Case Number 2501143/16

EMPLOYMENT TRIBUNALS

Claimant	*Respondent*
Ms S Peel	County Durham and Darlington NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

MADE AT NORTH SHIELDS (without a hearing) ON 4th September 2017
EMPLOYMENT JUDGE GARNON (sitting alone)

JUDGMENT

The claim is dismissed on withdrawal by the claimant

REASONS

1. The Employment Tribunal Rules of Procedure 2013 (the Rules)include

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a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.*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 *Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal* ***shall*** *issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent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.

The word "shall" which I have emboldened is mandatory. Unless one of the exceptions applies, I must issue a dismissal judgment.

The Background Facts

2. I have conducted the case management of this claim since a preliminary hearing on 28th February 2017 at which the claimant was present. Her claim of constructive unfair dismissal involved serious allegations of poor patient care in which several colleagues were implicated. I recorded at paragraph 29 of the notes of discussion that when recounting certain matters the claimant became “very upset”. She has been represented throughout by her life partner Mr Crow who has no legal qualifications.

3. Initially they made the commonplace error of including far too much unfocused assertion and not enough primary fact. I explained the claim may become more intelligible and easier for the claimant to present at hearing if they simplified and narrowed the scope of the evidence. I am satisfied they tried their best to do so and largely succeeded.

4. At a preliminary hearing (PH) on 24th May 2017, the claimant did not attend . Mr Crow said she was too stressed to do so. I said, and recorded at Note 14, the Hearing would be an adversarial process not a public enquiry . I set the case down for ten days starting 4th September. By this point the claim was in a state in which, although all litigation is stressful, the claimant’s chances of being able effectively to present her arguments were far better than they had been earlier. By 22nd June her statement was largely prepared. Although there was a good deal of correspondence with the tribunal about the content of the respondent’s statements and some later about witnesses the case appeared to be well en route to trial. As directed the respondent sent to the tribunal electronically the witness statements under cover of an email dated 27th July.

5. By e-mail of 21st August at 11:53 Mr Crow wrote to the tribunal(bold is my emphasis) saying of the claimant

“*she is presently signed as unfit for work as the enclosed doctor’s note shows. I am very worried about her at this time and the consequences that any more stress will put her under. She has* ***started*** *medications but the doctor has said that these can take six weeks* ***or so to have any effect*** *and it can* ***then*** *be determined if any change of dosage is required to stabilise the situation.*
Due to this I ask the court to adjourn the above hearing to ***a later date*** *when Sylvia will be more stable and able to support her case.* “

6. The GP note followed by post. On 22nd August I caused the letter to be sent to Mr Crow saying the doctor’s note stated the claimant was unfit to work which does not necessarily mean she was unfit to attend the tribunal. The letter continued
“*If the GP wrote a note to that effect, stated what medication had been prescribed and gave an approximate date by which the claimant could be expected to be ‘more stable and able to support her case’ (to quote Mr Crow’s letter) it would help to inform the Employment Judge who makes the decision.* “

At 20:31 that day Mr Crow emailed the tribunal stating the medication consisted of sleeping tablets , an anti-depressant and a calmer for anxiety.

7. On Wednesday 23rd August an e-mail from the respondent's representative made a number of points opposing the application for postponement. In summary these were
(i) the case had been ongoing for almost a year and it was in everyone's interest it should now be heard
(ii) the respondent was ready to proceed, Counsel had been instructed, all directions had been complied with
(iii) the respondent was a public body under pressure to minimise expenditure
(iv) the passing of time would impinge upon recollections of events
(v) the solicitor with conduct of the case was going on maternity leave
(vi) the claimant had not provided adequate medical evidence to support her application
(vii) it would assist rather than exacerbate the claimant's stress to get the matter heard , the hearing could continue with appropriate adjustments, for example regular breaks, shorter days and the claimant being able to give her evidence in stages.

In the hasty written reasons I gave last week I said all points were valid, but (iii) and (v) did not figure in my considerations. Employment Judge Johnson asked for the claimant's response and the answer from her GP.

8. On Friday 25th August Mr Crow replied at 23:26. He took particular objection to the phrase used by the respondent's representatives that the claimant had "chosen" to bring the proceedings. He made various references including some to without prejudice matters. With regard to point (iv) he says '*as stated previously Ms Peel remembers the incidents clearly and always will*'. He does not consider the recollections of others. I must.

9. The 28th of August was a Bank Holiday Monday. On 29th August I viewed a short letter from Dr Shaw the claimant's GP which said
I am writing to confirm that in my medical opinion this lady is not fit to attend for a tribunal hearing at the present time. She is currently suffering from stress and anxiety and her mental state is such that she would not be able to attend. She is taking currently taking the following medication
Sertraline 50 mg daily
Diazepam 2 mg as required
Zopiclone 3.7 mg notce

Completely absent was a prognosis or estimate of when the claimant may be fit to attend.

10. In the short reasons I gave last week, I cited Riley -v- The Crown Prosecution Service. The claimant has the right to a fair trial within a reasonable time contained in Article 6 of the European Convention on Human Rights. The respondent as an organisation is not a human being and therefore does not have those rights. However the witnesses about whom allegations are made are human beings and have a right to be heard within a reasonable timeframe particularly as the consequences for them may involve their jobs or even their ability to practice as nurses being called into question.

11. I gave great consideration to the postponement application. It was a finely balanced decision based partly on the absence of medical prognosis and the discussion I had with

the claimant when she attended the preliminary hearing in February. She had not accompanied Mr Crow to subsequent preliminary hearings because even such relatively low stress hearings were too much for her. I could see no reasonable prospect of the claimant being able to attend to give evidence at a hearing within the not too distant future. In these circumstances, I refused the postponement application.

12. On 30th August Mr Crow emailed the tribunal saying he and the claimant disagreed with my decision but accepted the "difficulties in rescheduling". I cannot over emphasise administrative inconvenience to the tribunal, or indeed to the respondent, was not a consideration at all. Mr Crow said the claimant had no option but to withdraw. I respectfully disagree. Her option was to attend and give her evidence. I would have ensured all steps were taken to make the giving of that evidence as stress free as possible. However, it would be a stressful experience **at any time it had to be done**. I understand why the claimant made a decision to withdraw. Mr Crow also said the claimant may send later a document stating the ways in which the respondent's statements are wrong or untrue. The tribunal will not examine any material received after this judgment has been sent to the parties.

13. Although Mr Crow says in an e-mail of 29th August important matters concerning patient care will have to be "otherwise dealt with", the claims of unfair and wrongful dismissal have been withdrawn without reservation of the right to bring a further claim. Rule 52 is meant to produce finality so the interests of justice require this judgment.

14. Although the respondent may contemplate applying for costs, in the circumstances I would discourage such an application . I draw their attention to the following relevant legal provisions. The Rules include as far as relevant

76 (1) A Tribunal may make a costs order .., and shall consider whether to do so, where it considers that—
(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or ***otherwise unreasonably*** *in either the* ***bringing*** *of the proceedings (or part) or* ***the way that the proceedings (or part) have been conducted****; or*
(b) any claim .. had ***no reasonable prospect of success****.*

77. A party may apply for a costs order .. at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

The Court of Appeal and EAT have said costs orders in the Employment Tribunal:

(a) are rare and exceptional.
(b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so
(c) the paying party's conduct as a whole needs to be considered, per Mummery LJ in Barnsley MBC v. Yerrakalva [2011] EWCA 1255 at para. 41:

"*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.*"

15. Several factors are relevant on withdrawals. An Employment Tribunal must consider whether the claimant has brought or conducted the proceedings unreasonably in all the circumstances, and not whether the late withdrawal of the claim was in itself unreasonable, see McPherson v BNP Paribas (London Branch) 2004 ICR 1398. In that case the Court of Appeal said it would be wrong if, acting on a misconceived analogy with the Civil Procedure Rules, tribunals took the line it was unreasonable conduct for claimants to withdraw claims, and if they did, they should be made to pay costs. The Court pointed out withdrawals could lead to a saving of costs, and it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs upon withdrawal that might well not be made against them if they fought on to a full hearing and failed. In National Oilwell Varco (UK) Ltd v Van de Ruit EATS 0006/14 in which McPherson was cited a claimant had not acted unreasonably in withdrawing his claim on the day prior to a pre-hearing review. In this case, as the trial approached the claimant realised she could not put herself through the ordeal. That does not indicate she never intended to "go through with it" or that her allegations were other than genuine What I call the "threshold" issue is whether I am satisfied one of the circumstances in Rule 76 exists. The pleadings reveal substantial disputes of fact. Although Employment Judge Johnson ordered such orders be considered at the hearing I conducted in February, for reasons I gave fully no strike out or deposit orders were ever made. If the "threshold "has not been reached. I need decide no more and I have difficulty seeing how it will be.

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T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 4th SEPTEMBER 2017

JUDGMENT SENT TO THE PARTIES ON

5 September 2017

P Trewick
FOR THE TRIBUNAL