



EMPLOYMENT TRIBUNALS

Considered at: London South

On: 9 May 2024

By: Employment Judge Ramsden

In the matter of Mr J McCabe v Home Office

Consideration of judgment reached on: 14 December 2023

JUDGMENT ON RECONSIDERATION

1. The Claimant's application for reconsideration of the judgment dismissing his claim given in this matter on **14 December 2023** is granted, and the decision in that judgment is revoked. The Claimant's claim will proceed to a Final Hearing on **11 October 2024 at 10am**.
2. The Respondent's application for an Order of costs against the Claimant pertaining to the costs the Respondent incurred in attending the 14 December 2023 hearing is refused.

BACKGROUND

3. The Claimant's Claim Form was filed on 25 July 2023. The Claimant claims that:
 - a) the Respondent made an unauthorised deduction from his wages, contrary to section 13 of the Employment Rights Act 1996, when it deducted £135.34 from his pay on 25 February 2023; and
 - b) he was treated less favourably than a comparable full-time worker, contrary to regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the **PT Regulations**), when the Respondent required him to work on 15 March 2023.
4. The Respondent resists these complaints.

APPLICATIONS

5. The Claimant applied, under Rule 71 of the Employment Tribunals Rules of Procedure 2013 (the **ET Rules**), for reconsideration of the decision of Employment Judge Fowell on 14 December 2023 to dismiss the Claimant's claim under Rule 47 for his non-attendance at the hearing scheduled for that date for two hours, which was to be the Final Hearing of the matter.
6. The Claimant's reasons for applying for reconsideration of that decision are that:
 - a) he made an error as to the date, and he does not think it is in the interests of justice that the claim is dismissed as he had been demonstrating a clear intention to pursue his claim at the time (he cited the fact that he and the Respondent exchanged witness statements on 13 December 2023, the day before the 14 December 2023 hearing);
 - b) while the Tribunal attempted to telephone him at the time of his non-attendance, because he was driving he did not answer the telephone. He was unaware that the hearing was due to take place on 14 December until he logged into his email account later that day. He emailed the Tribunal straight away (at 22:26 on 14 December 2023) to alert it to his error;
 - c) his error was due to the fact that, at the time the parties were informed of the listing in August or September 2023, he had sustained an injury for which he was being medicated, and which injury was impeding his sleep. The Claimant says that these caused him to write the date of the Final Hearing incorrectly in his calendar as 15 December 2023;
 - d) the CVP details sent to the parties on 13 December 2023 did not specify the date of the hearing, and so he was still labouring under the mistake that the hearing would take place on 15 December 2023; and
 - e) the Respondent had applied, ahead of the 14 December 2023 hearing, for that hearing to be converted to a preliminary hearing on the basis that the two-hour listing was insufficient time for the Claimant's complaints to be determined. Had he attended the 14 December hearing, the Claimant would have supported that application. The Claimant therefore says that the appropriate course of action for the Employment Tribunal on 14 December 2023 when he did not attend would have been to postpone the hearing and re-list it for one day.
7. The Employment Judge in this hearing asked whether any consideration had been given by either party to the fact that the hearing of 14 December 2023 was conducted by an Employment Judge alone, which would have been appropriate for hearing the complaint of unauthorised deduction from wages, but (in the absence of the parties giving their consent) not for the complaint of less favourable treatment under the PT Regulations.

8. The Claimant said that, had he attended the hearing on 14 December 2023, he would have objected to that hearing proceeding as a Final Hearing unless the listing had been lengthened to one day. As this was not possible (confirmed by the Tribunal in writing ahead of the 14 December hearing), the Claimant says he would not have consented to the PT Regulations complaint being heard by EJ Fowell sitting alone, as that would have prompted a relisting of the Final Hearing and both parties would then have pushed for that relisting to be for an appropriate period of time.
9. In response to the Claimant's application and the Employment Judge's question, the Respondent says:
 - a) The Claimant's reasons for non-attendance on 14 December 2023 are not sufficient to make it "*in the interests of justice*" that the dismissal of his claim is revoked:
 - (i) While the Claimant's injury, with its impact on his sleep and the impact of his medication might excuse the error the Claimant made in diarising the December hearing in August or September, the Claimant had ample opportunity to correct that error between September and December;
 - (ii) Parties to litigation have a responsibility to engage with the matter sufficiently that they attend scheduled hearings;
 - (iii) The Respondent had emailed the Claimant numerous times in the run-up to the 13 December 2023 hearing, with the date of the hearing in the subject-line of the emails, and the Claimant had responded to emails with those subject lines; and
 - (iv) It does not matter that the Tribunal's email sending the CVP log-in details did not remind the parties of the date of the hearing. The mistake in not attending remained the responsibility of the Claimant; and
 - b) As regards the "Tribunal composition" point raised by the Employment Judge, had the Claimant attended on 14 December 2023 and it been realised that a three-person Panel should hear the PT Regulations complaint, the Respondent would have pushed for the unauthorised deductions claim to have been determined then, even if the determination of the PT Regulations complaint would have been postponed. (The Claimant agreed that he would likely have supported that application.)
10. The Respondent applied for a Costs Order, i.e., for an Order under Rule 76 that the Claimant be required to pay to it a sum of money pertaining to the costs the Respondent incurred in attending the 14 December 2023 hearing.

RULES

11. Rule 47 of the ET Rules provides:

“Non-attendance

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.”

12. The Rules on reconsideration are set out in Rules 70 to 73 of the ET Rules. The pertinent one for these purposes is Rule 70:

“Principles

A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision (“the original decision”) may be confirmed, varied or revoked. If it is revoked it may be taken again.”

13. The Rule on costs is that in Rule 76, the relevant part of which is set out below:

“When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that-

(a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success; or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.”

REASONS

14. The Employment Judge did not consider that the reasons put forward by the Claimant meant that it was “*in the interests of justice*” that the decision to dismiss the claim be revoked. As the Respondent put it, it was the responsibility of the Claimant to ensure that he attended the Final Hearing that he was Ordered to attend, and however understandable the error he made in August or September in diarising it, he had ample opportunity to correct that, and he was presented

with numerous reminders from the Respondent that the hearing was to proceed on 14 December 2023.

15. However, the evidence from the Claimant was clear that if he had attended he would have supported the application already made by the Respondent to convert the hearing to a Preliminary Hearing, and to relist the Final Hearing for one day. If the Tribunal's oversight in listing the matter to be heard before an Employment Judge sitting alone rather than a three-person Panel been appreciated at the time, it is probable that the Respondent's application would have been granted.
16. In light of that fact, it is in the interests of justice that the decision to dismiss the claim be revoked. The whole claim could not have been heard even if the Claimant had attended if he would not have consented to the PT Regulations complaint being heard by an Employment Judge sitting alone. Given the overlapping factual issues between the unauthorised deductions complaint and the PT Regulations complaint, the Tribunal thinks it highly unlikely that the Tribunal would have proceeded to determine the former in the absence of being able to determine the latter.
17. Consequently, even if the Claimant had attended, the Final Hearing would have been postponed.
18. Moreover, there is a public interest in allegations of discrimination (such as the second complaint made by the Claimant) being heard.
19. This is also the reason why the Respondent's costs application is refused. Any costs incurred by the Respondent in attending the aborted hearing on 14 December 2023 would have been incurred by it whether or not the Claimant attended, and Final Hearing would have been postponed in any event.
20. While the gateway condition to making a Costs Order under Rule 76(1)(a) is met – the Claimant *did* act unreasonably by not attending the 14 December 2023 hearing – it is not appropriate to make such an order for the following reasons:
 - a) Costs are the exception rather than the rule in this jurisdiction;
 - b) The Claimant made a single, one-off error, and has otherwise demonstrated an active pursuit of his claim;
 - c) The Claimant is a litigant-in-person;
 - d) His behaviour was not contumelious; and
 - e) The Claimant's behaviour made no difference to whether the Respondent incurred the costs it did or not. The Tribunal's oversight was the critical factor. While the Claimant's conduct need not cause the costs in question, whether it did so or not is a relevant factor in deciding whether to exercise the discretion to award costs in response to unreasonable conduct.

21. Looking at this whole picture, it is not appropriate for an award of costs to be made in these circumstances.

DECISIONS

22. For the reasons set out above, the Claimant's application for reconsideration succeeds and the decision dismissing the Claimant's claim is revoked. The claim will proceed to Final Hearing on 11 October 2024.
23. The Respondent's application for costs is refused.

Employment Judge Ramsden

Date 9 May 2024

JUDGMENT ON RECONSIDERATION SENT TO THE
PARTIES ON

15th May 2024

For the Tribunal Office