



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Andreou

v

Gant UK Limited

Heard at: Watford

On: 25 June 2019

Before: Employment Judge Milner-Moore

Appearances

For the Claimant: Not in attendance

For the Respondent: Mr L Newell

JUDGMENT

1. The claims are struck out in their entirety.

REASONS

1. The claimant brings claims of: unfair dismissal, discrimination on the grounds of race and marriage, breach of contract and unlawful deduction from wages and breach of the Working Time Regulations (holiday pay).
2. This hearing was listed to consider the respondent's application dated 28 May 2019 that the claims should be struck out on the basis that the claimant had failed to comply with the Tribunal's Orders, that this had made it necessary for the respondent to seek the vacation of a four day, full merits hearing (which had been listed since 15 August 2018 and was due to take place on 24 June 2019), and that the claimant was not actively pursuing his claims.
3. It is relevant to set out something of the procedural history to date. The matter came before Employment Judge Lewis on 15 August 2018 for case management. He made orders for various steps be completed before the full merits hearing took place. There was a pattern of delay on the claimant's part in complying with these orders. The schedule of loss was provided late. On 15 April 2019, an Unless Order was made due to the claimant's failure to comply with the order for disclosure, originally due on 26 February 201 and eventually provided on 26 April 2019.

4. The claimant subsequently failed to comply with Orders in relation to provision of a remedies bundle and in relation to exchange of witness statements (due to occur respectively on 22 March and 10 May 2019). In consequence, the respondent made an application for strike out on 28 May 2019 and stated that it did not consider that the full merits hearing could proceed in the circumstances.
5. The claimant had by then instructed solicitors (Slater Gordon) to act for him and the application for strike out was opposed by them. In an e-mail sent to the Tribunal on 3 June 2019 they explained the non-compliance by reference to the claimant's ill-health and sought the postponement of the full merits hearing, again on the grounds of the claimant's ill-health. The email stated that that the claimant had been involved in a car accident "several weeks ago" as a result of which he had been suffering from neck, back and shoulder pain. This was affecting his ability to concentrate. He was also experiencing stress as a result of the proceedings and trying to find work. It was asserted that he would be unable, on medical grounds, to attend the hearing on 24 June 2019 and that his medical conditions explained his delay in complying with the Tribunal's orders. The email stated that the claimant was obtaining a medical certificate to confirming his inability to attend. However, no certificate has ever been provided. It was also suggested that the claimant had been unable to exchange witness statements because one of the claimant's witnesses had just given birth. The respondent has on a number of occasions requested to be supplied with medical evidence in relation to the injury suffered by the claimant but none has ever been supplied.
6. On 19 June 2019, having been advised that the full merits hearing had been postponed but the case was to be listed for an open Preliminary Hearing to consider the strike-out application, the claimant said that he would be unable to attend and asked that the hearing be rescheduled for a date in July. Later that day he sent a further e-mail to the tribunal stating

"I cannot attend I am on a training course abroad."
7. On 20 June 2019, in response to the claimant's e-mails, the tribunal wrote to the claimant to say that he should provide evidence of the training course that he was attending and evidence of when it was arranged if he wished the tribunal to consider his application for a postponement. Again, no such evidence has been provided.
8. The claimant has not attended today and has not provided any further explanation for his absence. Attempts to contact him by the tribunal staff were unsuccessful. The hearing proceeded in the claimant's absence.
9. The respondent invites me to strike-out the claim, not only on grounds of failure to comply with the Tribunal's order and failure to actively pursue it, but on also on the grounds that the various claims have no reasonable prospects of success.

10. Under rule 37 of the Tribunal's 2013 procedure rules a tribunal has discretion to strike-out all or part of a claim or a response on grounds including that there has been non-compliance of any rule or Order of the tribunal, that it has not been actively pursued or that the claim has no reasonable prospect of success. A claim may not be struck-out unless the party in question has been given a reasonable opportunity to make representations either in writing or at a hearing.

11. In considering whether to strike the case out on grounds of non-compliance with orders I have considered a number of factors including:
 - 11.1 the Tribunal's overriding objective to deal with cases fairly and justly and, in particular, avoiding delay.
 - 11.2 the extent of the non-compliance with Orders and where responsibility for non-compliance lies,
 - 11.3 the disruption that has resulted;
 - 11.4 the proportionality of strike-out as a response, and
 - 11.5 whether a fair hearing is still possible.

12. In considering whether the claim should be struck-out on the basis that it is not being actively pursued, I have considered:
 - 12.1 the Tribunal's overriding objective to deal with cases fairly and justly and, in particular, avoiding delay
 - 12.2 whether the delays in this case have been excessive or inexcusable, or intentional, and
 - 12.3 whether there is a risk that as a result of delay, a fair hearing is impossible or that serious prejudice to the respondent is likely to result.

13. I have concluded that the claims should be struck out on grounds of non-compliance with the Tribunal's orders and on grounds that the claimant has failed actively to pursue his claims. I have reached that conclusion for the following reasons:
 - 13.1 Whilst I recognise that striking the case out will have a considerable impact on the claimant, shutting him off from any potential remedy. I nonetheless consider that it is a proportionate response in the circumstances of this case.
 - 13.2 The claimant failed to comply with orders for the supply of a remedy bundle and for the exchange of witness statements. This forms part of a pattern of repeated non-compliance with orders. As a result of that failure to comply a full merits hearing which had been listed for several months had to be postponed.
 - 13.3 I am not satisfied that there is any good reason for non-compliance. In particular, I note that, whilst it is suggested that the claimant has been unable to comply due to ill health, no supporting evidence in relation to the claimant's health has been supplied. I also note that it appears that the claimant was apparently, sufficiently well to book himself on to a training course and to travel abroad to attend that course over the period in which the full merits hearing was due to take place. That is inconsistent with the claimant being too unwell to comply with the Tribunal's orders and too unwell to attend a hearing.

- 13.4 Nor do I consider that the fact that one of the claimant's witnesses has recently given birth is a good reason for non-compliance with the Tribunal's orders. The claimant was due to have exchanged statements on 10 May 2019. Had he prepared in good time for that deadline his witness would have been available to provide a statement.
- 13.5 Compliance with the overriding objective and with the obligation to provide a fair hearing, includes provision of a hearing without unnecessary delay. The events complained of in this case occurred in September 2017. If the case is relisted it could not be heard before April 2020. It would be prejudicial to the respondent in terms of the impact on witness recollections. One of the respondent's key witnesses is no longer employed by the respondent and has lost 4 days' work as a result of the postponement of the full merits hearing. Delay of this order is a matter of serious prejudice where, as in this case, the delay is avoidable.
14. I did not consider it appropriate to strike the case out on the grounds that it had no reasonable prospects of success, given that the claims include allegations of discrimination and involve issues of significant factual dispute which could not properly be resolved at a preliminary hearing.

Costs

15. The respondent's representative made an application for costs in the sum of £1,168.75. Whilst the claimant had been placed on notice in general terms of the possibility that an application for costs might be made, he had not been advised of the amount sought. Having considered rule 77 of the Tribunal's procedure rules, I did not consider that it would be fair to the claimant to determine the respondent's application in circumstances where the claimant was not present and would have no opportunity to address the amounts claimed or to put forward information as to his means and ability to pay costs.
16. If the respondent wishes to make an application for costs the respondent should make an application to the Tribunal in writing and copy it to the claimant:
- 16.1 setting out the facts and matters relied on in support of the application for costs and an explanation of the sums claimed;
- 16.2 setting out in full the text of the relevant parts of the 2013 Procedure Rules dealing with applications for costs and, in particular, rule 84 dealing with the ability to pay; and
- 16.3 confirm whether the respondent is seeking to have the application determined on paper or at a hearing.

Employment Judge Milner-Moore
1st July 2019

Date:

Sent to the parties on: 8/7/2019

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For the Tribunal Office