



EMPLOYMENT TRIBUNALS

Claimant: Mr C Golding

Respondent: I 4 C Executive Search Limited

Heard at: Lincoln **On:** Wednesday 21 August 2019

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimant: In Person

Respondent: Mr M Keenan, Solicitor

JUDGMENT

The Employment Judge gave judgment as follows: -

1. The Claimant's application to strike out the response fails and is dismissed.
2. The Claimant's application for a wasted costs order against the Respondent's representative fails and is dismissed.
3. The Respondent is ordered to pay the Claimant's costs in respect of the adjournment of the hearing on 12 December 2018 in the sum of £360.00.

REASONS

Background to this Hearing

1. The Claimant presented his claims to the Tribunal on 22 December 2017. He had been employed as a Director of the Respondent company between 3 October 2011 and 25 October 2017. He was dismissed for alleged gross misconduct. He claimed unfair dismissal and breach of contract in respect of notice pay.
2. The claim had originally been listed for hearing on 19 July 2018. At a telephone case management Preliminary Hearing on 18 June 2018 conducted by my colleague Employment Judge Faulkner he postponed the hearing and ordered the matter should be listed for 2 days. The parties were to provide details of availability for a hearing to be listed in Lincoln.
3. On 23 July 2018 the parties were notified that the case would be heard at the Lincoln Hearing Centre on 12 and 13 December 2018.
4. On 5 October 2018 there was a commencement of winding up of the

company and the company now is in creditors voluntary liquidation. These proceedings continued.

5. An application for a postponement of the hearing was made by the Respondent's representative on 11 December 2018. The hearing was postponed by my colleague Regional Employment Judge Swann on 11 December 2018. The reason for the postponement was the non-availability of Mr Hancock, a Director of the Respondent company and main witness.

6. The applications before me arise out of that postponement. The application made on 21 February 2019 was for: -

- A costs/preparation time order
- And/or a wasted costs order on the grounds that the respondent adapted abusively and disruptively in seeking the postponement based on misrepresentations after the health of Mr Hancock
- To strike out the response because the manner in which the proceedings had been conducted by the Respondent had been scandalous and unreasonable.

7. Whilst the parties have corresponded in respect of the above application, no efforts have been made at this stage to relist the matter for hearing. I have dealt with that today in the case management orders that follow on from this decision.

Listing the Final Hearing

8. The claim will be heard by an Employment Judge sitting alone at the **Magistrates Court, 358 High Street, Lincoln LN5 7QA on Monday 25 November 2019, Wednesday 27 November 2019 and Thursday 28 November 2019 at 10:00 am** on each day or as soon thereafter on each day as the Tribunal can hear it. The case has been given a time allocation of 3 days and will deal with liability and remedy. The Employment Judge will also read into the file at Nottingham on Friday 22 November 2019 and the parties are not required to attend on that day.

Evidence

9. I heard evidence from Lee Hancock, a Director of the Respondents and Caroline Adams a witness for the Claimant. I was satisfied that both gave truthful and consistent evidence.

The Relevant Facts

10. The claim was listed for hearing for 2 days at the Lincoln Hearing Centre on 12 and 13 December 2018.

11. A commencement of the winding up of the Respondents occurred on 5 October 2018 when they appointed an insolvency practitioner, Michael Chamberlain of Chamberlain and Co to be responsible for a creditors voluntary liquidation. The company is now in creditors voluntary liquidation.

12. On 10 December 2018 at 9:13 am Alexandria Barnes, a Litigation Executive for Peninsula wrote to the Tribunal to request a postponement of the hearing. They said that they had now been instructed by the insurers of the

Respondent company and needed additional time to take instructions and draft witness statements. The Claimant's representative objected to the application which came before me. I refused the postponement request saying that the case had been listed for hearing since July 2018. The previous hearing listed in July 2018 had been postponed at the Respondent's request and the Claimant had been dismissed for over 12 months and the claim should now proceed.

13. On 11 December 2018 at 11:05 am Alexandria Barnes made a further application for a postponement. She said since the initial application had been made they had now become aware that Lee Hancock who was the main witness for the Respondent had suffered an injury to his back and as a result could not walk or stand for any period of time. They had sought medical evidence and would provide this once it was available. The solicitor for the Claimant again objected to the postponement "in the strongest possible terms". They said that there had been no mention of Mr Hancock's injury the day before when the previous application for a postponement had been made.

14. The matter came before my colleague Regional Employment Judge Swann who decided the case should be postponed. His reasons were: -

"Having considered the submissions made by both parties and whilst this is clearly going to cause difficulties for the Claimant, given the potential evidence to be provided by Mr Hancock and in the interests of justice, it is appropriate the case be postponed and relisted as soon as possible and to avoid the case going part heard. The Respondent is required to produce the medical evidence referred to within 7 days."

15. Having received notification of the postponement the Claimant then made an urgent appeal regarding the decision that had taken place. His e-mail set out his objections to the postponement.

16. My colleague Employment Judge Heap responded to that e-mail at 15:47 on that day. The e-mail had been referred to my colleague Employment Judge Heap because Regional Employment Judge Swann was not available that afternoon and she decided to treat the "appeal" as an application for reconsideration under Rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the rules").

17. She refused the application saying that Regional Employment Judge Swann had considered the representations of the Claimant before taking a decision as to whether to postpone the hearing. That it was clear that Peninsula had not been aware of the illness of Mr Hancock at the time the original application was made and she noted that the Respondent's had been ordered to provide medical evidence. She said that the Claimant could make any necessary applications once the medical evidence was received if he continued to dispute the incapacity of Mr Hancock and wished to adduce evidence that he was not unfit as alleged and that the Tribunal has been misled.

18. She decided that the decision of Regional Employment Judge Swann should stand and the hearing would not proceed.

19. On 17 December 2018 Alexandria Barnes sent to the Tribunal a copy of the statement of fitness for work. The document indicated that the Claimant had been assessed on 12 December 2018 at the Birchwood Medical Practice. It certified that he was not fit for work because of "back pain". The medical

evidence did not comply with the Presidential Guidance on postponements and adjournments because it did not deal with his incapacity to attend the hearing or when the incapacity first manifested itself, nor did it deal with when he would be fit to attend. The letter from Alexandra Barnes said that it was expected the condition would last for 2 weeks and that he had also produced a second statement of fitness for work which is dated until 2 January 2019 as his condition had not improved.

20. From the medical evidence produced to me today I can see in fact that Mr Hancock had been examined at home on 3 December 2018. The notes indicate that he had been suffering from lower back pain since the previous day. His diagnosis was paraspinal muscle spasm and he was prescribed with Diazepam and Co-codamol.

21. He next saw a doctor on 12 December 2018. The notes say that he had been gradually getting better until he had twisted his back again the previous night and had to miss the Tribunal because of his back pain and wanted a sicknote.

22. He saw another doctor on 13 December 2018 who gave him a further sicknote and the doctor described "lower right muscle tenderness, no spinal tenderness, no red flags. The diagnosis was "low back pain".

23. Mrs Adams saw Mr Hancock on the evening of 21 December 2018 coming out of the Strugglers Inn in Lincoln and being collected by his wife. She says at that time Mr Hancock was walking without aid and said that her impression was that it appeared that Mr Hancock was intoxicated. Mr Hancock does not dispute that Mrs Adams saw him or that he had been for a drink but explains that his condition had improved dramatically since 13 December 2018.

24. Mr Hancock tells me that he had had 2 physiotherapy appointments on 13 and 18 December 2018 and that by 21 December 2018 he was sufficiently well enough to go into work and could sit up or stand. On that date he had gone out with friends to celebrate Christmas and that he had been in the Strugglers Inn in Lincoln.

The Law

Strike out

25. The Claimant's application for a strike out is made under Rule 37 of the rules. That states:

"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike 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 conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious."

26. It is contended by the Claimant in this case that the manner in which these proceedings have been conducted by the Respondent have been scandalous and unreasonable.

27. The grounds for this are that the Respondent's did not provide all the medical evidence and prognosis compliant with the Presidential Guidance. That the Respondent had misled and misrepresented the position to the Tribunal about Mr Hancock's health. That their purpose was to delay the proceedings.

28. As I explained to Mr Golding, strike out is a "draconian" measure and would only be exercised by me today if I was satisfied that the Respondent's had deliberately misled the Tribunal about Mr Hancock's ability to attend the hearing.

Costs

29. The Claimant makes a costs application against the Respondent under Rule 76 of the rules. That provides: -

"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that: -

(c) A hearing has been postponed or adjourned on the application of a party made less than 7 days before the hearing on which the relevant hearing begins."

30. The amount of the costs order is determined in accordance with Rule 78 which gives me the power to order a specified amount not exceeding £20,000.

Wasted Costs Order

31. This claim is made under Rule 80 which provides: -

"(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs: -

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) which in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay."

32. This involves a 3-stage test which comprises the following: -

"(1) Has the legal representative acted improperly, unreasonably or negligently?

(2) If so did such conduct cause the applicant to incur unnecessary costs?

(3) If so is it in the circumstances just to order a legal representative to compensate the applicant for the whole or any part of the relevant costs?"

My Conclusions

33. Having heard evidence from the parties I am satisfied on balance that Mr Hancock was genuinely incapacitated as at 11 December 2018. The medical evidence shows that he had suffered a back problem on 2 December 2018 which

had necessitated him calling out the doctor on the following day. I am satisfied that his condition worsened again on 11 December 2018 to the extent that he could not attend the hearing. This is confirmed in his medical notes relating to his appointment with his doctors on 12 and 13 December 2018. As I am satisfied that he has not misled the Tribunal it is clearly not appropriate for me to strike out the response.

34. I am satisfied that he had recovered sufficiently by 21 December 2019 to be able to celebrate in town but that does not mean he was fit to attend the hearing on 12 and 13 December 2018.

Costs

35. I am satisfied that the Claimant incurred costs as a result of the postponement of the hearing. The application was made less than 7 days before the hearing. His solicitors had clearly been involved in e-mailing the Tribunal with their objections to the postponement and they have spent some time in considering documents. I am satisfied that the costs incurred as a result of the postponement are excessive at £768.00 plus VAT. I am satisfied that an appropriate amount of costs to award in this case is £300.00 plus VAT.

36. I am satisfied that it would be appropriate to exercise my discretion to award those costs in this case on the grounds that the case had to be postponed on only two days' notice. I note that the charge out rate for the solicitor dealing with this matter for the Claimant was £120.00 per hour plus VAT. I am prepared to allow him one-hour preparation time and one and a half hours for sending out and receiving e-mails and making telephone calls. That totals £300.00 plus VAT.

Wasted Costs Order

37. I am satisfied in this case that the legal representative has not acted improperly, unreasonably or negligently. They have acted properly on their instructions from their client who informed them that he was not fit to attend the hearing. They did not try to mislead the Tribunal in any way nor have they behaved improperly, unreasonably or negligently. That claim also fails and is dismissed.

Employment Judge Hutchinson

Date 4 September 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE