



EMPLOYMENT TRIBUNALS

Claimant: Ms L Cogoni and 12 others

Respondent: Listen Limited (in liquidation)

Heard at: Bury St Edmunds Employment Tribunal (remote via CVP)

On: 18 August 2022

Before: Employment Judge K Welch (sitting alone)

Representation

Claimant: Ms M Hasan and Ms L Abram

Respondent: Mr D Northall, Counsel (representing the liquidators)

WRITTEN REASONS

1. Reasons having been given orally on 18 August 2022 and Judgment having been sent to the parties on 22 August 2022, the claimant requested written reasons by email dated 22 August 2022. This request was referred to me on 13 October 2022.

Background

2. This hearing was listed to determine whether the Tribunal should reconsider the strike out judgment given by EJ Lewis on 22 April 2021 and sent to the parties on 17 May 2021.
3. I heard no evidence but was provided with a bundle of documents by the respondents and page numbers in this Judgment refer to pages within that bundle.

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4. The original claim was brought by Mr Jenkins a CWU representative on behalf of 103 claimants on 11 November 2019. This claim complained that the respondent had failed to collectively consult in accord with s188 Trade Union and Labour Relations (Consolidation) Act 1992.
5. The Tribunal wrote to the claimants on 21 March 2020 to confirm that, as the respondent was in administration, consent was required from either the Administrators or the Court in order for the case to proceed. It confirmed that the necessary consent should be sent to the Tribunal, failing which it would be referred back to a Judge in 6 months' time.
6. On 13 July 2020, Ms Abram, one of the claimants, contacted the Tribunal asking for an update, as the person with conduct of the matter on their behalf was not getting back to anyone.
7. The respondent came out of administration but went into creditor's voluntary liquidation on 27 May 2020.
8. On 7 November 2020, the Tribunal wrote to the claimant's representative [P93] asking whether consent of the Administrator or the Court had been obtained, despite this not being required at this stage.
9. The claimant's representative responded on 20 November 2020 and whilst he did not confirm whether or not consent had been obtained, he did explain that he had tried to contact the Tribunal by telephone on a number of occasions and had been in several hospitals with serious medical conditions. The respondent's representative was copied into this correspondence.
10. After this, a strike out warning was issued on 9 January 2021 which stated:
"I refer to the tribunal's letter dated 7/11/20. You have not told us that you have obtained the consent of the Administrator or the permission of the court to allow

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your claim to proceed. Accordingly, an Employment Judge proposes to strike out the claim because it has not been actively pursued."

11. This was on the basis that the claim was not being actively pursued. It gave the claimant's representative 14 days to say whether an application had been made to the administrator or the court and, if not, why not. *"If such an application has been made, you should say when and what the result was"* The claimant's representative was told that if the claimant did not give an acceptable reason, the claim would be struck out without further notice.
12. There was no response and the claims were therefore struck out by a Judgment dated 22 April 2021, which was sent to the parties on 17 May 2021 on the basis that the claims were not being actively pursued.
13. Ms Hasan on behalf herself and 11 other claimants made an application for a reconsideration on 30 September 2021. This explained that they had chased their representative, but had been informed that the Covid-19 pandemic had caused serious delays in the Tribunal process. The claimants had been unable to make contact with their representative since April 2021 and had only found out that their case had been struck out in a report from the Liquidators on 29 July 2021.
14. Mr Jenkins wrote to the Tribunal himself on 5 October 2021 explaining that he had been seriously ill in hospital for a number of months, requesting further information be provided and requesting that other contacts at the Union be noted on the Tribunal file.
15. The claimants presented a further application for reconsideration on 26 November 2021, although it appeared to be largely the same as the original application.
16. Mr A James made a reconsideration application on 13 December 2021 and this was accepted to be considered with the one already presented on behalf of the 12 claimants.

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17. The Secretary of State was notified of the claims on 17 March 2022 and filed a response on 6 April 2022.
18. The hearing was originally listed for 4 May 2022 and this was postponed by the Tribunal due to lack of judicial resource. It then came before EJ Gumbiti-Zimuto on 6 June 2022 who did not have the file before him so was unable to consider the case but relisted it for today to consider the reconsideration and, should that succeed, to go on to consider the substantive claim with members in attendance. The very useful Case Management Order appeared at pages 75-78 dated 16 June 2022.
19. The respondent objected to the claimants' application for reconsideration by letter dated 26 April 2022 [P107-109] on the basis that the claims were struck out for good reason and the applications for reconsideration did not disclose any grounds for reinstating the claims.
20. I heard submissions from both parties before considering my decision.

RELEVANT LAW

21. Rule 70 of the Employment Tribunals Rules of Procedure 2013 provides:

"70 Principles

A Tribunal may, either on 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."

22. Rule 71 of the Employment Tribunals Rules of Procedure provides that the application shall be presented within 14 days. However, rule 5 provides a discretion to shorten or lengthen any time limits contained within the rules.

23. I was referred to the cases of Lindsey v Ironsides Ray & Vials [EAT] [1994] IRLR 318 particularly paragraph 24 which states:

“Failings of a party’s representatives, professional or otherwise, will not generally constitute a ground for review. That is a dangerous path to follow. It involves the risk of encouraging a disappointed applicant to seek to re-argue his case by blaming his representative for the failure of his claim. That may involve the Tribunal in inappropriate investigations into the competence of the representative who is not present at or represented at the review. If there is a justified complaint against the representative, that may be the subject of other proceedings and procedure.”

24. This case therefore advises cautiously exercising the wide discretion provided by the old rule for review (now reconsideration) and that failings by a representative (professional or otherwise) would not usually give rise to such a review.

25. I was also referred to the case of MOJ v Burton – [2016] ICR 1128 which was a Court of Appeal decision supporting that view.

CONCLUSION

26. I am allowing the reconsideration application for the reasons that follow:

27. The letter giving the strike out warning was based, in my view, on erroneous grounds. Whilst it referred to the case not being ‘actively pursued’ it went on to say, *“you should say whether an application has been made to the administrator or the court and, if not, why not. If such an application has been made, you should say when and what the result was.”*

28. Whilst I understand the points made by the respondent that the claims were not being actively pursued at that time, and therefore the grounds for striking out the claim remain sound, I do not consider it to be in the interests of justice to deny the claimants the ability to have their case heard in these circumstances.

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29. Further, the pandemic was understandably affecting the Tribunal process, including the ability of individuals to contact the Tribunal to find out the progress on their case, and also the claimants ability to discuss the case with one another. The claimants may well have assumed that their case was progressing, albeit very slowly.
30. There is a wide discretion and even when considering the cases to which I was referred, I do not consider allowing the reconsideration will fall foul of that general principle.
31. I have not made the decision purely on the failings of the claimant's representative. I have taken into account the effects of the pandemic on all concerned, in not necessarily realising that the case was not progressing, the claimants attempts to contact their representative during this time, the references to illness and hospital stays by the claimants' representative and the Tribunal's delay in dealing with the case. Additionally, that the premise for the strike out warning was incorrect.
32. Therefore I consider it is in the interests of justice to allow the reconsideration and the strike out judgement dated 22 April 2021 is thereby revoked.

Employment Judge Welch

Date 21 October 2022

JUDGMENT SENT TO THE PARTIES ON

....24 October 2022.....

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FOR THE TRIBUNAL OFFICE

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Case Numbers: 3325550/2019 and others

Case Number	Claimant Name
3325550/2019	Laura Fetherston
3325553/2019	Samar Durant
3325554/2019	Graeme Evelyn
3325557/2019	Rudy Gilpin
3325561/2019	Manolya Hasan
3325565/2019	Adam James
3325577/2019	Donna Kuye
3325580/2019	Greg Langola
3325584/2019	Louise Abram
3325602/2019	Jakob Bailey-Hummel
3325626/2019	Winston Service
3325628/2019	Jasbir Singh
3325645/2019	Adam Windsor
3325648/2019	James Smith