



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss T Best-Thomas

v David Messiah t/a Fitz Health Club

DECISION AND JUDGMENT

1. The claimant's application dated 22 April 2019 to vary suspend or set aside the deposit order made at the Preliminary Hearing on 30 November 2018 is refused as it is not in the interests of justice to do so.
2. The claimant's application dated 22 April 2019 for reconsideration of the judgment striking out the claims for non-compliance with the Deposit Order sent to the parties on 21 December 2018 is refused as there is no reasonable prospect of the decision being varied or revoked.

REASONS

1. On 30 November 2018 at an open preliminary hearing before me, I determined that the claimant's remaining complaints being pursuing against the respondent should be the subject of a deposit order requiring the claimant to pay a sum of up to £60 in total if she was to be permitted to continue with those claims. I made it clear that this sum would have to be paid within 21 days of the Order being sent out failing which her claims would be automatically struck out. Full reasons for making the Deposit Order were provided at the time and sent in writing to the parties on 21 December 2018. I heard evidence directly from the claimant about her means and took careful account of it. Indeed, as I noted at paragraph 8 of my reasons, there was a challenge by the respondent at the conclusion of the hearing that the claimant had not been truthful about the extent of her means but I indicated I would take that matter no further and assume that the claimant had been truthful and complete in the evidence she advanced about her means. A detailed explanatory note was sent with my Deposit Order repeating what I had explained at the hearing: that the claims would be struck out if payment was not made within 21 days of the Order being sent (paragraphs 4 and 5); and giving details of how the deposit payment should be made (paragraphs 7 to 10). Thus although being aware of the requirement to pay the deposit amount since 30 November 2018, the time for payment did not expire until 11 January 2019, six weeks later.
2. As recorded in tribunal correspondence of 11 April 2019 referring to my

decision, the claimant did not make any application to extend time to comply with the Deposit Order prior to the date by which payment was to be made. Indeed, despite corresponding with the Tribunal on 19 and 26 January 2019, the claimant did not request an extension of time prior to her email of 28 January 2019. It was not until 28 January 2019 that the claimant first suggested that dental health problems were the reason for her failing to comply. Furthermore, the claimant failed to make any deposit payment until it was received by the Tribunal Service on 4 February 2019 some three weeks late.

3. Following notification of my decision that the claimant's reason for non-compliance was insufficient to justify any extension of time and refusing the claimant's application, the claimant made an application on 22 April 2019 requesting a reconsideration of that refusal to extend time so as to reverse the automatic strike out of her claims. Although it is not entirely clear, it appears that she is also applying to have the deposit order reconsidered and for the respondent's response to be struck out for non-compliance of earlier case management orders.
4. By rules 70-73 of the Employment Tribunals Rules of Procedure 2013, parties may apply for reconsideration of judgments made by a tribunal.
5. The sole ground upon which a judgment may be reconsidered is that it is necessary in the interests of justice to reconsider it.
6. Rule 71 provides that an application must be sent within 14 days of the date on which the decision was sent to the parties. The application must be in writing and must set out why reconsideration of the original decision is necessary.
7. By rule 72(1), the application to have a decision reviewed shall be considered, where practicable, by the employment judge who made the decision, or who chaired the tribunal which made the decision. The judge shall refuse the application if he considers that there is no reasonable prospect of the decision being varied or revoked.
8. Deposit orders are not "judgments" as defined by r1(3) of the 2013 Tribunal Rules. As such the order itself cannot be the subject of a reconsideration application. I accept, however, that it can be the subject of an application under r29 to vary a case management order. Notwithstanding this, in accordance with the decision in Sodexo Ltd v Gibbons [2005] ICR 1647 EAT, automatic strike out of a claim for failure to comply with the deposit order is generally considered to be a judgment that can be the subject of a reconsideration application under r70. Both rules require me to consider what is in the interests of justice and therefore, in practical terms, the distinction to be applied has little material impact on the approach I am to take in relation to both. Nevertheless, I am aware of the fact that different rules apply for these two elements of the claimant's application.
9. I consider that the claimant's application is in time. It was made within 14 days of the claimant being notified that her claim had been automatically struck out and that her retrospective application to extend time to comply

with the Deposit Order had been refused. Even if it could be said that time ran from the date payment was due (11 January 2019) or the date of the claimant's previous application (28 January 2019) which I do not accept, I would have extended time to allow her most recent application to be considered out of time given that she did not receive the outcome of her earlier application until 11 April 2019.

10. In summary, the claimant seeks a reconsideration of my decision on the asserted grounds of: a) inability to obtain legal advice; b) her medical condition (and that of her son); and c) failure to fully consider her financial circumstances at the time of making the Deposit Order.
11. The claimant has provided additional documentation in support of her application. I have, once again, carefully considered the content of that documentation and the representations the claimant makes in her accompanying application (and covering letter) of 22 April 2019. I make the following observations about that documentation:
 - 11.1. The vast majority of the material was evidence that was available but not advanced at the time of her original retrospective application to extend time;
 - 11.2. The further medical evidence provided does not demonstrate that the claimant was indisposed to any significant degree and certainly not to the extent that she was unable to comply with the requirements of the Deposit Order;
 - 11.3. In so far as she needed to, the claimant was able to obtain legal advice and assistance from "Jackie Sellers" of "Nucleus" as at 3 January 2019 and communicate and correspond accordingly both with her and the Tribunal at that time.
12. Furthermore, as I have stated above, the claimant's financial circumstances were fully considered at the hearing on 30 November 2018 and I made detailed findings in that regard.
13. When considering the interests of justice, these must be seen from both sides. None of the grounds that the claimant has advanced in support of her application are sustainable or made out from the evidence she has provided. Indeed, the further medical evidence does not appear to support the claimant's asserted position. The Deposit Order was made after both parties were able to make full and detailed representations at the Open Preliminary Hearing on 30 November 2018. The amount of the deposit was determined on the basis of information and evidence provided directly by the claimant. There is no basis for varying, suspending or setting aside the Deposit Order made or for reconsidering my decision that there was no proper basis for the claimant failing to comply with the Deposit Order, or that time should be extended regardless, such that the claim was automatically struck out.
14. For the reasons given above, I therefore reject this application for reconsideration and/or variation of a case management order. I do so because there is no reasonable prospect of the Judgment or Order being varied or revoked.

15. Given that the claimant's claim remains struck out her application to have the respondent's response struck out is academic. Nevertheless for completeness, I would refuse it because a) the claimant has not been specific about what any failings were and b) in any event, none of the three matters referred to in section 3(B) of her application materially impacted upon the fairness of the hearing that took place on 30 November 2018.

Employment Judge Wyeth

Date: 06/06/2019

Judgment sent to the parties on

07/06/2019

For the Tribunal office