



EMPLOYMENT TRIBUNALS

Claimant: Mr Gourley

Respondent: Swans Travel Limited

HELD AT: Manchester

ON: 22 February 2019

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: In person

Respondents: Mr Peers, Operations Director

JUDGMENT ON AN APPLICATION FOR RECONSIDERATION

It is the judgment of the Tribunal that the claimant's application for reconsideration of the judgment sent to the parties on 26 October 2018 is granted. The Tribunal revokes that judgment and the claims will be heard on a date to be fixed.

CASE MANAGEMENT ORDERS

The Tribunal makes the following orders

- (1) The respondent provides the claimant with a (further) copy of the bundle by **4 March 2019**;
- (2) The claimant do serve upon the respondents his witness statement by **18 March 2019**;
- (3) The respondents have permission if so advised to serve upon the claimant any further witness evidence by **29 March 2019**;
- (4) The claims be relisted for a hearing before any Employment Judge sitting alone on **25 June 2019** at 10.00 a.m. at Manchester.

REASONS

1. The Tribunal this morning has been considering the application made by the claimant Mr Gourley for reconsideration of the Tribunal's judgment of 25 October 2018 sent to the parties on 31 October 2018, in which the claimant's claims were dismissed pursuant to Rule 47 of our rules of procedure on the basis that the claimant had failed to attend or be represented at the hearing

2. The matters giving rise to that judgment were that the hearing of the claimant's complaints of unlawful deduction from wages was listed for 25 October 2018. The respondents attended and were represented by their solicitor then Mr Tobin, but there was neither attendance nor representation by the claimant. On that basis the Tribunal having waited until approximately 11.40, given there was no attendance by the claimant the respondents applied for dismissal of the claims and in those circumstances having no information at the time as to why the claimant had not attended the Employment Judge on that occasion did dismiss the claims.

3. The claimant however the following day emailed the Tribunal and in that email he explained to the Tribunal why he had not attended, and that email in fact was timed at 9.38 the following morning. He explained in that email that he should have been at a hearing yesterday, but due to a family emergency with his mother who had just had an operation for cancer and had developed an infection she had been rushed back into hospital, he went on to say he did try to call yesterday morning but due to the fact the phone lines were very busy he couldn't get through. He apologised for not attending, and asked for a new date to be arranged. Having got that email the following day the Tribunal then directed that the reconsideration be heard today, and also directed that the claimant file evidence in support of his application which he did by sending in further emails to the Tribunal to which he attached some documents, the first of which is a letter dated 28 December 2018 in which the Oncologist treating the claimant's mother confirmed her diagnosis and the treatment that she was undergoing under his care. There was also a letter which the date looks like it has been slightly cut off at the top of the letter but a letter from a Dr Syed of the Cornerstore Centre, which is handwritten and brief, but says that Mr Gourley was absent from court in October due to his mother's continued treatment for cancer as the letter from the hospital says.

4. So those two documents were submitted by the claimant in support of this application, as was a hand written statement dated 18 February 2019 from Mrs Pauline Gourley in which she sets out that she was confirming that Mr Gourley did not attend court in October due to her having treatment for lung cancer on the day that he should have attended court, when she had an infection and he had to come with her to the hospital. So that was the written evidence that was provided to the Tribunal in support of the claimant's application, and today the claimant has given evidence himself and indeed, his mother Mrs Gourley has given evidence along the lines of the statement that was submitted for the claimant.

5. In that evidence Mrs Gourley is not specific, and cannot be specific as to the exact date upon which she awoke with what turned out to be an infection, she having recently undergone surgery for removal of part of her lung. She explained to the Tribunal how her son came around that morning, and he took her to A & E at

Wythenshawe Hospital where they stayed for most of the rest of the day and certainly until the afternoon. He mentioned to her she confirmed, that he should have been at court and she knows at some point he tried to make some phone calls but doesn't know who those were to. There was however only one such occasion in that October last year when this happened , so in terms of whether there could be any confusion as to the occasions when this occurred but seems unlikely that that would be the case as this was only once that this sudden need to go back to hospital arose, and so whilst unable to identify the precise date Mrs Gourley has given evidence that it was a day when her son was supposed to be in court and it was in October although she thought it was a Monday or a Tuesday whereas the hearing was actually on a Thursday. She has given that evidence and Mr Gourley himself has given evidence and has confirmed that that was the position.

6. Thus, in a nutshell his application is based on having a reason for his non-attendance on 25 October, a good reason he submits, one that he apologises for and which he invites the Tribunal to find as a good reason for allowing his claims to be reinstated and proceed to a hearing.

7. The respondents are no longer represented by a solicitor but Mr Peers, their Operations Manager has attended today, he has not sought to cross-examine Mrs Gourley or Mr Gourley in terms of Mrs Gourley having the condition that necessitated her operation and subsequent treatment. His essential position on behalf of the respondents is that the claimant has not produced any documentary evidence confirming the date of the admission of his mother to Wythenshawe Hospital as being 25 October 2018, and it is this lack of corroboration as Mr Peers put it, that means the respondents have not accepted and invite the Tribunal not to accept the basis upon which the claimant is seeking his reconsideration and it is this lack of documentary confirmation that is the issue as far as the respondents are concerned.

8. In terms of the test to be applied reconsideration is governed by Rules 70 to 73 of the Tribunals Rules of Procedure of 2013 and the grounds for reconsideration since those rules changed from the 2004 rules were very simply expressed in Rule 70 which is that reconsideration may be granted where it is necessary in the interests of justice to do so. There used to be a list of particular circumstances in the previous rules but that went in the 2013 rules and the broad principles are quite straightforward and it is a question of whether it is in the interests of justice to allow the application and upon reconsideration a Tribunal can either revoke a previous judgment or vary it but the invitation here is that the Tribunal revokes that last judgment and then proceeds in due course to hear the claimant's claims which of course have not yet been heard.

9. In terms of the evidence it is right, as Mr Peers observes , and indeed the Tribunal did in terms of its correspondence that regrettably the claimant has not been able to produce to the Tribunal documentary evidence confirming the precise date upon which Mrs Gourley was admitted to hospital in those circumstances. That is unfortunate but the Tribunal bears in mind that in dealing with these matters as indeed all civil matters it does not have to be satisfied in matters beyond a reasonable doubt. It has to be satisfied of matters on a balance or probabilities. It is unfortunate that there is no such hard corroboration, not least of all because if it had been provided to the respondents they may not have opposed this application and

indeed indicated that in correspondence, but understandably they wanted to test the evidence and have done so today.

10. I have to decide whether or not I accept that evidence and whether, on the balance of probabilities, the reason Mr Gourley did not attend on 25 October was indeed that he was at hospital with his mother in what amounted to a fairly urgent situation. That is the simple issue for me and I either accept that or I do not.

11. Whilst appreciating that the evidence about this is far from ideal, it is obviously not without significance that Mrs Gourley herself has attended to give that evidence and to say what happened. She is unable to give us a precise date but it is quite clear that whenever the day was it was one when her son was supposed to be in "court" and there was only one such episode in October of last year when she attended hospital in these circumstances. So it seems unlikely that she is confusing one admission with another, there was only one such occasion. There was also the possibility, as the Tribunal actually put to Mr Gourley that given that he was potentially a witness for a Mr Elliott who brought a similar claim against these respondents and whose hearing was indeed held on 19 October that there was a possibility at least that that was a reference to another occasion when the claimant might have been expected to be at the Tribunal, however, he explained and there is nothing to contradict this that he was never going to attend as a witness although he made a witness statement for Mr Elliott and so in terms of days when he should have been at the Tribunal on 19 October was not going to be one so it seems that any possibility of confusion in relation to that date and this incident having taken place and then may also not really arise.

12. Ultimately, I am left with whether to accept this evidence or not, and on the balance of probabilities I do, whilst observing it is unfortunate that it has not been further corroborated by a simple letter from the hospital, but ultimately I accept Mrs Gourley's evidence and Mr Gourley's evidence that on a date when he should have been at the Tribunal i.e. 25 October he was not present for the reasons that he has given the Tribunal which are accepted as being emergencies and where he has understandably attended to his mother's health rather than attend the Tribunal.

13. Additionally, in support of that the Tribunal does take into account the fact that he made this application very promptly, he made it the following morning, so this is not a case where there has been days of delay, or he has waited for the judgment to be sent out. In fact he would not know what the judgment was at that time, but the following day he has immediately contacted the Tribunal at 9:38 in the morning to explain why he was not present the day before. That then lends some credibility to his application, and it is obviously a prompt application which reinforces the fact that it would be in the interests of justice to reconsider the judgment.

14. So whilst appreciating the respondent's understandable response to this application, the Tribunal is satisfied that it would be in the interests of justice to revoke the dismissal judgment, and the claims are re- instated.

Case Management.

15. The Tribunal went on to consider what case management orders were now necessary for the claims to be reheard. The respondents had in the previous

hearing suggested that the claimant had not served a witness statement. The claimant, however, contended that he had, and believed that he had sent this to the Tribunal, and possibly also the respondents. He could not, however, point the Tribunal to any email today where he had done so, and the respondents similarly are unaware of any such document. To that end, it seems that the claimant's witness statement may still be outstanding and in any event, it may be better for him to make a fresh one in the light of the discussion that then ensued. The claimant also claimed not to have received a copy of the bundle. The respondents were formerly represented by Mr Tobin of Tobin Solicitors, but they no longer act for the respondent and indeed, have ceased practice. In those circumstances it seemed simplest for the respondents simply to provide a further copy of the bundle to the claimant and Mr Peers agreed to do so.

16. There was a discussion as to the issues before the Tribunal. The Employment Judge went through the unlawful deduction from wages claims with the claimant and asked him, first of all, as to whether there was any issue as to the contractual terms under which the respondents claimed to be entitled to make deductions. He initially indicated that there would be such a dispute, but given that he has signed, it would appear, a contract of employment which is contained in the bundle, and dated the 19 April 2018 with his signature, it seems highly likely that the express terms relied upon by the respondent will indeed be established. The claimant needs to clarify whether he disputes these terms as terms, and if so, on what basis. If he does not, however, it seems the only issues that the Tribunal will have to determine at the final hearing are the factual basis for the deductions that were made.

17. The claimant agreed this was the case, and there are three deductions made where the respondents will have to establish that the facts justified them being made under the contractual provisions. The claimant did clarify that he was not seeking reimbursement of the deduction made for the driver float in the sum of £20, and so the sums at issue are the £37.18 for the balance of a repayment plan, replacement tyre damage at £282.50, and a refund made to a customer on 30 April 2018 in the sum of £125.

18. For the respondent, Mr David Williams has dealt with these matters in his witness statement which the claimant has seen, and so should form the basis of the statement that he can now make in relation to the factual basis for each of these deductions.

19. The claimant did raise the issue of the fact that the deductions were not notified on his final payslip. That, the respondents concede is correct, and indeed in the bundle at page 69 one can see the final payslip in which these deductions do not appear. The respondents nonetheless contend that by an email of 16 May 2018, possibly repeated on 30 or 31 May 2018 these deductions in the form of the reconciliation provided by Ms Swindells at page 62 of the bundle were notified to him.

20. The Employment Judge discussed this issue with the claimant and pointed out to him that whilst, technically, this may amount to a failure to provide an itemised pay statement under Section 8 of the Employment Rights Act 1996, whilst the claimant would be entitled to a declaration to that effect, pursuant to Section 12 of

the Employment Rights Act 1996, he would not necessarily thereby be entitled to the Tribunal awarding the amount of any unnotified deductions. This is because whilst under Section 12(3) of that Act the Tribunal is required to make a declaration that a pay statement does not contain the particulars required to be included in it by Section 8 or Section 9 of the Act, in terms of any unnotified deductions the Tribunal may (but not must) make an award in respect of the amount of any unnotified deductions. Consequently, of itself, the failure of the respondents to include these deductions on the claimant's final pay slip will not entitle the claimant to an award of the sums so deducted.

21. Thus, the issue will come back to one under the unauthorised deductions from wages claim, under Section 13 of the Act, which will require the Tribunal to determine whether the respondents were or were not on both the contractual terms and the facts entitled to make the deductions that they admitted that they did.

22. Those then will be the issues for the Tribunal.

23. The claimant also raised the issue of national minimum wage, and has suggested (the Employment Judge thought for the first time) that the deductions made would mean that he was working at less than the national minimum wage. If this is to be pursued, the claimant needs to particularise this part of his claim and set out the calculation by which he comes to this conclusion.

24. Before pursuing this matter further, however, the claimant may wish to take advice, or consider the effects of Regulation 12(2)(a) of the 2015 Regulations which do provide that, for the purposes of calculating the national minimum wage, deductions made in respect of the conduct of a worker or for any other reason in respect of which the worker was contractually liable will not be counted for the purposes of national minimum wage. In other words, the same issue will arise in relation to the national minimum wage issue as in relation to the unlawful deduction from wages claim. If the deductions were in effect lawful, then they will not have the effect of reducing the claimant's pay below the national minimum wage, it would seem to the Employment Judge at this stage. This may therefore be an issue that is not worth pursuing, given that the same issue will have to be determined for all purposes.

25. There ensued some discussion about the way in which the claim should now be dealt with. The respondents will provide the claimant with a further copy of the bundle, and the claimant will serve a witness statement, regardless of whether he has previously done so. A date was set for that to be done. The respondent's previous representative had suggested that the Tribunal should make an Unless Order in relation to provision of the claimant's witness statement. The Employment Judge considered this, but given that the claimant has claimed, if at the moment unsubstantiated, that he has served a witness statement, the Employment Judge thought it would be unduly harsh to make an Unless Order, the consequences of non-compliance with which would result in the dismissal of his claims. Consequently, he did not make an Unless Order, but he did point out to the claimant that in the event that there is default in compliance with this or indeed any other orders the respondents would be entitled to bring that default to the attention of the Tribunal and to seek that the claims be struck out for non-compliance with Tribunal

orders. The claimant understood that and will ensure that he complies with the orders of the Tribunal.

26. Consequently, the claims have been re-listed for a hearing of one day's duration with the respondents to notify the Tribunal of dates to avoid within seven days. They have since indicated that they have no dates to avoid

27. The claimant is awaiting eye surgery, but has no date for it. If a hearing date is fixed the claimant subsequently is notified that he is to undergo that surgery, then obviously he can then apply to the Tribunal with the appropriate documentary evidence in support of an application to postpone the final hearing.

28. It is noted that some of the dates discussed in Tribunal erroneously fall at weekend. The revised dates set out above apply.

Employment Judge Holmes

Dated: 1 March 2019

JUDGMENT ORDERS AND REASONS SENT TO THE PARTIES ON

04 March 2019

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FOR THE TRIBUNAL OFFICE

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