



# EMPLOYMENT TRIBUNALS

**Claimant:**

Mr J Wisniewski

v

**Respondent:**

Volution Ventilation UK Limited

**Heard at:**

Reading

**On:** 6 July 2020

**Before:**

Employment Judge Anstis (sitting alone)

**Appearances**

**For the Claimant:** Mr P Wisniewski

**For the Respondent:** Ms C McCann (counsel)

## REASONS FOR THE JUDGMENT OF 6 JULY 2020

### INTRODUCTION

1. On 6 July 2020 I conducted an open preliminary hearing in this case, following which I issued a judgment striking out all of the claimant's claims except for five complaints of race and age discrimination.
2. I gave the judgment and reasons for it orally on the day of the hearing. The resulting written judgment was signed by me on 6 July 2020 and issued to the parties by the tribunal on 17 August 2020.
3. The claimant sent an email to the tribunal on 7 August 2020 making various points in relation to the hearing and the decision, though this was not framed as either a request for written reasons or an application for reconsideration.
4. In response to the judgment being sent on 17 August 2020, on 18 August 2020 the claimant sent an email to the tribunal asking for the email of 7 August 2020 to be considered as a request for written reasons and as an application for reconsideration of the judgment. This request was repeated in an email from the claimant on 28 August 2020, with further submissions being sent by him on 30 August 2020.
5. Each of those emails of August 2020 was first referred to me on 25 May 2022, apparently following prompting from the EAT. I am unable to explain why these were not referred earlier. A note on the tribunal file says that the emails "*did not ever meet the file and therefore were never put before the judge*", but this does not explain why the emails "*did not ever meet the file*".

6. Fortunately the recording of my oral reasons has been retained, and what follows is a transcript of that, subject to some minor editing. Unfortunately I have not had the benefit of being able to refer back to the documents that were before me at the hearing when compiling these written reasons.
7. The question of reconsideration will be dealt with by way of a separate judgment.

## REASONS

### **Disability discrimination**

8. The first point I have to decide is whether the claimant is a disabled person, or perhaps more correctly, whether he was a disabled person at the material time, which the parties have spoken of as being 2018.
9. It was originally identified that the disability relied on was depression, but during the course of this hearing the claimant's representative identified a number of other medical matters which I will deal with separately. It did appear that depression was the primary disability relied upon.
10. It is for the claimant to prove that he is a disabled person and thereby provide the basis for his disability discrimination claim. In this case the evidence I have as regards depression as a disability is two medical notes from the claimant's time in Poland in the early 2000s. Those were translated by his representative during the course of the hearing today and I accept that they show that the claimant received treatment for a mental health condition while in Poland, but in the translation that was given there was no mention of any specific conditions such as depression. In the rest of the medical evidence from the claimant's time in the United Kingdom depression is mentioned once in one sick note where it is mentioned in passing alongside two other conditions. Those other conditions appear to have been seen by the doctor as being more significant, or having a more substantial impact on the claimant, than his depression. There is also, as pointed out by the claimant's representative and as I note from the medical records, comments about the claimant having problems with nightmares. It is said that that may be in relation to his depression, although the doctor did not describe it as such.
11. If the claimant had this condition, there is then the question of whether it had a substantial adverse effect on his day-to-day activities. A disability impact statement has been produced in accordance with the tribunal's usual direction, but I'm afraid that doesn't help me in getting anywhere with the effect of depression on the claimant's day-to-day activities. It relates to a full range of the claimant's health conditions and simply says that he is having problems with sleeping, having problems with doing things, having problems with making rational decisions and remembering things and with normal functioning in the society. That isn't sufficient to persuade me that the claimant is disabled by reason of depression. There is nothing in there that I

would need to see about the particular effect of his depression on his day-to-day activities and there is certainly nothing in the medical evidence that shows me that this would count as being a disability in the legal sense. The claimant had not demonstrated that he was a disabled person by reason of his depression.

12. As I mentioned before, he has a number of other medical conditions which are said to have arisen out of his work with the respondent.
13. A large part of the hearing and the claim itself appears to have been conducted as if this is a personal injury claim, in which a relevant question is whether these illnesses derived from his work. As I explained during the course of the hearing that is not usually an issue in any disability discrimination claim in the employment tribunal, where the cause of the disability is rarely relevant.
14. There are three particular conditions that were mentioned: asthma, carpal tunnel syndrome (which related to the period 2013 and 2014) and hearing loss.
15. There are medical records showing that the claimant suffers from asthma and had carpal tunnel syndrome and there is also something showing a small diminution in his hearing, but there is nothing whatsoever that would suggest to me in the evidence that these had a substantial adverse effect on his normal day-to-day activities, so they are not disabilities for the purposes of the Equality Act 2010.
16. Finally, there is the question of Alzheimer's disease. This appears to have been a relatively recent development for the claimant and least in terms of his diagnosis. What I have on that is a doctor's letter giving a diagnosis in 2020. There is nothing in this to suggest that he had this illness during his time with the respondent. The claimant's representative made much of the question of whether this was caused by working conditions at the respondent. That is not what I have to decide. I find that the Alzheimer's disease was not a disability at the relevant times.
17. The end result of all of that is that I find that the claimant was not a disabled person for the purposes of his claim under the Equality Act. That must mean that the claimant's disability discrimination claim has to be dismissed.

### **Dismissal**

18. The second point I was to deal with today was an application by the respondent to strike out the claimant's claims. This fell into two parts. The first was the claims of unfair dismissal and discrimination in relation to the claimant's dismissal. The argument from the respondent on this was that the presentation of the claim on 10 December 2018 was premature. The claimant had traced his dismissal back to August 2018 based on the letter that he had

had saying that if he did not produce a sick note he would be treated as having resigned.

19. The respondent placed considerable reliance on a case called Rai, which I have read. It was said that that showed that a conditional dismissal such as “if you don’t do something by some time you will be dismissed” couldn’t take effect - at least not as a notice period. I’ve read the Rai case and seems to me it’s not quite the same situation that we have here. The problem in Mr Rai’s case was that he had submitted his claim after having received conditional notice but before the notice took effect. The EAT decided that such a document couldn’t be considered to be a notice period within the meaning of section 111(3) of the Employment Rights Act 1996.
20. I have, however, found that the claimant’s claims in relation to dismissal were premature. The reasons for that are that I do not think there is any concept of self-dismissal or deemed resignation such as appears in the August letter. I simply don’t think that works, and I also take note of the communications that continue between the claimant and the respondent where there is lots of talk about returning to work. It appears that both sides treated his employment as continuing until his dismissal in late December 2018 or early January 2019. For that reason, the claims in relation to dismissal are premature and that must mean that they struck out because the tribunal has no jurisdiction to consider them.

### **Age and race discrimination**

21. There were then the question of the non-dismissal complaints which must be limited to age and race discrimination because the disability discrimination claim has been struck out. Ms McCann is right that the claimant has been given a number of opportunities to clarify exactly what those claims are, most recently by Employment Judge Vowles in a hearing on 2 July at which the employment judge required the claimant to give particulars of his claim no later than 27 August. I’ve been referred to the document that resulted from that. There is a lot in this that would seem to be the recitals of fact set out by the claimant and his representative, but at the heart of it there are clearly made out claims of race discrimination and age discrimination.
22. Ms McCann criticises these as not meeting the requirements of specificity that were set by Employment Judge Vowles. Well, I think that means that I’m asked to strike out the claim because these items didn’t comply with the order and therefore it is a question of whether I should strike out the claim for not complying with the tribunal order and I won’t do that. As I will come onto I think there is a role for an unless order in this situation, which was the alternative order sought by Ms McCann to give the claimant a last chance to fully explain this case. I will work through with the parties now what I have identified as being the claims of age and race discrimination and we will see

what may need to be done by way of an unless order to ensure that the respondent properly knows the case that it has to meet.

**Employment Judge Anstis**

Date: 26 May 2022

Sent to the parties on: 26 May 2022

For the Tribunal Office