



EMPLOYMENT TRIBUNALS

Claimant: Miss N Kowalczuk

Respondent: Alliance Disposables Ltd

Heard at: Manchester

On: 21 November 2018

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Mr B Norman, Counsel

Respondent: Mr D Elder, Director

JUDGMENT

1. Upon reconsideration, the judgment striking out the claim which was sent to the parties in writing on 26 July 2018 is revoked.
2. The final hearing is now listed to take place on **Monday 13, Tuesday 14, Wednesday 15, Thursday 16 and Friday 17 May 2019** at **Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA.**
3. In all other respects the Case Management Order sent to the parties in writing on 5 January 2018 remains valid.

REASONS

Introduction

1. This hearing was convened to consider an application by the claimant for reconsideration of a judgment sent to the parties in writing on 26 July 2018 striking out the claim because it had not been actively pursued. That judgment was issued following the failure of the claimant to respond to a strike out warning letter of 14 July 2018. The reconsideration application was made on 26 July 2018.

2. Mr Norman represented the claimant and had helpfully prepared a written submission accompanied by a bundle of documents. Mr Elder represented the respondent and relied on points made in earlier emails to the Tribunal as well as oral submissions.

Law

3. The power to reconsider a judgment arises under rule 70. The test is whether it is necessary in the interests of justice to reconsider the judgment. In common with all powers under the Rules, it must be exercised in accordance with the overriding objective in rule 2, which is to deal with a case fairly and justly.

Facts

4. The material facts were not in dispute and can be stated shortly.

5. Following a case management preliminary hearing on 18 December 2017, I issued a written Case Management Order which contained in Annex C a timetable for steps by way of case preparation. They included a requirement for parties to provide copy documents to each other by 9 February 2018, for the claimant then to prepare a draft index to the bundle of documents for the final hearing by 23 February 2018, and for witness statements to be served by 6 April 2018. The case was listed for a five day final hearing between 6-10 August 2018.

6. On 20 April 2018 the respondent emailed the Tribunal to say it had not received any correspondence from the claimant. That email was not copied to the claimant.

7. By a letter of 14 June 2018 the Tribunal asked for comments from the claimant. That letter was sent by email to the claimant's then representative, Mr Watson, at Laveer Legal. No reply was received.

8. On 14 July 2018 I caused a strike out warning letter to be issued to the claimant. The letter was addressed to Mr Watson. It was sent out by email. Unfortunately a member of the Tribunal administrative staff made an error and the email was sent only to Mr Elder, not to Mr Watson. Mr Elder subsequently received a copy of that letter in the post but I accepted that the letter had not been received by Laveer Legal.

9. The letter required any objections to the claim being struck out to be received by 23 July 2018. None were received and on 25 July I signed judgment striking out the claim. That judgment was sent by email on 26 July. That email was sent to Mr Watson, and it produced an immediate response from Mr Watson making an application for reconsideration on the basis that the strike out warning had never been received. The claimant's witness statement had been served on 19 July 2018.

10. On behalf of the respondent Mr Elder indicated in correspondence that he resisted the application and therefore it was listed for hearing today.

Submissions

11. Mr Norman submitted that it would be in the interests of justice to reinstate the claim by revoking the judgment. Had the claimant's solicitors received the strike out

warning they would have responded, and they would have been able to have confirmed that the claimant's witness statement had been served on 19 July 2018. He accepted that the claimant's solicitors had been default in not serving it in early April, but he submitted that a fair trial would still have been possible at the hearing dates in August 2018. It would certainly be possible now if the matter were reinstated. It would be wrong to penalise the claimant by striking out her claim when a material cause of the failure of her solicitors to respond was an error by the Tribunal administrative staff.

12. Mr Elder resisted this. He made the following points:

- (a) The claimant had been late in bringing her complaints against the four individual respondents, and had therefore had to withdraw those complaints against them in January 2018;
- (b) There was no good reason why the claimant's witness statement had not been served in accordance with the timetable in Annex C to the previous Case Management Order;
- (c) Even when it was served the claimant's witness statement contained inconsistencies with the statement she had made when the issues in this case were originally investigated;
- (d) There had been contact between her solicitors and the respondent about a possible resolution of the proceedings during the period when no action was taken, and therefore her solicitors had been aware of the need to progress the claim;
- (e) The proceedings were very stressful for the respondent's managers and witnesses. They had only had one previous Employment Tribunal complaint against them, which was successfully defended. It would not be in the interests of justice to allow the claim to be reinstated and to hang over the business well into 2019.

Decision

13. Although I understood the points made by Mr Elder, I concluded that the interests of justice favoured reinstating the claim. The prejudice to the claimant of having her case struck out because the Tribunal had failed to send an email to her representative outweighed the prejudice which the respondent would suffer if the judgment were revoked and the case proceeded. The respondent would still be able to have its defence heard on the merits.

14. The claimant (or her solicitors) could properly be criticised for not having served witness evidence in accordance with the timetable in Annex C to my previous Case Management Order, but Mr Elder accepted that that was the only failure to comply with Annex C. The witness statements were served about a month before the hearing and a fair trial would still have been possible in August had those dates not already been cancelled when the claimant's solicitors finally responded. In circumstances where a material cause of the striking out of the claim was the Tribunal's own failure it would not be in the interests of justice to leave it struck out. The points raised by Mr Elder about inconsistencies in witness evidence were matters which could be put to the claimant in cross examination, and the stress for

the business of having this case hanging over it for a further considerable period did not outweigh the prejudice to the claimant of having her case fail for procedural reasons.

15. I therefore revoked the earlier judgment and we re-listed the case by agreement. It still looks like a five day case based on the timetable discussed and recorded in the previous case management hearing.

Preparation Time

16. Part of the overriding objective requires that the parties be placed on an equal footing so far as possible. As the respondent was not legally represented I advised Mr Elder of its right to apply for a preparation time order if it considered that the claimant or her solicitors had acted unreasonably in their conduct of this part of the case.

17. I expressed no view on whether a Tribunal would find that there had been unreasonable conduct, although I observed that it was unusual for an error by the Tribunal to be a material cause of a claim being struck out.

18. I suggested that any application should be left until the conclusion of the proceedings. That is because the Tribunal cannot make a preparation time order and a costs order in the same case. Accordingly if a preparation time order were to be made now it would prevent the respondent seeking a costs order if it chooses to be legally represented at the final hearing and that final hearing goes in its favour.

19. Information about costs and preparation time orders can be found in the Presidential Guidance on General Case Management, a link to which appeared in paragraph 20 of Annex A to the previous Case Management Order.

Employment Judge Franey

21 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 November 2018

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