EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Martin	**v**	**SQ Trading Ltd t/a Spectank UK**

Heard at: Watford via CVP **On**: 8 January 2021

Before: Employment Judge Bartlett

Appearances

For the Claimant: no attendance
For the Respondent: Mr Lomas

JUDGMENT

1. The claimant failed to comply with the Unless Order of Employment Judge Lewis dated 20 May 2019 in its entirety.

2. Accordingly, the claimant's claims were struck out upon 4 June 2019 without any need for further order.

REASONS

1. On 7 January 2021 and the morning of 8 January 2021 the claimant sent numerous pieces of correspondence to the employment tribunal relating to her request for the preliminary hearing of 8 January2021 to be adjourned as she had a medical appointment in the morning of 8 January 2021. As part of this correspondence the claimant included a medical card which set out that she had an appointment at 10:50am on 8 January 2021 for "Phototherapy" which is commonly used in the treatment of psoriasis. On the bottom of the appointment card it is handwritten "it is very important in regards to your treatment that you attend every appointment – [signature] phototherapy nurse". The card also states that "if you failed to attend on three occasions without informing the appropriate phototherapy team prior to your appointment you will be discharged from the treatment lists."

2. The claimant's request for an adjournment of the hearing was refused on 7 January 2021. I also decided not to adjourn this hearing. This preliminary hearing was listed on 25 March 2020. It was open to the claimant to request an adjournment significantly in advance of her request in late December 2020 which she has subsequently repeated. Further, I am not satisfied that the claimant has made any attempts to move her phototherapy appointment as there is no evidence of such. In addition, the claimant could have suggested that the hearing commence later in the day because she set out that after the appointments she returns home and continues work in the afternoons.

3. I gave consideration to rule two of the Employment Tribunal Rules of Procedure and I consider that it is in the interests of the overriding objective for the hearing to go ahead today. This is partly because the main issue to be decided at this preliminary hearing is whether an unless order dated 20 May 2019, which is 20 months old, has been complied with. The claimant has been on notice that this issue would be decided at this preliminary hearing from approximately April 2020 when it was initially raised by the respondent's representatives in correspondence. The respondent's representatives have raised the issue in correspondence several times and the claimant appears to have made a written response around April 2020 however her document is undated and it is hard to determine the exact date.

<u>The Unless Order</u>

4. Mr Lomas for the respondent made submissions which can be summarised as follows:

    a. in an order dated 18 March 2019 the claimant was directed to provide adequate particularisation of her claim by 15 April 2019;

    b. the claimant failed to provide any information in response to that order;

    c. Employment Judge Lewis made an unless order for the claimant to comply with the 18 March 2019 order by 3 June 2019 and if she did not do so the discrimination claims would be struck out;

    d. the first submission was as follows:

        i. the claimant did not provide any information until an email to the Employment Tribunal on 7 June 2019 which is four days after the date set out in the unless order. Therefore the claimant has failed to comply with the unless order. The claimant's further information was not provided to the respondent until 30 June 2019;

ii. the unless order is not ambiguous. There is no evidence that the claimant communicated with the tribunal in relation to the unless order or the 18 March 2019 order until 7 June 2019;

iii. the claimant made a written response to the respondent's application dated 11 April 2019 for strike out of the claimant's discrimination claims as a result of non-compliance with the unless order non-compliance. This appears to accept that the claimant did not comply with the unless order;

e. the second submission was:

i. in the alternative the claimant's discrimination claims should be struck out because there was material non-compliance with the unless order as evidenced by the disparity in the particularisation of 7 June 2019 and 25 March 2020;

ii. the respondent accepts that the particularisation by the claimant in the document of 7 June 2019 provides adequate information (namely who, rough date and act) for the respondent to understand the case against. As compared with the 25 March 2020 document the 7 June 2019 is considerably more limited;

iii. the June 2019 particularisation sets out:

1. one allegation of sex discrimination
2. one disability which is relied on namely arthritis of the knees;
3. disability discrimination events in March, May, June and July 2018

iv. whereas the 25 March 2020 particularisation sets out the following additional claims:

1. stress and psoriasis have been added to the list of disabilities;
2. new disability discrimination complaints have been added which include:
    a. about meetings with Mr Samuels in April and July 2018;
    b. about who the claimant reported to;
    c. about travelling to work;
    d. about removing parts of the claimant's job;
    e. about altering the claimant's terms of employment;

f. about not being permitted to work from home

3. new sex discrimination complaints have been added which include:

a. a refusal to allow the claimant to undertake training as an engineer

v. further what is set out in the 25 March 2020 particularisation is not particularly clear.

The Orders

5. The relevant part of the 18 March 2019 order by employment Judge Lewis is set out below:

> No later than **15 April 2019,** the Claimant is to send to the Tribunal and the Respondent, a list of all the events which she asks the Tribunal to decide were matters of sex or disability discrimination.
>
> The list must be typed, in numbered paragraphs, and the events listed in date order. In relation to each event in this list, the Claimant must give all the following information:
>
> 1. A summary of what happened;
> 2. When and where it happened;
> 3. Who was present;
> 4. Who was involved on behalf of the Respondent;
> 5. The basis upon which the Claimant complains that the event was an act of sex or disability discrimination; and
> 6. What is the disability and when was it diagnosed.

6. The unless order dated 20 May 2019 by employment Judge Lewis is set out below:

> On the Tribunal's own initiative and having considered any representations made by the parties, Employment Judge R Lewis ORDERS that-
>
> **Unless by 4pm on 3 June 2019 the claimant complies in full with the order of 18 March 2019 her claim of discrimination will be struck out without a hearing.**

My Conclusions

7. Rule 38 of the Employment Tribunal Rules of Procedure deals with unless orders and sets out the following:

> *Unless orders*
>
> *38.—(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. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.

(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21.

8. Mr Lomas referred me to the EAT Decisions in **Johnson v Oldham Metropolitan Borough Council [2013] UKEAT 0095_13_1704 (17 April 2013)** and **Uwhubetine v NHS Commissioning Board of England UKEAT/0264/18/JOJ**. The terms of the unless orders which gave rise to those appeals included, in the case of Uwhubetine the wording "*unless they do their claims will be struck out without further notice*" and in the case of Johnson "*shall be dismissed without further notice*". I do not consider that there is a material difference between the wording of "*without further notice*" and "*without a hearing*" which was used by Employment Judge Lewis. This is particularly so given the comments at paragraph 49 of the EAT in Uwhubetine which are as follows:

   "*Further, if the conclusion is that the Order has not been complied with, and has taken effect, although that will have occurred automatically, there is an obligation on the Tribunal to issue a written notice to the parties confirming what has occurred. That is both because that is what Rule 38(1) says and because it is the issuing of such a written notice that triggers the right of a party to make an application under Rule 38(2) to have the Order set aside on the basis that it is in the interests of justice to do so. That is why such an application is treated, as the authorities confirm, as an application for relief from sanctions, as opposed to a freest*anding challenge to the original Order having been made in the first place."

9. It is most regrettable that no written notice concerning compliance or not with the unless order has to date been issued by the tribunal. This is particularly so given that there was a telephone preliminary hearing which took place on 25 March 2020. This hearing seems to have been largely ineffective because the claimant failed to copy her list of issues/particularisation of that date to the respondent and therefore they could not be discussed at the hearing. The delay in providing written confirmation of what happened with the unless order has led to some of the complexity involved in the respondent's second-line of argument.

10. I find that the unless order is unambiguous, it refers to both of the claimant's discrimination claims and sets out what information is required from the claimant. This information is needed so that the respondent understands the case against it and the parties can prepare the case knowing the issues which will be considered at the final tribunal and that the issues that will be decided by the tribunal hearing the final hearing are known to all participants, in other words it is required by the overriding objective.

11. Uwhubetine provides further guidance on the task that I have to undertake:

"43 I can summarise these points as follows. Firstly, there are potentially three distinct decision points for a Tribunal under Rule 38. Firstly, there is the making of an Unless Order. Secondly, there is the determination of whether an Unless Order has been complied with, and hence whether the relevant claim or response or part thereof has been automatically dismissed by operation of the Unless Order. Thirdly, the determination of an application, if there be one, to set aside the Order on the basis that it is in the interests of justice to do so. These are distinct decision points to be approached on distinct bases, in respect of which, if any such decision is to be challenged, a separate appeal is required and time would run from the date of the relevant decision.

44 Where a Tribunal is determining whether there has been compliance with an Unless Order and hence whether to give written notice as to whether the relevant pleading has been dismissed by the Order taking effect, the Tribunal is not concerned at that point with revisiting the terms of the Order: whether it should have been made, or whether it should have been made in those terms. Nor is it concerned at that point with the question of whether, if there has been non-compliance with the Order, there should be some relief from sanctions.

45 The starting point for the Tribunal engaged in that task is to consider the terms of the Order itself and whether what has happened complies with the Order or not. This may call for careful construction of the terms of the Order, both as to what the Order required and as to the scope of the Order in terms of the consequences of non-compliance, particularly in cases where there are multiple claims or multiple parties. If there is an ambiguity the approach should be facilitative rather than punitive, and any ambiguity should be resolved in favour of the party who was required to comply. However, what the Tribunal cannot do is redraft the Order or construe it to have a meaning that it will not bear, though its words should of course be construed in context.

46 Next, the test to be applied is as to whether there has been material non-compliance, that being a qualitative rather than a quantitative test. In a case where the Order required some further Particulars to be given, the benchmark is whether the Particulars have sufficiently enabled the other party or parties to know the case that they must meet. However, the Tribunal is not concerned with the legal or factual merits of the case advanced, but merely with whether sufficient Particulars have been given to meet that test."

12. In relation to the respondent's first line of argument, I find that the claimant has failed to comply with the unless order this is because she did not provide any further information in the period between 18 March and 4 June 2019. I find that she provided further information, purportedly in compliance with the unless order, on 7 June 2019. However the effect of the unless order is that at 1 minute past 5pm on 3 June 2019 the

claimant's discrimination claims were dismissed. There can be no argument relating to whether there has been material compliance in this case of total non-compliance. This is a further reason why I consider it fair and pursuant to the overriding objective to make my findings at this preliminary hearing which the claimant did not attend.

13. The respondent's second line of argument is substantially more complicated. I believe it can be summarised as follows:

    a. the unless order does not take effect until there is a further order such as a strike out order;

    b. by the respondent's concession that the 7 June 2019 particularisation adequately set out the case against it in terms of who, what and when etc is an acceptance that the 7 June 2019 particularisation provided the information required by the unless order;

    c. however because no further order or action in relation to the unless order has taken place to date combined with the fact that the 25 March 2020 particularisation included so much more information it inevitably means the 7 June 2019 particularisation did not comply with the unless order i.e. the particularisation of 25 March 2020 demonstrates that the 7 June 2019 particularisation was a material failure to comply with the unless order

14. I am not strictly required to consider this line of argument in light of my findings in relation to the first line of argument.

15. I consider the second line of argument is substantially flawed because it misunderstands the nature of the unless order. However I will proceed on the basis that the unless order did not have the inevitable consequences of dismissing the claimant's discrimination claims either because some further action needed to be taken by the tribunal or because there was some ambiguity in the unless order. As I have made this clear I do not consider this to be the case but I will adopt this hypothetical position as otherwise it is impossible to make findings in this regard.

16. If some further action needed to be taken by the employment tribunal in addition to the unless order to result in the dismissal of the claimant's claims, I do not see how any of those actions could happen until today and my judgement and findings issued today.

17. The second line of argument is effectively that the 25 March 2020 particularisation so greatly expands the 7 June 2019 particularisation that it cannot be said that the 7 June 2019 particularisation complied with the unless order.

18. The difficulty with this argument is that it would seem to require that at some time between 7 June 2019 and 25 March 2020 something

automatically happened to result in the dismissal of the discrimination claims. But nothing has happened.

19. For completeness I find that the 25 March 2020 particularisation greatly expands the claimant's claim in both the disabilities relied on and the allegations of sex and disability discrimination. I have set out some areas of the expansion of the claims below:

    a. three medical conditions relied on as disabilities (even though the claimant states there are two). Increasing from arthritis of the knees to stress and psoriasis;

    b. the claims of disability discrimination are substantially increased and include:

        i. the threat that the claimant may be fired;

        ii. an expectation that the claimant would travel to work and attend at 9 AM;

        iii. the refusal of working from home request(s).

    c. The claims of sexual discrimination are increased to include:

        i. the refusal to allow the claimant to train as an engineer; and

        ii. forced resignation

20. The difficulty with this second line of argument is it relies on actions taken in 25 March 2020 undermining the particularisation of 7 June 2019. However if there was not an automatic dismissal of this discrimination claims arising from the unless order at 1 minute past 4pm on 3 June 2019 there can have been be no decision until today as to whether the terms of the unless order have been complied with and what consequences should follow. Whilst the 25 March 2020 particularisation could be clearer I consider that it adequately sets out the who, what and when and the particularisation of the claim required for the respondent to understand the claim against it. If, which it appears to be, the 25 March 2020 particularisation sets out a substantial number of new claims which are not set out in the claim form the correct procedure to deal with this is an application by the claimant for an amendment to her claim and for this to be considered in accordance with the usual principles including **Selkent**.

21. Therefore the respondent second line of argument fails.

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Employment Judge Bartlett

Date: 12 January 2021

Sent to the parties on: ...22/01/2021.....

.....S.Kent.....
For the Tribunal Office