



EMPLOYMENT TRIBUNALS

Claimant: Mr Robin Collingridge

Respondent: Toma Business Enterprises Limited

Heard at: by video **On:** 14.08.2024

Before: Employment Judge Mensah

Appearances

For the claimant: Not in attendance

For the respondent: Mr David Gray-Jones (Counsel)

JUDGMENT

1. **For the reasons set out below I strike out claim 3335142/2018.**

Background

2. The claims brought in this case were by claim form dated 2 February 2018. At that stage the Claimant brought claims for constructive Unfair dismissal, notice pay, holiday pay and arrears of wages. The Respondent argues the Claimant was dismissed for fraudulently misappropriation of company assets. The claims were stayed on the 23 May 2019 as by that point the Claimant face bankruptcy and his estate had vested in a Trustee in bankruptcy. The details of the history are set out in the order of Judge Din dated 28.04.2023 and so I do not repeat it here, but that order should be read alongside this judgment.
3. Judge Din concluded the Trustee in Bankruptcy had erroneously taken a decision it had no interest in the employment claim brought by the Claimant when in fact Judge Din found the claim rested with the Trustee in Bankruptcy.
4. The Respondent wanted the claims struck out back in 2023. Judge Din added the Trustee in bankruptcy as a party and ordered the Claimant to:
 - (i) Notify the Tribunal and Respondent of the name and contact details of the trustee in Bankruptcy within 28 days of receipt of the case management order.

- (ii) Notify the Trustee in Bankruptcy of his claims in these proceedings and send a copy of his case management order to the Trustee in bankruptcy.
 - (iii) Have the matter relisted after 6 months before a Judge to consider the Trustee in Bankruptcy position.
5. The Judge ordered the Trustee in bankruptcy to write to the Tribunal if it decided to withdraw and abandon the claims.
6. By email dated 23 July 2023 the Claimant informed the Tribunal he had sent the Case Management Order to Sally Critchley of RSM UK Creditor Solutions LLP and provided the details stating this was the Trustee in Bankruptcy.
7. There is nothing before me to suggest any contact from the Trustee in Bankruptcy either directly or indirectly to the Tribunal or the Respondent. By order dated 26 April 2024 Judge Din gave the Claimant until the 10 May 2024 to confirm he had complied with the previous order and the results. He warned if the answers were not acceptable a Judge might strike out the claims without further notice because they have not been actively pursued.
8. On the 10 May 2024 the Claimant emailed the Tribunal and Respondent confirming he had complied with the case management order of Judge Din of the 25 June 2023 and suggesting,

“The Insolvency service, along with various government regulatory bodies and the Grafton Group PLC wish to review the case and its content in greater detail in light of the following disclosure and actions of the company managing director and secretary Mr Ion Toma, Mrs Corina Toma & Company Accountant Mr Mustafa Kachwala of Kachwala and Co.”
9. He then requested an extension of time regarding proceedings so that,

“further investigative measures can be conducted whilst the regulatory bodies look to review the case and gain the necessary evidence to assess my claim and the actions of the company Directors and associated parties.”
10. The Respondent says they have no knowledge of any investigations or allegations against them and argue against any further stay.
11. The Respondent seeks for the claims to be struck out because the Trustee has not actively pursued them. The Claimant wants a further stay but does not have standing to pursue the claims or act on them.
12. The Trustee in Bankruptcy has failed to respond despite a period of more than twelve months having elapsed since Judge Din’s order. Given the Claimant confirmed he had complied, Judge Foxwell did not strike out the claims immediately but listed this for hearing today in order dated 24 June 2024 to consider whether the claims should be struck out because the Claimant’s Trustee in Bankruptcy had not actively pursued the claims or because the Tribunal considered it was no longer possible to have a fair hearing.

Documents.

13. I was presented with a main bundle of 336 pages prepared by the Respondent. The Claimant had not lodged any documents for the purposes of these proceedings and so beyond his response to Judge Din, the Claimant has not filed anything for the purposes of those matters to be addressed.

Attendance of the Claimant

14. Just before the hearing was about to start, I received an email from the Claimant's email address said to be from the Claimant's neighbour stating he had *Bilateral anterior Uveitis* and attaching an expired fit note. Mr Gray-Jones filed a Skeleton Argument.
15. Counsel argued the claim vested in the Trustee in Bankruptcy who should have conduct of the claim as per Judge Din's order. The Claimant's attendance would be as an observer and would not require a postponement. Further the fit note has expired (24.06.2024 to 24.07.2024) and the note and the email doesn't explain, why the Claimant would not be able to attend, and nor does the Claimant request a postponement?

Decision to proceed

16. The Trustee is the Claimant or stands in the shoes of the Claimant. I agreed with Mr Gray-Jones. The Claimant's attendance was of limited value in relation to the current issues before me. The Claimant had already explained he had complied with the order of Judge Din. He has not filed anything else before me.
17. Further, the medical evidence did not explain why the Claimant would not have been able to observe the hearing as it was a video/audio hearing, and he did not attend to explain the same despite the email suggesting he might attend. The fit note was prepared to address whether he was fit to work and not whether he was fit to attend and observe the proceedings. The fit note had expired, and I had no further evidence before me. I agree it was in accordance with the overriding objective to proceed.
18. Turning to the issues before me I heard from Mr Gray-Jones, and he relied upon his Skeleton argument. I do not repeat the document here, but I have read the same.

The Law

19. (19) Rule 2 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") provides:

"2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;*
 - (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
 - (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
 - (d) avoiding delay, so far as compatible with proper consideration of the issues;*
- and*
- (e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

Strike Out

20. (20) Rule 37 of the Rules provides that:

- “(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—
- (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).

Intentional Delay

21. Mr Gray Jones argued the time I needed to consider is from the 23 January 2023 when the claim vested in the Trustee in Bankruptcy. Judge Din recorded what the Trustee in Bankruptcy had said regarding the claim before the Tribunal, and this was erroneous as per Judge Din’s order dated 28.04.2023. The Trustee had stated that they were advised the employment claim was unlikely to carry any merit due to the high court action, it was unclear of the claim vested in the Trustee, the claim was Unfair Dismissal as so was “unlikely to vest” and unlikely to realise any monetary value.
22. He argued the reason for the delay sit with the Trustee in Bankruptcy’s erroneous understanding or view of the effect of the bankruptcy on the proceedings as per Judge Din’s order. He referred to his skeleton argument,
- “It is further submitted that the Trustee’s decision to disavow any interest in the case, based on their erroneous conclusion that it did not vest, is not a reasonable excuse for the delay. The reason for a delay does not need to arise from the conduct of a party to the proceedings: see **Elliott v The Joseph Whitworth Centre Ltd** where the delay arose partly because of administrative failures on the part of the Tribunal Service.”*
23. He argued the delay is intentional on the part of the Trustee in Bankruptcy by failing to act and ignoring or taking an erroneous view of their duties and so

did not progress it. He argued this is sufficient to find intentional delay on the part of the trustee and I need not go further.

24. I agree with Mr Gray-Jones. I find the Trustee in Bankruptcy was made aware of Judge Din's view of its responsibilities and standing in this employment claim when the Claimant sent a copy of the case management order to the same. Therefore, despite their original view of the claim they were on clear notice of what Judge Din had said about the nature of the claims, the claims being monetary claims and their standing. They then had the opportunity to consider or reconsider their position.
25. Once that order was before the Trustee in Bankruptcy it had a choice as to how to act and whether to respond to the Tribunal proceedings and play some part, or to either ignore, or decide not to act on the same.
26. I am satisfied this does reach the threshold of intentional delay. The delay started with the erroneous decision of the Trustee and continued despite having been sent Judge Din's clear order. The Claimant has suggested there is some investigation, but the Trustee has not engaged with the Respondent or the Tribunal, as the legal entity standing in the Claimant's shoes. Therefore, there is no evidence before me from the Trustee in Bankruptcy showing they have any intention of taking any further action in pursuit of this claim. The delay is intentional and now persists for some nineteen months.

Inordinate and Inexcusable Delay

27. The principles in the civil case of **Birkett v James [1978] AC 297**, [1977] 2 All ER 801, House of Lords apply. The issue is whether there has been intentional and contumelious default or inordinate and inexcusable delay leading to a substantial risk that a fair trial is not possible and that the other party has thus been prejudiced.
28. Mr Gray-Jones argued inordinate and inexcusable delay is a question of fact. He argued I could infer the prejudice to the Respondent if the claim is allowed to continue. He argued even if the delay is not fault of the Claimant this would not prevent the test being met. He stated, I am required to consider the conduct of the party even if the Claimant didn't contribute such as where there is a serious illness.
29. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, Sch 1, r 37(1). This has been held to mean 'a fair trial within the allocated trial window' as opposed to whether a fair trial was possible at all so as to demonstrate the narrower interpretation also met the threshold: **Emuemukoro v Croma Vigilant (Scotland) Ltd (2021) EA-2020-000006 UKEAT 0014/20, [2022] ICR 327**.
30. For completeness, Mr Gray-Jones argued inordinate and inexcusable delay. He argued it was inordinate as the employment termination over six years ago and the claim has not progressed since the response was presented. If the claim proceeds it would be even further delay before concluded. He argued

the only reasonable conclusion is inordinate. He argued it is inexcusable delay as the Trustee in Bankruptcy's reason for not being involved is based on an error of judgment and as per Judge Din's order. The claims fell within the category of proprietary claims so he argued it was difficult to see how they could have concluded the claims didn't vest in the Trustee.

31. Mr Gray-Jones argued this as an unreasonable failure to discharge their responsibilities. The Trustee should have acted as a party. He asked me to find it was no longer possible to have a fair hearing because:
- (i) There is no certainty the Trustee in Bankruptcy would engage given they are likely to have been aware of the claim from the order last year. He questioned how likely the Trustee would pursue it now or in the foreseeable future and questioned when the case progress could be heard.
 - (ii) He argued significant prejudice to the Respondent given the events took place so many years ago. He asked me to draw inferences that he said were self-evident through the passage of time. He argued the Respondent should not have to complete disclosure to show its prejudice and show witnesses would struggle to recall what happened.
 - (iii) He argued whilst the Claimant would suffer prejudice, and recognising it is difficult for the Tribunal to assess merit, the claim is based on procedural failings and the Respondent would argue Polkey and contribution to reduce an award to nil. The Trustee in bankruptcy took the view there was no monetary value in the claim. Given the likely financial status of the Claimant any costs will be unlikely met. He argued the value of the employment claim is on a broad view is based on procedural matters. On that basis he argued more prejudice to the Respondent given the likely financial value.
 - (iv) Turning to public interest he argued there is no wider public interest. Page 157 ICR report Lord Steyn demonstrates there is no wider public interest as an unfair dismissal claim and the consequence for the Claimant is the loss of a finding of unfair dismissal but little monetary value, yet the Respondent will suffer significant prejudice in cost and time as above.
 - (v) In relation to Rule 37(e) he argued there is no date when we might say this matter could be pursued to final hearing. There is nothing to indicate they intend to actively pursue the claims.
32. In the alternative, I agree the delay is inordinate and inexcusable delay. I find even if the Trustee took that view, once the Trustee in Bankruptcy had sight of Judge Din's order, it had the opportunity to review their position and act. Instead, there is a completed failure to engage at all.

33. Considering the passage of time since the employment relationship ended, the time that has elapsed for the pursuit of the claim, and the realistic and likely impact on memories of witnesses and evidence as argued by Mr Gray-Jones the delay is inexcusable.
34. This case has not progressed since it was filed in December 2018, and we are now nearly six years on. I find on the evidence before me the Trustee in bankruptcy has no intention of pursuing this claim by its inaction and the prejudice weighs more heavily in favour of the Respondent.
35. Taking a broad-brush approach to the claims and particularly the substantive claim of Unfair Constructive Dismissal claim, there are grounds for a Polkey and contribution reduction argued on behalf of the Respondent (the Respondent in fact says it dismissed the Claimant) to nil. Therefore, even if ultimately any of the alleged procedural failings were proven, I agree it is likely to reduce the value of the claim to of little or no monetary value to the Trustee. This may have formed part of the reasoning for the decision of the Trustee, and their statement regarding likely realisation. It may have played a part in their lack of response.

Decision

36. I strike out all claims on the grounds the claims have not been actively pursued by the Trustee in Bankruptcy and in the alternative on the ground the balance of prejudice weighs in favour of the Respondent if the claims proceed as such a fair trial is no longer possible.
37. The Respondent asked me to note it was considering its position regarding any further applications it may make and if so advised would make them in accordance with the time limits set out in the Rules.

Employment Judge **Mensah**

Date 14.08.2024

JUDGMENT SENT TO THE PARTIES ON
28 October 2024

FOR THE TRIBUNAL OFFICE

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A strike out judgment affecting a claim is amenable to a reconsideration application on the interests of justice ground under Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, Sch 1 r 70–73.