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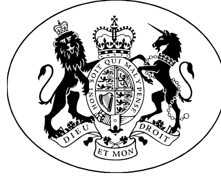

EMPLOYMENT TRIBUNALS

Claimant	Mr J Spires		
Respondent:	Anchor Hanover Group		
Heard at:	Cambridge	**On:**	9 January 2020
Before:	Employment Judge Johnson		

Appearances
For the Claimant: Mr Varnam, Counsel
For the Respondent: Mr Dennis, Counsel

JUDGMENT on RECONSIDERATION

1. Upon hearing the Respondent's application dated 2 September 2019 for reconsideration of the Judgment of Employment Judge Johnson dated 18 September 2019, the decision of the Tribunal is that the application is allowed and the judgment is therefore revoked.

2. The Respondent is permitted to rely upon its response presented to the Tribunal on 21 February 2019

3. The case will be listed for a Full Merits Hearing of liability on 11 and 12 August 2020 at the Cambridge Employment Tribunal.

4. As it is understood that the case is ready for hearing, no further Case Management Orders will be made at this stage unless requested by the parties.

5. The Claimant's application for the Respondent to pay the costs occasioned by the application will be reserved to the Remedy Hearing.

REASONS

Background

1. The Claimant was employed by the Respondent from 29 July 2015 as a Team Leader until his dismissal for gross misconduct on 3 December 2018. The Claimant presented a claim with the Employment Tribunal on 7 January 2019 following a period of Early Conciliation from 7 December 2018 until 7 January 2019. The Claimant brought complaints of unfair dismissal, wrongful dismissal and unpaid payments in respect of annual leave entitlement.

2. A response was presented by the Respondent on 21 February 2019 resisting the claim.

3. The Respondent argues that the Claimant was dismissed for the potentially fair reason of gross misconduct. Additionally, they say that he was not wrongfully dismissed and that any outstanding contractual payments relating to unpaid holiday pay have since been paid.

4. The Tribunal's 'ET2-UDL Plus' letter dated 25 January 2019 gave notice of a hearing on 3 September 2019 at 10:00am. Case Management Orders made within the letter included an Order that witness evidence should be exchanged by no later than 5 April 2019.

5. The Employment Tribunal received an application from the Claimant's Solicitor on 18 July 2019 seeking an Unless Order requiring witness statements be exchanged within 7 days of the Tribunal making the Order. The Claimant explained that the reason for this application was that witness statements were due to be exchanged on 5 May 2019 and upon the Respondent's request an extension was agreed between the parties until 14 June 2019. The Claimant's Solicitors had advised that despite further emails having been sent during July, they were unable to obtain a response from the Respondent's Solicitor. As a consequence, they were concerned that the case would not be ready for hearing in early September 2019 as listed.

6. The matter was considered by Employment Judge Ord on 18 August 2019 who warned the Respondent that the Tribunal was considering striking out the response because the Respondent had not complied with the Order of the Tribunal dated 25 January 2019 and that the case had not been actively pursued.

7. The Tribunal's regional office in Watford did not receive any reply from the Respondent within the timescale allowed by the strike out warning. The case was referred to me and the Tribunal's letter of 31 August 2019 informed the parties that I had Ordered that the response be struck out due to non-compliance with the Employment Tribunal's Order and its

subsequent strike out warning. The parties were informed that a Strike Out Judgment would be issued shortly thereafter.

8. The Judgment striking out the response was made on 18 September 2019. It confirmed that the reason for this decision was that the Respondent had not complied with the Order of the Tribunal dated 25 January 2019 and that the case had not been actively pursued.

9. On 2 September 2019, the Respondent's solicitor sent an email to the Employment Tribunal warning that they intended to apply for reconsideration of the strike out judgment once received. On 15 October 2019, the Respondent provided the Tribunal with an application for reconsideration and supporting documentation.

The Application for Reconsideration

10. The Respondent's application was based upon reconsideration being in the interests of justice for the following reasons:

    10.1 The Respondent did not have a proper opportunity to make representations before the Judgment was made; and

    10.2 That the Judgment should never have been made, applying the correct legal principles.

Documents and Evidence Available at the Hearing

11. The Respondent had prepared a hearing bundle providing details of the Tribunal documents, correspondence between the parties and the Tribunal and also copies of email correspondence between the parties. A signed witness statement was provided by the Claimant's solicitor Ms Crombie and the Respondent provided witness statements from Ms Adele Dethick and Amanda Gonsalves who had worked within their in house legal team. Ms Dethick whom I understood to have been engaged by the Respondent as a locum, had provided an unsigned statement.

12. Mr Dennis, Counsel for the Respondent, confirmed that he did not intend to cross examine Ms Crombie.

13. Mr Varnam, Counsel for the Claimant, confirmed that he would have liked to cross examine Ms Dethick, who unfortunately was not present at the hearing. It is understood she was currently absent from work as she was on sick leave. The Statement from Ms Gonsalves confirmed attempts which had been made to obtain a copy of a signed statement from Ms Dethick but unfortunately these had been unsuccessful. Under these circumstances, I informed the parties that I would be unable to place much weight upon Ms Dethick's evidence given her non-attendance and the absence of a witness statement containing a signed statement of truth.

14. The issues regarding the witness statements did not ultimately cause me significant difficulties in reconsidering this matter as the bundle of documents contained sufficient correspondence between the parties to enable me to understand the issues to be considered. As the correspondence was between the parties' representatives, the hearing witness evidence relating to events taking place at the relevant time was less important than I originally anticipated.

15. Both Mr Dennis and Mr Varnam produced skeleton arguments for use at the hearing and supplemented these with additional oral submissions. I am grateful to both Counsel for their assistance in this case and for the quality of the documents that they have provided.

Caselaw referred to in the Application.

16. For the Respondent, Mr Dennis primarily relied upon the cases of *Rolls Royce Plc v Riddle [2008] IRLR 873* and *Baber v Royal Bank of Scotland Plc UKEAT/0301/15*.

17. In Rolls Royce, Lady Smith considered the test to apply under the old *Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004* when a Tribunal decides whether to strike out a claim due to it not being 'actively pursued' contrary to Rule 18(7). She reminded the parties that in exercising its discretion, a Tribunal must *'take account of the whole facts and circumstances including the fact that strike out is the most serious of sanctions'*. She goes on to refer to the *Birkett principles* originally determined in *Birkett v James* [1977] 3 WLR 38 and which were applied in the tribunal jurisdiction in the case of *Executors of Evans v Metropolitan Police Authority* [1992] IRLR 570. They say that *'a failure to pursue a claim will fall into one of two categories. The first of these is where there has been 'intentional and contumelious' default by the claimant and the second is where there has been inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be a serious prejudice to the respondent',* (see para. 19 of Rolls Royce).

18. While this case related to a claim, these principles would apply to a response under the new 2013 Rules.

19. In *Baber,* Simler J confirmed that Tribunals; *'must have regard to the overriding objective of seeking to deal with cases fairly and justly. That is the guiding principle and requires consideration of all the circumstances and, in particular, the following factors: the magnitude of the non-compliance; whether the failure was the responsibility of the party or his or her representative; the extent to which the failure causes unfairness, disruption or prejudice, whether a fair hearing is still possible; and whether striking out or some lesser remedy would be an appropriate response to the disobedience in question' (para. 12).*

20. Simler J goes on to say that *'Rule 37(2) is an important procedural safeguard…because a strike out has such serious consequences, it is essential that the Tribunal assures itself that the affected party is aware of the opposing party's application and has in fact had a reasonable opportunity to make representations. Tribunals should not act hastily and it should be clear to a Tribunal that proceeds to address a strike out application, that the affected party is aware of it and has had the requisite opportunity to respond' (para. 49).*

21. For the Claimant, Mr Varnam referred to the case of *Blockbuster Entertainment Ltd v James [2006] IRLR 630.* Like *Rolls Royce,* this case considered strike out in relation to the 2004 Rules.

22. Mr Varnam asserted that Sedley LJ in Blockbuster set out that the 'cardinal conditions' for the Tribunal to exercise its discretion to strike out are either that a fair trial is no longer possible, or that there has been a deliberate and persistent disregard of required procedural steps. He argued that the latter of these conditions was 'plainly made out'.

23. However, Sedley LJ in *Blockbuster* also made clear that the '*power… [to strike out a claim]… is a draconian power, not to be readily exercised,* (para. 5).

Discussion and findings in relation to the Application

24. I do not propose to provide a lengthy description of the events which led to the application being made for an Unless Order and the discussions between the parties concerning the exchange of witness evidence. Instead, I will focus upon the key issues relating to this application.

The Respondent did not have a reasonable opportunity to make representations before the Judgment was made contrary to Rule 37(2)

25. The Respondent has an in-house legal team and at the time the response was presented, its Employment Lawyer Gemma Crayford was representing the Respondent in this case. On 27 February 2019, Ms Crayford provided an email to the Watford Tribunal which requested that the hearing be postponed and relisted for two days and also that there be a variation to case management orders. However, what is relevant to this application is that the final paragraph of this email informed the Tribunal that:

> *"please note, I am going on maternity leave on 1 March 2019 and so I should be grateful if any response can be sent to Lorraine Donoghue at 'Lorraine.donoghue@anchorhanover.org.uk'."*

26. Unfortunately, the Tribunal continued to forward emails to Ms Crayford and this continued until Judgment was entered on 31 August 2019. As a consequence, the Respondent did not appear to open the email of the

Tribunal dated 18 August 2019 enclosing the Strike Out Warning ordered by Employment Judge Ord when it was sent to the parties. This meant that when the matter was considered by myself later that month, it appeared that the Respondent had not complied with the Order of the Tribunal dated 25 January 2019 insofar as it concerned witness evidence being exchanged, or that it had been actively pursuing this matter.

27. Once the Tribunal letter was sent to the parties on 31 August 2019, it is noted that Adele Dethick who was the Employment Lawyer covering for Ms Crayford during her absence, responded on 2 September 2019 advising that she will be applying for reconsideration of the Strike Out Judgment.

28. I did hear submissions from Mr Varnam which sought to argue that the footnote to the email sent by Ms Crayford on 27 February 2018 did not constitute a valid change of representative in accordance with Rule 86(1)(d) and (2) of the Employment Tribunal Rules of Procedure 2013. While I acknowledge the point which he made concerning the application of the rules, I feel it is important to take into account the overriding objective in relation to this particular matter. I have considered the information provided by Ms Crayford in the email of 27 February 2019 and am of the opinion that the effect of this paragraph is to inform the Tribunal staff that she would not be available to attend to this case from the date indicated and for the foreseeable future. It is usually the case that an employed woman who is about to commence a period of maternity leave, will be away from work for many months. The footnote to the email clearly identifies maternity leave as being the reason for her absence from 1 March 2019. Any reasonable reading of this email would leave the reader with the view that the alternative email address provided should be the relevant point of contact in this case until further notice.

29. It is correct that the Respondent did not appear to be monitoring Ms Crayford's email account on a regular basis and as Mr Varnam suggested, it did not remind the Tribunal that it should not be sending any emails to this particular account. However, I do think that it was reasonable for the Respondent to assume that once the email on 27 February 2019 had been sent, further emails from the Tribunal would be sent to Ms Donoghue whom Ms Crayford had nominated. If this had happened, it was likely that Ms Dethick would have become aware of the Tribunal's letter of 18 August 2019 would have been received by her. It is unfortunate however, that she or those engaging her, were not more proactive in notifying the Tribunal of the change of representation as soon as she became involved in this case.

30. Ms Dethick was quick to respond to the letter of the Tribunal dated 31 August 2019 advising that the Respondent's case had been struck out and in her email of 2 September 2019 indicates that she would have responded to Employment Judge Ord's letter had it been sent to her email address.

31. For that reason, I am of the view that the Respondent did not have a reasonable opportunity to make representations before the Judgment was made contrary to Rule 37(2). This is in accordance with my duty to comply with the Overriding objective in Rule 2 and to deal with this case fairly and justly in a way which is proportionate to the issues to be considered. I have considered the balance of prejudice to the parties and while it is unfortunate that a postponement of the original hearing was necessary, I am not satisfied that a fair hearing is no longer possible.

32. On this basis it is reasonable for my Judgment to be revoked and for the Respondent's response to be reinstated.

<u>The Judgment should never have been made in light of what actually occurred</u>

33. Taking into account my decision concerning the first part of the Respondent's application, it might appear unnecessary for me to spend much time dealing with this particular issue. However, it is relevant in that the Claimant's solicitors have made an application for costs.

34. The Judgment was appropriate at the time it was made based upon the Tribunal's knowledge at that time. There was an absence of correspondence from the Respondent's representatives and even allowing for the Tribunal's failure to record the change of representative's contact details, there was little evidence of the Respondent engaging with the Claimant in ensuring that the case was ready for the hearing on 3 September 2019.

35. It is clear from the correspondence in the bundle that Ms Crombie for the Claimant, had been making numerous attempts to contact Ms Dethick for the Respondent to enter into an exchange of witness statements. The original date set by the Tribunal had been formally extended by the parties without the involvement of the Tribunal and Ms Crombie was understandably anxious that the hearing in early September might be prejudiced.

36. Ms Dethick failed to respond to several emails sent by the Claimant. Indeed, she did not respond to an email that was sent in May until July 2019. Furthermore, once the Respondent did get in touch with the Claimant, it failed to properly engage with outstanding need to exchange witness evidence. This was why the application was made by Ms Crombie to the Tribunal for an Unless Order.

37. Ms Crombie felt it necessary to force an exchange of witness evidence and on 2 August 2019 sent an email to the Respondent enclosing a password protected witness statement on behalf of the Claimant. She explained in this email that the password would be provided upon receipt of the Respondent's witness evidence. Unfortunately, she did not receive any further information from Ms Dethick concerning the Respondent's position until much later in August.

38. There then appeared to be an ill-tempered exchange of emails during late August where Ms Dethick refused to accept that she had received the Claimant's email of 2 August 2019 and sought to suggest that she did not receive this email because the password protected document was causing her employers' email account to prevent it from reaching her email inbox. The Claimant's representative decided not to forward a further copy of the statement that was not password protected. It is unfortunate that the parties were unable to resolve this matter more quickly through a telephone conversation as it appears that there was a misunderstanding which could not really be resolved through email correspondence.

39. It is noted that subsequently, Ms Dethick for the Respondent was able to access Ms Crayford's email account and was able to use this to respond to emails. It is surprising that this action was not taken by them at an earlier stage.

40. The exchange of witness statements did eventually take place at the end of August, but by this time the hearing had been postponed.

41. Taking into account the lack of action from the Respondent's in this matter concerning the exchange of witness evidence, it is reasonable that the application for an Unless Order to exchange witness evidence was made by the Claimant in July 2019. Based upon the information available to the Tribunal in August 2019, it was reasonable for a strike out warning to be issued to the Respondent. The order to strike out was of course made on the basis that the Respondent despite having had an opportunity to explain its position within the time provided by the strike out warning letter, had failed to do so.

42. Even if Ms Crayford's email address had been correctly changed by the Tribunal to that of a colleague, it is likely that compliance by the Respondent with the Order for exchange of witness evidence would only have taken place towards the end of August 2018. The Claimant's representative was aware of the correct contact details for the Respondent and was engaging with them concerning the exchange of witness statements in accordance with the Tribunal's case management orders. The Respondent's delay with regards to this procedural step would have still placed the Final Hearing at risk of postponement.

43. It is for this reason that the Respondent's failure to deal with the outstanding Case Management Order relating to witness evidence following numerous approaches from the Claimant, not only necessitated an application for an Unless Order, but also put at risk the hearing listed to take place on 3 September 2020.

ORDER

44. The Order therefore, is that the Respondent's application for reconsideration is successful and the response is reinstated.

45. The claim will now be listed for a hearing to consider liability in the Cambridge Employment Tribunal on Tuesday 11 and Wednesday 12 August 2020.

46. The parties are encouraged in accordance with the overriding objective to work together to ensure that any remaining preparatory steps required to ensure that the case is ready for this hearing, take place. However, in the event that further Orders are required, the parties are invited to write to the Employment Tribunal as soon as they are considered necessary.

47. The Claimant's application for costs to be Ordered to be paid by the Respondent of and occasioned by the application for reconsideration will be reserved and considered upon the conclusion of the Final Hearing.

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Employment Judge Johnson

Date: 28 January 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE