EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100948/16 & Others Held at Aberdeen on 2 March 2017

Employment Judge: Mr J M Hendry (sitting alone)

Mr Stephen Young & Others	**CLAIMANTS** **Represented by:** **Mr P O'Donnell – Solicitor**
Wood Group PSN	**RESPONDENT** **Represented by:** **Ms V Kerr – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the reconsideration is granted and the Judgment dated 16 December 2016 is recalled in relation to the following claimants: Mr. N. Tonkin, Mr. J. McLaughlin, Mr. J. Skelton , Mr. A. Jones, Mr. P. O'Neill and Mr. G.R. Newton.

REASONS

1. A request for reconsideration was made by the claimant's solicitors following the issue of a Judgment dated 16 December 2016 dismissing the claims of Mr N Tonkin and others. The application related to Mr. N. Tonkin (case no S/4100949/16), Mr. J. McLaughlin (case no S/4100950/16), Mr. J. Skelton (case no S/4100953/16), Mr. A. Jones (case no S/4100954), Mr. P.O'Neill (case no S/4100956/16) and Mr. G.R. Newton (case no S/4100957/16).

2. The claim by Mr S. Young (case no S/4100948/16) was dealt with by Judge Hosie on 8 December and subject to a separate reconsideration application. It was intimated that the claims made by Mr J McLaughlin (case no. S/4100950/16), Mr A Jones (case no. S/4100954/16) were no longer being insisted upon.

3. Parties agreed that the reconsideration application should be dealt with by written submissions. Detailed and substantial written submissions were lodged by both parties. The Tribunal extends its thanks to the Respondent's agents for their detailed summary of the history of this case contained in their written submissions.

4. There appeared to be two principal issues for the Tribunal to consider. The first was whether or not it was appropriate for the Claimants' solicitors to seek reconsideration when, in the, Respondents' submission it was their failure to respond to a Tribunal "Unless Order" that led to the dismissal of cases. In any event the Respondents argued the Employment Tribunal had sufficient grounds to issue the Judgments in accordance to Rule 37 of the Employment Tribunals (2013) because of the general conduct of the case. The second issue was whether the circumstances at the time were apt for the issue of Judgment given that it was argued that the Respondents had suffered no prejudice and there had been no material change in the situation since an earlier request for strike out had been refused.

Brief Background History

5. The brief history of the matter is that the Claimants worked for the Wood Group PSN in various supervisory posts. Issues arose in relation to whether they had been properly paid by the Respondents. This led to the issue of proceedings on 13 April 2016 against the Respondents. The claims were not particularised. No specific sums were calculated as being due.

6. It might be fair to suggest that one of the main areas of contention between the parties related to the Claimants' failure over a period to set out in detail what they believed was their client's exact contractual entitlement. The Respondents

accepted that the Claimants were employed to work in Sullom Voe in Shetland. Their position was that the employees' terms and conditions of employment relating to pay were governed by a site agreement. They denied that the Claimants had been underpaid and maintained that the Claimants had been paid correctly in accordance with that agreement.

Progress of Claim

7. The Respondent in their ET3 included calls for further specification of the claim. No further specification was provided.

8. On 24 May 2016 the Respondent's solicitors e-mailed the Tribunal stating that until the claims were properly specified the issues could not be determined and as a consequence they could not ascertain who would have to be witness in the case.

9. On 14 June the Respondent's solicitors e-mailed the Claimants' representative stating that they required the claimants to properly specify the claims. No further specification was provided.

10. On 21 June a further request for specification was made.

11. A Preliminary Hearing was held by telephone conference call on 27 June. During the discussion the solicitor for the claimants stated that she had not received instructions in relation to providing specification but she believed that she would receive such instructions in the following two weeks. She explained that the claimant's worked offshore and contacting them when they were offshore was difficult. The claimants were given a further two weeks to provide specification. This period expired on 11 July and no further specification had been provided.

12. On 11 July the claimants' solicitor wrote to the Employment Tribunal indicating that she was not able to provide further specification as the claimants had not given her instructions. She requested a further extension of two weeks. No further specification was provided within this period.

13. On 26 July the Claimants' representative passed on information they had received from some of their clients. They requested a four week extension of the time to provide further specification. The Tribunal granted the request. The e-mail stated:

> "*I write to advise that EJ Hendry has granted the requested extension of 4 weeks to supply the information ordered. He also advises that an Unless Notice will be issued if the information is not supplied in this time frame."*

14. No further specification was provided by 8 August.

15. On 12 August with reference to the e-mail sent by the Employment Tribunal on 28 July stating that an Unless Order would be issued if the claimants did not provide further specification the Respondents solicitors wrote to the Tribunal and requested that the Employment Tribunal issue an Unless Order as earlier indicated.

16. On 25 August the claimants' representative provided limited further specification. By letter dated 25 August the Employment Tribunal granted the claimants a further two weeks to provide specification.

17. A Date Listings Letter was sent out on 25 August to identify hearing dates.

18. On 31 August the Respondents' solicitors wrote to the Employment Tribunal submitting that in their view it was not fair or appropriate to require them to complete a Date Listing Letter specifying who their witnesses would be when material aspects of the claims had not been specified. They once more requested an Unless Order to be issued in accordance with the Employment Tribunals' earlier indication.

19. On 21 September 2016 the Respondent again called for further specification and wrote to the Employment Tribunal in relation to the Unless Order request.

20. On 11 October the Tribunal sent out a further Date Listing Letter. The Respondents' solicitors completed the Date Listing Letter as best they could as instructed by the Tribunal.

21. On 17 October parties were advised that Employment Judge Hosie had refused the request for an Unless Order request and instructed that the case should be set down for a full hearing.

22. The Respondent's solicitors wrote to the Tribunal on the 7 November requesting a Preliminary Hearing as the claims lacked specification and asking for written reasons why the Unless Order request had been refused. On 15 November Employment Judge Hosie responded:

> "*Your e-mail below has been referred to EJ Hosie and he instructs me to advise you the reason why he has refused the request for an Unless Order is that he does not consider that the circumstances merit such a draconian step. EJ Hosie was satisfied that the representations by the Claimants' solicitor opposing the application in particular the e-mails of 8 September and 5 October were well-founded.*"

23. At this point the Employment Tribunal also asked the Claimants' solicitors to respond to and provide comments on the Respondents' solicitor's e-mail of 7 November. Further correspondence ensued.

24. On the 15 November Judge Hoise responded to the respondent's solicitors that he did not consider the circumstances merited the issue of an unless order.

25. On 25 November EJ Hosie having considered matters issued the following strike out warning to the Claimant's solicitors. It stated:

> "*Employment Judge EJ Hosie is considering striking out your claim, namely **Wages Act** on the grounds that the manner in which the proceedings have been conducted by you or on your behalf has been scandalous, unreasonable or vexatious in terms of Rule 37(1)(b) of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and that the claim (or relevant part) has not been actively pursued in terms of Rule 37(1)(d) of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.*
>
> *Employment Judge EJ Hosie has directed that if you disagree, you should set out your reasons for disagreeing in writing by **4 December 2016** or tell us by **4 December 2016** that you want the Employment Judge to fix a*

hearing so that you can put forward your reasons in person. You must copy any communication to the other party(ies) and confirm to us that you have done so.

If nothing is heard from you in the timescale set out above then the Employment Judge will decide whether to strike out your claim, or part of it as the case may be, on the basis of the information which is otherwise available."

26. No response was received from the Claimant's solicitors and Judgments were issued dismissing the claims.

Submissions

27. The Claimants' solicitors indicated that the reason there was no response to the letter of 25 November was through an administrative error made by them. The letter was received in their office. It was apparently placed on file without being seen by the person dealing with the case. This did not come to light until 8 December when the Judgments were received. They submitted that it was in the interests of justice that the Claimants should not be penalised by this error. They also addressed the issue of whether or not the strike-out warning issued on 25 November was justified. They noted that the Tribunal had refused a request for such an Order on 15 November. No further application was made by the Respondents and the strike out was issued on the Tribunal's own motion because of the failure to comment on the Respondents' e-mail of 7 November.

28. That email was a request for a Preliminary Hearing and an Unless Order. The Employment Judge directed the Claimants' solicitor to respond. They posed the question that they were unsure as to why the Tribunal took the view that the claims were not being actively pursued or conducted in an unreasonable manner. They referred the Tribunal to the case of ***Bolch v. Chipman (2004)IRLR 140*** and to their further e-mail of 12 January 2017 responding to the Respondents' position. They indicated that the decision to strike-out should not be reconsidered solely on the basis of the failure to respond to the letter of 25 November. They did not accept that this appeared to be the sole or determinative reason why the claim was struck out and explained that their application was not advanced solely on that basis.

29. They sought to distinguish the case of ***Lindsay v. Ironsides, Ray & Vials (1994) ICR*** on the basis that it did not carry the same weight that it would in a case where the sole cause of the strike-out was the failure to respond to the correspondence of 25 November. That case was very different in their submission from the present situation as that case related to a Preliminary Hearing on time-bar. Their position was that the Claimants were entitled to a hearing. There was no evidence that the case was not being actively pursued. The Respondents had by their e-mail of 14 October sought an extension of time to return the Date Listing Letter which indicated that they at least considered it was possible to proceed to a hearing. The earlier application for strike-out in their view had no relevance. There was no material change in the circumstances between the refusal of the earlier strike-out and the strike-out carried out by the Tribunal at its own hand.

30. As indicated earlier in the Respondent's submitted written submissions after giving a detailed chronology of events they argued that the main reason why the case had been dismissed related to the error of the Claimants' representatives and accordingly it was not in the interests of justice to reconsider the Judgment. They referred the Tribunal to the case of ***Lindsay v. Ironsides, Ray & Vials [1994] ICR 34 EAT***. Their position was that there were no unusual circumstances in this case. The principles set out in ***Lindsay*** should be applied. It was not in the interests of justice to reconsider the matter.

31. In relation to the Claimants' representative's assertion that the error in failing to respond to the strike-out warning was not the determinative reason why the claims were struck-out they submitted that if the Claimants' solicitor was correct in stating that there were insufficient grounds to justify strike out relating to the conduct of the case more generally it showed that the reason why the claims were struck out must relate to the failure to respond to the letter. The tribunal had grounds to justify the strike out on both grounds. In this case the Claimants' representatives failure to respond to the letter of 25 November was the latest incident in a persistent failure to comply with the required procedural steps.

32. Turning to the submissions in relation to access to justice the Respondents submitted that the Claimants would have a claim against their representatives. They submitted that the Tribunal had sufficient grounds to issue the Judgments and they submitted that the tests for striking out is set out in the case of ***Blockbuster Entertainment Ltd v. James [2006] IRLR 630 CA***. The test set out in that case was that the Tribunal required to be satisfied that the parties' conduct involved had deliberate and persistent disregard of the required procedural steps has made a fair trial impossible; neither case for striking out must be a proportionate response. They submitted that it wasn't possible for a trial to take place as they still had no fair notice of fundamental aspects of the Claimants' claims. They were seriously prejudiced if the case proceeded to a Final Hearing. In their view there had been a deliberate and persistent disregard of the required steps and the case had not been actively pursued.

Decision

33. The basis of reconsideration of a Judgment is set out in Rules 70, 71 and 72.

70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall

inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

34. Although not explicit from the Rules which really just set out the process to be adopted the basis on which a Judgment can be reconsidered is encapsulated in the phrase 'interests of justice'. This is a wide concept but one that has its limits. The previous Employment Tribunal Rules set out a couple of the type of circumstances envisaged namely that there had been an 'administrative error' or that a decision was made in the absence of a party. Broadly it pointed to a situation where a mishap had occurred. The phrase administrative error was not one confined to the Tribunal staff but to errors made by parties. (Sodexho v Gibbons (2005) IRLR 836.

35. I will not dwell on the circumstances leading up to the dismissal of the claims. Progress could be described as glacial although in describing it as such I

acknowledge the difficulty the solicitors had in taking instructions from a group of litigants, some of whom have fallen by the wayside at points, who would have been dispersed and possibly working abroad or offshore. There is no doubt that the respondent's solicitors were losing patience with the situation and asking the Tribunal to consider strike out. It is against this situation, sadly not an uncommon one, that the claimant's solicitors failed to note that they had a time limit to respond to. But the dismissal of the claims did not depend wholly on their response or lack thereof. The claimant's solicitors are correct to point out that Judge Hosie did not issue an 'Unless Order' rather he sought a response to the respondent's strike out application and advised that he would reconsider the position with or without such a response. The reconsideration must therefore look at the basis for the strike out application and its merits and not solely on the basis of the explanation proffered for not responding to the Judges invitation to comment further or seek an oral hearing on strike out. The whole picture is important. In passing I would comment that the suggestion that the Tribunal by issuing listing letters in October inferred that it had concluded that a fair trial of the issues was possible cannot been seen as having too much significance. It was an administrative step and one that could in effect be overridden if the circumstances warranted it.

36. It was unfortunate that the present cases came to another Judge to deal with rather than to Judge Hosie who had case managed the process from the outset and who possibly had a deeper understanding of the issues involved. The terms of the Judgment perhaps do not make it clear that the failure to respond by the 4 December triggered a reassessment of the strike out application's merits. There is some force in the argument that since Judge Hosie refused the strike out application and then refused to issue an 'unless order' that nothing further of any great material significance occurred from that point until the failure to respond by the claimant's solicitors. That was a failure to respond to a request for a further preliminary hearing made on 7 November by the respondent's solicitors and by implication a failure to either act reasonably or actively pursue the case. The claimant's solicitors are correct when they indicate that beyond reference to the Rules no particular or specific failure was suggested.

37. Both parties have provided the Tribunal with detailed and helpful written submissions which highlight the main issues here. In principle I accept that the situation is different from one in which it is simply the agents failure or error. It also seems to me that the error was the sort of administrative mishap that can happen in any organisation and was in no way a wilful flouting of the Tribunal Judge's clear wish to have a response to the renewed strike out application. The case relied on by the respondent's solicitors of **Lindsay** is in these circumstances not as helpful to their position as they would wish.

38. The respondents argues that no fair trial is possible. On the current state of the pleadings that is the case. However I am of the view that the strike out of these cases was premature. If the claimants now provide specification then a fair trial will be possible. If they cannot then the process can be short circuited by an application for strike out.

39. In addition to the matters set out above I have concerns that the striking out of the applications were made at the Tribunal's own hand although I am sure that the respondents solicitors, if asked, would have renewed such an application Although the Tribunal has such an inherent power it should be slow to use it and it is better for the Tribunal to respond to such applications coming from parties. The test was whether a fair trial was possible and as at the 16 December that question must be answered in the affirmative. The action taken was premature although looking at the history of the case there has been a failure by the claimants to set out their case in sufficient detail and once the case is restored, unless there are good reasons, then they must do so quickly to prevent any further delay.

40. In the circumstances the applications shall be granted and a Preliminary Hearing arranged to discuss future procedure.

41. Finally can I apologise for the length of time taken to address this matter and issue a Judgment. There were a number of causes for this none of which are truly satisfactory reasons in themselves but a combination of moving premises and workload are the principal ones.

Employment Judge: James Hendry
Date of Judgment: 31 May 2017
Entered in register and copied to parties: 31 May 2017