



EMPLOYMENT TRIBUNALS

Claimant:
Mr A Fox v

Respondent:
EDF Energy Limited

Heard at: London South (via CVP)

On: 17 January 2023

Before: Employment Judge Fredericks

Appearances

For the claimant: Did not attend

For the respondent: Mr S Chegwin (Solicitor)

JUDGMENT

The claimant's application to set aside the strike out of his claim under Rule 38(2) Employment Tribunals Rules of Procedure 2013 is refused and the claim remains struck out.

REASONS

1. The hearing continued in the absence of the claimant under Rule 47 Employment Tribunals Rules of Procedure 2013. Before making the decision to continue, I considered the information I had available about the reasons for the claimant's non-attendance. We waited until 10:30am for the claimant to attend before continuing. No contact was made by the claimant during the hearing window and no reasons were given for non-attendance. The subject of the hearing was to consider whether to set aside an unless order which was set following the claimant's failure to comply with directions. I was told that the claimant had not attended a single hearing in this case to date and that this was the third hearing in the case. The only reason that the claim was not simply dismissed under Rule 47 for the non-attendance was that the claim already stands struck out and cannot be dismissed.
2. I heard from Mr Chegwin for the respondent. He carefully and meticulously took me through the bundle of documents for this hearing, which ran to 165 pages. In the absence of the claimant, Mr Chegwin noted points in the claimant's favour relating to the claimant's illness and the illness of his wife, who was representing him. He is to be commended for his approach.

3. The claimant brought claims for unfair dismissal and disability discrimination related to his treatment by the respondent prior to and during his dismissal by reason of redundancy. He was dismissed on 6 March 2020. On 10 March 2021, the claimant was ordered by Employment Judge Martin to provide a disability impact statement. The deadline for this was extended to 9 April 2021. An unless order was issued on 15 June 2021 by Employment Judge McLaren requiring the same document to be submitted by 10 September 2021. The claimant did not attend that hearing before Judge McLaren either. A strike out warning was issued on 25 June 2021 due to the apparent non-pursuit of the claim on the part of the claimant. The claimant did not comply with the terms of the unless order and the claim was struck out by Employment Judge Wright on 21 October 2021.
4. On 11 November 2021, the claimant applied to set aside the strike out order. His representative, his wife, submitted that it is in the interests of justice to set aside the strike out and gave six non-exhaustive reasons why this is the case. Those are, in summary:
 - 4.1. failure to comply with the unless order was due to serious health issues of the claimant and his representative, not through wilful conduct;
 - 4.2. the claimant's disabilities are seriously impeding his ability to participate in this claim;
 - 4.3. the claim is not vexatious and has arisen as a result of the respondent's treatment of him;
 - 4.4. the claimant is unable to deal with the claim as expediently as the Tribunal requires because of his difficulties;
 - 4.5. the claimant is at a disadvantage in these proceedings compared to the represented respondent; and
 - 4.6. the claimant considers that the overriding objective can still be met with minor adjustments for the claimant.
5. The application to set aside was refused by Employment Judge Wright. That decision was returned to the Tribunal by Jason Coppel QC (sitting as a Deputy High Court Judge) in the Employment Appeal Tribunal, with directions that the application should be considered again with reference to Rule 38(2) Employment Tribunal Rules of Procedure 2013. This is that re-hearing. Rule 38(2) provides that a strike out order may be set aside "*on the basis it is in the interests of justice to do so*".
6. When considering where the interests of justice lies in a case, I am required to consider the relative burdens of prejudice which falls on each party whether the decision goes one way or another. The prejudice to the claimant is clear. The claim is struck out and there is no opportunity to bring a claim which may have merits. I must balance this against the prejudice to the respondent should I set aside the strike out order. I must also keep in mind the principles from the overriding objective to deal with the case fairly and justly, proportionate to the issues, and without allowing parties to introduce undue delay.

7. In my view, the claimant has failed to engage adequately with this claim. The claimant relies on his disability and health issues as reasons to have not attended hearings or complied with key orders since bringing his claim in late 2020. However, he has not to date provided a statement which properly explains what those disabilities are or how they impact him. There has been no effort, that I have seen, on the part of the claimant to cure his breach of the initial case management order from 10 March 2021, almost two years prior to this hearing. It is therefore difficult to assess the ailments relied upon or their impact. Similarly, the claimant has relied on the illness of his wife who is representing him. It is unfortunate that Mrs Lonergan-Fox has been unwell, but that does not excuse him of his obligations in litigation. There is no absolute right to select a particular representative and, if the claimant's wife is unable to represent him, it is reasonable to expect that an alternative representative is found. Given the central importance of a disability impact statement in establishing disability in the Employment Tribunal, and the length of time that the claimant has failed to provide one when ordered, I consider this to be a serious breach of the Tribunal's order.
8. The conclusions drawn above mean that there is little force, in my judgment, behind the first, second, fourth and sixth reasons offered by the claimant as reasons to set aside the order. The Tribunal cannot take submissions made by a representative alone as evidence of a disability and its impact. A witness statement outlining the disability and its effect on day to day living is required for that. Similarly, reasonable adjustments cannot be made until the ailments are understood. That is why the unless order was made, and it is still not complied with. The claimant cannot establish those reasons to set aside the strike out order without providing the document which was covered by the unless order. This has not been provided. In any event, I consider that reasonable adjustments have been made for the claimant. The claimant has had his claim survive despite non-attendance at hearings because of his explanations for his absence. He was allowed almost seven months to complete a disability impact statement before the claim was struck out. In my view, the approach of the Tribunal to the claimant's non-compliance has been extremely lenient.
9. I also do not provide much weight to the third and fifth reasons given for setting aside the strike out order. There has been no suggestion in any Tribunal document I have seen saying that the claim is vexatious. The problem has not been with the merits of the claimant's claim itself, but his failure to comply with the requirements of the litigation process. All claimants consider that their position is as a result of the respondent's treatment of them, whatever their claim or the alleged treatment. The claimant is not unusual in that respect and most others do not have their claims struck out for failure to comply with an unless order. Finally, the fifth reason relating to disadvantage is not, in my view, a strong justification for setting aside the strike out order. It is common for a claimant to not have professional representation in the face of professional lawyers instructed by the respondent. The Tribunal will make adjustments as far as it can in those circumstances, including showing the sort of leniency in the face of breaches of orders that has been afforded to the claimant in these proceedings. It is apparent from the documents that the claimant's wife is able to utilise the rules and the law to make arguments better than most lay representatives.

10. Having made these observations, I must weigh in the balance the prejudice to the respondent should I set aside the strike out order. The respondent has incurred cost and suffered delay as a result of the claimant's inaction in these proceedings. This is the third hearing that the respondent's lawyers have been required to attend when, ideally, only one case management hearing should have been necessary. The delay would be on-going. If the strike out is set aside, then the claimant would be ordered to provide a disability impact statement. I am not sure when, or if, that would occur given the history and the two years which have passed since that was first ordered. Then, the parties would need to deal with disclosure of documents and agreeing the bundle. This would require the claimant to participate. Then, the claimant would be required to produce a witness statement, which would likely be a more detailed and in depth process than the production of an impact statement. Finally, the claimant would need to be able to attend and participate in a final hearing which may last several days. Even without any delay to any of those steps, it is unlikely that such a final hearing will take place until late 2024 or early 2025. That may be as long as five years since the dismissal.
11. In my judgment, such a long delay would severely prejudice the respondent in being able to evidence a defence to the claim. It is likely that the key individuals involved would either lose clarity in their memory of the events, or to move employment away from the respondent such that their evidence is lost altogether. This would result in the respondent being compromised in being able to participate fairly in proceedings, and it would be very difficult to hold a fair hearing. I have very little confidence that the claimant will comply with future orders and I cannot envisage the claimant attending the final hearing when he has not attended a single hearing in this case to date.
12. This prejudice to the respondent is extremely significant, and I am reminded that this is the reason why it is so very important for parties to comply with Tribunal orders. The claimant has not complied with an order for almost two years. He did not comply with an unless order. He has not attended any hearing in the claim to date. I do not consider it likely that a fair trial can now be held in his claim. In those circumstances, it is not in the interests of justice to set aside the strike out order in this matter, and so I refuse to do so.
13. The claim remains struck out.

Employment Judge Fredericks
Date: 10 March 2023