



# **EMPLOYMENT TRIBUNALS**

**Claimant:** Mr S Fleet

**Respondent:** Nestle UK Limited

**Heard at:** Leeds (by CVP) **On:** 8 January 2024

**Before:** Regional Employment Judge Robertson (sitting alone)

## **Representation**

**Claimant:** Ms K Lorain, counsel

**Respondent:** Ms M Hughes, solicitor«resp\_others»

# **JUDGMENT**

1. On reconsideration under rules 70-72 of the Employment Tribunals Rules of Procedure 2013, the Tribunal's judgment dated 16 November 2023 striking out the claim under rule 39(4) of the Employment Tribunals Rules of Procedure 2013 is revoked.
2. Except that the time for payment is extended to 29 November 2023, the claimant's application to vary or set aside the deposit order made by the Tribunal on 13 October 2023 is refused. The deposit order remains in effect.
3. Case Management Orders for the further conduct of the proceedings are made in a separate document.

# **REASONS**

1. On 13 October 2023 the Tribunal (Employment Judge Rogerson, sitting alone) made a deposit order in this case under rule 39 of the Employment Tribunals Rules of Procedure 2013. The deposit of £50.00 was to have been paid by the claimant by 3 November 2023.

2. On 3 November 2023, the last date for payment of the deposit, the claimant's solicitors made an application for "reconsideration" of the deposit order. However, the claimant did not pay the deposit as ordered or apply for an extension of time for payment.
3. On 16 November 2023 I struck out the claimant's claim under rule 39(4) of the Employment Tribunals Rules of Procedure 2013 because the claimant had not paid the deposit.
4. On 24 November 2023 the claimant's solicitors applied for "reconsideration" of the deposit order and "relief from sanction" in respect of the strike-out judgment (stated to be under rule 38(2) or by way of reconsideration under rules 70-72).
5. On 29 November 2023 the claimant paid the deposit ordered by the Tribunal.
6. In December 2023 I directed that the applications be listed for hearing. I carried out an initial assessment under rule 72(1) of the application for "relief from sanction" on the basis it was properly an application for reconsideration. I decided I could not say it had no reasonable prospect of success and it should proceed to hearing. I also decided that my involvement in the reconsideration of the strike-out judgment and Employment Judge Rogerson's absence on long-term sick leave were material changes of circumstances entitling me to deal with the application relating to the deposit order.
7. This has been the hearing of the claimant's applications. It has taken place remotely using the Tribunal's CVP functionality. Ms Loraine, counsel, has represented the claimant and Ms Hughes, solicitor, the respondent. For reasons explained to the parties at the time, I reserved my decision.
8. I begin with the relevant law, which can be simply stated. Rule 39(4) provides that where a deposit is not paid by the date specified in the order, the argument or allegation to which the order relates shall be struck out. This is mandatory and allows no discretion, as shown by the use of the word "shall" in the rule. In this case the deposit order related to the entirety of the claimant's complaint of unauthorised deductions from wages, meaning the whole claim was struck out.
9. An application to extend the time to pay the deposit (or, by necessary inference, to set aside the deposit order) does not prevent the mandatory striking-out under rule 39(4) if the deposit is not paid by the due date – see **Oyesanya v South London Healthcare NHS Trust UKEAT/0335/2013**. This was why I struck out the claim on 16 November 2023.
10. A deposit order cannot be reconsidered under rules 70-72, as it is not a judgment. Further, rule 38(2) concerns unless orders made under rule 38, and has no application to judgments under rule 39(4). However, a strike-out judgment applying rule 39(4) may be reconsidered on the usual basis that the interests of justice require it, and a deposit order may be varied or set aside under rule 29 on application by a party or of the Tribunal's own motion - see **Sodexo v Gibbons 2005 IRLR 1647**. I have proceeded accordingly, treating the claimant's solicitors' mistaken references to reconsideration of the deposit

order, to relief from sanction in respect of the strike-out judgment and to rule 38(2) as errors of form, not substance, and the basis of the applications as being sufficiently clear.

11. I consider first the application to set aside the deposit order. The claimant's solicitors applied in their letters of 3 and 24 November 2023 for it to be "reconsidered" on the ground that they disagree with the decision. Ms Loraine contends that Employment Judge Rogerson's reasons for ordering the deposit, as set out in paragraphs 7-24 of her orders, were wrong and the basis of the claimant's complaint of unauthorised deductions from wages was clear from the Particulars of Claim.

12. I have decided without difficulty that the application is wrong in principle and should be refused. It is well-established (see, for example, most recently on the point, **Liverpool Heart and Chest Hospital NHS Foundation Trust v Poullis 2022 ICR 785**) that save in exceptional cases or where there has been a material change of circumstances, employment judges should not, in effect, hear an appeal against their own decisions, or those of an employment judge at an equivalent level, and there should be finality in litigation so that the parties do not subsequently find that an order has been altered absent a material change in circumstances. If, objectively, there has been no change of circumstances, it would be an erroneous exercise of discretion for an employment judge to vary an order on the basis that there has been such a change in circumstances.

13. Has there been a material change of circumstances here? In my judgment, there has not. Ms Loraine contends that Employment Judge Rogerson made the deposit order based on a misunderstanding of the claimant's case. She says that the claimant's case as to his entitlement to the 28% shift premium is clear from the Particulars of Claim.

14. Whether that is so or not, as to which I make no finding, this shows no material change of circumstances. It shows only a party disagreeing with an employment judge's decision and seeking to reopen the issues decided by that judge. If the claimant disagreed with Employment Judge Rogerson's decision on a point of law, he could and should have appealed to the Employment Appeal Tribunal.

15. I therefore affirm the deposit order which remains in effect except that, anticipating it, as a necessary result of my decision below to revoke the strike-out judgment, I extend the time for payment to 29 November 2023, the date the Tribunal received the claimant's deposit.

16. I turn then to the reconsideration of the strike-out judgment. Under rules 70-72, a judgment may be reconsidered if it is in the interests of justice to do so, and may be confirmed, varied or revoked.

17. Ms Loraine does not dispute that the strike-out judgment was properly issued following the claimant's failure to pay the deposit. She tells me that the claimant's solicitors intended to pay it, but it was not paid because of "an administrative error" on their part. She says that the claim is funded by the claimant's trade union, and the claimant's solicitors should have requested the necessary funds from the union. Initially she suggested the claimant's solicitors should have requested the funds when they made the

**RESERVED DECISION**  
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application to set aside the deposit order, but when I reminded her that that was on the last date for payment, which would have been too late, she accepted that they should have requested the funds earlier.

18. Ms Hughes submitted that the claimant had never intended to pay the deposit. Instead, his solicitors left it until the last day allowed when they applied to set aside the deposit order. In any case, the claimant was bound by his solicitors' error and the judgment should not be set aside. She reminded me that the deposit order had made clear by when the deposit was to be paid, and Employment Judge Rogerson had specifically stated at paragraph 24 of her orders that if the claimant wished to amend the claim to clarify the basis of the claim, he should pay the deposit and then apply to amend. She contended that the respondent had incurred prejudice in the time and costs of dealing with this application.

19. I do not find that the claimant (or the trade union funding him) made a conscious decision to delay paying the deposit and instead made the late application to set aside the deposit order. I have no evidence on which to base that finding. The lack of any satisfactory explanation for the unspecified "administrative error" is troubling, but on balance I find that responsibility for the failure rests entirely with the claimant's solicitors, as Ms Loraine submitted. No explanation has been provided for the failure. I note that the solicitors were able to apply for reconsideration of the deposit order on 3 November 2023 which indicates that the file was receiving active attention and makes the failure to pay the deposit inexplicable.

20. That is not the end of the story, however. The effect of the strike-out is that the claim is at an end. That prejudice to the claimant outweighs the limited prejudice in terms of time and costs suffered by the respondent, which may properly be dealt with by way of a costs order in due course, if one is sought. I have a broad discretion what to do, and I do not consider it is in the interests of justice for the claimant to lose his claim through the fault of those advising him, when a fair trial is still possible. In these circumstances, I have concluded that I should revoke the strike-out judgment and permit the claim to proceed.

21. I have made separate case management orders for the further conduct of the proceedings and in those, I have dealt with the claimant's amendment application which accompanied his solicitors' letter of 24 November 2023.

Regional Employment Judge **Robertson**

Date: 9 January 2024