



EMPLOYMENT TRIBUNALS

Claimant
Mr G Allotey

Respondent
Elysium Healthcare Limited

v

JUDGMENT ON RECONSIDERATION

1. Having considered the representations made in writing by both parties the judgment sent to the parties on 28 December 2017 is set aside. The claim is re-instated. I make case management orders in a separate document which will be sent to the parties with this judgment.

REASONS

1. On 22 December 2016 the claimant presented a claim of unfair dismissal. That was served on the respondent by letter from the Tribunal dated 3 February 2017. The hearing date was fixed for Wednesday 17 May 2017 at the Employment Tribunal sitting at 8-10 Howard Street, Bedford, Bedfordshire MK40 3HS. On the 3 February 2017 the following case management orders were sent to the parties.
 - 1.1 *By no later than 3 March 2017 the claimant should set out in writing what remedy the Tribunal is being asked to award. The claimant shall send a copy to the respondent. The claimant shall include any evidence and documentations supporting what is claimed and how it is calculated. The claimant shall also include information about what steps the claimant has taken to reduce any loss (including any earnings or benefits received from new employment).*
 - 1.2 *By no later than 17 March 2017 the claimant and the respondent shall send each other a list of any documents that they wish to refer to at the hearing or which are relevant to the case. They shall send each other a copy of any of these documents if requested to do so.*
 - 1.3 *By no later than 31 March 2017 the respondent shall then prepare sufficient copies of the documents for the hearing. The documents shall be fastened together in a file so as to open flat. The file of documents shall be indexed. The documents shall be in a logical order. All pages shall be numbered consecutively. The respondent shall provide the other parties with a copy of the file. Two copies of the file shall be provided to the Tribunal at the hearing.*

- 1.4 *By no later than 14 April 2017 the claimant and the respondent shall prepare full written statements of the evidence they and their witnesses intend to give at the hearing. No additional witness evidence may be allowed at the hearing without permission of the Tribunal. The written statements shall have numbered paragraphs. The claimant and the respondent shall send written statements of their witnesses to each other. Two copies of each written statement shall be provided for use by the Tribunal at the hearing.*
- 1.5 *By no later than 10 May 2017 where the claimant and the respondent are both professionally represented, the professional representatives shall prepare a draft statement of issues or questions that are to be decided by the Tribunal at the hearing. The draft statement of issues shall be subject to the Tribunal's agreement at the commencement of the hearing.*
2. The claimant failed to serve a response by 3 March 2017.
3. Following an application by the respondent and the submission of a draft response time was extended to enable a response to be accepted and that was confirmed to the parties by letter from the Tribunal dated 11 April 2017.
4. The respondents requested an additional date be made available for the hearing so that it take place on 17 and 18 May 2017 due to the number of witnesses the respondent intended to call. Employment Judge Moore agreed to extend the time allocation to 2 days and the matter was relisted for hearing on 7 and 8 August 2017. However, that relisting did not take into account the availability dates provided for the respondent's witnesses. Employment Judge Moore considered the application and because the parties were not consulted on dates for the adjourned hearing and because the interests of justice would not be served if either party were deprived of the opportunity to call witnesses in those circumstances the hearing fixed for the 7 and 8 August 2017 was postponed on 28 June 2017.
5. The file was transferred from the Huntingdon Employment Tribunal to the Watford Employment Tribunal in late June 2017 on the closure of the administrative team previously located at Huntingdon and the consolidation of all files and their administrative support from the Watford Employment Tribunal.
6. On 4 September 2017 notice of a 2 day hearing on Wednesday 3 and Thursday 4 January 2018 was sent to the parties.
7. On 17 November 2017 the respondent made an application to the Tribunal in writing that the Employment Tribunal issue an unless order that, *"if the claimant does not provide us with the remedy he is seeking and confirm exchange of witness statements by 23 November 2017 the claim should be struck out"*.

8. On 17 December 2017 a strike out warning letter was sent by the Tribunal to the claimant which stated

“Employment Judge Order is considering striking out the claimant because

- *You have not complied with the Order of the Tribunal dated 3 February 2017.*
- *It has not been actively pursued.*

If you wish to object to this proposal, you should give your reasons in writing or request a hearing at which you can made them by 24 December 2017.”

9. On 28 December 2017 noting that no response had been received to the Tribunal strike out warning I gave judgment striking out the claim of unfair dismissal, the claimant having failed to comply with the order of the Tribunal dated 3 February 2017 and the claim not having been actively pursued. The hearing fixed for the 3 and 4 January 2018 was vacated, although it appears from the file that this was not communicated in any way to the parties.
10. On 12 February 2018 the respondent wrote to the Tribunal repeating those matters that were set out in their letter of 17 December 2017 to the Tribunal namely that the claimant had failed to provide details of the remedy claimed and had failed to exchange witness statements. The respondent also stated that on 13 December 2017 the respondent had received from the CAB a letter advising that the claimant had written to the Employment Tribunal and advised that the schedule of loss was sent on 30 March 2017 and his witness statement sent on 12 April 2017. The respondent stated *“however the witness statement purportedly relied on is a letter dated 12 April 2017 a copy of which is enclosed. This does not constitute a statement for the purposes of the hearing. Furthermore, the claimant has not included any evidence or documentation supporting what is claimed and how it is calculated. The claimant has not provided any information about what steps he has taken to reduce any loss, including any earning or benefits received from new employment.”* The respondent maintained that in the circumstances the claim should remain struck out.
11. The correspondence from the parties was subsequently referred to a Judge on either 6 or 26 March 2018 (the date is unclear on the referral) and on 24 April instructions were given for correspondence to be sent to both parties which direction was finally actioned by the Tribunal administration on 3 June 2018. The letter stated;

“Regional Employment Judge Byrne has reviewed the file following the receipt by the Tribunal of the respondents’ letter of 12 February 2018. He regrets the time it has taken to deal with this correspondence which is a reflection of the current pressures on the Employment Tribunal.

He notes on reviewing (typed "receiving") the file that the claimant did provide a schedule of loss to the Tribunal on 6 April 2017, copy enclosed, but this does not appear to have been forwarded to the respondent. He also notes that the claimant states in his letter of 13 December to the respondent that the schedule of losses and his witness statement are in the bundle prepared for the hearing. A copy of that letter is enclosed.

In all the circumstances, Regional Employment Judge Byrne does not refuse the reconsideration application under Rule 72(1). He does not consider that a hearing is necessary in the interests of justice for the reconsideration. Any further written submissions either party wishes to make must be copied to each other and sent to the Tribunal by 26 June 2018.

If the judgment is sent aside, Regional Employment Judge Byrne proposes inviting the claimant to provide a written response to set out why the claim should not be struck out as having been represented out of time".

12. By letter dated 11 June 2018 the respondent replied to the Tribunal's letter dated 3 June 2018. That letter accepted that whilst the claimant had provided a schedule of loss ;

"He failed to provide any evidence or documentation supporting what is claimed and how it is calculated. The claimant has also failed to include any information about what steps he has or indeed is taking to reduce his loss. Therefore, we submit that the claimant has failed to comply with this order.

Furthermore, the claimant was required to prepare a full witness statement of the evidence that he and their witnesses intend to be given at the hearing. The witness statement shall have numbered paragraphs.

The claimant's purported witness statement is a letter dated 30 March 2017. This does not constitute a statement for the purposes of the evidence that he is required to give at the Employment Tribunal.

Accordingly, we are of the firm opinion that the claimant has failed to comply with the order of 3 February 2018 for the reasons provided above.

The claimant is being supported by the Citizens' Advice Bureau throughout this process, and they should have advised his on the terms of the orders that required compliance, including the content of the witness statement. Accordingly, we are of the view that the claim should remain struck out for the reasons set out above."

13. On 19 June 2018 the claimant submitted written submissions in support of the reconsideration application. He stated that the schedule of loss was served on the respondent's representatives on 30 March 2017. He stated that he had taken advice from the Citizens' Advice Bureau and the earliest he was able to obtain an appointment was 13 December 2017. He stated that at his appointment with CAB he was informed that he had already complied with the request for the remedy sought. He provided a copy of a letter dated 13 December 2017 sent to the respondent's solicitors which reads

*"I am writing to you in response to your recent emailed correspondence to inform you that:
- my remedy sought is set out in the schedule of losses that I sent to you on 30 March 2017. This is included in the bundle as pages 29-31.
- My witness statement is included in the letter sent to you on 12 April 2017. This is included in the bundle as pages 42-43.*

I am copying this to the Employment Tribunal to inform them."

That letter does not appear on the Tribunal file.

14. At the time the claim was struck out my understanding was that the claimant had not complied with the order of the Tribunal dated 3 February 2017 with regard to supplying a schedule of loss and further with regard to providing a witness statement. Whilst it is correct that the schedule of loss does not include any evidence or documentation supporting what is claimed and how it is calculated, it is apparent from the content of the schedule of loss how it is calculated, for example the average weekly pay is the basis on which the loss of earnings is calculated. Whilst it is also correct that the claimant has not included information about what steps the claimant has taken to reduce any loss (including any earnings or benefits received from new employment) the lack of that information will only prejudice the claimant in the event that the claim is successful and the Tribunal has to assess the amount of any award payable. If the claimant is unable to show what steps the claimant has taken to mitigate that will inevitably impact on the level of any award.
15. It is also right to record that the extent of the actual information contained within the claimant's witness statement is extremely limited. However it is open to the Tribunal to limit the Claimant's evidence at the hearing to what is set out in the claim form and what is set out in that witness statement and the claimant will have an opportunity to put his case accordingly. In any event this is a claim of unfair dismissal so the onus is on the Respondent to show the reason for dismissal and that the dismissal was fair applying Section 98(4) of the Employment Rights Act 1996.
16. In all the circumstances, applying the overriding objective, it is clear to me that had I been aware on 28 December 2017 of the steps that had been taken by the Claimant as to both the provision of a schedule of loss and the witness statement I would not have made a judgment striking out the claim.

17. The respondent argues in a letter to the Tribunal dated 17 July that they had not appreciated until they received an email from the Citizens' Advice Bureau on 19 December 2017 enclosing a letter from the Claimant dated 13 December 2017 that he was purporting to rely on his letter dated 12 April as his witness statement, but that they are of the view that it is not a witness statement as directed by the Tribunal and that the Claimant would have been aware of this when he sought advice from the Citizens Advice Bureau. I have nothing from the Claimant to set out what advice he may or may not have received from the Bureau and I can make no assumptions, as the Respondent suggests I do, that the Claimant would have been made aware by the Bureau that his witness statement was not compliant with the Order. It appears common ground that he is relying on his letter of 12 April as his witness statement. In my view it cannot now be said that as at 28 December 2017 the claimant had not complied with the order to the Tribunal dated 3 February 2017. The level of compliance was not total but there was significant compliance with the order. Similarly, it cannot be said that as at the 28 December 2017 the claimant had not actively pursued the claim. He had written to the respondent on 13 December and he had consulted the Citizens' Advice Bureau. He had had taken steps to comply with the orders and progress the claim.
18. Maintaining the strike out of the claim results in much greater prejudice to the Claimant than the Respondent. I consider the fair way to proceed is to set aside the Judgment and Order that the Claimant is limited in his evidence before the Tribunal to those matters set out in his ET1 and his letter dated 12 April 2017. The onus in any event is on the Respondent to show the reason for dismissal and that the dismissal was fair applying the provisions of Section 98(4) of the Employment Rights Act 1996.
19. For all those reasons I set aside the judgment of 28 December 2017.

Regional Employment Judge Byrne

Date:

Sent to the parties on: ..31/08/2018....

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For the Tribunal Office