Appeal No. UKEAT/0433/13/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 24 February 2014

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR ZENON WANIA — APPELLANT

WINCANTON GROUP LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Written Submissions
For the Respondent	MR LANCE HARRIS (of Counsel) Instructed by: Messrs Osborne Clarke Solicitors 2 Temple Back East Temple Quay Bristol BS1 6EG

SUMMARY

PRACTICE AND PROCEDURE – Case management

At a case management discussion in July 2011 the Employment Tribunal had said that if the Respondent disputed disability there should be a joint medical expert and fixed the hearing for January 2012. Because of the Claimant's delays that hearing had to be adjourned and a new timetable fixed in December 2011. In February 2012 the Respondents were in a position to say they disputed disability but they also said they no longer considered that a medical expert was necessary, a position which they maintained up to the substantive hearing. Notwithstanding this the Respondent co-operated to an extent in seeking and naming some suitable experts but the Claimant took no active steps to push matters forward. The hearing had been re-fixed for June 2012, but that hearing was also adjourned due to the Claimant's ill health. The hearing was re-fixed for February 2013. Shortly before the hearing the Claimant applied to strike out the defence on account of the Respondent's failure to jointly instruct an expert; the ET refused the application. At the substantive hearing the Claimant applied for a further adjournment so that he could obtain expert medical evidence.

Having looked at the whole correspondence the ET agreed to the adjournment but only on condition that the Claimant make a contribution to the Respondent's costs of £1,200, at which point the Claimant withdrew his application for an adjournment.

On the Claimant's appeal against the decision to make the adjournment conditional the EAT decided that the ET's decision was a perfectly reasonable case management decision well justified in the light of the whole history and the strong element of fault on the Claimant's side and dismissed the appeal.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal by the Claimant against a decision sent to the parties by the Bedford Employment Tribunal, rejecting his case that he was disabled and consequently rejecting claims of disability discrimination. At the hearing which took place on 13 February 2013 he also withdrew a claim for unfair dismissal.

2. On the hearing of this appeal, the Respondents are represented by Lance Harris of counsel. The Claimant is not represented, although it appears that Mr Green, who has been representing him for some time now, had communicated with the Tribunal some days ago stating his intention not to be present at the hearing but to rely on his written submissions, which I have re-read in the course of this hearing.

3. At the original hearing before the Employment Tribunal, there was no expert report relating to the Claimant's disability, and the Employment Tribunal had to rely on the Claimant's oral evidence and such medical documents as they were referred to, the majority of which were occupational health reports from the Respondent's occupational health provider, Atos, and notes which were made by the OH adviser at various times. The Claimant asked for an adjournment of that hearing to enable him to seek such a report. The Employment Tribunal indicated that it would adjourn, but that any such adjournment would be conditional on a substantial contribution to the Respondent's costs, which the Tribunal put in the sum of £1,200. At that point the Claimant withdrew his application for an adjournment, because, as he now says, he could not afford that sum.

4. The Claimant says that making the offer of an adjournment conditional on the payment of costs was unfair because the lack of a medical report was the fault of the Respondents, who had

failed to comply with earlier orders of the Employment Tribunal. I should say that the Tribunal, basing itself on his oral evidence and the occupational health reports and notes, came to the conclusion at paragraph 14 of their Judgment, that the Claimant had exaggerated the effect of the impairment that they had found, and that they "heard little medical evidence to support the Claimant's assertion that his dizziness continued".

History of proceedings

5. It is necessary to look at the history of the case management by the Employment Tribunal in considering the Claimant's appeal. The Claimant was dismissed on the grounds of incapacity due to ill-health on 25 January 2011, having been off work for over five months. It was his case, as I have indicated, that he was disabled, having been diagnosed with gastritis and hernia hiatus in August 2010, and that proper adjustments had not been made. He claimed unfair dismissal, disability discrimination, both direct and by failure to make adjustments. The Respondents did not admit that he was technically disabled and denied disability discrimination and unfair dismissal.

6. There was a case management discussion on 28 July 2011, and the Tribunal made a series of orders set out at pages 44 and 45 of my bundle. In particular, the Claimant was to produce a written statement dealing with his alleged disability by 25 August 2011. He was also to disclose all his medical records by that date. And, by paragraph 5, the Respondent was to inform the Tribunal and the Claimant whether it continued to dispute the fact and/or extent of the Claimant's disability within two weeks of the receipt of that statement and the medical records. So that would have been in early September 2011. Then paragraph 6 is the all-important order. It says this:

> **"If the Respondent continues to dispute the fact and/or extent of the Claimant's disability they shall (having agreed to do so) jointly instruct a suitably qualified medical expert to report on**

> **the question of the Claimant's disability, such report to be provided to the parties within 8 weeks from the date the Respondent informs the Claimant and Tribunal of the fact that it continues to dispute liability."**

The hearing was fixed for 17-20 January 2012, five or six months after the case management discussion.

7. On 14 December 2011 Osborne Clarke, on behalf of the Respondents, wrote to the Tribunal. They confirmed that the Claimant had by then provided his written statement concerning disability, copies of his medical records, and details of his complaint. They said the Respondent was in the process of considering those documents and they noted that the timetable had effectively slipped. They proposed a new timetable, which required them to indicate whether they continued to dispute disability by 16 January 2012 and moved the deadline for the report under paragraph 6 of the case management order to 12 March 2012. All that obviously required an adjournment of the date that had been fixed for the Employment Tribunal hearing. On 3 January 2012 the Tribunal vacated the hearing date and agreed to the change in the dates on the timetable. I would note at this point that it is clear that that adjournment and that shifting of dates was clearly something for which the Claimant was responsible.

8. At some stage the hearing was re-fixed for 27 June 2012. On 6 February 2012 the Respondents through Osborne Clarke indicated that they did contest the issue of disability, and they went on to say this:

> **"However, we consider there is sufficient evidence currently available for the Tribunal to make a finding on the issue of disability and that instructing a medical expert would be of limited value, given the time that has elapsed since the point of dismissal. We therefore suggest that there is no need for either party to be put to the cost of instructing a joint medical expert and propose that the Tribunal determine the issue on the basis of the evidence currently available."**

Although that represented a shift in the position from that which they had indicated in July 2011, it is fair to say that that position was thereafter maintained right through to the actual hearing which took place in February 2013.

9. A good six weeks later, the Claimant responded to that communication from Osborne Clarke on 29 March 2012, saying:

> **"I insist and declare that the respondent adheres and obeys the orders as stated at point 6 especially that there is sufficient proof and evidence of my disability. And that all the time that has elapsed since my evidence was presented."**

So the Claimant was, albeit very late, indicating that, so far as he was concerned, he wanted a jointly instructed expert, but, as I say, that was rather late, as Mr Harris points out. Under the new timetable, the report was to have been provided two weeks before the Claimant's communication of 29 March 2012.

10. Osborne Clarke, in response, wrote on 13 April 2012 to Mr Green, who by this time was representing the Claimant. They said that they confirmed their position regarding disability in their letter to the Claimant dated 6 February 2012, over two months before. They said that having received no response to that position, the Respondent had proceeded on the basis that both parties were in agreement that there was no need to obtain further medical evidence. They went on to say this:

> **"Notwithstanding that the Respondent does not consider further medical evidence is necessary, it is willing to pay half the costs of the jointly appointed medical expert's assessment and report. You may wish to apply to the Tribunal for a contribution to the Claimant's half of the medical expert's costs."**

That seems to be a reference to getting money from the Tribunal. Whether that was a realistic proposal is not clear, but nothing turns on it. They went on and said:

> **"We are in the process of making enquiries as to the availability of medical practitioners with the relevant expertise in the local area and are currently waiting for confirmation as to availability. We will write to you with our suggestions as soon as we receive responses from the medical practitioners. If the Claimant wishes to propose any medical experts who are available to assess his medical condition swiftly, please provide the details to us together with a curriculum vitae or statement of qualifications and experience as soon as available."**

They then raised a matter that had already come up about disclosure of the Claimant's occupational health notes.

11. The position on the joint report was that it was open, of course, at all times to the Claimant to find a suitable expert and to press on with his instruction, but in fact the Claimant failed to take the matter in hand, although by this stage he was represented by Mr Green. On 20 April 2012 Osborne Clarke wrote to Mr Green, pointing out the deadlines (as I have said the hearing was now fixed for late June 2012) and asking the Claimant to provide details of appropriate medical experts.

12. On 30 April 2012 Osborne Clarke wrote again to Mr Green, saying they had not been able to identify an expert, but there were two people who they named who they had not had answers from. Not only did they name them but they gave details of their secretaries and telephone numbers and email addresses. They said they would continue to try to contact those individuals, but they stressed that it was up to the Claimant to push matters forward and to contact them in the first instance. On 14 May 2012 Osborne Clarke wrote again to Mr Green, saying that they had had no luck but also pointing out that there had been no answer and no activity on the part of the Claimant in relation to getting a joint expert and they also pointed that they were very worried about the case not being ready for the late June date.

13. A few days later, on 17 May 2012 they wrote to the Tribunal and pointed out what had been going on and asked that the late June date was postponed and that revised directions be given. That application was refused by the Tribunal on 29 May 2012, and the Judge said in the letter of refusal that Osborne Clarke's letter:

> **"...did not indicate any active involvement by the Claimant in seeking to identify a medical expert. If that is the case, as the burden of proof is on the Claimant to establish the facts and extent of his claimed disability, application for postponement is refused."**

In the event, and luckily at that stage for the Claimant so far as his litigation was concerned, the late June hearing was again postponed because he was unwell.

14. Before leaving June 2012 I also note that Mr Green wrote to the Tribunal in late May, saying that he had found a consultant who would do an examination, but asking that the Tribunal provide a letter to enable an examination to take place, because the relevant doctor's secretary had said he would need a letter from an authority detailing the examination required. Unsurprisingly, the Tribunal was not very impressed with that, and wrote back saying it was for the parties to determine the terms of instruction for the expert witness.

15. So the June 2012 date passed, and there had still not been a medical report produced either jointly or at the behest of the Claimant. That remained the case such that, on 20 November 2012, Osborne Clarke wrote to Mr Green and stated this:

> **"As we have previously communicated, the Respondent considers that the issue of whether the Claimant was disabled at the relevant time can be determined on the basis of the medical information which is available and without the need for a referral to a medical expert.**
>
> **In addition we consider that the notes of the occupational health assessment are relevant and we again request that the Claimant provides his permission to the disclosure of those notes. For the avoidance of doubt, we consider that a refusal to do so would be unreasonable in the circumstances."**

So Osborne Clarke were again making it clear that, as far as they were concerned, a medical report was not going to help.

16. On 18 January 2013 Osborne Clarke made an application to the Employment Tribunal, and I should say by this stage the hearing had been fixed for February 2013. The purpose of the application was to request an order requiring the Claimant to provide his permission to the occupational health advisers to disclose the notes to the Respondent. In the course of their letter to the Tribunal, they also informed the Tribunal that the Claimant's representative had stated:

> **"...that the Claimant wishes to instruct a medical expert to provide evidence on the Claimant's medical position. The Respondent's position is that the issue of whether the Claimant was disabled...can be determined by the Tribunal based on the documentary evidence already in existence and that the notes of the occupational health assessment will be of importance in that assessment. In addition, given the time that has passed since the Claimant's dismissal in 2011 we consider that a medical expert's assessment carried out at this stage would be of limited assistance to the Tribunal. Clearly the Respondent is not in a position to a refuse a request by the Claimant to obtain an assessment by a medical expert, however the Respondent's position is that given the above, the Respondent does not consider it reasonable to expect it to pay for or contribute to the costs of any such assessment. We consider that this position has been made clear to the Claimant's representative."**

17. Mr Green wrote to the Tribunal on 22 January 2013, saying that his position was that:

> **"...advice from an independent consultant would be beneficial and necessary in this case as the occupational health adviser...used by the respondent is paid by the respondent and is therefore not truly independent."**

He said that the Respondent had consistently refused to agree to a consultation with an independent consultant and sought an order that the Respondent co-operate with the Claimant in agreeing a truly independent examination of the Claimant by an independent medical expert. On 4 February 2013 he also wrote to the Tribunal, suggesting that the Respondents had failed to comply with paragraph 6 of the original case management order and seeking, on the basis of that, an order striking out their defence for non-compliance.

18. That led to a decision by the Employment Tribunal, in a letter dated 11 February 2013, from Employment Judge O'Rourke, which says this.

> **"The application for strike out of the response is refused. The Claimant is referred to [another letter] and is reminded that as he is alleging that he is disabled, the burden of proof in that respect is upon him and it is therefore for him to decide what evidence he wishes to produce at the hearing to support that contention."**

19. As I have already described, the hearing took place on 13 February 2013. At the outset of the hearing, the Claimant raised the fact there was no statement from a medical expert regarding the asserted disability. The matters which led to this situation were discussed. The Claimant then sought to apply for an adjournment. The Tribunal indicated it would postpone the hearing to allow such a statement to be obtained and would make a costs order in the Respondent's favour in the sum of £1,200. Following consideration, the Claimant did not pursue the postponement application. The case therefore went ahead, as I have described, and the Claimant lost on the issue of disability. Mr Harris, who has appeared as I say for the Respondents today, confirms that at the hearing the Tribunal went through the correspondence in much the way that I have just done.

Conclusions

20. It seems to me that this appeal cannot succeed unless the decision by the Tribunal to refuse the adjournment unless the £1,200 costs was paid was a decision outside the range of case management decisions that Employment Tribunals are entitled to make. Looking at the history, it is right to say that the Respondents somewhat changed their position between 2011 and 2012 as to the requirement for an independent expert and as to their willingness to jointly instruct such an expert. But, given the whole history, it seems to me clear that it was the Claimant that was at fault, at least by the time the case came up for hearing in February 2013. If he had wanted to move things along, that was within his power, and he and his advisers

should have moved things along. They had raised the matter with the Tribunal at least twice and been given answers unfavourable to them. They had not appealed against those decisions by the Tribunal or taken any further steps. By 13 February 2013, with the long previous history, it was open to the Tribunal and actually quite generous of the Tribunal to say that there could be an adjournment but only on terms that the Claimant pay the costs or part of the costs which had been thrown away. I cannot see any valid criticism that can be made of that decision.

21. I have re-read the Notice of Appeal and the skeleton argument by the Appellant, but I can see no basis for allowing this appeal, and I therefore dismiss it.