THE EMPLOYMENT TRIBUNAL

Claimant: **Mr B. Gutierrez**

Respondent: **London General Transport Services Ltd**

Heard at: London South Employment Tribunal (considered on the papers)

On: 11 October 2022

Before: Employment Judge A. Beale

JUDGMENT

The Claimant's application for reconsideration of the Judgment dated 12 April 2022 striking out the Claimant's claim is refused.

REASONS

1. The Claimant's claim for disability discrimination was submitted on 8 January 2020. It was struck out, on the basis that it had not been actively pursued, by Regional Employment Judge Freer on 12 April 2022, a week before a four-day full hearing was due to commence. The Claimant applied for a reconsideration of that decision on 19 April 2022, and by letter dated 3 May 2022, Regional Employment Judge Freer decided not to refuse the Claimant's application under rule 72(1) of the Employment Tribunal Rules of Procedure, but invited the Respondent's submissions in response, and the parties' views on whether the application could be determined without a hearing. The parties agreed that the application could be determined on the papers. As REJ Freer has now moved to a different region, the reconsideration application has been allocated to me to determine.

Documents

2. I have reviewed the Employment Tribunal file, and I have had regard in particular to the submissions made on behalf of the Claimant by Muhammad Munir of Daffodils Solicitors, dated 19 April 2022 and 17 May 2022, and those made on behalf of the Respondent by Sam Murray-Hinde of Howard Kennedy LLP, dated 16 May 2022. The respective submissions are summarised in the relevant section of my reasons below.

Factual Background

3. I have taken the relevant factual background from the documents on the file.

4. As set out above, the Claimant's claim for disability discrimination (specifically, discrimination because of something arising from disability under s. 15 Equality Act 2010, and a failure to make reasonable adjustments under s. 20 – 21 EqA 2010) was submitted on 8 January 2020. The disability relied upon was migraine. At that time, the Claimant was represented by United Voices of the World Union. The Respondent entered a response denying all claims on 7 February 2020.

5. A telephone case management hearing was listed for 13 July 2020. Ahead of that hearing, the Respondent asked first that there be an open preliminary hearing to consider whether the claim should be struck out as having no reasonable prospect of success, and then on 18 June 2020, modified its request to ask instead that consideration be given to making a deposit order at the telephone case management hearing.

6. It was intended that this application be considered at the case management hearing, held as planned on 13 July 2020, but there was insufficient time to deal with it. The case was to be listed for a three day hearing and directions were made, but no hearing date was listed. The Respondent was to make any application for a deposit order in writing.

7. The Respondent made its written application on 11 August 2020. The Claimant's representative (still United Voices of the World Union) resisted the application by email dated 25 August 2020.

8. There was a slight delay on the part of the Claimant's then representatives in complying with the directions made on 13 July 2020; however, on 28 August 2020, the Claimant's representative provided a signed disability impact statement, a letter from his GP and amended Particulars of Claim.

9. On 12 October and 9 November 2020, the Respondent's representatives sent chasing emails to the Tribunal regarding the deposit order application and the listing of the full hearing. On 3 February 2021, the Tribunal wrote to the parties to inform them that a further telephone preliminary hearing would be listed to deal with the outstanding applications and list the final hearing. On 27 February 2021, United Voices of the World Union came off the record for the Claimant and provided his contact details to the Respondent and the Tribunal.

10. The telephone preliminary hearing was listed for 18 May 2021, but was postponed due to lack of judicial resource. On 4 June 2021, the Respondent wrote to the Tribunal stating that it would dispense with the application for a deposit order given that most of the preparation for the final hearing had been completed and suggesting directions which, if agreed, could obviate the need for a telephone hearing. The Claimant was copied into the email, and the Respondent noted that it had not heard from him in response to an earlier email proposing the directions dated 20 May 2021. There was no response from the Claimant to this email.

11. A telephone preliminary hearing was listed for 14 January 2022, and in response to this, by email dated 26 July 2021, the Respondent renewed its request that orders be made without the need for a telephone hearing. The Claimant was again copied into the email, but did not respond. The Tribunal wrote to the parties on 15 September 2021, requesting that a list of issues and a time estimate for the hearing be provided before considering the Respondent's request. On the same date, the Respondent provided the list of issues which had been agreed with the Claimant's former representatives in September 2020, provided details of the witnesses the

parties proposed to call (again based on the Claimant's previous case management agenda) and a time estimate.

12. On 20 December 2021, Employment Judge Andrews wrote to the parties confirming the vacation of the hearing on 14 January 2022 and that the claim had been listed for a 4 day hearing (in view of the Claimant's need for an interpreter). She also made directions that the parties should exchange witness statements within 8 weeks of the date of the letter and that the Claimant should provide an updated Schedule of Loss and copies of any evidence regarding his efforts to mitigate his losses six weeks prior to the final hearing. On the same date, a Notice of Hearing was sent to the parties listing the hearing for 19 – 22 April 2022.

13. On 1 March 2022, the Respondent's representatives wrote to the Tribunal to request that the Claimant's claims be struck out, on the basis that he was no longer actively pursuing them. The email states that the Respondent had contacted the Claimant regarding witness statement exchange on 11 and 15 February 2022, but had received no response, and in fact had not heard from the Claimant since 17 May 2021. This email and a further email sent on 8 March reiterating the request were copied to the Claimant.

14. On 4 April 2022, the Tribunal wrote to the Claimant stating that it was considering striking out his claim because it had not been actively pursued. The Claimant was informed that, if he wished to object to this proposal, he should give his reasons in writing or request a hearing by 11 April 2022.

15. On 6 April 2022, the Tribunal sent an information sheet about the full hearing to both parties, informing them that it would go ahead in person and giving information about preparing for the hearing.

16. On 12 April 2022, having heard nothing from the Claimant, Regional Employment Judge Freer struck out the Claimant's claim because it had not been actively pursued.

17. As noted above, on 19 April 2022, the Claimant's new representative, Mr Munir, applied for a reconsideration of the strike out judgment, and the submissions made are summarised below.

Submissions of the Parties

18. The submissions made on behalf of the Claimant in the reconsideration application dated 19 April 2022 can be summarised as follows:

    (a) the Claimant had been represented by Kesar & Co solicitors from February to November 2021 as evidenced by an email dated 6 July 2021 (the email in question refers to an appeal being made to the Legal Aid Agency);

    (b) the Claimant had subsequently contacted Monaco solicitors on or around 3 March 2022, but their quote for representation was too expensive;

    (c) a further firm, Cavendish Employment Law, had not responded substantively to the Claimant's contact email and chasing on or around 8 March 2022;

    (d) the Claimant contacted Daffodils Solicitors on 13 April 2022 and they had taken his case on 15 April 2022;

    (e) the Claimant did not speak good English and became stressed when reading court letters; hence he was seeking legal representation for the hearing. He

was concerned that if he attended court and had to communicate in English as a litigant in person, it would cause a recurrence of his migraines;

(f) the Claimant had no-one else to assist him with the claim.

19. The Respondent's submissions dated 16 May 2022 can be summarised as follows:

(a) there was an apparent gap in the Claimant's attempts to seek legal representation between November 2021 and March 2022;

(b) the lack of legal representation did not explain why the Claimant had not responded to the Respondent or the Tribunal, even just to state that he was seeking representation or did not understand what he was required to do. There was no suggestion in the application that the Claimant had not received or understood any of the Tribunal's or the Respondent's correspondence;

© the Claimant's conduct in failing to make any contact between 17 May 2021 and 12 April 2022 had entailed significant cost for the Respondent;

(d) the Respondent did not accept that the Claimant had an inability to speak and write good English as he had needed to communicate effectively in English in his role as a bus driver, and in any event, an interpreter had been booked for hearings;

(e) the Respondent would be prejudiced if the claim were to be allowed to proceed, as the Claimant had been dismissed in September 2019. The Respondent was further of the view that the claim had no reasonable prospect of success.

20. The Claimant's representative sent a further email on 17 May 2022 containing the Claimant's own comments in response to the Respondent's submissions. In summary, it was the Claimant's position that he did not respond to the emails from the Respondent and the Tribunal because he did not want to make any mistakes, and thus did not want to respond until he had representation, particularly as the Respondent's emails were trying to persuade him to drop his claim. He said he did not understand all of the letters. He said that as a bus driver he had used basic English communication, but could not deal with legal technical terms. He also said that after he failed to get legal aid with Kesar & Co, he had sought other representation (but gave no further details of any other attempts to find legal representation prior to March 2022).

The Law

21. Rule 70 of the Employment Tribunal Rules of Procedure provides as follows:

> 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. In *Newcastle upon Tyne City Council v Marsden* [2010] ICR 743, commenting on the previous iteration of the Employment Tribunal Rules, Underhill P (as he then was) said:

> 16. *Williams v Ferrosan Ltd* and *Sodexho Ltd v Gibbons* clearly show that the extensive case law in relation to rule 34(3)(e) and its predecessors should not be regarded as requiring tribunals when considering applications under that head to apply particular, and restrictive, formulae—such as the "exceptionality" and "procedural mishap" tests which were understood to be prescribed by *DG Moncrieff (Farmers) Ltd* and *Trimble*. I

would not in any way question that approach or the general message of both decisions. There is in this field as in others a tendency—often denounced but seemingly ineradicable—for broad statutory discretions to become gradually so encrusted with case law that decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires in the particular case. Thus a periodic scraping of the keel is desirable. (The exercise would indeed have been justifiable even apart from the introduction of the overriding objective. It is not as if the principles of the overriding objective were unknown prior to their explicit incorporation in the Rules in 2001: rule 34(3)(e) itself is based squarely on the interests of justice. But I can see why its introduction has commended itself to judges of this tribunal as a useful hook on which to hang an apparent departure from a long stream of previous authority.)

17. But it is important not to throw the baby out with the bath-water. As Rimer LJ observed in *Jurkowska v Hlmad Ltd [2008] ICR 841*, para 19 it is "basic"

> "that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made."

The principles that underlie such decisions as *Flint* and *Lindsay* remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation—or, as Phillips J put it in *Flint* (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry—seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course, to appeal)...

23. In *Phipps v Priory Education Service Ltd* [2022] EAT 129, the EAT stated, at paragraph 48:

> The test for whether reconsideration may take place is quite strict, which is appropriate given the usual expectation of finality in litigation. It is that reconsideration should be "necessary" in the interests of justice. The interests of justice are not limited to the point of view of the person claiming reconsideration. The interests of the other party or parties must also be taken into account, as must the interests of the tribunal system, which has limited resources to be shared appropriately between all those who need them.

Conclusions

24. I have given careful consideration to the submissions of both parties, the documents on file, and the authorities referred to above.

25. I accept that the Claimant felt he required legal representation to pursue his claim, and that he made at least some attempts to secure representation between February 2021 and April 2022. However, it is not clear what happened after the contact from Kesar & Co on 6 July 2021, which states that a legal aid appeal was on foot, and as the Respondent says, there appears to have been no attempt to obtain legal representation between November 2021 and March 2022, despite the fact that the Tribunal wrote to the parties giving a hearing date on 20 December 2021, and making directions that needed to be complied with by February 2022. I note that the Claimant managed to secure legal representation within three days of his claim being struck out in April 2022.

26. I also accept that English is not the Claimant's first language and that he does not have a technical legal vocabulary. I have reviewed the limited documentation available to me evidencing the Claimant's abilities in English. I can see that he corresponded with Kesar & Co Solicitors in English on 5 July 2021, and although there are some errors, the email is clear. The same is true of the Claimant's comments in response to the Respondent's email of 16 May 2022, which are stated by his solicitor in the covering email to be the Claimant's own comments. In particular, the Claimant is able to explain in a fully comprehensible way his standard of English, his reasons for not responding to correspondence, and his view that his claim does have good prospects of success. It also appears that the Claimant understood the points being made by the Respondent.

27. There is no medical evidence to support the Claimant's assertion that attending a Tribunal hearing would cause a recurrence of his migraines. Furthermore, as the Respondent notes, an interpreter was booked for the hearing so the Claimant would not have had to communicate in English.

28. I accept the Respondent's submission that there is no evidence to suggest that the Claimant did not understand the Tribunal's communications. I also accept the Respondent's submission that there is no good reason why the Claimant could not have responded to the Tribunal or the Respondent to state that he was seeking representation or (if this was indeed the case) that he did not understand what he was required to do.

29. The Tribunal file shows that the Claimant was not in touch with the Respondent or the Tribunal at all between 17 May 2021 and the strike out judgment on 12 April 2022. Although I understand the difficulties faced by the Claimant as a litigant in person attempting to deal with a claim in a foreign language, for the reasons I have given above, I do not consider that the Claimant has provided an adequate explanation for this period of complete silence. This is particularly so given that, during this period, the Claimant received numerous pieces of correspondence from the Respondent and the Tribunal, including an application from the Respondent seeking to strike out his claim, and a letter from the Tribunal requiring him to show cause as to why his claim should not be struck out.

30. I accept that this lengthy period of silence has caused the Respondent to incur costs, both in chasing the Claimant and in making preparations for a full hearing that, owing to the Claimant's failure to comply with directions, did not go ahead. The Claimant's silence has also placed an additional burden on the limited resources of the Tribunal system.

31. I have also taken into account the need for finality in litigation. This claim was commenced in January 2020, and it was not actively pursued by the Claimant between May 2021 and April 2022. The Claimant was given numerous opportunities both by the Tribunal and the Respondent to explain his position over that period but he did not do so. In the absence of a clear and full explanation from the Claimant for his failure to pursue his claim over a period of 11 months, and taking into account the overriding objective and the legitimate expectations of both parties, I place significant weight on the need for finality in considering this application.

32. For these reasons, I do not consider that it is necessary in the interests of justice to review or to vary the decision of Regional Employment Judge Freer to strike out

the Claimant's claim. I therefore confirm that original decision. I should make clear that, in reaching this conclusion, I have placed no weight on the Respondent's submissions as to the prospects of the underlying claim, as I do not consider that I have sufficient information to reach a view on this point.

33. The Respondent has made an application for costs, which was not listed for determination today. I will make separate directions for consideration of that application.

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Employment Judge Beale

Date12 October 2022