



EMPLOYMENT TRIBUNALS

Claimant: Mr C Smith
Respondent: Secretary of State for Education
On: 11 October 2021
Before: Employment Judge Ahmed (sitting alone)
At: Leicester (via CVP)

Representation

Claimant: In person
Respondent: Ms Sophie Garner of Counsel instructed by The Government Legal Department

JUDGMENT ON AN APPLICATION FOR A RECONSIDERATION AND AN APPLICATION FOR COSTS

1. The Claimant's application for a reconsideration dated 20 May 2021 is refused.
2. The Respondent's application for costs is refused.

REASONS

1. This case was listed for a hearing on an application for a reconsideration of the judgment dismissing the claim on withdrawal on 4 March 2021 (the "original decision"). The original decision was made without a hearing and signed by Regional Employment Judge Swann. Pursuant to Rule 72(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as amended (hereinafter the "Employment Tribunal Rules"). I was assigned to hear this case as it was not practicable for the Regional Employment Judge to hear the case today.

2. In these proceedings the Claimant brought complaints of direct race and age discrimination.
3. On 24 February 2020 the Claimant applied for the role of an Assistant Investment Manager. He was shortlisted for the role and interviewed on 1st April 2020. He subsequently received notification that he was not successful.
4. On 11 August 2020 he presented his claim (ET1) to the Employment Tribunal bringing complaints of race and age discrimination. There was a telephone preliminary hearing on 5 November 2020 at which the issues were identified and various case management orders made. The case had already been listed for a full merits hearing for 3 days in January 2022.
5. On 26 February 2021 the Claimant wrote to the tribunal in the following terms
“I am writing to notify you of my decision to withdraw the above claim from the tribunal process on grounds of rapidly deteriorating ill health resulting from the issues which gave rise to my claim and further compounded by the ongoing pandemic and my difficulties in finding suitable employment. Please find attached a note from my doctor for further information .

I take this decision with a heavy heart as I am in no doubt that I suffered a gross injustice made clearer by the information disclosures following the preliminary hearing last NovemberI have decided to give priority to my health....

In withdrawing this claim I am aware that the Respondent is under no obligation to offer any redress to me. However, I hope they will be guided by their moral and public duty responsibility to do what is fair and just to bring closure to the matter.

I am profoundly grateful to the tribunal and ACAS for accepting my claim and for their help.”
6. The application was accompanied by an email which confirmed that the Claimant was notifying the tribunal of his decision to withdraw the claim.
7. As a consequence a Judgment dismissing the claim on withdrawal was signed on 4 March 2021 and sent to the parties on 6 March 2021.
8. On 20 May 2021, the Claimant applied to re-instate his claim. He gave various reasons included an improvement in his health, the fact that he had now secured resources to appoint legal advisers, that he had now found alternative employment at a more senior level and information that he had now obtained about the two successful candidates following disclosure.
9. On 14 August 2021 Regional Employment Judge Swann directed that pursuant to Rule 72(1) the matter should be set down for a reconsideration hearing. The case was listed for hearing today.

THE LAW

10. Rules 51 and 52 of the 2013 Rules states:

Rule 51 End of claim

“Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.”

(emphasis added)

Rule 52 Dismissal following withdrawal

“Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless— (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

11. The leading authority on an application to reinstate a claim following a withdrawal is **Khan v Heywood & Middleton Primary Care Trust** [2006] EWCA Civ 1087. That case was decided under the predecessor to the 2013 Rules which were the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. The relevant rule there was Rule 25 which was as follows:

25 Right to withdraw proceedings

- (1) A claimant may withdraw all or part of his claim at any time – this may be done either orally at a hearing or in writing in accordance with paragraph (2).
 - (2) To withdraw a claim or part of one in writing the claimant must inform the Employment Tribunal Office of the claim or the parts of it which are to be withdrawn. Where there is more than one respondent the notification must specify against which respondents the claim is being withdrawn.
 - (3) The Secretary shall inform all other parties of the withdrawal. Withdrawal takes effect on the date on which the Employment Tribunal Office (in the case of written notifications) or the Tribunal (in the case of oral notification) receives notice of it and where the whole claim is withdrawn, subject to paragraph (4), proceedings are brought to an end against the relevant respondent on that date. Withdrawal does not affect proceedings as to costs, preparation time or wasted costs.
 - (4) Where a claim has been withdrawn, a respondent may make an application to have the proceedings against him dismissed. Such an application must be made by the respondent in writing to the Employment Tribunal Office within 28 days of the notice of the withdrawal being sent to the respondent. If the respondent's application is granted and the proceedings are dismissed those proceedings cannot be continued by the claimant (unless the decision to dismiss is successfully reviewed or appealed).
 - (5) The time limit in paragraph (4) may be extended by a chairman if he considers it just and equitable to do so.
- (emphasis added)

CONCLUSIONS

The Reconsideration application

12. In my judgement there is no material difference between the wording in the 2004 Rules where it refers to a withdrawal where “*proceedings are brought to an end*” and the present 2013 Rules where “*the claim or part of it comes to an end*”. I am satisfied therefore that **Khan** remains good authority.

13. At paragraphs 70 and 74 of the judgment of the Court of Appeal in **Khan**, Wall LJ said this:

“In the first place, in my judgment, the ET is a creature of Statute and its procedure is specifically governed by the 2004 Regulations. It is much used by litigants in person. Its procedures are governed by what is meant to be an informal, but clearly understood code. Thus, whilst at first blush, and particularly given the tight time-limits for instituting proceedings, it might seem sensible to have a

procedure by means of which a litigant who had mistakenly withdrawn a claim should be allowed to revive it, I am satisfied that, for such a procedure to exist, it would need to be set out expressly in the rules. I therefore regard the absence of any such express provision in the rules as important.

..... I agree with the Chairman of the Tribunal and the judge that the words "brought to an end" mean what they say. Those particular proceedings have indeed been brought to an end and cannot be revived against a respondent. That does not mean, however, that absent dismissal, a fresh claim on the same facts cannot be made."

14. This case is not of course concerned with a fresh claim which is brought after one that has been withdrawn but an attempt to revive claim that has been withdrawn. The situation for Mr Smith is therefore worse than the Claimant in **Khan** because in **Khan** the Claimant had only withdrawn his claim – here the Claimant has not just withdrawn but has a dismissal judgment issue against him too.

15. This is not a case where there was any duress or improper pressure applied on the Claimant to withdraw and none is alleged. The withdrawal was unconditional and voluntary.

16. In all of the circumstances and having regard to the decision in Khan and the wording of Rule 52 I consider that I have no alternative but to refuse the application for reconsideration and to confirm the original decision. The Claim therefore remains dismissed on withdrawal.

The Respondent's application for costs

17. After the announcement of the decision on the reconsideration application, the Respondent made an application for costs.

18. Rule 76(1) of the 2013 Rules, so far as is material, is as follows:

"A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

(b) any claim or response had no reasonable prospect of success;"

19. The application is made on the ground that the Claimant has acted "unreasonably" and that the Claim or application had "no reasonable prospects of success". In support the application Ms Garner argues that the Claimant should have agreed to the reconsideration application being determined on the papers which would have reduced or saved costs, that the Claimant has done nothing to research the position on the Rules and that if he had he would have realised that there was no real chance of the Claim being reinstated.

20. In determining the costs application I take on board the fact that the Claimant is a litigant in person and whilst he could have obtained legal advice as to his position he has not acted unreasonably in not doing so. It was not unreasonable to insist on an oral hearing rather than agreeing to the application being determined on paper.

21. Furthermore, I am satisfied that the Claimant was entitled to believe that his application was not wholly without substance as he did overcome the initial hurdle of

satisfying the Regional Employment Judge at the preliminary consideration stage and for the case to be listed for a Reconsideration hearing.

22. We might never know what would have been the outcome if the case had proceeded to a final hearing. Mr Smith certainly appears to have been well qualified for the role and to say that he did not perform well at interview may well have required more detailed analysis. He has an impressive list of qualifications and considerable experience. He has one Bachelors degree, two Masters degrees, a Ph.D as well as two Postgraduate Diplomas. He is the author of several books on the subject relevant to the role he applied for. He says he has 23 years' relevant experience in various government departments, the last 16 of which involved performing similar duties to the role for which he was rejected, but all of them at a substantially higher level in a more complex policy environment. He says that one of the books he co-wrote (he has written five) involved a Business Case model which has been adopted by HM Treasury for use throughout the whole of the UK public sector. The job that he was applying for was a junior role as an Assistant Investment Manager. It is not clear why he chose to apply for a job for which he seems to have been over-qualified but he says it was a job he felt was right for him at the time. He has since been appointed to a much more senior role but is understandably still upset and mystified at the decision to be rejected. He was undoubtedly entitled to ask why he failed at interview and whether the decision was related to his race and/or age. However, he gave he chose to withdraw his Tribunal claim for the reasons he gave. Under the Rules, and in the circumstances of his case, there is unfortunately no undoing of that act.

23. I do not consider that the Claimant has been unreasonable in making this reconsideration application or in bringing these proceedings nor can it be said that the claim had no reasonable prospects of success. The application for costs is therefore dismissed.

Employment Judge Ahmed

Date: 3 November 2021

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