



EMPLOYMENT TRIBUNALS

Claimant: Jesse Middleweek
Respondent: ThorntonRones Limited
Heard at: East London Hearing Centre, via CVP
On: 23 February 2024
Before: Employment Judge Sugarman
Representation
Claimant: Did not attend
Respondent: Richard Rones, Director of the Respondent

JUDGMENT

The judgment of the Tribunal is that: -

1. The Claimant having failed to attend or to be represented at the full merits hearing listed today, 23 February 2024, his claims are dismissed under Rule 47, Schedule 1 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013.

REASONS

Background and Facts

1. By a Claim Form presented on 2 May 2023, the Claimant brought a claim for unlawful deductions from wages pertaining to monies said to have been deducted from his final pay packet on termination following the termination of his employment on 18 January 2023.
2. On 23 March 2023, the case was originally listed for a final hearing to take place on 16 October 2023.

3. On 24 May 2023, the Claimant was ordered, within 4 weeks to send to the Respondent;
 - 3.1. a document setting out how much he was claiming and how the amount has been calculated;
 - 3.2. copies of all supporting documents and evidence.
4. He failed to do so.
5. The Claimant did not attend the hearing listed for 16 October 2023, having previously informed the Tribunal he could not participate in it. Employment Judge Elgot postponed the hearing. She said that the Claimant had not seen or had the opportunity of responding to Mr Rones' evidence. Mr Rones accepts that is right because the Respondent had mistakenly filed the evidence with the Tribunal but had not served it upon the Claimant. He was ordered to do so thereafter and did.
6. Both parties were reminded to comply with the Orders made on 24 May 2023 and the date for compliance was extended to 30 November 2023.
7. The Claimant failed to comply.
8. Notice of today's hearing was sent to the parties on 4 January 2024. It was sent again yesterday and again today.
9. Yesterday, on 22 February 2024, the Respondent applied to strike out the claim. It pointed out the Claimant had failed to comply with any of the Tribunal's Orders and was not pursuing his case. It made the point that the calculates in the Claim Form appeared to be incorrect and a properly set out Schedule of Loss was important. He did not respond to that application.
10. The Claimant did not attend the hearing today, having not communicated in advance that he would not be attending. I asked my clerk to contact him by phone and email. He did not answer either.
11. At the hearing today, Mr Rones asked me to dismiss the claim under Rule 47 or strike it out.
12. I had before me the Claim Form, Response and Mr Rones' statement with exhibits.

Conclusions

13. Rule 47 provides:

'If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.'
14. I had regard to the Court of Appeal case of **Roberts v Skelmersdale College** [2004] IRLR 69. Although it was decided under the old rules, there is sufficient similarity between the two rules that it remains good law. The following propositions can be taken from the judgment:

- 14.1. the rule confers a very wide discretion;
- 14.2. the rule does not impose on an employment tribunal a duty of its own motion to investigate the case before it, nor to satisfy itself that on the merits the Respondent has established a good defence to the claim of the absent employee;
- 14.3. before making a decision the Tribunal shall have regard to the information required under the rule.
15. The Claimant provided no evidence for me to consider and there is no evidence that he has complied with any of the Tribunal's Orders.
16. Having been provided with notice of the hearing today, he has failed to attend or explain his absence. There is no application for an adjournment.
17. I had in mind the guidance in **Roberts** that there is no obligation on the Tribunal to conduct its own investigation into a case where a party fails to attend. However, I also had regard to the information available to me from the Claim Form and Response together with the witness statement and appendices provided by the Respondent.
18. I concluded it was not possible to fairly proceed with a hearing in the absence of the Claimant. The issue as to whether an employer is entitled to deduct holiday pay in respect of holidays taken and paid for in excess of that which has accrued to an employee in the first year of their employment is a contentious one. Although there is some authority in the Claimant's favour, **Hill v Howard Chapell**, EAT/1250/02, that was decided on the provisions in the Working Time Regulations 1998 prior to their amendment by the Working Time (Amendment) Regulations 2001, which inserted Regulation 15A providing for incremental accrual over the first year of employment. It was not the case in **Hill** that the claimant had taken more leave than in fact had accrued to him under the Regulations.
19. Further and in any event, the Respondent disputed the figures claimed in the Claim Form and the Claimant would have been required to adduce evidence in support of his claim, the burden being on him to prove his claim.
20. In short, evidence was required to prove the claim, the burden being on the Claimant to do so, and the Claimant has failed to provide such evidence or indeed to progress his claim.
21. I have taken into account that dismissal of a case under rule 47 is a severe sanction. I considered whether it would be right, as an alternative, to adjourn the hearing to another occasion. I decided that it, in the circumstances, it would not be right to do so. There was no such application but even if the Tribunal had done so of its own volition, if the case were relisted, there is no basis on which I could conclude the position would likely be any different in the future. The Claimant has already failed to attend two hearings, on this occasion with notice or excuse. Moreover, he has failed to comply with all directions.
22. Given the current caseload being dealt with by the Tribunal, it would be months before it could come on for hearing. The delay would be inherently undesirable and would also impact other litigants waiting for their cases to be heard.

23. In all the circumstances, I have taken the decision to dismiss the claim in accordance with Rule 47.
24. Had I not dismissed the claim under Rule 47, I would have struck it out under Rule 37. The Claimant had notice of the Respondent's application. He had failed to comply with the Orders of the Tribunal identified above and is not actively pursuing his claim.

**Employment Judge Sugarman
Dated: 23 February 2024**