



EMPLOYMENT TRIBUNALS

Claimant

Mr. L. Andersen

v

Respondent

Practice Plus Group

Heard at: Birmingham

On: 16 August 2024

Before: Employment Judge Wedderspoon

Representation:

Claimant: No attendance

Respondents: Ms. A. Rumble, Counsel

JUDGMENT

1. The claimant's application for a postponement of today's hearing is refused.
2. The claim is struck out.
3. The claimant will be pay the respondent's costs of today assessed at £900.

REASONS

Postponement application

1. The parties were informed about this hearing by notice dated 18 March 2024. The claimant failed to attend the hearing and the Tribunal clerk contacted the claimant by telephone to inquire whether he would be attending. The claimant appeared to be driving and pulled over; he was using a mobile telephone and informed the clerk he had forgotten about the hearing today; had no paperwork with him and implied he wished to seek a postponement of the hearing.
2. The respondent objected to the postponement application relying upon the notice of hearing sent to the parties in March 2024 and of the correspondence from the respondent sent to the claimant recently reminding the claimant of today's hearing date. The respondent submitted the claimant's conduct should be considered in the context of persistent failures to engage with the respondent's solicitor and the Tribunal. Furthermore, there were no exceptional circumstances identified by the claimant such as an emergency sudden illness which prevented him from engaging with the hearing today.

Determination

3. Pursuant to Rule 30A(1) of the 2013 Employment Tribunal rules, an application by a party for a postponement of the hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known. Pursuant to 30A (2) where a party makes an application for postponement of the hearing less than 7 days before the date on which the hearing begins the Tribunal may

only order the postponement where all of the parties consent to the postponement (not applicable here) or the application was necessitated by an action or omission of another party (the Tribunal finds not applicable here) or there are exceptional circumstances. The Tribunal was not satisfied that the claimant forgot about the hearing noting that he had received a notice about the hearing date on 18 March 2024 and he had been reminded of the hearing date on the 8 of July 2024 in correspondence from the respondent. There were no exceptional circumstances in order for the Tribunal to exercise its discretion to postpone the hearing. The Tribunal determined taking into account the pattern of behaviour of the claimant by failing to engage with the Tribunal and the respondent, it was not in accordance with the overriding objective to postpone the hearing and in the interests of justice the hearing will proceed today. The claimant's postponement application was refused

Strike Out

4. By claim form dated 10 March 2023 the claimant brought a claim for unfair dismissal and claim for "other payments". In the claim form, the claimant's representative was identified as Andy Groves of GMB trade union.
5. The claim was insufficiently particularised. In the respondents ET3 at paragraphs 12 and 16 the respondent requested further information of the claimant's complaints of unfair dismissal noting that no facts pleaded in the claim form could amount to a claim for unfair dismissal or other payments; the respondent stated that the basis of the claim had not been specified or the quantum of payments claimed.
6. Legal Officer Singh required the claimant's representative to provide the requested further information set out in paragraphs 12 and 16 of the grounds of resistance by 30 May 2023.
7. On 2 June 2023 the respondent's solicitor emailed the claimant's trade union representative reminding the representative that the Tribunal had requested by letter dated 22 of May 2023 further information about the claimant's complaints and asked when the claimant may be in a position to provide the information. This was not responded to.
8. On 16 June 2023 the respondent's representative wrote again to the claimant's trade union representative asking when the claimant would be in a position to provide the information. By e-mail dated 20 June 2023, Mr Groves of the GMB replied stating he was awaiting instructions and would come back to the respondent once he had instructions.
9. On 7 July 2023 the respondent's solicitor wrote again to the claimant's trade union representative asking for the further information. On 7 July 2023 Mr. Groves of GMB replied stating he had not received anything further.
10. On 3 August 2023 the representative of the respondent wrote again to the claimant's representative asking whether he had been able to take instructions from the claimant and when they could expect the further information. On 16 August 2023 the claimant's representative replied; he was unable to provide any responses and was still awaiting instructions.
11. On 17 August 2023 the respondent's representative wrote to the Tribunal, copying in the claimant's representative, and sought an unless order against the claimant to providing the further information requested. The respondent's solicitor sent further chasing emails to the Tribunal for this order on 29 September 2023; on 15 November 2023 and on 20 November 2023. By email dated 20 November 2023, Mr. Groves of GMB stated he

- cannot provide any information as he had not been instructed by the claimant.
12. By further email dated 20 November 2023 the respondent's solicitor asked whether Mr Groves of GMB was actually representing the claimant in the Tribunal proceedings. Mr Groves responded by return *"he would not be Mr Andersen's representative for these proceedings"*.
 13. By e-mail dated 24 November 2023 the respondent's solicitor emailed the Tribunal, Mr. Groves of GMB and directly emailed the claimant attaching a copy of the unless order application for the claimant's consideration.
 14. On 19 of December 2023 the claimant responded stating that he will attempt *"to ascertain who is responsible on the union end and in the meantime I would suggest sending any correspondence to myself"* and giving an e-mail address.
 15. By letter dated 4 January 2024 Employment Judge Broughton notified the claimant that he was considering striking out the claim because it had not been actively pursued. The claimant was given until 18 January 2024 to object to the strike out proposal and was requested to set out reasons in writing or request a hearing by 18 January 2024. Furthermore, by separate e-mail dated 4 January 2024 Judge Broughton sought the claimant's information in respect of paragraph 12 and 16 of the grounds of resistance dated 16th of April 2023 by 11 January 2024. The claimant did not reply.
 16. On 12 January 2024 the respondent solicitor wrote to the Tribunal and copying in the claimant noting that the claimant had not provided the comments in accordance with the order of the Judge Broughton.
 17. On 23rd January 2024 the respondent solicitor emailed the claimant and the Tribunal stating that it had still not received the claimant's comments on paragraph 12 and 16 of the grounds of resistance which were due by 11 January or a response to strike out warning. Further, on 26 February 2024 the respondent's solicitor wrote to the Tribunal copying in the claimant saying that the position remained unchanged; the claimant had still not provided comments to paragraphs 12 and 16 of the grounds of resistance nor had he responded to the Tribunal's strike out warning.
 18. On 28 February 2024 the claimant emailed the Tribunal and the respondent's solicitor stating not to strike out the claim; the claim remained valid and there had been some confusion with the GMB legal representative; although they told the claimant they were representing him they apparently sent an e-mail stating they needed it in writing. The claimant's e-mail provider treated their e-mail as junk so he did not see it He said he had now updated the respondent's solicitors with a new e-mail and *"I am now in a position to resolve any issues and move forwards with the claim"*.
 19. By email dated 29 February 2024 the respondent invited the claimant to provide responses to the further particulars sought at paragraph 12 and 16 of the grounds of resistance as soon as is practicable.
 20. By notice dated 18 March 2024 the parties were informed about today's hearing. The notice stated at paragraph 5 *"an Employment Judge will determine the claims brought and the issues, whether the claim should be struck out for failure to comply with the Tribunal order dated 4 January 2024 and any further case management."*
 21. By e-mail dated 8 July 2024 the respondent solicitor received a bounce back e-mail indicating that the claimant might no longer have access to the e-mail account used and the respondent re-sent the e-mail to the next most recent

e-mail that the respondent had for the claimant. He asked the claimant to confirm receipt of the e-mail and confirm we can continue to use the e-mail address and communication.

22. The respondent submitted pursuant to rule 37 that the claimant had failed to comply with the order and had acted in an unreasonable manner; part and parcel of that behaviour was failing to attend today's hearing; failing to provide the further information required in accordance with the Tribunal's order. The respondent submitted it had no confidence that the claimant would comply with Tribunal orders in the future; there was effectively a waste of Tribunal's valuable resource; there could be no fair hearing and it would not be in the interests of justice to allow the claim to proceed. The respondent submitted that it ought to be struck out because there has been a failure to engage with the Tribunal procedure and the respondent's reasonable enquiries.

Determination

23. Pursuant to rule 37 of the 2013 Rules the Tribunal has a discretion to strike out claims where (i) the manner in which the claimant has conducted the proceedings has been scandalous unreasonable or vexatious or (ii) for non compliance with any of these rules or within order of the tribunal or (iii) it has not been actively pursued. Prior to striking out a claim a party should be given a reasonable opportunity to make representations either in writing or if requested by the party at a hearing. Striking out a claim is a draconian order.
24. The Tribunal took into account the case of **Smith v Tesco Stores Limited 2023 EAT 11** namely considered whether (a) any conduct had been scandalous, unreasonable or vexatious (b) whether a fair trial was still possible (c) whether a lesser sanction was proportionate. In accordance with the case of **Emuemukoro v Croma Vigilant Scotland Limited 2022 327** a fair trial must take account undue expenditure of time and money; the demands of other litigants and the finite resources of the court in accordance with the overriding objective.
25. The Tribunal found that the claimant had failed to comply with the Tribunal order dated 4 January 2024 when he failed to provide the information requested by the respondent in its ET3. Once it was clarified that the GMB trade union representative was not acting for the claimant, in February 2024 the claimant expressed that the claim should not be struck out but failed to clarify his complaint. To date, the claimant has failed to clarify his claims and the respondent is still unaware of the case it needs to meet at trial.
26. The Tribunal was not persuaded that the claimant forgot the hearing date having been sent the notice of hearing in March 2024 and the respondent reminding him on 8 July 2024 of today's hearing. There is no adequate explanation as to why it has taken some 17 months for the claimant to confirm the basis of his complaints. It is not optional for a litigant to comply with a Tribunal order; the requirement to comply is mandatory.
27. The Tribunal determined that the claimant had failed to comply with the order dated 4 January 2024. Further it determined the claimant had failed to actively pursue the claim and there was unreasonable conduct on the part of the claimant. In failing to comply with the case management order to provide particulars of his claim; then failed to engage with the process over a period since February 2024 amounts to unreasonable conduct. The threshold under Rule 37 has been met.

28. The Tribunal accepts the respondent's submission that the claimant is unlikely to engage with the process by reason of there being limited evidence of his engagement to date. The Tribunal takes account that the Tribunal has already used undue expenditure of time and money seeking clarification from the claimant as to the nature of the claims he brings; he has failed to provide this essential information. There are a number of other litigants who engage in the process conscientiously seeking to have their claims heard. There are finite resources of the Tribunal.
29. The Tribunal determined that the claimant by his persistent failure to engage with the process and to provide no further particulars of his complaint, that a fair trial taking account of the factors in **Emuemukoro** it was not possible to have a fair trial. The Tribunal determined to strike out the claim because there was no lesser sanction which was proportionate in the circumstances. The claimant had been given a number of opportunities to state his case and there was a realistic expectation that he would not engage in the future.
30. The Tribunal determined to strike the claim out.

Costs

31. The respondent applied for costs of today in the sum of £750 plus VAT totalling £900. The respondent submitted that the claimant was placed on notice via email on 15 of August that if he did not attend today the respondent would make an application for costs. The respondent had served the document bundle on the claimant on 6 August 2024; he did not respond. The respondent submitted the claimant's non-attendance today formed a pattern of unreasonable behaviour in not actively pursuing his case before the Tribunal. He could have notified the parties prior to today if he was not going to attend but instead the case had gone on today. The respondent had been forced to attend to make the application incurring unnecessary costs. The claimant's conduct was unreasonable conduct had the effect of causing costs to the respondent.

Determination

32. Pursuant to rule 75 (1)(a) of the 2013 Rules a costs order is an order that a party, the paying party makes payment to another party, the receiving party, in respect of the costs that the receiving party has incurred while being legally represented or while represented by a lay representative.
33. Pursuant to rule 76 (1)(a) a Tribunal may make a cost order and shall consider whether to do so where it considers that a party or that party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted.
34. Pursuant to rule 78 a cost order may order the paying party to pay the receiving party a specified amount not exceeding £20,000. Pursuant to rule 84 in deciding whether to make it costs preparation time or wasted cost order and if so in what amount the Tribunal may have regard to the paying parties ability to pay.
35. In the Court of Appeal case of **Barnsley MBC v Yerrakalva 2012** ICR 420 the Court of Appeal stated, the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing or conducting the case and in doing so to identify the conduct, what was unreasonable about it and what effects it had. In the case of **Dyer v the**

- Secretary of State for Employment** whether conduct amounts to unreasonable conduct is a matter of fact for the employment tribunal
36. The Tribunal determined that the claimant was guilty of unreasonable conduct by failing to attend the hearing today and in failing to clarify his claim. The Tribunal was not satisfied that the claimant had merely forgotten the hearing having received a notice on the tribunal on 18 of March 2024 and having been reminded of the hearing by the respondent in correspondence. The claimant had failed to engage with the Tribunal and the respondent in terms of its reasonable requests to clarify his claim. There have been no attempts by the claimant from the clarification of the GMB union in December 2023 that they were not representing the claimant for him to provide the further information required so that the respondent knew the case it has to meet at trial.
37. Today's hearing could have been used as an opportunity to clarify that claim but the claimant failed to attend and as stated, the Tribunal was not satisfied that the claimant had merely "forgotten". The claimant has acted unreasonably. The effect of the claimant's unreasonable conduct has meant that this hearing had to take place today to ascertain whether the claim should be struck out because of the failure of the claimant to engage in that process. This has caused the respondent to expend unnecessary legal costs. The Tribunal determines it would be appropriate to exercise its discretion to make an order. The claimant's unreasonable conduct has caused the respondent to expend legal costs of today of attending the hearing. The claimant therefore will pay the respondent's costs of attendance assessed at £900.

Employment Judge Wedderspoon

16 August 2024

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