claim concerning unlawful deduction from wages. The claim form at section 8.2 reads in part as follows:

"Our claim against British Airways is for loss of wages which started from October 1st 2016 to the present."

2. In summary, the Claimants' case is that they should have been given five weeks' notice of a change in shift: they were not. The transfer from working permanent nights to days resulted in them suffering losses. The amounts claimed by the seven Claimants were not specified. The Respondent defended the claim.
3. The case came before Employment Judge Hawksworth on 9 May 2017. The Judge ordered the claimants "to provide further information concerning the claim and in particular the basis on which future loss is being claimed".

4. Case management orders were made which included an order that the parties were to exchange witness statements by 2 October.
5. The case was listed for hearing on 1 and 2 November 2017. It became clear that the case would not be ready for hearing on those days because the tribunals orders had not been complied with.
6. The case was listed for a further preliminary hearing to take place on 10 October 2017 to consider case management. The case came before Employment Judge Vowles. The Judge made orders varying the case management orders previously made, including an order that witness statements were now to be exchanged by 13 February 2018. The Judge listed the case for hearing on 22 and 23 May 2018.
7. On the respondent's application the date for exchanging witness statements was extended on application to 27 February 2018.
8. The parties agreed to that exchange of witness statements would take place on 13 March 2018. The Respondent provided its witness statement to the Claimants in accordance with the agreement. The Claimants' witness statements were not provided to the Respondent.
9. On 14 March 2018 the respondent wrote to the tribunal applying for the claims to be dismissed pursuant to the unless order sent to the parties on the 22 October 2018.
10. The first tranche of statements from the Claimants was provided to the Respondent on 15 March 2018 and the complete set of statements were provided on 16 April 2018.
11. The position therefore is that following an extension of time granted by the tribunal, the parties did not comply with the order of the tribunal order, and agreed a time for exchange of the statements beyond the extension granted by the tribunal.
12. The Respondent has been in a position to exchange statements in line with the tribunal's order but the Claimants were not in a position to do so. It is agreed that the Claimants are in breach of the order which was made by Judge Vowles. It also agreed that Claimants failed to provide witness statements in accordance with the parties' agreed variation.
13. The first question I must consider is whether there was a breach of the order so as to give effect to the unless order. I am satisfied that as there was a failure to provide the statements in accordance with the terms of the order, and the terms of the order as varied by the tribunal there was such a breach.
14. Rule 38(1) of the Employment Tribunals Rules of Procedure 2013 reads that:

“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 that has occurred.”

15. In this case, there does not appear to have been a written notice confirming that the claim was dismissed by reason of the unless order. However, the effect of the breach is that it brings the claim to an end. Failure on the part of the tribunal to provide that written notice does not alter the consequence of the failure to comply with the order.

16. Rule 38(2) provides a mechanism for getting a relief from the effects of the unless order.

“A party whose claim or response has been dismissed, in whole or 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.”

17. There is provision for dealing with cases struck out on the basis of an unless order for setting aside the effect of the unless order and this may take place at a hearing if requested.

18. In this case, there was no such request, but today the case is listed for the full merits hearing to take place. I am asked to confirm that the claim has been struck out, the claimants oppose that application. We are in effect at the place where we would have been had the written notice confirming dismissal been sent by the Tribunal and an application made to have that dismissal set aside.

19. The basis on which the dismissal would be set aside is where it is in the interests of justice. I note that the provisions which relate to the reconsideration of judgments also provide that where the interests of justice require it, the tribunal may reconsider any judgment.

20. It seems to me that the question I have to ask myself where there has been a breach of an unless order made by the tribunal and the Claimants seek relief from its effect is whether it is in the interests of justice to grant that relief.

21. The claim that is brought by the Claimants is criticised by the Respondent on the merits of the case. A number of points are taken.

22. The claims are made on the grounds of an unlawful deduction from wages but fail to identify the deduction. The claims, it is said, do not show that the apparent facts in the case give rise to an unauthorised deduction at all. It is said that the process followed by the Respondent and the criticisms made by the Claimants of that process do not show that there was a sum that was properly payable as wages and therefore on its face, the claim does

not give rise to a claim for an unlawful deduction from wages that has any prospect of success.

23. These are all significant points in respect of the merits of this claim and when argued before me, I have not really been able to identify a basis for saying that those points are not well made. I remind myself that at this stage I am not making a definitive conclusion in relation to the points taken. However, I consider that this is a factor that I can take into account in considering whether it is in the interests of justice to grant relief in this case.
24. If I was to decide this case on the information currently before me, what could the judgment be in favour of the Claimants? I might find that the Claimants were there was a failure on the part of British Airways to give the proper notice but on the information before me, it does not follow that I could conclude that there was any deduction from wages. How the deduction arises in the specific facts of each of these individual Claimants is just not explained. Is it in the interests of justice to grant relief? I am not satisfied that this is a case where the clear breach of the tribunal's order ought to result in a granting of relief.
25. My decision is that the claim was struck out by operation of the order. It is not in the interests of justice to make an order pursuant to rule 38 or alternatively to reconsider the judgment pursuant to rule 70.

Employment Judge Gumbiti-Zimuto
Date: 11 June 2018

Judgment and Reasons

Sent to the parties on:

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For the Tribunal Office