



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107851/2020

Held in chambers on 15 March 2022

Employment Judge R Gall

Ms M Wieteska

Claimant

HC-One Ltd

Respondent

JUDGMENT

The Judgment of the Tribunal is that the dismissal of the claim which occurred automatically following failure by the claimants to comply with an Unless Order issued on 2 December 2021 is set aside, it being in the interests of justice so to do. The claim will therefore proceed.

REASONS

1. A Preliminary Hearing ("PH") took place by video conference call on 29 November 2021. Following that PH a Judgment was issued. That Judgment was dated 2 December 2021. It confirmed that elements of the claim could not proceed due to having being brought out of time. For the reasons given, time was not extended enabling those elements of claim to proceed.

2. The Judgment also contained Orders. The respondents had sought strike out of the claim. That application was refused. Given the history and circumstances narrated in the Judgment, the Orders were issued on an “Unless” basis. The nature and effect of the issuing of Orders on that basis was explained at the PH and confirmed in the Judgment.
3. There was an interpreter present at the hearing and I was, and am, satisfied that the claimant understood all that happened at the PH. Ms Wieteska can read and write in English, however spoken English is problematic for her, hence the involvement of the interpreter in this and earlier PHs.
4. The Unless Orders required to be complied with within 28 days of the date of the Note and Orders. The date of the Note and Orders was 2 December 2021. Compliance was required at latest therefore by 30 December.
5. The claimant submitted a response on 31 December, by email timed at 14.14. In those circumstances the claim was dismissed without further Order of the Tribunal due to failure to comply with the Unless Order.
6. The claimant objected to this having occurred, stating her view that she had 28 days from the date when the Judgment and Orders were sent to her. They were sent by attachment to an email from the Tribunal of 6 December.
7. This was treated as an application in terms of Rule 38 (2) of the Employment Tribunals (Rules of Constitution & Procedure) Regulations 2013 to have the Order set aside. That is sometimes referred to as an application for relief from sanctions. That application was made within 14 days as is required in terms of Rule 38 (2).
8. Neither party sought a hearing on the application when that was raised. It was therefore confirmed that the application would be considered in chambers. That has now occurred.

9. In terms of Rule 38 (2) an application of this type can result in the Order being set aside if the Tribunal considers it to be in the interests of justice so to proceed.
10. There are various cases which have considered such applications. Those relevant as the Tribunal regards it are *Wentworth-Wood v Maritime Transport Limited* [2016] UKEAT/0316/15, *Kier Highways Limited v Cunning* [2018] UKEAT/0008/18 ("*Kier Highways*"), *Thind v Salvesen Logistics Ltd* [2010] UKEAT/0487/09 ("*Thind*"), *Enamejewa v British Gas Trading Limited* [2015] UKEAT/0347/14, *Singh v Singh* (as representative of the *Guru Nanak Gurdwara West Bromwich*) 2017 ICR D7, *Morgan Motor Co Ltd v Morgan* ("*Morgan*") EAT 0128/15 and *Polyclear Ltd v Wezowicz and Others* 2022 ICR 175.
11. Those cases give guidance as to the principles which an Employment Tribunal should keep in mind in considering whether it is in the interests of justice to set aside dismissal in this scenario. *Thind* says that the factors "*will generally include, but may not be limited to, the reason for the default, and in particular whether it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial is possible.*" *Morgan* confirms that there does not require to be a "*compelling explanation*" or "*special factor*" for relief to be granted.
12. In the cases the significance of an Unless Order is also underlined, together with, in my words, the importance of it having teeth. Nevertheless, the terms of Rule 38 (2) and decided cases make it clear that relief from sanctions can appropriately be given if it is considered by the Employment Tribunal that it is in the interests of justice for that to occur.

Position in this Case

13. There was non-compliance with the Unless Order, as previously determined. The claimant states that she regarded the time for compliance as running from the date the Order was sent to her. That is the reason for her failure to comply with the time frame. It is of relevance that there was no evidence of bad faith or ignoring of that Order on the part of the claimant. Rather, she misunderstood the date of commencement of the period for compliance. I take account of the fact that this matter was

covered at the time of the PH when the claimant had the benefit of an interpreter. It is also something which is clearly detailed in the Order itself. As mentioned above, the claimant has confirmed at each PH before me that she can read and understand written English and is able to write in English, as indeed evidenced by her various communications with the Tribunal.

The Orders and Response

14. The Orders are in the following terms:-

1. *"What does the claimant say is the less favourable treatment because of her Polish nationality, the acts of discrimination by the respondents, she experienced in the period after 11 July 2020?"*
2. *Who carried out each of those alleged acts?*
3. *When after 11 July 2020 did each of those alleged acts take place? (please provide the day and month and the time of day as that is recalled, together with who was there if there were any witnesses)*
4. *Does the claimant say that she was treated less favourably than another actual employee of the respondents who was not Polish and who was in the same circumstances as she was?*
5. *If the answer to question 4 is "yes",*
 - (a) *Who was that employee and what was their nationality?*
 - (b) *How was the other employee treated by the respondents in the circumstances which are the same as those of the claimant?*
 - (c) *Why was that treatment more favourable than the treatment the claimant experienced in those circumstances?*
 - (d) *Why is it that she regards her less favourable treatment as being because of her Polish nationality?*
6. *If there was no such actual employee, does the claimant say that had there been an employee in the same circumstances as she was and who was not Polish, the claimant would have been treated less favourably than the other hypothetical employee because the claimant is Polish?*

7. *If the answer to Question 6 is “yes”, why does the claimant say that?*
8. *The claimant has specified in her document of 6 March 2021 that she seeks £16,000 for “loss of mental health”.*
- 5 (a) *Is that the total sum she asks the Tribunal to award if successful?*
- (b) *If not, what sum does she ask for?*
9. *How has the claimant arrived at the sum of £16,000 or any other amount she states?*
10. *Does the claimant rely on any medical information in support of her financial claim? If so a copy of it is to be provided within the 28 days for compliance with this Order.”*
- 10
15. The reply from the claimant adopts the same numbering and is as follows:-
1. *“The act of Direct Discrimination was that I was subject to unfounded allegations that I had carried out acts of gross misconduct without any form of investigation.*
- 15
2. *The acts were carried out by my line manager Louise Singh*
3. *13th July and 3rd September*
4. *No – there was no actual comparable employee*
5. *Not applicable*
- 20
6. *Yes*
7. *Although there were other employees who were of non-UK origin, I was the only Polish person who worked there. I was specifically singled out for unfounded allegations with no attempt to properly investigate these. The line manager expressly referred to “people like me” could not be trusted. As the only different characteristic that I had from the other employees was my nationality it seems clear that this was the reason for my treatment,*
- 25
8. *Yes*
9. *This appears to be an appropriate award for the act of discrimination. I do not have legal assistance in this matter.*
- 30
10. *I have been diagnosed with depression. Given the time of year and the restrictions under which GP practices are operating I would seek further time to supply medical reports from my doctor.”*

Discussion and Decision

16. I keep in mind the history to this claim. The allegations are of direct discrimination. The protected characteristic is that of nationality, the claimant being Polish. There have been various attempts to obtain specification of the claim by way of clarification of the allegations of discrimination. Details of the comparator, actual or hypothetical, have been sought for some time.
17. The claimant clearly believes that she has been badly treated and regards the procedures followed and actions taken by her employer as being wrong. It has been explained to her that the Tribunal can only consider claims under the various statutory provisions giving it authority. In an ongoing employment situation, what might be viewed by her as “bad practice” or “bad management” are not of themselves matters about which the Tribunal can hear as a basis of claim. Information as to why it is that the claimant considers the matters upon which she relies as being discriminatory in nature is essential if a valid claim is to be advanced.
18. At the PH in November which resulted in the Judgment being issued containing the Unless Orders, the respondents had sought strike out of the claim. They referred to the previous Orders which had not been met, despite time for compliance having been extended and the orders having been reissued. The view to which I came was that, whilst Orders had not been met, the lesser sanction of an Unless Order was appropriate, rather than the claim being struck out. The objective was to obtain specification by way of fair notice of the claim.
19. The reply was late, as mentioned. The claim was dismissed as soon as the time specified in the Unless Order for reply passed without there being any reply. There was no need to consider whether there had or had not been material non-compliance with the Order. There had been no compliance whatsoever at that point.
20. A response to the Order was received within a matter of a day of expiry of the time limit for compliance. The fact that the reply was submitted so close to the deadline is of relevance in that it cannot (and is not) suggested that

a fair trial is no longer possible due to the passage of time since expiry of the time for appropriate response.

21. In considering the interests of justice, I properly have regard to the reason for default and whether it was deliberate.

5 22. The reason for default was the misunderstanding of the time frame for reply. I accept the claimant understood the time for compliance to be as she details. She did not in my view deliberately reply late. The time frame is clear however from the Order and was discussed at the PH. On balance, I accept that something may have become confused in the claimant's mind
10 and she may have genuinely not appreciated the time for compliance being other than as she now sets out.

23. Given the fact that the reply was only marginally late, there is no prejudice to the respondents through time having passed. There is prejudice to the respondents if I permit the claim to proceed by granting the application for
15 the order to be set aside. They face a claim currently dismissed. It is however a claim which they have been gathering information to defend and have been engaged with since it was raised. They have sought and continue to seek information as to the precise allegations made.

24. There is prejudice to the claimant if I do not grant the application to set
20 aside the order. The claim is at an end. That, of course, is only the case due to her failure to reply to the Unless Order within the time permitted for that. That time was not a short time, being 28 days.

25. The balance of prejudice favours the granting of the application, in my view, given the prejudice to the claimant through dismissal of the claim
25 remaining in place.

26. That however is not sufficient to determine the application. I can have regard to the details of the reply to the Order in considering the interests of justice as the key and overriding element in consideration of the application.

30 27. The terms of the reply are set out above. I see it as of relevance to consider if there has been material compliance or non-compliance with the Order, excluding the time within which compliance was required as it is known

that the time given was not met. In considering this, I take account of previous written statements from the claimant and of her claim form in considering her reply to the Unless Order.

- 5 28. The answer to question 1 is, in my view, tolerably clear. The claimant does refer to there being no form of investigation. As I understand it, the exchanges to which she refers were at the investigation meetings with her. Her difficulty appears to be that there was no prior checking of the allegations before she was questioned about them. I believe that the acts of direct discrimination are said by the claimant to be the putting to her of what she views as unfounded allegations without those being checked out or investigated prior to that happening. That puts the respondents on notice of the allegations of direct discrimination.
- 10
- 15 29. The answers to points 2 and 3 confirm that the person who put those allegations to her was Louise Singh and that this occurred on 13 July and 3 September 2020. Those are the two instances when direct discrimination is said to have occurred. It is true that the time of day and whether there were witnesses is not stated by the claimant. The respondents are aware however of the meetings referred to and agree that there were those encounters. They therefore know the times and are able to confirm who attended the meetings.
- 20
- 25 30. The answers to questions 4 – 7 relate to the comparator. It is now clear that there is no actual comparator. That had been in doubt prior to this. A hypothetical comparator is relied upon. The claimant is next asked why it is that she believes she was subjected to the alleged discrimination due to her nationality and why she believes someone not of her nationality but in the same position would not have been treated in the same way. She refers to being the only Polish employee. She also refers to a remark said to have been made that people like her could not be trusted.
- 30 31. It is appreciated that the respondents deny that any such remark was made. It is also appreciated that the respondents say that any employee employed by them in the care setting and about whom allegations of possible ill treatment had been made would have been seen an investigation result. The respondents say that in course of any such investigation any such employee would have been spoken with and

transferred to day shift to ensure greater supervision took place. The claimant does not, they say, explain why a non-Polish employee would not have been treated as was the claimant.

32. There is clearly an evidential dispute as to whether the remark was made.
 5 The Tribunal would have to hear evidence and find facts on that. It would also have to consider the actions of the respondents and their explanation for those. It is not possible to foresee the view to which the Tribunal might come on the remark being made or not. The context for the remark, if made, and what, if any, implication was properly drawn from all of this
 10 would all require to be considered. What I regard as relevant is that the claimant has given her reason for coming to the view that her nationality lay behind the decision of the respondents and that their actions would not have been the same had she not been Polish.

33. The claimant may or may not be successful in her position. I have
 15 concluded, however that there was material compliance with the Order in this regard, timing apart.

34. The claimant was ordered to confirm that she sought £16,000 if successful and, if she did, to explain how she had arrived at that sum. She confirms that this is the sum she seeks and says it is in her view an appropriate
 20 award. Clarification has been given, therefore, albeit no specific reference to the means by which she reached this sum is laid out.

35. When asked in the Order about any medical information, the claimant seeks further time to provide a medical report. She explains she is affected by depression. This request for an extension of time was not considered
 25 given that the claim had been dismissed due to failure to comply with the Unless Order.

36. Given that I have concluded that the Order falls to be set aside and that the claim is not dismissed, it is appropriate to vary the Order to enable more time to be available to obtain the medical report. To be clear, it is the
 30 impact on the claimant of the alleged discriminatory treatment which is of relevance. A further **6 weeks from date of this Judgment (by 5pm on 28 April)** is given for that information to be supplied by the claimant. The Order of 2 December is varied to that extent. The report is likely to be from

the claimant's GP, it is understood. Knowing the pressures GPs are under particularly at present, if a further extension of time is required, it should be confirmed to the Tribunal when the information was sought from the claimant's GP and such a request can be made to the Tribunal and considered by it.

Conclusion

37. In this Judgment I have kept in mind the purpose and effect of an Unless Order, the terms of Rule 38 (2) and the relevant guidance from decided cases as detailed above. I have had consideration of the interests of justice at the forefront of my mind. The claimant put herself in peril by missing the deadline for replying to the Unless Order. She missed that, however, by a small margin. That is not of itself to warrant the setting aside of the Order and granting of relief from sanctions. It is, however, a factor. The terms of the reply, whilst not entirely focussed and clear, when taken with the whole facts and circumstances, lead me to the conclusion that it is in the interests of justice to proceed as stated in the Judgment above. The Order is therefore set aside and the case will therefore proceed.

38. A case management PH should be set down with a view to making arrangements for the hearing.

Employment Judge: Robert Gall
Date of Judgment: 17 March 2022
Entered in register: 17 March 2022
and copied to parties