



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr R Curry

v

Academies Enterprise Trust (R1)
Anthony Williams (R2)

JUDGMENT

The respondent's application for a judgment dismissing this claim on withdrawal under Rule 51 fails for the reasons that follow.

REASONS

1. The matter which I have to determine, at the request of both parties as confirmed in the record of a preliminary hearing which took place on 11 October 2018, is whether the claimant in this case unequivocally withdraw his claims in this matter by email dated 17 September 2018. Was that a withdrawal in accordance with the provisions of Rule 51 of Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules), and accordingly whether a judgment should now be issued by the Tribunal in accordance with Rule 52. The unusual background to the consideration of this point is fully set out in the record of the preliminary hearing that took place on 11 October 2018 before Employment Judge Laidler, which was sent to the parties on 26 October 2018. I do not propose to repeat again in these reasons what is recorded in that document but confirm that I have fully considered the submissions that are recorded in that document as having been made on behalf of both parties regarding the matter I now have to consider.
2. However, for clarity it is in my view appropriate to set out in full the relevant items of correspondence which result in my consideration of the current application. I have commented in bold type as appropriate within the text of two of those items of correspondence.
3. On 17 September 2018 the claimant wrote by email to the Tribunal in the following terms in relation to Case No 3331026/2018:

"Dear Sirs,

Due to my lack of faith in the Employment Tribunal's ability to resolve my claim within a reasonable time, fairly and with due

attention and care to the seriousness of my claim, I am hereby withdrawing my claim. I have not yet received promised orders from the preliminary hearing Judge (28th August 2018 in Bury St Edmunds My note-this related to Case No no3303660/2018 the earlier issued proceedings) and have not received any communication from yourselves regarding the delay. The preliminary hearing Judge gave me the impression he viewed my claims as frivolous or less than worthy of his due time and consideration. As a layperson, I am disgusted at the Judge's treatment of my claim given I am a Stage 4 terminal cancer patient seeking resolution to a 3-year campaign of disability discrimination and unfair dismissal from my former employer. Yours faithfully, Raymond Curry"

4. That letter was referred to me on the 7 September and on 1 October I gave the following directions which were actioned on 3 October in a letter to the parties in the following terms:

"I have been directed to write to the parties as follows:

Regional Employment Judge Byrne has read the claimant's email of 17 September 2018, referred to him by the administration on 27 September 2018. Given that the claimant should have now received the case management orders made at the hearing on 28 August 2018 and sent to the parties on 20 September 2018, does the claimant still wish to withdraw the claim?

Regional Employment Judge Byrne regrets the delays that have occurred in dealing with correspondence quickly in this case. Given the current volumes of work in the Employment Tribunal and the current lack of judicial resource notwithstanding the hard work of the administration, matters are not being dealt with as promptly as they should be.

The claimant is directed to respond to the Tribunal in writing by 22 October 2018."

5. When I gave directions for that letter to be sent I had overlooked that a preliminary hearing in the case to identify the claims and issues was listed for 11 October in case No 3331026/18 at the Bury St Edmunds Employment Tribunal.
6. On 5 October 2018 the respondent wrote to the Tribunal in the following terms:

"We write in relation to the Tribunal's letter of 3 October, asking the claimant to confirm whether or not he still wishes to withdraw his claim by 22 October 2018.

Whilst we wish to express our sympathy for the claimant's position, on behalf of our client we need to be clear that the respondent would now not be able to attend a final hearing 5 and 14 November 2018. We understood the claimant's withdrawal of his claim on 17 September 2018 to be unequivocal. We applied for the dismissal of the claim later that day and have not received any objection to that application by the claimant. (There is no record of that application on the Employment Tribunal file – I am not in any way suggesting that it was not sent but there is no record of it having been received. There have been extensive IT issues within the Employment Tribunal and I am aware that on occasions emails sent by parties to the Tribunal have not been received notwithstanding the parties having received an automated acknowledgement of those emails). Accordingly, we have ceased our preparations for the hearing. Neither party has complied with the directions made by Employment Judge Postle as the preliminary hearing on 28 August 2018. We have not received a schedule of loss from the claimant (due on 25 September), we have not exchanged lists of documents (due on 25 September) or copies (due on 4 October). We had made arrangements to take proofs of evidence from the respondents' witnesses on 18 September, but this was cancelled given the claimant's withdrawal of his claim, in the interests of saving the respondents significant costs which would have been incurred (we understood unnecessarily). The respondents' witnesses have removed the hearing from their diaries. It will not be possible for the respondents to now prepare for a final hearing between 5 and 14 November 2018 and in the event the claimant does wish to retract his withdrawal, we will have to make an application for a new final hearing date, on the basis that the respondents would be significantly prejudiced were the hearing to proceed on 5 November.

We also note that a preliminary hearing was due to take place on 11 October in the Bury St Edmunds Tribunal. This is before the claimant is required to confirm whether or not he will retract his withdrawal. We request urgent confirmation from the Tribunal whether this hearing will proceed. If it is to take place, we request that it be held over the telephone, to reduce the costs incurred by the respondent. We submit this is in accordance with the overriding objective, given the claimant's withdrawal and the lack of certainty as to whether the claim will proceed going forward.

We have copied the claimant into this correspondence.”

7. That correspondence from the respondent was referred to Employment Judge Warren at the Bury St Edmunds Tribunal and he directed a letter be sent to the parties in the following terms:

“Given the terms in which the claimant expressed the withdrawal of his claims and the absence of a judgment dismissing his claim, it

was unwise of the respondents to clear their diaries. The case may yet go ahead on 5 November, given the particular circumstances.

The preliminary hearing will proceed on 11 October and will be attended, unless the claimant requests otherwise or confirms that he does indeed wish to withdraw his claim.

I suspect the REJ may have missed the fact that there is a preliminary hearing on 11 October when he set the deadline for the claimant of 22 October. It would be helpful if the claimant would please confirm before Thursday whether or not he wishes to withdraw.”

8. The claimant replied to that email the same day in the following terms, copied to the respondent:

“I write regarding the respondents’ emailed response and objections dated 5th October 2018 to the Tribunal’s letter dated 3rd October 2018, asking me to confirm whether I still wish to withdraw or proceed with my claim against the respondents. In short and with the Tribunal’s permission, yes, I do wish to proceed with my claim given I now have a copy of the case management orders and an explanation for the unexpected delay.

Having said that, I would like to address the respondents’ objections to the Tribunal’s recent instructions in the letter dated 3rd October:

- 1. I was not aware that I am required to respond or object to every application made by the respondents. I will bear this in mind with future correspondence.*
- 2. I had hoped to receive a reply from the Tribunal regarding the unexpected delay and my disappointment prior to further communicating with anybody regarding the matter.*
- 3. The respondents did not seek clarification from me regarding my complaint of delays prior to submitting their application.*
- 4. It is not fair on the part of the respondents to suggest I have not complied with the preliminary hearing instructions. I have been significantly disadvantaged (as a layman) from doing so without having a copy of the case management orders for guidance. Further, the respondents have effectively prevented me from preparing a schedule of loss by intentionally withholding up-to-date and accurate pay details that include my recent pay progression award (backdated to September 2016). I still have not received the recalculated pay details (no a P45 or P60) despite several emailed requests to the respondents’ HR Director beginning shortly after the preliminary hearing in August. The pay progression award was confirmed on 11th July 2018 (delayed from November 2017), and still has not been paid into my bank account.*

5. *I have been unsuccessful in securing legal representation (per Employment Judge Postle's recommendation) to date. I am currently awaiting a response from two separate firms, and hope to have a decision by the end of this week."*
9. None of the correspondence referred to in paragraphs 6. to 8. above was referred to me and the case proceeded to a preliminary hearing on the 11 October 2018 when the parties requested that the matter be referred to me for consideration as to whether the proceedings should be dismissed applying the provisions of Rule 51 and Rule 52.
10. The first point I consider is whether the claimant's email of 17 September 2018 was an unequivocal withdrawal of the claim. In my view plainly it was not unequivocal given the content and context of the reported withdrawal. I was concerned at the claimant's lack of faith in the Employment Tribunals ability to resolve his claim within a reasonable time, a lack of faith no doubt arising from the delays on the part of the Employment Tribunal in sending to him the orders following the preliminary hearing in August. All parties to proceedings, whether claimants or respondents, are understandably anxious and concerned about their case. Delay in the sending to the parties of case management orders following a hearing can understandably cause concern. In my view the claimants statement in the email sent in September "I am hereby withdrawing my claim" was born out of frustration at the delay in communication from the Tribunal following the 28 August 2018 preliminary hearing. The Employment Tribunal file shows that the orders were sent out on the 20 September. I was aware of that delay when I directed that letter in the terms set out in paragraph 4 be sent to the parties, as was actioned on the 3 October 2018.
11. Mindful of Rule 2 and the need to deal with cases fairly and justly and given the, in my view, equivocal nature of the purported withdrawal, it appeared to me essential to clarify what the claimant's position was regarding withdrawal once he had received the case management orders made on 28 August 2018. That is why I directed as I did in the letter sent on 3 October 2018. The error that I made was that I had overlooked the preliminary hearing listed for 11 October had given the claimant until 22 October to clarify his position on withdrawal of the proceedings. Judge Warren's intervention of 8 October requiring a response by the Thursday of that week prompted an immediate response from the claimant. It was quite clear from the claimant's email of 8 October 2018 that he did wish to proceed with the claim. The relevant line of his email reading "In short and with the Tribunal's permission, yes, I do wish to proceed with my claim given I now have a copy of the case management orders and an explanation as to the unexpected delay".
12. The respondent's submission are that the withdrawal was unequivocal. For the reasons set out in paragraph 10. above I do not accept that argument. I am in particular mindful of the claimant's direct reference to his lack of faith in the Employment Tribunal. It is surely an essential part of the judicial process conducted by Employment Tribunals that parties must have trust in

the Employment Tribunal and that for the Tribunal to accept a decision made by a party in circumstances such as these, based on their lack of trust in the Tribunal seems to me to be perverse. I am also mindful of the submissions made by the claimant's solicitor at the hearing on 11 October and the case of **Campbell v OCS Group UK Limited and Moffit** UK EAT/0188/16 and to paragraph 19 of that judgment which stated "*so far as withdrawal is concerned, as Langstaff P made clear in Segor, Tribunals faced with an application to withdraw should consider whether the material available amounts to a clear unambiguous and unequivocal withdrawal of the claim or part of it. There is no obligation on Tribunals to intervene in such a situation, whether by reason of the overriding objective or any principle of natural justice, Tribunals are entitled to make such enquiries as appear fit to check whether a party itself, or lay representative, intends to withdraw. If the circumstances for withdrawal give rise to reasonable concern on the Tribunals part, it is entitled to make such enquiries as appropriate to ensure that the purported withdrawal is clear, and unambiguous and unequivocal.*" In writing to the claimant in the terms of the Tribunal's letter of 3 October 2018 I was doing just that, to ensure that the purported withdrawal was clear and unambiguous and unequivocal. It was not and accordingly the claimant did not act in accordance with the provisions of Rule 51 at the time he wrote to the Tribunal on 17th September 2018 and accordingly Rule 52 is not activated and there is no obligation on the Tribunal to issue a judgment.

13. Separate directions for further case management will now be considered in order that the timetable for outstanding compliance with directions be reset and a further hearing date urgently relisted.

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Regional Employment Judge Byrne

Date: 27 December 2018

Sent to the parties on: .7 January 2019

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For the Tribunal Office