



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Wisniewski

v

Volution Ventilation UK Limited

Heard: Reading (by video)

On: 24 and 25 May 2021
and in chambers
on 26 and 28 May 2021

Before: Employment Judge Hawksworth
Ms H Edwards
Mr P Hough

Appearances

For the Claimant: Mr P Wisniewski (the claimant's son)

For the Respondent: Ms C McCann (counsel)

Polish Interpreters: Ms Walaszek (24 May) and Ms Joseph (25 May)

RESERVED JUDGMENT

Employment Tribunals Rules of Procedure 2013 – Rule 38

1. The unanimous decision of the tribunal is that the dismissal of the claimant's complaints of race discrimination or harassment for non-compliance with an unless order dated 6 July 2020, confirmed in a letter dated 19 November 2020, is set aside pursuant to rule 38(2).
2. Case management orders for the future conduct of the case have been sent separately.

REASONS

The claim, response and preliminary hearings

1. The respondent designs, manufactures and distributes ventilation and fan equipment. The claimant was employed as a mouldshop operative for the respondent from 10 January 2005 until 31 December 2018.
2. The claim form was presented on 10 December 2018 after Acas early conciliation from 5 November 2018 to 26 November 2018. The claimant

made complaints of unfair dismissal, disability discrimination, race discrimination, age discrimination and unauthorised deduction from wages.

3. The respondent presented its response on 28 March 2019.
4. The claimant's complaints were clarified at a private preliminary hearing on 2 July 2019. A public preliminary hearing then took place on 6 July 2020 at which Employment Judge Anstis considered whether the claimant was a disabled person pursuant to section 6 of the Equality Act 2010, and concluded that the claimant was not a disabled person at the relevant time. Judge Anstis also considered an application by the respondent to strike out the claimant's complaints. He struck out the claimant's complaints other than three complaints of race discrimination or harassment, and two complaints of age discrimination or harassment.
5. Further information was required about the claimant's complaints of race discrimination or harassment. Judge Anstis made an unless order which required the claimant to provide further information about these complaints by 23 August 2020. The tribunal wrote to the parties on 19 November 2020 to confirm that the complaints of race discrimination were dismissed as the unless order had not been complied with. On 24 and 25 November 2020 a written application was made on behalf of the claimant to have the dismissal set aside. Unfortunately, that application had not been referred to a judge by the time of the full merits hearing before us. This reserved judgment deals with that application. We apologise to the parties on behalf of the tribunal service for the administrative errors which have resulted in this application being outstanding by the time of the full merits hearing.

Hearing on 24 to 26 May 2021

6. The full merits hearing took place by video (CVP) on 24 and 25 May 2021. There was a deliberation day in chambers on 26 May 2021 and a further deliberation discussion on 28 May 2021. The claimant was represented by his son, Mr Paul Wisniewski. In this judgment we refer to Mr Paul Wisniewski as Mr Wisniewski and to Mr Jan Wisniewski as the claimant.
7. Polish interpreters attended the hearing on both 24 and 25 May 2021, although there were problems with the video links and they arrived late. On 24 May 2021 we took some time for reading while we waited for the interpreter to arrive. The interpreter Ms Walaszek was present by 11.30 when we restarted the hearing. Mr Wisniewski chose to speak in English and did not require the interpreter, but Polish interpretation of the hearing took place for the remainder of the day as the claimant was present in the room with Mr Wisniewski and required translation. On 25 May 2021 the interpreter was Ms Joseph. She was not present at 10.00am. The claimant was not present on this day, and Ms Joseph was only required to interpret for the claimant's witnesses Mr Rosinski and Mr Kitka when they were giving their evidence. We heard evidence from the respondent's witnesses first and Ms Joseph was able to join at 10.30am.
8. On the first day of the hearing, Mr Wisniewski said that he wanted to make the tribunal aware of situations constituting perversion of the course of

justice. He also raised these issues in emails to the tribunal on 19 May 2021. Mr Wisniewski said that one of the claimant's witnesses, Mr Rosinski, had been telephoned by someone in August 2020 who introduced themselves as an employee from the legal office and asked him to confirm his identify. He was approached by another lawyer in May 2021. Mr Wisniewski said that he thought this contact was from the respondent's lawyers. Further, Mr Wisniewski himself had received two text messages from drug dealers in May and June 2020 after providing his telephone number for the purposes of this case. Finally, Mr Wisniewski said that the respondent had made political donations, that the ultimate owner of the group of companies which included the respondent was George Soros and that David Cameron was involved in secret lobbying. He said that there were potentially political pressures involved in this case and that these might have led to pressure on Employment Judge Anstis at the preliminary hearing.

9. The respondent's counsel said that neither she nor the respondent's solicitors had contacted Mr Rosinski or had any involvement in the matters raised. She said the contact Mr Rosinski had received looked like it could be a webchat scam. She said she could not comment further.
10. We considered Mr Wisniewski's comments carefully. We accepted what we had been told by the respondent's counsel that the contact with Mr Rosinski was not from the respondent's lawyers and that they do not know anything further about these matters. There was nothing to suggest that Employment Judge Anstis was under any pressure at the preliminary hearing or that there was any other issue with his decision. There was nothing in what Mr Wisniewski had said that suggested there could not be a fair trial in this case.

Issues for determination

11. On the first day of the hearing, we identified with the parties the issues for determination by us. These were the two complaints of direct age discrimination or age-related harassment recorded in the case management order of 6 July 2020.
12. Mr Wisniewski raised the application to set aside the dismissal of the race discrimination or harassment complaints. It was apparent that the application had not been addressed by the tribunal and that it remained outstanding.
13. We discussed with the parties how we should proceed. The respondent had prepared their case on the age discrimination complaints only, those being the only complaints before the tribunal. We decided that we should proceed to hear the complaints of age discrimination. We took into account when reaching this decision that the claimant has a progressive condition that affects his memory, and that there were 8 witnesses at the hearing and ready to give their evidence (three witnesses for the claimant, in addition to the claimant himself and Mr Wisniewski, and three witnesses for the respondent). We decided that we should also hear the parties' submissions on the outstanding application in respect of the complaints of race

discrimination or harassment, and that if the application succeeded, another hearing would be required for those complaints.

14. After hearing evidence and submissions on the age discrimination complaints, and submissions on the application to set aside the dismissal of the race discrimination complaints, we reserved our judgment. This judgment deals only with the application to set aside dismissal of the race discrimination complaint.

Submissions by the parties

15. The application on behalf of the claimant to set aside the dismissal judgment was set out in the written applications made by Mr Wisniewski and emailed to the tribunal on 24 and 25 November 2020, and in oral submissions made at the hearing before us. Mr Wisniewski said that there had been compliance with the unless order. He said that proper particulars of the complaints of race discrimination had been provided on 21 and 22 August 2020, and that an application to set aside the dismissal had been made on 24 November 2020. He said that it was in the interests of justice to set the dismissal aside.
16. The respondent's counsel said that it was not in the interests of justice to set aside the dismissal. The claimant had been given many chances to particularise his claims. Particulars of the race complaints had been provided on 21 and 22 August 2020 but these were insufficient and there was still material non-compliance with the unless order. The continued lack of clarity had been emphasised by the respondent in its supplementary amended grounds of resistance served on 18 September 2020. In addition, the respondent's counsel said that the race discrimination complaints are significantly out of time. She said that it would not be in accordance with the overriding objective to set the dismissal aside, particularly considering the time and costs which would be required for another hearing.

The Law

17. Rule 38 of the Employment Tribunal Rules of Procedure states:

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.

18. Rule 38(2) is an express provision for an application to set aside a dismissal following non-compliance with an unless order. The process is separate from the process for reconsideration under rule 70 (Enamejewa v British Gas Trading Ltd EAT 0347/14).
19. There are potentially three stages of consideration required in relation to an order under rule 38, each involving different legal tests (Wentworth-Wood v Maritime Transport Ltd EAT 0316/15). First, there is the decision whether to impose an unless order and if so in what terms. This is a decision to be taken in accordance with the overriding objective set out in rule 2. Secondly, there is the decision to give notice under rule 38(1) dismissing the claim or part of it. This requires the employment tribunal to form a view as to whether there has been material non-compliance with the order.
20. When determining at this second stage whether there has been compliance with an unless order, the starting point is to consider the terms of the order itself and whether there has been non-compliance with the order in any material respect (Uwhubetine v NHS Commission Board England EAT 0264/18 and Marcan Shipping (London) Ltd v Kefalas 2007 1 WLR 1864, CA). In particular the tribunal should consider whether the particulars given enable the other party to know the case it has to meet, or enable the tribunal to understand what is being asserted (Johnson v Oldham Metropolitan Borough Council EAT 0095/13).
21. Thirdly (the stage which has been reached in this case), if the party concerned applies under rule 38(2), the employment tribunal will decide whether it is in the interests of justice to set the order aside. HHJ Richardson in Wentworth-Wood emphasised that:

“This is not the same as asking whether it was in the interests of justice to make the Order in the first place. It is the stage of the procedure at which the Employment Tribunal considers relief against sanction, and it can take into account a wide range of factors, including the extent of non-compliance and the proportionality of imposing the sanction.”

Chronology

22. In order to consider the claimant’s application, we first considered the chronology of events. Page references are to the hearing bundle.
23. At the preliminary hearing on 6 July 2020 the complaints of race discrimination were identified as complaints of direct race discrimination or racial harassment (with the claimant describing his race or ethnic origin as "European", and the surrounding circumstances being described at pages 13 and 14 of the claimant's particulars of claim) as follows:
 - a. The claimant's work being "sabotaged" and as a result the claimant having to put in additional work to meet his targets.

- b. The claimant and other European staff (including Grzegorz Rosinski) being required to work on 4-5 machines at the same time, whereas Asian workers were only required to work on 1-2 machines at the same time.
- c. Being told (by Asian workers) that he 'stinks' and 'his food stinks'.
24. At the hearing Employment Judge Anstis made an unless order requiring further particulars of those complaints to be provided within four weeks of the date of the order being sent to the parties. He set out what further particulars were required. The case management order was sent to the parties on 26 July 2020. This meant the date for compliance with the unless order by the claimant was 23 August 2020 (page 85).
25. On 21 August 2020 Mr Wisniewski sent a 9 page email to the tribunal and the respondent headed 'Voluntary presented additional information Particulars - Part 2 (Race Discrimination)' (pages 87 to 95). On 22 August 2020 he emailed the tribunal and the respondent again (page 96 to 105). This second email included a different version of the further particulars. It said '(new version!)' in the subject line of the email and 'new version! (more info)' in the heading.
26. Employment Judge Anstis had given the respondent leave to amend its response to address the claims as clarified and any further particulars provided by the claimant (page 85). Any such amended response was to be provided by 20 September 2020. The respondent sent a supplementary amended grounds of resistance on 18 September 2020 (page 106). The document has an introductory note which says:
- "These supplementary Grounds of Resistance are provided by the Respondent to respond, in so far as it is able to do so, to the Further Particulars provided on behalf of the Claimant by email dated 22 August 2020. In general, the Respondent considers that its ability meaningfully to respond has been prejudiced by the continuing lack of specific detail in respect of the three allegations of race discrimination/harassment and by the passage of time. The Claimant's complaints appear to date back many years (covering the period 2005 to 2017) and, as such, his ET1/Details of Claim (as now amended) was presented outside the prescribed time limit."*
27. On 19 November 2020 a letter was sent to the parties on the direction of Employment Judge Anstis, confirming the dismissal of the complaints of race discrimination by operation of the unless order, following non-compliance by the claimant (page 115). There was no explanation in the tribunal's letter as to how the further particulars sent on 21 and 22 August 2020 failed to comply in any material respect with the unless order. Employment Judge Hawksworth examined the tribunal file and found that at the time that Employment Judge Anstis gave his direction, neither of the claimant's emails of 21 and 22 August 2020 nor the respondent's email enclosing its amended grounds of resistance on 18 September 2020 had been printed and put on the tribunal file.

28. On 24 November 2020 Mr Wisniewski emailed the tribunal and the respondent with an application to set aside the dismissal (page 122). He said he did not understand why the race discrimination complaints had been dismissed, as further particulars had been provided (page 123). The following day he sent another email (page 116) which included the application and said again that further information about the complaint of race discrimination had been provided (page 119).
29. Unfortunately, neither of Mr Wisniewski's emails of 24 or 25 November 2020 were put on the tribunal file and neither were referred to a judge for consideration. As a result, by the time the hearing before us started on 24 May 2021, this application remained outstanding.

Conclusions

30. Mr Wisniewski made a valid application for the dismissal to be set aside, within the time frame required in rule 38(2). To consider that application we have to consider whether it is in the interests of justice to set aside the order which resulted in the dismissal of the claimant's complaints of race discrimination or harassment.
31. We note first that there is no requirement in rule 38 for the decision under rule 38(2) to be taken by the same tribunal or the same employment judge that took the decision under rule 38(1). That is not the same as the procedure for reconsideration of judgments in rules 70 to 73, which requires that, where practicable, reconsideration should be by the employment judge or the full tribunal which made the original decision. Rule 38 contains a separate procedure to the rule 70 procedure. If the rules required that decisions under rule 38(2) should be made by the same judge or tribunal that made the decisions under rule 38(1), we would have expected the rule to say so, and it does not. We have concluded that we are able to consider the application to set aside the order of Employment Judge Anstis. In case we are wrong about this and rule 72(3) applies here, Regional Employment Judge Foxwell has, for reasons of practicability, appointed us to consider the application.
32. Next, we considered the chronology of events relating to the unless order as found by us. The further particulars provided on behalf of the claimant complied with the unless order in terms of the time frame. They were sent on 21 and 22 August 2020, within the four week period for compliance as ordered by Employment Judge Anstis which expired on 23 August 2020.
33. We have concluded that when Employment Judge Anstis gave his direction that the claimant's complaints of race discrimination or harassment should be dismissed for non-compliance with the unless order, he was not aware that the claimant had taken steps to comply with the order. He was not aware that further particulars had been provided on behalf of the claimant on 21 and 22 August 2020. We reach the conclusion that this is most likely to have been the position firstly because at the time of Judge Anstis's direction neither of the claimant's emails with the particulars nor the respondent's amended response which referred to them were on the tribunal file. Secondly, if Judge Anstis had been aware that further

particulars had been provided and had then gone on to decide that they did not comply with the unless order in some material respect, we would have expected his decision that written notice confirming the dismissal should be issued to have explained why the particulars were deficient and in what respects. However, Employment Judge Anstis's decision as recorded in the tribunal's letter of 19 November 2020 merely said that the unless order was not complied with.

34. We have concluded therefore that a decision has been taken to confirm dismissal of the race discrimination/harassment complaints by the automatic operation of the unless order in the incorrect belief that no particulars at all have been provided, when in fact the claimant had taken steps to comply. As a result of an administrative error by the tribunal service, no consideration had been given before confirming dismissal of the race discrimination complaints to whether the particulars of 21 and 22 August 2020 materially complied with the unless order.
35. We have gone on to consider that question. It is relevant to our consideration at the third stage of rule 38 as to whether it is in the interests of justice to set aside the order. If the further particulars of the race discrimination or harassment complaints fail in any material respect to comply with the unless order, we might then conclude that the second stage rule 38 decision to dismiss the complaints would have been the same even if the judge had seen the particulars which were provided by the claimant. In those circumstances, we might conclude that it would not be in the interests of justice to set aside the rule 38 order.
36. We have started by considering the terms of the order itself and the particulars provided on behalf of the claimant to assess the extent to which there has been non-compliance with the order and whether that non-compliance is material.
37. In respect of the first complaint (sabotage), the particulars describe the sabotage as i) hiding the claimant's tools, ii) putting faulty elements in his boxes, iii) dumping boxes with unfinished elements on the claimant and iv) telling lies about his behaviour. The claimant's supervisor and manager are named. 'Other colleagues' are referred to but they are not named. The treatment is said to have taken place during 2005 to 2014. Marek Wisniewski is said to have witnessed the sabotage.
38. The respondent's counsel submitted that these further particulars were deficient because:
 - 38.1 some of the colleagues were unnamed;
 - 38.2 no particulars were given about what the lies were;
 - 38.3 the order had required the claimant to specify the month and year of the treatment but no months were given.
39. In respect of the second complaint (overwork), the claimant says the other European workers who were overworked were Marek Wisniewski, Steven and Ralph (no surnames given). He says that the Asian workers who were

treated better were 'All Asian employees' of the respondent. He says the machines operated by Asian employees were slower, and Europeans were given harder to operate machines. A statement by Grzegorz Rosinski is enclosed with the particulars and this includes more detail about the different types of machines (page 104).

40. The respondent's counsel said that these further particulars were deficient because:
 - 40.1 they did not name the Asian employees' who were treated better;
 - 40.2 they do not provide information about which machines were worked on.
41. In respect of the third complaint (comments that the claimant and his food stinks), the particulars do not give the name of any employee who made these comments. The particulars explain why it is difficult for the claimant to provide the names of the employees who made these comments, saying for example that rotas did not include full names, name tags were not worn, and there was a language barrier. The particulars say the comments took place a few times during the years 2005 to 2017.
42. The respondent's counsel says that the particulars are deficient in respect of the third complaint because they do not say who is alleged to have made the comments, and again they do not specify the month and year in which the comments happened.
43. Another factor in the assessment of whether particulars comply with an unless order is whether the particulars given enable the other party to know the case it has to meet, or enable the tribunal to understand what is being asserted.
44. In this case, the respondent served supplementary amended grounds of resistance on 18 September 2020 (it was given leave, but not ordered to do so). In the amended grounds of resistance, the respondent says that its ability meaningfully to respond has been prejudiced by the continuing lack of specific detail in respect of the three allegations of race discrimination or harassment and by the passage of time. However, the respondent does provide its response to the complaints of race discrimination and harassment and the particulars of 22 August 2020, summarising its understanding of the three complaints. It provides a detailed response to the complaints about sabotage and overwork. It says that it cannot plead a proper response to the allegation about the comments that the claimant and his food stinks because of the lack of any specific detail and the passage of time.
45. Having carried out this assessment of the information provided on behalf of the claimant in response to the unless order, we have concluded that there is no material non-compliance with the order. We have taken into account in reaching this conclusion the fact that the claimant is being represented by his son who is not legally qualified. The main aspects of non-compliance or 'gaps' in the information provided are i) the failure to provide the months as well as years in giving the dates when the matters took place and ii) the

failure to provide names in relation to the third complaint. However, in a case where allegations span a number of years, it may not always be possible to identify dates with specificity. Further, the claimant has explained why it is not possible for him to provide some names. He has also explained that there are particular issues with memory in his case. The lack of specificity of dates and names in some complaints may be a matter to be taken into account by the tribunal when considering whether the claimant can make out his case, but does not in our view amount to material non-compliance with the unless order.

46. We have also taken into account that the respondent has been able to reply in some detail to the complaints of race discrimination and harassment. We appreciate that the respondent was doing its best to reply to particulars which it made clear it still regarded as deficient. However, it has been able to provide a detailed response to the first and second complaints. Overall, even in respect of the third complaint, which is the least particularised, the respondent and the tribunal are able to understand what is being asserted. Finally, we have taken into account the proportionality of imposing the sanction of dismissal of the complaint, given the extent of non-compliance with the order.
47. We have concluded that the further particulars provided on behalf of the claimant do not fail to comply with the unless order in any material respect. We do not consider that the second stage rule 38 decision to dismiss the complaints would have been the same even if the judge had seen the particulars which were provided by the claimant.
48. For these reasons, we have concluded that it is in the interests of justice that the order and the dismissal of the race discrimination/harassment complaints should be set aside under rule 38(2).

Employment Judge Hawksworth
Date: 8 June 2021

Judgment and Reasons sent to the parties
on: 7 July 2021

S. Bhudia

For the Tribunal Office