



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE ELLIOTT (sitting alone)
BETWEEN:

Mr T Bennett

Claimant

AND

W & N Training Ltd t/a Want Medical Services

Respondent

ON: 31 March 2017

Appearances:

For the Claimant: Ms V Brown, counsel

For the Respondent: Mr W Sturt, managing director

JUDGMENT ON RECONSIDERATION

The Judgment of the Tribunal is that:

1. The judgment of 21 November 2016 is revoked.
2. The respondent pay the claimant's costs of **£720**.

REASONS

1. This judgment was delivered orally on 31 March 2017.
2. By a claim form presented on 5 September 2016 the claimant Mr Timothy Bennett claims constructive and automatic unfair dismissal and detriment for having made a protected disclosure, notice pay, holiday pay and unlawful deductions from wages.
3. The date for the filing of the ET3 was 11 October 2016. As no ET3 was

- filed with the tribunal by that date, I entered a default judgment on 21 November 2016. It was sent to the parties on 28 November 2016. The respondent seeks a reconsideration of that decision.
4. On 8 December 2016 the respondent applied for reconsideration on grounds that no evidence had been considered by the tribunal. The letter of application was sent by the respondent's managing director Mr Wayne Sturt who said "*I do not know why the response to the claim was never received by the courts*". No copy was attached to the letter of application.
 5. The tribunal wrote to the respondent, copied to the claimant, on 30 December 2016 saying "*Is the respondent saying that they filed a response to the claim by 11 October 2016, and, if so, please provide evidence of this*". Mr Sturt replied by email on 17 January 2017 saying "*We did send in our evidence but unfortunately by standard post (The post office was closed when we posted so no proof of posting was obtained).*" It was not clear from the email whether Mr Sturt was referring to the ET3 or to the letter of application of 8 December which listed the "points of defence" upon which the respondent wished to rely.
 6. The issue for the tribunal at this hearing was whether to vary, confirm or revoke the judgment of 21 November 2016.

Witnesses and documents

7. The tribunal heard from Mr Wayne Sturt for the respondent.
8. I had a set of four EAT authorities from the claimant which I considered: ***Sodexo Ltd v Gibbons 2005 IRLR 836; Newcastle upon Tyne City Council v Marsden EAT/393/09; Outasight VB Ltd v Brown EAT/0253/14 and Harris v Academies Enterprise Trust 2015 IRLR 208.***
9. The tribunal had oral submissions from both parties which were fully considered together with the authorities relied upon, even if not expressly referred to below.

Findings of fact

10. The claimant worked for the respondent as an ambulance care assistant. His period of service was from 1 January 2015 to 27 May 2016. The respondent provides a private ambulance service to patients and hospitals. The respondent had about 30 people working for them but by the date of this hearing this had reduced to about 10 people.
11. The respondent company is facing some difficulties. The claimant's representative had done a Companies House search and was aware that there is a proposal to strike off. Mr Sturt is under a lot of pressure. He has a business office in Portslade near Brighton but he also works hands-on on an ambulance. He has an administrative assistant but it is only he who opens the post.

12. He received the claim form. He filled out the response form and personally went to the post office to post it. He intended to obtain proof of posting from the post office but he was delayed on the ambulance and got there after the post office had closed. He therefore posted it in the mailbox without a proof of postage because he wanted to meet the deadline. He kept a copy of the ET3 in his office but unfortunately he has not produced this. I accept his evidence that this is because he is on his own professionally, he is under a lot of pressure and he did not appreciate the importance of doing so.
13. In the reconsideration application of 8 December 2016, the respondent set out its headline points of defence.

Submissions

14. The parties' submissions were fully considered; the entirety of those submissions were considered even if not expressly mentioned below.
15. The respondent contests the merits of the claim and relies on his evidence. The respondent says that as a litigant in person, Mr Sturt was not sure what he was meant to do. He said that what may be obvious to lawyers is not obvious to him. He is an ambulance technician and that is what he is good at.
16. The claimant opposed the application for reconsideration. The claimant submitted that: The interests of justice have to be considered from both sides. The interests of the general public also have to be considered and only in unusual cases should there be a "second bite of the cherry" and there should be finality of litigation. The claimant accepts that there is no exceptionality threshold. There is no peculiar injustice in this case (as per the **Marsden** case referenced above).
17. It is accepted that the respondent made an application for reconsideration but the claimant submits that he should have done more and sent a copy of his ET3 with the application and that there were numerous opportunities to do so which were not taken, including today.
18. I raised with the claimant that the default judgment may not have covered all that he wished to recover. I was informed that nevertheless the claimant wished to seek to uphold the default judgment but that if it were set aside the claimant would wish to pursue other elements of compensation such as an award for injury to feelings.

The law

19. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides that a tribunal may, either on its own initiative 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.

20. In *Outasight VB Ltd v Brown EAT/0253/14* the EAT held that the interests of justice ground in the 2013 Rules of Procedure requires the same approach to be taken as under the 2004 Rules and the principles in the case law that had built up under the previous rules, including the specific grounds in the former Rule 34, were still relevant under the 2013 Rules.

Conclusions

21. Mr Sturt's evidence was not challenged that he posted the ET3 back to the tribunal to meet the deadline. Ms Brown for the claimant could say no more than it was not proven.

22. I found Mr Sturt to be a very convincing witness. I accept and find that he personally posted the ET3 back to the ET. It was not received, for reasons that no-one knows. It may have gone astray in the post. Unfortunately because of time and work pressure Mr Sturt did not manage to obtain proof of posting and he has not brought a copy to the tribunal today. I find that he is under strain with having lost a recent contract which has resulted in a substantial drop in his workforce and he does not dispute that his business is in difficulty.

23. The claimant submits that on the balance of injustice, the claimant faces the risk of no recovery, the greater the delay in this case and the respondent's failure to reply on time cannot be the reason why the claimant cannot recover. However, my finding is that the respondent did take action to file an ET3 on time, it was not received by the tribunal. There was action taken to comply with the rules.

24. Finality of litigation is not in the interests of justice where there has been no hearing of the merits and the respondent has sought to comply with the rules.

25. I find that in circumstances where the respondent has on my finding, acted to comply with the requirement to file an ET3, it is not in the interest of justice to allow the default judgment to stand.

26. The main headline points of defence are set out in the 8 December 2016 letter. The requirements of Rule 16 for a response are limited.

27. Based on my findings above the judgment of 21 November 2016 revoked and the decision will be taken again following a full merits hearing.

The claimant's costs application

28. The claimant made an application for costs, it was as a result of non-compliance with the Rules. The claimant relied upon Rule 76(2) and Rule 6. I find that the grounds in Rule 76(2) are not made out.

29. Rule 6 provides that a failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal

does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include.....awarding costs in accordance with rules 74 to 84.

30. As the judgment of 21 November 2016 was in consequence of the respondent's default and claimant has had to incur costs today in opposing the respondent's application I award the costs of today on a summary basis.

31. The costs claimed were £600 made up as to £300 for solicitors and £300 for counsel's fee for today plus VAT. I considered on a summary assessment that these sums were entirely reasonable and proportionate in the circumstances and I made the award in the sum of £600 + VAT making a total of £720. I was told the claimant is not VAT registered.

32. I was grateful to counsel for the claimant for the high standard of preparation and advocacy today and for her helpful and practical approach to the respondent as a litigant in person.

The issues

1. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:

2. **Public interest disclosure claims**

2.1. What did the claimant say or write? The claimant is ordered below to set out further and better particulars of his disclosures.

2.2. In any or all of these, was information disclosed which in the claimant's reasonable belief tended to show one of the following?

2.2.1. A criminal offence had been committed

2.2.2. A person had failed to comply with a legal obligation to which he was subject?

2.2.3. The health or safety of any individual had been put at risk.

2.3. If so, did the claimant reasonably believe that the disclosure was made in the public interest?

2.4. If so, was that disclosure made, to:

2.4.1. the employer

2.4.2. or to a prescribed person?

Detriment complaints

2.5. If protected disclosures are proved, was the claimant, on the ground of any protected disclosure found, subject to detriment by the employer or another worker in that

2.5.1. The respondent failed to pay him his outstanding holiday pay on termination

2.5.2. Subjected him to an unreasonable investigation and disciplinary process

2.5.3. A refusal to respond to his subsequent queries

2.5.4. Providing a misleading reference

2.6. If the act of detriment was done by another worker,

2.6.1. can the employer show that it took all reasonable steps to prevent that other worker from doing that thing or acts of that description; or

2.6.2. can that worker show that s/he had relied on a statement by the employer that the doing of the act did not contravene the Act, and that it was reasonable to rely on that statement

Unfair dismissal complaints

2.7. Was the making of any proven protected disclosure the principal reason for the dismissal **or** was there a health and safety reason under section 100 ERA? The claimant is ordered below to give full particulars of the section 100 claim based on the facts already pleaded.

2.8. As the claimant does not have 2 years service the burden is on him to show jurisdiction and therefore to prove that the reason or if more than one the principal reason for the dismissal was the protected disclosure(s) or a health and safety reason under section 100.

3. Unpaid annual leave – Working Time Regulations also put as breach of contract and unlawful deductions from wages

3.1. Is the claimant owed holiday pay of £1,304.74 being the balance due for 25 days accrued untaken holiday pay?

4. Remedies

4.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

4.2. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract (for holiday pay) and/or the award of interest.

Judicial mediation

5. I raised the possibility of this case being considered for an offer of judicial mediation. The respondent is not interested in judicial mediation but said that they would still like to pursue other means of alternative dispute resolution.

Other matters

6. If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were

any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

Listing the hearing

7. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within **4 days**. It has been listed at London South Employment Tribunal, Croydon to start at 10am or so soon thereafter as possible on **18 July 2017**. The parties are to attend by 9.30 am. The hearing may go short, but this allocation is based on the on the claimant's intention to give evidence and call two further witnesses and the respondent's intention to call four witnesses.
8. The hearing will be to deal with liability and remedy, if the claimant succeeds.
9. The respondent's business is cash-strapped and I therefore mentioned to Mr Sturt that there are free sources of legal advice which he may be able to access, such as from CAB's or Law Centres.
10. The parties had an opportunity today to have some without prejudice discussions. They were not able to reach a settlement today because the claimant (who was not present but from whom counsel was taking instructions by phone via her instructing solicitors) required further time to consider his position. The parties were encouraged to continue to explore the opportunity to reach a settlement and appeared to be keen to do so.
11. I made clear to the respondent the importance of complying with Orders and time limits. I also informed the respondent that it was their responsibility to ensure that they had complied and I recommended that Mr Sturt check that documents he sends have been received.
12. I made the following case management orders by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. **Further information / Amended response**
 - 1.1. On or before **19 April 2017** the claimant shall provide to the respondent with a copy to the tribunal, the following further and better particulars of the claim:
 - 1.1.1. Exactly what the claimant said to Ms Georgina Myhill on or about 15 March 2016 which he relies upon as a protected disclosure.
 - 1.1.2. Exactly what the claimant said to Mr Wayne Sturt on or about 10 March 2016 which he relies upon as a protected disclosure.
 - 1.1.3. Any other disclosures as referred to in paragraph 7 of the Grounds of Complaint which he relies upon as a protected

disclosure including the names of the persons involved and the words used and the dates or approximate dates.

- 1.1.4. In relation to the whistleblowing claim what specific criminal offence does the claimant say had been committed and by whom?
 - 1.1.5. Who failed to comply with a legal obligation, what was that obligation to which he was subject by specific reference to the relevant statutory provision or contractual term.
 - 1.1.6. Whose health or safety of any individual had been put at risk and how.
 - 1.1.7. The date of the email to the CQC and the words relied upon in that email.
 - 1.1.8. Particulars of any disclosure to the police (Grounds of Complaint paragraph 8) and how this is relied upon.
 - 1.1.9. On the detriment claim what "subsequent queries" did the respondent fail to respond to.
 - 1.1.10. Full particulars of the section 100 dismissal claim by reference to the facts already pleaded. Which subsection of section 100(1) ERA 1996 is relied upon and why?
- 1.2. On or before **3 May 2017** the respondent shall file its response to the claim as then understood. Failure to do so may result in a further default judgment as no ET3 has yet been filed. Time is extended to 3 May 2017 for this purpose.

2. Disclosure of documents

- 2.1. The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before **31 May 2017**. This includes, from the claimant, documents relevant to all aspects of any remedy sought.
- 2.2. Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts applied to, all correspondence in writing or by email with agencies or prospective employers, all pay slips from work secured since the dismissal, the terms and conditions of any new employment. It is understood that the claimant has secured new employment.
- 2.3. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.
- 2.4. The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

3. **Bundle of documents**

- 3.1. It is ordered that the claimant has primary responsibility for the creation of the single joint bundle of documents required for the hearing.
- 3.2. The claimant is ordered to provide to the respondent a full, indexed, page numbered bundle to arrive on or before **14 June 2017**.
- 3.3. The claimant is ordered to bring sufficient copies (at least five) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

4. **Witness statements**

- 4.1. It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
- 4.2. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.
- 4.3. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 4.4. If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 4.5. It is ordered that witness statements are exchanged so as to arrive on or before **4 July 2017**.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Elliott

Date: 31 March 2017