Appeal No. UKEAT/0349/14/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 10 February 2015

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR J TABINAS APPELLANT

KUSCO-KINGSTON UNIVERSITY SERVICE CO LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NATHANIEL CAIDEN (of Counsel) Free Representation Unit
For the Respondent	MISS IRIS FERBER (of Counsel)

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

The claim was struck out under Rule 37(1)(d) as not being actively pursued, when the Claimant had not produced witness statements nor co-operated in preparing bundles, and had failed to reply to correspondence. On being warned that his claim might be struck out, the Claimant had given reasons for his failure to respond to correspondence, being illness. He supplied a witness statement and disclosed documents. The Employment Judge gave no reasons for his being satisfied that the claim should be struck out. The reasons given were so short as to fail to show the Claimant why he had been unsuccessful. The Employment Appeal Tribunal could not tell from the Reasons why the Employment Judge found it proportionate to strike out the claim. Appeal allowed and case remitted to a fresh Employment Tribunal to hold a Preliminary Hearing, to fix a date for a Full Hearing and make such orders as it finds necessary for case management. The Claimant's application for payment of the fee for appealing to be paid by the Respondent refused; the Respondent had acted responsibly and there was no reason why the fee should be paid by it.

THE HONOURABLE LADY STACEY

Introduction

1. This is my decision in the case of Mr Julio Tabinas and Kingston University Service Company Ltd. This is a case about striking out of a claim for race discrimination. I will refer to the parties as the Claimant and the Respondent, as they were in the Employment Tribunal. It is an appeal by the Claimant in those proceedings against a Judgment of Employment Judge Hildebrand, sitting alone at London (South), in which Reasons were sent to parties on 3 December 2013.

2. The Claimant represented himself in the Employment Tribunal proceedings, but since the matter has been before the EAT, he has had representation from Mr Caiden, Counsel. The Respondent was represented before the Employment Tribunal by Mr Morrison, Solicitor, and before me by Miss Ferber, Counsel.

The Procedural History

3. By his initiating form the Claimant claimed race discrimination and victimisation. A case management discussion was held on 12 February 2013 at which the Employment Judge noted that the Claimant was unclear about what he intended to prove. After discussion, however, it was ascertained, and I have the impression it was ascertained with a little difficulty, that he claimed direct race discrimination, indirect race discrimination, racial harassment and victimisation.

4. As the Claimant's position was far from clear, orders were made that further Particulars should be provided before 1 March 2013 and the Respondent should amend its response in

accordance with those further Particulars if necessary. A list of issues was to be provided, as was a Schedule of Loss. Documents to be relied on were to be disclosed by 11 April 2013. Directions concerning the bundle of papers, the chronology, Skeleton Arguments and witness statements, were made. Most importantly, a hearing was set for 4 November 2013.

5. The Claimant, however, did not follow the orders made at that case management discussion in some respects at all, and in other respects on time. Mr Morrison, the solicitor for the Respondent, helpfully wrote to him in March 2013, setting out questions that needed to be answered in order that the Claimant, who as Mr Morrison no doubt recognised was representing himself, had to give in order to give the further particulars. And the Claimant did respond to that by a document which at least purported to answer those questions point by point. It is dated 7 May 2013. I understand that a Schedule of Loss was produced.

6. After that Mr Morrison became concerned that the Claimant did not respond to his attempts to contact him. He did not accept delivery from Mr Morrison of the bundle of papers. He did not exchange witness statements. And he did not reply to queries Mr Morrison made of him about progress in the case. Mr Morrison then acted very responsibly by writing to the Employment Tribunal on 22 October 2013 in terms seeking help in ensuring that the date for trial was effectively used. He stated in his e-mail to the Employment Tribunal that he had attempted to serve the bundle of documents and he had attempted to contact the Claimant, but could get no response from him and he stated his own view, which was that the Claimant had seemingly lost interest in pursuing his claim.

7. That matter came before the Regional Judge, Judge Hildebrand, who having read Mr Morrison's letter, wrote on 30 October 2013 by e-mail to the Claimant stating that he was

considering striking out the claim because it had not been actively pursued. He told the Claimant that if he wanted to object to that proposal he should give his reasons for objecting in writing by 6 November. The Regional Judge also vacated the hearing, which was listed for 4 November. I pause to say that the course of events which I have just narrated cannot be criticised and indeed is not criticised by the Claimant. Mr Morrison acted responsibly. The Regional Judge was entitled to act as he did in light of the information that was given to him. Thereafter a response came from the Claimant by e-mail within a few hours of the letter from the Employment Tribunal, and it was followed up in the next day or so by some written material.

8. In the e-mail the Claimant said, "I surely oppose to the striking out". He also said:

> **"… I'm really sick and can't even write properly as I'm encountering 'vertigo' every now and then. …"**

He went on in his e-mail to make a number of suggestions, which were not to the point. He described e-mails sent to him by the lawyer for the Respondent as a form of harassment. He gave his views on democracy. In the separately sent document, which was headed "Compliance", he said at the foot of the first page:

> **"… I am suffering of malady beyond my control from time to time which really impelled me to rest for months upon the advice of my GP. Thus, it has impeded me from filing the submission of my own case bundle on time. And I would like to append to this compliance a verified medical certificate issued by Dr A. S. GOR dated 24th October 2013. I had been seen and examined with the chief complaint of frequent stresses / depression; migraine and anxiety attacks; diabetes mellitus (long standing); and altogether, that I am unable to work. I was advised to be seen regularly by him at his clinic with a written prescription."**

9. He included a photocopy of a list of prescriptions which he had been given by his doctor. The diabetes was said to be longstanding, and there was no particular indication of the length or otherwise of other conditions, though it could be seen that the prescriptions had been available during September of that year.

10. The Employment Judge decided to strike out the claim because he decided it had not been actively pursued. The Reasons given by him for that Judgment are correctly described as terse. They state that the Claimant has failed to make any sufficient representations why this should not be done or to request a hearing. The claim is therefore struck out.

11. The Claimant appealed against that Judgment, and at first an order under Rule 3(7) was made on the basis that the Grounds of Appeal lodged did not deal with the decision made so as to show that there was or may be an error of law. However, at a hearing under Rule 3(10) HHJ Clark took the view that he was persuaded by Mr Caiden, who appeared at that stage under the ELAAS Scheme, that this was a matter that should be ventilated at a Full Hearing.

The Law

12. The rules with which we are concerned are the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** and, in particular, Rule 37. That Rule provides in subparagraph (1) that:

> **"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -**
>
> > **(a) that it is scandalous or vexatious or has no reasonable prospect of success;**
> >
> > **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
> >
> > **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
> >
> > **(d) that it has not been actively pursued;**
> >
> > **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."**

13. Subparagraph (2) provides:

> **"(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."**

Submissions

14. The Amended Grounds of Appeal are to the effect that the Employment Tribunal erred in law, as it did not identify any inordinate and inexcusable delay on the part of the Claimant and did not consider whether any such delay gave rise to a substantial risk that it would not be possible to have a fair trial of the issues. It has been argued that the terse Reasons did not identify any delay, never mind inordinate and inexcusable delay. It has been argued before me that the Reasons do not show what the Employment Judge thought about the response that was received from the Claimant and therefore do not show that he considered all that was before him. He did not give any indication of having considered proportionality before striking out. Counsel argues on that last matter that it is necessary in the case of **Blockbuster Entertainment Ltd v James** [2006] EWCA Civ 684 to consider proportionality before applying the draconian order to strike out. Consideration could and should have been given to less drastic orders such as requesting further medical information or making an order for costs, which are just given as examples.

15. The Respondent argues that the Employment Tribunal Judge has made no error of law. She argues that he may have made a decision which would not have been made by other Employment Judges, but that of course does not equate to an error of law. Counsel argues that the Employment Judge has said all that he needs to say when one considers the context. Taking her oral and her written argument together, as I have done in the case of the Claimant, she lists the failures by the Claimant as follows: (a) failure to reply to a request for further information; (b) failure to accept service of documents; (c) failure to collaborate with preparing a trial bundle; (d) failure to collaborate in preparing a chronology; and (e) failure to exchange witness statements. She points out that he got reminders from the Respondent's solicitor, but did not reply.

16. When he was told by the Employment Judge that he was thinking about striking out the claim because the claim was not being actively pursued, Counsel points out that the Claimant replied very quickly and gave at least a good quantity of detail in setting out his position. She argues that he did not explain his illness and did not explain whether he had been incapacitated from carrying out the Tribunal's orders during the whole time. Of course the time to which she is referring, taking it at the best for the Claimant, is from May, when he did make some response, until the end of October. She argues that, while he certainly has said in his response that he has been ill and he suffered a malady for months, he does not explain why it is that that prevented him carrying out those orders and nor does he explain why he was suddenly able to do so when he was faced with the letter from the Employment Tribunal which told him that, if he did not explain himself then, there was a very real danger that his case would be struck out.

17. Turning then to the law on this, Claimant's Counsel argues that there is insufficient reasoning with this Decision, as is evidenced by the fact that Counsel do not agree what caused the claim to be struck out. He argues that there may be confusion between Rule 37(1)(c) and 37(1)(d). I proceed on the basis that it is 37(1)(d) with which we are dealing, because that after all is what the Employment Judge says in his letter and in his Decision.

Discussion and Conclusions

18. The legal principles which require to be applied appear to me to be as follows. The Employment Judge is entitled to consider striking out if the case is not actively pursued. In order so to do, he has to notify the Claimant of his intention and he did so. However, he has to consider any response received and, in accordance with normal principles of law, he has to give a Decision which is reasoned, so that the Claimant in this case knows why what he produced

was considered not to be sufficient and so that this Tribunal (that is, the Employment Appeal Tribunal) can tell whether the Judge did make any error of law in his consideration.

19. I have come to the view that the Decision is not sufficient in its reasoning to show that the Employment Judge considered what the Claimant said about his health and made a decision in light of it. There has been some discussion before me and in the Skeleton Argument helpfully produced about whether this is a case properly considered as one not actively pursued or if it is a case in which orders have not been complied with. I appreciate that both Counsel were prepared and able to address me fully on the law in both situations, but I did give an indication that I considered that matters were perhaps being unnecessarily complicated.

20. It seems to me that the Employment Judge has stated in his Decision that he struck the claim out because it was not actively pursued. Therefore I do not find it necessary to consider the law and the decided cases about inordinate length of any delay. I do, however, find it necessary that the Employment Judge gives more indication in his Reasons of what he was thinking. I cannot tell from those Reasons if he has applied the two-stage test which Rule 37 requires: that is, on the basis that we are concerned with a failure to pursue the case actively: was there such a failure? If the answer is yes, then the next question is: has any explanation been given? If there has, the next question is: is that an adequate explanation? If it is not, there is still a further question, and that is: is it proportionate to strike the case out, thereby dismissing the case with no enquiry into the facts? Or is there some other order that should be properly be made to enable the case to be heard while being fair, not only to the Claimant but to the Respondent as well? I cannot tell from the Reasons given for this Decision if that thought process was gone through by the experienced Regional Judge or not, and if I cannot tell that, neither can the Claimant.

21. It therefore seems to me that I require to uphold Mr Caiden's submissions and to allow the appeal.

Disposal

22. On the question of disposal, Miss Ferber, recognising that the Reasons might be seen by me as being too short, argued that the case ought to be sent back to the Employment Judge, under the procedures set out in the case of **Barke v SEETEC Business Technology Centre Ltd** [2005] ICR 1373 and **Burns v Consignia plc (No 2)** [2004] ICR 1103, for the reasoning to be expanded. Mr Caiden submitted that that was not appropriate as the Reasons were so terse as to be in the category where any further expansion would be a matter of giving reasons for the first time rather than amplifying or clarifying reasons which were given but which were ambiguous.

23. I agree with Mr Caiden on that. I do not consider this is a suitable case for the **Burns-Barke** procedure.

24. I have then gone on to consider the proper disposal. Despite neither Counsel proposing this, I did consider whether it would be proper to send the case back to an Employment Judge to consider the explanation that was given and to make a decision about whether it was sufficient and whether it was proportionate to make a strike-out order. But, bearing in mind the overriding objective of dealing with cases fairly, and in attempting to get things done at a reasonable speed, I have decided not to do that. I do not think it would be in anyone's interests for me to require that decision to be made once again.

25. I am therefore prepared to adopt the disposal urged on by Mr Caiden, which is to allow the appeal and remit this to an Employment Tribunal for a Preliminary Hearing, (previously a Case Management Discussion) at which orders should be made by that Tribunal to fix a hearing but to make such ancillary orders as parties may suggest are necessary for the matter to be properly focused.

26. I should say, in making this order, that I must emphasise that both parties are required to obey the orders of the Tribunal and to do so on time. The Respondents cannot be faulted in this case. They have obeyed the orders, and Mr Morrison, if I may say so, has acted very responsibly and very helpfully towards a person representing himself, which no doubt a properly instructed solicitor would do. But I should remark on that, because there is no doubt that that has happened. The Claimant, on the other hand, did not volunteer any information as to his difficulty in complying until being told that his case was at risk of being struck out. Therefore I wish to make it plain that the Claimant has to comply with any orders that may be made at a case management discussion by the Tribunal to whom I remit. If his state of health is such that he is unable to do that, then he must get in touch with the Employment Tribunal and explain his state of health and vouch it: that is, a proper report from a doctor stating why he is unable to comply, if that is the case. I hope it is not. But if the Claimant's state of health is such that he is not able to comply then he must not leave matters. He must get in touch with the Tribunal and explain that, because as I say Tribunal orders are not lightly to be disregarded.

27. I would like to thank both Mr Caiden and Miss Ferber for their helpful submissions and I will simply sum up by saying once again that I will allow this appeal and remit it to an Employment Tribunal to fix a new Full Hearing and to make such case management orders as are appropriate.