



EMPLOYMENT TRIBUNALS

Claimant: Mr B Harrison

Respondent: M & S Financial Services PLC

Heard at: Manchester

On: 25 July 2018

Before: Employment Judge Ainscough

REPRESENTATION:

Claimant: In person

Respondent: Mr S Lewinski of Counsel

JUDGMENT having been signed by the Tribunal on 25th July 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a reconsideration of a strike out Judgment under Rule 70 which has arisen from the claimant's late payment of the deposit order. The question for the Tribunal was whether it was necessary in the interests of justice to confirm or revoke that decision.

ISSUES

2. The claimant's position is that he did not receive the payment methods information from the Tribunal and when he had contacted the Tribunal to enquire, it was too late to make the payment by the deadline imposed in the deposit order.

3. The respondent's position is that the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 are clear that any late payment of a deposit order leads to an automatic strike out. It is the respondent's contention that the claimant has provided no good reason for the delay in payment and given the

perceived poor merits of the claim, it is not in the interests of justice to revoke the strike out and the claim should be dismissed.

FINDINGS OF FACT

4. The Tribunal heard evidence from the claimant and submissions from both parties.

5. Following the preliminary hearing on 23 April 2019, the claimant knew he had to make a payment to keep his claims alive. By email of 14 May 2019 the Tribunal erroneously sent out only the Case Management Order to the parties. It did not actually reach the claimant because it was sent to the wrong email address. On 15 May 2019 the respondent asked for a copy of the deposit order, and on the same date the Tribunal sent all documents to the parties. Unfortunately, the documents sent to the claimant were still sent to the wrong email address. The date for the payment of the deposit order was 5 June 2019.

6. On 9 June 2019 the claimant emailed the Tribunal asking whether he should have received documents following the Tribunal hearing on 23 April 2019.

7. On 19 June 2019 the Tribunal realised its error and sent all the documents again and extended time for the claimant to pay the deposit order to 10 July 2019.

8. It is accepted that the claimant only received emails, nothing by post, noting the date and setting a calendar reminder to pay nearer the time as he did not have the capacity to pay at that date. He recalls that he did not see how to pay on receipt of the email on 19 June 2019, rather just the date by which he needed to pay.

9. It took the claimant until 8 July 2019, at 8.30pm, to enquire how to pay, having saved the money; he had an assumption that he could do so online or by debit card. It seems that from the chronology of emails from 9 July that a call was first made to the Tribunal querying how to pay. The claimant was told that he could not pay by debit card or bank transfer and he should post his payment and request an extension of time.

10. There were various emails between the claimant and the Tribunal, into which, unfortunately, the respondent was not copied. Prior to the hearing today, the respondent had not had sight of these emails and was unaware of the content. In these emails the claimant sought information on how to make the payment. The Tribunal resent the documents sent in May, and sent again June.

11. At approximately 2.10pm on 9 July 2019 the claimant sent an email advising the Tribunal that the payment information was not within the one page document he had received. The Tribunal finds that the claimant was referring to the letter of Regional Employment Parkin of 19 June 2019, which is a one page document setting out the extension of time to make the payment. The claimant offered to attend at the Tribunal the next day to make the payment.

12. Later in the email correspondence the claimant offers to make the payment by bank transfer. It takes until 3.48pm for the note detailing the payment methods to be sent again to the claimant. During this email correspondence the claimant was at

work and did not have access to the original email. The claimant responded at approximately 4.15pm and stated he had not seen the note before and queried whether the Tribunal would accept payment if he sent it in “tomorrow”, being 10 July. The claimant was unable to get to the Post Office to do a postal order that day because he was at work, and his evidence is he went home and saw the additional pages, containing the note on payment methods, in the archived email.

13. The Tribunal sent an email on 13 July 2019 to the claimant stating that the notes were explicit in regard to the date for payment.

14. The Tribunal finds that whilst the claimant now accepts he had that information on 19 June 2019, he did not look at it, nor did he look at it on 9 July 2019. The view of the Tribunal is that an email sent by the claimant on 15 July maintains his position that he never received that information.

15. The claimant must have looked at the email of 19 June to see the letter from the Regional Employment Judge, because that is the first attachment to that email. As a result, the Tribunal finds the 15 July 2019 email is misleading.

THE LAW

16. Rule 39(4) of the Employment Tribunals Rules states that if the paying party fails to pay by the date specified in the deposit order, the complaint shall be struck out. The Employment Appeals Tribunal (EAT) confirmed in **Sodexo Ltd v Gibbons (2005) IRLR 836** that a strike out is a judgment as it concludes proceedings.

17. The Tribunal can only reconsider this judgment either, on application by the claimant or, on its own initiative. It is on its own initiative that the Tribunal has reconsidered this judgment. If, as in **Gibbons**, the Tribunal finds that the judgment should be revoked, the Tribunal then has the power under its general case management powers to extend the time limit of the original deposit order.

18. In **Gibbons** it was confirmed by the EAT that the Employment Tribunal Judge who had made the decision to revoke the strike out order and extend time for payment of the deposit order, had rightly identified the question of whether confirming the strike out would be more unfair to the claimant than revoking it would be to the respondent. The EAT suggested that a Tribunal should look at factors similar to those used when considering any application to amend, following the principles established in the case of **Selkent Bus Co Ltd v Moore 1996 [ICR] 836**.

SUBMISSIONS

19. Mr Lewinski made brief submissions, the thrust of which are set out at paragraph 3 of this Judgment. Mr Lewinski also made the point that the Respondent would be prejudiced by the further delay, having already endured delay when the claim was originally struck out in 2013 and reinstated in 2018.

20. Mr Lewinski submitted that the claimant had benefited from the proper operation of the Rules when his claim was reinstated to the prejudice of the respondent, but that the Rules should also be properly operated to maintain the strike out judgment to the benefit of the respondent and the prejudice of the claimant.

21. The claimant accepted that the information had been supplied to him in the email of 19th June but he had not read the same. The claimant apologised to the Tribunal for this oversight.

CONCLUSIONS

22. The Tribunal takes the view that the delay in payment was a minor delay (two days). The original delay requiring the extension of the original time limit was not the claimant's fault – the Tribunal had sent the Order to the wrong email address. In the interest of justice, I conclude that the second delay was essentially caused by the claimant's inability to pay, and having only saved the relevant funds near the deadline, he had left it late to enquire about payment methods. It was clear that the claimant had not read all the documents that were sent to him on 19th June.

23. In making this decision the Tribunal has to conduct a balancing exercise of hardship and injustice on both sides. There is no doubt that a failure to look at all the documents was an error by the claimant and an assumption in regard to the payment methods was also an error. However, the claimant did chase the Tribunal both on 9 June and on 8 July. The deadline was not missed because of any inaction by the claimant: he is a litigant in person, he is unrepresented.

24. If the strike out Judgment is confirmed the claimant cannot pursue his case; if it is revoked the respondent faces the case it always faced. The merits of claim remain the same and the reasons that the deposit order was made, stand. For these reasons the Tribunal agrees to revoke the strike out Judgment and to vary the deposit order and allow time for the payment until 12 July 2019.

Employment Judge Ainscough

Date 12th August 2019

REASONS SENT TO THE PARTIES ON

29 August 2019

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