Case Number: 3303660/2018
3331026/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Curry	**v**	(1) Academies Enterprise Trust (2) Anthony Williams

Heard at: Bury St Edmund's (in private) **On**: 11 October 2018

Before: Employment Judge Laidler

Appearances
For the Claimant: Ms M Robinson, Solicitor
For the Respondent: Mr S Brittenden, Counsel

JUDGMENT ON PRELIMINARY HEARING

1. A determination of whether this claim has been withdrawn by the claimant and if so whether it should be dismissed under Rule 52 of the Employment Tribunal Rules 2013, will be referred to the Regional Employment Judge Byrne.

2. The hearing scheduled for the 5 – 14 November 2018 is postponed.

3. The claims are staid pending the decision of the Regional Employment Judge.

REASONS

1. The claimant issued proceedings on 2 July 2018, bringing complaints of unfair dismissal, disability discrimination and claims for other payments. A second claim was issued on 30 January 2018 and the claims have been consolidated.

2. There was a preliminary hearing before Employment Judge Postle on 28 August 2018, when the claims were clarified. This preliminary hearing was listed upon issue of the second claim and it was agreed at the preliminary hearing before Judge Postle that it would remain as listed to cover any outstanding case management, the full merits hearing being listed for 5 – 9 and 12 – 14 November 2018, by Employment Judge Warren when he case managed the first claim at a hearing on 21 May 2018.

3. By letter of 17 September 2018, sent by email at 12:46 hrs, the claimant wrote to the tribunal, copied to the respondent, as follows:-

"Dear Sirs,

Due to my lack of faith in the Employment Tribunal's ability to resolve my claim within a reasonable time, fairly and with due attention and care to the seriousness of my claim, I am hereby withdrawing my claim. I have not yet received promised Orders from the Preliminary Hearing Judge (28th August 2018 in Bury St Edmunds), and have not received any communication from yourselves regarding the delay. The Preliminary Hearing Judge gave me the impression he viewed my claims as frivolous or less than worthy of his due time and consideration. As a layperson, I am disgusted at the Judge's treatment of my claim given I am a Stage 4 terminal cancer patient seeking resolution to a 3-year campaign of disability discrimination and unfair dismissal from my former employer."

4. That email was not seen by Employment Judge Byrne until 27 September 2018, when he directed the following matter to be sent to the parties, which was sent on 3 October 2018:-

"Dear Sir / Madam,

Employment Tribunals Rules of Procedure 2013

I have been directed to write to the parties as follows:

"Regional Employment Judge Byrne has read the claimant's email of 17 September 2018, referred to him by the administration on 27 September 2018. Given that the claimant should have now received the case management orders made at the hearing on 28 August 2018 and sent to the parties on 20 September 2018, does the claimant still wish to withdraw the claim?

Regional Employment Judge Byrne regrets the delays that have occurred in dealing with correspondence quickly in this case. Given the current volumes of work in the Employment Tribunal and the current lack of judicial resource notwithstanding the hard work of the administration, matters are not being dealt with as promptly as they should be.

The claimant is directed to respond to the tribunal in writing by 22 October 2018."

Yours faithfully,
N BEGUM
For the Tribunal Office "

5. By letter of 5 October 2018, the respondent's solicitors wrote to the Employment Tribunal stating that in their view the withdrawal had been unequivocal and the respondent was not now able to attend a final hearing between the 5 and 14 November 2018. They drew to the tribunal's attention that a preliminary hearing was due to take place on 11 October 2018, in the Bury St Edmund's Employment Tribunal. This was, however, before the date that the claimant had been given by REJ Byrne to respond by 22 October 2018.

6. The file was considered by EJ Warren on 8 October 2018 and he instructed the following letter to be sent to the parties:-

"Given the terms in which the Claimant expressed the withdrawal of his claims and the absence of a Judgment dismissing his claim, it was unwise of the Respondents to clear their diaries. The case may yet go ahead on 5 November, given the particular circumstances.

The preliminary hearing will proceed on 11 October and will be attended, unless the Claimant requests otherwise or confirms that he does indeed wish to withdraw his claim.

I suspect the REJ may have missed the fact that there is a preliminary hearing on 11 October when he set the deadline for the Claimant of 22 October. It would be helpful if the Claimant would please confirm before Thursday whether or not he wishes to withdraw."

7. When this matter came before the tribunal on 11 October 2018, the letter from the claimant of 8 October 2018, was not on the file. The judge was only made aware of it by a reference being made to it in Mr Brittenden's written submissions. A copy was obtained from the claimant's representative who attended this hearing. Clearly, as it was not on the tribunal file, and the file had not been referred back to REJ Byrne, following his letter sent on 3 October 2018, he has never seen this letter.

Submissions

8. Mr Brittenden handed out written submissions which it is not proposed to recite again in these reasons. Miss Robinson, who had only recently been instructed on behalf of the claimant, made the following submissions to the tribunal.

Submissions on behalf of the Claimant

9. The following cases were relied upon:-

Segor v Goodridge Actuation Systems Ltd. UK EAT/0145/11

Drysdale v The Department of Transport [2014] EWCA CIV 1083

10. Referring to Drysdale, a Court of Appeal decision, Miss Robinson drew particular attention to paragraph 49 where it was stated by the court that the following general principles could be derived from the authorities:-

> (1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.
>
> (2) What level of assistance or intervention is "appropriate" depends upon the circumstances of each particular case.
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> (3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.
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> (4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all time be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.
>
> (5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.
>
> (6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant.

11. It was submitted that when the Regional Employment Judge wrote to the claimant, asking if he really wished to withdraw in the circumstances, that he was clearly applying the overriding objective, taking into account that the claimant was a litigant in person and seeking to ensure that both parties were placed on an equal footing. The Regional Employment Judge had ensured that the case management discussion summary was sent to the claimant and queried whether he wanted to withdraw. It was

appropriate it was submitted for the Regional Employment Judge to make those enquiries as the claimant was suggesting he was withdrawing because of the employment tribunal. The Regional Employment Judge was obviously not satisfied that this was a clear withdrawal.

12. The case of Campbell v OCS Group UK Ltd. and Moffit UK EAT/0188/16 is relied upon by the respondent, but Miss Robinson suggested that the guidance given in paragraph 9 was exactly what the Regional Employment Judge was trying to do and did. In Campbell the court stated at paragraph 19:-

"So far as withdrawal is concerned, as Langstaff P made clear in Segor, tribunals faced with an application to withdraw should consider whether the material available amounts to a clear unambiguous and unequivocal withdrawal of the claim or part of it. Though there is no obligation on tribunals to intervene in such a situation, whether by reason of the overriding objective or any principle of natural justice, tribunals are entitled to make such enquiries as appear fit to check whether a party who is self, or lay represented, intends to withdraw. If the circumstances for withdrawal give rise to reasonable concern on the tribunal's part, it is entitled to make such enquiries as appear appropriate. To ensure that the purported withdrawal is clear, unambiguous and unequivocal."

13. It was submitted that the Regional Employment Judge was entitled to make the enquiries and they were indeed appropriate in this case.

Further submissions on behalf of the Respondent

14. It was submitted that it did not appear that the respondent had been invited to comment on the Regional Employment Judge's letter. The letter does not have any express reference to Rule 51 or the authorities now referred to. In the second paragraph it asks whether the claimant still wishes to withdraw, which contains a specific acknowledgement that that is what the claimant had communicated. That question would only be asked if there had been a withdrawal. The Regional Employment Judge did not say that he did not understand what the claimant was referring to.

15. Whilst the respondents have tremendous sympathy for the claimant's situation and there is absolutely no criticism of him in the submissions being made, there is only one outcome so far as the authorities are concerned. It is clear beyond doubt that the claimant was withdrawing. It was not unclear and was not unconditional. It has been submitted on his behalf that the claimant did not know how to proceed and was at a loss as to how to go forward, but there is no evidence to support that. His letter had only one meaning.

16. The solicitor for the claimant then raised the issue of Rule 52 and that if the tribunal determined the claimant had withdrawn, an application would be made to consider whether the claim should be dismissed so that the claimant would be able to issue again subject to arguing any time points.

17. The respondent's submitted that it could not be in the interests of justice within the meaning of Rule 52 for the claimant to have made a conscious decision to withdraw, then change his mind in circumstances where there is no evidence and for the respondent then to have to attend not only this hearing, but further hearings, upon the claimant reissuing. There may be harsh consequences of withdrawing, but they apply, taking into account all the authorities.

18. Mr Brittenden referred further to Campbell where it was made clear that the effect of Rule 51 is that withdrawal brings the proceedings to an end. As stated in paragraph 30 of that decision,

"There is no jurisdiction for a notice of withdrawal to be rescinded or revoked and no scope at all under the rules of the claimant to revive those claims."

19. It was submitted on behalf of the respondent that Rule 51 is clear, as are the principles set out in Caen v Heywood and Middleton Primary Care Trust [2006] IRLR 793.

20. With regard to the case of Segor relied upon by the claimant, this was with regard to a dispute as to whether an argument had been abandoned during a hearing. It is factually miles removed from the present case.

Relevant Rules

21. Rules 51 and 52 of the Employment Tribunal Regulations 2013:

WITHDRAWAL

End of claim

51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.

Dismissal following withdrawal

52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or

(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice

Conclusions

22. The judge determined that it was only proportionate in an accordance with the overriding objective that this matter be referred back to the Regional Employment Judge. The arguments have been summarised but it will be a matter for him as to how he proceeds. This has been done as Rule 51 is only one of the issues in this matter, the next will be whether the claim should be dismissed under Rule 52.

23. The EAT was concerned with Rule 52 in the Campbell case and in paragraph 23 stated,

"There is nothing in the wording of Rule 52 itself that requires tribunals as a matter of course to invite representations from the parties before concluding that the proceedings should be dismissed…".

It went on however, at paragraph 24 to state:-

"However,… tribunals are empowered to regulate their own procedure and to conduct hearings in a manner considered fair having regard to the overriding objective… If there is material available that puts a tribunal on notice that… a decision to withdraw the claim was ill considered or irrational for some reason or that there are other good grounds for suspecting dismissal may not be in the interests of justice in the particular circumstances of the case, those would all afford a proper basis for enquiries to be made by the tribunal of the withdrawing party before moving to a decision to dismiss. Whether to make enquiries at all and the extent of those enquiries, would depend entirely on an assessment of the facts and the relevant context and is a matter of judgment falling squarely within the margin of discretion of the tribunal…"

24. It is not for this tribunal to state or speculate as to what in the claimant's email of 17 September 2018, led the Regional Employment Judge to write to him in the terms he did in the letter of 3 October 2018. So far as this tribunal is aware, the Regional Employment Judge has not seen, and indeed it was not on the tribunal file, the claimant's reply of 8 October 2018. He should have that referred to him with this summary and then decide how he wishes to proceed.

25. This course of action has been taken having regard to all aspects of the overriding objective and particularly in the belief that it is a proportionate way of dealing with the matter.

26. This decision having been given to the parties, it was confirmed that the 5 November 2018 hearing cannot be effective and is vacated. Miss Robinson has taken the claimant's instructions and in view of his terminal condition, has concerns that he may not be in a position to attend a hearing that may have to be relisted in the spring of next year. That will also be brought to Employment Judge Byrne's attention. The matter is staid pending his decision.

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Employment Judge Laidler

Date: …26.10.18……..

Sent to the parties on: ....14.12.18.....

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For the Tribunal Office