



EMPLOYMENT TRIBUNALS

Claimant: Phillip Wareham

Respondents: The Staffing Group t/a Single Resource Group

Record of a Preliminary Hearing heard by CVP at the Employment Tribunal

Heard at: Nottingham On: 4 January 2022

Before: Employment Judge Hutchinson (sitting alone)

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

Representation

Claimant: In person

Respondent: Mr Pettifer, Solicitor

JUDGMENT

1. The application to set aside the strike out of the Claimant's claims confirmed to him on 14 August 2021 fails and is dismissed.

REASONS

Background to this Hearing

1. The Claimant presented his claim to the Tribunal on 26 September 2019. He had been employed by the Respondent as a Warehouseman from 11 August 2018 until 1 August 2019.
2. In his original claim he complained of;
 - Unfair dismissal
 - Race discrimination
 - Disability discrimination
3. The claim of unfair dismissal was dismissed because the Claimant did not have sufficient service.
4. The claims of race discrimination were dismissed by Employment Judge Camp at a Preliminary Hearing on 14 December 2020.
5. As determined by Employment Judge Camp at that hearing there were two complaints left namely;
 1. A claim of victimisation. The allegation was that the Respondents had stopped offering the Claimant at least his contractual number of hours of work each week because he had done a protected act namely that between approximately 6 and 10 July 2019 he had complained that his existing duties were exacerbating wrist pain possibly caused by carpal tunnel syndrome and he had asked for a change of duties supported by a Doctor's fit note dated 8 July 2019.
 2. A breach of contract claim. Namely, that the Respondents had stopped offering the Claimant at least the contractual minimum number of hours of work each week from around 22 July 2019 onwards.
6. Employment Judge Camp had made Case Management Orders in respect of the those claims and listed the matter for a 3-day hearing commencing on 7 June 2021.
7. On 12 February 2021 I granted the Claimant an extension of time to comply with the orders, but he still failed to comply with them.
8. On 18 March 2021 the Respondent's Solicitors wrote to the Tribunal to inform us that the Claimant had yet again failed to comply with the Case Management Order. He had still not provided the disclosure of a list of documents or copies of the same in line with the Case Management Orders by 1 March 2021. They had still not received a fully detailed schedule of loss also in line with the Case Management Orders.

9. My colleague Employment Judge Heap wrote to the Claimant saying that she was considering striking out the claim because of his failure to comply with orders and not actively pursuing his claim. He was given until 26 March respond.
10. The Respondents again wrote to the Tribunal on 19 April 2021 because the Claimant had still not complied with the Case Management Orders. They also asked for a postponement of the hearing due to commence on 7 June 2021 because it would not be possible to hold a hearing in view of the Claimant's delays in complying with the order.
11. The final hearing was then converted to a Case Management Preliminary Hearing. At that hearing my colleague Employment Judge Ahmed refused the Respondents application to strike out the claim.
12. At that hearing he gave a final chance to the Claimant to comply with orders.
13. In particular he ordered that the Claimant should send to the Respondent a list setting out all the documents in his possession, power or custody or control by no later than 4.00pm on Monday 5 July 2021. He said that;

"Unless by 4.00pm on Monday 5 July 2021 the Claimant complies with this part of the order the claim shall stand dismissed without further order or hearing. This is an "Unless Order" within the meaning of Rule 38 of the Employment Tribunals Rules of Procedure 2013".
14. I am satisfied that at the hearing Employment Judge Ahmed explained what a Case Management Order was and what the consequences of the Unless Order were, and he sent his order to the parties on 16 June 2021.
15. The case was then listed for a further final hearing to commence on 20 June 2022. The Claimant again did not comply with that order and 14 August 2021 a letter was sent to the Claimant and to the Respondent saying that his claims had now been dismissed under Rule 38 and the hearing cancelled.
16. On 22 September 2021 the Claimant wrote to the Tribunal. He said that he had not been receiving emails although that email was sent from the very email address that the orders were sent to. It appeared that he was seeking relief from the dismissal of his claim and on 5 October 2021 my colleague Employment Judge Adkinson wrote to him to say that his email would be treated as an application to set the strike out confirmed on 14 August 2021 aside.
17. On 25 October 2021 this matter was listed for a hearing and prior to today's hearing the Claimant has not provided any further details as to why he did not make an application to set the decision aside an earlier stage.

The Law

18. Rule 38 of the Employment Tribunal Rules of Procedure provide;

“(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for hearing, the Tribunal may determine it on the basis of written representations”.

My Conclusions

19. As the Respondents point out the two claims that remained were only dismissed following a litany of non-compliance by the Claimant with orders of the Tribunal over a period in excess of two years. The Claimant has been given multiple opportunities to pursue his case but has failed to do so. He has repeatedly failed to comply with the orders of the Tribunal.
20. In this case an application under Rule 38 (2) has to be made within 14 days of the notification being sent to the parties. This means that any application should have been made by 28 August 2021. No application was made by him until 22 September 2021.
21. I asked the Claimant if he could provide me with an explanation of this, but he could only say that he had spent some of August in hospital as a result of Covid. He has provided no evidence of this and I am not satisfied with his explanation for the delay. Nor am I satisfied that he had not received notification of the dismissal of his claim.
22. I am satisfied that it would not be in accordance with the overriding objective to allow this application bearing in mind the history of this case.
23. This claim has been going on for two years and it now only consists of one claim of victimisation and one claim of breach of contract neither of which have been pursued and the Claimant has been given countless opportunities to proceed with the claim but failed to do so.
24. I point out that even if the application had been made in time it would not have been in the interests of justice to allow it. This is because of the number of opportunities the Claimant has had of pursuing his claim but repeatedly failed to do so.
25. The Respondents through no fault of their own have been badly prejudiced by the delays. They have incurred substantial costs and had a case that has been running now for over two years with no prospect of the Claimant dealing with matters in the future.
26. For these reasons the Claimant’s application to set the strike out aside is refused.

Employment Judge Hutchinson

Date: 28 January 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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