



EMPLOYMENT TRIBUNALS

Claimant
Mr. D Hall

v

Respondent
Wilkinson Retail Ltd

OPEN PRELIMINARY HEARING CONDUCTED BY CLOUD VIDEO PLATFORM

Heard at: Nottingham

On: 13th May 2022

Before: Employment Judge Heap (Sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr. R Powell - Solicitor

JUDGMENT

1. The Respondent's application to strike out the claim is refused.
2. The complaint of unauthorised deductions from wages is dismissed on withdrawal.
3. The complaints of discrimination relying on the protected characteristics of marriage or civil partnership and sexual orientation stand as dismissed under Rule 38 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

REASONS

BACKGROUND

1. This Preliminary hearing was originally listed to deal with case management and, particularly, to clarify the claims and the issues. It is the fourth Preliminary hearing in these proceedings and I shall come to the history of the matter below because it is relevant to an application made by Mr. Powell on behalf of the Respondent.
2. In that regard, shortly before the Preliminary hearing Mr. Powell made an application to strike out the claim because the Claimant has not complied with Orders made, it has not been actively pursued and a fair hearing is no longer possible.

3. As that application could only be determined in public I converted it from a private hearing and the listing was placed on Courtserve so as to notify any members of the public wishing to attend the hearing. The hearing remained conducted by Cloud Video Platform (“CVP”) as had originally been scheduled. We encountered some technical difficulties, but I am satisfied that we were nevertheless able to have a fair and effective hearing.
4. It is necessary to set out the background and how we are now where we are and why the strike out application has been made. I borrow heavily here from the background which was set out by Employment Judge Clark at the last Preliminary hearing which took place on 21st September 2021. Before that, on 18th August 2020 there was a Preliminary hearing before Employment Judge Adkinson to identify the issues and consider general case management. That was the first Preliminary hearing of the claim and had been listed as is standard to all such claims in this Tribunal region. The Claimant did not attend that hearing. The day before he had sent an email to the Tribunal explaining that he was mentally exhausted from the whole experience so that he could not focus on what was going on. He said he was seeking help from his mental health team. Employment Judge Adkinson considered his representation and issued a strike out warning based on his concern that the Claimant may not be actively pursuing the claim. He also made case management Orders for the parties to take various steps towards determining the question of whether the Claimant was at all material times a disabled person within the meaning of Section 6 Equality Act 2010.
5. The Claimant responded to the strike out warning on 12th September re-stating that he had been extremely mentally unwell. He went on to state that he did not know how to process things and that he was not getting any support with the paperwork. Employment Judge Clark considered that response and decided not to strike out the claim whilst making it clear that the Claimant needed to comply with the Orders that had been made by Employment Judge Adkinson.
6. It is not in dispute that those Orders – which were principally in respect of disclosing his medical records and providing an impact statement - were not complied with and the Respondent applied for an Unless Order. In response Employment Judge Camp issued a strike out warning to the Claimant. A reply was received on behalf of advisers assisting the Claimant at that time and also from the Claimant directly.
7. The explanation was accepted and the claim was not struck out but was listed for a further Preliminary hearing which was conducted by Employment Judge Butler. Orders were again made for the Claimant to supply an impact statement and further information and the Claimant was advised to engage and access support. The Claimant did supply the impact statement but not his medical records and he referred in being unable to do so because of his mental health. A further Preliminary hearing was then listed to discuss the approach to disability and future case management.
8. That was the hearing today, albeit I had converted it to a public hearing because the Respondent had applied to strike out the claim on the basis of

the Claimant's non-compliance with Orders made, that it has not been actively pursued and the fact that it is said that a fair hearing is no longer possible. The Claimant is on notice of that application.

THE LAW

9. Rule 37 of the Employment Tribunals (Rules of Procedure) Regulations provides as follows:

“37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing”.

10. Whilst the striking out of discrimination claims should be rare because of the public interest importance of such claims being determined after examination of the evidence (see **Anyanwu v South Bank Student Union [2001] 1 W.L.R. 638: UKEAT/0128/19/BA** – albeit in a different context) that will be a permissible step where there can no longer be a fair hearing, including within a reasonable time frame (see **Peixoto v British Telecommunications plc EAT 0222/07** and **Riley v Crown Prosecution Service 2013 IRLR 966, CA**).

CONCLUSIONS

11. In addition to the written application I have heard brief submissions from Mr. Powell. He references the fact that the Claimant has still not complied with the Orders made to disclose his medical records, the impact statement is not in the expected form and the Respondent is still no clearer as to the basis of the claims because he has not complied with the Orders made by Employment Judge Clark.
12. It is also said that a fair hearing is no longer possible because one of the Respondent's witnesses has left the business and it may be that they are not available to give evidence and the other two witnesses might also possibly leave before the claim is heard. It is said that little or no progress has been made since the claim was issued.

13. I have considered all of those matters and I have sympathy with the Respondent as to why the application has been made. However, I have to balance that against the fact that the Claimant's non-compliance has not been deliberate but because of his mental health and that he is now accessing counselling which he thinks will assist. It might also assist – as we shall do now and with the next hearing – to take matters in bite sized chunks. As to the claim not being actively pursued, I am satisfied that the Claimant has tried to engage and other than one Preliminary hearing which he did not attend he has attended hearings (albeit one late). He has also communicated with the Tribunal albeit largely failing to do what was actually required of him. I do not accept therefore that there has not been actively pursued. Whilst I note the position on the witnesses there is nothing to say at this stage that the one who has left the business will not assist, that is just an assumption at this point. The Respondent can also apply of course for a Witness Order if necessary to compel attendance. Equally, there is nothing at this stage to say that the other witnesses will leave the Respondent before a hearing. Balancing the positions of the Respondent and the Claimant I am not satisfied at this stage that the claim should be struck out.
14. However, I have explained to the Claimant that this is very much a case of him being in the last chance saloon. He must now comply with what I required of him and set out in the attached Orders to the letter and on time. If he does not do so then I will revisit at the next Preliminary hearing whether the claim should be struck out because, to again echo Employment Judge Clark, whilst we are not quite there yet there will come a time if there is further non-compliance where a fair hearing will no longer be possible.
15. I would also echo what other Judges have told the Claimant which is that he should try and seek advice and assistance, including legal advice, which will remove some of the stress that he is experiencing dealing with these proceedings.

Employment Judge Heap
Date: 15th May 2022
REASONS SENT TO THE PARTIES ON
24 May 2022

FOR THE TRIBUNAL OFFICE