



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr K Jawara

AND

Respondent
Tesco Store Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY VIDEO (CVP)

ON

7 April 2022

EMPLOYMENT JUDGE GRAY

Representation

For the Claimant: In person
For the Respondent: Mr N Singer (Counsel)

JUDGMENT

The judgment of the tribunal is that the Claimant's application for reconsideration succeeds and the Judgment dated 5 January 2022 is revoked.

REASONS

The Application

1. The Claimant applied for a reconsideration of the judgment dated 5 January 2022 which struck out the Claimant's claim and which was sent to the parties on 12 January 2022.
2. The reasons for the strike out judgment were:

"1. By a letter dated 14th December 2021, the Tribunal gave the claimant an opportunity to make representations or to request a hearing, as to why the claim should not be struck out because

- it has not been actively pursued.
2. The claimant has failed to make representations in writing, or has failed to make any sufficient representations, why this should not be done or to request a hearing. The claim is therefore struck out.
 3. The hearing fixed for 14th-17th February 2022 will not take place.”
 3. The Claimant’s reconsideration application is set out in an email dated 12 January 2022.
 4. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 (“the Rules”). Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received within the relevant time limit.
 5. By email dated 13 January 2022 the Respondent opposed the application as it asserted the Claimant was still not actively pursuing his claim.
 6. The Claimant was asked by email dated 11 February 2022 by the Tribunal to provide comments on this. He did by email dated 16 February 2022 saying he was trying to comply. The Respondent then challenged this by email dated 21 February 2022.
 7. By notice of hearing dated the 9 March 2022 the parties were informed:

“The correspondence dated 16 and 21 February 2022 has been referred to Employment Judge Gray.

Employment Judge Gray directs that the Judgment issued on 12 January 2022 will be reconsidered to consider the Claimant’s application for a relief from sanction, and then if granted, to deal with case management.

The hearing will take place via Video Hearing System (VHS) on **7 April 2022 at 10:00 am**. It has been given a time allocation of **2 hours**. If you feel that this is insufficient, please inform us in writing within 7 days of the date of this letter. Employment Judge Gray directs that the Reconsideration Hearing will take place by video, unless the parties raise objection, saying why, by return.”
 8. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

9. The Claimant sets out his grounds in his email dated 12 January 2022:

“Dear Parties.

I am writing this concerning about the Strike out of my claims letter dated 14th December 202. I thank you all for the time and patient.

Tribunal has gave me an opportunity to make an representation or a request a hearing, in that case I am claiming or persuading my claims not to strike out and I am looking forward for hearing 14th and 15th February hearing that will took place.

Unfortunately the representation from me was over due according to dated, an I have ample reason why as follows.

Been mentioned to my other party earlier with our hearing that took place of telephone discussion, that I have only small limited access to internet.

I am doing this case issues myself as I contacted the Citizen advice bureau for a support of an solicitor and couldn't manage to offer me one.

I work recently two sperate part time job to afford my recent and previous bills that I owed plus some mobile phone contracts when I lost my 6yrs contracted job with Tesco.”

10. The letter the Claimant refers to dated 14 December 2021 from the Tribunal says:

“On the application of the respondent and having considered any representations made by the parties, Employment Judge Gray is considering striking out the claim because

- it has not been actively pursued.

If you wish to object to this proposal, you should give your reasons in writing or request a hearing at which you can make them by 31 December 2021.”

11. No response was received from the Claimant.

The Procedural Background to this Claim

12. By way of procedural background to this claim, by a claim form presented on 11 May 2020 the Claimant brought the following complaints;

- a. Unfair dismissal;

b. Discrimination on the grounds of race;

13. The Claimant notified ACAS of the dispute on 9 April 2020 and the certificate was issued on 9 May 2020.
14. There was a case management preliminary hearing before Employment Judge Bax on the 23 December 2020 which the Claimant did not attend.
15. It records as background to the claim that the Claimant was employed by the Respondent between 26 July 2012 and 8 February 2020. Also, that in the claim form the Claimant says that on 18 January 2020, the store manager accused him of smoking cannabis. He says that the accusation was an assumption because he was smoking a roll up cigarette. The accusation was put to the Claimant on 19 January 2020. The Claimant's colleagues said that he was smoking tobacco. On 22 January 2020, Ms Emberley the '.com' manager said that she was satisfied there was nothing in his possession when he was searched. The Claimant was dismissed.
16. It records that the Respondent asserts that it was made aware by the store manager that there was concern the Claimant had smoked cannabis on the premises. The Claimant was suspended pending investigation. An investigation meeting took place on 24 January 2020. 8 witnesses were interviewed, a number of whom described smelling cannabis. A disciplinary hearing took place on 7 February 2020, following which the Claimant was dismissed for gross misconduct. The Claimant's subsequent appeal was dismissed. The Respondent asserts that the dismissal was fair and was unrelated to the Claimant's race.
17. At that hearing it was directed that the Claimant should ... "on or before 6 January 2021, provide to the Tribunal and the Respondent an explanation in writing as to why he did not attend the hearing on 23 December 2020."
18. The case was also listed for a further case management preliminary hearing to take place on the 23 March 2021 by telephone.
19. The Claimant did not comply with the case management direction of Employment Judge Bax so after application by the Respondent Employment Judge Rayner made an Unless Order dated 11 February 2021 (which was sent to the parties on the 23 February 2021) which said:

"On the application of the Respondent and having considered any representations made by the parties, Employment Judge Rayner ORDERS that-

Unless by 2 March 2021:

1. The Claimant provides reasons in writing to the Employment Tribunal and to the Respondent explaining his non-attendance at the Case Management Hearing of 23 December 2020 and

2. Confirms that he intends to actively pursue his claim

The claim will be struck out without further notice.”

20. The Claimant replies in response to this Unless Order by email on the 1 March 2021 saying as follows:

“I am writing back concerning the failure of not attending the telephone hearing of 23 December 2020.

There were a lot of reasons why I didn't attend the hearing as follows..

Since I lost my job with Tesco I was struggling to get a job during this period of pandemic, and also I have a issues with my landlord as I need to pay his house bill and that I also don't have access to internet all the time so i missed a lot stuff going on internet at the moment.

I hope you can all understand my situation at the moment and I thank you all for the time and really my apologies for keeping you all waiting.”

21. The case management preliminary hearing listed for the 23 March 2021 then took place before Employment Judge Rayner. It records that the Claimant should be communicated with by ordinary post as he did not have access to the internet at that time. It also agrees the issues and case management directions, including listing the matter for final hearing for four days from the 14 to 17 February 2022.

22. It was directed by Employment Judge Rayner that the disclosure process by lists and copies of documents was to be completed by the parties by the 28 May 2021.

23. From the applications made by the Respondent in this matter it can be seen that it completed the disclosure process on the 3 June 2021 and chased the Claimant on the 14 June 2021. The Claimant emailed the Respondent on the 14 June 2021 to say that he has been busy and will get back to the Respondent the next day (15 June 2021).

24. There is then a chaser email sent by the Respondent to the Claimant on the 7 October 2021, and without response it then makes its application for strike out on the 19 October 2021.

25. There is then an email from the Claimant to the Respondent dated 30 November 2021 in which he says:

“Again my apologies for waiting concerning about the exchanging of list documents. I remembered sending you an email that i was so busy sorting out my list of documents which i was trying to sort out, only because i didn't have most of the document with me earlier i have to chase my representative to send me through of them.

I am still apologising to you, for the time being, waiting patiently as the situation is beyond my control since I lost my job with Tesco, and I'm still struggling for a better life.”

26. As a consequence of the disclosure process not being completed the remaining case management directions had not been complied with.

27. It was by email dated 19 October 2021 that the Respondent then made an application for strike out on the basis that the Claimant has failed to actively pursue his claim following a breach of the case management orders.

28. By email dated 19 November 2021 the Tribunal wrote to the parties as follows:

“This matter has been referred to Legal Officer Thomas Holt who directs me to write as follows.

The claimant is asked to provide comments on the respondent's application, by return.

The claimant is also asked to confirm if he still does not have access to the internet at the moment. In any event this correspondence will be sent to his new address along with a copy of the application.”

29. No response was received from the Claimant which then resulted in the Tribunal's strike out warning and then the claim being struck out (as detailed above).

This Hearing

30. For reference at this hearing the Respondent had submitted:

- a. A bundle consisting of 97 pages with separate index (in the main made up of the pleadings and party correspondence about disclosure)
- b. Copies of the following case authorities.

- i. Outasight VB Ltd v Brown UKEAT/0253/14
 - ii. Abegaze v Shrewsbury College of Arts & Technology, 2009 WL 364217 (2009)
 - iii. Blockbuster Entertainment Ltd v James 2006 IRLR 630
 - iv. Newcastle upon Tyne City Council v Marsden, [2010] I.C.R. 743 (2010)
 - v. Osonnaya v South West Essex Primary Care Trust, 2012 WL 1533568 (2012)
 - vi. Peixoto v British Telecommunications Plc, 2008 WL 1771466 (2008)
 - vii. Rolls-Royce Plc v Riddle, 2008 WL 833573 (2008)
31. The hearing commenced with the parties by video shortly after 10am when the Claimant's connection issues were resolved.
32. The hearing, its purpose and process was then explained to the parties. The procedural background was then discussed and agreed as set out above.
33. After oral submissions from both parties which included a helpful summary of the law by Respondent's Counsel and confirmation by the Claimant that he could send copies of his documents to the Respondent's representative by email on the 13 April 2022, the hearing was adjourned for 20 minutes for Tribunal deliberations.

The Law

34. Under Rule 70 of the Employment Tribunals Rules of Procedure, a judgment will only be reconsidered where it is 'necessary in the interests of justice to do so'.
35. A tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly' (Rule 2). This includes:
- a. ensuring that the parties are on an equal footing;
 - b. dealing with cases in ways which are proportionate to the complexity and importance of the issues;

- c. avoiding unnecessary formality and seeking flexibility in the proceedings;
- d. avoiding delay, so far as compatible with proper consideration of the issues; and
- e. saving expense.

36. As to relevant case authorities concerning the grounds of reconsideration this was helpfully summarised in the oral submissions of Respondent's Counsel and from that and those case authorities the following is noted:

- f. ***Outasight VB Ltd v Brown UKEAT/0253/14*** "The interests of justice had long allowed for a broad discretion, albeit one that had to be exercised judicially, which meant having regard not only to the interests of the party seeking reconsideration but also to the interests of the other party to the litigation and to the public interest requirement that there should be a finality to litigation."
- g. ***Council of the City of Newcastle Upon Tyne v Marsden 2010 ICR 743, EAT***, the claimant was absent from a pre-hearing review (PHR) because his representative wrongly informed him that he need not attend. His representative did not tell the chairman conducting the PHR of his error and, in the absence of any explanation for the claimant's absence, the chairman proceeded to dismiss his disability discrimination claim. The claimant succeeded in having that decision reviewed and the employer appealed against the review decision. The EAT agreed that the original decision to dismiss the claim had been an error of law. The representative's lack of candour cost the claimant the chance to apply for an adjournment, which would very likely have been granted. This was an exceptional case where it would be unjust to the claimant to expect him to seek a remedy directly against his representative for the defective presentation of his case.
- h. ***Blockbuster Entertainment Ltd v James 2006 IRLR 630***, the Court of Appeal confirmed that it would take something very unusual indeed to justify striking out on procedural grounds a claim that had arrived at the point of trial.
- i. ***Rolls Royce plc v Riddle 2008 IRLR 873, EAT***, an employment tribunal erred when it declined to strike out a claim after the claimant falsely informed it that he had been medically unfit to attend the hearing and failed to comply with its various directions. In so holding, the EAT noted that what is now rule 37(1)(d)) is not drafted in such a way as to oblige a tribunal to take account of any particular

considerations but found that strike-out applications on this ground will generally fall into one of the two categories identified by the House of Lords:

- i. that the default is intentional and contumelious (showing disrespect or contempt for the tribunal and/or its procedures),
or
 - ii. the conduct has resulted in inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the other party.
- j. ***Abegaze v Shrewsbury College of Arts and Technology 2010 IRLR 238, CA***, an employment tribunal erred in concluding that, six years after it had upheld a race discrimination complaint, the claimant had failed to actively pursue the case such that a fair trial of the remedies hearing was no longer possible. Although the claimant had been uncooperative and this had prevented the remedies hearing taking place, a fair trial remained possible and an ‘unless order’ could encourage the claimant to cooperate.
- k. ***Peixoto v British Telecommunications plc EAT 0222/07***, the EAT held that an employment tribunal had not erred in striking out claims of unfair dismissal and disability discrimination made by a claimant suffering from chronic fatigue syndrome on the basis that it was no longer possible to have a fair hearing. The claimant had asserted that she would not be physically able to give oral evidence, the case could not be decided on the documents alone and there was no prospect of the claimant being able to proceed at any time in the future, particularly given the nature of the medical evidence, which had persistently predicted a sufficient recovery that did not in fact materialise. In the absence of any prognosis for recovery, the tribunal was unable to establish any point in the foreseeable or even distant future when a trial could take place and concluded that a fair hearing was no longer possible. This conclusion was rooted in Article 6 of the European Convention on Human Rights, which lays down the right to a fair trial, including the right to have a trial within a reasonable time.

The Decision

37. Having considered carefully the documentation in this matter, the parties’ oral submissions and the relevant law I decide as follows:

38. As the case was understood at the time of the strikeout judgment it does not appear to be the wrong decision to have dismissed the claim due to the Claimant not actively pursuing the matter.
39. However, the Claimant now explains a combination of factors that have made it difficult for him to comply with case management orders. In short, he asserts he is trying to comply but has been impaired because:
- a. He uses a pay as you go mobile phone for his internet access, which means it is not consistent;
 - b. He suffered shock at losing his job after 6 years of service with the Respondent and has been trying to find work and maintain work, while managing his finances, home life and landlord difficulties;
 - c. He has tried to get legal assistance but has been unable to secure it so has been managing the matter all by himself.
40. The Claimant has apologised for his conduct (this can also be seen in the emails he writes). The Claimant believes he has been dismissed unfairly and discriminated against and considers it important that his claim is heard.
41. This does not seem therefore to be a case where his default is intentional and disrespectful or contemptuous for the tribunal and/or its procedures. At this hearing the Claimant has also now provided a definite date to comply with his obligations under the disclosure process being the 13 April 2022.
42. As to whether the conduct has resulted in inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the other party I have considered carefully what the Respondent submits about this.
43. In short, the Respondent submits there has been inordinate delay and no reason to suggest that anything will change in the Claimant's conduct. It is asserted that the passage of time prejudices the Respondent more and that the employee who dismissed has now retired but will still engage with the process and give a witness statement.
44. About this I would observe the following though:
- a. The Claimant did comply with a previous unless order. Although it should not be necessary for the Tribunal and Respondent to constantly police the Claimant's failures to comply with case management directions, an unless order is a less draconian option in this case than strike out;

- b. The issues in this case have been agreed since the case management hearing before Employment Judge Rayner so the Respondent understands the case it must meet.
 - c. As this is a complaint of unfair dismissal where the reason is challenged the initial burden of proof is on the Respondent, and as the dismissing employer it would have most of the documents as to liability already in its possession.
 - d. The Respondent did not submit to the Tribunal that it was ready for the hearing on the 14 to 17 February 2020 to proceed.
 - e. There is a greater prejudice to the Claimant with his claim having been struck out in that he will have no further recourse on the matters he complains about.
45. Weighing up all these factors I consider that it is in the interests of justice to revoke the strike out judgment, reinstating the claim. This is though on the basis that as to disclosure of documents, the Claimant's confirmed date of action is subject to an unless order.
46. For all these reasons the Claimant's application for reconsideration is granted and the judgment dated 5 January 2022 revoked.

Employment Judge Gray
Dated: 7 April 2022

Judgment sent to parties: 25 April 2022

FOR THE TRIBUNAL OFFICE