



EMPLOYMENT TRIBUNALS

Claimant: Mr S Garbutt

Respondent: Avant Homes

RECORD OF A PUBLIC PRELIMINARY HEARING

Heard at: Newcastle upon Tyne Hearing Centre
On: Thursday 17th June 2021

Before: Employment Judge Speker OBE DL

Appearances

For the claimant: In Person
For the respondent: Miss Amy Smith of Counsel

DECISION ON RECONSIDERATION APPLICATION

Decision

1. On reconsideration the original decision and judgment made on 15th March 2021 by Employment Judge Johnson is confirmed.

REASONS

1. This was an application made by the claimant for reconsideration of the judgment of Employment Judge Johnson sent to the parties on 15th March 2021 (but authorised on 3rd February 2021) that the claim be struck out on the grounds that it had not been actively pursued.
2. The case involves claims brought by Mr Garbutt alleging disability discrimination and breach of contract. A claim of unfair dismissal had been dismissed on withdrawal.
3. Following a preliminary hearing on 26th March 2020 before Employment Judge Aspden at which the claimant was legally represented by Mr Henshall, Solicitor, directions were made for a full hearing and it was identified that the case should be listed for three days. A hearing was listed from 7th to 9th October 2020.

Because of the pandemic it was eventually decided that the hearing should be converted to a video hearing by CVP. The tribunal was notified on 1st October 2020 that Mr Henshall was no longer representing the claimant. On 3rd October a letter was sent to the claimant asking if he would communicate to the tribunal his computer connection details for the hearing by video commencing on 7th October. The claimant responded on Tuesday 6th October stating that he wished to have a postponement as he did not have relevant computer equipment for a hearing to go ahead by CVP. The respondent informed the tribunal that the application for a postponement was opposed. It was considered by Employment Judge Aspden, who having taken all matters into account, decided that the hearing should indeed be postponed and relisted.

4. On 8th October a postponement order was sent out to the parties setting out orders made by Employment Judge Aspden to the effect that the hearing fixed for 7th to 9th October be postponed to a date to be confirmed and that the hearing take place in person rather than by video platform. It was directed that the parties write to the tribunal within fourteen days with details of any dates between March and August 2021 when the parties would not be able to attend the hearing. The letter went on to recite the circumstances in relation to which the late application for a postponement was made and outlined the reasons why the judge had granted the postponement having given effect to the overriding objective to deal with cases fairly and justly. Her view was that the prejudice to the claimant in allowing the case to proceed without him outweighed the prejudice to the respondent in granting the postponement and it was felt that the circumstances were exceptional. However the letter went on state that the claimant was directed to write to the tribunal and the respondent by 22nd October 2020 "to explain why he and/or Mr Henshall did not tell the tribunal sooner that he would be unable to participate in a CVP hearing." The respondent was then to indicate by 5th November whether it would be seeking to make an application for costs.
5. The claimant did not reply and a reminder was sent to him by the tribunal on 12th November asking for a reply by 19th November 2020. In the absence of a reply a further reminder was sent from the tribunal on 8th December asking for a response by 15th December. The claimant did not reply. The respondent wrote further to the tribunal on 10th December with regard to costs which had been wasted as a result of the postponement namely Counsel's fees of £3,000 plus VAT - £3,600 which had been reduced by negotiation to £1,500 plus VAT - £1,800.
6. On 14th December the tribunal wrote to the claimant reminding him of his failure to respond and asking for a reply by 21st December 2020.
7. On 13th January 2021 and on the basis of the claimant's continued failure to comply with the order of 8th December issued a strike-out warning informing the claimant that this was being considered because of his failure to comply with the order of the tribunal dated 8th October 2020 and stating that if he wished to object he should give his reasons in writing or request a hearing by 20th January 2021.

8. The claimant did not respond and the papers were put to Employment Judge Johnson who on 3rd February 2021 authorised the making of a strike out judgment which was formerly affected and sent to the parties on 15th March 2021. The claim was struck out because it had not been actively pursued and the claimant had failed to make representation in writing as to why this should not be done or request a hearing.
9. It was put to the tribunal that the claimant had sent an e-mail on 5th March 2021 although in fact this appeared to be an e-mail to the respondent and not copied to the tribunal in which the claimant stated that he had already given information that he did not have equipment for a video link hearing and that that was the reason the case could not go ahead. However this was not an explanation given to the tribunal and nor did it explain the lateness of the application. Furthermore it was an e-mail as stated which was not to the tribunal and in any event it was after Employment Judge Johnson had authorised the strike out.
10. Following the strike out judgment the claimant sent an e-mail to the tribunal stating that he did not consider that it was fair for the case to be struck out and stating that he was not up to date with the technology or computer systems and was dyslexic and needed help with the case in court. This was treated as an application for consideration which led to today's hearing.
11. As it was not practicable for Employment Judge Johnson to hear the application, authority was obtained by the acting regional employment judge to authorise me to deal with the application.
12. In evidence Mr Garbutt explained that he had very little ability with regard to computer equipment and that his only item of equipment was his mobile phone which he used to send and receive e-mails. During the hearing he did make use of it to try to locate in his sent items box other items which he thought that he had sent to the tribunal in response to the various reminders although he was not successful in doing so. He explained that he made his application for postponement at the earliest time as soon as it became known to him that Mr Henshall would no longer be providing legal representation and he, Mr Garbutt, had been made aware that the hearing was to be by CVP which he could not accommodate himself. His suggestion was that his request for a postponement was made at a reasonable time.
13. With regard to the catalogue of communications from the tribunal and reminders and extensions Mr Garbutt apologised and said that he thought that he had replied. In addition to this during January he had contracted pleurisy which meant that he was in hospital for two days and he had a period of weeks when he was incapacitated.
14. On behalf of the respondent Miss Smith made detailed submissions referring to the overriding objective. She concentrated more on the claimant's failure to reply to the tribunal and provide a written explanation and his failure to provide alternative dates so that the case could be relisted. She argued that no adequate explanation was given for this and that the claimant certainly had abilities with regard to dealing with e-mails as was demonstrated during the hearing. With regard to prejudice she referred to the pressure on the

employment tribunal system and the limited resources particularly bearing in mind the pandemic and that the loss of a three-day hearing was of significance. The tribunal was not able to arrange a replacement hearing because of the failures of the claimant and this was unfair upon the respondent from the point of view time incurred and legal expenses. She also submitted that the time which had been afforded to the claimant prior to the decision being made to strike the case out was significantly in excess of what would normally be expected as reasonable in accordance with the rules.

15. Mr Garbutt apologised to the tribunal for his failure to communicate. He repeated that his application for a postponement of the hearing of 7th to 9th October had been made as soon as possible. With regard to his failure to reply to the order made by Judge Aspden to give an explanation to provide alternative dates and the subsequent repeated reminders, he thought that he had communicated but in any event he said that he had had a period of ill-health and that he was not able to deal with complex communications and was hampered by his dyslexia. He confirmed that the dyslexia was not the disability upon which his disability discrimination claim was founded.
16. I've considered in detail the chronology of what occurred in this case. In relation to the October hearing I accept that Mr Garbutt was compromised by the fact that there was a late withdrawal by his solicitors for their own reasons which Mr Garbutt said was related to him having only a fifty-fifty chance of success with his claim. This left him in a position where he had to deal with the case himself or seek other representation which he tried to do unsuccessfully because of the impending hearing. As soon as he was aware of the fact that the hearing was to be by video he immediately within a very few days contacted the tribunal by telephone and then in writing to say that he needed a postponement. I find that in the circumstances his conduct was not unreasonable. However of course this had already been considered by Employment Judge Aspden in deciding to grant the late application for a postponement despite opposition from the respondent and to take into account the overriding objective.
17. What followed however was the specific direction from the tribunal that within a limited time the claimant was to provide an explanation of his late application, the circumstances of which of course were not known to the tribunal at that time and he was also to provide non-availability dates. The claimant did not reply to the letter of 8th October and nor did he respond to the further reminders from the tribunal of 12th November, 8th December and 14th December all of which were giving him additional time. When a strike out warning was sent on 13th January he failed to reply at all by 20th January and this led to the case being considered for strike out by Employment Judge Johnson which is what occurred. On the facts and documentation placed before Employment Judge Johnson it was entirely appropriate and proper for the strike out judgment to have been made.
18. In Rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) 2013 the tribunal may reconsider any judgement "where it is necessary in the interests of justice to do so". In the present case I take into account that the strike out was not because of the late application but because of the claimant's failure to co-operate with the tribunal and respond to the numerous communications and directions sent to him. Had the claimant responded then

the likelihood is that the case would have been relisted on him providing non-availability dates and he would have had a hearing in person. However this did not happen because he continuously over a period of months failed to reply to the tribunal in order to give the explanation or any explanation as requested by him and this was despite receiving the proper warning that his claim would be struck out. Such an extensive failure to co-operate with the tribunal and reply to communications persuades me that it is not in the interests of justice to interfere with the decision made that this claim be struck out. The interests which must be considered under the overriding objective on the interests of the respondent which has been put to considerable expense and delay and uncertainty with regard to what was happening with the case and the pressure upon the tribunal system which has even more strained resources because of the pandemic and in relation to which against a background of a three-day hearing not being able to proceed, has not been able to advance the case because of non-cooperation from the claimant. A further point to be borne in mind is that there must be finality with litigation and where a party who has brought a case does not co-operate with the system then the case inevitably drags on so that by the time this case was struck out was already well over a year from the time when the claim form had been issued and sixteen months after the employment had ended.

19. Accordingly and for the above reasons the strike out judgement is confirmed.
20. Having announced this decision I communicated to the parties and in particular Counsel for the respondent that bearing in mind my findings as to the late application for a postponement of a hearing commencing on 7th October 2020 and the explanation now given that, that I was not minded to grant an application for costs incurred by the respondent and wasted in relation to the hearing in October 2020 which could not take effect. Miss Smith said that she could not confirm whether she wished to make an application for costs but would like the opportunity to take instructions. Accordingly an order has been made that the respondent inform the tribunal within fourteen days namely by 1st July 2021 as to whether the respondent wishes to proceed with an application for costs. If so the matter will be listed for a one-hour in person hearing for the respondent to make an application for costs.

Employment Judge Speker OBE DL

25 June 2021