



EMPLOYMENT TRIBUNALS

Claimant: Mr M Farrow

Respondent: Out and Out Original Limited

Heard by video On: 8 February 2023

Before: Employment Judge Corrigan

Appearances

For the claimant: In person, prior to his leaving the hearing

For the respondent: Mr M Williams, Counsel

JUDGMENT

1. The claimant's claim is struck out due to the manner in which the proceedings have been conducted by the claimant.
2. In the alternative, the claimant's claim for unlawful deduction of wages is not well-founded. The claimant's claim is dismissed.

REASONS

1. The claimant attended the hearing by telephone only. He had not provided a witness statement or a schedule of loss as he had been ordered to do by 20 January 2023.
2. I explored with the claimant whether he could attend by video as is usually required at a final hearing when he will be giving evidence. He gave a number of reasons why he could not, appearing unwilling to do so, citing that he was in a conference room at work (a solicitors' firm) using a work

- phone. Eventually he accepted he had a smart phone back at his desk and he could try to get it and log in. He then hung up before the conversation ended, although he may have understood that he was to log back in by video straight away.
3. He then logged back in again by phone only and though he said he could see the other participants in the video we still could not see him. He said he was unwilling to attend by video. He said for the first time that he was ill. I explained what would normally be involved in giving evidence and the need to see the witness. He said he did not want to go on camera. He said he was at work and was ill. He said had flu.
 4. He said he had provided his evidence. I asked about his witness statement as the respondent said he had not disclosed a statement. He said he did not need to do a statement, he had disclosed his documents. I explained he had been ordered to do a statement and that he needed to prepare a statement setting out his evidence that he wanted to give to the tribunal and that oral evidence is by way of responding to questions from the other side and tribunal.
 5. I explained that it is his case and we would normally expect a party not to be at work during a hearing and to join the hearing so we can see the party and see them as they give evidence.
 6. He said at some stage "we can adjourn, it's up to you".
 7. As I was still speaking to the claimant he left the hearing without explanation (i.e. he appeared to "hang up").
 8. The clerk contacted the claimant by email (as the tribunal had no current contact number on file) to ascertain whether he had left intentionally or whether he would be returning stating: "You appear to have been disconnected – will you be rejoining the hearing as [Employment Judge] Corrigan would like to continue speaking with you?"
 9. The tribunal received the following reply:
"I am unwell. I was given the choice to enter via telephone which I did. I then as the judge asked went online. I do not want to go on webcam looking this ill. Sadly...I am [ill] and wish this hearing to be postponed for another date".
 10. It appeared the claimant was behaving unreasonably as he had attended work, was able to attend the hearing by phone and was able to speak eloquently over the phone. This all appeared inconsistent with his unwillingness to appear by video to a video hearing. He only mentioned feeling unwell once he was asked to re-attend by video. His concern appeared to be his appearance whilst ill (though he had attended work) rather than being unfit to attend.
 11. However, I considered rule 46 (a hearing can be conducted by use of electronic communication (including by telephone) provided that the tribunal considers that it would be just and equitable to do so and provided the parties ...attending the hearing are able to hear what the Tribunal hears

and, so far as practicable, see any witness seen by the tribunal); the overriding objective of dealing with a case proportionately; and the fact that the case is simply about whether the claimant should have been paid full pay or sick pay over the period 22 June 2021 to 2 July 2021. I spoke with the respondent's representative who also acknowledged that despite the claimant's conduct the most proportionate way forward was to invite him to return and allow the claimant to participate and give evidence by telephone, though it was not ideal.

12. The following message was therefore sent to the claimant at 11.37:

"Employment Judge Corrigan orders you to return to the hearing in whatever format you choose by 11.45 am. You will be allowed to give brief evidence by telephone. Otherwise, she will consider whether or not the claim should be struck out".

13. The claimant had not attended by 11.56 but the respondent's witness was able to provide a telephone number for the claimant so the clerk called him to check he did receive the email. The message relayed by the clerk was that the claimant had seen the email but that he had said he was unwell and would be happy to attend once he was feeling better. He was now on his way home. He would not be logging into the hearing but would be happy to once he was better.

14. I heard from the respondent's representative who applied for the claim to be struck out. He argued as follows. The claimant's explanation was not remotely satisfactory. It was difficult to reconcile the claimant's statements that he was at work, and "keeping his head down at work", with not being well enough to come on camera. He said the explanation lacks credibility. It was in the context that the claimant had not presented any evidence. He has not submitted a statement or schedule of loss. He has therefore not put forward a positive case and has disobeyed the Tribunal's orders. He is not therefore progressing the case. The case could be struck out for that and for his behaviour today, putting the telephone down twice on the tribunal. His behaviour this morning was unreasonable. It is not in the interests of justice to adjourn.

15. I agreed with the respondent that the claim should be struck out under rule 37(b) on the grounds the claimant had conducted the proceedings unreasonably for the following reasons:

15.1 the claimant had stated he was unwilling to attend a video hearing by video;

15.2 The claimant left the hearing without explanation whilst the Employment Judge was speaking;

15.3 The claimant then declined to return when given the opportunity to return and give evidence and participate by telephone as he had initially wanted.

16. I took into account the background that the claimant had not complied with the tribunal orders stating he "did not need a witness statement" and that he had said he did not want to come onto the video looking unwell despite having attended work. An adjournment for the reasons given by the

claimant would be completely disproportionate given the value and issues in the claim

17. Under rule 47 when a party fails to attend or be represented at a hearing the Tribunal may dismiss the case or proceed in the absence of the party. An alternative was therefore to continue to hear the case in the claimant's absence. With the respondent's agreement I did go on to consider the claim itself in the alternative (that being the most proportionate use of the time) and to hear brief evidence from Ms Leake, the respondent's witness, and consider the documentation in respect of the substantive issue of whether the claimant was off sick during the period 22 June 2021 to 2 July 2021 and therefore only entitled to sick pay.
18. The respondent's case is that the claimant was paid full pay on 22 June 2021 and then I accepted that the claimant's own messages showed that he was unwell from 23rd June until his return to work on 5th July 2021. On 23rd June the claimant was unwell and not working. He requested 24th and 25th June as a sick day. He did then express an intention to work from home from the following Monday. I was concerned about a response from Mr Fairburn which appeared to say he could not do so, despite the respondent's memo on 13 May 2021 and Mr Fairburn initially having said he was to work at home when he first went sick. It appeared he may have changed his stance with the claimant because of an issue that had arisen. However, I was satisfied that this was then superseded by the claimant remaining unwell and being admitted to hospital from about the 25th June 2021 until 29th or 30th June 2021. There was a message from the claimant on the 30th June saying his symptoms were not better and that he understood he was off ill. I asked questions about the 1-2 July 2021 but accepted that the respondent did not receive anything to contradict their understanding that the claimant remained too unwell to work. On 5th July the claimant sent an email saying "this would be my first day returning to the office after recovering from COVID-19". This is consistent with this being the claimant's first day well enough to work.
19. I therefore found that the claimant's claim was in any event, and in the alternative, not well-founded on the merits. He was only entitled to statutory sick pay from 23 June 2021 until 2 July 2021 and that was what he was paid.
20. The following message was then forwarded to me after the hearing had finished, although sent to the tribunal at 11.47, in response to the message at paragraph 12 above.
21. That stated "sadly, however since my last email was sent my symptoms have got worse. I am currently travelling home at this moment and not well enough to attend this hearing. Can this be passed to the judge to have this hearing moved to another date when I am better." In the absence of supporting medical evidence, and in the context of the way the claimant had behaved during the hearing, this did not change my decision.

Employment Judge Corrigan
London South
20 March 2023

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.