



EMPLOYMENT TRIBUNALS

Claimant: Mrs E Ivanova

Respondent: Miss Y Tasheva (1)
Tasheva Housekeeping Limited (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD remotely on CVP

On: 22 April 2021

Before: Employment Judge Henderson (sitting alone)

Appearances

For the claimant: Mr J Theaker (FRU representative)

For the respondent: Ms Tasheva in person

STRIKE OUT JUDGMENT

The respondents' response is struck out in its entirety under rule 37 (1) of the Employment Tribunal Rules of Procedure 2013.

The respondents must pay to the claimant the total sum of £10,016.40 (as itemised in the Reasons below). This sum is awarded gross – the respondents must account to HMRC for income tax and National Insurance Contributions as appropriate.

REASONS

Background

1. This was a claim for unlawful deduction (non-payment) of wages and for unpaid holiday pay. The ET1 was lodged on 31 December 2019. The ET3 was filed on 12 February 2020. Soon after that (in March 2020) the Lockdown due to Covid 19 was imposed which affected the running and administration of the employment tribunals. A Case Management Preliminary Hearing (CPH), listed

for 15 April 2020 was postponed because of the closure of the London Central Hearing centre.

2. There was a CPH with EJ Goodman on 26 October 2020, which went ahead in the claimant's absence. That CPH identified the main issues in dispute between the parties: namely whether the claimant was self-employed or an employee or a worker; if the claimant was not self-employed, whether she was owed any unpaid wages and any unpaid holiday entitlement. The Final Hearing of the claim was listed for 28 January 2021 before EJ Joffe, to be conducted remotely using the Cloud Video Platform (CVP).
3. At that hearing, the claimant had significant technical difficulties connecting to the remote hearing and with access to relevant documents. Fortunately, the claimant was represented at that hearing by Mr Theaker of FRU, and EJ Joffe was able to convert the hearing into a further CPH at which the outstanding issues were clarified and directions were made for the progress of the hearing. The final hearing was listed for 22 April 2021.
4. EJ Joffe made practical directions with a view to assisting the claimant to join the hearing remotely as she was now based in Greece. EJ Joffe also made directions for further information and documents to be provided by the respondents no later than 4pm on 25 February 2021. This information included: (i) clarification by the respondents of alleged inaccuracies in the invoices submitted by the claimant; (ii) identifying the invoices in respect of which the respondents said that the claimant had been paid in cash and (iii) evidence via bank statements etc of the amounts paid in cash to the claimant and the dates of such payments.
5. There were also directions made for the disclosure of documents and the exchange of witness statements. It was agreed by both parties that EJ Joffe had spent the best part of the day clarifying the issues and making these directions. Mr Theaker said that the Judge had clearly set out the relevant dates in the directions.
6. Unfortunately, due to problems with tribunal administration, although EJ Joffe prepared the Case Management Order in good time, it was not actually sent to the parties until 12 April 2021, ten days before the final hearing date. Ms Tasheva's position was that she did not regard herself as bound by the Tribunal directions until she had received them in writing. She applied for a postponement of the final hearing on 20 April 2021 which was refused by the tribunal.

Conduct of Hearing

7. This hearing was conducted using CVP. As before, there were technical problems with the claimant connecting to the hearing, even though Mr Theaker had taken steps for the claimant have access to a laptop. The claimant did have access to a hard copy of the relevant documents. However, as the respondents had not complied with any of the Tribunal directions, the claimant would not

have had access to any late documents which Ms Tasheva may have attempted to submit.

8. Further, as the claimant spoke very little English, the tribunal had the assistance of a court-appointed interpreter in Bulgarian. However, given the poor connection, the interpreter agreed that she would have difficulty in carrying out the translation. Given these problems, Mr Theaker agreed that it would not be possible to have a fair substantive hearing, which would require the claimant giving evidence and being subjected to cross-examination.
9. However, it was agreed that the tribunal could hear the claimant's application dated 4 March 2021 to strike out the response in its entirety. Ms Tasheva confirmed that she did not need the assistance of the interpreter in this regard. The claimant and the interpreter were duly released.
10. The tribunal and Ms Tasheva had been sent (on 21 April 2021) by Mr Theaker, a hearing bundle - in several parts. Ms Tasheva had not sent any substantive documents, which were not already included in the claimant's bundle.
11. I heard submissions from both Mr Theaker and Ms Tasheva on the strike out application. Following a short lunch break, I gave my decision orally with short form/summary reasons.
12. I ordered that the respondents' response should be struck out in its entirety under rule 37 (1) (a), (b), (c) and (d) of the Employment Tribunal Rules 2013 and awarded the claimant the sum of £10,016.40 (gross), subject to the respondent accounting to HMRC for income tax and NIC's. I confirmed that I would prepare full reasons in writing.

Claimant's Strike Out Application

13. I asked Ms Tasheva whether she had taken any legal advice. She said that she had chosen not to do so because of the cost. However, she also made reference to not having time to seek advice from the CAB or FRU, because she had only received EJ Joffe's Case Management Order (CMO) on 12 April 2021.
14. I asked why she had not sought free legal advice earlier. She said that she had made no notes at the CPH on 28 January; had not written down the dates of the various directions and had not realised that there would be a final hearing on 22 April 2021. She had thought that nothing was valid until it was done in writing. Ms Tasheva confirmed that she was ready to represent herself at this hearing.
15. I explained to Ms Tasheva what was meant by a strike out application. I also referred Ms Tasheva to the claimant's strike out application of 4 March 2021. Ms Tasheva had originally objected to a strike out application as she said nothing had been put in writing; however, she accepted that she had received the application. I allowed her time to read that application.
16. I then asked Mr Theaker to make his oral submissions on strike out. I asked him to do so slowly, so that Ms Tasheva could understand the basis of the

application. Mr Theaker said that he was relying on the grounds set out at rule 37 (1) (a)-(d). I set these out below, the underlining represents the focus of the claimant's application, which I clarified with Mr Theaker and then explained to Ms Tasheva.

17. I read each of these grounds out to Ms Tasheva and asked her to make a careful note of them. I then heard submissions from Mr Theaker on each of the grounds and allowed Ms Tasheva to answer each ground.

18. Rule 37 ET Rules 2013 states that

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;
- (d) that it has not been actively pursued;
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

No reasonable prospect of success

19. Mr Theaker said that the respondents had not substantiated their defence in any regard. He referred to Ms Tasheva's witness statement in defence which she had provided in August 2020. I noted that this was the statement that Ms Tasheva had sent to the tribunal on the morning of the hearing. There had been no other documentation provided by the respondents.

20. The penultimate paragraph of that statement said, "*I will produced sufficient evidence prior to the full hearing to substantiate my full defence*". Mr Theaker said that no such evidence had been produced and this demonstrated that the respondent was unable to produce such evidence and that the defence had no reasonable prospect of success.

21. Ms Tasheva's response to this was to say that the claimant had herself failed twice to attend hearings in April and October 2020 and that she, Ms Tasheva, had explained at the CPH on 28 January which documents she intended to provide. I clarified with Ms Tasheva what these were. She said they were incorrect invoices, evidence that the claimant had received cash payments and inaccuracies in the claimant's time recording. I noted that EJ Joffe had ordered that these documents should be provided by 25 February 2021. Ms Tasheva repeated that she had not received the order from the tribunal until 12 April 2021 so had not provided the documents.

22. Ms Tasheva repeated that the claimant was self-employed. The relevant terms of agreement between the claimant and R2 was at page 95 onwards of the hearing bundle. However, there was also an agreement, signed by the claimant (dated March 2018) at page 89, which contained an opt out from the 48 hour working week limit contained in the Working Time Regulations 1998. I asked Ms Tasheva why the claimant had been asked to sign this if she was self-employed. Ms Tasheva said that this was because she might have to work more than 48 hours a week. Ms Tasheva said she was unaware that the 48-hour limit applied to employees and workers, as she had never taken any legal advice on this point. She was not aware that there was any inconsistency here.
23. Given the documents referred to above and given the recent Supreme Court decision in the Uber case, on determining the status of an employee/worker, I find that the respondents would have no reasonable prospect of success on the issue of the claimant's status as a worker.

Conduct of the proceedings by the respondent was unreasonable

24. Mr Theaker said that the respondent had not met any of the dates set out in EJ Joffe's CMO or in EJ Goodman's CMO in October 2020. He acknowledged that the respondents had not taken legal advice, but he did not accept as credible the fact that Ms Tasheva had not written down any of the dates ordered by EJ Joffe. He referred to paragraph 12.1.1 of Judge Joffe's CMO which said, "*the above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date the compliance has passed.*"
25. Ms Tasheva repeated that she had only received the CMO on 12 April 2021 and could not have read that paragraph until then. She said that it was unreasonable of the tribunal to expect someone with no legal knowledge to follow the proceedings. She accepted that EJ Joffe had explained things carefully but said she believed that she needed everything in writing in order to prepare for a fair trial. Ms Tasheva repeated the fact that the claimant had not attended the first two CPHs.

Non-compliance with Tribunal orders and no active pursuit of the defence

26. Mr Theaker's submissions were effectively the same as those set out above. Ms Tasheva's responses were also the same: namely that the claimant had not attended two previous hearings and that she had not received Judge Joffe's CMO until 12 April 2021. As someone without legal advice, Ms Tasheva said she could only rely on the order once she had received it in writing. She had not realised that what the Judge said at the CPH was binding.
27. Mr Theaker also pointed out that the respondent had made no response to the written application for strike out dated 4 March 2021. He referred to pages 42a-42n of the hearing bundle. Ms Tasheva repeated her previous comments concerning the fact that she had not received the CMO until 12 April 2021. She said that the tribunal had never advised her of the hearing on 22nd April: she

had only received the notice of hearing on 15 April, which meant she could not apply for the postponement within 14 days of the hearing date.

28. Ms Tasheva was referred to page 42h, which was an email of 16 April from the tribunal administration recording EJ Baty's request that the respondents provide their comments on the claimant's strike out application and asking whether they had complied with EJ Joffe's CMO directions. Ms Tasheva was asked why she had not replied to this email. Ms Tasheva said that her response was the application for postponement on 20 April 2021.
29. Ms Tasheva again repeated her complaints that the claimant had not attended the CPHs in April and October 2020. She also said that she was not legally represented. It was pointed out that this was her choice, given that she ran her own business. Ms Tasheva said that she had believed she could do the hearings herself but she now realised that she should have sought legal advice.

Conclusions

Strike Out

30. The respondents essentially relied on two points to oppose the strike out application: first that the claimant had previously not attended April and October 2020 CPH hearings, so she was at fault too. I note that the April 2020 CPH had in fact been postponed, so the claimant cannot be criticised for not attending. The claimant did not attend the October 2020 CPH (as she did not have assistance from FRU at that stage); however, the respondents were not prejudiced by the claimant's non-attendance as the hearing went ahead in her absence. However, the respondents had not complied with any of the directions in the October 2020 CMO.
31. The second point relied upon by the respondents was that the Tribunal had not sent EJ Joffe's CMO of 28 January 2021 to the parties until 12 April 2021 and so the respondents had not taken any action till then, and that there had been insufficient time to prepare for this hearing. However, I note that Mr Theaker had chased the tribunal with regard to the CMO in mid-February 2021 and the respondents were copied in to this correspondence.
32. Ms Tasheva referred to her own correspondence with the tribunal and I note an email from the tribunal administration to Ms Tasheva dated 19 February 2021, which I read out to her.
33. This email refers to the CPH on 28 January 2021 and asks whether Ms Tasheva has received Judge Joffe's order, which outlined the documents and information required from Ms Tasheva by 25 February 2021. The tribunal notes that the claimant has not received Judge Joffe's order and says that if Ms Tasheva has not received the order then the tribunal will arrange for this to be sent to her immediately. Ms Tasheva did not reply to this email. If she had done so she might have received the written CMO earlier than 12 April 2021.

34. This email of 19 February also states “*the deadline of 25 February still stands for your submissions.*” Therefore, Ms Tasheva knew as at 19 February that the relevant direction in Judge Joffe’s order was active, but took no steps to comply with that deadline.
35. I have found that the respondents had no reasonable prospect of success in showing that the claimant was self-employed.
36. Taking the provisions of rule 37 (1) (b) (c) and (d) together, I find that there has been no satisfactory explanation given by the respondents for their failure to comply with tribunal orders. I also find that the respondents have conducted these proceedings in an unreasonable manner and have failed to actively pursue their defence of the claims.
37. Ms Tasheva’s submissions were disingenuous and lacked credibility. She had clearly hoped that ignoring the claimant’s claims would mean that she would not have to face up to them. She made the decision not to take legal advice, but as with all such business decisions, she must take the consequences of those decisions. Ms Tasheva made various comments during the hearing about the complexity of employment law, with which I completely agree. However, as someone running a business and engaging people to work for that business, she should have taken that into account at an earlier stage and sought appropriate advice.
38. The tribunal must of course acknowledge the error of its administrative team in not providing Judge Joffe’s CMO in writing to the parties until 12 April 2021. However, even then, the respondent took no steps to prepare for today’s hearing other than to apply for a postponement. She knew as at mid-February that there was a problem with the tribunal sending the January CMO to the parties but chose to ignore the tribunal’s communication that she should still comply with the directions for 25 February 2021.
39. The claimant’s application for strike out of the response in its entirety is granted.

Award to the Claimant.

40. The claimant has provided an updated schedule of loss. The respondent has provided no documentation or evidence to challenge that schedule of loss.
41. I award the sum of £6639 as unpaid wages. I award the sum of £3377.40 as unpaid holiday. These sums are awarded gross and the respondent must account to HMRC for income tax and national insurance contributions accordingly. I confirmed with Ms Tasheva that she understood what was meant by these terms.

The claimant is awarded a total sum of £10,016.40 gross.

42. Ms Tasheva was clearly disappointed by the decision. I told her that she may wish to take legal advice on applying for reconsideration of the decision or an

appeal, but stressed that she must ensure that she complies with any relevant time limits.

43. I also confirmed that I would emphasise to the tribunal administration that they must send my order to the parties as soon as possible.

Employment Judge Henderson

JUDGMENT SIGNED ON: 27 April 2021

JUDGMENT SENT TO THE PARTIES ON
28/04/2021

FOR THE SECRETARY OF THE TRIBUNALS