IN THE INDUSTRIAL TRIBUNAL

Case No. 22/2009

BETWEEN:

MOHAMMED REDUAN

Complainant

and

BAHIA CATERERS LIMITED

Respondent

RULING

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1. This matter came before me on Tuesday 8th December 2015 as a directions hearing convened by this Tribunal, through its Secretary, since the Complaint had remained dormant after January 2010, in other words for nearly 6 years. Only the Respondent, Bahia Caterers Limited, appeared, through its legal representative Mr Daniel Benyunes of Charles Gomez & Co. There was no appearance by or on behalf of the Complainant, Mr Mohammed Reduan. The only other person appearing was the interpreter, Sergio Ballantine whose services had been engaged by the Secretary should the Complainant have needed them. Mr Ballantine was released when the Complainant had still not appeared at the end of the 30 minute postponement which I allowed.

2. In anticipation of this hearing the Respondent filed an application for dismissal "for want of prosecution and failure to comply with" the only Order made in these proceedings, being a consent Order of directions, as long ago as 27th January 2010.

3. At the conclusion of the hearing I ruled that the Complaint be struck out for want of prosecution I did so taking the following into account; the absence of any appearance or application on the part of the Complaint; the procedural history of this matter as evidenced by the Industrial Tribunal file for this Complaint; having heard the Respondent this morning; considered the relevant legislation, in particular the Industrial Tribunal Rules and also the recent decision of my fellow Chairman Mr Kenneth Navas of 10th June 2015 in the case of *Jesus Espada Ruiz v Gibdock Limited* (Complaint 3/2012). I did not award costs to the Respondent, which it applied for, on the grounds that I have no power to do so.

4. At the conclusion of the hearing I gave my ruling. I also said I would be giving a written Ruling, which I now do, and in the course of doing so address a couple of the points which I mentioned in my *ex tempore* ruling.

HISTORY OF THE COMPLAINT

5. The Complainant initiated these proceedings by his IT1 Form dated 6th October 2009, and filed the day after, claiming that he had been unfairly dismissed by his employer, Bahia Caterers Limited, the Respondent. At that stage the Complainant was legally represented by Mr Nicholas Caetano. The Respondent filed its IT3 Form with formal grounds of defence, resisting the claim. Notification of proceedings was prompt and the IT3 filed within the period of 14 days, pursuant to the Industrial Tribunal Rules.

6. I was appointed Chairman soon after, on 22nd October 2009. The case proceeded at a relatively acceptable pace to a first directions hearing on 27th January 2010.

7. The Tribunal record confirms that that directions hearing was attended by Counsel on both sides, with no lay client present. The Directions were made by consent Order of the same day, 27th January 2010, and were standard directions as to the filing of Further Particulars by the Complainant, disclosure of documents and exchange of witness statements all of which ought to have been complied with by 7th May 2010. At that point the matter was to be set down for hearing and the further directions allowed for preparation of bundles and filing of skeleton arguments within prescribed periods prior to the substantive hearing. So, subject to the Tribunal's diary and those of the parties, it can be said, if only in retrospect, that this Complaint could well have been heard by the autumn of 2010 (although that was never expressly articulated as being anticipated – nor was any other date, for that matter).

8. Instead, the Complaint then went into what is best described as a prolonged period of hibernation. The Tribunal record shows that no directions were complied with. In particular, the Complainant did not take the first step which was to file Further and Better Particulars by 24th February 2010, pursuant to the Order for Directions, or since then, and Mr Benyunes informed me that no such Particulars were served on the Respondent by 24th February 2010 or in the period since that date.

9. There was an attempt by the Tribunal's Secretary to bring this Complaint out of the cold in January 2014 with letters sent to both parties. In the case of the Complainant, it transpired that his Mr Caetano was no longer in private practice and an attempt was made to notify the Complainant through the law firm Stephen Bullock and Company since the Tribunal records showed that they were acting for the Complainant at some stage, although no change of legal representative had been filed. On the 17 January 2014 Mr Bullock's secretary emailed the Tribunal to say that she was unable to trace who was dealing with this matter and that she held no records. In the result the Secretary was unable to make contact with the Complainant. So as at January 2014 the Complainant's intention as to this Complaint remained unknown and in suspense.

10. In the course of the attempts made to deal with historical cases, such as this one, on 13th March 2015 the Secretary, telephoned the Complainant on the Spanish mobile telephone number which he had provided in his original IT1 Form, namely 00 34 645 524 295. The Secretary was successful and having explained the purpose of her call to the Complainant he replied that he still wanted to continue with the case. The Complainant also said that he could no longer afford a lawyer and was asking the Tribunal for guidance. The Secretary informed him that what the Tribunal could do was convene the hearing and for him to attend and explain his position.

11. During that conversation the Complainant informed the Secretary that his address had changed. It was no longer the address on the IT1 Form, Av. Menendez Pelayo, No 63 1o D, La Linea, but rather Calle Perlita 73, Algeciras 11205. I refer to this as the "Algeciras address". He also explained that that was his mother's home address but that he collected his mail from there.

12. Having heard nothing from the Complainant by the end of April 2015, the Secretary on 4th May 2015 sent him a letter by registered post to the Complainant at the Algeciras address, in which letter she asked him to state whether he was to proceed and provided a withdrawal form in case he didn't want to.

13. Once again, the Secretary heard nothing from the Complainant and her attempt on 10th August 2015 to speak to reach him on his said Spanish mobile telephone proved fruitless.

14. However, on 1st September 2015, wholly unannounced, the Complainant called at the Industrial Tribunal office at the Employment Ministry and spoke to the Secretary. He referred to the letter from the Secretary and confirmed that his intentions were to proceed with the Complaint. The fact that he referred to the letter meant that the letter which had been sent by registered post to his Algeciras address had reached him.

15. In due course on 14th October 2015 the Secretary gave notice of this hearing and sent it to the Complainant by registered post to his Algeciras address. The Secretary did not receive a reply nor was the letter returned as not undelivered.

16. The Secretary did succeed in speaking to the Complainant when she called him on his Spanish mobile telephone number on 12th November 2015. The purpose of her call was to say that a Re-Listing Notice was being issued because the Hall Lecture Room was not available on date which had been fixed, 26th November 2015, due to the general election, with the new date for this hearing being 8th December 2015. The Complainant informed the Secretary that he would be attending. On the same day as the call, 12th November 2015, the Secretary sent the Re-listing Notice to the Complainant by registered post to the Algeciras address and it was never returned as undelivered.

17. It is important to record that the Complainant in that call confirmed to the Secretary that the Spanish mobile number at which the Secretary had reached him in March and then, in November, was his and correct. He added that he was living and/or working in an albergue (which I understand is an inn or a hostel) but that at all times his mailing address remained the Algeciras address, that of his mother's home from where he picked up his mail.

18. However, despite the fact that he confirmed that the telephone number was correct, various attempts by the Secretary to contact him to remind him of this hearing, on occasion a few times a day, have drawn a blank. Instead, the recorded message is to the effect that the line is "no disponible" which I understand means is not available, as it seems, for a prolonged period of time now.

19. As I mentioned at the start of this Ruling, the Complainant did not appear by the later time of 10.30 am on 8th December 2015 and the hearing proceeded in his absence.

20. The only other matter that I need to mention having seen the file at the Industrial Tribunal is that from time to time the Respondent's legal representatives (initially Attias & Levy and presently Charles Gomez & Co) have contacted the Tribunal for news and updates. They have also in turn responded to communications and notifications from the Secretary.

21. The Respondent's submissions in support of its application that the Complaint be struck out for want of prosecution, specifically, for not filing Further Particulars pursuant to my order for directions of 27th January 2010, and secondly, costs was filed with the Tribunal on 1st December 2015. The Secretary sent a copy to the Complainant by registered post on 7th December 2015 to his Algeciras address, which was not returned as undelivered. For its part Mr Benyunes informed me that his firm had also sent a copy of the application to the Complainant at the Algeciras address by ordinary post within Spain and did so on 4th December 2015

22. I have satisfied myself that the provisions for the giving of notices prescribed by Rule 18 of the Industrial Tribunal Rules have been satisfied and in fact the Secretary has gone further by using registered post and not ordinary post, which would have been sufficient under Rule 18, and to an address in Spain, whereas Rule 18 only requires the sending of notices to an individual to his address in Gibraltar. The Respondent used ordinary post but went further by sending the application to the address in Spain.

APPLICATION TO STRIKE OUT

23. Mr Benyunes relied on written submissions which were a little sparse and supplemented by his oral submissions. In his written submissions he highlighted the failure by the Complainant to comply with the Order for Directions, especially the first step of filing further particulars, adding that the Complaint had lacked Particulars and the order for Directions was the

> "opportunity (given) to rectify this deficiency" and that "in the last 6 years or so, the Complainant has made no attempt to remedy his default or so much as to contact the Tribunal..."

The written submissions then referred to the power to order further particulars contained in Industrial Tribunal Rule 10(1)(a) which reads:

> R.10(1) Subject to rule 6(2)[1] a tribunal may on the application of a party to the proceedings made either by notice in writing or at the hearing of the originating application:
>
> (a) require a party to furnish in writing to the person making the application further particulars of the grounds on which he or it relies and of any facts and contentions relevant thereof;

They also referred to Rule 16(1) which gives the Tribunal the power to regulate its own procedure:

> R.16(1) Subject to the provisions of these rules, the tribunal may regulate its own procedure.

adding in the written submissions that

> "Logically, failure to comply with an order must bring with it sanctions including the dismissal of a complaint".

24. It is immaterial for the purpose of this hearing whether the lack of particulars was seen as a deficiency in the Complaint, but I should record that I do not recall the Complainant being censured for not particularising the Complaint or that it was deficient for that reason. What is clearly relevant is that the Complainant did not comply with the first Direction which was ordered, the filing of further particulars, and had not progressed his Complaint in any other way.

25. Mr Benyunes reiterated in his oral submissions his call that non-compliance of the Order for Directions , in his own words,

> "must have consequences"

which he submitted was that the Complaint be struck out. His analysis was that there had not been an application by the Complainant to extend time, which the Industrial Tribunal Rules do provide for. And so, relying on what he submitted were the inherent powers of the

[1] Not relevant

Tribunal, as read with Rule 16(1) that the Tribunal regulates its own procedure, and invoking Rule 13(3), set out below, the application could be struck out.

R.13(3) If a party shall fail to appear or to be represented at the time and place fixed for the hearing, the tribunal may dispose of the application in the absence of that party or may adjourn the hearing to a later date.

RULING ON STRIKE OUT

26. I concluded the Complaint ought to be struck out for want of prosecution for the factual and legal reasons which expressed then and set out in paragraph 3 of this Ruling.

27. In the course of so ruling I expressed disagreement with Mr Benyunes on two points. In the first place I disagreed with him that the Tribunal had any inherent power and strongly recommended that Mr Benyunes acquaint himself with the decision of my fellow Chairman Mr Kenneth Navas in his decision in *Jesus Espada Ruiz v Gibdock Limited* (Complaint 3/2012, of 10th June 2015). I pointed out to Mr Benyunes that I concurred with Mr Navas that a creature of statute like the Industrial Tribunal can have no inherent powers although it can expressly regulate its procedure, as here, and in so doing exercise a power which is readily and easily to be implied. In cases of this sort, as is evident from the decision in *Espada*, the existence of any such power is rooted in the statutory obligation and powers of the Tribunal to deal with cases justly and fairly. Where therefore a respondent is entirely at the mercy of a complainant who decides not to proceed with his application, it could be right and proper, all other things being equal, for the Tribunal to strike out the complaint.

28. I also noted the difference between the High Court of England and Wales having an inherent jurisdiction, even though it is a creature of statute itself, because at the time it was created, it was expressly to continue to have and exercise all the powers previously exercised by the superior courts including that of common law.

29. I added that I did not agree with Mr Benyunes that Rule 13(3) was of any assistance to his client at this application since the power of disposing of the application in the absence of a party, contained in Rule 13(3), only arises at the time the complaint had been set down for its substantive hearing and not for a directions hearing.

APPLICATION FOR COSTS

30. The Respondent's submissions were, again, not as full as they could have been although, in the event, I would still have ruled against the application. The provision to which the Respondent pointed to was Rule 15(1) where it is stated that subject to sub-rules (2) and (3) the Tribunal shall not normally award costs but

> "R15(1) Where in its opinion a party to any proceedings...has acted frivolously of vexatiously, the Tribunal may make an order that that party shall pay to another party either a specified sum in respect of the costs incurred by that other party or in default of agreement the taxed amount of those costs."

31. Before turning to sub-rule (2) Mr Benyunes agreed with me that the application could only succeed if the Complainant had acted frivolously and vexatiously. When I asked him which or both of those he believed was the case, he chose the former on the grounds that in his view the filing of a complaint and then not proceeding with it, failing to file Further and Better Particulars and not, as far as it appeared, contacting the Tribunal or attending today, amounted to neglect which, in his view, amounted to frivolously acting. In my ruling I disagreed and I indicated that whilst in certain cases that may amount to an indication of vexatious conduct, there had to be some basis for that, and it was not shown.

32. I took the opportunity to point out that, as *Espada* also records, the law clearly states that a power cannot be implied beyond what the rules allow. Therefore, I observed that there being an express, limited provision in rule 15 as to when costs can be awarded, there could not be implied a wider power to grant costs, when striking out on the grounds of non-prosecution, as in this case.

33. At this point I referred also to sub-Rule 15(2) which states that:

> "R15(2) notwithstanding...sub-rule (1) where on an application the party to the proceedings the Tribunal has postponed the day or time fixed for the hearing or has adjourned the hearing, the Tribunal may make orders against that party as at sub-rule (1) ..... costs incurred as a result of the postponement or adjournment".

On re-reading this provision after giving my ex tempore ruling, it is evident that that is simply another instance as to when costs can be awarded and, again, seems to prohibit the reading in of general power to award costs, outside the scenarios encountered in Rule 15(1) and 15(2).

34. The Complaint was therefore struck out on 8th December 2015, with no order as to costs. Attached hereto is a copy of my Order of that day. The Secretary will forward a copy of this Ruling and Order to the Complainant by registered post to the Address and to the Respondent by post to Charles A Gomez and Co.

David J V Dumas QC

Chairman

12th January 2016

IN THE INDUSTRIAL TRIBUNAL **Case No. 22 of 2009**

BETWEEN

MOHAMMED REDUAN

Complainant

-And-

BAHIA CATERERS LIMITED

Respondent

ORDER

Tuesday 8th December 2015

Before David Dumas QC, Chairman

AT THIS DIRECTIONS HEARING convened by the Tribunal,
THERE BEING no appearance by they Complainant **AND** Daniel Benyunes of Charles Gomez & Co appearing for the Respondent
AND UPON HEARING the application of the Respondent that the Complaint be struck out for want of prosecution
IT IS ORDERED THAT:-

1. The Complaint, case no 22 of 2009, be and is hereby struck out

2. No order as to costs.

CHAIRMAN