



EMPLOYMENT TRIBUNALS

Claimant

Mr A O'Leary

Respondent

British Telecommunications Plc

v

OPEN PRELIMINARY HEARING

Heard at: Watford

On: 14 November 2018

Before: Employment Judge Alliott

Appearances:

For the Claimant: In person

For the Respondents: Mr S Hall, Solicitor

JUDGMENT

1. The judgement of the Employment Tribunal is that:
 - 1.1 The claim is struck out under Rule 27 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 as having no reasonable prospect of success.

REASONS

1. On 22 May 2018 this matter was set down for a full merits hearing to be heard by an employment judge sitting alone on today's date, Wednesday 14 November 2018. The respondent put in a response to the claim form along with an application to strike out the claim on the basis of res judicata / abuse of process.
2. By a notice dated 14 July 2018 the hearing on 14 November 2018 was converted to a 3 hour open preliminary hearing to consider whether the claim should be struck out for the reasons given by the respondent in their application dated 14 June 2018.

The facts

3. Mr Adrian O'Leary was dismissed by the respondent on 24 February 2014.

4. He clearly involved ACAS as appropriate as his original claim form has an ACAS Early Conciliation Certificate number.
5. The claimant brought his original claim for unfair dismissal on 29 May 2014. From the file that I have it is clear that the issue fee of £250 was paid. Mr O'Leary told me in evidence that he himself had not paid that fee but he thought it highly likely that the Communication Workers Union (CWU) paid the fee on his behalf.
6. The respondent submitted its response and grounds of resistance on 19 June 2014. The respondent also made an application to strike out the claimant's claim and/or for a deposit order on the grounds of no (or little) prospect of success.
7. A preliminary hearing was held on 8 September 2014 at Watford Employment Tribunal. The applications for strike out and/or a deposit order were refused and the tribunal gave case management orders to progress the case to a final hearing.
8. The respondent provided its witness statements to the claimant on 20 October 2014 as directed. However, the claimant did not provide his witness statement.
9. I assume that the respondent was requesting the claimant's witness statement. On 23 October 2014 the claimant emailed the employment tribunal indicating that he had fallen way behind in his case and requesting an extension. That was considered and the full merits hearing fixed for 10/11 November 2014 was postponed to 10/11 December 2014.
10. Meanwhile, the claimant managed to prepare an undated witness statement.
11. At some stage I assume that the claimant would have been requested to pay the £950 hearing fee. The print out that I have on file suggests that a request for the hearing fee was made on or about 8 September 2014. That fee was not paid by the claimant or the CWU on his behalf. At some stage, probably three or four months prior to the hearing in November 2014, the CWU had withdrawn support for the claimant. This was not due to the claimant failing to pay his union fees. I do not know the precise reason why the union withdrew. Thereafter, the claimant told me that he was approaching solicitors for assistance in presenting his case. The claimant told me that he was being quoted costs of £8,000 to £9,000 for representation.
12. On 19 November 2014 the claimant emailed the employment tribunal as follows:

“Dear Employment Tribunal,

With the spiraling costs of getting professional help for my unfair dismissal I have had to give in on my case.

I am very disappointed that is (sic) has come to this but I am unable to gamble 10,000 pounds to seek justice. I apologise for this and thank the court for helping me in my case.

Kind regards

Adrian O'Leary”

13. In evidence the claimant told me that the figure of £10,000 had been arrived at by combining the costs “of £8,000 to £9,000” and adding the £950 hearing fee.
14. Following that email to the employment tribunal, on 25 November 2014 the proceedings were dismissed follow a withdrawal of the claim by the claimant.
15. From a print out on my file it would appear that an unless order was issued on 20 November 2014 requiring payment of the hearing fee due by 27 November 2014.
16. What appears to have happened thereafter is that the claimant was written to prior to January 2018 by HMCTS. I do not have a copy of that letter. Following that letter, it would appear that the claimant confirmed that he would like to apply for his case to be reinstated. Because his original claim form ET1 could not be located so he was written to on 30 January 2018 in the following terms:

“Dear Mr O’Leary,

Reinstatement of employment tribunal claims following rejection, dismissal or closure for failure to pay a fee or present a valid application for help with fees.

We previously wrote to you about your employment tribunal claim which was rejected and returned because you didn’t pay an issue fee. Thank you for confirming that you would like to apply for that case to be reinstated.”

17. I observe that the statement that the claimant’s original claim had been rejected and returned because he did not pay an issue fee was wrong. As recorded above the issue fee had been paid.
18. The claimant returned the tick box form indicating that he wished to have his claim reinstated and he enclosed a new claim form.
19. On 13 March 2018 the reinstatement request with attached ET1 and reinstatement request letter was remitted to Watford Employment Tribunal for consideration. The decision whether to accept the claim was referred by the administrative staff to Employment Judge Smail indicating that the claimant was requesting reinstatement but that no ACAS number had been provided. As already recorded the claimant did in fact have an ACAS number and so that was not a problem. Employment Judge Smail directed that the whole of the claim should be accepted. I note that the information that Employment Judge Smail had was that HMCTS were asserting that the claim had been rejected because the claimant did not pay an issue fee.
20. And so, this hearing comes to be heard on the respondent’s application.

The procedural position

21. My understanding of the procedural position following the Unison decision in 2017 is that certain cases were to be automatically reinstated as an administrative act with no judicial input. I have not been provided with and have not been able to find the criteria upon which automatic reinstatement would take place. The best that I can do is reiterate the opening words of the letter dated 30

January 2018 which appear to set out the basis upon which reinstatement was being offered by HMCTS. This is: -

“Reinstatement of employment tribunal claims following rejection, dismissal or closure for failure to pay a fee or present a valid application for help with fees.”

22. It seems to me that for an administrative automatic reinstatement to be workable there can be no debate as to whether or not the criteria for automatic reinstatement has been established. Otherwise a mechanism for hearing contested applications for reinstatement and criteria for any discretion as to whether or not to reinstate would have been set out.
23. I consider that my hands are very much tied in this case. The original claim was not dismissed for failure to pay a fee. The original claim was dismissed on withdrawal. Consequently, I find I have no option other than to strike out the current claim on the grounds that it has no reasonable prospects of success.
24. The reason I find the claim has no reasonable prospects of success is on the grounds of res judicata. From the IDS Handbook Employment Tribunal Practice and Procedure at 2.108, the following is recorded: -

“The dismissal of a claim upon withdrawal by the claimant constitutes a “decision” for the purposes of the res judicata doctrines.”

25. In case it becomes relevant on any appeal, I make the following findings in so far as the motives of the claimant in withdrawing his case, are concerned. I found the claimant to be an entirely truthful individual and I accept what his motivations were. He was being quoted £8,000 to £9,000 for legal representation and he was also aware that there was a hearing fee of £950 to be paid. The claimant told me that he did not have the confidence to present his own claim as he wanted to present the best possible claim he could. He was shopping around to find cheaper representation and in fairness, when asked if he could have afforded say £3,000 for representation, was not in a position now to say whether or not he would have gone ahead. He told me that he needed to make an assessment as to the risks of going forward in terms of losing that money compared with what he might obtain in terms of a judgment. He told me that he could not remember if he was working but probably was not at the time and that £950 could well have been a problem. As regards any advice that he had obtained as to his prospects of success, obviously enough I was not privy to that privileged legal advice, but I do observe that the CWU had withdrawn support for his claim and that the respondents had endeavored to strike out the claim, albeit unsuccessfully, at an early stage.
26. I find that the issue of the hearing fee was a relatively minor aspect of the overall decision of the claimant to withdraw his claim. As set out in his email the overwhelming and predominant reason was that he could not afford legal fees in the region of £8,000/£9,000.
27. For the avoidance of doubt and because I have been asked to clarify this, it seems to me that the application for reinstatement should never have been accepted in the first place and was based on the erroneous assertion that the original claim had been rejected for non-payment of the issue fee. However, procedurally it seems to me that I cannot revisit that decision to accept

reinstatement and the correct procedural course to end this litigation is to strike it out under Rule 27.

28. For the above reasons I have struck out this claim.

Employment Judge Allott

11 December 2018

Sent to the parties on:

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For the Tribunal:

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