



EMPLOYMENT TRIBUNALS

Claimant Mr M Nze
Represented by Mr D Brown, Counsel

Respondent Guy's and St Thomas' NHS Foundation Trust
Represented by Mr P Michell, Counsel

Before: Employment Judge K Andrews

WRITTEN REASONS FOR THE ORDER DATED 14 JANUARY 2022 PROVIDED AT THE REQUEST OF THE CLAIMANT

1. On 8 February 2021 at a preliminary hearing in this matter I made a deposit order in respect of the claimant's claims of:
 - a. wrongful dismissal;
 - b. discrimination arising from his disability based on the unfavourable treatment alleged at paragraphs 3(b) and 6 (of the list of issues before me at the preliminary hearing); and
 - c. failure to make reasonable adjustments where the substantial disadvantage relied upon is dismissal at paragraphs 11 and 15(a) (of the list of issues before me at the preliminary hearing).
2. The order with reasons attached was sent to the parties on 19 February 2021. The deposit was not paid. Many months later (unfortunately the Tribunal file cannot currently be located and in order to avoid further delay I will send out these reasons without the precise date that the application was made) the claimant applied for the deposit order to be reconsidered and this hearing was held on 14 January 2022. These written reasons were requested by the claimant on 27 January 2022. The remaining issues are due to be heard at a final hearing commencing 21 February 2022.
3. Clearly what should have happened following non-payment of the deposit is that the relevant claims should have been struck out. From looking at the file I can see that a Judgment striking out the whole claim was incorrectly prepared. I corrected it and sent it back to the administration team to send to the parties. For some inexplicable reason that was not done and I apologise for that.
4. That being the situation the power I am being asked to exercise can only be to set aside an order pursuant to the general case management provisions in rule 29 of the Employment Tribunal Rules 2013. As there was no judgment the

specific rule that applications for reconsideration have to be made within 14 days of the judgment being sent out does not apply and there is no corresponding express provision as to timescale within rule 29. However, it must also be an integral part of the exercise of discretion under rule 29 to take into account the promptness or otherwise with which an application to set aside is made. I also remind myself that rule 29 states that an order to set aside can be made where it is necessary in the interests of justice and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

5. In summary the basis of the claimant's application to set aside is that in the reasons given for making the deposit order I expressly referred to the fact that the claimant was informed of his right to appeal the decision of the ARPC to release him from the relevant training programme but that he did not so appeal. The parties agree that that is factually incorrect as the claimant did appeal.
6. The parties also agree that in a letter to the claimant dated 8 August 2017, which was not before me at the earlier hearing, Health Education England (HEE) referred to a letter from the respondent to the claimant dated 21 July 2017, which terminated his employment on the grounds of capability with immediate effect. HEE's letter stated:

'Therefore I am writing to inform you that your involvement in the foundation training programme... is terminated immediately.'
7. The claimant says that as that letter of 8 August 2017 was not before me when I made my decision on the deposit order it is in the interests of justice for that order to be set aside so that the arguments as to the status of the claimant's employment, i.e. whether it had terminated by operation of law/frustration or continued through to July 2017, can be explored and fully considered by the Tribunal at the final hearing.
8. Mr Brown for the claimant made thorough submissions as to why he says this is an exceptional case that should be allowed to proceed notwithstanding the delay in making this application. Mr Michell for the respondent says in reply that it is far too late for this application to be made and that in any event it is without merit
9. First of all on the question of timing of the application. As I have said the strict 14 day deadline does not apply as we are not talking about reconsideration of a judgment however an application to set aside should be made promptly. This application plainly was not made promptly and I am not satisfied that there were good reasons for that delay. The claimant has been represented in these proceedings by a very experienced legal team both in terms of his solicitors and Counsel from well before the hearing on 8 February 2021, in the months that followed and continues to be so represented today. It is plain that the relevance or otherwise of my error with regard to an appeal taking place would have been evident to the claimant's legal team immediately upon receipt of the written

reasons for the deposit order. Also the claimant would have been well aware of the existence of the letter of 8 August 2017 as he was the recipient. Both those matters must have been, or should have been, apparent to his legal team when they drafted the application in July 2021.

10. I have to conclude in all the circumstances that it is not in accordance with the overriding objective for the claimant's application to set aside the deposit order to be heard at this very late stage. I do take into account in making that decision that the claimant had an alternative route open to him namely the obvious one of paying the deposit which was set at a very modest level given what I was told at the time about his means. Further he could have applied for an extension of time to pay that deposit.
11. For those reasons the application is refused. In any event, I would not allow the application on its merits. I am not persuaded that even if I had been informed that the claimant had appealed and I had been referred to the letter of 8 August 2017, that would have changed my analysis as to the chances of success of the claimant's arguments.

Employment Judge K Andrews
Dated 18 February 2022