



EMPLOYMENT TRIBUNALS

Claimant: Aziz Ur Rahman Mohammed Miah

Respondent: Health-on-Line Company UK Limited (AXA PPP)

Heard at: Southampton **On: 12 September 2019**

Before: Employment Judge Housego

Representation

Claimant: In person

Respondent: Mr N Caiden, of Counsel, instructed by DAC Beachcroft LLP, solicitors

JUDGMENT

The claim is struck out.

REASONS

1. Mr Miah brought an Employment Tribunal claim which was issued on 10 September 2014. He applied for fees remission in respect of the initial fee of £250. On 18 August 2014 his application for fee remission was refused. He did not pay the fee. The claim was allowed to proceed without the fee, presumably by reason of Tribunal error.
2. The Respondent filed its ET3, which is dated 09 October 2014.
3. On 04 December 2014 there was a preliminary hearing at which directions were given, and a hearing date of 13–15 April 2015 was set.
4. On 22 December 2014 the Employment Tribunals Central Office wrote to the Claimant to ask him to submit a payment of £950 or a fee remission application no later than 16 March 2015. The letter gives a hyperlink for a fee remission application form.
5. On 02 February 2015 the Claimant filed a medical report dated 07 January 2015. He had not complied with other directions given.

6. The Respondent wrote to the Tribunal on 30 January 2015 concerning the Claimant's non-compliance with other directions and that letter was forwarded to the Claimant.
7. On 06 February 2015, when the Tribunal acknowledged (78) the medical report, the Claimant was asked for comments upon that letter from the Respondent.
8. The Claimant did not respond to that letter, and on 20 February 2015 the Tribunal wrote to the Claimant (79) to say that the Employment Judge was considering striking out the claim on the basis that it was no longer possible to have a fair hearing of the claim by reason of the Claimant's breach of directions. It asked that any objection be made by 27 February 2015.
9. On 25 February 2015 the Claimant sent to the Respondent a draft bundle of documents (101), but he did not write to the Tribunal.
10. In the absence of any reply from the Claimant the Employment Judge struck out the claim on 09 March 2015 for non compliance with directions. The Claimant did not appeal that decision.
11. Following the Unison judgment the Tribunal wrote to the Claimant in the mistaken belief that the claim had been struck out for non-payment of fees.
12. On 23 April 2018 the Tribunal received back the form it had sent to the Claimant, completed by him to state that the claim was closed for non-payment of fees.
13. With that form the Claimant submitted a new claim form, and it was issued with a new number. That is for administrative reasons: it is the same claim as that of 23 April 2014.
14. This hearing arises from the Respondent's objection to the reissue of the claim on the basis of *res judicata*, and because the claim was not struck out for non-payment of fees but for non compliance with directions.
15. The Claimant says that the deadline for the payment of fees was rapidly approaching. He points to the state of his bank account, which was in credit only in the sum of 4p at the time, said that he was not able to pay the initial £250 and had no prospect of being able to raise either that or the further £950 that was required in order to go to a hearing. He had kept the claim going as long as he could, but by the time the claim was struck out he says that had no prospect of being able to raise the funds and so effectively threw in the towel, ceasing to be engaged in the process, leading to the claim being struck out.
16. Therefore, he says, the requirement to pay fees was the operative factor in his decision not to comply with the directions, for there was no point as he was never going to be able to get to a hearing. He points to the end date in the fee remission letter, only a little over a month after the strike out warning, and says that his absence of reply was in effect despair at being unable to proceed. He says that he did write to ask for more time but that the Employment Judge refused.
17. The Respondent replies that there is no evidence that this was why the Claimant failed to deal with directions. More fundamentally the Respondent says that one cannot go behind the fact of the judgment striking out a claim for non-compliance with directions. The premise behind the Claimant's decision (if it was such a decision) not to comply with the directions cannot be relevant. The situation is, they say, analogous to someone who has a claim struck out on the basis of the

law as it was at the time, but then the law is changed subsequently.

18. They also point out that the Claimant did not withdraw his claim, and it was struck out for non-compliance with directions. While the Claimant says that he wrote to the Tribunal about the issue with fees he produced no such letter. The Tribunal file has been destroyed so that was not able to assist. While the Claimant says that he asked for time, that letter was not this produced, and the reply from the Tribunal dated 20 January 2015 (189) stated "*Employment Judge Reed directs that he will not grant a specific extension. The Claimant should comply as soon as he can. The Respondent will then have 14 days to state their position.*" That is clearly indicative of a request for extension of time for compliance with directions and could not be related to fees because the Respondent could have no observation to make on that topic. I agree with this submission.
19. The question of res judicata is a matter of the application of law rather than consideration of the merits. Here, the claim was struck out for non-compliance with directions. There is force in the Respondent's argument that the reason the claim was struck out is not relevant.
20. The Claimant's response is that it was fortunate for them that the claim was struck out on 09 March 2015, only some two weeks before it would have been struck out for non-payment of fee. If it had been struck out for non-payment of fees then he would have the right to have it reinstated. As this was in effect the reason why the claim was struck out he says that I should permit his new claim to proceed.
21. I decide in favour of the Respondent. A judge cannot make findings and decisions without following the law, and the Respondent's assessment of the law is correct. (It is fully set out in Counsel's skeleton argument, and I do not repeat it here. In essence where there is a judicial decision which is not appealed, in the interests of finality it cannot be reopened, in particular by re-examination of why someone did, or did not do, something.)
22. I did not need to consider whether I might have formed a different view if there was convincing evidence that at the time this was the operative factor on the Claimant's mind. Certainly that is his view now, and it has a certain inexorable logic to it. However that is with hindsight.
23. At the time, the Claimant was complying with some directions. He had sent in a medical report. He said that he was instructing solicitors (although I appreciate this might have been bluff to try to induce settlement) and he asked for time to comply with the directions (I so find). At no time did he write to the Tribunal to say that he was unable to pay the fee and so was going to withdraw the claim or allow it to be struck out.
24. I appreciate that despair at the lack of prospect of success, particularly with the Claimant's health problems at the time, might lead to inertia rather than a clear setting out of the reason for discontinuance or abandoning action on the claim, but the fact remains that there is no contemporaneous evidence that the matter of fees was the reason why there was non-compliance with the directions.
25. Further, the claim had been allowed to proceed despite non-payment of the initial £250, and so there was no reason for the Claimant to regard the date set in the letter for the payment of the fee of £950 as a cliff edge beyond which his claim would be struck out. While he had previously been refused fee remission the letter asking for the hearing fee of £950 was absolutely clear that he could submit an application for fee remission. The Claimant says that having been refused

once he did not know that he could apply again. If he had been minded to continue with the claim then he would have at least made enquiries.

26. Accordingly, if, and I make no finding that it would make any difference, it would be relevant if motivation of the Claimant for not complying with the directions was inability to comply with the requirement to pay a fee, on the balance of probabilities, he has not shown this was the motivation for his non-compliance.
27. Accordingly I find that the Tribunal does not have jurisdiction to hear this claim and it is struck out.

Employment Judge Housego

Date 12 September 2019