



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE F SPENCER

CLAIMANT Mr C Gregory

RESPONDENT British Telecommunications plc

ON: 12 October 2021

Appearances:

For the Claimant: did not attend
For the Respondent: Ms A. Jervis, counsel

JUDGMENT

The Judgment of the Tribunal is the Claimant's claim is struck out for failing to comply with tribunal orders and for not actively pursuing his case.

If the Claimant is able to comply with the outstanding tribunal orders and paragraph 17 below, he may apply for a reconsideration of this judgment within 14 days of the date that this order is sent to the parties.

REASONS

1. The Claimant Mr Clyde Gregory presented a claim to the Tribunal on 24 January 2021. His claim is for unfair dismissal and discrimination because of sexual orientation in that he told his manager that he is bisexual. The Respondent's case is that the Claimant was dismissed for gross misconduct, and they deny knowledge of the Claimant's sexual orientation at the relevant time.
2. A preliminary hearing took place on 13th May 2021 which the Claimant attended. Orders were made for the management of the case to a hearing due to start today.

3. Since the case management hearing and, despite being legally represented, the Claimant has failed to comply with any of the case management orders made by the Tribunal. He has not provided a schedule of loss nor provided a list of documents for disclosure. Chasing emails sent by the Respondent to the Claimant's solicitor asking for the schedule of loss and for lists of documents have not been responded to. On 8 July 2021, having not heard from the Claimant or his solicitor the Respondent unilaterally sent its list of documents to the Claimant. The Claimant has not asked for any documents on the Respondent's list.
4. On 29th July the Respondent wrote to the Tribunal making an application for the Claimant's claim to be struck out for failure to comply with the Employment Tribunal's orders and/or failing to actively pursue the claim or in the alternative for an unless order to be made under Rule 38 of the Employment Tribunal's Rules of Procedure.
5. On 5 August 2021 the Respondent sent the Claimant copies of the documents on its list. On 6th August the Claimant said he was unable to respond because he had been sick, and he still had not received his "records" At some point in late August the Claimant's solicitor came off the record and the Claimant has been acting in person.
6. On 6 September the Claimant wrote to the tribunal asking for postponement because he had not "received any paperwork from BT making it very difficult to prepare my case." That application was made notwithstanding that the Claimant had not provided his own list of documents or a schedule of loss. He also referred to his personal difficult circumstances. In fact, the position was that the Respondent had sent all their documents relevant to the issues to the Claimant on 5th August. Ms Jervis for the Respondent says that the Claimant is in fact seeking his training records in connection with his new employment, and that those documents are not relevant to the issues before the tribunal.
7. The Claimant's application for a postponement was opposed by the Respondent and refused by Employment Judge Grewal who ordered (i) the Respondent to advise whether they had complied with its disclosure obligations and (ii) the Claimant to set out why he hadn't complied with the order to provide a schedule of loss and to provide disclosure by list and copy documents. The Claimant did not respond to that order. The Respondent responded to confirm that they had provided both a list and disclosure despite not having received any lists or disclosure from the Claimant.
8. On 9th September 2021 REJ Wade informed the parties that the hearing would take place by CVP and enquired whether the case was ready for hearing. The Claimant responded that he was not able to do the hearing via CVP as his computer had stopped working and he had not received the paperwork necessary for him to prepare his case against BT. He applied again for postponement.

9. On 17th September EJ Grewal postponed the full hearing and converted today's hearing to an open preliminary hearing to take place "in person" at the Tribunal to consider the Respondent's application to strike out the claim.
10. Yesterday the Claimant emailed the Respondent to ask for postponement because he had had emergency dental treatment on Sunday and was in extreme pain. The email was (perhaps inadvertently) not sent to the Tribunal.
11. This morning at 6.56 a.m. the Claimant emailed the tribunal to inform it that he could not attend today due to "unpredicted health issues". He said he had to visit the accident and emergency dental department over the weekend with a cracked tooth, he was in extreme pain and had a dental infection. In addition, he had presented with covid 19 symptoms over the last 5 days.
12. Ms Jervis expressed some reservations as to the Claimant's reasons for the postponement, noting that the Claimant had been applying for a postponement since 6th September and had not complied with the Tribunal orders to prepare his case. If he had had Covid symptoms for 5 days, he should not have been attending for an emergency dental appointment. The Respondent had provided all the relevant documents and it was not accurate to say that they had refused to provide any documents that would enable him to prepare his claim. She noted that the Claimant had not responded to any of the Respondent's representatives emails since 6 August 2021 when he requested an extension to 11th August to provide a schedule of loss and disclosure, but those documents had still not been provided.
13. Rule 37 of the Employment Tribunal's Rules of Procedure provides that Striking out
37. – (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 –
...
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that is had not actively been pursued;
...
(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing, or if requested by the party, at a hearing.
14. It is commonly accepted that strike out is a draconian sanction. Although there is the power to strike out a case for failure to comply with orders the guiding principle is the overriding objective. Relevant factors are the magnitude of the default, whether the default is that of the party or their representative, what disruption unfairness or prejudice has been caused

and whether a fair hearing is still possible. However, orders are there to be obeyed, otherwise cases cannot be properly case managed, the party who has complied with the orders is put to unnecessary inconvenience and expense, and there is a waste of tribunal and judicial time.

15. In this case I accept that the Claimant has not complied with any of the tribunal orders and has not responded to chasing emails from the Respondent. Despite being aware of the purpose of today's hearing since 17th September he has still failed to engage with the Respondent to prepare his case for a hearing. He has not explained which documents he is waiting for from the Respondent, and why they are relevant to his case. It appears, without having heard directly from the Claimant, that he has been failing actively to pursue his case. There has been a continuing failure to comply with orders for case management. As a result it had been necessary to postpone the full merits hearing.
16. I would not normally strike out a case where a Claimant is unable to attend a hearing because of ill-health, and to explain in person why he has failed to comply with Tribunal orders. However, I accept that the Respondent had some reason to doubt the reasons given for the Claimant's non-attendance given the history to date.
17. If the Claimant genuinely wishes to pursue his case, he should write to the tribunal within 14 days of the date that this judgment is sent to him asking for a reconsideration of this judgment. That reconsideration application should contain details of the reasons for his absence today (with appropriate medical evidence of the treatment he received on Sunday and its effects) and confirmation that he has sent to the Respondent a schedule of loss and a copy of any document in his possession or control, not contained in the Respondent's list of documents, which he contends is relevant to the issues in this case, including documents relevant to remedy, such as earnings from the new employment which (according to his claim form) he began one week after his dismissal.

Employment Judge Spencer
15th October 2021

JUDGMENT SENT TO THE PARTIES ON

.18/10/2021..

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FOR THE TRIBUNAL OFFICE