



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

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v

- (1) Defence International Limited (London)
- (2) Defence International Limited (Ottawa)
- (3) Mr Edward Banayoti

Heard at: London Central

On: 27 November 2020

Before: Employment Judge Glennie

Representation:

Claimant: Mr C Milsom (Counsel)

Respondents: Mr E Banayoti

JUDGMENT ON RECONSIDERATION

1. The Tribunal's judgments striking out the response and determining liability are confirmed.

REASONS

1. On 25 November 2019 the Tribunal sent to the parties my two judgments, with reasons, striking out the response and determining liability. These judgments followed a hearing on 14-16 October 2019. The procedural background to that hearing is set out in my reasons for the striking out judgment.
2. The bundle of documents used in that hearing has been updated for the purposes of this hearing, and page numbers in these reasons refer to that bundle.

3. With the agreement of the o parties, the hearing took place partly by video (Mr Milsom) and partly by telephone (Mr Banayoti, from Canada).

Procedural matters

4. On 3 December 2019 solicitors instructed by the Respondents after the October hearing wrote to the Tribunal at page 451 seeking to set aside the judgments. Although the assertion in that email that the Respondents had no knowledge of the claim until 26 November 2019 was plainly incorrect (Mr Banayoti had taken part by telephone in a hearing on 21 March 2019 and had engaged in correspondence in September and October), I accept the solicitors' explanation at page 453 that this was an innocent error.
5. The Respondents' solicitors applied on 4 December 2019 at page 455 for a reconsideration of the two judgments. Further explanation of the application was given on 5 December 2019 at page 462, and full grounds on 9 December 2019 at pages 465-469.
6. On 6 January 2020 the Respondents appealed against the two judgments, raising what HHJ Stacey in the Employment Appeal Tribunal identified as three grounds. In summary, these were:
 - 6.1 In relation to the decision to strike out the response, failing to appreciate Mr Banayoti's state of health and/or the difficulties presented by his being resident in Canada.
 - 6.2 Reaching an incorrect conclusion that both companies were the Claimant's employers.
 - 6.3 Reaching an incorrect conclusion with regard to territorial jurisdiction.
7. On 26 August 2020 HHJ Stacey found that grounds 1 and 3 above had no real prospect of success, and that ground 2 should be considered at a further hearing (to take place in February 2021). The Respondents have not sought to take the appeal in respect of grounds 1 and 3 any further.
8. The reconsideration hearing was listed at a telephone preliminary hearing before me on 22 September 2020, which the Respondents' solicitor attended. One of the matters relied on in the reconsideration application is Mr Banayoti's health, and in this connection I made an order for the disclosure of any medical evidence relied upon by 30 October 2020. At that hearing, the Respondents' solicitor observed that there might be difficulties in obtaining medical records for Mr Banayoti in Canada, because of the privacy or data protection legislation in that country.
9. On 29 October 2020 at page 494 the Respondents, through their solicitor, applied for an extension of time for provision of medical evidence for the purposes of the reconsideration application, and for a postponement of the reconsideration hearing. This was followed up on 30 October, 5, 23 and 24

November. Regrettably, the Tribunal's administration did not refer this application or the correspondence that followed to me at the time, and I first became aware of it on 26 November when the file was sent to me for the purposes of this hearing.

Postponement application

10. At the commencement of this hearing, I informed the parties that in the first instance I would hear and determine the Respondents' application for a postponement.
11. Mr Banayoti, speaking on behalf of all Respondents, made the following points in support of the application:
 - 11.1 He was not in good health, and that his medical records would disclose various conditions, including stomach cancer, an ulcer and high cholesterol. The medication he was taking left him liable to fractures were he to fall. He could not read for long periods. He relied on a letter from his doctor in Canada dated 22 October 2020 which read:

“Mr Banayoti requested statement of health for personal reason.

Mr Banayoti have been under my care over 15 years and he has several chronic health problems that he is receiving treatment and medical evaluation and specialist care and he had been following the recommended treatment regularly. Recently, he had a several diagnostic testing and still waiting for specialist appointments, his health conditions, including chronic gastrointestinal problem, neurological disorder, osteoporosis, hypertension and cholesterol disorder.”
 - 11.2 His understanding was that an order from a Canadian court was required for his hospital records to be sent to his doctors, and then to him.
 - 11.3 The Respondents' solicitor had come off the record because the Respondents were unable to pay them. He wanted to find a lawyer who would act without charging, failing which he would ask the Tribunal for advice.
 - 11.4 The Respondents were seeking a witness order in respect of a Mr Thorpe, who could give evidence about a conversation he said had taken place between him and the Claimant, and which was relevant to the latter's credibility.
12. Mr Milsom opposed the application for a postponement. He submitted that the letter from Mr Banayoti's doctor did not suggest that he was unable to participate in the proceedings, and that Mr Banayoti had in fact taken part as recorded above. He did not accept that Mr Banayoti could not have

access to his medical records without a court order, and submitted that the reconsideration application had been on foot for nearly a year, so that there had been ample time to address any such matter.

13. I concluded that I should refuse the postponement application. I had regard to the overriding objective of the Rules of Procedure, which is to enable the Tribunal to deal with cases fairly and justly. Three particular elements of the overriding objective were relevant to my consideration. One is that of ensuring that the parties are on an equal footing. The parties are not on an equal footing in the present hearing, in the sense that the Claimant is represented but the Respondents are not. It is not within the Tribunal's powers to remedy that today: what can be done in this situation is for the Tribunal to ensure that the unrepresented party understands the proceedings and is able to advance their case fully. The other elements are those of avoiding delay, so far as compatible with a proper consideration of the issues, and saving expense. Both of these militated in favour of refusing the postponement. The claim was presented over 2 years ago and should be brought to a conclusion. If I were to postpone the hearing, there is no certainty as to when, if at all, the Respondents' position would improve.
14. It was also the case that I had the full grounds of the reconsideration application sent by the Respondents' solicitors on 9 December 2019.
15. With regard to the particular points relied on by the Respondents, my observations were as follows:
 - 15.1 The evidence does not suggest that Mr Banayoti is unable to participate in the proceedings because of his medical condition. The letter from his doctor does not say this, and I would expect it to have expressly said so if this were the case. Mr Banayoti was able to make the points that he wished to make in the course of the hearing, and has been able to participate in the past as indicated above.
 - 15.2 Although I have no knowledge of my own on the subject, I found it unlikely that Canadian law, or the law of the state of Ottawa, is such that an individual is barred from access to his own medical records in the absence of a court order. Neither Mr Banayoti nor the Respondents' solicitor, while acting, has identified any legislative or other basis for this assertion. In any event, it has been open to Mr Banayoti to provide evidence (whether from his doctor and/or by way of a witness statement from himself) about his conditions.
 - 15.3 It seemed to me unlikely that the Respondents would find a lawyer willing to act without charging in proceedings of this nature and at their present stage.
 - 15.4 I could see what Mr Thorpe apparently had to say about the matter from the document in his name at page 405. It would not be necessary for him to attend the reconsideration hearing: it might be

different if the outcome of that were the revocation of the judgment and an order for a re-hearing on liability.

16. After I had given my decision on the postponement application, Mr Banayoti said that he was applying for money from his church to fund legal representation, and that he had not previously mentioned this because he was ashamed. This did not sit very comfortably with Mr Banayoti's earlier statement that he was looking for a lawyer who would act without charging: he could, of course, be pursuing both approaches, but I would have expected him to say so in the first instance. I found that, even if this had been raised before I gave my decision, that decision would have been the same, for the same reasons. Additionally, there was no evidence of the request being made and no indication of the likely outcome or timescale.

Decision on reconsideration

17. I identified the following grounds relied on in the 9 December 2019 document in support of the reconsideration application:
 - 17.1 Mr Banayoti apologised for his failure to comply with the Tribunal's orders or to attend the hearing.
 - 17.2 Mr Banayoti did not attend the hearing because of his health conditions. In particular, he was unable to travel from Canada.
 - 17.3 More generally, Mr Banayoti's being in Canada put the Respondents at a disadvantage.
 - 17.4 Mr Banayoti was acting in person and did not fully understand his obligations as a litigant.
 - 17.5 The Respondents have a good defence to the complaints. There were various elements to this, including a denial of territorial jurisdiction, a denial that the Claimant ever commenced work, evidence that showed that the Claimant had advertised herself as available as an escort, the document from Mr Thorpe, and a question as to whether the Claimant was permitted to work in the UK.
 - 17.6 The compensation claimed is excessive and the recommendations sought would ruin the Respondents' business.
18. In his oral submissions Mr Banayoti added that he had suffered two strokes and that he tended to forget things. He said that the Claimant had approached him asking for help finding work (it being common ground that he and the Claimant had previously had a personal relationship). Mr Banayoti said that the document from Mr Thorpe showed that the claim was premeditated: he could not remember when he had first heard from Mr Thorpe (Mr Milsom was able to help with the information that the document had been produced on 28 October 2019). He asked for a chance to prove his innocence.

19. Mr Milsom submitted that the only ground for reconsideration that had ever been viable was that based on Mr Banayoti's health, and that this now had no prospect of success given the rejection of the Respondents' appeal on this ground. He further submitted that the interests of justice required finality in litigation, and that the evidence from Mr Thorpe should not be admitted.
20. Rule 71 of the Rules of Procedure provides that, on reconsideration, a decision may be confirmed, varied, or revoked.
21. I first considered the judgment striking out the response. I had in mind the need to strike a balance between the general need for finality in litigation and Mr Banayoti's expressed wish (on behalf of all Respondents) to have the opportunity to defend the claim.
22. I did not entirely agree with Mr Milsom's submission that the EAT's rejection of the first ground of appeal meant that a reconsideration application based on Mr Banayoti's health was bound to fail. It seemed to me that the EAT's decision reflected an assessment of my earlier judgment in the light of the evidence then before me. There might be further evidence available on reconsideration that could lead me to conclude that, although my original decision had been upheld, I should nonetheless vary or revoke it in the light of that further evidence. In the event, however, it is not the case that there is now evidence before me that would cause me to take that course.
23. I concluded that I should confirm the striking out judgment. I found as follows in relation to the arguments raised by the Respondents:
 - 23.1 I noted the apology expressed on Mr Banayoti's behalf, and his courteous approach to the present hearing. Welcome as these were, they were not in themselves reasons to revoke or vary the judgment.
 - 23.2 I rejected the contention that Mr Banayoti had not understood his obligations as a litigant. I have previously held that the case management orders, in particular for the provision of witness statements for the final hearing, were clear. Nothing said in the course of the present hearing caused me to modify that view. Although Mr Banayoti is not a lawyer, he is evidently an intelligent and articulate man who is, in my judgement, well able to understand Tribunal orders and the general nature of litigation.
 - 23.3 I accepted that being located in Canada may have presented Mr Banayoti with some logistical challenges in relation to the litigation, but I found no reason to believe that, with emails and the telephone, these were insuperable. There was nothing specific advanced to show why the Respondents could not have given disclosure or provided witness statements in accordance with the orders made.

- 23.4 Everything I have previously said regarding the contentions about Mr Banayoti's health conditions in relation to the postponement application is applicable again here. He has had the opportunity to produce evidence to show that the reason why he did not comply with the orders was his health, and he has not done so. As I have already observed, whatever the position about his medical records, Mr Banayoti has not produced evidence from his doctor, or indeed from himself, to show that his health was the reason why he could not comply with the orders.
- 23.5 To the extent that the potential merits of the Respondents' defence may be relevant to the question of striking out, these are dealt with below.
24. I also concluded that I should confirm the liability judgment. Apart from the matters canvassed above in relation to the striking out judgment, my reasons for reaching this conclusion were as follows.
25. The EAT has upheld the decision I made as to territorial jurisdiction. That issue has therefore been determined. There is no reason for me to make a different decision.
26. The contention that the Claimant never commenced work is not the same as a contention that she was never employed. In any event, the point taken on appeal about employment (and which is still live) is the argument that the Claimant cannot have been, or was not, employed by both companies. There was no appeal on the basis that the Claimant was never employed by either company. I therefore found that this issue has also been determined, subject to the point about whether both companies were correctly identified as employers. Again, there is no reason why I should make a different decision on this point.
27. Assuming for the purposes of this hearing that it is correct that the Claimant has advertised herself as available for work as an escort, I found it unlikely that this would have any relevance to the issues on liability. It might have some bearing on the issues as to remedy, which have yet to be determined.
28. The matters contained in the document from Mr Thorpe might be relevant to credibility. He says that he spoke to the Claimant in the summer of 2019 (he being able to identify her by what she said about being a claimant, and then subsequently reading about the present case in the press). He said that she stated that she had tried to lure a man who he believed to be Mr Banayoti into having sex with her, that he was not interested, that she was not going to let him get away with it and that she was "going to screw him".
29. I concluded, however, that this material was unlikely to be of great value on credibility because it would more likely give rise to parallel disputes about what, if anything, the Claimant had said to Mr Thorpe, and what she meant by anything she may have said. If the Claimant did say the things

attributed to her, they may well show an animus against Mr Banayoti, but they were said after the claim had been presented and do not necessarily mean that the claims are false. I did not find this additional evidence a compelling reason for revoking the judgment.

30. The striking out and liability judgments will therefore stand and the claim will proceed to a hearing on remedies. I have made separate case management orders in relation to that, including as to the Respondents' ability to participate.

Employment Judge Glennie

Employment Judge Glennie

Dated:17 December 2020.....

Judgment sent to the parties on:

29/12/2020.....

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For the Tribunal Office