



# EMPLOYMENT TRIBUNALS

**Claimant:** Samuel Malkin  
**Respondent:** Structural Steelcraft Limited  
**Before:** Employment Judge Mr. M. Salter

## RECONSIDERATION JUDGMENT

The judgment given on 15<sup>th</sup> March 2019 is varied in regards to the notice pay claim which will now proceed to Final Hearing.

## REASONS AND CASE MANAGEMENT ORDERS

### THE LITIGATION

1. This is an application by the Claimant for reconsideration of my judgment give on 15<sup>th</sup> March 2019 and sent to the parties on 19<sup>th</sup> March 2019.
2. By an ET1 presented on 3<sup>rd</sup> September 2018 the Claimant brought claims of an unlawful deduction from wages relating to wage payments he was owed but which were withheld from him by the Respondent on grounds he had damaged their property. He also presented a claim for breach of contract in relation to unpaid notice.
3. The Respondent disputed the claims, but by the time of the hearing the Respondent paid the sums outstanding that formed the unlawful deduction from wages claim.
4. The email address used by the Claimant in correspondence with the Respondent and tribunal was that identified by the Claimant on his claim form. The Claimant had sent to the Respondent a collection of documents he wished to be included in the bundle for the final hearing.

**Case Number: 1403190/2018**

5. However, in advance of the hearing, the Claimant had not provided the Respondent with a witness statement.
6. On the 13<sup>th</sup> March 2019 the Respondent sent to the Claimant its witness statement and the bundle of documents by email. The Respondent has produced a receipt that shows the email was received by the Claimant's email account.
7. Originally that final Hearing had been arranged for 11am on the 15<sup>th</sup> March, however on 14<sup>th</sup> March 2019 the hearing time was changed to 10am. Notice of change was sent to both parties by email.
8. On the morning of 15<sup>th</sup> March 2019 I was informed that the Respondent was in attendance but the Claimant was not. I directed that the tribunal contact the claimant, however there was no telephone number recorded on the tribunal's file.
9. At 10:05am the Final Hearing was called on. The Claimant still had not attended and there was no notification as to why he had not attended. The Respondent informed me they had not received a witness statement from him nor had they heard from the Claimant as to his non-attendance.
10. Having read the papers and the witness statement of the Respondent I made the judgment I did: the Claimant's unlawful deduction from wages claim succeeded so I made a declaration to that effect, but as he had been paid the outstanding money I made no financial order; but the Claimant's breach of contract claim failed as the evidence before me showed that the Respondent had paid all the sums owed to the claimant.
11. It transpires that after the hearing had finished the Claimant arrived at tribunal to be told that the hearing had finished and judgment given.
12. My judgment was written up on the 15<sup>th</sup> March and sent to the parties on 19<sup>th</sup> March 2019.
13. On 3<sup>rd</sup> April 2019 the Claimant applied for a reconsideration of my judgment. He did so by way of email from a different email address than was on the tribunal record. The email attached a letter dated 31<sup>st</sup> March 2019 which gave the reasons for claimant's failure to attend the hearing on time. There is no explanation as to why this letter took three days to email to the tribunal nor why it is sent after the expiry of the time limit for reconsideration application. The Claimant explains that his email account suffered some "technical issue" and so he was unable to access it and so did not get the notification of the final hearing's change of time, he also highlights that on his ET1 he requested his preferred method of receiving correspondence from the tribunal was by post.
14. He provided no evidence of the technical issue he had with his email account, or, as I say an explanation for the delay in getting the application to the tribunal nor for his failure to provide the Respondent with a witness statement.
15. The Respondent's views on the application were sought and these were received on 17<sup>th</sup> April 2019. They object to the application being granted as they say it has

been presented out of time. They say the application can be dealt with on the papers.

#### THE LAW

16. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received outside the relevant time limit.
17. Under Rule 5 the Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in the Rules or in any decision, whether or not (in the case of an extension) it has expired.
18. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.
19. In the Kwik Save decision, the EAT held that " the process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice".
20. A useful guide may also be found in r3.9 of the Civil Procedure rules that identifies potentially relevant factors to consider: these are the interests of justice; whether the application has been made promptly, whether the failure was intentional; whether there is a good explanation for the failure; the extent to which the party has complied with other rules, practise directions and orders; was the failure the parties or their advisory what would be the impact of granting relief on each party

#### MY DECISION

21. Having set out the background of this matter I then proceeded to consider the various relevant factors.

#### Administration on justice

22. I must consider the interests of justice and, in accordance with the overriding objective ensure that matters are dealt with justly and proportionately which includes allocating a proportionate amount of tribunal resources to the claim, whilst the value of the claim is relatively modest, it is still a claim by the claimant for money he is owed and which the tribunal system was created to address within a short period.

#### Whether the application has been made promptly

23. The application has been made late with no explanation for the delay between the apparent typing of the application and its sending to the tribunal. it arrived a day late.

#### Was the failure intentional

24. The Claimant's failure to attend the tribunal was not intentional, he did not, on his account, receive notification of the change of time.

Was there a good explanation for the failure

25. The claimant's explanation for his non-attendance is plausible and, if correct, understandable: notification of the change in time was sent the day prior to the hearing via email.

The extent to which the party in default has complied with other rules, practice directions orders

26. I note that in this matter the claimant has not: he has failed to provide a witness statement in accordance with the tribunal case management order, and the application for reconsideration was itself presented late. He did however attend the hearing at the originally listed time.
27. I have taken a considerable period of time on this aspect of the litigation as it could be seen that the claimant is not complying with tribunal directions and deadlines and therefore occasioning the tribunal and respondent to use valuable resources on his matter. That said, as I say, the claimant did attend the tribunal at the original time for his hearing and I remind myself that he is a litigant in person.
28. For these reasons I am prepared to permit his application for reconsideration to proceed.

The effect that failure to comply had had on each party

29. The failure to attend at the relisted time deprived the Claimant of an opportunity to test the respondent's evidence on the payment of his notice and, potentially, financial compensation. The Respondents however, will still have an opportunity for their account and evidence to be placed before an Employment Judge to determine.

#### CONCLUSION

30. Applying these principles in this case, I conclude that the Claimant would suffer greater prejudice if I were not to vary my judgment, than the Respondent would, albeit they will put to the inconvenience of having to attend a further hearing. There are triable issues between the parties in relation to the notice pay claim.
31. Accordingly I grant the application for reconsideration pursuant to Rule 70 because it is in the interests of justice to do so. The Judgment of 15<sup>th</sup> March 2019 is varied in respect of the notice pay claim only.
32. I should say it is not without considerable reservation that I do make the order in light of the claimant's history of non-compliance with deadlines. Any further failures by him could result in his claim being made subject to an unless order or, ultimately, being struck out.

### **CASE MANAGEMENT ORDERS**

### **Made pursuant to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**

33. The matter will now proceed to a final hearing with a 2-hour time estimate, a Notice of Hearing with the new hearing date in will be sent to the parties.
34. The Claimant is ordered to provide to the Respondent his witness statement within 14 days of the date of this judgment is sent to the parties.

## **CONSEQUENCES OF NON-COMPLIANCE**

1. **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.**
2. **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.**

**Note:** For further assistance in relation to the requirements of these directions and in order to prepare themselves for the final hearing, the parties are referred to the *Presidential Guidance - General Case Management* which can be found at:

<http://www.justice.gov.uk/downloads/tribunals/employment/rules-legislation/presidential-guidance-general-case-management.pdf>

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Employment Judge M Salter

16 May 2019