



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs B P Fenton

v

Dukes Aldridge Academy

Heard at: Cambridge

On: 24 October 2019

Before: Employment Judge Johnson

Appearances

For the Claimant: Mr Lewis, Counsel

For the Respondent: Did not attend and was not represented

RECONSIDERATION JUDGMENT

1. The Judgment issued on 5 August 2019 striking out the Claimant's claims is revoked.
2. Following the withdrawal of the complaint of Race Discrimination by the Claimant, the only complaints which will now proceed in this matter relate to Unfair Dismissal, Breach of Contract as to notice, Unpaid Wages and Holiday Pay.

REASONS

1. On 14 November 2018, the Tribunal held a Preliminary Hearing Case Management to consider the relevant issues in this case. It was heard by Employment Judge Foxwell, there was no appearance for the Claimant and the Respondent was represented by Mr Tindall, their Solicitor. There was no reason given why the Claimant was unable to attend the hearing and Employment Judge Foxwell made case management Orders with the case listed for hearing for three days on 22 – 24 July 2019 at the Cambridge County Court.
2. This Order was sent to the parties by email on 29 November 2018. On the same day a Strike Out Warning letter in accordance with Rule 37 was sent by email to the Claimant, where Employment Judge Foxwell advised her that he was considering striking out her claim because it had not been

actively pursued. This would have been issued due to the Claimant's non-attendance without good reason at the Case Management Hearing.

3. On 4 December 2018, the Claimant's instructed Counsel, Mr Lewis, notified the Tribunal by email that he was now representing her in these proceedings. The Claimant's previous instructed Solicitors had come off the record and understood that the Claimant was dissatisfied with the service she had received from them. Mr Lewis did not have any papers and requested that the Tribunal provide a copy of the Case Management Order and details of the next Tribunal Hearing date so that he could properly advise his client.
4. It is noted that the Employment Tribunal sent an email on 13 January 2019 to Mrs Fenton enclosing a copy of the Case Management Order of 14 November 2019. The email did not make any mention of a copy of the Rule 37 Strike Out Warning of the same date being included as an attachment.
5. On 23 January 2019, Mr Lewis wrote to the Respondent Academy informing them that he now had a copy of the Case Management Order dated 14 November 2018 and had taken account of the Case Management Orders given. He explained that he had an opportunity to discuss this matter with the Claimant and he was now informing them that he was withdrawing the Race Discrimination claim from these proceedings. He also provided with that letter, copies of a schedule of loss and a disclosure index. He requested a copy of the disclosure list from the Respondent's Solicitor.
6. He also advised the Respondent that the Claimant's start date in the ET1 claim form was incorrect and he was asking the Tribunal to amend this accordingly. His letter concluded with reference to an attached copy of the letter which he had sent to the Tribunal which presumably dealt with the issues raised in the letter sent to the Respondent Academy. Unfortunately, a copy of this letter was not available at the Reconsideration Hearing, but it is assumed that it would have been prepared.
7. Mr Lewis informed me at the Reconsideration Hearing that the Tribunal had not provided a copy of the Strike Out Warning letter of 28 November 2018 and had only sent him a copy of the Case Management Order.
8. The Claimant, in her witness statement, which she had provided in advance of this Hearing on 23 October 2019, confirmed that she did not receive a copy of the Strike Out Warning letter either. This would suggest that neither the Claimant nor her instructed Counsel were aware that the Tribunal was considering striking out the claim due to it not being actively pursued. It would also explain why Mr Lewis did not specifically respond to the Warning, while responding to matters raised in the Case Management Order, upon being instructed in this matter or following his receipt of the email from the Tribunal on 13 January 2019.

9. I did not see any evidence of correspondence from the Respondent's Solicitor enclosing copies of these documents to Mr Lewis. As the Respondent or a representative was not present at the hearing, I was unable to make enquiries with them. However, the Respondent appeared from the available information to have only alerted Mr Lewis to the possibility of the case being struck out by email on 21 May 2019. This email simply told him that the claim had been struck out, even though this was not the case at this time. Understandably, Mr Lewis was concerned about this suggestion and contacted the Tribunal the same day and was able to inform the Respondent's Solicitor on 21 May 2019 that the case remained listed for 22 – 24 July 2019.
10. The Tribunal did send a further letter to Mr Lewis on 11 July 2019 following his email being sent to them of 30 May 2019, which referred to the Application of 23 January 2019. While it is clear that the Tribunal had not received a copy of this Application and sought a copy of it from Mr Lewis, it did not make any mention of the letter of 29 November 2018 which gave the Rule 37 Strike Out Warning and on this basis, it would appear that Mr Lewis remained unaware that the Tribunal might still consider striking out this claim.
11. As a consequence, Mr Tyndall, who is the Solicitor for the Respondent, made an Application on 3 July 2019 asking that the Tribunal strike out the Claimant's claim due to it not being actively pursued. In this email he referred to the Order of Employment Judge Foxwell dated 29 November 2018 which gave the Strike Out Warning. Mr Lewis was copied into this email but no attachment of the Strike Out Warning letter was included. The letter of the Tribunal informing the Claimant that the Application of 23 January 2019 was also considered by the Tribunal and resulted in Judgment being given on 24 July 2019 by Employment Judge Ord striking out the Claimant's claim. This was sent to the parties on 5 August 2019.
12. Immediately upon receipt of this Judgment, Mr Lewis responded by email seeking a review of the Order and for directions to be given. A further email was sent on 20 August 2019 making an Application to set aside Judgment.
13. I am satisfied that Mr Lewis effectively made an Application for the Judgment to be reconsidered on 5 August 2019 and indeed on 17 September 2019, directions were given by Employment Judge Ord that the matter be listed for a Reconsideration Hearing.
14. In considering this case, I am aware that the Claimant has been represented for the majority of these proceedings. Although she might be unhappy with her previous instructed Solicitors, their involvement is not relevant for the consideration of this Application as it relates to Judgment which was entered on 5 August 2019 following an earlier Strike Out Warning being given on 29 November 2018. At this point, it would appear that the Claimant was unrepresented but shortly afterwards on

4 December 2018, Mr Lewis gave notice of his representation of the Claimant.

15. There does appear to have been a great deal of confusion in this case and to some extent this has been due to the Claimant not receiving a copy of the original Strike Out Warning and Mr Lewis only having been sent a copy of the original Case Management Order of 14 November 2018 without the accompanying Strike Out Warning.
16. It is understandable that he was unable to appreciate that the Claimant was expected to provide the information required by the Strike Out Warning and at no stage does a further copy appear to have been sent to either Mr Lewis or the Claimant. I am satisfied, however, having read the papers in this case, that Mr Lewis has been involved throughout these proceedings following his instruction on 4 December 2018 and indeed, in January 2019 went so far as to obtain the Claimant's instructions to withdraw the Race Discrimination claim and to comply with the directions given by Employment Judge Foxwell in relation to a Schedule of Loss and Disclosure. His letter of 23 January 2019 dealing with these matters was sent to the Respondent's address and not their instructed Solicitors. However, at the point that this letter was sent, Mr Lewis only had information that the Respondent was unrepresented. It is therefore reasonable to assume that once these documents had been received by the Academy, they would have forwarded them onto their instructing Solicitors. Unfortunately, this does not appear to be the case. That is not the fault of Mr Lewis or his client.
17. The Respondents have chosen not to attend the Hearing today and I have been unable to hear representations from them. Their instructing Solicitors did send an email to the Tribunal on 18 October 2019, explaining that they did not believe it was necessary for them to attend this hearing today. They are not criticised for failing to attend, but as a consequence it has not been possible to obtain any further information from them concerning their involvement in these proceedings and the extent to which correspondence has been received, or not been received, by them.
18. However, I am satisfied that they have been aware of Mr Lewis' involvement in these proceedings for some time and his confusion concerning the question of whether or not the case has been struck out. I do find that the Respondent's email of 21 May 2019 to Mr Lewis added additional confusion in this matter in that they sought to argue that the Claimant's claim had been struck out, even though at this stage it quite clearly had not been struck out.
19. In revoking the Judgment of the 5 August 2019, I am aware that the Claimant wishes to withdraw the complaint of Race Discrimination. This is noted and accordingly the only complaints which will now proceed in this matter relate to Unfair Dismissal, Breach of Contract as to notice, Unpaid Wages and Holiday Pay.

20. It is also noted that the Claimant's start date with the Respondent is incorrectly stated in paragraph 5 of the ET1 claim form as 31 August 2002. The Claimant wishes to amend this date to 31 August 2000 and the Tribunal notes that this is the case.

21. Although the Respondent's representative is not present at the hearing today, I am content that this case can now be listed for a hearing to deal with the remaining issues in this case and listing has therefore been made for 20 and 21 July 2020 at The Cambridge Employment Tribunals.

Employment Judge Johnson

Date: 7 November 2019

Sent to the parties on:

.....
For the Tribunal Office