EMPLOYMENT TRIBUNALS

Claimant: Mr M Smith

Respondent: James Baxter & Sons Ltd

Heard at: Manchester **On:** 24 October 2019

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Ms K Durham, Advocate
Respondent: Mr S Walker, Solicitor

RECONSIDERATION JUDGMENT

On reconsideration, the Judgment sent to the parties on 30 May 2019 striking out the claim is confirmed.

REASONS

1. By a Judgment signed on 24 May 2019 and sent to the parties on 30 May 2019 I struck out the claim because it had not been actively pursued and the claimant had failed to comply with Case Management Orders. The claimant applied for reconsideration by a letter of 7 June 2019 and the application was listed for a hearing. I had the benefit of oral submissions from both parties and a written note from Ms Durham. I did not hear any evidence but the material facts were not in dispute.

Relevant Facts

2. The claim form was presented on 5 March 2019. The claimant had instructed solicitors by then and they completed the claim form for him. He complained that he had been unfairly dismissed from his role in production at the respondent's seafood processing and distribution company. The claimant had worked for the respondent in Morecambe since 1989 but production was moving to a different site in Grange-over-Sands. He also claimed a redundancy payment, notice pay and holiday pay.

3. On 15 March 2019 the Tribunal issued notice that the case would be heard on 12 August 2019. It also made Case Management Orders requiring the claimant to

serve a Schedule of Loss by 12 April 2019, to send his documents to the respondent by 26 April 2019, and for witness statements to be served by 24 May 2019.

4. The response form was presented on 11 April 2019. It defended the complaint. It denied that there had been any dismissal and said the claimant had resigned to pursue another job. It asserted that the requirement for him to start work at Grange-over-Sands was a reasonable management instruction, and that job was a suitable alternative, meaning he had lost the right to any redundancy payment. The respondent denied that the claimant was entitled to notice pay or holiday pay.

5. The claimant did not serve a Schedule of Loss by 12 April as required.

6. On 18 April Mr Walker emailed Ms Durham to remind her that it was overdue. There was no reply.

7. On 26 April the respondent's solicitors served its list of documents. It said that it looked forward to receiving the claimant's list by return. There was no reply.

8. On 29 April the respondent emailed the Tribunal to say that no Schedule of Loss had been served. The email was copied to Ms Durham. There was no reply.

9. On 8 May the respondent emailed the claimant to say that no list of documents had been received. The respondent was unable to comply with its obligation to compile the joint bundle for the final hearing. The claimant was warned that an application would be made to the Tribunal if the list was not provided. There was no reply.

10. On 13 May 2019 the respondent emailed the Tribunal to say that the list of documents had not been provided either. It applied for an "Unless Order" striking out the claim if no list was forthcoming. That email was copied to Ms Durham. There was no reply.

11. On 14 May by email a letter was issued by the Tribunal warning the claimant that I was considering striking out the claim because of failure to comply with Case Management Orders issued in March and because it had not been actively pursued. If the claimant wished to object to the proposal that should be made known by 21 May 2019. There was no reply.

12. On 22 May the respondent emailed the Tribunal to say that it had heard nothing further from the claimant.

13. On 24 May I signed the Judgment striking out the claim. That Judgment was sent to the parties on 30 May 2019.

14. The judgment prompted a reply. On 7 June 2019 the claimant's solicitors wrote to the Tribunal applying for reconsideration. The letter said that the claimant disputed the respondent's version of events, the claim was being pursued, and the Schedule of Loss had been delayed only due to a miscommunication between the claimant and his representative. The Schedule of Loss was attached to that letter. Excluding holiday pay it sought a total of just less than £18,000.

15. On 10 June the respondent objected to the application for reconsideration. The matter was listed for hearing today.

Relevant Legal Framework

16. Rule 70 provides as follows:

> **"A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any Judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."**

17. This power must also be exercised in accordance with the overriding objective in rule 2. That objective is to deal with cases fairly and justly. That includes, so far as practicable, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, so far as compatible with proper consideration of the issues, and saving expense.

18. In **Outasight VB Ltd v Brown [2015] ICR D11** the Employment Appeal Tribunal confirmed that the discretion to reconsider a Judgment must be exercised judicially:

> **"which means having regard not only to the interests of the party seeking the review or reconsideration, but only to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation."**

19. The Appeal Tribunal has considered cases in which there have been errors by a representative. In **Lindsay v Ironsides Ray and Vials [1994] ICR 384** a case was ruled out of time when the representative failed to make any submissions on the discretion to allow a late application. A review was sought on the ground that the interests of justice required it. The application was refused and the EAT upheld that decision. The failure of the representative to make submissions at the hearing did not amount to a denial to the claimant of a fair opportunity to present an argument on the point. The EAT said:

> **"Failings of a party's representatives, professional or otherwise, will not generally constitute a ground for review. That is a dangerous path to follow. It involves the risk of encouraging a disappointed applicant to seek to re-argue his case by blaming his representative for the failure of his claim. That may involve the Tribunal in inappropriate investigations into the competence of the representative who is not present at or represented at the review. If there is a justified complaint against the representative, that may be the subject of other proceedings and procedure."**

20. There have nevertheless been exceptional cases in which a reconsideration has been permitted where the representative was at fault. An example is **Newcastle-upon-Tyne City Council v Marsden [2010] ICR 743** where the claimant was wrongly advised by counsel that he did not need to attend a preliminary hearing to determine whether he was disabled under the equality legislation.

Claimant's Submission

21. In her written and oral submission Ms Durham explained in more detail why there had been a failure to comply with Case Management Orders. This was a combination of two matters. Firstly, the claimant had not provided his solicitors with documents in a legible form. He had sent copies of photographs taken on his mobile phone. There were difficulties getting proper legible documents from him and they

did not arrive until after the case had been struck out. Secondly, the failure to respond to correspondence (including the strike out warning) was attributable to pressure of work because Ms Durham had been required to cover a colleague's workload at the time. She apologised for the failure to respond.

22. More broadly she submitted that it would be in the interests of justice to allow the claimant to have his case determined at a final hearing. He believed he had been treated badly by the respondent and deserved a chance to have the case decided. The Case Management Orders which had been breached were relatively early in the case management timetable and the default had not jeopardised the final hearing in August. Striking out a claim was a draconian step which should not be taken if a fair hearing remained possible.

Respondent's Submission

23. Mr Walker said that the claimant had been given a fair chance to have his case heard, but had failed to take. He took me through the occasions on which there had been communications with the claimant's solicitor which she had not answered. He pointed out that the Schedule of Loss had been served after the case was struck out and yet no steps had been taken to provide any documents. He drew my attention to the decisions in **Lindsay** and **Marsden**, and referred to two other authorities in passing (**Flint v Eastern Electricity Board [1975] IRLR 277** and **Serco Ltd v Wells [2016] ICR 768**).

24. He submitted that this was the claimant seeking to have a second bite at the cherry. It would not be fair to the respondent or the public purse to allow these proceedings to be revived when the claimant through his representatives had simply failed to follow the case management timetable. The failings of the representative in this case did not approach the exceptional circumstances in the **Marsden** case. The claimant should have complied with the Case Management Orders as directed. Although he conceded that a fair hearing was still possible, to allow the case to be restored would effectively say that there is no reason to comply with Case Management Orders at all.

Conclusion

25. I accepted Ms Durham's explanation as to the reason for the failure to engage in correspondence with the Tribunal or the respondent in the relevant period. However, that did not seem to me to be a good reason. The respondent had acted impeccably in drawing attention to the failure to comply with Case Management Orders, and in communicating with the claimant prior to making applications to the Tribunal. All that correspondence had been copied to the claimant's solicitor but no reply had been forthcoming. Even in the absence of legible copies of documents form the claimant, the solicitors should have responded, if only to seek an extension of time.

26. The failure to engage was particularly concerning when the Employment Tribunal strike out warning was sent by email on 14 May 2019. The letter clearly gave the date of 21 May 2019 to object to the claim being struck out. No objection was made.

27. I accepted that the effect of the decision to strike out the claim was that the claimant was deprived a hearing of his complaint against the respondent, but that

seemed to me to be a consequence of the failure of his representatives to pursue the case on his behalf. There was no unusual circumstance such as serious illness or post going astray which could explain the failure to pursue the case and comply with Case Management Orders. There was no good reason for the failure of the claimant's solicitor to notify the Tribunal and the respondent that there were difficulties getting legible documents from the claimant and to seek an extension to the case management timetable. That would readily have been granted as long as the final hearing date was not jeopardised.

28. Similarly, if I had been told by 21 May what was told to me in the hearing today I would not have struck out the claim. A fair hearing would have remained possible at that point.

29. However, the position once a Judgment has been promulgated is that the litigation is at an end, and in my judgment the claimant has failed to establish that the interests of justice require the Judgment to be revoked and the claim reinstated. To do so would be to deny procedural justice to the respondent, and would put the respondent to significant extra expense in dealing with a final hearing. It would also require the public purse to allocate further time to this case when the claimant has had every chance to pursue it and has failed to do so. The interests of the respondent and of the public have to be taken into account as well as the interests of the claimant.

30. In the absence of any good explanation for the failure to engage with the case, including the regrettable failure to reply to the strike out warning, I decided that the original Judgment should be confirmed.

Employment Judge Franey

24 October 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 November 2019

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