



EMPLOYMENT TRIBUNALS

Claimant: Mr T Brown

Respondent: Syft Online Limited

RECORD OF A RECONSIDERATION HEARING

Heard at: London Central (remotely by CVP)
On: 17 November 2023

Before: Employment Judge Heath

Appearances

For the claimant: Did not attend

For the respondent: Ms L Robinson (Counsel)

DISCUSSION

Introduction

1. This was a hearing to reconsider a Judgment sent to the parties on 5 August 2022 in which I dismissed the claimant's claim in its entirety, his having failed to make any representations as to why his claims should be struck out for want of jurisdiction in response to a strike out warning.

Procedural history

2. By a claim presented on 11 May 2022, the claimant set out that he had been in agency work of the respondents between 26 August 2021 and 20 December 2021. He ticked the box claiming unfair dismissal, and made further claims of "unpaid wages, breach of contract, human exploitation and modern day slavery".
3. A strike out warning was sent to the claimant on 17 June 2022 which stated:

Your claim is accepted for administrative purposes, but it appears that it may have been filed out of time. This means that a tribunal may decide at a later date that it must be

struck out because the tribunal does not have jurisdiction.

In your claim form one of your complaints is that you were unfairly dismissed.

Under section 108 of the Employment Rights Act 1996 claimants are not entitled to bring a complaint of unfair dismissal unless they were employed for two years or more except in certain specific circumstances which do not seem to apply in your case.

It appears from your claim that you were employed for less than two years. If so, the Tribunal cannot consider your complaint that you were unfairly dismissed.

As you do not appear to be entitled to bring that part of your claim an Employment Judge is proposing to strike it out. This does not affect the other complaints in your claim form.

You have until 30th June 2022 to give reasons in writing why your complaint of unfair dismissal should not be struck out.

Meanwhile, the respondent has been told that no response to your unfair dismissal claim is necessary at this stage.

4. The claimant did not respond to this strike out warning.
5. The respondent submitted its Response and on 15 July 2022 made a written application for the tribunal to dismiss the claim under Rule 27 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules") or in the alternative to strike out the claims under Rule 37. It submitted the unfair dismissal claim should be struck out pursuant to the strike out warning, and the other claims because they have been brought out of time. In the alternative the respondent made further submissions in respect of the jurisdiction to hear a breach of contract claim, a modern day slavery claim and submitted he had failed to particularise his wages claim.
6. It is sometimes the case that a tribunal will strike out a claim subject to a strike out warning in the absence of a response without a hearing. This was not done in this case.
7. A preliminary hearing took place before me on 5 August 2022. The claimant did not attend and I gave Judgment as follows: "*The claimant's claim in its entirety is dismissed, his having failed to make any representations as to why his claims should be struck out for want of jurisdiction in response to the tribunal's Strike Out Warning dated 17 June 2022*".
8. On 10 August 2020 the claimant emailed the tribunal to "request that the claim not be struck out and listed for hearing. I have been unwell for over a month and had sent in my sick notes. See attached again". He attached some notes covering the period from June to 12 August 2022.
9. On 31 August 2022 the tribunal wrote to the parties on my instruction indicating that I was treating the claimant's email of 10 August 2022 as an application to reconsider my judgment. I expressed the provisional view that the application should be granted because it was arguable that the strike out

warning of 17 June 2022 had been solely in respect of the unfair dismissal claim. I pointed out that his absence from the hearing could be explained by certificated ill-health. I invited the parties to set out their views as to whether the application could be determined without a hearing, and invited the respondent to give reasons why the judgment should not be reconsidered.

10. On 14 September 2022 the respondent submitted (in summary) that the judgment should not be reconsidered. In the alternative, it proposed that any reconsideration should be in a hearing, which would also hear an application to strike out the claims (or in the alternative, make them subject to a deposit order) if the application for reconsideration was successful.
11. On 7 October 2022 the tribunal wrote to the parties on my instruction that the reconsideration hearing would be listed, which would also determine any application to strike out or for a deposit order. The respondents were invited to clarify the basis for their application to strike out, which they duly provided on 21 October 2022.
12. Up there appears to have been a delay in progressing matters, but on 17 July 2023 a notice of a reconsideration hearing was sent to the parties listing the matter for hearing on 17 November 2023 ink.

The hearing today (17 November 2023)

13. The respondent provided a 95 page bundle to the hearing. At 8.39am the claimant emailed the tribunal and the respondent as follows: "*Please find attached my sicknote as I am currently admitted into hospital. Please could this email urgently be forwarded to the judge*". He attached a fit note provided by a doctor at James Cook University Hospital which indicated he had a gastric condition and was not fit for work between 6 November 2023 and 27 November 2023.
14. There was some discussion with Counsel as to how best to proceed. The tribunal clerk telephoned the claimant and spoke to him, asking him whether he was still in hospital, whether he had access to a device that would allow him to attend the hearing, and whether he had any evidence that he was not fit to attend the hearing (as opposed to being unfit for work). The claimant said he was still in the James Cook University Hospital. He had been there since 4 October 2023. He had been due to be discharged the day before but was still unwell. He said he did not know when he would be discharged. He gave the tribunal consent to call the hospital, and said that he could provide a discharge letter to the tribunal when he is discharged.
15. I had further discussions with Ms Robinson as to how best to proceed, indicating my view that a postponement of the hearing because of the claimant's ill-health looked highly likely. After taking instructions Ms Robinson pointed out that this matter had been listed for a hearing rather than a paper reconsideration because the respondent had requested it. Her instructions now were to seek a paper reconsideration of the judgment with the parties being given the opportunity to make written representations.

16. Rule 72(2) ET Rules provides:

If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a written hearing the parties shall be given a reasonable opportunity to make further written representations.

17. I consider the interests of justice for this matter to proceed by way of a paper hearing for a number of reasons:

- a. This is the second hearing the claimant has not attended due to long-term sickness.
- b. The respondent was the one requesting the hearing, and it has changed its mind. The claimant has not suggested a hearing.
- c. This matter is getting old. This is an application to reconsider a judgment made over 15 months ago. Setting a reasonably brisk timescale for the parties to set out their written positions and dealing with the application in writing means a swifter determination of the application to reconsider. It also avoids any risk of a further hearing having to be postponed because of the claimant's illness or any other reason.

18. The claimant has not set out his position about whether he has two years service to bring an unfair dismissal claim, and has not addressed why he, apparently, has presented his claims out of time. He needs to do so, as these could well be factors I need to have regard to in considering whether to reconsider my decision.

19. I have therefore made the below orders in respect of medical evidence and taking forward the reconsideration application, which I will now determine without a hearing based on the written representation of the parties.

CASE MANAGEMENT ORDERS

20. The claimant's application of 10 August 2022 for a reconsideration of the judgment of 5 August 2022 will be determined on the papers without a hearing.

21. The claimant is to set out in writing and provide to the respondent and the tribunal by no later than **15 December 2023** why he says the Judgment of 5 August 2022 should be confirmed, varied or revoked, and in particular to set out:

- a. Whether he has two years service that would allow him to bring an unfair dismissal claim;

- b. Why he did not bring his claim within the time limit (as extended by ACAS early conciliation) of 6 April 2022.
22. The respondent is to respond to any representations made by the claimant on reconsideration by **5 January 2024** and to provide the same to the claimant and the tribunal.
23. The claimant is by **1 December 2023** to send to the respondent and the tribunal any medical evidence (such as a discharge letter) to confirm that he was in hospital on the day of the hearing.

EJ - Heath
17 November 2023

Sent to the parties on:

17/11/2023

For the Tribunal Office: