



EMPLOYMENT TRIBUNALS

Claimant: Mr M Allman

Respondent: Brendan Daley

Considered on paper at: London South Employment Tribunal

On: 28 June 2023

Before: Employment Judge Ferguson

JUDGMENT

On the Respondent's application of 9/2/23 to strike out the claim and having considered written representations from the parties

It is the judgment of the Tribunal that:

The claim is struck out

REASONS

1. On 17 August 2021 the Claimant presented a claim for unpaid wages against the respondent, a sole trader in the construction business.
2. A final hearing was listed on 7 November 2022. The hearing was not effective because neither the judge nor the Respondent had sight of documents which the Claimant had sent to the Tribunal by email and he wished to rely on. Employment Judge McCann converted the hearing to a preliminary hearing. She clarified the complaints and issues, noting that the Claimant claimed unpaid wages, unpaid commission and breach of contract in respect of travel expenses. She also issued orders, including for exchange of documents by 6 December 2022 and exchange of witness statements by 13 January 2023. The orders were sent to the parties on 10 November 2022 together with a notice of hearing for a one-day final hearing on 23 May 2023.

3. On 2 December 2022 the Claimant wrote two emails to the Tribunal, not copied to the Respondent (despite a number of earlier reminders that all correspondence to the Tribunal must be copied to the other party), complaining about the length of time before the final hearing.
4. On 10 January 2023 the parties were sent a revised notice of hearing, bringing forward the date of the final hearing to 13 February 2023.
5. On 9 February 2023 the Respondent wrote to the Tribunal applying for the claim to be struck out on the grounds that the Claimant had failed to actively pursue the claim and failed to comply with Tribunal orders. It was alleged that the Claimant had not complied with the orders for exchange of documents or exchange of witness statements. The Respondent's representative said they had attempted to liaise with the Claimant but he did not respond.
6. The hearing took place by CVP on 13 February 2023 before Employment Judge Randall. The Respondent had provided a bundle and a witness statement in advance of the hearing. According to the Hearing Summary, the Claimant said at the hearing that he had received the Respondent's application but had not read it for "personal reasons" linked to family commitments and ill health. As to the orders made on 7 November 2022, the Claimant said he had missed the date for sending documents to the Respondent because he had been focused on complaining about the hearing date. He alleged that having missed the date the Respondent's representatives told him it was too late to send the documents. He claimed to have had problems dealing with the Respondent's representatives, said he did not trust them, and that in the end he gave up and sent the documents directly to the Tribunal. He accepted he had not sent a witness statement to the Respondent and said this was because of the issues he had with the Respondent's representatives.
7. Employment Judge Randall gave the Claimant an opportunity to respond to the strike out application in writing and said the application would be considered on paper after 28 February 2023. She gave directions for the parties to provide written submissions on the application.
8. On 19 February 2023 the Claimant wrote to the Tribunal claiming that he had spoken to the Tribunal on the phone after receiving the notice of hearing for 23 May 2023 and "they said they will pass my comments to the judge and said I should wait for the dates to be confirmed. Which I thought would include the submission date." He also said he had received threatening emails from Croner (the Respondent's representatives) "telling me to close the case or they will sue me for the legal fees". He said he tried to contact them but his calls were ignored "all afternoon". He said he eventually got through to someone who was "rude". He said "They are difficult to deal with so I sent my statement directly to the tribunals email and to the previous Clerk who is cc'd in this email".
9. The Respondent responded to the Claimant's comments on 24 February 2023. They alleged that they had made attempts to liaise with the Claimant about the bundle and exchanging witness statements in December and January. They claimed that the Claimant had never contacted them except on 10 February 2023 when he rang two members of staff continuously, both of whom were unavailable because they were with other clients at the time. He then rang the office multiple times and eventually Mrs Ralph, the Respondent's

representative, came out of her meeting to take the call. It was alleged the Claimant was verbally abusive to her on the phone.

10. The Claimant sent further emails to the Tribunal on 14 March 2023, again not copied to the Respondent, saying “I’ve sent all the info I have with regards to my pay as an employee. He enclosed screenshots of text messages which he claimed showed that another client of the Respondent had been left in debt. He said this was provided “so the judge can start to understand what we’re dealing with here”.
11. The file was reviewed by Employment Judge Siddall on or around 19 April 2023. She instructed a letter be sent to the parties giving the Claimant a final chance to provide the information necessary for his claim to be determined. The Tribunal communicated this decision to the parties by letter dated 23 May 2023. This included orders for the Claimant to
 - 11.1. provide a schedule of loss to the Respondent within 7 days,
 - 11.2. provide to the Respondent copies of any documents relating to his claim within 14 days, or alternatively inform the Respondent within 7 days that he does not have any such documents.
 - 11.3. send his witness statement to the Respondent within 21 days,
 - 11.4. Write to the Tribunal within 28 days to confirm whether or not these orders had been complied with.
12. On 29 May 2023 the Claimant complied with the order to provide a schedule of loss.
13. As at today’s date, 28 June 2023, the Claimant has not written to the Tribunal to confirm whether or not the orders were complied with.
14. On 20 June 2023 the Respondent wrote to the Tribunal stating that the Claimant had not complied with the order to provide documents or the order to send his witness statement.
15. Rule 37 of the Employment Tribunals Rules of Procedure provides:

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- (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or 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).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

16. In deciding whether to strike out a claim for non-compliance with an order under Rule 37(1)(c), the Tribunal must have regard to the overriding objective to deal with cases fairly and justly. This requires the Tribunal to consider all relevant factors, including:

16.1. the magnitude of the non-compliance

16.2. whether the default was the responsibility of the party or his or her representative

16.3. what disruption, unfairness or prejudice has been caused

16.4. whether a fair hearing would still be possible, and

16.5. whether striking out or some lesser remedy would be an appropriate response to the disobedience

(Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT)

17. The magnitude of the Claimant's non-compliance here is a significant factor. The Claimant attended the hearing on 13 February 2023 having failed to provide any documents or his witness statement to the Respondent. This was a very serious breach of the orders made on 7 November 2022. The Respondent attended ready to proceed, having produced a bundle of his own documents and a witness statement. The Employment Judge decided not to strike out the claim but to give the Claimant a further opportunity to respond to the strike-out application in writing. The Claimant could have used that opportunity to rectify his failure to comply with the orders made on 7 November 2022. He did not do so. Instead he continued to send documents to the Tribunal that had not been requested and without sending a copy to the Respondent, in breach of Rule 92. The Claimant was then given a further, "final", chance to provide his documents and witness statement to the Respondent pursuant to the orders in the letter of 23 May 2023. He still has not done so. He also has not complied with the order to confirm within 28 days, i.e. by 20 June, whether he had complied with the other orders.

18. The Claimant's failure to comply with the orders of 7 November 2022 was the sole cause of the 13 February 2023 not being effective. The Claimant has not provided any satisfactory explanation for his non-compliance. The fact that the Claimant had complained about the delay in listing the hearing was not a good reason. The Claimant has also not given a consistent explanation of the reasons for his failure, saying in the hearing that it was because he was "focused" on complaining about the hearing date, and then alleging in his email of 19 February 2023 that a member of staff in the Tribunal told him to wait for confirmation of the dates. The orders had been made at the hearing on 7 November 2022 and explained to the parties. The fact that the Claimant was

requesting an earlier hearing date had no bearing on those orders. There was no reason for the Claimant to think that the orders to provide documents and a witness statement would be affected by the hearing date being brought forward. In any event a further notice of hearing was sent on 10 January 2023, so as at that date the Claimant would have known the hearing was taking place on 13 February and that he needed to prepare for it by complying with the orders made on 7 November 2022.

19. Nor do the Claimant's assertions about the Respondent's representatives provide any excuse for his failure to comply with the orders. The Claimant's own account of what happened, in his email of 19 February 2023, is consistent with the Respondent's representatives' account, that the Claimant called repeatedly on one afternoon and the call was answered once. The Claimant has not disputed the account given by the Respondent that he failed to respond to their earlier attempts to agree a bundle and arrange the exchange of witness statements. Even if the Claimant had difficulties getting through to the Respondent's representatives by telephone, there was no reason why he could not have provided his documents and witness statement by email.
20. As matters stand it is not possible to have a fair hearing because the Claimant has not put forward any evidential basis for any of his complaints. A final hearing was ineffective due to the Claimant's non-compliance with Tribunal orders and he has still not remedied the default, despite being given ample opportunity to do so.
21. I am satisfied that it is proportionate to strike out the claim. The Claimant has already had the benefit of alternative remedies, including giving him a final opportunity to provide the evidence necessary to determine his claim. The Claimant having failed to comply with that "final chance", and applying the overriding objective, it is appropriate to strike out the claim.

Employment Judge Ferguson

Date: 28 June 2023