EMPLOYMENT TRIBUNALS

Claimant: Mr A Ziolo

Respondent: E H Booth & Co Ltd

Heard at: Manchester **On:** 13 November 2019

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Miss L Kaye, Counsel

RECONSIDERATION JUDGMENT

Upon reconsideration, the judgment of the Tribunal is as follows:

1. The Judgment sent to the parties on 11 March 2019 striking out the claim is confirmed.

2. The Reconsideration Judgment sent to the parties on 6 June 2019 rejecting an application for reconsideration of the earlier Judgment is also confirmed.

3. The Costs Judgment sent to the parties on 18 July 2019 is revoked and in its place a wasted costs order is made as set out in the next paragraph.

4. Under rule 80(1)(a) the claimant's representative, Merseyside Employment Law, is ordered to pay to the respondent the sum of £1,200.00 in respect of the costs wasted by the respondent in preparing for and attending the reconsideration hearing on 24 May 2019.

REASONS

Introduction

1. This was a reconsideration hearing convened to consider the claimant's application of 2 August 2019 for reconsideration of the earlier Judgments in his case. The claimant confirmed at the outset of the hearing that he wished all the earlier Judgments to be reconsidered.

2. I heard oral evidence from the claimant and I had the benefit of submissions from the claimant and Miss Kaye. The documents to which I had access were solely those retained on the Tribunal file.

3. The claimant's representatives, Merseyside Employment Law ("MEL") were notified of this hearing at the same time as the claimant and the respondent. The tribunal's letter of 30 September 2019 was sent by email to the parties and to MEL, and the letter made clear that if the Costs Judgment were revoked I would consider making a wasted costs order instead against MEL.

4. Despite that notification, MEL did not make any written representations prior to this hearing and nor did anyone from MEL attend.

5. At the outset of the hearing I explained to the claimant that his dealings with MEL were protected by privilege, but that if he chose he could waive that privilege and tell the Tribunal about his dealings with them. He confirmed that he wanted to waive privilege and explain the dealings he had with MEL.

6. I will summarise the law applicable to applications for reconsideration, then set out the procedural history of this case, record the factual findings I made as a consequence of the evidence heard during this hearing, and then explain the reasons for my decision recorded in this judgment.

Legal Principles

7. The test for reconsideration of a Judgment is the interests of justice (rule 70). On reconsideration, the original decision may be confirmed, varied or revoked.

8. The power to reconsider earlier Judgments must be exercised in the light of the overriding objective in rule 2, which is to deal with a case fairly and justly.

9. That objective includes, so far as practicable, avoiding delay, so far as compatible with proper consideration of the issues, and ensuring that the parties are on an equal footing.

10. The importance of finality in litigation was confirmed by the Court of Appeal in **Ministry of Justice v Burton [2016] EWCA Civ 714**. The discretion to act in the interests of justice is not open-ended. The importance of finality in litigation militates against the discretion being exercised too readily.

Procedural History

Claim and Response

11. The claim form was presented on 16 April 2018. It brought complaints of unfair dismissal and disability discrimination arising out of the dismissal of the claimant from his post as a Warehouse Operator in November 2017. The claim form identified MEL as the claimant's representative and MEL remained on the record as his representative throughout these proceedings.

12. By its response form of 25 May 2018 the respondent defended the claim. It did not admit that the claimant was a disabled person but in any event denied any unlawful discrimination. It said that it was a fair dismissal due to sickness absence.

Preliminary Hearing 23 August 2018

13. I conducted a case management preliminary hearing by telephone on 23 August 2018. A solicitor from MEL, Ms Durham, represented the claimant. I made Case Management Orders and listed the case for a four day final hearing between 11 and 14 June 2019. The case preparation timetable and hearing dates were confirmed as part of the written Case Management Order sent to the parties on 30 August 2018.

Compliance with Case Management Orders

14. The first two steps required of the claimant were to provide a Schedule of Loss and some further particulars of his claim. They were required by 14 September 2018. On behalf of the claimant MEL provided them by email of 18 September 2018.

15. The respondent provided an amended response on 12 October 2018 in compliance with the case management timetable.

16. There were further Case Management Orders with which the claimant did not comply. They included provision of a disability witness statement and medical information by 28 September 2018, the provision of a list of documents by 2 November 2018, and the provision of witness statements by 25 January 2019.

Application to Strike Out the Claim

17. On 25 January 2019 the respondent wrote to the Tribunal seeking an order striking out the claim because of these failures. The application enclosed an email of 15 January 2019 to Ms Durham drawing attention to the default. There had been no reply.

18. On 6 February 2019 a letter was issued to MEL warning them that I was considering striking out the claim. Any objection, or a request for a hearing to make objection, was due by 13 February 2019.

19. No response was received, and on 22 February 2019 I signed a Judgment striking out the claim because of a failure to comply with Case Management Orders and/or because it had not been actively pursued. That Judgment was sent to the parties in writing on 11 March 2019. The final hearing in June 2019 was cancelled.

Reconsideration Application by MEL

20. MEL applied for reconsideration of that Judgment by email of 26 March 2019. The email said:

> **"The claim is being pursued and was only not updated due to an IT failure and an administrative error. We confirm that we can return the claim to the process without any disadvantage to the respondent or their legal representatives."**

21. On 9 April 2019 the respondent's solicitor, Mr Fox, provided comments objecting to the application for reconsideration. The parties were notified by letter of 7 May 2019 that the application would he heard on 24 May 2019.

22. There was no attendance by or on behalf of the claimant on 24 May. The respondent was represented by counsel. I dismissed the application for reconsideration. That was confirmed in a written Judgment sent to the parties on 6 June 2019.

Costs

23. That written Judgment also acknowledged that the respondent could make an application for costs within 28 days of the date the Judgment was sent to the parties in accordance with rule 77.

24. The respondent made a costs application on 12 June 2019. The application was copied to MEL. No objection was received on behalf of the claimant.

25. The Reconsideration Judgment sent to the parties on 6 June 2019 made it clear that I would determine the costs application on the papers without a hearing unless either party requested one. No-one did so, and on 3 July 2019 I signed a Judgment ordering the claimant to pay the sum of £1,200 in respect of the costs that the respondent incurred while legally represented in preparing for and attending the reconsideration hearing on 24 May 2019.

26. That Costs Judgment with Written Reasons was sent to the parties on 18 July 2019.

Contact from the Claimant

27. Between my signing the Costs Judgment and it being sent out, the claimant had emailed the Tribunal on 9 July 2019. His email was not copied to the respondent. In its entirety it said:

> **"Hello,**
>
> **Please can you send me copies of any documents regarding that case. I am a claimant and my representative is Mrs Kathy Durham. Unfortunately since 2018 she didn't [pass] to me any information regarding my case. Communication with her was always difficult because she never [had] time for me when I try to reach her. Only on 10 June 2019 I got email from Annie Tyson that Mrs Durham missed deadline and my case [has] been [struck out].**
>
> **Many thanks"**

28. Because of that email the Costs Judgment was sent not simply to MEL but direct to the claimant by email as well. He was also provided with copies of the earlier Case Management Order and Judgments.

29. On 1 August 2019 the claimant emailed the Tribunal seeking reconsideration. He reiterated that he had not had any information from MEL about the case since 2018. He said he had found out about the case being struck out only a few days before the hearing due to start on 11 June 2019. He said he had not heard about the application for a costs order and had had no chance to respond to it.

30. That application for reconsideration was listed for hearing today. The claimant confirmed that he intended it to apply to all the Judgments in his case.

Additional Findings of Fact

31. Having heard oral evidence from the claimant in response to questions from the Tribunal and from Miss Kaye, I found the relevant facts not apparent from the Tribunal file to be as follows.

32. The claimant instructed MEL prior to his claim form being presented. He had to fill in legal aid forms. He was told that they would deal with all the preparation of the case for him, but he would have to represent himself at the final hearing.

33. The claimant was not present with Ms Durham during the telephone case management hearing on 23 August 2018, but he was sent by email the timetable and the dates for the final hearing in June 2019.

34. After that his contact with MEL was very limited. He signed a form of authority for release of medical records. He was not given any draft disability witness statement or draft statement about the whole case. He did try to contact them on some occasions by telephone but was not able to speak to Ms Durham. He was told she was very busy and could not talk. He trusted MEL to deal with his case and felt that they would contact him if there was something important. He had no contact from MEL informing him of progress in the case in 2019.

35. Conscious that he would be representing himself, a few days before the final hearing he contacted MEL and was told by Annie Tyson that a deadline had been missed, his case struck out and the hearing would not be going ahead. They told him they were sorry but said that the case was now over. The strike out was confirmed to him by email of 10 June 2019 (which I have not seen). Understandably this came as a shock to him.

36. The claimant tried to find a solicitor to advise him about what to do next but could not afford the cost of advice. He had not been told by MEL that he could do anything about his case. He decided to email the Tribunal to ask for copies of documents and that resulted in his email of 9 July 2019. He then received copies of the Judgments from the Tribunal, and applied for reconsideration on 1 August 2019.

Conclusions

37. I first considered the Judgments relating to the striking out of the claim, and then the question of costs.

Strike out Judgments

38. Miss Kaye argued that the application for reconsideration should be rejected in relation to these Judgments. She said that the application made by the claimant on 1 August was well outside the 14 day time limit for both Judgments. Even if time were extended, it would not be in the interests of justice to reopen the case. To do so would go against the principle of finality. Reopening the case would put the proceedings back to where they had been in August 2018, and a four day hearing would be well into 2020. It could be almost three years between the dismissal and the final hearing. That delay would have an adverse impact on the recollection of witnesses. Instead the proper course of action was to confirm those Judgments, and for the claimant then to seek compensation from MEL for having lost the chance to pursue his claim because their negligence had meant that the case was struck out.

39. Having heard what Miss Kaye said, the claimant did not seek to persuade me that the Judgments should be revoked and the case proceed in the Employment Tribunal. Pragmatically he accepted that it would be very difficult to have a fair hearing given the passage of time.

40. Having heard from both sides, I decided to extend time to allow this reconsideration application to be considered on its merits. There had been a serious default on the part of the claimant's representative and he had not known about the Judgments that he now seeks to have reconsidered. He had been entitled to trust MEL to deal with the case for him and to keep him properly informed.

41. However, it was not in the interests of justice to revoke either of those Judgments. It was over six months since the case had been struck out. If it were reinstated a final hearing would be in the second half of 2020, almost three years since dismissal. That would have a significant adverse effect on the ability of witnesses to remember the relevant events. This was not a case where witness evidence had been secured at an earlier stage because the failure by MEL to comply with Case Management Orders had begun with the requirement to complete disclosure.

42. Accordingly I confirmed the Judgment striking out the claim from March 2019 and the Judgment on reconsideration from June 2019.

43. It is for the claimant to take up with MEL a claim for compensation resulting from any negligent failure to pursue his claim properly. That is not a matter in which the Employment Tribunal will be involved.

Costs Judgment

44. Miss Kaye suggested that the claimant could have pursued MEL during the proceedings to find out what was happening with his case. He ought to have realised they had not been in touch, for example, with a draft disability witness statement.

45. However, if I were minded to revoke the Costs Judgment in favour of the claimant she sought a wasted costs order against MEL.

46. The claimant also submitted that he should not have to pay any of these costs.

47. I was satisfied that it was in the interests of justice to revoke the costs order against the claimant. Responsibility for the costs wasted by the respondent in preparing for and attending the reconsideration hearing on 24 May 2019 lay with MEL, not the claimant alone. Taking into account his limited knowledge of legal proceedings and the fact he had instructed specialist employment law advisers, it was reasonable to trust MEL to do their job. He had tried to contact MEL during late 2018 but without success. The claimant himself had not behaved unreasonably. He should not have to pay that costs award.

Wasted Costs Order

48. I then considered whether to make a wasted costs order against MEL. I referred to rules 80-84.

49. I was satisfied that MEL had been given a reasonable opportunity to make representations at this hearing in response to the proposal that there could be a wasted costs order. No representations had been made.

50. I considered whether a costs order was prohibited by rule 80(2). That sub rule says:

> **"'Representative' means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit."**

51. I had no information about the basis upon which MEL acted for the claimant other than that MEL would be paid by the Legal Aid Board. That suggested a paid service rather than a free service. On that basis I concluded that MEL fell within the definition of "representative" in rule 80(2).

52. Having considered those rules, I applied the guidance contained in the Judgment of the Court of Appeal in **Ridehalgh v Horsefield [1994] 3 All ER 848**. That recommends that a three stage test be applied.

53. The first test was whether the legal representative acted unreasonably or negligently. I was satisfied that was the case and therefore that there were grounds for a wasted costs order under rule 80(1)(a). The failure of MEL to make any written submissions in support of the reconsideration application, or to attend the hearing on 24 May 2019 to do so, was unreasonable and/or negligent. There should have been some representations made in support of the reconsideration application since without them the application was doomed to fail.

54. Secondly, that conduct had caused the respondent to incur unnecessary cost. The hearing was effectively pointless yet the respondent reasonably incurred legal costs in preparing for it and attending.

55. Thirdly, in all the circumstances of this case it was just to order MEL to compensate the respondent for those costs. On my findings of fact in this hearing, and in the absence of any representations by MEL to the contrary, I was satisfied that the costs wasted were entirely the responsibility of MEL, not the claimant personally.

56. I therefore ordered MEL to pay the sum of £1,200.00 by way of a wasted costs order to the respondent.

57. It is open to MEL to seek reconsideration of this judgment if it considers that it was not acting in pursuit of profit. Any such application would have to explain why no representations were made for this hearing and why it would be in the interests of justice to vary or revoke this judgment.

Employment Judge Franey

13 November 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
2 December 2019

FOR THE TRIBUNAL OFFICE