



EMPLOYMENT TRIBUNALS

Claimant: Mr D Adams

Respondent: Be Smart Home Ltd

Heard at: Manchester (via CVP)

On: 4 January 2022

Before: Employment Judge Fredericks

Appearances

For the claimant: In person

For the respondent: Ms Evans-Jarvis (litigation consultant)

JUDGMENT

The claimant's claims are struck out under Rule 37 contained at Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds that the claimant has not complied with an order of the Tribunal such that it is no longer possible to have a fair hearing.

WRITTEN REASONS

Procedural background

1. The claimant brought claims for unfair dismissal, unlawful deduction from wages, and notice pay. The claims were due to be determined at a hearing by Employment Judge Aspinall on 13 August 2021, but the matter was not ready to be heard. That hearing was converted to a preliminary hearing and the claims were discussed in detail so that orders and directions could be given to ensure that the claim was ready to be heard next time.
2. In order for the claimant's claims to be understood, the claimant was ordered, by 26 November 2021, to prepare and serve a witness statement which set out his claims and reasoning for them. The statement was to include specific explanation and clarification of the following matters in relation to the holiday pay element of his wages claim:
 - a. the basis upon which he claimed that holiday pay should be ten hours' pay;

- b. what he says the total number of days annual leave should be for his whole employment;
 - c. how many and which days he took as annual leave in his whole employment;
 - d. what he was paid for the days he took;
 - e. what is the shortfall in pay he claims for the days he took;
 - f. what he says is the outstanding number of days for the days on termination of employment; and
 - g. what he says is the calculation and total for how the days at (f) should have been paid to him.
3. The witness statement was also to include specific explanation and clarification of the following matters in relation to the bonus element of his wages claim:
- a. what he says he did to try and get the targets set;
 - b. how it is in the absence of those targets that he says he is due a bonus;
 - c. what bonus he claims;
 - d. what bonus was paid to him, if any; and
 - e. what shortfall he claims for what period.
4. On 30 December 2021, the claimant applied in writing for a postponement of the 4 January 2022 hearing on the basis that he had not had sufficient time to prepare a witness statement, in that he needed more than one month to prepare a witness statement with the documents in the bundle. There had been issues in agreeing the bundle, and the claimant did not wish to prepare his own bundle of documents as the respondent had suggested to him.
5. The claimant's postponement application was refused by Employment Judge Slater on 31 December 2021 because (1) the claimant did not appear prejudiced by the circumstances and (2) postponement could lead to considerable delay in the case being concluded. The claimant was then directed to send any documents that he sought to rely upon to the tribunal, and to send witness statements to the tribunal and the respondent, "*as soon as possible*". The claimant was advised that he may renew his application at the hearing on 4 January 2022 and that he would "*need to explain to the judge why he cannot reasonably have been expected to be ready for the final hearing on that date*".

The 4 January 2022 hearing

6. The claimant had not supplied a witness statement by the morning of the hearing. The respondent made a written application for the tribunal to strike out the claimant's claims which arrived shortly before the hearing was due to commence. The claimant also wrote to the tribunal asking for a postponement on the basis that he had

contracted Covid-19 and was unwell. He supplied a picture of a rapid antigen test to support the position.

7. The tribunal clerk was able to make contact with the claimant and the claimant agreed to join the hearing on the basis that he was not significantly unwell. At the outset of the hearing, I asked him if he felt well enough to begin and explained that he should say at any time if he felt that he could not continue, as it was important that he was able to participate properly in the proceedings. The claimant said he did not feel particularly unwell and would say if he began to feel any worse. His postponement application in relation to illness therefore fell away.
8. The claimant relied on the written application of 30 December 2021 to ask for a postponement in relation to what he said was an inability to prepare for the hearing. He confirmed that he had been aware of the need to produce a witness statement since the hearing on 13 August 2021. He was aware of the importance of the witness statement and of the specific points he had been asked to include. He said that he had not initially started to prepare a statement because the bundle was not agreed. He said that he thought other documents should be in the bundle, that he was not able to manipulate PDF documents, and that he needed to have a full two months to prepare his witness statement. When asked, he said that he had not started to prepare any document which might become a witness statement. He had not asked for help in the production of a witness statement, and he had not raised any issue with the timetable and preparation time with the tribunal until 30 December 2021.
9. The respondent resisted the application for postponement and made submissions supporting an application to strike out the claim. Ms Evans-Jarvis acknowledged that this was a severe step, but submitted that the claimant had had ample time to prepare but had not done so. She said that the respondent was unsure of the precise nature of the claimant's claims or how he intended to argue them. The order to produce witness statements was designed to clarify this so that it was possible for the respondent to be able to answer the claim and have a fair hearing. Finally, Ms Evans-Jarvis submitted that the tribunal's overriding objective may support strike out of the claimant's claims because this would dispose of the proceedings efficiently and fairly.

The law

10. The tribunal's overriding objective (Rule 2) requires the tribunal to deal with cases fairly and justly including, so far as practicable, ensuring that the parties are on an equal footing and avoiding delay (so far as compatible with proper consideration of the issues).
11. The tribunal may strike out a claim on a number of grounds, including because the claimant has not complied with a rule or order (Rule 37(1)(d)), and/or because the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim (Rule 37(1)(e)).
12. An unrepresented party cannot rely on that lack of representation for non-compliance with rules or orders; the rules of litigation must apply to the same standard as if the party was represented (Barton v Wright Hassell [2018] UKSC 12). The tribunal is able to strike out a claim or response if, because of the conduct of a party in not

complying with a tribunal order, it is no longer possible to hold a fair trial within the listed trial window (Emuemukoro v Croma Vigilant (Scotland) Ltd and Others [2021] UKEAT/0014/20).

Discussion and conclusion

13. Striking out a claimant's claim has a very significant prejudicial effect upon them, and should never be done lightly. Here, the claimant has not in my judgment seriously attempted to comply with the order that he produce a witness statement so that his claims can be understood. Although it is possible to conduct a final hearing without witness statements where the issues or claims are clear, in this case a statement had been ordered precisely so that the tribunal and the respondent could understand the basis for the claimant's claims.
14. This claim had already been delayed from 13 August 2021. The claimant had been allowed over three months from being on notice that he should provide a statement to the day that the statement should have been sent to the respondent and the tribunal. There were a further five weeks between that date and the hearing. He applied to postpone the hearing two working days before it was due, and he said this was the first time he had raised issues with the tribunal about the timetable. The claimant was not able to convince me that it was unreasonable to have expected him to comply with the order and produce a witness statement ahead of the hearing, and therefore to have complied with the order of Employment Judge Aspinall and the instruction of Employment Judge Slater.
15. The absence of a witness statement meant that the respondent was not clear about the case it would be required to meet. The tribunal was not clear about the basis upon which the claimant was advancing his claims. Consequently, the only way in which this claim could be heard fairly would have been to postpone the hearing and abandon the listed trial window. In my judgment, this would not be in furtherance of the overriding objective. This would introduce delay and additional cost in a situation where the claimant has unreasonably failed to comply with a tribunal order.
16. With particular consideration to the overriding objective, Barton, and Emuemukuro, I therefore struck out the claimant's claims under Rule 37.

Signed:

Employment Judge Fredericks
Dated: 31 January 2022

Case Number: 2407177/2021

Sent to the parties on:10 February 2022

For the tribunal office: