



EMPLOYMENT TRIBUNALS

Claimant:
Mr H Dankali

And

Respondent:
London United Busways Ltd
t/a RPTV Dev London

Heard by:

On: 6 October 2021

Before: Employment Judge Nicolle by CVP

Representation:

Claimant: Mr J Neckles, trade union representative.
Respondents: Ms R Blyth, solicitor.

Open preliminary hearing

Application by the respondent for the striking out of all of the claims being pursued

Judgement

The respondent's application for the striking out of the claim is refused.

Reasons

1. Extempore reasons were given to the parties but Mr Neckles requested written reasons.

Background

2. This is an application brought by the Respondent for the striking out of all of the claims being pursued. It is brought under the five separate limbs of Rule 37. The application follows from a letter sent by the Tribunal at the Order of Employment Judge Spencer dated 22 July 2021. That letter directed that the full merits hearing listed to commence on 27 July 2021 should be vacated as it would appear that the Claimant is

not actively pursuing his claim and his representative is unable to take instructions. It went on to state that the Employment Judge was considering striking out the claim because it is not actively being pursued. The Claimant was given a period of 14 days to indicate that he wished to proceed and that he has withdrawn the disability claim.

3. The Tribunal in a letter dated 8 September 2021 listed the case for a three hour hearing to be heard via CVP. The relevant facts are as follows. The Claimant was dismissed from his employment on 24 January 2020 following a sickness absence of 176 days. He did not appeal his dismissal. On 3 June 2020 he submitted his claim. There have been various previous case management hearings to include applications made by the Respondent for the strike out of various claims being pursued by the Claimant. It is unnecessary for me to detail those various case management hearings, judgments and reconsideration of those judgments.

4. It is relevant to confirm which claims remain extant. Mr Neckles confirmed that the only claims being pursued were for unfair dismissal and breach of contract. The reference to disability did not involve a freestanding claim under the Equality Act 2010 but rather a contention that for the purposes of his unfair dismissal claim the Respondent failed to give consideration as to whether the Claimant had a disability as referred to in clause 5 of a collective agreement dating from June 2008 entitled "guidelines for dealing with long term sickness absence". There is a specific provision at paragraph 5 regarding disability. There is a dispute as to whether that collective agreement remained in force and whether it was contractually incorporated as part of the Claimant's contract of employment as at the date of his dismissal.

5. In a letter dated 11 July 2021 to the Tribunal Mr Neckles summarised the position as it then existed. He advised the Tribunal that we have a current and ongoing emergency in the matter and proceedings in that we are seriously afraid that something may have happened to the Claimant or otherwise some kind of emergency is preventing him from being in contact with us. He advised that the Claimant had travelled to his home country of Eritrea in November 2020 and went on to say that they were extremely concerned about his wellbeing. He listed the apparently exhaustive efforts to contact the Claimant via a variety of means to include email, phone, WhatsApp, postal address, via ex-colleagues and even via the Swedish and Eritrean Embassies. Those attempts have been unsuccessful.

6. Mr Neckles said that he had had no communication with the Claimant either directly or indirectly since February 2021.

Respondent's submissions

7. The Respondent's submissions in relation to why the claim should be struck out are on the basis that the matter cannot proceed in the absence of the Claimant and as a result of a lack of recent instructions from him to his Trade Union Representative. They rely on each of the five limbs of Rule 37 and set out why under each of those limbs the case should be struck out. Particular issues were highlighted in terms of the Claimant's non attendance at the hearing and it being argued in effect that a continuation of a hearing where there would be no reasonable prospect of success was a waste of time, money and inconsistent with the overriding objective. Further issues potentially related to the Claimant not being able to demonstrate that he had a disability for the purposes

of the collective agreement, should that be found to be applicable, and in relation to how remedy and mitigation would be assessed.

Claimant's submissions

8. Mr Neckles stated that it was entirely the Claimant's prerogative as to whether he chose to give witness evidence. He says it would not wholly unusual for cases to proceed in the absence of one or other party. A position which I acknowledged to be the case particularly with Respondents who may be insolvent for example. He also says that it is possible for a claimant's estate to continue a claim posthumously.

9. He states that the Respondent has already had one bite of the cherry in arguing that the claims have no responsible prospects of success. He refers to the hearing before Employment Judge Russell on 9 November 2020 and the resultant judgments dated 26 November 2020 and reconsidered on 17 December 2020.

10. He says that the Claimant has via his officers complied with case management orders but the Respondent has refused to disclose its witness statement. He says that the Claimant has already made full disclosure.

11. He says that the burden of proof is on the Respondent in terms of demonstrating the fairness of dismissal. He says there is no need for the Claimant to give evidence.

12. He says the Claimant gave instructions at the outset of the claim to do what is ever necessary without the need to revert and therefore says the lack of instructions is not an issue. Mr Neckles is not able to provide any written evidence as to the scope of his instructions and the unconditional authority he says has been bestowed upon him to take all actions necessary in the conduct of the claim. He says that is not how the union works, things are much more informal.

13. He says that only the Claimant will be prejudiced by his failure to attend to give evidence in terms of being able to demonstrate the existence of a disability and in relation to what, if any, compensation should be awarded should his claim succeed. Mr Neckles is not able to provide any written evidence as to the scope of his instructions and the unconditional authority he says has been bestowed upon him to take all actions necessary in the conduct of the claim. He says that is not how the union works, things are much more informal.

14. The Claimant has previously presented a detailed schedule of loss which involves seeking compensation over a period of 78 weeks. Mr Neckles confirmed that as far as he was aware the Claimant had not been able to mitigate his loss and had not received any benefits to which the Recoupment Regulations would apply.

Conclusions

15. The starting point is to consider Rule 37 and the discretion which a tribunal has to strike out a claim. It is important that I do not revisit a decision previously made by Employment Judge Russell based on whether the underlying claims have a reasonable prospect of success. I have avoided doing so. My sole consideration is whether given the lack of communication from the Claimant this is a case where it would be appropriate

to strike out the claim given the basis upon which Mr Neckles says it would continue to be conducted.

16. Looking in turn at each of the various limbs of Rule 37(1).

(a) That it is scandalous or vexatious or has no reasonable prospect of success.

17. I do not consider the conduct to be scandalous or vexatious. Whilst I consider that there may be a limited prospect of success absent the Claimant's attendance to give witness evidence I do not consider that it follows automatically that the claim has no reasonable prospect of success. It may well be that the claim is potentially weak but that is not in itself sufficient for it to be struck out.

(b) That the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious.

18. It is not suggested that Mr Neckles in his conduct of the proceedings has been in any way scandalous, unreasonable or vexatious. Given that his position is that he has unconditional authority to take all actions necessary in the claim I do not consider any basis exists for this limb to be made out.

(c) A party has not complied with any of these Rules or with an order of the Tribunal.

19. I find this more difficult as there have been various elements of the claim where arguably the Claimant has not provided full disclosure of evidence. Nevertheless, the position as now stated by Mr Neckles is that the Claimant has made full disclosure, he is not going to be providing any medical evidence as to the existence of disability, but rather relying on what he says is the Respondent's failure to give consideration to whether disability potentially applied and the enhanced benefits which may therefore have arisen under a collective agreement should it be enforceable, and that failure to provide evidence of mitigation would be to the Claimant's disadvantage. I am therefore not sufficiently satisfied that there has been a sufficiently serious failure to comply with Tribunal Orders that it would be justified to strike the claim out on this basis.

(d) The claim has not been actively pursued.

20. At the outset I considered this to have been the most of likely ground for strike out given the acknowledged position that the Claimant has been incommunicado since February 2021. Nevertheless, based on Mr Neckles' unequivocal confirmation that he has unconditional authority to take all steps in the claim, that the intention was to pursue the claim, that he was a participant in today's hearing and has been involved in correspondence throughout I do not consider that it can be said the claim is not being actively pursued. It is true that it is being pursued in a highly unusual manner. That in itself gives rise to issues but to say the claim was not being actively pursued because it was being done on behalf of, rather than with the direct involvement of a claimant, would in my view be wrong. There will be occasions, for example, a claimant with a mental health incapacity who is not capable of giving instructions where the claim would be pursued absent their direct instructions. It may also be pursued by a deceased claimant's estate. So, whilst unusual it is not wholly unprecedented and does not in itself provide an automatic reason why there should be a strike out.

(e) That the tribunal considers it is no longer possible to have a fair hearing.

21. Whilst I accept the hearing will have unusual elements they will inevitably be to the Claimant's disadvantage. The Tribunal will have to make findings of fact and conclusions and if necessary assess mitigation. Absent the Claimant that can only be to the his disadvantage but it does not mean that the hearing is not a fair hearing. Certainly as far as the Respondent is concerned it has the cards stacked firmly in its favour but it does not mean that it is not receiving a fair hearing.

22. The Claimant has the prerogative, as Mr Neckles argues, whether to give witness evidence or not, normally this is a right exercised or not in criminal proceedings rather than civil proceedings but nevertheless there is no absolute obligation on a party to give evidence. The fundamental principle is that each party has a discretion as to which witnesses it chooses to call, of course that normally would include the claimant, but there is no automatic obligation for it to do so.

Final conclusion

23. Therefore, having carefully weighed up factors on what is in my view a marginal situation I have nevertheless found the balance of prejudice, after weighing all of the relevant factors, that it would not be appropriate to strike out the claim and therefore the claim should proceed and be listed for a hearing at the earliest available date to take place regardless of the Claimant's attendance. In other words the non attendance of the Claimant would not be a reason for a further postponement.

Employment Judge Nicolle

8 October 2021

Sent to the parties on:

08/10/2021.

For the Tribunal: