CASE NO: 2600363/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr George Joseph Tyrell

Respondents: NDT Services Limited

Record of an Open Preliminary Hearing heard by CVP at the Employment Tribunal

Heard at: Nottingham On: 13 June 2022

Before: Employment Judge P Britton (sitting alone)

Representation

Claimant: In person and for a short period during the hearing his son George William Joseph Tyrell also assisted but then had to go back to work.

Respondent: Mr Owen Dear, Solicitor

JUDGMENT

1. Automatically pursuant to Rule 38 of the Employment Tribunal Rules and Procedure 2013 there is now hereby formally issued a notice to the effect that the non-compliance by the Claimant with the Unless Order dated 29 March 2022 means that in that respect the claim for detrimental treatment by way of whistleblowing short of dismissal is formally dismissed.

2. However, pursuant to Rule 38(2) and with the consent of the parties, I have abridged the process for reconsideration of my Unless order and it being in the interest of justice so to do revoke it thus meaning that the struck out claim is restored.

REASONS

Introduction and the reconsideration issue

1. This case by now has a somewhat protracted history. Suffice it to say that I heard a first Case Management Hearing in the matter on 6 October 2021 and published a very full record thereof on the 21st including that I required the Claimant to provide further and better particularisation of his claims which essentially, as I set out therein, relate to whether he was detrimentally treated by reason of whistleblowing pursuant to section 47B of the Employment Rights Act 1996 (the ERA) post disclosure to Mr Dangar in March 2019. Thus, thereafter as to whether the detrimental treatment flowed through to include because of his whistleblowing his selection for redundancy and the process relating thereto and thence through to his actual dismissal, and therefore whether this was an automatically unfair dismissal pursuant to section 103A of the ERA as well as, and which was claimed, being unfair dismissal pursuant to section 95 and 98 of the ERA.

2. So, I ordered further and better particulars. These came in in due course and were somewhat short and didn't deal with the particularisation which was needed and in particular setting out why this was a public interest disclosure pursuant to section 43B of the ERA and then setting out chronologically the circumstances starting with the disclosure to Mr Dangar in particular setting out each detriment alleged, who was the perpetrator, what they did and when, and running it all the way through to the actual dismissal. So, I having ordered those particulars at that first Case Management Hearing and there not having been sufficient compliance I then heard an Open Preliminary Hearing by CVP on 10 March 2022. That was intended to deal with the application of the Respondent that there was no disclosure which passed the test at section 43B and that there was no particularisation of detrimental treatment or a link to the dismissal; hence to consider strike out of the whistleblowing elements of the claim. I signed the record of that hearing on 29 march 2022

3. At that hearing inter alia what I did was to explore with Mr Tyrell and his son, who assisted him, as to the reasons for the then non-compliance and this can be seen as set out by me at paragraphs 1 to 4. The explanation was given at that stage was that the Claimant and his son thought that in terms of providing the full particularisation they didn't need to do that until they had received the trial bundle and could see the documentation that they could cross reference to. I bear in mind that I had ordered the trial bundle to be prepared and served by the Respondent by 25 February 2022 and which had been done. However they also explained that they had asked the

Respondent for some additional documentation which they needed for the particularisation, but that this had been refused it. In any event I therefore found as per my paragraph 4 that I didn't conclude that the two of them had "flouted my orders". So what I did was to set out very carefully in detail in that paragraph what I wanted to see in what was now going to be a Scott Schedule which the Respondent would prepare in terms of a template and send across to Mr Tyrell and his son to complete. And because there had been non-compliance with my first order I made that an Unless Order and so what I ordered, and I will now briefly refer to it and it was only in relation to the detrimental treatment short of dismissal claim section 47B, was that as per my order 2; -

"The Claimant will then fully complete his entries and send the same to the Respondent copying the Tribunal by Friday 29 April 2022. Because there has been a failure to comply with my orders so far and because that has put the Tribunal to in many ways an unnecessary further hearing, I therefore have decided that this is an Unless Order and what it means is if the Claimant does not fully comply as I have directed by that deadline then the claim will be struck out for failure to comply with the Tribunals orders".

4. I then made an order for the Respondent to be able to file an amended response in relation thereto which it duly did, and I listed this further hearing today to take matters up so to speak as they would have been proceeded with at the first Preliminary Hearing had there been the compliance prior thereto by the Claimant.

5. What the Tribunal got, and Mr Tyrell served it at the same time on the Respondent's Solicitors, was a Scott Schedule on 26 April but accompanying it was a detailed statement it was headed **"George Joseph Tyrell Background to Detriment of Feelings Case"** and then after three paragraphs another subheading **"History of Detriment to Feelings**. I had however also asked that, and this was supposed to be in the Scott Schedule, that the Claimant would set out the history of matters so to speak prior to the disclosure to Mr Danger in March 2019. That was not in that document and the other thing to point out is that Mr Dear had very fairly emailed back the Claimant on 28 April as soon as he got the two documents, I have now referred to pointing out that when it came to the Scott Schedule, *"you do not appear to have provided the full details".* And he went on to say, *"with that in mind, although I cannot advise or assist you in this regard, I would urge you to review and reconsider the information set out at paragraph 4 of the Tribunals Case Management Summary and paragraph 2 of the order set out in the same document, and should you wish to take the opportunity to do so, make an amendment to the Scott Schedule before the Tribunals deadline for compliance".* The reason he did that was because Mr Dear had quite accurately pointed out that the actual Scott Schedule was very short indeed and it didn't set out in any detail and in the format that I had asked for the detriments relied upon which was obviously crucial in terms of the Respondent knowing the case it had to meet. So, the actual Scott Schedule which is at page 69 in the PDF bundle placed

before me by the Respondent has only two entries. It has one in terms of the public interest disclosure to Mr Dangar in March 2019 and in that respect, it deals with what I requested because it sets out what was the public interest disclosure and what it related to and as to which subsections at section 43B the Claimant was relying on and why it was in the public interest to make this disclosure and to where it could actually be found in terms of the trial bundle. He made reference to the disciplinary report of Mr Neil Cooke which goes back to the issue of whether or not the Claimant was wrongfully made the subject of a disciplinary investigation culminating in September 2019 and because he had been whistleblowing.

6. The next part of this Scott Schedule table which was supposed to deal with detriments was vague in the sense that although he stated overall stated what kind of detriments he was suffering from, he gave no specifics. So, this did not comply with what I had ordered, and I could not have made clearer what I expected to see. But as I say there was this first statement that accompanied and then what happened following Mr Dear's very reasonable email to the Claimant is that he put in a second version of the statement on 29 April so still complying with my Unless Order deadline in which he gave the history of detriment to the feelings and as per the first statement again put down the specifics of the actual detriments that had occurred post the disclosure to Mr Dangar. But the point is that they were not in the Scott Schedule as per my Unless Order.

7. So, the first issue in that sense for me to deal with is has there actually been compliance with my Unless Order. This engages Rule 38 of the Employment Tribunals Rules of Procedure 2013. Taking it short Mr Dear wrote into the Tribunal on 27 May pointing out that there had been the non-compliance and that therefore the claim should be struck out. This matter was in fact referred to this Judge who decided he would look at it today. So, I had before me the bundle to which I have referred, and which includes two versions of the Scott Schedule but which are the same in content, but also the two statement the second one having the further particulars of the history of matters up to the start of the detriments and to which I have referred.

8. Taken strictly the Unless Order has not been complied with it therefore obviously follows that as an automatic consequence as per Rule 38(a) the claim is therefore dismissed and struck out. So, in that sense what I must now do as per rule 38 is to make a confirmatory order to that effect. However, within 14 days of the issuing of such an Order the Claimant would be entitled to make written representation for in effect a reconsideration.

9. Mr Tyrell indicated that he would seek reconsideration. Mr Dear took some instructions on this issue and thus the way forward the during the adjournment which

I accordingly granted. Essentially neither party wants to come back for yet another preliminary hearing and in order to deal with the reconsideration issue. Thus, he was content for me in accordance with the overriding objective to abridge time for the consideration of the reconsideration application and deal with it today. So, with the consent of both parties I am therefore going to deal with the issue today.

10. In this respect I am guided by the Judgment on the issue of reconsideration of Unless Orders of The Honourable Mr Justice Underhill as he then was as President of the EAT in the case of ***Thind v Salvesen Logistics Limited UKEAT/0487/09/DA,*** and in particular his reference to at his paragraph 13 and 14 of the by then Judgment of The Court of Appeal in ***Governing Body St Albans School v Neary [2009] EWC Civ 1190***. So, in determining a reconsideration application in relation to an Unless Order and as to whether I should therefore revoke it engaged in particular is his Judgment at paragraph 14; -

"The Law is as it now stands is much more straightforward. The Tribunal must decide whether it is right in the interests of justice and the overriding objective to grant relief to the party in default not withstanding in breach of the Unless Order. That involves a broad assessment of what is in the interest of justice, and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They would 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 remains possible. The fact that an Unless Order has been made which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if it does not do so, will always be an important consideration. Unless Orders are an important part of the Tribunals procedural armoury (albeit not one to be used lightly) and it must be taken very seriously, the effectiveness would be undermined if Tribunals are too ready to set them aside. But it is nevertheless no more than one consideration. Not one factor is necessarily determinative of the course the Tribunal should take. Each case will depend on its own facts".

11. In terms of the interests of justice test taking the Claimant's case at its highest I will deal at this stage with whether or not there is prima facie in this case a public interest disclosure. Mr Dear has helpfully taken a pragmatic stance in that respect. The Claimant has made plain that whereas in the Scott Schedule entry he was relying on four subsections under section 43B he is no longer going to rely on "(a) ie that a criminal offence has been committed….". He is going to rely on section 43(1)(b) ie "that a person has failed or is failing or is likely to fail to comply with any legal obligation to which he is subject", and also on section 43B(1)(d) namely " that the health or safety of any individual has been or is likely to be endangered". I had already rehearsed in essence what the whistleblowing was all about as to which see my detailed first Case Management Hearing. Thus, principally whether or not the Respondent in its working practices in allowing piecework was therefore sacrificing quality at the expense of speed with concomitant implications bearing in mind it is involved in the safety

inspection of aerospace parts and inter alia in particular for such as Rolls Royce. Self-evidently if the Claimant raised such issues to Mr Dangar and as to which he had a genuine belief, then they would on the face of it come within that definition. The Claimant has now made very clear indeed exactly what he did say to Mr Dangar as to which see the particularisation in the statements I have referred to, and which can thus be read in conjunction with the Scott Schedule entry. The Respondent denies that he raised anything like the content that Mr Tyrell says that he did and therefore denies that this would constitute a public interest disclosure As to whether as a matter of fact he did raise in terms of the information he imparted to Mr Dangar sufficient to constitute a public interest disclosure as per s43A is a matter for finding of fact for the Tribunal at the main hearing Turn it round another way and taken at its highest following the particularisation there is a case to answer.

12. The second question would be as to whether elements of the claim and in particular the alleged disclosure to Mr Dangar in March 2019 and such as the disciplinary process the attempt to impose a disciplinary sanction on Mr Tyrell in September 2019 are out of time. The Respondent submits that they do not form part of a "continuing act". But this of course engages the seminal authority of ***Hendricks v Commissioner of Police for the Metropolis (2003) IRLR 96 CA*** *per Mummery LJ* and to which I referred last time. Given the time span of events which is not that long being as it is between March 2019 up to October 2020, this is again a matter for findings of fact by the Tribunal at the main Hearing which commences on 19 September 2022.

13. As to prejudice the Claimant has now fully particularised the alleged detriments and certainly sufficient for the Respondent to know the case it has to meet, in the second version of the statement accompanying the Scott Schedule. Furthermore he tells me he raised it all in any event in terms of the internal process and particularly at his appeal against the decision to dismiss him by reason of redundancy. Mr Dear does not argue that the Respondent is unable to defend due to the passage of time and that accordingly a fair trial is no longer possible.

14. As to the merits of the claim I repeat that taken at its highest and for the purposes of this adjudication only at this stage there is a case to answer.

15. That brings me to the seriousness of the default in terms on the Unless order. I bear in mind that the Claimant is not a person with legal knowledge, nor is his son. They are not at this stage being supported by the Trade Union. Mr Tyrrell has not the funds to use Solicitors because he needed to pay off his mortgage with his redundancy payment, I bear in mind his age and that therefore on the face of it this was a sensible thing to do.

16. They thought that they could deal with the Scott Schedule point by reason of putting in the statement which was intended to be attached to it and in that sense point out that the second version thereof which dealt with all aspects they would say of what this Judge ordered was put in by of course the deadline of 29 April. Yes, it ought to have been put into the Scott Schedule and I am with Mr Dear in that respect, but it is not a case where they just simply ignored my orders and didn't do anything or provided in one shape or form insufficient particularisation.

Conclusion on the reconsideration issue

17. Accordingly, for all those reasons I have concluded that it is in the interest of justice to therefore revoke upon reconsideration as per Rule 38 the Unless Order in this case.

The Way Forward

18. As per my orders the trial bundle has been completed, I have already extended as per my first Case Management Hearing the main hearing to 5 days commencing on Monday 19 September 2022. .The date for exchange of witness statements is Friday 5 August 2022.

Time Estimate

19. We discussed this again today because the Claimant had indicated he might be planning to call more witnesses. Following discussion it became clear that he will refer to and thus place reliance upon the supportive evidence which one potential witness gave in the disciplinary investigation report. I therefore queried that if that witness is not willing to attend the main hearing and thus might have to be summonsed and was in legal parlance thereby a hostile witness, then wasn't the Claimant better served by relying upon the evidence that person gave to the internal investigation? The Claim will therefore reflect upon that observation. His second proposed witness may also be reluctant. He would go to the working practices historically but which in many ways is covered by the other witness that he has referred to and thus within the internal investigation. So the Claimant may therefore take the view that he can again make the points he wishes to by questioning of the Respondent witnesses and submissions. I only so observe because of course the trial date is not long away and if he is talking about witnesses who are not willing to attend, then he is unlikely to be able to get statements off them and therefore he will have to apply for witness orders forcing their appearance. He now appreciates the risks he might run in doing so.

20. It follows that bearing in mind the number of the Respondent's witnesses has not changed that I remain of the view that we should be able to get through this case in terms of dealing with liability within the 5 days allotted.

24. The second issue that Mr Dear has raised is that he wishes to have **7 days** from today to inform the Tribunal as to whether or not the Respondent is now willing to enter into Judicial Mediation. Of course, **I grant him that request. Suffice it to say that if the Respondent does decide that it wants Judicial Mediation then that will have to be listed promptly because we do not want to lose the main hearing slot.**

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Employment Judge P Britton

Date: 8 July 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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