EMPLOYMENT TRIBUNALS

Claimants:

1. Mrs Dorota Tunicka
2. Miss Barbara Kaczmarczyk

Respondent:

Impacta Limited

JUDGMENT ON AN APPLICATION FOR RECONSIDRATION

The claimants' application of 19 May 2019 for reconsideration of the tribunal's decisions made on 26 April 2019 is refused.

REASONS

The application

1. This is an application by the claimants, Mrs Dorota Tunicka and Miss Barbara Kaczmarczyk, for reconsideration of my decisions made on 26 April 2019, the written records of which was sent to the parties on 7 May 2019, by which I (1) struck out both claimants' claims for unpaid holiday pay and (2) refused Miss Kaczmarczyk's application to amend her claim so as to allege that her dismissal was an act of direct race discrimination.

2. The claimants' application is made by way of a letter from their representative, Miss R Carrington, dated 19 May 2019 and received by the tribunal on 21 May 2019, attaching letters from each of the claimants and various other documents.

3. For the reasons set out below, I dismiss the application pursuant to rule 72(1) of the Employment Tribunal Rules of Procedure 2013 since I consider that there is no reasonable prospect of either of the decisions being varied or reversed upon reconsideration.

Strike out

4. The reasons for my decision to strike out the claimants' claims of unpaid holiday pay were given orally during the hearing, but they can be summarised as follows.

    a. The claimants failed to provide any particulars of their claims for unpaid holiday pay, or the evidence which they wished to rely on in support of those claims, at any stage prior to the hearing on 25 and 26 April 2019.

    b. When asked by the respondent, some weeks before the hearing, to provide details of these claims, the claimant's representative replied by email on 28 March 2019 refusing to do so unless the respondent paid for the work which she had done in preparing the relevant calculations.

    c. When the matter came on for hearing on 25 and 26 April 2019 the relevant documents and calculations had still not been provided, and they were not provided until 5pm on the first day of the hearing. I was satisfied that, despite having spent time looking at these materials that evening, the respondent was not in the circumstances able to respond at that stage to the claims being advanced, and there was not in any event time to proceed with the matter on the second day.

    d. I was satisfied that the claimants were in breach of tribunal orders (in the case of Miss Kaczmarczyk, the tribunal's order of 23 October 2018 to provide details of her claims by 31 October 2018, and in the case of both claimants the case management order of 8 August 2018); that their conduct was unreasonable; and that a fair trial of the holiday pay claims was not possible on the days appointed for the hearing of the matter.

e. I concluded that appropriate and proportionate course was to strike these claims out.

5. In her letter of 19 May 2019 Miss Carrington makes a number of points in seeking a reconsideration of this decision. I do not consider that any of these, whether taken individually or together, gives rise to a reasonable prospect of the original decision being varied or revoked.

6. It is said, first, that the respondent should have kept the records necessary to calculate the claimants' claims. There is no merit in this point. It was for the claimants to state how their claims are put, and how the amounts which they were claiming were calculated; it was not for the respondent to guess as to what case it had to meet. It was also for the claimants to identify the evidence on which they sought to rely. These were matters of common sense, but were also explicitly required of the claimants by the tribunal's orders of 8 August and 23 October 2018. The claimants not only failed to comply, but (through their representative) they *refused* to do so, unless the respondent complied with their unreasonable and unwarranted demand for payment. The result was that the matter was not ready to be heard when it came on for hearing on 25 and 26 April 2019.

7. The next point raised is that the claimants spent money in making copies of the relevant evidence on the afternoon of the first day of the hearing before me. It is correct that I directed on the afternoon of the first day that the claimants produce this material by 5pm that day, and it is correct that they did so, but the purpose of my direction was to try to find a way, if possible, for the matter to be resolved in the time available. However this proved unsuccessful as the respondent was not able in the limited time available to digest and properly to respond to the information which was now being provided, so the prejudice to the respondent's ability to defend the case, and to the possibility of a fair trial, had not been remedied.

8. Finally, the point is made that at the time of her email of 28 March 2019 Miss Carrington felt overwhelmed by the correspondence she was receiving from Mr Warren. This is a point which I took into consideration when reaching my decision to strike these claims out. While it is possible to have some sympathy for Miss Carrington in experiencing the stresses of this particular litigation that does not excuse the unreasonable refusal and failure to provide the requested (and necessary) information prior to the hearing.

9. In her statement attached to the letter of 19 May 2019 Mrs Tunicka makes various further points, none of which in my judgment have any relevance to the basis on which the claim was struck out.

10. Overall I consider that there is no reasonable prospect of the decision to strike out the holiday pay claims being varied or reversed upon reconsideration.

Amendment

11. Miss Kaczmarczyk seeks reconsideration of my rejection of her application to amend her claim so as to allege that her dismissal was an act of direct race discrimination.

12. The reasons for my refusal were, in summary, as follows.

    a. The amendment would have added a substantially new claim which was different to the claim as it then stood, in that it raised a new type of claim (race discrimination) and it related to facts (the decision to dismiss) which at that stage did not form the focus of the claimant's claim. It is notable that by the time when the application was made, the unfair dismissal claim which had originally been brought had been struck out on the ground that the claimant lacked the requisite continuity of service to being such a claim.

    b. The new claim of discrimination would have been well out of time by application of the relevant statutory time limits.

    c. I was not satisfied that there was a good reason for the claim not having been raised sooner.

    d. The lateness of the application to amend meant that the matter could not be determined at the hearing listed for 25 and 26 April and had I allowed the application to amend the matter could not have been heard without a delay of many more months.

    e. To raise this claim after the earlier striking out of the unfair dismissal claim meant that in a sense the respondent would be unfairly vexed twice with the same matter.

f. There would have been real prejudice to the respondent in allowing the application, which outweighed the prejudice suffered by the claimant in refusing it.

13. In her letter of 19 May 2019 Miss Carrington makes the point that she is not a lawyer and that when she and Miss Kaczmarczyk filled in the ET1 she had had no prior experience of filling in ET1s, other than Mrs Tunicka's. I accept this, but I was mindful of Miss Carrington's inexperience when I considering the amendment application on 26 April 2019. I concluded then, and remain of the view now, that the ET1 was based squarely upon on Miss Kaczmarczyk's letter dated 18 September 2018, which Miss Kaczmarczyk herself had written soon after the events which it described, and that letter had made no mention of any kind of discrimination.

14. Overall neither the letter of 19 May 2019 nor the attached statement from Miss Kaczmarczyk raises any points which would create a reasonable prospect of the original decision being varied or revoked upon reconsideration.

Conclusion

15. Having considered the claimant's application and all the materials provided in support of it, I consider that there is no reasonable prospect of either of the original decisions being varied or reversed upon reconsideration. Accordingly the application for reconsideration is dismissed pursuant to rule 72(1) of the Employment Tribunal Rules of Procedure 2013

Employment Judge Coghlin QC
30 May 2019