



EMPLOYMENT TRIBUNALS

Claimant
Mr K Ford

Respondent
Sheffield Teaching Hospitals NHS
Foundation Trust

PRELIMINARY HEARING IN PUBLIC

Heard at: Leeds

On: 26 February 2018

Before: Employment Judge Davies

Appearances

For the Claimant:

Did not attend

For the Respondent:

Mr Webster (counsel)

JUDGMENT

1. This claim is struck out pursuant to Rule 37 Employment Tribunal Rules of Procedure 2013.

REASONS

Introduction

1. This was a preliminary hearing to decide whether the claim should be struck out for non-compliance with Tribunal orders and/or because it is not being actively pursued. The Respondent was represented by Mr Webster of counsel. The Claimant did not attend. However, shortly before the hearing started he telephoned the Leeds Tribunal to explain that he had gone to the Sheffield Tribunal. He explained that he had just worked a long shift and was now unable to come to Leeds. He then sent an email asking whether it was possible to rearrange the hearing.
2. The preliminary hearing was originally listed in Sheffield and a notice of hearing was sent to the Claimant's representative, Mr Pagdin, on 30 January 2018. The Regional Employment Judge then directed that this (and three other related claims) be moved to Leeds. The parties were informed of that on 15 February 2018. An amended notice of hearing moving the preliminary hearing to Leeds was sent to Mr Pagdin on 15 February 2018. Furthermore, Mr Webster reminded me that Mr Pagdin (and on one day Mr Ford) attended the hearing (before me) in one of the related cases in Leeds last week. The Tribunal has not heard anything from Mr Pagdin this morning. I decided to proceed in the Claimant's absence. The notice of hearing had been sent eleven days ago to his representative at the email address he has provided and used. He and his representative were present here

together five days ago. They must have known in general terms that these hearings have been moved to Leeds and Mr Pagdin must have known that this hearing had been moved to Leeds. Particularly given the nature of the hearing and the background (see below) I considered that it was not consistent with the overriding objective to postpone the hearing in those circumstances.

Factual Background

3. From the file and Mr Webster's submissions, it is apparent that this claim was lodged in August 2017. The Claimant was representing himself at that stage. Early case management orders were set aside pending a decision whether to hear all four of the related claims together. A preliminary hearing by telephone was arranged to decide that question. That hearing took place on 7 November 2017 before EJ Wade. The Respondent emailed an agenda to the Claimant on 3 November 2017. The Claimant did not dial in, and did not provide any explanation for failing to do so. EJ Wade decided that the claims should not be heard together. She made case management orders in this case. They were sent by email to the Claimant on 9 November 2017. They made clear that he must disclose copies of relevant documents by 5 December 2017, agree a file of documents by 12 December 2017 and exchange witness statements by 16 January 2018. The claim was listed for a two day hearing on 28 and 29 March 2018.
4. On 4 December 2017 the Respondent emailed the Claimant a list of its documents, and said that hard copies had been sent recorded delivery. Those documents were sent to the address given by the Claimant in the claim form. He was not in and the documents were eventually returned to the Respondent by the Royal Mail marked "not called for." The Claimant did not contact the Respondent or disclose any documents.
5. On 6 December 2017 the Claimant emailed the Tribunal to say that Mr Pagdin was now his representative, but he did not provide any contact details for him. The Tribunal asked for details on 20 December 2017 and the Claimant provided them on 31 December 2017.
6. Meanwhile, on 13 December 2017 the Respondent applied to the Tribunal for an order striking-out the claim for non-compliance with Tribunal orders or because it was not being actively pursued. That was copied to the Claimant (the Respondent being unaware that Mr Pagdin was now representing him).
7. On 10 January 2018 a letter was written to the Claimant warning him that I was considering striking out his claim and giving him until 17 January to respond. The parties were told that the Respondent's strike out application would be considered after 17 January 2018, and that if the claims were not struck out, fresh case management orders would be made.
8. That day, Mr Pagdin emailed the Tribunal saying that he was at a loss to understand what "time line and information we have failed to give." EJ Wade's case management orders and the Respondent's strike out application were forwarded to him on 16 January 2018. The following day he emailed the Tribunal. He said that the Claimant had not received any documents from the Respondent, which made it "impossible" for him to respond or to comply with the remaining case management orders. The Claimant thought everything was going to plan. He

was simply waiting for the Respondent to forward him the bundle and then respond as required. On 18 January 2018 the Respondent emailed the Tribunal with its response explaining that it had sent documents to the Claimant. Mr Pagdin then sent a further email on 18 January 2018. He accepted that he is a Unite representative who supports individuals with employment law issues, but said that he has limited knowledge of Tribunals. He accepted that he and the Claimant had breached “serious timing requests”. He accused the Respondent of delay in its internal processes. The Respondent sent a further email on 19 January 2018.

9. It was at that stage that this preliminary hearing in public was listed. As set out above, that was originally to be in Sheffield, but was moved to Leeds. The Claimant has not attended, as recorded above. To date he has not disclosed any documents, taken steps to agree a hearing bundle or provided a witness statement. Giving him the benefit of the doubt, I proceed on the basis that he may have considered from 10 January 2018 onwards that the case management orders had been suspended.

Legal principles

10. Under Rule 37, the Tribunal has a power to strike out a claim on the ground that there has been non-compliance with an order of the Tribunal (Rule 37(1)(c)) and/or on the ground that it has not been actively pursued (Rule 37(1)(d)). As Mr Webster reminds me, that is a draconian power.
11. When considering striking out a claim for non-compliance with Tribunal orders, the Tribunal must consider all the relevant factors. Those include the magnitude of the non-compliance; whether it was the fault of the party or his/her representative; what disruption, unfairness or prejudice would be caused; whether a fair hearing is still possible; and whether striking the claim out is proportionate, or some other, lesser, sanction could be applied: see e.g. *Weirs Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371 EAT.
12. In a case of failure actively to pursue a claim, the Tribunal must again have regard to whether there is a substantial risk that a fair hearing is no longer possible or of serious prejudice to the Respondent.

My decision

13. In this case the Claimant failed to attend the preliminary hearing on 7 November 2017. To date, no explanation for that non-attendance has been provided. He failed to comply with EJ Wade’s orders – both by failing to disclose copies of his own documents and by failing to communicate with the Respondent so as to agree a hearing bundle. Although he asserts that he did not receive documents from the Respondent, that does not remove the obligation to disclose his own documents. In any event, the Respondent’s documents were sent to the address he provided in the claim form. He has not indicated that that address is incorrect. He appears not to have collected the documents. Further, he was also sent an email informing him that the documents were to be provided in that way. He took no steps in response.
14. Mr Pagdin accepts on his behalf that he was in breach of the Tribunal’s orders. No proper explanation has been provided and no steps have been taken since to

rectify the position (even if the Claimant thought that the case management orders had been suspended after 10 January 2018).

15. Against that background, and in circumstances where both the Claimant and Mr Pagdin were present at the hearing of one of the related claims in Leeds last week, the Claimant has failed to attend today. If the fault for that lies with Mr Pagdin, then the Claimant may need to take that up with him or Unite.
16. In those circumstances, I am satisfied that the Claimant is in breach of Tribunal orders. He appears to accept that both he and Mr Pagdin were at fault. The consequence, given the Claimant's non-attendance today, is that the hearing in four weeks' time will have to be postponed. Disclosure still has not taken place, and without the Claimant's participation today it was not appropriate to make further case management orders.
17. I accept Mr Webster's submission that a fair trial involves more than the question whether evidence is still available and can be fairly obtained and heard. There comes a point where it is unfair to a Respondent to proceed where a Claimant has failed wholesale to comply with the Tribunal's orders and has failed to attend two preliminary hearings. The claim was lodged in August. Six months later the Claimant has failed to do the things he was ordered to do and has provided no adequate explanation for that. The Tribunal can have no confidence that anything will change and the hearing will now be delayed.
18. I have considered whether any sanction short of striking the claim out is appropriate and whether striking it out is proportionate. I do not consider that there is any lesser step that should be taken. I am not in a position to make a costs order today, because the Claimant has not attended. I do not know anything about his ability to pay and whether a costs order would be likely to remedy the situation. Likewise, without any proper explanation or involvement from the Claimant, it does not seem to me that an unless order would be appropriate. In all the circumstances, it is therefore appropriate to strike out the claim.
19. Mr Webster indicated that he will consider with the Respondent whether to make an application for its costs associated with the Claimant's non-attendance today and/or with his conduct of the proceedings more generally.

Employment Judge Davies

Date: 26 February 2018