EMPLOYMENT TRIBUNALS

Claimant: Adam Kusnierz
Respondent: Vitalograph Ltd

Heard at: Cambridge (by CVP)

On: 22 January 2025
Before: Employment Judge Mr J S Burns

Representation
Claimant: In person
Respondent: Ms A Amesu (Counsel)

JUDGMENT

1. The Response/Grounds of Resistance is struck out insofar as liability is concerned

2. The Claimant was unfairly dismissed.

3. The Claimant's application for Re-instatement or Re-engagement is refused.

4. The compensatory award is £10076.

5. The Respondent must pay the Claimant the balance of the compensatory award after The Employment Protection (Recoupment of Benefits) Regulations 1996 have been complied with. The prescribed period is 21/4/23 to 11/8/23. The prescribed amount is £10076. The difference between the compensatory award and the prescribed amount is nil. The Claimant's National Insurance number is NS449954A.

REASONS

For striking out the defence on liability.

1. On 8/9/23 the case was listed for a final hearing on 8/1/24 with a direction that the parties exchange witness statements on 1/12/23. The Claimant served his by that date but the Respondent did not as it's solicitor was waiting for a CMO on a second claim brought by another employee who had been dismissed in similar circumstances by the Respondent. Having received that CMO on about 20/12/23, on 21/12/23 the Respondent's solicitor filed an "urgent application" to postpone the final hearing on 8/1/24 and for other directions for consolidation etc. On 5/1/24 the final hearing listed for 8/1/24 was postponed.

2. According to the Respondent's solicitor, also on 5/1/24 she sent to the Tribunal, (but not to the Claimant), the Respondent's witness statements.

3. On 14/1/24 the Respondent's solicitor emailed the Claimant saying that the Respondent's witness statements had been filed at the Tribunal, and the Claimant acknowledged this.

4. On 17/1/24 the Claimant complained in writing to Tribunal (copied to the Respondent) that he had not received the Respondent's witness statements and requested that they be sent to him, but they were not.

5. On 20/3/24 the Tribunal sent the parties a direction of EJ Brown that the Respondent should send it's witness statements to the Claimant by 3/4/24. The Respondent did not comply.

6. On 14/4/24 and again on 20/6/24 the Claimant wrote to the Tribunal complaining about this, copied to the Respondent's solicitor, but she did not send the witness statements.

7. On 25/9/24 there was a preliminary hearing before EJ Fitzgerald. The Respondent's solicitor attended as did the Claimant. It was not suggested that as the Respondent had already served its witness statements it did not have to do so. The EJ made a CMO including a direction that "*The Claimant and the Respondent must send each other copies of all their witness statements by 9 December 2024*" and a warning that "*If any of these orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules*".

8. The Claimant had already served his witness statement (on or before 1/12/23) but the Respondent had never reciprocated. It failed to do so by 9/12/24.

9. The Claimant made an application (effectively for the Respondent to be debarred) to the Tribunal (copied to it the Respondent's solicitor) about this on 11/12/24. On 13/1/25 the Tribunal wrote to the parties stating that the Claimant's application would be dealt with on the first day of the final hearing (listed for today and tomorrow 22-23/1/25).

10. The Respondent's solicitor did not respond to this until 20/1/25 at 21.43 when she emailed the Tribunal and the Claimant attaching the Respondent's witness statements and writing the following : *"We apologize for not having sent these to the Claimant ahead of today. These had been prepared ahead of the postponed hearing in January 2024 and the writer had forgotten which documents had already been sent to the Claimant during the course of this matter. When we received the tribunal's correspondence of 13.01.2025, the writer was engaged in another (5 day) final hearing and had not had the opportunity to respond until today. We also note that we have not received any application from the Claimant to the Employment Tribunal dated 11.12.2024, which is referred to in that correspondence, in accordance with the (then applicable) 2013 Employment Tribunal Rules….. In accordance with the previous case management discussions, the Respondent has three witnesses / witness statements. These three witness statements total 8 pages. We note that the Claimant's amended witness statement is 17 pages in length. From previous dealings with the Claimant, he is an intelligent and capable person and we are sure that the three statements of the Respondent will not cause him any prejudice or difficulty in his preparation for questioning these witnesses on Thursday. …The tribunal will see that the*

statements are dated January 2024 and no amendments to these statements have been made despite receiving the Claimant's statement ahead of this email. We do not believe that the Claimant has suffered any prejudice in this regard"

11. Then on 21/1/25 the Respondent's Solicitor wrote "*We write further to our email of 20.01.2025, timed at 9.44pm (attached). In the 9.44pm email, we stated that we had not received the Claimant's email of 11.12.2024; having checked the writer's email folders, the email of 11.12.2024 has been received, but had been blocked by our security filters and therefore had not been downloaded into the writer's email inbox. We do not wish to mislead the tribunal about the receipt of the email, however the position is still correct in respect of the contents of that email not having been viewed due to the security filter and therefore it is correct that we were unaware of the contents of that email when sending the 9.44pm email yesterday….We also wish to clarify our understanding of the exchange of witness statements. In readiness for the (postponed) hearing of 08.01.24, on 05.01.2024 we sent the tribunal a combined pdf bundle of documents (email and pdf attached). This pdf included the Respondent's witness statements. These are the same witness statements that the Respondent wishes to rely on for the re-scheduled hearing and have not been amended; there are no supplemental or additional statements for the Respondent. We do however note on review, that the Claimant was not copied into the 05.01.2024 email. The parties received confirmation that the 08.01.24 hearing was postponed within approximately half an hour of us sending this email and pdf attachment…There was then a lengthy period of approximately 9 months until a further preliminary hearing took place, following which no supplementary statements were required by the Respondent, which is relying on the three statements sent to the tribunal on 05.01.24. The writer therefore believed that all statement preparation had been completed and there were no further statements to exchange with the Claimant….We can only apologize to the Employment Tribunal and the Claimant for this oversight and confirm that the Claimant has been sent copies of the witness statements, as per our email of 20.01.2025."*

12. The Claimant pursued his application at the beginning of the Final Hearing today. He explained the chronology and stated that as a litigant in person whose first language is not English (he is of Polish origin) he had not had enough time to prepare for the trial. He wanted much longer than the one day which the late service of the Respondent's witness statements had afforded him. Although he had prepared some questions for purposes of trying to cross-examine the Respondent's witnesses (in case the Tribunal did not accede to his application) this was not how he had wanted to prepare for the trial and he felt prejudiced and disadvantaged because he had not had enough time to think about and digest what the Respondent's witnesses had written. Had he been given a proper period for consideration he could have done more and better to prepare his questions and for the trial generally.

13. I told the Respondent's Counsel that I was contemplating striking out the defence on liability and gave her two short adjournments to take instructions before completing her submissions, during which she referred me to two authorities namely Bolch v Chipman 2004 IRLR 140 and Blockbuster Entertainment Ltd v James [2006] IRLR 630, CA.

14. Rule 38 of the 2024 Employment Tribunal Rules reads in part as follows:

38.—(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).”

15. The Respondent has failed to comply with three directions for service of its witness statements, namely those issued on 8/9/23, 20/3/24 and 25/9/24.

16. The fact that the Respondent’s witnesses reside in Ireland or the desire to consolidate two cases were not good reasons to disregard the direction that the Respondent’s witness statements should be served in good time before the hearing on 8/1/24. The unilateral decision to withhold the statements even from the Tribunal until 5/1/24 set the tone of disregard of directions and lack of consideration for the Claimant which has continued for over a year since then.

17. If the Respondent’s solicitor really thought that she had already served the Respondent’s witness statements on the Claimant on 5/1/24, she had no reasonable grounds for doing so. Furthermore, it is unexplained why she did not check that she had done so, especially in the light of the repeated complaints by the Claimant and the specific directions made about this by the Tribunal on 20/3/24 and then again on 25/9/24.

18. The failure to comply with the third direction in December 24 or to respond to the Claimant’s application of 11/12/24 promptly, even when it was referred to in the Tribunals letter of 13/1/25, is part of a pattern of unreasonable and careless conduct over 13 months which has caused the Claimant considerable frustration, anxiety and additional work and which has in the end fatally prejudiced his ability to adequately prepare in time so that a fair trial can take place within the scheduled hearing time.

19. I do not accept the Respondent’s submission that as the Claimant has had one day to prepare and has prepared some questions during that time, it would be fair to allow a trial on the merits to proceed, or that extra time for his preparation should be found today or tomorrow before the final hearing proper got under way. That would place extra pressure on the Claimant and even then not afford him the time he says he requires, and it would also make it unlikely that the case could be completed within its listing.

20. The point of directing witness statements to be served a month before trial is that such service gives time for full and mature consideration, which can include taking advice or seeking assistance. That is especially important for inexperienced litigants-in-person such as the Claimant.

21. The only way in which a trial on the merits in this case could be carried out fairly, and in a manner in which the Claimant would feel had been fair, would be to adjourn it to some later date. That would be disproportionate and wrong, especially as the trial has already been significantly delayed at the Respondent’s request.

22. The Respondent was warned by the directions of 25/9/24 that non-compliance could lead to a strike-out.

23. The conditions in paragraphs (b) (unreasonable conduct), (c) (non-compliance with an order) and (e) (fair trial impossible) of Rule 38 are all met. Although strike-out is a draconian measure, it is justified and appropriate in this case to strike-out the defence on liability. To partially mitigate the severity of this I have allowed the Respondent to give evidence on the Claimant's re-instatement/reengagement application and to make submissions on that and on the issue of the Claimant's mitigation and the quantum of the compensatory award.

24. Hence I struck out the liability defence and entered judgment for the Claimant on his UD claim.

Remedy

The Claimant's re-instatement/re-engagement application

25. The Claimant applied for this. I explained the options and I heard evidence on the point from both the Claimant and from Mr Downey, the Respondent's Chief People Officer.

26. The Claimant's old job-role no longer exists. The work which he used to perform (working from home in Northampton) is no longer performed for the Respondent in the UK. The Respondent, (for its own business reasons such as avoiding problems caused by Brexit and wishing to streamline and increase the efficiency of its operation), re-arranged matters in 2022/2023 so that the work which the Claimant did is now carried out in the Respondent's premises in Ennis in the Republic of Ireland. The employees doing that work also carry out other functions such as equipment dispatching and "listening to coughs" which cannot be carried out remotely and which take place in a tightly controlled and secure business location.

27. The Claimant does not have much recent experience in the other aspects of the work of the current employees. In any event he does not wish to move to Ireland.

28. The Claimant referred to the Respondent's Japanese operation as illustrative of the point that a mixed remote role (such as the one which he submitted should be created for him in Northampton) would be feasible. However, the Respondent maintains the Japanese office because it is a regulatory requirement that it have Japanese speakers on hand locally. That does not apply to the UK. There are no vacancies in the Japanese office and the Claimant does not speak Japanese or wish to go there anyway.

29. The Claimant suggested that a role in project management could be found for him. This is not the work he was doing before and there are no vacancies in the UK.

30. It would not be practicable for the Respondent to comply with any such order.

31. Hence, I refuse to order re-instatement or re-engagement.

Financial compensation.

32. The Claimant was paid ten weeks' notice pay. He also received his statutory redundancy entitlement and so is not entitled to a basic award.

33. The Claimant has produced only one document which he claims dates from 2023 showing a job application to the police. The document is undated. He has produced further documents showing only 2 unsuccessful job applications in 2024.

34. The Claimant says he has applied throughout 2023 and 2024 for hundreds/thousands of jobs but all unsuccessfully. If that is true it is surprising that he has not been able to produce any reasonable documentary evidence to show this. If he had produced a CV or registered with employment agencies he could and should have documentary evidence of this. He should have screen-shots of his applications even if they were made on line. He should have a reasonable number of emails or messages to produce.

35. The Claimant says he was signing on for state benefits and had to record his job applications in a "little book" but even that he said he had shredded and could not produce.

36. I get the impression that the Claimant, who was born on 10/3/1960 and is now approaching retirement age, since dismissal has been content to live on his savings and then state benefits while entertaining his unrealistic hopes that he would be re-instated into his old job by the Tribunal.

37. The Respondent has produced various screenshots of "Indeed" webpages (pages 75 et eq) showing numerous technical support roles being available in 2023 in places like Cambridge and London, including 236 "Work From Home Technical Support Roles". On the face of it there have been abundant available jobs in IT support which may well have been suitable for the Claimant who has IT skills.

38. The Claimant admitted that he has not made any attempt to obtain menial work such as delivery driver or working in a supermarket.

39. I find that the Claimant has not made a proper effort to find alternative work and that it is just and equitable to make an award on the basis that had he done so he would have fully mitigated by 6 months (26 weeks) after dismissal.

40. The Claimant has already been paid his notice pay for 10 weeks after dismissal - that is to 21/4/23. I do not award compensation up to that date.

41. The period of 16 weeks starting on 21/4/23. expired on 11/8/23. I award him compensation for that period only, plus an award of £300 for loss of statutory rights.

42. The Claimant's 10th month payslip (for January 2023) was produced which showed he had earned £30281 gross and had paid £3959 tax and £2635 NI contributions, while the Respondent had paid £2784 towards his pension over the same ten-month period. I calculated his average weekly pay net of tax and NI contributions but including the

employer pension contributions as follows: £30281 - 3959 - 2635 + 2784 = £26471/10 x 12 = £31765.2/52 = £611 per week. This was agreed by the parties during the hearing.

43. Total award 16 x £611 = £9776 plus £300 LOSR = £10076.

Approved by:
Employment Judge J S Burns
22/1/25
For Secretary of the Tribunals
Date sent to parties
7 February 2025