



EMPLOYMENT TRIBUNALS

Claimant: Mr A Musarurwa
Respondent: Commisceo Primary Care Solutions Limited
Before: Employment Judge Gardiner

UPON APPLICATION made by letter dated 19 August 2022 to reconsider the judgment dated 5 August 2022 under Rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing

RECONSIDERATION JUDGMENT

The judgment of the Tribunal is that:-

The Claimant's application for reconsideration of the Judgment dated 5 August 2022 striking out the Claimant's claim is refused.

REASONS

1. On 5 August 2022, I issued a Judgment striking out the Claimant's claim on the basis that it had not been actively pursued. My Reasons identified that the Claimant had failed to attend Preliminary Hearings on 16 September 2021 and 21 March 2022. In addition, the Claimant had failed to respond to the Employment Tribunal's letter dated 15 February 2022 asking for confirmation that he was ready to proceed with the hearing having completed all case management orders. The Judgment was sent to the parties on 9 August 2022.
2. On 19 August 2022, the Claimant made an urgent application for reconsideration of the Judgment, providing reasons why the Judgment should be reconsidered. The Tribunal invited comments from both parties on whether the Judgment should be reconsidered and on whether the reconsideration application could be dealt with on the papers without a hearing. The Claimant's solicitors indicated in a further email dated 22 September 2022 that the Claimant had no objection to the application for reconsideration being considered without a hearing. The Respondent objected to the reconsideration application being granted but has not commented on whether the application could be dealt with on the papers without a hearing.
3. I have decided that it would be in the interests of justice for this issue to be dealt with on the papers, without a hearing. The Claimant's solicitors have indicated that they consent to this approach; and no request for a hearing has been made by the Respondent. There is sufficient information on the Tribunal file and in the

Claimant's application for the issue to be dealt with on the papers. There has been a full response from the Claimant's solicitors in a letter dated 19 October 2022 to the letter from the Respondent dated 26 September 2022 setting out the Respondent's stance on whether the Judgment should be set aside.

4. The test in considering an application for reconsideration is set out in Rule 70 of the Employment Tribunal Rules 2013, which is expressed as follows:

"A Tribunal may, either of its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again"

5. The interests of justice will include having regard to the overriding objective which is set out in Rule 2 of the 2013 Rules as follows:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as is practicable-

- (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.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by these Rules.

6. As a result, the Tribunal must review all relevant circumstances in deciding whether setting aside or varying the Judgment would be in the interests of justice.
7. The Claimant's Tribunal claim arises from his work for the Respondent. The dates given in his Claim Form are 11 January 2021 to 29 January 2021. He was working as a Team Leader. He claimed unfair dismissal and race discrimination. The details of his claim were described as follows:

"I was employed by Comisceo Primary Care Solutions from 11 January 2021 as a Tester in a Covid testing station. After 1 week I was appointed Team Leader at Saffron Walden. On Friday 29 January at 11:00 'Racquel' arrived and informed me that she was taking over, and that there was a new policy that only local white workers were to be employed in order not to discourage attendance by individuals seeking testing. She introduced herself as the new manager. She stated that there was a new policy that only local, white

people were to be employed as staff as anyone else would discourage attendance at the centre by the local (white) population. I spoke to my manager, Jo Harvey, over the phone who claimed I was being dismissed because I had been caught sleeping on the premises, which was untrue. I was instructed to leave the premises and was removed from the Company WhatsApp group. I did not receive a P45 or payslip.

I believe I was dismissed on grounds of race and I am a victim of direct race discrimination”

8. In the Claim Form, the Claimant named his representative as Aidan Loy of Monaco Solicitors, and provided a phone number.
9. On 25 May 2021 the Tribunal sent the Claim Form to the address for the Respondent given on the Claim Form, which was its registered office address. It gave the Respondent until 22 June 2021 to respond. The Respondent has failed to do so. As a result, the Tribunal sent a letter dated 9 August 2021 stating that a judgment may now be issued. The Respondent would only be permitted to participate in any hearing to the extent permitted by the Employment Judge who hears the case. That letter, if not the earlier proceedings, had obviously reached the Respondent because the Respondent emailed on 10 August 2021 stating that “we did not receive any documentation regarding a claim, so have not been given the opportunity to respond to any claim”. It provided an email address for the Respondent so future communications could be sent by email. On 12 August 2021, a copy of the ET1 was sent to the Respondent. For whatever reason, the Respondent has still not entered a Response to the Claim. On 12 July 2022, Employment Judge Lewis noted that it was not appropriate to issue a judgment because it was necessary to hear evidence to decide the claim.
10. Also on 25 May 2021, the Tribunal informed the parties that a telephone preliminary hearing for had been listed for 16 September 2021. A blank agenda for the preliminary hearing was attached, which was to be completed and returned to the Tribunal seven days before the date of the preliminary hearing. The parties were told that the parties would be contacted on the telephone numbers provided.
11. A third and final letter was sent by the Tribunal on 25 May 2021. This was a Strike Out Warning letter in relation to the Claimant’s unfair dismissal claim. It was prompted by the span of the Claimant’s employment lasting less than two years. It asked for a response from the Claimant by 1 June 2021 explaining why the unfair dismissal claim should not be struck out as having insufficient service. The Claimant’s solicitors did not respond with this timescale, prompting a chasing letter from the Tribunal dated 9 August 2021, asking for a response by 23 August 2021. On 10 August 2021, the Claimant’s solicitors responded. It did not consent to the unfair dismissal claim being struck out for insufficient service, although acknowledged that “the Claimant was aware that he was under the Service limit to bring a complaint of Unfair Dismissal”. The gist of the response was that the

dismissal was an act of race discrimination which would lead to a remedy similar in size to that of unfair dismissal if the Tribunal struck out the unfair dismissal claim.

12. The Tribunal appears never to have reached a conclusion on whether the unfair dismissal claim should be struck out for insufficient period of continuous service. It therefore remained a live claim.
13. On 13 September 2021, the Claimant's solicitors attached the agenda for the preliminary hearing on 16 September 2021. Mr Aidan Loy apologised for its late arrival as "we have had extreme difficulty in obtaining instructions". The form itself which was sent through to the Tribunal was mainly blank.
14. The telephone Preliminary Hearing at 2pm on 19 September 2021 was conducted by Employment Judge Burgher. Mrs J Harvey (Chief Operating Officer) attended on behalf of the Respondent. The Tribunal attempted to contact the Claimant's representative on the mobile number provided on the Claim Form, but without success. As the first line of the record of hearing noted "The Claimant's representative did not accept the calls that the Tribunal was making to 07851 239 723 from 14:00 to 14:40. The hearing therefore proceeded in the Claimant's absence". Not only did the Tribunal attempt to contact the mobile number provided. It also emailed Mr Loy at 14.20, saying "Please can both parties provide telephone number to reconnect at 2.30pm. There was no response from Mr Loy until 14:34 in the following terms "The number is as provided: 07851 739723". This was in fact a different number from the number contained on the Claim Form. It explains why the Tribunal was unable to contact the Claimant's representative.
15. At the Preliminary Hearing, the Claimant was ordered to provide a fully completed schedule of loss by 14 October 2021. Although a record of the hearing and of the case management orders made was sent to the parties on 20 September 2021, no Schedule of Loss was provided to the Tribunal. It also provided that disclosure should take place by 21 January 2022, a hearing bundle should be prepared by the Respondent by 22 February 2022, and witness statements should be exchanged by 22 March 2022.
16. Following the Preliminary Hearing there was no further communication from the Claimant's solicitors with the Tribunal until the reconsideration application.
17. On 2 October 2021, the parties were informed that there would be another Preliminary Hearing on 21 March 2022. Dial in details were provided so that the parties could access the Hearing. On the same day the parties were told that there would be a two day Final Hearing on 25 and 26 August 2022.
18. On 15 February 2022, The Tribunal asked the parties to confirm by 1 March 2022, in advance of the Preliminary Hearing listed for 21 March 2022, that they would be ready to proceed with the hearing having complied with the case management directions. There was no response to this communication from either party. A chasing letter was sent on 3 March 2022 extending the deadline for responding to 10 March 2022. Again, there was no response from either party.

19. At the Preliminary Hearing on 21 March 2022, there was no attendance from either party. Employment Judge P Britton made an unless order in the following terms:

“Unless the Claimant provides a full explanation for his non-attendance by 7 days from the issuing of this Order, the claim will be dismissed for failure to comply with the Tribunal’s Orders and want of prosecution”

20. I issued a Judgment striking out the claim on 5 August 2022, which was sent to the parties on 9 August 2022. My reasons were expressed as follows:

The Claim is struck out under Rule 37(1)(d) ET Rules 2013 on the basis that it is not being actively pursued. The Claimant failed to attend Preliminary Hearings on 16 September 2021 and 21 March 2022. In addition, the Claimant has failed to respond to the Employment Tribunal’s letter dated 15 February 2022 asking for confirmation that he is ready to proceed with the hearing having completed all case management orders. The Claimant did not respond to this letter”

21. As a result, I vacated the Final Hearing which was listed to take place on 25 and 26 August 2022.

22. The Claimant’s application for reconsideration is essentially advanced on the following four bases:

- a. There was an administrative error within the Claimant’s solicitors which resulted in the Tribunal’s emails not being picked up. This was caused by the departure of the case handler, Aidan Loy “in October 2021”.
- b. The Tribunal had dialled the incorrect phone number for the Claimant’s solicitors firm in relation to the Preliminary Hearing on 16 September 2021.
- c. The “Claimant’s claims” (plural) have good prospects.
- d. The Respondent had failed to engage in the Tribunal process.

23. The response from the Respondent noted that the failures of the Claimant and his lawyer had been particularly flagrant over a long period of time. It indicated that it appeared that the Applicant had never contacted his lawyer to query the stage at which his claim had reached. It disputed that the Claimant’s claim had good prospects of success. It indicated that the Respondent had photographic evidence of the Claimant sleeping at work and stated that around 80% of the Respondent’s staff were black or from ethnically diverse backgrounds. It suggested that the Claimant was self-employed.

Conclusions

24. My conclusion is that it would not be in accordance with the overriding objective or the interests of justice for the Judgment to be reconsidered. I note that all discrimination claims raise serious allegations which ought to be carefully

considered if there has been sufficient engagement and co-operation with the Tribunal process. I note that the Respondent is far from blameless in the way it has responded to the Tribunal complaints, given that it has yet to lodge an ET3 and apply for an extension of time in doing so. However, the interests of justice do not warrant setting aside the Judgment for the following reasons:

- a. There had already been fault on the Claimant's part or on the part of his solicitors even before the hearing on 16 September 2021. There had been no response to the Tribunal's original strike out warning letter. The Agenda sent in advance of that hearing was not sent seven days in advance as required. It was significantly incomplete. The reason given at the time was "extreme difficulty in obtaining instructions".
- b. Contrary to the assertion in the Claimant's solicitors' reconsideration application, it appears it was the fault of the Claimant or his legal representative that he did not attend the Preliminary Hearing on 16 September 2021. It was not the Tribunal's fault for dialling the incorrect number. Either the Claimant or Mr Loy had provided the wrong telephone number on the Claim Form. This had not been corrected at any point until 34 minutes after the scheduled start time for the telephone hearing.
- c. Whilst the Claimant's solicitors have provided some explanation for the failure to actively pursue the claim from September 2021 onwards, the explanation provided is not a full explanation and not a good explanation. The precise date on which the previous representative left has not been identified. No explanation has been given about the handover arrangements that were made so as to ensure that an alternative file handler was able to take over the file without any impact on the Claimant or on compliance with Tribunal directions. No explanation has been given as to why the Respondent's solicitors did not arrange for the Tribunal to be notified that there had been a change in the file handler and therefore a change in the email address for correspondence. No explanation has been provided as to whether Mr Loy had diarised the deadlines set out in the Tribunal's case management orders made on 16 September 2021 which he would have received shortly after 20 September 2021 and before he left the Claimant's solicitors. If he was still working for the Claimant's solicitors on 2 October 2021, he ought to have received notification of the Preliminary Hearing listed for 21 March 2022. Several further emails were sent by the Tribunal to the email address for Mr Loy. The Tribunal received no notification that the email address given to the Tribunal for general correspondence was not active, whether by an out of office autoreply or by notification that the email address was not recognised. It appears that the email address remained live despite Mr Loy's departure, but emails sent to that address were not automatically forwarded to another file handler. No explanation has been provided as to whether the Claimant himself had enquired of his solicitors at any point between September 2021 and August 2022 as to the status of his claim. No sufficient explanation has been provided

as to why the Claimant's solicitors had reason to access Mr Loy's emails on 12 August 2022 but had not had particular reason to do so before then.

- d. In accordance with the terms of the Unless Order made by Employment Judge P Britton on 21 March 2022, the Claimant's claim was dismissed 7 days after 25 March 2022 (ie 1 April 2022) in circumstances where the Claimant did not provide any explanation for his non-attendance at that hearing.
 - e. The Claimant's representative failure to attend the first Preliminary Hearing has required another Preliminary Hearing to be listed. His failure to engage with the Tribunal directions has led to the loss of a two-day Final Hearing. The allocation of these ineffective hearing dates to the Claimant's case will inevitably have had an impact on the availability of hearing dates for other litigants. Were the claim to be reinstated, it would require a further Preliminary Hearing and further dates for a Final Hearing. A Final Hearing is most unlikely to be capable of being listed until the middle of 2023, which would be a year after it was originally due to be heard. Such a further period of delay would inevitably prejudice the Respondent and those at the Respondent who are accused of discrimination.
 - f. Mr Loy appeared to accept in his email to the Tribunal dated 11 August 2022 that his client did not have the necessary two years' service. There is therefore no merit in the unfair dismissal claim in any event because the Tribunal has no jurisdiction to consider it.
 - g. The only act of race discrimination alleged in these proceedings is the Claimant's dismissal. Even on the Claimant's case, a non-discriminatory reason was given at the time of dismissal. As the legitimacy of that reason is disputed, no view is taken on the merits of the Claimant's discrimination claim. However, the Claimant has provided no explanation of the scale of the financial loss which he has experienced as a result of the alleged discriminatory dismissal.
25. Therefore, the Tribunal's Judgment dated 5 August 2022, which was sent to the parties on 9 August 2022, will not be varied or set aside.

Employment Judge Gardiner

19 October 2022