Appeal No. UKEAT/0002/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 March 2018

Before

HER HONOUR JUDGE KATHERINE TUCKER

(SITTING ALONE)

MR W KHAN — APPELLANT

LONDON BOROUGH OF BARNET — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondent	MS ANYA PALMER (of Counsel) Instructed by: HR Public Law Harrow Council PO Box 2 Civic Centre Station Road Harrow HA1 2UH

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

An Employment Judge had struck out the Claimant's case on the grounds it was not being actively pursued. The Claimant appealed. Striking out a claim is a draconian step. Although initially in this case it appeared that the Employment Judge may not have given sufficient consideration to those steps which the Claimant had taken, full analysis of the chronology of events revealed that the Claimant had a history of being selective about which correspondence and Orders he would respond to and which directions he would engage with. On balance, the Judge was entitled to conclude that the point had been reached where it was no longer just to allow him to continue to have access to the Tribunal, to make the Strike Out Order.

HER HONOUR JUDGE KATHERINE TUCKER

1. This is my decision in relation to an appeal that has been lodged by Mr Khan. Mr Khan appeals against the Decision of an Employment Judge dated 28 July 2017 ("the July Decision") pursuant to which his claim was struck out.

2. HHJ Shanks allowed the application to proceed to a Full Hearing on the grounds that it appeared to him, having considered the Notice of Appeal, that the decision to strike out (page 1 of the appeal bundle) may have been made on a false basis. When he considered the case at the sift procedure, he also suggested on the sift that it may be appropriate, and save time for all involved, if the Employment Tribunal Judge reconsidered the application to strike out. The Employment Judge did do so on 22 January 2018. The Employment Judge confirmed his decision. That Decision was sent to the parties on 9 February 2018 and is in the appeal bundle at pages 73 to 74.

The Events Leading to the Decision to Strike Out the Claim

3. The chronology of the events leading to the July Decision are as follows. On 3 January 2017 the Claimant lodged his claim; a copy of that appeared in the appeal bundle. The details of the claim are relatively limited. The Claimant complains about a failure to pay sick pay, about his manager's temperament, and also about difficulties working with intolerant attitudes of certain staff which, he asserted, were not tackled by management. He stated that he had heard racist comments, Islamophobic comments, which went beyond the banter in the workshop environment.

4. The Respondent lodged a detailed Response to that claim, noting that there were aspects of the claim which were unclear with the consequence that they could not clearly understand the claim that was being made against them. The Respondent's case was that the Claimant had been dismissed following a proper and fair disciplinary process. The Respondent asserted in its Response that the Claimant had failed to engage in that process, in particular, by failing to attend investigatory meetings and disciplinary meetings, without any explanation. The Respondent also stated that it was unclear from the claim lodged by the Claimant, precisely what type of discrimination claim the Claimant was making.

5. On receipt of the documents the Tribunal sent out a Notice of a Case Management Hearing (CMH) to the parties. That Notice was sent out on 13 January 2017, and the case management hearing was listed for 3 April 2017. The Tribunal, apparently of its own initiative - although precisely why this occurred is not clear - emailed the Claimant on 31 March 2017 and asked the Claimant to confirm that he would be attending the CMH hearing on the following Monday, 3 April 2017.

6. On 3 April 2017 the CMH took place. A representative from the Respondent attended the hearing. The Claimant did not attend. He did, however, email the Tribunal on that date stating that he could not attend the hearing due to illness, that he tried calling the phone number, but it had been busy all morning, and asking if this hearing could be rescheduled, apologising for inconvenience and stating that it was only due to illness that he could not attend.

7. On 8 April 2017 the Tribunal sent two documents to the Claimant; those were in the appeal bundle at pages 41 and 43. It appears that they were sent to the Claimant by email and

also by post. In the first letter, dated 8 April 2017, the Claimant was warned that an Employment Judge was considering striking out his claim. That was set out in the form of a standard letter from the Employment Tribunal in which it was noted that the Claimant had not attended the hearing on 3 April 2017. The letter stated that the Employment Judge (Employment Judge Henry) was considering striking out the claim because it was not being actively pursued. The letter continued, "*If you wish to object to this proposal, you should give your reasons in writing or request a hearing at which you can make them by 24 April 2017*".

8. In addition, on the same date, the Tribunal sent the Claimant a second letter headed "*Acknowledgement of correspondence*". That stated, "*I refer to your letter dated 3 April 2017, which was placed on the file*". The letter continued, "*Employment Judge Henry has directed that you provide further details of how your illness affects him*" - although that should have been "you" - "*so as to prevent [you] attending at Tribunal. Please provide relevant medical evidence*".

9. The Claimant did not respond to either of those letters in any way on or before 24 April 2017.

10. On 15 May 2017, the Respondent emailed the Tribunal stating that they had not been forwarded any correspondence from the Claimant in response to a request for further information. Further, the Respondent referred to the strike out warning letter sent to the Claimant on 8 April 2017 and asked whether there had been any response to that correspondence from the Claimant. That email appeared to have solicited some response from the Claimant, because he emailed the Tribunal and stated:

> **"I did write to ask if its possible to reschedule the tribunal case as i was unable to attend due to illness.**

> **I didn't understand this last email i was sent by watford tribunal, how can i reschedule this case?**
>
> **apologies for any misunderstanding."**

11. There was no further correspondence sent by the Tribunal to the Respondent. On 26 May, the Respondent again emailed the Tribunal. On this occasion, it asked the Tribunal directly to exercise its powers to strike out the claim on the basis that it was not being actively pursued and also because the manner in which the Claimant had conducted the proceedings was unreasonable. The history of the claim and the correspondence was recited within the email. A reference was made, in the third paragraph of the Respondent's email, to the fact that the Claimant had still not provided information about his ill health and how that had prevented him from attending the Tribunal. The email then continued as follows:

> **"The Claimant only corresponded with the tribunal after we wrote to the tribunal asking for an update … [and that the] Claimant has shown a complete disregard for the tribunal's correspondence."**

That email was copied in to the Claimant and it concluded with a statement:

> **"… should they object to this application they should do so in writing to the tribunal as soon as possible copying us in to the correspondence."**

12. It appears that it was on or around 28 May 2017 the matter was placed before the Employment Judge, who struck out the Claimant's claim, giving very limited reasons as to why that was. The Judgment was that the claim was struck out. The Reasons recited the letter of 8 April 2017 and the fact that the Claimant was given an opportunity to make representations or to request a hearing in order to set out why the claim should not be struck out because it was not being actively pursued. It then stated:

> **"2. The claimant has failed to make any representations in writing why this should not be done and has not requested a hearing. The claim is therefore struck out."**

13. When considering the appeal I have also had regard to the application for reconsideration referred to above in paragraph 2. In the Judgment and Reasons given in respect of the reconsideration, the Employment Judge stated that the Claimant had failed to attend the hearing on 3 April 2017 but acknowledged that he had communicated with the Tribunal. Further, the Judge noted that on 8 April 2017, the strike out warning letter was sent to the Claimant and that the Claimant was also sent an email and letter requesting him to provide details of his illness. Paragraph 4 of the Judgment on reconsideration stated that:

> **"4. The claimant has not responded to either correspondence of 8 April 2017, but instead, sent the correspondence on 15 May 2017, … [the text then recites what is said in that correspondence]."**

14. Paragraph 5 of the Judgment on reconsideration stated as follows:

> **"5. The correspondence neither furnished any medical evidence or otherwise gave an account as to how his illness prevented him from attending the tribunal as scheduled on 3 April 2017. It equally did not ask for a hearing, for him to make representations against strike out, but merely asked for the 3 April 2017 preliminary hearing to be rescheduled."**

15. The Judgment on reconsideration concluded:

> **"6. The claimant has not engaged with the tribunal as requested, to either make representations against strike out or to ask for a hearing as to why the claim should not be struck out.**
>
> **7. For the reasons above stated, there is no reasonable prospect of the original decision being varied or revoked."**

16. The Claimant, in the meantime, had issued an application to appeal. Before considering the appeal, I have set out the circumstances in which the appeal was heard and decisions I made regarding the hearing today.

The Appeal Hearing

17. In the appeal application the Claimant had set out, very shortly, the history of the matter. The EAT Order was made in January 2018, following the decision of HHJ Shanks, and it

A required the parties to undertake various steps in preparation for today's hearing. There was non-compliance with that Order by the Claimant, so much so that on 12 February the Respondent emailed the Employment Appeal Tribunal and asked that the matter be struck out. As a result, on 1 March 2017 an Unless Order was sent to the Claimant stating that:

B

> **"1. Unless the Appellant notifies the Court by no later than 4.00pm on the 2nd day of March 2018 that he is pursuing the appeal it shall stand dismissed on that date without further notice."**

C 18. The Claimant, in my judgment, did, at that point, just enough to keep the appeal alive. He emailed the Appeal Tribunal stating:

> **"I have not received any correspondence until 2 weeks ago from the respondent. Their emails have been going into the junk mail as it is not a recognised email …"**

D He also stated that he had received a representation document two weeks ago from the Employment Appeal Tribunal that he sent off immediately, but he suspected it was past his deadline date. (I note I am still unclear what that representation was.) He stated that:

E

> **"If possible i would like to delay the EAT appointment for another time so that i can prepare a response and have representation to give me a fair hearing."**

19. That email was treated as an application to adjourn today's hearing. I refused that

F application and stated that the reasons were as follows:

> **"Unnecessary delay is not in the interest of Justice. The Appellant has not provided evidence to support his statements that emails were received in his junk email box. Further, he has not explained why he has not responded to the letters which were sent to his address, nor why he has not been actively complying with the directions Order of the EAT (that is the document sent to him on 2 January 2018)."**

G

The Claimant was informed that the hearing would remain listed for today. The reference to documents being received by post in the paragraph set out above, was a reference to the

H submissions made by the Respondent, at length, in an email dated 5 March 2018, where the Respondent had set out what it had done in order to comply with the Order of HHJ Shanks.

20. Yesterday (7 March), the Claimant again emailed the EAT, repeating the fact that he had asked for a postponement and asking to see proof of the documents of letters being sent by post; i.e. recorded delivery slips. I directed that a response should be sent as follows:

> **"The hearing will still go ahead and my previous decision stands. The Appellant could provide screen shots of his junk mail inbox. Further, the issue to determine on appeal is a short one. The Appellant should attend tomorrow and I can then ascertain what documents it is that he says that he has been unable to consider."**

21. This morning, the Respondent attending for the hearing. At 10.30 there was no appearance from the Appellant. Staff attempted to contact him by telephone, but to no avail. I then directed that an email be sent to him.

22. When I was informed this morning that the Appellant had not attended - a matter about which I was not entirely surprised in light of the history - I directed that an email be sent to him as follows:

> **"As you are aware, your application to adjourn the hearing today has been refused. The EAT is ready and waiting to hear your appeal. You have stated that documents from the Respondent have [not] gone to your inbox. You have not yet provided screenshots of that as requested. Further, the Respondent has stated that documents were also sent to you in the post.**
>
> **The point that you seek to raise on appeal is a relatively simple one and will not, in the Judge's view, need a lot of documents to be read in order to decide. When you attend the hearing the Judge will ensure that you have time to consider the relevant documents, having identified which ones you have not yet seen. The case has been postponed until 11.30am to allow you to contact the EAT. In addition to this email a voice mail has been left on your telephone. Unless [you contact] the EAT the Judge will start the case at 11.30am."**

23. That email elicited a response from the Claimant. That stated:

> **"Dear sir or madam**
>
> **I sent form stating I would rely on written statements and not be attending the hearing.**
>
> **I have not received the respondents letters by post, if it was sent by record mail I would appreciate copy of receipts.**
>
> **I have attached copy of emails going to junk mail box."**

I have not seen any form from the Claimant/Appellant stating that he would rely on written submissions and that in those circumstances would not be attending. Further, all that was attached to the email was a one-page document which had at the top "Spam 30" and appeared to have within it one email from David Hodge and Noopor Talwar, with a heading "*Khan v London Borough of Barnet*": "*Dear Sirs, The Respondent has attempted …*". It clearly had an attachment attached to it and was dated 1 March 2018.

24. At its highest, that shows that one email dated 1 March 2018- which was five days ago - has, at some point, been in the Appellant's inbox. That does not appear to be entirely consistent with, or sit easily with, the Appellant's claim that it was some two weeks ago that he had identified the problems relating to his emails, not today.

25. I proceeded to hear the appeal in the absence of the Appellant.

The Appeal

26. I identified at the outset that I had two primary concerns in respect of the decision to strike out. The first was that the Strike Out Order made on 28 July 2017 stated that:

> **"2. The claimant has failed to make any representations in writing why this should not be [struck out] and has not requested a hearing. …"**

Like HHJ Shanks, I considered that that appeared to me to be problematic. The Claimant had, in his original email to the Tribunal, stated that he was not well, and had, arguably therefore, made at least some representations why the claim should not be struck out. Secondly, he had, in that email, requested a hearing, which he then repeated on 15 May 2017.

27. Secondly, the Employment Judge had not in that Judgment expressly stated why a lesser sanction - such as, for example, an Unless Order - would not be sufficient.

28. I stated that having read the papers, those were two areas, in particular, which I considered needed to be addressed. I considered that there could be merit in the arguments advanced by the Claimant in his appeal. I then heard submissions from the Respondent.

29. My initial view about this has changed over the course of the morning: at some points I thought that my initial analysis was right, at others however, I have been swayed by that which the Respondent has said. Ultimately, however, I have decided that the appeal should be dismissed and that is for this reason: all decisions taken by Tribunal Judges and by this Court should have the effect of furthering the overriding objective. The overriding objective is to allow both Tribunals and this Appeal Tribunal to deal with cases justly. Dealing with a case justly does not have a one-size-fits-all approach; what is appropriate in a particular case will depend on the circumstances of that case. In this case the decision to strike out the claim was one which was open to the Employment Judge, having regard to all the circumstances and was in accordance with the principles set out in the overriding objective.

30. One aspect of the overriding objective is that it requires ensuring that the parties are on an equal footing. I have been particularly astute in this case to seek to ensure that that is the case. The Respondent is a large organisation, represented by solicitors and counsel. The Claimant represents himself; he has not, to my knowledge, had legal assistance throughout the claim.

31. That said, Tribunals are well used to working with litigants in person - those who represent themselves - as is this Tribunal. The correspondence that has been sent to the Claimant by the Tribunal is in clear terms; the language used is relatively straightforward. I was concerned that the Claimant had stated that he had not understood one of the documents which he had received from the Tribunal. I re-read the correspondence. I cannot fairly understand why he did not understand that he was being asked to say what it was about his health that had prevented him from attending the hearing on 3 April 2017. Nor has he explained in the documents which I have seen why that was so. I do not see how he did not understand that he was being asked to provide medical evidence. Being a litigant in person does not mean that a litigant is exempt from compliance with procedures or from engaging in the litigation process to pursue a claim.

32. A decision to strike out a claim is not to be taken lightly. It is a matter of last resort. In this case the reason for strike out was because the Claimant appeared not to be actively pursuing his claim and had not complied with directions. I was referred by counsel for the Respondent to an authority, **Rolls Royce plc v Riddle** [2008] IRLR 873, and, in particular at paragraphs 18 to 20 of the report. At paragraph 20 Lady Smith sets out as follows:

> **"20. … it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the employment tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures. In that event a question plainly arises as to whether, given such conduct, it is just to allow the claimant to continue to have access to the tribunal for his claim. …"**

33. I considered that that paragraph was particularly apposite in this case. It is clear from the July Decision, read in light of the further information in the Reconsideration Judgment and Reasons that in this case the Employment Judge had clearly reached the view some seven months after the claim had been instituted by the Claimant that that point had been reached; that the Claimant had not shown that he was prepared to take reasonable steps to address his claim

in a manner that showed that he had respect for the rules of procedure, and the Employment Judge took the decision that his claim should be struck out. I might have taken a different view at that particular point in time; that, of course, is not the test for me to apply on appeal. I might have considered that making an Unless Order was the way to proceed. However, I considered that a decision to strike out when faced with the failure to engage with the litigation process as set out above was a decision open to the Employment Judge.

34. The Reconsideration Judgment provides more information about the thought processes behind the Tribunal's decision, in particular in respect of the complete lack of response to legitimate and reasonable requests from the Tribunal as to why he did not provide information about his illness and/or as to why he had not, within the timeframe set out, requested a hearing to explain why his case should not be struck out. Both of the preliminary issues I raised were addressed: the reality was that the Claimant was not engaging with the process. At most, he would do just enough at each juncture to avoid potentially strike out, but not, in my judgment enough to demonstrate a real intention to progress his claim. He failed to attend a hearing at which the issues could have been clarified. He failed to give an adequate explanation for his non-attendance. He appeared to hope or believe that, irrespective of those matters, Tribunal and Respondent alike would re-arrange the wasted hearing which could not go ahead on 3 April 2017. Having regard to this case, having regard to the way it has been pursued, I have, contrary to my initial view, been persuaded by the submissions made on behalf of the Respondent that the Tribunal Judge was entitled, in the exceptional circumstances of this case and the complete lack of engagement with the progress in a meaningful way by the Claimant, to strike out his claim. I considered that the Employment Judge was entitled to conclude that the Claimant had engaged in such a way that it is no longer just to continue to allow the Claimant to have access to the Tribunal for his claim.

35. That was my decision on the appeal. I observe however that the Claimant's approach to his appeal has shown some similarities with the approach he took to the underlying Tribunal procedures. When it became clear that the Claimant wished to have an adjournment, I considered carefully the matters that he raised. However, despite my request, he did not, until this morning, provide any material to substantiate his assertion that he had not been receiving emails from the Respondent. When he did provide some information, it was not, as set out above, without difficulty. Furthermore, at no time has he ever explained why he had not taken steps to comply with the Directions Order of the Appeal Tribunal, nor even to this day has he placed before this Tribunal an explanation of why his illness prevented him attending the hearing.

36. The impression given from the documents which were before the Employment Tribunal was that the Claimant showed a tendency to pick and choose which emails and requests to comply with. Once he had issued his appeal in this Tribunal, that tendency revealed itself more and more. The Appellant, just at the point at which he is at risk of having a draconian Order imposed upon him, has, in my judgment, done just enough, but only ever just enough, to avoid that happening. His response on 2 March 2018 is an example of that, so too is his email response this morning stating, as far as I am aware for the first time, that he would not be attending the hearing and that he would be relying on written submissions.