EMPLOYMENT TRIBUNALS

Claimant: **Mr R Thomas**

Respondent: **Michael Michael**

HELD: **Sheffield** **ON: 29 April 2021**

BEFORE: **Employment Judge Brain**

REPRESENTATION:

Claimant: **Written representations**
Respondent: **Written representations**

JUDGMENT UPON RECONSIDERATION

The Judgment of the Employment Tribunal is that there is no reasonable prospect of the Judgment dated 21 April 2021 being varied or revoked. Accordingly, the claimant's application for reconsideration is refused.

REASONS

1. The open preliminary hearing held on 21 April 2021 was listed pursuant to an Order made by Employment Judge Jones. He presided over a case management hearing which took place on 4 February 2021.
2. In his case summary, he said that it had not been possible to identify the legal complaints of disability or sexual orientation discrimination or harassment from the claim form or from the further information sent by the claimant in response to the questions posed by Employment Judge Smith on 1 December 2020.
3. On 1 December 2020, Employment Judge Smith had directed the claimant to provide further information about his claim. Notwithstanding the information supplied by the claimant in response to that request, Employment Judge Jones remarked, as I have said, that it had not been possible to identify the legal complaints brought by him.
4. It was upon that basis that Employment Judge Jones directed that there should be a public preliminary hearing the purpose of which was: for the Tribunal to

identify any legal claims and issues; to consider whether the case or any part of it should be struck out on the grounds that it has no reasonable prospect of success; or to require the claimant to pay a deposit as a condition of being permitted to pursue any allegations or argument on the grounds that the claims have little reasonable prospect of success.

5. In addition, Employment Judge Jones (at the hearing of 4 February 2021) directed the claimant to write to the Tribunal and the respondent by 25 February 2021 with the information set out by him in paragraph 6 of his Order.

6. The claimant attempted to comply with paragraph 6 of the Order. He sent in an 11 pages' document. He did not follow the format or sequence of Employment Judge Jones' Order.

7. On 6 April 2021 Employment Judge Maidment caused a letter to be sent to the claimant. He said, "*The claimant has still not replied to the Order at paragraph 6 of the record of the preliminary hearing on 4 February 2021. Employment Judge Jones was very specific as to what was required – please read it. A lengthy narrative with little attempt to identify specific legal claims is not helpful to the claimant, the respondent or the Employment Tribunal".*

8. The claimant did not respond to the letter of 6 April 2021. He made no further effort to comply with Employment Judge Jones' Order.

9. The matter came before me on 21 April 2021. Initially, I proposed that we consider the claimant's 11 pages' document with a view to ascertaining the complaints which the claimant seeks to pursue. This suggestion met with reasoned objection from Mr Coates (who acts upon behalf of the respondent). He submitted that proceeding as I suggested would effectively give the claimant a fourth opportunity to present his claim. (Mr Coates submitted that the claimant already has had three opportunities: the claim form, the response to Employment Judge Jones' Order and Employment Judge Maidment's direction). *(I observe that in fact, this would have been the fifth opportunity as in addition Employment Judge Smith had directed that further information be filed).*

10. After hearing Mr Coates' submissions, a further suggestion was made by me which was to send to the claimant a template or matrix form in which I would signpost the information required in relation to each of the complaints referred to in paragraph 6 of Employment Judge Jones' Order. The claimant would then fill in the details in each box of the template. *(I interpose here to say that Employment Judge Jones had not necessarily detected a complaint upon each of the six grounds set out in paragraph 6 of his Order. He was simply seeking to direct the claimant to provide a better focused particulars of his claim).*

11. The claimant objected to this suggestion. He said that he could not understand why the Tribunal was making him provide further particulars again. However, my suggestion could hardly have come as a surprise to him in the light of Employment Judge Maidment's direction of 6 April 2021.

12. The claimant will appreciate that it is not for the Employment Tribunal or the respondent to try to work out the claim being brought. As was said by the then President of the Employment Appeal Tribunal, HHJ Langstaff, in ***Chandhok v Turkey*** [2015] IRLR 195 at paragraph 16*, "The claim, as set out in the ET1, is not something to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the*

parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond."

13. Langstaff J went on to say in paragraph 18 that *"… a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost a jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."*

14. My suggestion (referred to in paragraph 10) of sending the claimant a template or matrix to reformulate his claims was in fact made after a break in proceedings after the claimant had become very distressed. As I have said, the claimant said that he was not minded to provide the information. He said (at around 10:52) words to the effect *"that's it, I'm done."* He then terminated his video link. He did not seek to reconnect.

15. I did, of course, remain seised of the case notwithstanding the claimant's termination of his link. Mr Coates then made an application to dismiss the claimant's claim upon the basis that it had no reasonable prospect of success. I put to Mr Coates that it may now no longer be appropriate to consider that matter should the claimant's words be interpreted as a withdrawal by him of his complaint. However, I urged caution given the claimant's evident distress earlier in the morning.

16. At 11:03, 11 minutes after his termination of his video link, the claimant emailed the Employment Tribunal. The email was addressed *"to whom it may concern"* and said, *"I'm done there's no point with everything supplied including video evidence and the fact they've admitted there lies and yet your still asking me to point out the basis of my claim? They win I don't know why I had faith in the system let alone the police. Take Simon's side I'm over it." ('Simon'* is a reference to Mr Coates).

17. Mr Coates submitted that the caution I expressed about treating the claimant's conduct at around 10:52 as a verbal withdrawal was well made but that must be seen in the context of the email sent by him 11 minutes later confirming his intentions. I agreed with Mr Coates that the claimant's email of 11:03 was confirmation of his intention to withdraw his claim. A period of around 11 minutes is ample time for reflection and retraction of something done in the heat of the moment.

18. I therefore acceded to Mr Coates' application to treat the claimant's oral representation at 10:52 and email at 11:03 as intimation of his wish to withdraw his claim. I also acceded to Mr Coates' application to dismiss his complaint upon withdrawal pursuant to Rule 52 of schedule 1 to the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.* The

judgment (which I shall now refer to as *'the Judgment')* was sent on 21 April 2021).

19. On 22 April 2021 at 9:08, the claimant emailed the Employment Tribunal asking for permission to reinstate his claims. I treat this as an application for reconsideration of the Judgment. He said, *"I personally believe there is a difference in the words I can't do this to stating I'm withdrawing my claims because that was not the case whatsoever".* I interpret this to mean that the claimant says that before he terminated the video link at 10:52 on 21 April he said, *"I can't do this"* and did not say that he was withdrawing his claims.

20. I agree with the claimant that he did not use the word *"withdrawal"* either just prior to terminating the video link at 10:52 or in his email at 11:03 on 21 April. However, I do not accept that he simply said the words *"I can't do this".* Any doubt about this may be dispelled by the contents of the email sent at 11:03 where the claimant says, "*I'm done"* and *"I'm over it".*

21. Tribunals need to be careful, of course, to ensure that a party actually intends to withdraw a claim. Plainly, there may be scope for ambiguity. Here, there was no intimation by the claimant that he wished to pursue the claim. On the contrary, he said quite the opposite.

22. In my judgment, Mr Coates is correct to submit (as he does in his email in response to the claimant's reconsideration application – see his email of 22 April 2021 at 15:32) that, *"Even taking into account any anxiety condition, the claimant took a conscious decision and was aware of the consequences both at the time and subsequently"* of his withdrawal.

23. The claimant seeks to challenge the Judgment which I caused to be issued on 21 April 2021 recording that the claimant's complaint had been dismissed upon withdrawal. He does so by his application for me to reconsider the Judgment. The relevant provisions in the 2013 Rules upon reconsideration may be found at Rules 70 to 73. Rule 70 provides an Employment Tribunal with a general power to reconsider any judgment where it is necessary in the interests of justice to do so. This power can be exercised either on the Tribunal's own initiative or on the application of a party. Rules 71 to 73 set out the procedure by which this power can be exercised.

24. Rule 70 does not mean that in every case where a litigant is unsuccessful they are automatically entitled to a reconsideration. Instead, a Tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases fairly and justly.

25. The overriding objective may be found in Rule 2 of the 2013 Rules. The overriding objective includes:

- *Ensuring that the parties are on an equal footing.*
- *Dealing with cases in ways which are proportionate to the complexity and importance of the issues.*
- *Avoiding unnecessary formality and seeking flexibility in the proceedings.*
- *Avoiding delay, so far as compatible with proper consideration of the issues.*
- *Saving expense.*

26. The interests of justice have to be seen from both sides. '*Justice'* means justice to both parties.

27. An application for reconsideration must be made within 14 days of the date upon which the written record of the judgment under consideration was sent to the parties. Plainly, the claimant has made his application well within that 14 days' period.

28. The procedure to be followed is that the application for reconsideration is put before the Employment Judge that had the conduct of the case and who issued judgment under consideration. It is for the Employment Judge to determine whether there is no reasonable prospect of the Judgment under consideration being varied or revoked.

29. If he or she considers that to be the case then the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise, the Tribunal shall send a notice to the parties setting out a time limit for any response to the application by the other parties and seeking the view of the parties on whether the application can be determined without a hearing. *(I observe that Mr Coates has already made submissions upon the claimant's reconsideration application).*

30. The Employment Judge's role initially therefore is to act as a filter to determine whether or not there can be said to be no reasonable prospect of the original decision being varied or revoked. If the Employment Judge considers there to be no reasonable prospect then the application shall be refused. If the Employment Judge considers that it cannot be said that there is no reasonable prospect of the decision being varied or revoked then the decision shall be reconsidered at a hearing unless the Employment Judge considers that a hearing is not necessary in the interests of justice.

31. In my judgment, the claimant's application for reconsideration has no reasonable prospect of success. There is no reasonable prospect of the Judgment being varied or revoked. The claimant clearly and unequivocally withdrew his claims. While the word *'withdrawal'* was not used, the words used in his email of 21 April 2021 (at 11:03) were a proxy for withdrawal. They amount to and mean the same thing. Simply having a change of heart is not sufficient.

32. As I have said, the interests of justice apply to both parties. It would be unjust to the respondent to allow the claimant to have effectively a second bite of the cherry. There is also public interest in finality in litigation.

33. I also take into account that, notwithstanding the opportunities afforded to the claimant, the Employment Tribunal is having difficulty discerning the nature of his complaints. There is, in my judgment, much in Mr Coates' observation that if the claimant were able to identify any legitimate claim he would have done so by now given that he has had three opportunities to date so to do and eschewed a fourth opportunity when this was suggested to him upon the morning of 21 April. *(In fact, if Employment Judge Smith's direction of 1 December 2020 is included, the claimant has had four opportunities and eschewed a fifth chance).*

34. In my judgment, therefore, it is not consistent with the overriding objective to afford the claimant a further opportunity. Such would be disproportionate given the share of the Employment Tribunal's resources which the claimant has

enjoyed to date. It would be unjust upon the respondent to put the respondent to yet further expense in seeking to defend a claim which even now cannot properly be discerned. The remarks and observations of HHJ Langstaff in ***Chandhok v Turkey*** cited above are particularly pertinent.

35. That the claimant remains focused upon irrelevant issues is evidenced by an email which he sent to the Tribunal at 16:36 on 23 April 2021. He exhibited to the email a letter sent on behalf of the respondent by a different firm of solicitors and which was addressed to the claimant's former solicitor. This letter runs to two complete sides of A4 and is predominantly about a motor vehicle. This is a matter over which the Tribunal has no jurisdiction but which appears to be at the forefront of the claimant's consideration.

36. The claimant's unequivocal acts upon the morning of 21 April 2021 constitute a withdrawal of his complaint. That, coupled with the opportunities which the claimant has had to better particularise complaint over which the Tribunal does have jurisdiction together with his propensity to make reference to irrelevant issues about which the Tribunal has no jurisdiction persuade me that it is not in the interests of justice to allow this matter to be re-opened through a variation or revocation of the Judgment.

37. I should also comment that the claimant has sent to the Tribunal a number of emails copying in emails which he has sent to Mr Coates. The tone of these may be considered inappropriate and do not serve to in any way advance the case which the claimant has brought before the Employment Tribunal. This correspondence simply reinforces my judgment that varying or revoking the Judgment would be to open the door to the continued pursuit by the claimant of irrelevant matters over which the Tribunal has no jurisdiction and, as he sees it, the vindication of his position over that of Mr Coates.

38. During the course of the hearing on 21 April 2021, I sought to explain to the claimant that Mr Coates was acting upon the instructions of the respondent. He is entitled and, indeed, is obliged to advance the respondent's case in accordance with his professional duties as a solicitor. The claimant protested that Mr Coates and his client were lying. That is a serious charge to level at a solicitor who owes a duty not to mislead the court. Merely advancing a different version of events from that held by the claimant does not constitute professional misconduct on Mr Coates' part. If that were the case, then a solicitor's ability to conduct litigation upon behalf of a client would become impossible.

39. In conclusion, therefore, I am satisfied that there is no reasonable prospect of the Judgment being varied or revoked. The claimant withdrew his complaint on the morning of 21 April 2021. He has been given ample opportunity by the Tribunal to better particularise his claim. Notwithstanding the opportunities

given to him, three other experienced Employment Judges and I were unable to discern his case. In these circumstances, it is not consistent with the overriding objective for the Tribunal to devote further resources to this matter nor is it in the interests of justice so to do.

_____

Employment Judge Brain
29 April 2021