



EMPLOYMENT TRIBUNALS

Claimant: Mr L Haworth

Respondent: Birmingham Community Health NHS Trust

Heard at: Birmingham **On:** 25 February 2020

Before: Employment Judge Hindmarch

Representation
Claimant: Non-attendance
Respondent: Mr Palmer (Counsel)

JUDGMENT

1. The Respondents application for strike out of the claims under Rule 37 is granted and the claims are struck out.

REASONS

1. This case came before me for a 2 day Open Preliminary Hearing on 25 and 26 February 2020. The Claimant did not attend having emailed the Tribunal at 09:27am on the morning of the 25 February 2020 stating that he was *'unable to make today due to high levels of stress caused that by the NHS Trust and there (sic) Solicitors'* and asking the Tribunal *'reschedule'* the *'meeting'*. The email continued *'My blood pressure is at a dangerous level and been advised not to undertake any stressful meetings'*. I declined to postpone and decided to go ahead in the Claimants absence for the reasons herein.
2. The Respondent was represented by Counsel, Mr Palmer. He made an application to strike out the claims under Rule 37(1) on the following grounds (b), the manner in which the proceedings have been conducted by the Claimant has been unreasonable and (c) that (the claim) has not been actively pursued. In the alternative Mr Palmer made an application for an Unless Order – in short, that unless the Claimant complied with the Orders

made by Employment Judge Harding (made at a previous Open Preliminary Hearing on 20 November 2019) within 7 days the claims should be struck out.

3. Whilst Mr Palmer made no application for written reasons for my decision I proposed that I would give full written reasons so that the Claimant, who was not present before me, could understand and digest my reasoning.
4. This claim has a somewhat detailed history which is important to be set out in these reasons and the relevant chronology is below:-
 - a. The claim was issued on 20 March 2019 following a period of Early Conciliation from 7 March 2019 to 7 March 2019. The claims made were of unfair dismissal and disability discrimination. No dates of employment were given by the Claimant in his ET1.
 - b. On an initial consideration of the claim by Regional Employment Judge Monk it was directed that there be a Preliminary Hearing to determine whether the claim was in time. That (first) Preliminary Hearing was listed for 18 September 2019.
 - c. The ET3 was filed in time on 26 June 2019. The Respondent accepted employing the Claimant as a 'rehabilitation assistant' from 1998 to dismissal, conveyed to the Claimant's Trade Union representative on 18 November 2018. The Respondent raised jurisdictional questions as to whether the claim was in time, whether the Claimant was a disabled person for the purpose of the Equality Act 2010, and also raised concerns about the quality of the particularisation of the claim.
 - d. The response was accepted by the Tribunal on 7 September 2019 and on that date the Tribunal wrote to both parties reminding them of the Open Preliminary Hearing listed on 18 September 2019.
 - e. On 13 September 2019, the Claimant emailed the tribunal stating *'I have yesterday received notification my case is listed for 18 September. I did not know about this as I asked all correspondence to be emailed as I moved out of my old address on 27 March and moved into my new house 22 September 2019. Due to this and my health issues I will not be able to make this as I have not have time to prepare and I feel this will be very unfair if I was made to with little under a week to prepare my case. Please can I ask for this to be re-listed and the date emailed not posted like I have asked in the past'*.
 - f. On 16 September 2019 Employment Judge Butler agreed the Claimant's application to postpone *'for the reasons given in the Claimant's letter dated 13 September 2019'*. It is to be noted thereafter, and at the

Claimants request, all correspondence from the Tribunal was sent to him by email.

- g. The Preliminary Hearing was re-listed for 20 November 2019.
- h. Later in the day on 16 September 2019, after Employment Judge Butler had apparently agreed to postpone the Preliminary Hearing listed for 18 September 2019, the Respondent's Solicitors emailed both the Tribunal and the Claimant opposing that application on the basis that they had emailed the Claimant on 5 September 2019 referring to the date of the Preliminary Hearing and that the Claimant had therefore had sufficient notice of it. The Respondent's Solicitor also referred to an email they had sent to the Claimant on 12 September 2019 requesting further information about his claim which had gone unanswered. The Respondent had received a reply from the Claimant also on 12 September 2019 stating *'I will need to see if my lawyer can do this date (18 September 2019) and if it's enough time'*. Nevertheless the postponement had already been granted.
- i. On 16 September 2019, having received the correspondence from the Tribunal granting his postponement request, the Claimant emailed the Tribunal and the Respondent's Solicitors as follows:-

'Hi

Thank you for re schedule.

This is why my health is compromised, I had this attitude when I was working in the nhs. It is a bullying tactic but the Judge has ruled a future date and I respect this.

I have lost my family home as a result to the nhs and the bullying and I will prepare my case to show this.

My health and mental health is at the worst and the nhs counsel has made me so stressed and at at (sic) the point I feel suicidal you can see and read the anger I had on a day to day basis off managers I will be exposing'.

- j. On 17 September 2019 the Respondent's Solicitors emailed the Tribunal and the Claimant as follows:-

'Claimants health.

We note the Claimant's comments below in relation to his health which are concerning, and we would urge him to seek appropriate support and assistance from his GP or other support networks available'.

- k. On 19 September 2019 at 13:38pm (the day before the ((second)) Open Preliminary Hearing) the Claimant emailed the Tribunal as follows:-

'URGENT

Hi

I have to inform you I have been advised by my GP I am not fit to attend the meeting.

I am seeing my GP again tomorrow and I will get him to do a letter to confirm this.'

- l. The Tribunal (Employment Judge Harding) considered the email from the Claimant and the Tribunal wrote to him (sent by email) at 16:39pm as follows:-

'In order for (the Claimant's) application to postpone the hearing to be consider (sic) he must produce a letter from his GP in support of his application. Unless or until that is done the hearing remains listed.'

- m. The Claimant responded by email at 16:44pm as follows:-

'Hi

I will send a copy via email when I see the GP tomorrow or I attend with full responsibility of the courts. Last time I was made to attend a meeting I collapsed when the trust ignored the GP advice'.

- n. The Claimant did not attend the Preliminary Hearing on 20 September 2019. The Respondent was represented by Counsel and the matter was heard by Employment Judge Harding. Employment Judge Harding's Order noted the Claimant had not supplied medical evidence in support of his application to postpone. Her Order noted at point 3, '*...there have now been two Preliminary Hearings in this matter and the Claimant has attended neither hearing'*. She further noted the claims were 'inadequately pleaded' and the Claimant had not responded to requests made by the Respondent's Solicitors (on 12 September and 15 September 2019) for further and better particulars. Employment Judge Harding made a number of Case Management Orders in order to progress matters as follows:-

- By 11 December 2019 the Claimant was ordered to send to both the Tribunal and the Respondent an opinion from either his GP or other medical professional as to whether he was fit to attend the hearing on 20 September 2019 and if he was not fit, what was

the medical reason for this and an opinion as to when the Claimant would be fit to participate in (future) hearings.

- By 11 December 2019 the Claimant was ordered to send an explanation as to the timing of his application to postpone (made the afternoon before the hearing).
 - By 11 December 2019 the Claimant to particularise his discrimination and unfair dismissal claims and to submit a witness statement setting out his position on the timing of his application.
 - By 22 January 2020 the Respondent was to confirm whether it conceded the disability question and whether it remained of the view the disability discrimination claim remained out of time.
 - By 22 January 2020 the Respondent was to confirm whether it wished to pursue an application for strike out and if so on what basis.
- o. Employment Judge Harding listed a further 2 day Open Preliminary Hearing for 25 and 26 February 2020 to consider the time point, whether the Claimant was a disabled person, any strike out application and any further identification of issues and Case Management. Her Orders were sent to the parties on 4 December 2019.
- p. When the matter came before me today it was clear the Claimant had not complied with any of the Orders made by Employment Judge Harding. The Claimant having not complied with the matters ordered to be complied with by 11 December 2019, on 15 January 2020 the Respondent's Solicitors wrote to the Claimant. They noted they were mindful of his health and the intervening festive period, and noted they had not chased him earlier because of these matters. They asked however that he comply by return, failing which they would make an application for the claim to be struck out.
- q. Having had no response from the Claimant, on 29 January 2020 the application to strike out the claim was made by email by the Respondent to the Tribunal copied to the Claimant. On 12 February 2020 the application was considered by Employment Judge Findlay who directed that the Tribunal write to the Claimant and Respondent on the same day (sent by email) as follows:-

'Employment Judge Findlay has asked for your (the Claimants) comments on the enclosed letter from the Respondent dated 29 January 2020.

She has directed me (the Tribunal) to inform the Respondent that it has not complied with Rule 30(2) when making its application of 29 January 2020, as they do not appear to have informed the Claimant that any

objections to the application should be sent to the Employment Tribunal as soon as possible.

Please reply by Return'.

- r. On the same day (12 February 2020) the Claimant replied to the Tribunal:-

'Dear Sir

I will go over the email later and try my best to give the information needed. I must say I feel completely intimidated by the trusts lawyers and feel very stressed with the emails and withheld phone calls I constantly am getting.

I have a log and screen shots I will include with my response I spoke to my network provider as this has got my anxiety levels very high and not only emails now calls.'

- s. The Respondent's Solicitors replied (on 12 February 2020) firstly apologising for their oversight with regard to Rule 30(2) and secondly saying they had never made a telephone call to the Claimant and had only in fact sent the Claimant two emails since September 2019 (on 15th September 2019 and 29th January 2020 and as detailed above).
- t. The Claimant replied on 12 February 2020:-

'Dear Sir

Again I did not state the calls were from the lawyers and I wish the case to go ahead as I was retired on ill health by the trust but the trust pensions said they advised I was not ill enough to take my pension. I have gone through hell and if it is not heard by the courts I will Pursue through other means as I have been subject to intimidation and unfair treatment by the trust and there (sic) lawyers'

- u. The Claimant did not in fact respond to the application to strike out nor did he comply with the Orders made by Employment Judge Harding. He failed to attend today having emailed the Tribunal at 09:27am this morning.
5. I determined in light of the history as set out above, I should go ahead in the Claimants absence and decide the Respondents application to strike out. The hearing before me was the third Preliminary Hearing in a 6 month period, none of which the Claimant had been apparently able to attend for the various reasons given. Despite being informed by Employment Judge Harding on 19 September 2019 that the Tribunal would need to see medical evidence to agree any postponement application, despite then being ordered by Employment Judge Harding on 20 November 2019 to provide

that evidence the Claimant saw fit to apply half an hour before the hearing before me for a postponement on medical grounds without any supporting evidence. His emails sent out above refer to seeing his GP and taking medical advice and there is no good reason why he could not have provided medical evidence to support his application to postpone. He did not do so and I decided to go ahead in his absence bearing in mind the Respondent had gone to the expense (for a second time) of instructing Counsel to appear.

6. The Respondents application to strike out was set out in its email to the Tribunal copied to the Claimant, on 29 January 2020. It essentially referred to Rule 37(1)(d), the chronology of this claim, and the overriding objective.
7. Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides the following:-

‘Striking out

(1) At any stage of the proceedings, either its own initiative, or on the application of a party, a Tribunal may stroke out all or part of a claim or response on any of the following grounds:-

(b) that the manner in which the proceedings have been concluded by or on behalf of the Claimant... has been ... unreasonable;

(d) that it has not been actively pursued.

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing’.

8. I have considered whether the Claimant has been given a reasonable opportunity to make representations. In my view he has. Whilst he did not attend the hearing on 20 November 2019, Employment Judge Harding referred in her Order (set to the Claimant on 4 December 2019) of the possibility the Respondent may apply to Strike Out. The application was sent to the Claimant on 29 January 2020. On 12 February 2020 Employment Judge Findlay asked him to reply by return. He did not do so. He made no representations that I could consider despite being given every opportunity to do so.
9. Mr Palmer made submissions in support of the application. In his submission his instructing Solicitors had done their utmost to assist the Claimant to comply with the Orders, setting out carefully before the Open Preliminary Hearing on 20 November 2019 what was required by way of further and better particularisation, and giving the Claimant additional time following that hearing to comply with the Orders made by Employment Judge Harding. The Claimant had trade union assistance from the RCN at the time of dismissal and referred in correspondence on 12 September 2019

to *'his lawyer'*. Despite this, and since the filing of the ET1, the Claimant has failed to properly engage with the Tribunal process other than to apply for postponements on the basis of him suffering stress. I was told the Trust has continued post termination to provide medical support for the Claimant. The Claimant appears not to be taking the proceedings seriously, in today's case applying at very short notice for a postponement without medical evidence, and referring to the *'hearings'* as *'meetings'*.

10. I have considered that the Orders made by Employment Judge Harding were clear and in plain language. The usual consequences of failure to comply were set out in the notes section accompanying that order as follows: *'5. failure to comply with this order may result in a striking out, before or after the Hearing, of the whole or part of your claim if you are the Claimant'*. The notes also referred the parties to the overriding objective and the duty of the parties to assist the Tribunal in furtherance of the overriding objective.
11. I have reminded myself that a Strike Out Order is a draconian one and should only be made in the most serious of cases. Nevertheless I view this as such a case. The Claimant has failed to attend a hearing on three occasions. I accept that the hearing on 18 September 2019 was postponed at the Claimants request. Nevertheless there have been two further hearings which were not postponed and where little progress could be made as the Claimant had failed to comply with any requests from the Respondent or Orders made by the Employment Tribunal. It is now nearly 12 months since the claim was issued and very little progress has been made; responsibility for this lack of progress falls squarely on the Claimant. The Respondent is a publically funded body whose resources have now been expended in attending two hearings and in chasing the Claimant in relation to his failure to comply with Orders. I note the Claimant's correspondence this morning with the Tribunal where he states he *'has been advised not to attend any stressful meetings'*. His email tellingly does not say when he might be fit to attend a hearing. This is despite the fact Employment Tribunal Harding had ordered him to provide medical evidence to this effect. Whilst I appreciate litigation is stressful, perhaps more so for litigants in person, the Claimant has brought these proceedings and is expected to play his part.
12. I have considered whether, despite my findings above, a fair trial of the issues would still be possible. Given the poor particularisation of the claim, and the failure by the Claimant to provide further and better particulars, it is difficult to say. I have reminded myself that a Strike Out Order is not generally to be used as a punishment. I have concluded on balance, and particularly given the Claimant's lack of engagement with the Orders of the Tribunal, a fair trial would in these circumstances not be possible.

Employment Judge **Hindmarch**

Date **4 MARCH 2020**