



EMPLOYMENT TRIBUNALS

Claimant: Mr S Gourley

Respondent: Swans Travel Limited

Heard at: Manchester

On: 25 October 2018

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: Not in attendance

Respondent: Mr G Tobin , Solicitor

JUDGMENT

It is the judgment of the Tribunal that the claimant's claims are dismissed pursuant to rule 47 of the 2013 Rules of Procedure on the basis that the claimant has failed to attend or be represented at the hearing.

CASE MANAGEMENT ORDERS

It is the order of the Tribunal that:

1. The claimant's e-mail to the Tribunal of 26 October 2018 be accepted as an application for reconsideration pursuant to rule 70 of the Tribunal's rules of procedure, notwithstanding that it has not been sent to the respondent in accordance with rule 71.
2. The claimant do by **9 November 2018** send to the Tribunal and the respondent, copies of any documentation confirming the admission of his mother into hospital as an emergency case on 25 October 2018.
3. The respondent do by **16 November 2018** respond to the application, stating whether the same is opposed, and if so, on what grounds.
4. In the event that the application is opposed, a reconsideration hearing will be held, and further directions will be given.

REASONS

1. The Tribunal convened this morning to hear the claimant's complaints of unlawful deduction from wages and breach of contract which he brought by a claim form presented on 30 May 2018. The respondent responded to that claim and indeed brought a counterclaim which was listed for hearing today, in fact having been postponed from a previous hearing date. The Tribunal also made Case Management Orders which were sent to the parties on 27 September 2018 requiring them to serve and exchange witness statements and prepare a bundle of documents for today's hearing which was listed for three hours in that letter, in fact if not previously.

2. The claimant has not attended, it now being 10.40am, and he had not attended at 10.30am when the hearing was called on. Enquiries had been made by the clerk to the Tribunal of any emails or telephone communications but nothing has been received from the claimant. Mr Tobin has appeared on behalf of the respondent today prepared for the hearing. The respondent has prepared and exchanged a witness statement and prepared a hearing bundle. The application is therefore made by the respondent that the Tribunal exercises its powers under rule 47 to dismiss the claimant's claims in these circumstances.

3. In terms of any previous history in relation to this matter, I have been informed that the claimant in fact was a witness in terms of having made a witness statement for another claimant, a Mr Elliott, whose similar claim was heard by this Tribunal on preceding Friday, 19 October 2018. The claimant did not attend as a witness on that occasion but had made a witness statement in support of Mr Elliott's claim, which was a similar claim giving rise to consideration of the similar contractual provisions relied upon in this claim which was ultimately unsuccessful.

4. The claimant has not made and served a witness statement despite having been provided with the respondent's witness statement, nor has he responded in terms of any documentation, the respondent's solicitor having sent him a copy of the hearing bundle. There has, however, been some recent communication in which in an email to Mr Tobin the claimant did make reference to seeing him in court "on Friday". Mr Tobin did not, understandably, notice that that was the wrong day and did not immediately respond to the claimant pointing out that that was the wrong day. It may well be that the claimant was confusing the previous hearing with Mr Elliott which was on a Friday, with this one. Whatever the position, the claimant has not attended today and has not complied with the Tribunal's orders. Given the circumstances Mr Tobin invites the Tribunal to dismiss the claimant's claims.

5. The Tribunal has considered all these matters, the information before it, and indeed the enquiries that have been made this morning. The Tribunal is indeed concerned that given the lack of a witness statement and compliance with the Tribunal's orders that the claimant was perhaps not intending to attend. Certainly his non attendance today is unexplained, and given the history of the matter the Employment Judge is indeed satisfied that there is no reasonable explanation for his absence and there is no reason, therefore, why his claims should not be dismissed pursuant to rule 47. Consequently the claims will be dismissed on that basis.

6. There is also the respondent's counterclaim, to which the claimant is of course, a respondent. The counterclaim, however, is made in the alternative to the claimant's deduction from wages and breach of contract claim and I will dismiss it on the basis that it is an alternative claim. It has not been withdrawn by the respondent, but will be dismissed in these circumstances.

7. Consequently, the Tribunal will dismiss the claim and the counterclaim and that is the order that is made.

Postscript – the claimant's e-mail of 26 October 2018.

8. Since the hearing, however, the claimant has sent to the Tribunal an e-mail, at 09.38 on 26 October 2018, in which he stated that he had not been able to attend the Tribunal hearing because his mother, who had recently undergone an operation for cancer, had been rushed back into hospital, due to an infection. He said he had tried to telephone the Tribunal, but had not been able to get through. He does not appear to have copied this e-mail to the respondent, as required by rule 71. The Tribunal will do so.

9. The Tribunal will treat this an application for reconsideration under rule 70. The respondent is to respond to the application. If it is opposed, the Tribunal will hold a reconsideration hearing. It may be the case that the Tribunal would then go on, if the application is granted, to hear the claim, so as to avoid the need for a further hearing. That, however, will be considered when the position is clarified.

10. In the event that the application is opposed, the Tribunal will require the claimant to provide, as he has indicated he will, confirmation of his mother's admission to hospital on 25 October 2018. Further, from the information provided by the respondent's solicitor at the hearing, it appears that the claimant is in breach of the Tribunal's orders, in that he has not provided any documents, nor, more importantly, has he served a witness statement. If the Tribunal is to be asked to exercise its powers to revoke the judgement, and allow the claimant a further chance to participate in a hearing of his claims, he will need to address why he has failed so to comply, and to remedy any breach by making and serving his witness statement as soon as possible, and certainly by the time of any reconsideration hearing.

11. That statement should address particularly the factual basis upon which the respondent has made the admitted deductions. The claimant has had the advantage of seeing the witness statement of David Williams for the respondent, so knows precisely what the respondent's evidence will be. He should address any parts of that evidence where he disputes the facts. The Tribunal may reconsider (and hence revoke) its previous judgement if it is in the interest of justice to do so. If the claimant does not remedy his breach of the Tribunal's previous orders promptly, it may well take the view that it would not be in the interests of justice to allow his claim to proceed.

12. The claimant should also be aware that at a preliminary hearing (including one to reconsider a previous judgment) a Tribunal may, whether there is an application made by a party or not, make a deposit order if it considers that any claim or response has little reasonable prospects of success, under rule 39. Such an order would make it a condition of pursuing the claims further that the claimant pay a deposit of up to £1,000. The Tribunal would therefore be entitled to take into

account the prospects of success at the reconsideration hearing, and may make a deposit order if it considered that the claims, or any of them, have little reasonable prospect of success. At present, on the evidence from the respondent, that may well be the case, but, of course, the Tribunal has not seen what the claimant's case will be. He should be clear, however, that the Tribunal has no power to re-write the terms of his contract, nor to determine whether they were "fair". If satisfied that the respondent had the contractual right to make deductions, the only issue will be whether on the facts, the deductions were lawful. Further, to the extent that there may have been a failure to notify the deductions in any payslip, so as to breach s.8 of the Employment Rights Act 1996, the remedy provided under s.12 confers a discretion on the Tribunal whether to make an award of the amount of any unnotified (i.e unnotified in the payslip) or not.

Employment Judge Holmes

Date : 31 October 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

6th November 2018

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