# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr R Arif**

**Respondent:** **New Mirchi Ltd**

**Heard at:** **Cardiff by CVP** **On: 9th December 2021**

**Before:** **Employment Judge G Duncan**

**Representation:**
Claimant: In person via telephone assisted by Mrs Arif
Respondent: Mr Mahjid, Solicitor

**JUDGMENT** having been sent to the parties on 13th December 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

**Request for Reasons**

1. The hearing of this case took place on the 9th December 2021 via CVP and the judgment was sent to the parties swiftly thereafter. Unfortunately, since that time, the parties have encountered a significant and unacceptable delay in receiving these reasons for which I apologise on behalf of the Tribunal.

2. The Claimant requested written reasons on the 24th December 2021. By virtue of a lack of response, the Claimant sent a further chasing email on the 26th January 2022. Unfortunately, neither request was responded to by the Tribunal. Of greater relevance is that the requests were not actioned, and I was not informed that a request for reasons had been properly made. I am now informed that the requests for reasons were erroneously recorded as having been actioned back in January 2022. A number of

months passed before the Claimant was again forced to chase the Tribunal by way of email dated 11th July 2022. This request triggered the Tribunal to immediately apologise to the Claimant and explain the situation. It was only on the 22nd July 2022 that I first became aware that a request for reasons had been made many months ago. I can only apologise again on behalf of the Tribunal for what has been an unacceptable delay. My reasons for the decisions made on the 9th December 2021 are detailed below.

## Introduction

**3.** The Claimant, Mr Arif, was working at a restaurant operated by the Respondent, New Mirchi Ltd, from approximately the 6th February 2020. As outlined below, the relationship between the Claimant and Respondent terminated in or around June 2020.

**4.** The Claimant brings a claim in his ET1, dated 18th August 2021, to state that he started employment as an administrator on 6th Feb 2020. He states that he was not paid furlough pay for which he was owed. He states that he began his employment in February 2020 but after a few months his employer was unwilling to continue the furlough and that "they would let me go". He goes on to allege that the Respondent was acting fraudulently. The claim does not specify the amount that he claims.

**5.** The Respondent filed an ET3 and denies the claim. He states that the accountant kept the Claimant on the payroll and so furlough money was inadvertently claimed. The Respondent accepts that the Claimant discovered this but asserts that the company took action through HMRC to rectify the error.

**6.** The matter was subject to directions on 6th October 2021, it was directed that statements should be drafted by the Claimant within four weeks, Respondent in six weeks and the matter was listed for trial on 9th December 2021. It would appear that the Claimant wrote to the ET on 22nd November to state that the Respondent name should be New Mirchi Ltd. That triggered an amendment to the Respondent's name. Further, EJ Harfield reminded the parties that they must comply with the directions for evidence. As will be outlined below, they did not do so.

**7.** The case therefore proceeded to final hearing before me on the 9th December 2021 with neither party having filed any evidence.

## Hearing

**8.** At the start of the hearing, it was confirmed that the only documents sent to the Tribunal were the ET1 and ET3.

**9.** The Claimant was assisted at the hearing by Ms Arif. She confirmed that she had a number of documents upon which she wanted to rely. These include payslips, P60 and other material. Ms Arif stated that she and her husband were confused as to whether the documents needed to be sent to the Tribunal. She seemed to be of the view that she could adduce the documents at the final hearing – plainly this is wrong. The Respondent had not had sight of the documents either.

**10.** Mr Mahid explained that there were no documents to be relied upon by the Respondent. I remind myself that it is not for the Respondent to prove their innocence and it is for them to respond to the Claimant's case. He invited me to dismiss the claim today.

**11.** I made it clear at the outset of the hearing that there was no prospect of an effective hearing today. In terms of the parties' positions, the Claimant invited me to adjourn the case so to allow him to rely upon the documents he has. He states that the Respondent has simply kept his furlough pay. He states that he chased this up repeatedly. I asked the Claimant what his mindset was back in June 2020 as the ET1 states that the employment terminated at that time. It was confirmed that he was paid in March, April, May but there was no payment from June onwards. It is stated that the Claimant simply wanted what the Respondent kept in terms of furlough payment. I heard a detailed account from the Claimant regarding the attempts that he made thereafter to secure the payments. He states that he has uncovered evidence of fraud through the accountant given that they provided him with payslips and P60.

**12.** The Respondent says that this was an inadvertent error in continuing with the furlough scheme. He states that the proper route for the Claimant to take issue is to raise the matter with HMRC but that in any event the Respondent has resolved the furlough issue through their accountant. Mr Mahid states that this was nothing more than an innocent mistake.

**13.** I heard submissions as above and then took a break to consider the issues around furlough. I invited submissions on the point as to whether the Claimant was entitled to pursue the Respondent for such sums. I put both parties on notice that it was my view that time limits may need to be considered and that consideration may be given to the prospects of success. Neither party wanted to address me any further in respect of these issues and were content to rely upon their positions as outlined above.

## The Law

**14.** In consideration of the issues today, I have regard to rule 37 of The Employment Tribunal Rules, in particular, that at any stage of proceedings, a Tribunal may strike out all of 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).

**15.** I also have regard to the fact that I must give a party a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

**16.** In my view, paragraphs 37 a) c) and d) are particularly relevant in this case.

## Decision

**17.** The case was listed to hear the final hearing. The Claimant has failed to adduce any evidence upon which he intends to rely. It is clear to me that he has failed to adhere to the order for the filing of evidence. Further, despite being warned and reminded, they failed to send the documents to the Tribunal after EJ Harfield asked the court staff to write to the parties. There has clearly been a failure to comply with court orders – that is a serious matter that leads to a waste of Tribunal time and resources.

**18.** In addition, I am satisfied that such non-compliance in this case fits into the category of not being actively pursued. The Claimant has effectively done nothing since the claim form was issued. There is simply no evidence upon which I am able to determine the issues.

**19.** The greatest point of concern is whether there are no prospects of success. I have heard from the Claimant and his wife at length. What they

claim is the payment of inadvertent or fraudulent payments made to Respondent by HMRC but not received by the Claimant. In my judgment, taking the case at its highest, bearing in mind that the Claimant's employment is agreed to have terminated in June 2020, I do not have the power to require the Respondent to make such a payment, nor would any Judge at a final hearing considering this particular request. The furlough scheme is a relationship between HMRC and the Respondent. If there were fraudulent or inadvertent payments made, then it is for the Claimant to raise with HMRC directly in an attempt to correct or amend any records held in respect of his tax and to allow HMRC to investigate, if so advised. If I accept the Claimant's evidence in full, the relationship between the Claimant and Respondent came to an end by way of an effective termination in June 2020. What happens after that date is not something that I can intervene with given that the relationship had ceased. Even if the Tribunal were to give the Claimant the opportunity to file evidence, and that evidence supported his case in full, I am satisfied that no Tribunal will conclude that there is a claim against the Respondent for the reasons I have already outlined. Accordingly, I strike out the claim pursuant to 37a).

**20.** If I am wrong in respect of my approach regarding the claim having no prospects of success, I am satisfied that the case should be struck out under rule 37c) and d).

**21.** There has been a wholesale failure on the part of the Claimant to comply with court orders or to progress his claim. He had the benefit of a gentle reminder from EJ Harfield and yet still did nothing to address his claim's deficiencies.

**22.** I have regard to the prejudice that the Claimant is likely to suffer in taking this approach, and plainly the prejudice is substantial, but I also balance up the prejudice to the Respondent who still does not entirely know the claim against him and has been required to attend a hearing at which the Claimant has failed to prepare for appropriately.

**23.** I am satisfied that such a decision is in accordance with the overriding objective as to further adjourn and extend the timescales for filing of evidence would be disproportionate to the issues, cause delay that is unnecessary in the context of this case and would not be an effective use to Tribunal resources.

**24.** At the conclusion of the oral reasons, the Respondent made an application for costs. The Respondent invited the Tribunal to consider that there had been two flagrant breaches of orders and that accordingly the Respondent sought £750 for representation at the hearing today. I dismissed the application given that the Claimant had innocently failed to comply, that there was no evidence that his conduct had been

unreasonable other than the aforementioned failures, that the Respondent had also failed to comply with orders and that ultimately the Respondent had benefited from the Claimant's failure to be proactive in advancing his claim.

Employment Judge G Duncan
Dated: 16th August 2022

JUDGMENT SENT TO THE PARTIES ON 19 August 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche