



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Cloete

v

Moulton College

Heard at: Cambridge Employment Tribunal **On:** 26th February 2019

Before: Employment Judge King

Appearances

For the Claimant: Failed to attend

For the Respondent: Mr Burrell (counsel)

JUDGMENT

1. The Claimant's claims are struck out in accordance with Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 for the reasons given below.
2. The Respondent indicated today that an application for costs was to be made. I declined to hear that application today but any such application made within 28 days of receipt of these written reasons can be made in the usual way and would be considered on paper subject to any representations the claimant wished to make in accordance with the Tribunal Rules.

REASONS

1. The matter was listed today for hearing to make a final determination of the matter. The claimant failed to attend. The respondent made an application for a strike out on grounds (b) (c) and (d) of Rule 37 which I could have considered on my own initiative in any event.

The law

2. Rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 states that:

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;*
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;*
- (d) that it has not been actively pursued;*
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

The facts

3. The claimant was sent a notice of claim setting out the hearing date on 5th September 2018 with the case management orders on the reverse of that document. This was sent to the address provided by the claimant when he submitted his claim on 24th August 2018.
4. The date, time and location of the venue was on this document. The case management orders provided for a statement of remedy to be provided by 3rd October 2018. Documents by lists by 17th October 2018 and statements by 14th November 2018 with the respondent preparing the bundle by 31st October 2018.
5. There is no statement of remedy on the file aside from the comments on the ET1 form itself. Counsel before me was unaware of any such statement. The claimant failed to comply with this order.
6. The claimant did not send the respondent any documents as ordered by 17th October 2018. The claimant failed to comply with this order. On 21st October 2018 I am told by the respondent's representative that the claimant notified them that he had no such documents. He would have had in his possession documents relating to remedy and copy letters at the very least and did not require access to his work email to provide those.
7. The respondent sent the bundle by 31st October 2018 as per the order. The respondent's representative has no instructions from his instructing solicitors to indicate the claimant engaged with that process as to the bundle.

8. Witness statements were due to be exchanged by 14th November 2018 and the claimant was informed that the respondent was ready and to confirm when it was convenient to exchange by email. The claimant did not comply with that order.
9. On 20th November 2018 the respondent emailed the claimant to chase witness statements and attached a copy of the case management order. That document had the hearing date within the order. Again, this was forwarded on 28th November 2018 and the claimant was chased to no avail.
10. On 5th December 2018 the respondent made an application to the Tribunal for an unless order for compliance with the order for witness statements by 19th December 2018. This email attached the previous emails and was copied to the claimant.
11. On 13th December 2018 it is apparent from the file that the claimant received an email from the Tribunal and replied to say that he had not heard from the tribunal but was getting “harassed” by the kegal (stet) representatives of the respondent a lot. He makes reference to them keep saying they are acting in accordance with the Tribunal directions. He provided a new address with effect from 1st December 2018 and the Tribunal file was updated accordingly and all future correspondence sent to this address correctly.
12. I am told the claimant also replied to the respondent’s email (with the attachments) on the same day so he must have received that email also.
13. On 14th December 2018 the respondent replied and again attached a copy of the case management orders sent at the outset.
14. The respondent’s application was considered by Employment Judge Ord who extended the time for compliance and issued a second set of case management orders. An unless order was not made and the order enclosed the original case management orders (with hearing date). The hearing date was also referred to in the covering second set of case management orders “to ensure the matter is ready to proceed on 26th February 2019”
15. This was emailed to the claimant and the respondent by the tribunal office on 30th December 2018.
16. This second set of case management orders set out that the claimant set out his remedy statement by 11th January 2019, list of documents by then and a hearing bundle sent to the claimant by 25th January 2019. Witness statements should be exchanged by 12th February 2019.
17. There is no remedy statement sent by the claimant on file. He failed to comply with this second order.
18. The respondent sent lists and bundle again but the claimant did not engage in this process. Again, he did not comply.

19. On 6th February 2019 the respondent wrote to the claimant by email attaching the second case management orders and reminding the claimant of the 12th February 2019 and requesting a time for exchange.
20. On 12th February 2019 the respondent emailed the claimant its passworded statements. The claimant did not comply with the order.
21. On 13th February 2019 the respondent made a second application for an unless order if the claimant did not comply by 19th February 2019. This was copied to the claimant and attached previous correspondence. The third paragraph also stated "Judge Ord's order states that the new dates are to ensure the matter is ready to proceed on 26th February 2019 (the date of the hearing). Unfortunately, the file had not been referred to a Judge before today's hearing.
22. On 19th February 2019 the respondent emailed the claimant its passwords as it had not heard from the claimant and made reference to the hearing next week.
23. The claimant failed to attend the hearing today by 10am. Extra time was given as the venue is not easily accessible by public transport or by car due to traffic issues. After waiting a further period, the clerk to the Tribunal called the claimant on the mobile number on the file. He did answer the call but informed the clerk that he was unaware of the hearing. When asked if he could attend, he responded to say he was at work.

Conclusions

24. The hearing commenced and the application by the respondent was made. Had the application not been made I would have considered it of my own initiative given the history in this case. Counsel had been briefed and witnesses were in attendance.
25. In accordance with Rule 37 the application as pursued on three grounds (b)(c)(d). We also discussed ground (e) as the listing stencil illustrated that if the hearing was postponed today then the matter may not be listed until November 2019 if normal listing rules applied. The decision to strike out was not taken on the basis of ground (e) but delays were merely relevant as to the consideration of the alternative of granting a postponement.
26. I accept the respondent's submissions. I do not accept that the claimant was unaware of the hearing. I may have accepted that he did not receive the first case management order when it was sent in September 2018 but given that both the respondent and the tribunal have sent it on four separate subsequent occasions. Further the emails of the 13th February and 19th February 2019 should have made it plainly obvious to the claimant if he had missed it on the previous four occasions that there was a hearing this week.
27. I have considered this failure to attend against a backdrop of zero compliance with orders. The claimant has not taken a single step to prepare his case for

this hearing. He has ignored orders made by the Tribunal on two different occasions and has not provided any valid reason for doing so. He has not engaged in the process at all and then failed to attend. I therefore conclude that he is not actively pursuing his claim and that he has no intention of doing so.

28. I am satisfied that the case is not being actively pursued and that Rule 37(d) grounds are made out. I do not consider in light of this and the history a postponement is in accordance with the overriding objective. This will only cause delays and further expense to the respondent when the claimant has not shown he intends to pursue the case. Therefore, in my view a strike out is entirely appropriate.
29. Even today, 14 days after the second deadline for exchange of witness statements he has not complied with that order. He has also failed to provide a statement of remedy twice. Given the history of this file and that Employment Judge Ord gave the claimant a second chance for compliance which he did not take, I also conclude that the Rule 37(c) grounds are made out and that a strike out is also appropriate for repeated failure to comply with orders of the tribunal made in two sets of case management orders. Had the claimant complied with the orders but simply failed to attend I may have considered a postponement more appropriate.
30. Finally, in light of the above conclusions, it is clear that Rule 37 (b) grounds are made out as the manner in which the proceedings have been conducted by the claimant are unreasonable.
31. I am aware that a strike out is a draconian and drastic step to take in a claim but have concluded that it is in accordance with the overriding objective. The Tribunal system gives claimants and litigants in person a right to have their case heard when they feel they have been wronged. It does however require the claimant to engage in the process they themselves initiated by starting a claim. It is not in accordance with the interests of justice or the overriding objective to have parties ignore tribunal orders or waste the time of the tribunal and the parties in giving a case hearing time which is much in demand.
32. Had the claimant prepared his case for hearing and engaged in the process it may have been a more finely balanced decision as to whether to strike out the claim or not. In this case, the strike out seems logical conclusion to the issues before the Tribunal today given the level and extent of the non-compliance as such cases are rare. In my mind, the claimant is one of those rare cases and the power given to the Tribunal to strike out claims is an appropriate one to do in this case. The claimant's only reason for non-attendance I do not accept, as the orders have been sent to him multiple times and the decision is to be taken in the context of repeated non-compliance with orders and the clear position that the claimant has done nothing to advance his case. A postponement would only serve to increase delays and costs with the claimant not having demonstrated that he would engage at all.

Employment Judge King

Date: 26th February 2019

Sent to the parties on: 4 March 2019

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For the Tribunal Office