



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Carney

Respondent: Athena Care (Ormskirk) Limited t/a Abbeywood Lodge

HELD AT: Manchester (by CVP)

ON: 19 April 2021

BEFORE: Employment Judge B Hodgson (sitting alone)

REPRESENTATION

Claimant: Mr T Booth, friend

Respondent: Ms L Kaye, Counsel

JUDGMENT ON APPLICATION FOR RELIEF FROM SANCTION having been sent to the parties on 11 May 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Application

1. An agreed bundle was prepared for the purposes of this preliminary hearing and references to page numbers within these reasons are to pages as numbered within such bundle
2. In her ET1 Claim Form (pages 1 – 12), the claimant indicated claims of unfair dismissal and disability discrimination which are denied by the respondent (see Response Form at pages 22 – 29)

3. A Preliminary Hearing was held on 12 March 2020 ("the first PH") at which detailed Case Management Orders were made. The complaints being pursued were identified as: unfair dismissal; discrimination arising from disability; and failure to make reasonable adjustments
4. The question of whether or not the claimant was a disabled person, as defined, was not conceded. It was identified that "the claimant confirmed that she has suffered from Stage 3 cancer and has developed brittle bones as a consequence which led to her breaking her back". The claimant was ordered to disclose relevant medical evidence and produce an Impact Statement
5. The claimant failed to comply with these Orders and ultimately an Unless Order was made on 29 September 2020 (sent to the parties on 5 October 2020) ordering compliance by no later than 16 November 2020 (pages 63 – 65). The terms of the Unless Order were confined solely to the complaints of disability discrimination (and not, for the avoidance of doubt, to the complaint of unfair dismissal). Although some limited disclosure of medical records is understood to have been made in or about November 2020, it is not in dispute that this Unless Order was not complied with
6. The matter came back before the Tribunal for a further Preliminary Hearing on 2 February 2021 ("the second PH") (see pages 30 – 40)
7. At the second PH, the Tribunal noted that, contrary to the provisions of Rule 38, the claimant had not been sent written notice confirming that her complaints of disability discrimination had been dismissed. As a consequence, the right of the claimant to apply for the Order to be set aside within 14 days had not been triggered
8. It was further noted, following detailed discussion, that the impairment being relied upon by the claimant was in fact cancer. As a consequence the claimant would be deemed disabled and, in hindsight, the Orders made at the first PH as to production of medical records and an Impact Statement were not necessary with regard to the question of whether or not the claimant was at the relevant time a disabled person as defined. The Tribunal refers to paragraphs (8) to (22) of the Case Summary of the second PH (at pages 33 – 36) for the detailed discussion in this regard
9. Written notice pursuant to the provisions of Rule 38 was subsequently sent by the Tribunal by letter dated 8 February 2021 (sent by email) (page 41)
10. By email dated 8 February 2021, the claimant's representative, Mr Booth, made application to have the order set aside, setting out in detail the grounds upon which the application was based (pages 86 – 88)

Law

11. Rule 38 states:

...

- (2) *A party whose claim or response has been dismissed, in whole or in part, as a result of [an Unless Order] may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. ...*

12. Rule 2 states:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable

- (a) *ensuring that the parties are on an equal footing*
- (b) *dealing with cases in ways which are proportionate to the complexity and importance of the issues*
- (c) *avoiding unnecessary formality and seeking flexibility in the proceedings*
- (d) *avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) *saving expense*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and the Tribunal

Submissions

13. The claimant's representative relied upon the matters set out in his written application, supplemented by oral submissions, summarised as follows:

- 13.1. he accepted personal responsibility for the default, stating that it was in no way the fault of the claimant herself
- 13.2. he had been extraordinarily busy in his Care Centre work as a consequence of the Covid pandemic
- 13.3. they had had understandable difficulty in obtaining written medical records as a result of the strain placed upon the NHS in recent times
- 13.4. his father's health issues resulted in Mr Booth being required to devote extensive time to his care

- 13.5. he and the claimant, who had been engaged, separated in or about February 2020 which impacted on their communication
- 13.6. he confirmed that the claimant was relying solely on cancer as a deemed disability, the claimant's back injury not being relied upon as a discrete impairment. He believed this to have always been the claimant's position
14. The respondent's representative opposed the application, making oral submissions summarised as follows:
 - 14.1. Setting aside the dismissal of the disability discrimination claims can only be done if it is in the interests of justice to do so
 - 14.2. Under the analogous CPR Rule (Rule 39), all the circumstances of the case need to be looked at
 - 14.3. The first factor to consider is the extent of non-compliance and there has been blatant non-compliance. Limited medical records had been produced only after the date for compliance set out in the Unless Order and an attempt at an Impact Statement only on 1 February 2021 (the day prior to the second PH)
 - 14.4. The second factor is that there is no criticism of the administration on the part of the Tribunal – the Orders were sent and received. There has been no application for extension, the Orders were simply ignored. The terms of the Unless Order were clear and unambiguous. Although the respondent has sympathy with Mr Booth's personal issues concerning his father's ill-health, this is not a proper explanation for failure to comply. Even if Covid 19 may have impacted upon the timing of the release of medical records, it did not impact on the claimant's ability to produce an Impact Statement
 - 14.5. The third factor is that the default can only properly be described as deliberate
 - 14.6. The fourth factor is the seriousness of the default. The failure to comply has unnecessarily wasted Tribunal resources. It has cost the respondent wasted time and money and denied it the opportunity to review and decide its strategy as it did not understand upon what basis the claimant's case was being put
 - 14.7. The fifth factor is prejudice. There has been very little progress over the last twelve months although the respondent accepts that it probably cannot say that a fair trial is not possible
 - 14.8. The sixth factor is a failure on the part of the claimant to meaningfully remedy the defect. Although the claimant is now relying on cancer to be deemed a disabled person, this was not clear at the earlier stages and

the Orders were made based upon how the claimant was presenting her case at the time

Conclusions

15. This application must be determined "in the interests of justice" and the Tribunal must also be guided by the Overriding Objective "to deal with cases fairly and justly"
16. The claimant has undoubtedly created difficulties for herself (whether directly or through her representative) in failing to comply with the Tribunal Orders and then ultimately failing to comply with the Unless Order
17. Noting the timescale over which the Orders were required to be complied with, and the personal circumstances outlined over that timescale, no satisfactory explanation has been put forward to explain the default which can only properly be categorised as serious. The Tribunal does however acknowledge the difficulty the claimant had in obtaining her medical records and the fact that an attempt was made to forward limited medical records when they were to hand
18. Importantly in this regard, the Tribunal notes that, throughout, the claimant has effectively been a litigant in person. She has been represented by Mr Booth, who was previously in a relationship with her, but he is a lay representative and accepts that he has not dealt with passing on correspondence as promptly as he should have. There is no challenge to Mr Booth's assertion that the claimant herself was materially unaware of the procedure that should have been, but was not being, followed
19. In terms of prejudice, it is now apparent, given the clarification of the basis upon which the claimant relies in terms of being defined as a disabled person, that there was no necessity for the Orders as to disclosure of medical evidence or an Impact Statement and, on that analysis alone, it cannot be said that there has been any prejudice caused to the respondent in terms of the merit of the case. Although reference is made by the respondent's representative to the passage of time and lack of progress in the matter, caused by the claimant's failure to comply with the Tribunal's Orders, no argument has been pursued that the passage of time in itself has caused any prejudice to the respondent
20. The most significant factor for the Tribunal to consider is whether or not a fair trial remains possible and the conclusion of the Tribunal is that clearly this is the case. The hearing of the claim of unfair dismissal is still to proceed in any event. The disability discrimination claims are inherently linked with that claim in terms of the evidence to be produced. Without making any formal concession in that regard, there was no meaningful argument to the contrary pursued on behalf of the respondent
21. Considering and balancing all of these factors and the overall circumstances, the Tribunal is of the clear view that the interests of justice – and the objective

of dealing with cases fairly and justly - are such that it is appropriate to give relief against sanction and permit the disability discrimination claims to proceed

Employment Judge B Hodgson

Date: 22 June 2021

REASONS SENT TO THE PARTIES ON
2 July 2021

FOR THE TRIBUNAL OFFICE

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