



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr F Farrow

v

The Steiner Academy Hereford

Heard at: Birmingham

On: 7 November 2024

Before: Employment Judge Robin Broughton

Appearances:

Written submissions

JUDGMENT ON COSTS

The respondent's application for costs is refused.

Background

1. This hearing was arranged to consider the respondent's application for costs dated 26 February 2024, following the claimant's repeated failure to comply with tribunal directions, attend hearings and, ultimately comply with my unless order of 2 January 2024.
2. After 4pm, the day before that hearing, the tribunal received the following email

From: truthjuggler

Sent: 01 January 2024 16:34

To: MidlandsWestET

Subject: 1303238/2022 URGENT Farrow v The Steiner academy

To whom it may concern,

I am writing on behalf of Mr Frederick Farrow. I sent a fit note prior to the previous court hearing. We are still awaiting his current fit note and due to the renewal date being on 25th December have so far have not been sent it by Hereford medical group probably due to the Christmas break. Due to Mr Farrow's ongoing illness and the side effects of the medication he has been prescribed he is unable to attend the hearing at this time. I will in due course send a current fit note covering the period from the 25th December and ongoing and will inform the court when he is well enough to continue with the hearing.

Yours sincerely

Magdalene Farrow

3. It was far from clear why, if the contents of that email were accurate, the tribunal and respondent had not been contacted sooner.
4. Moreover, it appeared that no attempt has been made to comply with presidential guidance in relation to health-related postponements.
5. The last hearing, listed on 27 November 2023, had been postponed following a request on medical grounds on behalf of the claimant, made after close of business on Friday 24 November 2023 (the previous working day). It was supported by a fit note dated 23 November 2023, merely saying the claimant was unfit for work due to PTSD.
6. However, the Presidential guidance requires a medical report which states that
 - a. the claimant is unfit to attend a hearing
 - b. why they are unfit, including the nature of their condition and allowing for adjustments
 - c. the prognosis
 - d. when the claimant may be fit to attend
7. Whilst the Christmas period may have delayed provision of a medical certificate, a report detailing all of the above was required.
8. I determined that the proportionate response would be postpone the January hearing and to require the claimant to comply with the above guidance by way of an UNLESS ORDER.
9. In making that order, I noted that there was no dispute that all of the claimant's claims were presented around 1 year outside the primary time limit. The claimant relies on his mental health as an explanation for the delays.
10. Having reviewed the bundle provided for the January hearing again, along with all subsequent exchanges, it appears that the claimant's statements in relation to his mental health contain inconsistencies and, perhaps, a conveniently developing narrative. They are not supported by specific, specialist medical evidence addressing:
 - a. Why he was unable to bring his claim in time?
 - b. How / why he was able to bring it when he did?
 - c. Why he was unable to bring it sooner?
 - d. How / why his health subsequently deteriorated to the point he was unable to attend hearings, having previously done so?
 - e. How he was able to represent himself cogently, albeit obtusely, at the internal hearings?
 - f. How he has appeared able to do the same, in writing, both before and since the aborted hearings?

11. For example,
 - a. there were no entries in his GP records between March 2019 and July 2021, other than regarding an injury sustained in a police incident in February 2021
 - b. there was a mental health referral in July 2021 and an entry for mild stress in November 2021
 - c. He was able to successfully apply for benefits in August 2021
 - d. He was advised to speak to citizens advice in January 2022 and told his GP he was appealing his dismissal in February 2022
 - e. He entered early conciliation in June 2022, but still waited a further 3 weeks before issuing his claim
 - f. He was able to attend the telephone preliminary hearing in January 2023
12. That said, he appears to have received a diagnosis of PTSD in February 2022. Almost all the evidence, however, suggested steady improvement thereafter.
13. The claimant is currently living alone, working part-time and caring for his elderly mother.
14. He says that he could not provide the medical evidence required because he could not afford to go private. However, there are earlier letters from his GP before me and no explanations as to why he could not obtain another, nor something from his therapist(s).
15. Despite repeated opportunities over the last year, nothing more than a couple of sick notes have been provided.

The respondent's application

16. The respondent applied for costs under all of the potential grounds available under rule 76(1)(a), (b) and (c) as well as 76(2).
17. The order alleged to have been breached under 76(2) was my unless order of 2 January 2024.
18. They were, somehow, claiming in excess of £15000, including £250 per hour for trainees, which was surprisingly high for a claim that had only reached a closed preliminary hearing and two aborted open preliminary hearings.

Decision

19. Taking the latter (76(2)) point first.
20. The claimant suggested he was unable to comply with the unless order and, whilst there was no evidence of any reasonable attempts at compliance, either at the time or since, such failure was said to relate to the claimant's

health and perilous financial position. It resulted in the claim being dismissed and so, if anything, saved the respondent costs.

21. Costs orders are the exception rather than the rule and are intended to be compensatory, not punitive, so there appears to me to be no basis for such an order on this basis.
22. The claim for costs in relation to the postponements under rule 76(2) is best dealt with under rule 76(1)(c).
23. The claim in relation to alleged unreasonable conduct (76(1)(a)) was said to relate to the postponements also.
24. Whilst there were grounds for questioning some of the claimant's excuses and submissions, they have not been subject to cross examination and he has, at least, produced sick notes that suggest a possible explanation, albeit not a fully satisfactory one.
25. In those circumstances, I do not find that they amounted to unreasonable conduct, despite the incredibly late notice in both cases and the disruption and cost this caused the respondent and the tribunal.
26. The respondent also suggested that the claim had no reasonable prospect of success (76(1)(b)) basing their contentions on the fact that it was presented around a year outside the primary time limit.
27. However, given the claimant's reliance on the state of his mental health and at least some medical evidence in support of that, I would need to find that the claimant had no reasonable prospect of succeeding in getting an extension of time in relation to the reasonably practicable test for unfair dismissal. There is, arguably, a wider discretion for the discrimination claims.
28. The claims do not appear strong and are, arguably, contrived. The claimant would have had significant hurdles to overcome to even have them heard from a time limit perspective, but I cannot say he had no reasonable prospect of doing so.
29. Finally, I consider the respondent's strongest claim in relation to the 2 late postponement requests, on the last working day before the listed open preliminary hearings.
30. Whilst the claimant may have had some difficulties obtaining sicknotes, there was no evidence to support this. There was nothing to suggest that the claimant wouldn't have been aware of his alleged inability to attend more than 7 days before and yet no notification was given to the tribunal or the respondent.
31. There appears to have been no apology, or explanation, for the claimant's disrespect and disregard of others.

32. In those circumstances, there are, in my judgment, grounds for which a costs order could be made, at least in relation to the respondent's costs of preparing for and attending one of those hearings (the other they would have needed to attend in any event).
33. However, the respondent has ultimately saved costs by the claimant's failure to attend. There is also the mitigation of the claimant's apparent mental health problems. The claimant submits that he has limited income, considerable debt and no meaningful assets.
34. In those circumstances, it does not appear to me to be in the interests of justice to make a costs award. I hope that the claimant learns from this experience, recovers his health and life and becomes more considerate in future.
35. In my opinion, dragging out this litigation over a few hundred pounds that is unlikely to be paid is not in either side's interests and the respondent's application is, therefore, refused.

Employment Judge Broughton

Date: 9 November 2024