



EMPLOYMENT TRIBUNALS

At an Open Attended Preliminary Hearing

Claimant: Mr E Gadliauskas

Respondent: Bakkavor Foods Ltd t/a Freshcook

Heard at: Nottingham

On: Monday 21 January 2019

Before: Employment Judge Evans (sitting alone)

Representation

Claimant: In person
Mrs O Weller, Interpreter

Respondent: Mr S Foster, Solicitor

JUDGMENT

The Claimant's application for the order striking out his claim to be set aside is refused. The claim remains struck out.

REASONS

Preamble

1. The Claimant's application came before me in the Nottingham Employment Tribunal on Monday 21 January 2019. The Claimant represented himself on the day of the hearing. The Respondent was represented by Mr Foster from SAS Daniels LLP, Solicitors.
2. The Respondent had prepared a bundle running to 56 pages in advance of the hearing. The Claimant had not provided documents to be included in that bundle and did not produce a bundle of his own.
3. I therefore explained to the Claimant the issues which would be determined at the hearing and asked if he had any documents specifically relevant to those issues

which he wished me to consider. In particular whether there were any documents relevant to his failure to respond to the Tribunal's letter of 18 August 2018 or any documents relating to his holiday in Lithuania in early September 2018. The Claimant said that there were not.

4. This judgment was given extempore at the conclusion of the hearing on 21 January 2019.

The striking out of the Claimant's claims and the application to set aside

5. The Tribunal wrote to the Claimant on 18 August 2018. By that letter, Employment Judge Britton ordered as follows:

"...2. The Claimant has not said why he failed to attend the telephone hearing on 5 June 2018. Unless he does by Friday 24 August 2018 the claim will be struck out..."

6. The Claimant did not do so by 24 August 2018 and so his claim was struck out. This was confirmed by a letter from the Tribunal to the Claimant dated 10 September 2018.
7. On 21 September 2018, the Claimant wrote to the Tribunal. The document which he sent to the Tribunal was headed:

"APPEAL AGAINST CONFIRMATION OF DISMISSAL OF CLAIM DATED 10.09.2018"

8. In that letter, he said 1) he had not received the letter from the Tribunal dated 18 August 2018; 2) he had been abroad and was *"just back to the UK on 11.09.2018"*
9. The Tribunal treated the Claimant's letter of 21 September 2018 as an application under rule 38(2) of the Employment Tribunals Rules of Procedure. This provides that a party whose claim has been dismissed as the result of an unless order may apply to the Employment Tribunal in writing within 14 days of the date the notice was sent to have the order set aside on the basis that it is in the interests of justice to do so.

The Claimant's case and evidence

10. The Claimant gave oral evidence through an interpreter. I was satisfied that he and the interpreter understood one another and that there was no problem with the interpreting. The Claimant had not attended the Tribunal with a witness statement so I asked him neutral questions with a view to enabling him to provide his evidence in chief.
11. When I asked him whether he had received the Tribunal's letter dated 18 August 2018, he said: *"I'm not sure"*. He explained, however, that all of the letters which he received from the Tribunal or otherwise relating to his case had been given to his lawyer, Ewelina Bator .

12. Indeed, in terms of how his lawyer had represented him throughout this case, he explained that each time he received a relevant piece of correspondence he would take it to his lawyer in order that she might deal with it. He had been regularly making payments to her for her legal services.
13. I also asked the Claimant about when he had been on holiday to Lithuania. His answer was that he had been away from 1 to 11 September 2018.
14. Overall, the Claimant's evidence in relation to why there had been no response to the letter of 18 August 2018 from the Tribunal might reasonably be summarised as follows. Either he had not received it from the Tribunal and therefore he had not passed it on to his lawyer or he had passed it on and she had failed to deal with it. On the whole, the Claimant thought that the former was more likely than the latter.

Findings of fact

15. Ewelina Bator of temidaHelp4U was listed as the Claimant's representative on the ET1 Claim Form by which his claim was begun. However, on 22 March 2018 she spoke with the Tribunal by telephone to say that she was only assisting the Claimant with his claim. She was therefore removed from the record.
16. I find that this was consistent with the Claimant's own understanding of the assistance that he was receiving from Ms Bator. He did not suggest otherwise during his evidence or submissions at the Hearing. Further, if it was not consistent with that, he would have inevitably questioned why he was constantly having to take letters round to his lawyer rather than those letters being sent to her direct.
17. However, the Claimant's account (which I accept as true) was that Ms Bator has been advising him in relation to his claim throughout its history up to and including today. He was taking her all correspondence from the Tribunal and from the Respondent so that she could deal with it.
18. Unfortunately, the Claimant's lawyer (Ms Bator) did not in fact deal with the correspondence which she received via the Claimant from the Tribunal and the Respondent. Examples of this are as follows.
 - 18.1. The Tribunal issued case management orders on 24 January 2018 and these required a schedule of loss to be filed and served by 7 March 2018 and disclosure to take place by 2 May 2018. However, the Claimant did not comply with these orders.
 - 18.2. Further, the Respondent requested further and better particulars in relation to the Claimant's claim for race discrimination on 20 February 2018. This was a case in which it was abundantly clear that further and better particulars were required as the ET1 Claim Form contained absolutely no information which would have enabled the Respondent to understand why it was being accused of discrimination.

- 18.3. However, no further and better particulars were provided in response to that letter. Indeed, as at the date of this hearing, the Respondent is none the wiser as to the details of the Claimant's race discrimination claim.
- 18.4. Further, there was a preliminary hearing on 5 June 2018 before Employment Judge Ahmed. A notice of this was sent to the Claimant but neither he nor his representative attended. Employment Judge Ahmed gave orders requiring there to be a further preliminary hearing to decide whether the claims should be struck out as having no reasonable prospect of success or whether a deposit order should be made. He also made an order requiring the Claimant to explain his and his representative's non-attendance at the preliminary hearing. The Claimant did not comply with that order.
19. It was the Claimant's non-compliance with that order which led to the letter from the Tribunal on 18 August 2018 which contained the unless order.
20. I find that there has been no suggestion made by the Claimant that there was any kind of general problem with receiving correspondence from the Tribunal. To the contrary, the thrust of his evidence was that he regularly received correspondence which he then passed on to his representative.
21. Against this background, I find on the balance of probabilities that the Claimant did receive the letter of 18 August 2018 from the Tribunal but that he and his representative failed to deal with it. This is for the following reasons:
- 21.1. The fact that the letter was not dealt with by the Claimant or his representative is not of itself indicative of the letter not having been received given the general background as set out above of the Claimant and his representative failing to comply with the Tribunal's orders and to deal with correspondence.
- 21.2. His own oral evidence was that he was not sure whether he had received the letter of 18 August 2018. He did not as such put forward any positive case that it had not been received.
- 21.3. The contents of his letter of 21 September 2018 which had been drafted by his lawyer, were to some extent undermined by his oral evidence for the following reasons:
- 21.3.1. First, the Claimant's oral evidence was not the same as the content of the letter in that in his oral evidence he said he was not sure whether he had received the letter.
- 21.3.2. Secondly, the letter of 21 September 2018 referred to the Claimant having only recently returned from abroad and implied, without expressly stating this, that the period of his holiday was in some way relevant to his non-compliance with the unless order. This was contradicted by his oral evidence in which he explained that he had only gone on holiday to Lithuania on 1 September 2018.

22. Overall, I find on the balance of probabilities that the reason that the Claimant's claim was struck out was quite simply that he and/or his representative had failed to deal with the letter dated 18 August 2018, despite having received it, in the same way that they have failed to deal with a number of items of previous correspondence and indeed the Tribunal's orders.

23. In light of these findings I have concluded that it is not in the interests of justice to set aside the order striking out the Claimant's claim for the following reasons.

23.1. The Claimant has put forward no good reason for his failure to comply with the unless order. In light of my findings of fact set out above, I conclude that the Claimant's non-compliance was not a consequence of the letter dated 18 August being lost in the post or of an unfortunate one-off oversight by his lawyer. Rather it was the consequence of the Claimant and/or his lawyer consistently ignoring the Tribunal's orders and correspondence.

23.2. Further, the striking out of the Claimant's claim must be seen against a background of general delay. For example, it is now 14 months since the Claimant presented the ET1 Form to the Tribunal and yet the Respondent is still no wiser in relation to:

23.2.1. why the Claimant says he was discriminated against;

23.2.2. why it is contended that the Tribunal has jurisdiction to hear a claim of unfair dismissal given that the ET1 Form says quite expressly that he had less than 2 years' service.

23.3. The delay to date has, to some extent, prejudiced the Respondent because relevant witnesses have left its employment.

23.4. The Claimant has had legal advice throughout the history of his claim. His failure to comply with the Tribunal's orders does not result from, for example, an unfortunate reliance on the advice of a friend or volunteer. Rather, he has received and paid for professional advice. Obviously, if the failings all lay at the door of his lawyer, then that may be a matter that he will be able to pursue elsewhere.

24. For all these reasons, I refuse the Claimant's application to set aside the order striking out his claim.

Employment Judge Evans

Date: 6 March 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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