



EMPLOYMENT TRIBUNALS

Claimant: Mr L Carberry

Respondent: Integrity Pub Management Limited

JUDGMENT NOTICE OF HEARING AND CASE MANAGEMENT ORDERS

JUDGMENT

It is the judgment of the Tribunal, of its own motion, that:

- 1.As the response has not been actively pursued, and the respondent is in breach of the Tribunal's orders, the response is struck out.
- 2.The effect of this order is that the respondent will be entitled to notice of any hearings and decisions of the Tribunal but shall only be entitled to participate in any hearing to the extent permitted by the Employment Judge.

NOTICE OF HEARING

The preliminary hearing to determine whether the claimant's claims were presented within time, and if not, whether the Tribunal should extend time for their presentation will be held before an Employment Judge sitting alone at Manchester Employment Tribunal , Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA at 10.00 on 21 July 2022 for 3 hours. Unless otherwise requested, or notified, the hearing will be by CVP.

CASE MANAGEMENT ORDERS

The claimant shall no later than 14 days before the preliminary hearing:

- a) Deliver to the Manchester Employment Tribunal Bundles Inbox a hearing bundle comprising all of the documents relevant to (but only relevant to) the time limit issues and
- b) Deliver a witness statement by himself, setting out why the claims were presented out of time, and why it was not reasonably practicable for him to have presented them in time, and why he then presented them within a reasonable time.

REASONS

1. By a claim form presented on 21 May 2020 the claimant brought claims of unfair dismissal, and for unpaid notice pay and holiday pay, arising from his (alleged) employment by the respondent, which ended on 19 December 2019.
2. The response to the claims was due by 24 June 2020. A response, from Graham Healey, Director, was received on 22 June 2020. That response denies that the claimant was ever employed by the respondent company, or that he was a worker.
3. A preliminary hearing was held on 2 November 2020 to determine whether the claimant was an employee or a worker of the respondent. By a judgment sent to the parties on 2 December 2020 Employment Judge Ainscough determined that the claimant was indeed an employee and a worker of the respondent.
4. At the same hearing, by Orders sent to the parties on 15 December 2020 the Employment Judge made case management orders for the future conduct of the claims. They required the claimant to provide a schedule of loss by 18 January 2021, the parties to exchange documents by 30 November 2020, a bundle to be prepared by 21 December 2020, and witness statements to be exchanged by 18 January 2021. The final hearing was listed for 25 January 2021.
5. That hearing, however, was postponed, for a variety of reasons, amongst which were that the claimant had been unable to comply with the Tribunal's orders, because he was undergoing a biopsy for suspected cancer in January 2021.

6. Employment Judge Newstead – Taylor postponed the hearing, and by orders sent to the parties on 19 February 2021 varied the previous case management orders. She also listed a preliminary hearing for 16 August 2021 to determine the issue of whether the claimant had presented his claims in time. She made specific case management orders for that preliminary hearing, which required the parties to provide their documents by 21 June 2021, or the respondent to prepare a bundle for the preliminary hearing by 26 July 2021, and to exchange witness statements for the preliminary hearing by 19 July 2021.
7. The parties were ordered to confirm their readiness for the preliminary hearing by 8 August 2021.
8. On 9 August 2021, however, Graham Healey for the respondent informed the Tribunal that he was on holiday on 16 August 2021 and asked for the hearing to be re-arranged.
9. This application was refused by the Tribunal by letter of 10 August 2021, it being observed that the hearing date had been set on 25 January 2021 and notified to the parties on 19 February 2021.
10. On 13 August 2021, however, as no hearing bundle had been received, and the Tribunal had not heard from either party, that hearing was postponed, initially to 8 September 2021, and then again, when nothing had been heard from either party.
11. Regional Employment Judge Franey then directed that the Tribunal write to the claimant warning him that his claim may be struck out as it was not being actively pursued.
12. The claimant replied to that warning by email of 20 September 2021. He said he had been pursuing his claims and had provided a zip file of evidence for the hearing listed for 8 September 2021, though he accepted this was late. He also attached medical evidence confirming his diagnosis of, and treatment for, a melanoma on his back.
13. On 1 October 2021 the Tribunal wrote further (by email only) to the parties, seeking clarification of their compliance with the Tribunal's orders. Neither party responded to that email.
14. On 19 January 2022 the Tribunal wrote again to both parties, warning them that the Tribunal was considering striking out the claim and the response, on the grounds that both parties had failed to comply with the Tribunal's orders, had not replied to the Tribunal's letter of 1 October 2021, and both the claim and the response were not being actively pursued. Then parties were given to 2 February 2022 to respond, and to object to the proposal, or request a hearing.

15. The claimant did respond by email of 1 February 2021. He apologised for his failure to deal with his claim, due to medical issues, related to his cancer, but also to contracting Covid – 19, which had led to him being bedridden, and to ensuing fatigue, with him sleeping for some 14 hours a day. He said, however, that his health had started to improve, and asked for the opportunity to progress his claim. He had instructed a solicitor, whose details he provided.
16. The respondent, however, did not respond to the strike out warning.
17. Notwithstanding this, the Tribunal wrote to the respondent again on 17 March 2022, referring again to the strike out warning of 19 January 2022, and asking for a response.
18. Finally, by letter of 30 March 2022, the Tribunal wrote again to the respondent (i.e to Graham Healey – erroneously addressed as Henley) pointing out the recent history, and asking for a response by 7 April 2022, in default of which the response was likely to be struck out.
19. Graham Healy replied on 30 March 2022, saying this:

“As far as I am aware I am awaiting a decision by the Tribunal as to whether the Claim should be dismissed as the Claimant did not abide by the ACAS timeline rules”
20. The Employment Judge could not see how this was a reasonable view. The hearing to determine whether the claim was presented in time was listed for 16 August 2021, but postponed. There is nothing that the respondent is waiting for. A further letter, therefore, pointing this out was sent on 6 April 2022. The letter also pointed out that whilst the claimant had explained his default, the respondent had not.
21. Graham Healey’s reply on 7 April 2022 says this:

“I cannot explain the Claimant’s default.

He either brought the claim in time or he did not – You will have to decide.

I have nothing more to add – Ive (sic) spent enough time on this spurious claim!!!!”
22. Mr Healey does not, of course, in this, or in any other communication, address the respondent’s default in complying with the Tribunal’s orders. His last sentence gives no indication that the respondent will now comply.

23. The Employment Judge therefore considers that, given the substantial default, and lack of any explanation, excuse or apology, the respondent has no intention of complying with the Tribunal's orders, and the response is accordingly struck out.

The claimant's case – the time limit issue.

24. That does not mean, however, that the claimant can succeed. As previously observed, his claims were, on the face of it, presented out of time.
25. That must certainly be the case in respect of his unfair dismissal claim. His dismissal was on 19 December 2019. That would give him three months less one day in which to present his complaint of unfair dismissal to the Tribunal.
26. Whilst the early conciliation provisions do provide for potential extension of this primary time limit any such extension can only arise if the claimant starts the early conciliation process within the initial three months' time limit. In this case that would have been by 18 March 2020. The claimant only commenced early conciliation on 22 April 2020, a month out of time. he cannot therefore gain the benefit of any potential extension of time.
27. In relation to his claims for notice pay and holiday pay the time limit may be a little later, in that it would run from when these sums were payable. Given, however, that even if they were not payable until another month after his dismissal, that would be 19 January 2020, meaning that his ACAS early conciliation starting on 22 April 2020 would still make those claims too out of time.
28. This is not a determination, as these issues will be addressed at the preliminary hearing. If the claims are out of time, the claimant will have to show that it was not "reasonably practicable" for him to have presented his claim in time, and that he then presented them within reasonable time. To show want of reasonable practicability the claimant needs to show what prevented him from bringing he claims in time. He needs to explain what he knew of the way in which to present a Tribunal claim, ad the time limits for doing so, what, if any , steps he took to research the process, or obtain advice, and generally why he delayed in event approaching ACAS until after the three month time limit had expired
29. To that end his witness statement for the preliminary hearing, and his supporting documents, should address these issues. The claimant is urged to seek advice. The provisions of the Tribunal's letter of 13 August 2021 will apply to this hearing.
30. Whilst the respondent cannot participate, unless it seeks the Tribunal's position, as time limits go to the Tribunal's jurisdiction , they cannot be

overlooked, and the Tribunal has to make a determination that the claims can proceed, even if there is no active response.

Employment Judge Holmes
Date: 7 April 2022

JUDGMENT SENT TO THE PARTIES ON
Date: 27 April 2022

FOR THE TRIBUNAL OFFICE