



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr N Willson

v

Wm Morrison Supermarkets Plc

Heard at: Huntingdon

On: 10 December 2018

Before: Employment Judge Ord

Appearances

For the Claimant: In person

For the Respondent: Miss I Ferber, Counsel

JUDGMENT ON RECONSIDERATION

1. The judgment dated 28 August 2018 is revoked.
2. Case 3304049/2018 proceeds.

REASONS

1. This matter came before me today for reconsideration (of the tribunal's own motion), following judgment given on 28 August 2018, striking out the claim on the basis that the tribunal had no jurisdiction to hear it, the matters raised in the proceedings having already been the subject of judicial decision in cases numbered: 3303898/2018 and 3304019/2018 were dismissed on withdrawal.
2. At the time that judgment was given, the tribunal did not have before it copies of the email communication[s] sent on the claimant's behalf to the employment tribunal withdrawing those two cases.

3. The relevant history covers a very short period. The claimant presented three claim forms:
 - 3.1 On 5 February 2018, claiming unfair dismissal, (with no narrative or details of his claim set out on that form), which was issued with case number: 3303898/2018;
 - 3.2 On 13 February 2018, making complaints of unfair dismissal, automatically unfair dismissal on the ground that he was dismissed on the ground of membership of, or engaging in the activities of, an independent trade union, (3304019/2018); and
 - 3.3 On 14 February 2018, (the current case), which he was advised by his union to present because his second claim form referred to the fact that he had trade union support.
4. The first two claims were withdrawn and on 20 May 2018, a judgment dismissing those two claims following withdrawal was issued.
5. No information regarding the terms of withdrawal were before me when I considered this matter in August and it was therefore appropriate to strike out the current claim because it appeared that the facts had already been the subject of judicial determination, (the judgment striking the earlier claims out).
6. The matter was listed for reconsideration to enable the tribunal to obtain details of the withdrawal.
7. An order was made for the union officer whom had charge of the matter on the claimant's behalf to attend today's hearing and produce documents relating to the decision to withdraw claims numbered: 3303898/2018 and 3304019/2018. Mr Nash attended and produced a witness statement. A copy of the email was disclosed.
8. Mr Nash's statement said that as the claimant had issued three separate claim forms, and
"in an attempt to avoid any potential confusion, USDAW legal department sent an email to the tribunal asking to withdraw the first two claims..."
9. He further stated that,
"it was our intention to withdraw the claim forms specified, not the claim itself".
And,
"we also asked for the 'latest' claim form... to be amended [to include a claim for notice pay]".

10. The email which was sent to the tribunal reads as follows,

“We act on behalf of Mr Willson as his trade union.

Mr Willson has submitted two previous ET1 forms – claim numbers: X3ZC-D48F and T0SJ-JWR8 [at this stage no claim numbers had been given]. We wish to withdraw these claims on Mr Willson’s behalf.

We also request that his latest ET1 form, (X8MD-OE9V), be amended to include claims for unpaid notice and holiday pay”.
11. Under rule 52 of the Employment Tribunal Rules of Procedure 2013,

“where a claim or part of it has been withdrawn under rule 51, the tribunal should issue a judgment dismissing it, (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint), unless –

 - a. *the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the tribunal is satisfied that there would be a legitimate reason for doing so; or*
 - b. *the tribunal believes that to issue such a judgment would not be in the interest of justice”.*
12. Under rule 70,

“a tribunal may, either on its own initiative... or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision, (‘the original decision’), may be confirmed, varied or revoked. But if it is revoked it may be taken again.”
13. The claimant complains that he was unfairly dismissed and that his dismissal was automatically unfair pursuant to s.125 of the Trade Union and Labour Relations (Consolidation) Act 1992, (dismissal on grounds relating to union membership or activities).
14. The claimant says that his dismissal was unfair because others who had committed the same, or similar offences had been treated less severely and that his dismissal was unfair because, on his reading on the letter of dismissal, (which was not before me today), and / or the decision given at a disciplinary hearing, (equally not before me today), the respondent admitted that it would not have dismissed him but for his trade union activities.

15. The only ground to be considered on reconsideration of a judgment is whether it is in the interests of justice to reconsider the judgment and to either revoke, confirm or amend it.
16. Rule 52 clearly does not have any application here because this is not a case where, having withdrawn one set of proceedings, the claimant issued fresh proceedings. These proceedings were already on foot at the time the two earlier claim forms were withdrawn.
17. Even if rule 52 was of application, however, I would be satisfied that the terms of the email withdrawing the two earlier claims reserved the right to proceed with the third claim. That is the only sensible reading of the claimant's representatives email which requested that the third form be amended to include a claim for unpaid notice and holiday pay.
18. It was suggested by Miss Ferber that this meant that the third claim was proceeding on that issue only and that having withdrawn the first two claims, the claimant was abandoning his unfair dismissal / automatically unfair dismissal claim as set out in his third ET1. I cannot read the email as implying that at all. The intention was, as confirmed by Mr Nash in his statement, (which was accepted by both parties without any questioning of Mr Nash), to avoid confusion by having only one claim form proceeding.
19. I have also been asked to consider as part of my decision today the prospect of contributory fault being found against the claimant, (who has admitted some misconduct, but says that his dismissal was outside the range of reasonable responses, involved disparate treatment and was made on the grounds of his trade union activities); the respondent's claim that they may seek a deposit order, (but no application has been made hitherto) if the claim proceeds and finally that the claim is of limited value as the claimant had found, within two months of his dismissal by the respondent, alternative employment at a similar rate of pay.
20. The claimant had been employed by the respondent for 11 years. For eight of those years he was over the age of 41. His basic award, (I did not have the precise figures available), appears to be in the order of £6,000 or more. Two month's loss of earnings would amount to approximately £5,000 and the claimant says that although he obtained work promptly, he had to work substantially more hours per week in his new role than he did significantly more hours than he had in his role with the respondent to maintain his level of earnings. He says that that remained the case until approximately September or October of this year, (one full year after termination by the respondent). The claim is therefore worth a significant sum. Whilst some contribution may be found against the claimant, that is no reason why his primary complaints should not be heard. It is clearly in the interests of justice that the claim is tested on its merits rather than the respondent receiving a 'windfall' if the claim did not proceed.

21. In the circumstances of this case it is clear that the claimant's intention, via his representative, was not to abandon all claims but to avoid confusion by withdrawing the two earlier claim forms that had been submitted and allowing the third to proceed. To penalise him by the loss of his right to pursue his action of that reason would not be in the interests of justice. It is obviously and clearly in the interests of justice to revoke the judgment dismissing this claim and allow it to proceed. To not do so would be to deliver a grave injustice to the claimant who is entitled to have his legitimate claims heard. He has not sought to issue fresh proceedings having abandoned earlier ones, these proceedings were already on foot when he withdrew the first two claims to avoid confusion and duplication.
22. For those reasons it is in the interests of justice to reconsider the earlier judgment. That judgment is revoked, and the claim proceeds.

CASE MANAGEMENT DISCUSSION

23. Preparation for the final hearing of this case is well advanced and the only outstanding issue relates to witness statements.
24. There has been some discussion regarding a document which is mentioned in the list prepared by the claimant's former representative relating to a 'media page' on a Facebook account, but the claimant does not know what this relates to and his efforts to obtain a copy of it from his former representatives have proved fruitless. He does say that the respondent produced a copy of his Facebook account to him at the disciplinary hearing although this has not been disclosed by the respondent and Miss Ferber agreed to make enquiries in that regard.
25. There are audio files and CCTV footage to be used at the final hearing. The parties have already undertaken transcription of the audio files and I have made an order as regards their agreement. So far as CCTV footage is concerned, the respondent has the footage in its possession and will need to ensure that it brings to the hearing facilities to enable the tribunal and witnesses to view the footage together. The facilities to do so do not currently exist in either Cambridge or Huntingdon, (where this case will be heard).

Other Matters

26. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/

27. The parties are reminded of rule 92: *“Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise)...”*. **If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.**
28. The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
29. If the Tribunal determines that the respondent has breached any of the claimant’s rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.
30. The following case management orders were uncontentious and effectively made by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Final Hearing

All issues in this case, including remedy, will be determined at a final hearing before an Employment Judge sitting with Members at **The Employment Tribunals, Cambridge County Court, 197 East Road, Cambridge, Cambs., CB1 1BA**, on **16, 17 and 18 September 2019**. The case will be heard at 10:00 am or as soon thereafter as the tribunal is able to hear it on the first morning. The parties and their representatives must attend by 9:30 am on that day. The time estimate for the hearing is based on the claimant’s intention to give evidence, the respondent’s intention to call two witnesses and to allow sufficient time for preliminary reading, the hearing of the evidence and closing submissions, tribunal deliberations and the delivery of judgment followed by the consideration, if necessary, of remedy.

2. Witness Statements

The parties shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing. Those witness statements are to be exchanged between the parties by not later than **4 pm on 1 March 2019**. No additional witness evidence will be

allowed at the final hearing without the tribunal's permission. The written statements must have numbered paragraphs, where reference is made to a document from the final hearing bundle, the page number should be added and contain only evidence relevant to issues in the case. The claimant's witness statement must include a statement of the compensation or damages he is claiming together with an explanation as to how it has been calculated.

3. Final Hearing Preparation

On the **first morning** of the hearing, at **9:30 am**, the claimant must deliver five additional copies of his witness statement to the tribunal and the respondent must deliver five additional copies of the statements of the witnesses they intend to call, together with five additional copies of the final bundle. The parties should not deliver documents to the tribunal in advance of that date and time.

4. Other Matters

4.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

4.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.

4.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.

4.4 Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

4.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**

4.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b)**

striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

Employment Judge Ord

Date: 10 December 2018

Sent to the parties on: 10 January 2019

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For the Tribunal Office