

IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

No. Ind Tri 15/2008

B E T W E E N ;

ISABEL CAPARRO GARCIA

Complainant

- and -

THE CALETA HOTEL

Respondent

The 7th day of June 2016

R U L I N G

On 22nd May 2008, over 8 years ago, the Complainant issued an Originating Application through her solicitor at the time, Mr Nicholas Caetano, complaining of unfair dismissal.

On 4th June 2008 the Respondent filed and served a Notice of Appearance. On 17th October 2008 an Order was made by the Tribunal that Practice Directions be agreed and submitted to the Tribunal in writing without the need to attend. No Practice Directions, agreed or otherwise, were ever submitted to the Tribunal by either party and nothing was further heard of this matter.

Eventually, the matter was revived at the initiative of the Tribunal in its efforts to clear its list of dormant cases. The matter was set down for Practice Directions on 4th March 2016. The Complainant turned up at the hearing in person explaining that her solicitor was no longer in private practice and that she had had no communication with or from him for a very considerable time. She had made no effort to find out what the position was regarding her application. The Respondent's representative did not turn up but it was later explained to the Tribunal that the Notice served upon the Respondent mistakenly stated the time of the hearing as 11.00 instead of 10.00, which was the time set for the hearing. The Respondent's solicitor turned up at 11.00.

At the hearing, it was carefully explained to the Complainant that she could conduct her case herself but that it would be advisable for her to seek legal representation. She was also advised to communicate

with her previous solicitor to see whether he could offer her any assistance. It was explained that legal aid was not available for proceedings in the Industrial Tribunal to her. The hearing was adjourned to 13th April 2016 at 2.00.

On 13th April both parties attended, the Complainant again in person and the Respondents through their solicitors, Isolas, represented by Mr Phillips. The Complainant explained that she had not been able to communicate with her former solicitor and that she had not been able to instruct another solicitor as she could not afford this.

Mr Phillips informed the Tribunal that his instructions were to make an application to have the application struck out for failure by the Complainant to actively prosecute her complaint before the Tribunal.

The Tribunal made an Order setting the matter down for hearing on 7th June 2016 at 9.30 and that the Respondents file with the Tribunal not later than 14 days prior to the hearing date their arguments and authorities in support of their application to strike out with copies to the Complainant and that the Complainant or her solicitor file arguments and authorities as soon as possible thereafter prior to the hearing date. The Complainant explained that she would try and seek legal advice and representation.

In accordance with the terms of the Order of 13th April, the Respondents filed their arguments and authorities in support of their application to have the proceedings struck out for failure by the Complainant to actively prosecute her complaint. No reply or other papers or communication were filed or received by or on behalf of the Complainant.

On 7th June at 9.30 Mr Phillips appeared in Court for the Respondents accompanied by Mr Franco Ostuni, the General Manager of the Respondents. The Complainant did not appear. The Tribunal decided to give her 5 extra minutes. At the end of this time, the Complainant not having yet appeared, the Secretary telephoned her at home. The Complainant explained that she was ill in bed with back ache. The nature of the application set down for hearing that morning was again explained to her and that she would be advised as to what decision the Tribunal would take, if any.

In all of the circumstances, the Tribunal decided that the fair and proper procedure was to allow the Respondents to make their representations in the absence of the Complainant.

It was argued on behalf of the Respondents that there had been inexcusable and inordinate delay by the Complainant to actively pursue her claim. The only two witnesses who could give evidence as to the Complainant's dismissal were no longer employed by the Respondents and their whereabouts were not known. In any event, even if they could be located, they might refuse to give evidence and the Tribunal could not compel their attendance. Memories will also during the course of over 8 years have faded. If the proceedings were allowed to continue, it would give rise to a serious risk that a fair trial would not be possible and this would work very much to the prejudice of the Respondents. The Complainant had had more than ample time and opportunity to actively pursue her claim but had clearly made little if any effort to do so.

Mr Phillips then referred the Tribunal to the stock case in Gibraltar of *Jesus Espada Ruiz – and – Giblock Limited (Case No. Ind Tri 3/2012)* where it was held that a Tribunal, under its powers within Rule 16(1) of the Industrial Tribunal Rules to regulate its own procedure, has an implied power and authority to strike out a claim.

Mr Phillips also referred the Tribunal to the later case of *Danny Britto – and – Vocational training Scheme (Case No. 12/2005)*, decided on 20th July 2015, approving the case of *Ruiz*. The Tribunal was also referred to the English case of *Birket v James (1978 AB/T3)* where the House of Lords held, *inter alia*, “..... that the power of a Court to dismiss an action for want of prosecution should be exercised only where the plaintiff's default had been (1) intentional and contumelious or (2) where there had been inordinate and inexcusable delay on his or his lawyer's part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant.”

In this application before me I am not concerned with the merits of the substantive case for the Complainant or the Respondents and have not taken into account any part of their respective claims and arguments. The concern of the Tribunal in this application is to decide whether, in all of the circumstances, it is fair and just to have the Complainant's claim struck out for failure to actively pursue her claim.

I have already on 7th June decided that the Complainant's claim should be struck out and that I would give my reasons for this in writing at a later date; and I do so now.

The Complainant first issued her complaint for unfair dismissal on 22nd May 2008, over 8 years ago. The Tribunal has heard that her solicitor at the time has since ceased to be in private practice. This is in itself not a sufficient cause for the Complainant not to have proceeded with her claim. She could have instructed other solicitors or sought assistance from the Tribunal itself which I know is always ready to give whatever help it can. This could have enabled her to proceed on her own legally unrepresented. It must be borne in mind that this case has been awoken from its slumber only at the instigation of the Tribunal itself in seeking to clear its pending file of old unproceeded with cases. But for such initiative, it is doubtful whether the Complainant would herself, after some 8 years of inactivity, have done anything to revive the matter. Her failure to do anything after 4th April when she knew that an application to strike would be made on 7th June is also significant and her failure on that date to turn up for the application and not even bother to inform the Tribunal of her alleged inability to do so because of her backache is telling and demonstrative of her casual and indifferent attitude towards the pursuance of her claim.

I have concluded and now maintain that no good reason or persuasive excuse has been provided by the Complainant to explain, or even less justify, the very inordinate delay in seeking to actively pursue her present claim. Her general attitude since the revival of her claim earlier this year and her apparent lack of interest and effort has been significant.

I concur with the decision taken in *Ruiz and Britto* and agree that the Tribunal, within its powers under Rule 16(1) of the Industrial Tribunal Rules to regulate its own procedure, has a clear implied power to strike out a claim before it, including in cases where it is satisfied that there has been inordinate and inexcusable delay by a Complainant in actively pursuing the claim, as in the present case.

I therefore confirm my decision taken on 7th June of this year to have the Complainant's claim herein struck out for the reasons given above.



Eric C Ellul
Chairman