



EMPLOYMENT TRIBUNALS

Claimant: Mr C Keegan

Respondent: Little Lion Entertainment

Judgment

The Respondent's application for the Claimant's claim to be struck out is refused.

REASONS

Background

1. The claim is for unpaid holiday pay.
2. A preliminary hearing for case management was held by CVP on the 5th May 2023 in front of Employment Judge Singh. At that hearing, orders were made for preparation of the case for a final merits hearing.
3. In particular, the claimant was ordered to provide a schedule of loss to the respondent by the 19th May 2023.
4. The parties were also ordered to disclose relevant documents to each other by the 30th June 2023.
5. On the 11th July 2023, the respondent wrote to the tribunal to apply to have the claimant's claim struck out. The basis of the application was that the claimant had failed to provide a schedule of loss as directed by the tribunal and had not provided their documents to the respondent, even though the respondent had sent theirs to the claimant by the 30th June.
6. The respondent argued that the claimant's claim should be struck out because
 - a. the Claimant has not complied with the Case Management Order dated 5 May 2023 (Rule 37(1)(c)); and/or in the alternative
 - b. the claim has not been actively pursued (Rule 37(1)(d)).
7. The claimant's representative replied on the 12th July 2023 to resist the

application. The claimant's representative accepted that they had not complied with the directions by the ordered dates, but had now (on the 12th July 2023) provided the respondent with the claimant's documents and schedule of loss. They argued that an order for strike out would not be in line with the overriding objective.

The legal framework

8. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 state as follows;

“Striking out

37.(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.”

9. The EAT considered the principles for striking out a claim for non-compliance with a tribunal order in the case of Weir Valves & Controls (UK) Ltd v Mr J B Armitage

“13. What are the principles on which the Employment Tribunal should act in deciding whether to strike out in a case such as this, where there has been a breach of a direction?

14. Where the unreasonable conduct which the Employment Tribunal is considering involves no breach of a court order, the crucial and decisive question will generally be whether a fair trial of the issues is still possible: De Keyser Ltd v Wilson [2001] IRLR 324, at paragraphs 24 to 25 applying Logicrose Ltd v Southend United Football Club Ltd (Times, 5 March 1998) and Arrow Nominees Inc v Blackledge [2000] 2 Butterworths Company Law Cases, 167. De Keyser Ltd v Wilson was recently followed and applied in Bolch v Chipman [2003] EAT 19 May, a decision which has been starred and is likely to be reported: see pages 21-22.

15. Even if a fair trial as a whole is not possible, the question of remedy must still be considered so as to ensure that the effect of a debarment order does not exceed what is proportionate: see Bolch v Chipman at pages 23-25. For example, it may

still be entirely just to allow a defaulting party to take some part in a question of compensation which he is liable to pay: see page 25.

16. Those principles apply where there is no disobedience to an order. What if there is a court order and there has been disobedience to it? This is an additional consideration. The principles which we have set out above do not apply in the same way. The Tribunal must be able to impose a sanction where there has been wilful disobedience to an order: see De Keyser v Wilson at paragraph 25, Bolch v Chipman at page 22.

17. But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience. 18 In the Civil Procedure Rules 1998 there is, at Part 3, Rule 9, a checklist to be considered upon an application for relief from a sanction. The Employment Tribunal Rules of Procedure 2001 contain no similar checklist; but the overriding objective in Rule 10 requires a broadly similar approach. As Millet J said, in another context, in Logicrose Ltd v Southend United Football Club Ltd:

"The Court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice."

Decision

10. It is clear from the guidance that striking out is an extreme step that should not be taken lightly. Although it is accepted that the claimant failed to comply with the tribunal's orders and have provided little or no explanation for their failure, the tribunal is mindful that the hearing isn't listed until December 2023 and that this isn't a document heavy case. As such, even with the significant delays caused by the claimant's failure, a fair hearing is still likely to be possible.
11. The tribunal is mindful of the overriding objective that cases should be dealt with justly and balancing the impact of the failure to comply with orders on the respondent (which is minimal) to the impact of striking out the claim and denying the claimant the opportunity to have their complaints determined at a hearing, an order for strike out would not seem to be fair or reasonable. As such, the application is refused.

Employment Judge **Singh**

21st July 2023

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

06/09/2023

FOR THE TRIBUNAL OFFICE