



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Stephen Murrell

v

Norse Commercial Services Limited

Heard at: Norwich

On: 31 May 2023

Before: Employment Judge Postle

Appearances

For the Claimants: Not present

For the Respondent: Not present

JUDGMENT

Decision on the Respondent's Application to Strike Out, following written submissions by both parties' Representatives

1. The Respondent's Application to Strike Out does not succeed.
2. The issue of costs should be revisited at the conclusion of the Full Merits Hearing.

REASONS

1. This matter came before Employment Judge Postle on 9 December 2022, originally to determine whether the Claimant had a disability within the meaning of s.6 of the Equality Act 2010. The Claimant having pleaded a number of neuro-diverse conditions. Prior to that Hearing, the Respondents had on 17 November 2022, in writing, made an Application for Strike Out pursuant to Rule 37(1)(b) and Rule 37(1)(c) and further an Application for Costs under Rule 76.
2. At the Hearing on 9 December 2022, some concern was expressed by Respondent's Counsel that the Claimant might, or would, fall within the definition of a vulnerable witness and thus whether it was possible to proceed with the Respondent's Application for a number of various reasons advanced by the Respondent's Counsel.

3. As a result of that, a short adjournment was provided for the Claimant's Counsel to discuss the situation with the Claimant.
4. Counsel for the Claimant, having discussed the matter with the Claimant, wanted to proceed with the original aim of that Hearing; namely to determine the issue of disability.
5. Employment Judge Postle reminded Claimant's Counsel that given the Respondent's Application, it would clearly be appropriate to deal with that first, having regard to the overriding objective, albeit to give Claimant's Counsel an opportunity to respond and perhaps the matter should proceed by way of written submissions.
6. Employment Judge Postle took the view in order to ensure that the parties were on an equal footing, having regard to the overriding objective, that the case should be vacated that day and proceed by way of written submission.
7. Various Orders were made for written submissions, particularly the Respondent's Application to be served by 20 January 2023. The Claimant to respond by 10 February 2023. The Respondent had the right to reply on the Law by 17 February 2023.
8. Written submissions were sent to Watford Administration on behalf of the Claimant, around 10 February 2023, consisting of 37 pages.
9. The Respondent's submissions were sent to the Watford Administration around 20 January 2023, consisting of 174 pages. The Respondents further sent in a response to the Claimant's submissions around 17 February 2023.
10. Unfortunately, the papers did not find their way to Employment Judge Postle until late April, from the Watford Administration. Hence the delay.
11. The Claimant had relied on a number of Authorities, particularly:
 - Anyanwu & Anr. v South Bank Student Union & Anr. (Commission for Racial Equality) [2001] UKHL/14;
 - 479 Brennan & Ors. v Sunderland City Council & Ors. UKEAT/349/08;
 - Dunlop Slazenger International Ltd. v Joe Bloggs Sports Ltd. [2003] EWCA Civ.901;
 - 529 Great Atlantic Insurance Company v The Home Insurance Company and Ors. [1981] Court of Appeal; and
 - Thomas Pink Ltd. v Victoria's Secret UK Ltd. [2014] EWHC 1955.

12. The Respondents have also submitted a number of Authorities, particularly:
- Blockbuster Entertainment Ltd. v James [2006] IRLR 630;
 - HM Prison Service v Dolby [2003] IRLR 124;
 - Bennett v London Borough of Southwark [2002] EWCA Civ.223;
 - De Keyser Ltd. v Wilson [2001] IRLR 324;
 - Clancy v Cannock Chase Technical College [2001] IRLR 331;
 - Bennett v Southwark London Borough Council [2008] IRLR 873;
 - Emuemukoro v Croma Vigilant (Scotland) Ltd. EA 2022 ICR 327;
 - Harris v Academies Enterprise Trust [2015] IRLR 2008;
 - Rush & Tompkins Ltd. v Greater London Council & Anr. [1988] 1ALLER;
 - South Shropshire District Council v Amos CA 341; and
 - Mr S Graham v Agilitas IT Solutions Ltd. UKEAT/02/12/17.
13. Employment Judge Postle is grateful to both parties' Counsel for their extensive written representations and indeed extensive Authorities provided.
14. In summary, the Respondent's Application is that the Claimant's first claim presented on 29 September 2021, was deficient in that it failed to identify with any clarity the Claimant's disability or disabilities relied upon. Particularly the manner and extent to which the disability / disabilities were relied upon.
15. The Respondent entered their Response on 2 December 2021 indicating their intention to defend the Claimant's claim. Indeed, paragraph 5 of the Response set out information which was missing from the Claimant's pleaded case. In particular paragraphs 22b, 25b, 28b and 33 further identifying disability particularly missing from each of the alleged claims made.
16. The second claim was presented against Mr Wilby and Norse Eastern Limited. Those claims have now been dismissed on withdrawal by the Claimant with dismissal Judgments being sent to the parties on 15 July 2022.
17. Instead of the Claimant providing the information that was missing, it does appear that the Claimant failed or refused to provide the information

requested. Which meant the issue of disability could not be resolved without a Hearing.

18. On 3 March 2022, Employment Judge M Warren made a Case Management Order (Order 1) requiring the Claimant to provide precisely the information which the Respondent previously identified being missing from the claim. At the same time, Employment Judge M Warren Ordered the Claimant disclose all documents relevant to the issue of disability in his possession, including his GP Records and other medical notes. The Claimant was required to comply with Order 1 by no later than 31 March 2022.
19. The Claimant failed to comply with Order 1. The disability information provided was inconclusive and his Specialist Records were so redacted to the point that they were largely pointless in disclosing them. At the same time the Claimant refused to provide his GP Records. Rather oddly at that stage the Claimant's Solicitors threatened the Respondent, through its Representative, with a Wasted Costs Order merely for seeking the information which Tribunal had Ordered.
20. There then appears to have been protracted correspondence between the parties' Representatives which seemed to achieve very little in terms of the Claimant setting out his case regarding his disability and medical evidence in support. Employment Judge Postle therefore made a further Case Management Order (Order 2) once again requiring the Claimant to provide information which had been Ordered by Employment Judge M Warren pursuant to the Order 1. The Claimant was required to comply with Order 2 by no later than 12 August 2022.
21. Oddly and surprisingly, the Claimant continued to fail and refused to comply with either Order 1 or 2.
22. There was then further protracted correspondence and the matter came before Employment Judge Craft as a Telephone Private Preliminary Hearing held on 4 October 2022. Employment Judge Craft, at that Hearing, deemed it appropriate to require the Claimant to provide the information and disclose his medical records which had been the subject of Orders 1 and 2. Therefore Employment Judge Craft Ordered the Claimant, yet again, to provide the information and disclosure (Order 3) making it clear to the Claimant that he must now comply with these Orders if he wished to continue with his claim. The Claimant was Ordered to comply with Order 3 by no later than 1 November 2022.
23. On 28 October 2022, the Claimant's Solicitors wrote to the Respondent requesting further time for the Claimant to comply with Order 3 on the grounds that the Claimant's medical records had not yet been received from his GP Surgery. The Respondents agreed to this extension.

24. On 7 November 2022, the Claimant's Solicitors wrote to the Respondent indicating that the Claimant's medical records were still not available and that for reasons best known to them, commented,

"Getting them is going to be difficult and potentially time consuming".

25. Thereby disregarding the Tribunal's Orders. Apparently that correspondence from the Claimant's Solicitors went on to comment,

"...sees no benefit in further enquiries or deliberation"

and suggests that the Respondent should just concede the issue of disability without any medical evidence, Specialist, GP Records or otherwise for the Respondents to base such a decision on.

26. Clearly the Claimant breached Employment Judge Craft's Orders and remained in breach of those Orders made by Employment Judge M Warren and Employment Judge Postle.
27. It is for that reason the Respondents made their Application on 17 November 2022 to Strike Out the Claimant's claim together with a claim for Costs. Not surprisingly the Claimant resists the Application.
28. The Respondent's position is that the Claimant has been represented by a Solicitor throughout these proceedings and that the Claimant's conduct of the proceedings, whether his or his Solicitor, has been unreasonable. The Respondent's Counsel explores that in some detail at paragraph 39(a)(i) and paragraph 40 of his written submissions. The second submission by the Respondents is that the Claimant's Representative has also acted unreasonably in making references to 'without prejudice' communications between the parties. That is set out in more detail at paragraphs 42 – 51.
29. The Respondent summarised the Claimant's conduct in the proceedings at paragraphs 133 onwards, suggesting amongst other things that the Claimant's conduct through his Solicitor has been entirely and thoroughly unreasonable. Furthermore, it has been scandalous and suggested that the Claimant's Solicitor has breached no less than eight different Provisions of the Solicitor's Regulatory Authority Code of Conduct and sets those out at paragraphs 135a-h.
30. Further, the complete and contumelious failure to comply with: Order 1, being Employment Judge M Warren's Order; Order 2, being Employment Judge Postle's Order; and Order3, being Employment Judge Craft's Order. The Claimant continued to refuse to provide copies of any useful medical evidence that would assist the Tribunal, the Claimant and the Respondent in resolving the issue of the Claimant's disability.
31. The Respondent's Counsel concludes in accepting it is a discretion to Strike Out. The following specific points are made:

- a. The Claimant was taking up a considerable amount of Tribunal time and resources already;
 - b. The Claimant has flagrantly breached the Orders of three separate Employment Judges and his claim has still barely got off the ground;
 - c. The Claimant has had not one, but two second chances. Employment Judge Postle gave him a second chance after breaching Employment Judge M Warren's Order and Employment Judge Craft gave him a second chance after breaching Employment Judge Postle's Order;
 - d. The Claimant's conduct has been wilful, deliberate and persistent, which places him in a no mercy position regardless of whether a fair trial is still possible (De Keyser: riddle);
 - e. The Claimant has additionally shown contempt for the Tribunal's process and Orders. His conduct has long since met the definition of contumelious; and
 - f. There is absolutely no genuine contrition expressed at any point, either by the Claimant or his Solicitors. There is no reason for the Tribunal to think that they would not continue to breach Orders in the future.
32. The Respondent's Counsel concludes in asking the Tribunal to consider factors under the Legal Practice Rules 3.9, reaffirming why the discretion should be exercised in this case, namely:
- a. In the interests of the administration of justice;
 - b. Whether the Application for Relief has been made promptly;
 - c. Whether the failure to comply was intentional;
 - d. Whether there is a good explanation for the failure;
 - e. The extent to which the party in default has complied with other Rules, Practice, Directions, Court Orders and any other pre-action protocol;
 - f. Whether the failure to comply was caused by the party or its legal representative;
 - g. Whether the trial date or the likely date can still be met if Relief is granted;
 - h. The effect to which the failure to comply had on each party; and
 - i. The effect which the granting of Relief would have on each party.
33. The Claimant's response seems to accept there has been failure to provide any sufficient medical evidence in support of the Claimant's various disabilities. They go on to say that the Claimant has personally signed three Permission Forms to have his GP Records sent, starting in

March 2022 and made attempts alongside those of his Solicitors chasing the Records. In support of the failure and delay in disclosure, they say this has been caused by a number of factors, namely:

- a. The moving of house in May 2022;
 - b. Delay in GP Records being sent to a new GP;
 - c. His new GP Practice being short of staff;
 - d. Further change in GP Practice;
 - e. Shortage of staff in the new GP Practice;
 - f. Records ultimately being sent late, albeit redacted, the reason for the redacting of information is said to be about the Claimant's wife and children's medical conditions; and
 - g. The Claimant asserting that the information sent is sufficient to establish the existence of the Claimant's conditions amounting cumulatively to a disability.
34. They go on to suggest that the Claimant's own view is that whilst each of the conditions would meet the definition of disability cumulatively for the purposes of this claim, the ADHD and Autism have overlapping traits and the Claimant has been diagnosed with a combined type of ADHD. Apparently, therefore there is no clear defining line between the Claimant's Autism and ADHD.
35. The Claimant's submissions then go on to really recite and summarise the Authorities provided. Further, it argues there has been no breach in the Code of Conduct in the way the matter has been conducted by the Claimant's Solicitors.
36. The Claimant asserts that the pleadings are entirely adequate except in not of the quality that could reasonably or fairly be described as unreasonable conduct.
37. Any suggestion that privilege has been waived is denied.
38. The Claimant further asserts that they complied with the Case Management Orders supplying information that would have enabled the Respondent to make a concession on disability.
39. The Claimant concludes that the discretion has not been engaged and that a Strike Out would be disproportionate, that the Respondent has caused significant exhaustion of time and resource through the pursuant of weak and sometimes repetitive criticisms of the Claimant.

40. It accepts to the extent if there have been breaches they have been largely caused by the delay of the NHS, for which the Claimant is not to blame.
41. That the Respondent's categorisation of the Claimant's conduct is not reflected in the facts of the case. The Claimant furnished the Respondent with significant quantities of evidence, asked them to concede disability and what they say was contritional litigation conduct followed by lengthy Application in circumstances where a concession on disability is now being offered by the Respondents.
42. The Claimant is extremely sorry that the parties are in the position that they find themselves, not least of all for the time and cost involved. The Claimant cannot accept that any of the issues raised by the Respondent to the extent that any or a few of them have some genuine, albeit limited, merit to render a Strike Out justified or proportionate. The Claimant repeats the sole major issue in this case has been the delay in the provision of GP Records, which is not the fault of the Claimant or his legal advisors and does not warrant a Strike Out and is by its nature not a breach that can happen again.
43. The Claimant responds in respect of the Civil Procedure Rules 3.9 argument. In particular that the Respondent's litigation conduct file cannot conceivably be said to be beyond reproach. None of the Orders made in these proceedings at any time criticised the Claimant.
44. The ultimate concession by the Respondent that the Claimant does have a disability is not the only point in the Claimant's favour and therefore Strike Out is entirely disproportionate. The majority of the criticisms levelled by the Respondent's Application are without significant merit. The breaches admitted by the Claimant are not his fault and not the cause of significant prejudice to the Respondent and the delays are not one in which could form the basis of a Strike Out under Rule 37.
45. The Claimant concludes Strike Out would be wholly unjustifiable.

The Law

46. The power to Strike Out arises under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, particularly Rule 37 which states,

37(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 –

- a. that it is scandalous or vexatious or has no reasonable prospect of success;
- 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;

- c. for non-compliance of any of the Rules or with an Order of the Tribunal;
 - d. ...
 - e. ...
- (2) A claim or response may not be struck out unless the party in question has been given an opportunity to make representations either in writing or if requested by the party at a Hearing.
47. An Employment Tribunal's exercise of any of its powers under the Tribunal Rules is subject to the "overriding objective" which is laid out in Rule 2, which is to deal with cases fairly and justly. This objective includes, amongst other things ensuring that the parties are on an equal footing so far as is practical. It is recognised that this objective can require the Tribunal to take into account a party's vulnerability, and to adjust its procedure to ensure that the party is given a fair opportunity to present his or her case.
48. The word 'scandalous' in the context of Rule 37(1)(a) means irrelevant and abusive of the other side. It is not to be given its colloquial meaning of signifying something that is shocking.
49. A vexatious claim or defence has been described as one that is not pursued with the expectation of success, but to harass the other side or out of some improper motive.
50. Under Rule 37(1)(b), the terms 'scandalous' and 'vexatious' are used in much the same way as they are under Rule 37(1)(a) above.
51. For a Tribunal to Strike Out for unreasonable conduct, it has to be satisfied either that the conduct involved is deliberate and persistent disregard of required procedural steps, or has made a fair trial impossible. In either case the striking out must be a proportionate response.
52. It is not simply the Representative's conduct that needs to be characterised as scandalous, but the way in which he or she is conducting the proceedings on behalf of his or her client. The Tribunal must therefore consider,
- a. the way in which the proceedings have been conducted; and
 - b. how far that is contributable to the party the Representative is acting for and see the significance of the scandalous conduct.
53. The Tribunal repeats, 'scandalous' in the context of this Rule is not shocking, but rather it means either the misuse of legal process in order to vilify others, or the giving of gratuitous insult to the Tribunal in the course of such proceedings.

54. Where the conduct of the proceedings is categorised as scandalous, a Tribunal must go on to consider whether striking out is a proportionate response.

Conclusions

55. This is a case that the Tribunal have thought long and hard about in reaching its decision.
56. There is the accepted vulnerability potentially of the Claimant. It was noted quite properly by Mr Ashley, Counsel for the Respondent, at the Hearing in December. It is also worthy of note that some of the correspondence generated by the Claimant's Solicitors is far from helpful in achieving the overriding objective in moving the case forward.
57. The Tribunal have also considered that during and following the recent pandemic, there have been difficulties by parties in obtaining either medical evidence or their GP Records. The Claimant has, on a number of occasions, breached the Tribunal's Orders and the Claimant / Representative is reminded Orders made by the Tribunal are made to be complied with, indeed, to move the case forward.
58. Whether the Claimant's conduct has genuinely been wilful, deliberate and persistent, it is difficult to conclude given the Claimant's apparent vulnerability.
59. In considering whether to exercise my discretion to Strike Out, I have been minded of the Claimant's vulnerability, once again having regard to the overriding objective. Is it generally in the interests of justice to Strike Out? The Tribunal is not convinced, although it has come very close.
60. It is not clear whether the failure to provide medical GP notes was intentional by the Claimant or if difficulties arose when moving house, a delay by his GP and changes in his GP Practice, giving the Claimant the benefit of doubt.
61. Through the Claimant's Counsel, he has now expressed the fact that he is sorry that the parties find themselves in the position they are. It is fair to say that the major issue, not helped by the Claimant's Solicitors, is the delay in producing the GP Records and their breach of the Tribunal's Orders.
62. However, whether that in itself justifies a Strike Out, on balance the Tribunal is not persuaded, though the Claimant / his Representative ought be aware they have come very close in the Tribunal's view to being Struck Out.
63. The Tribunal repeats, on this occasion it feels that it would be not in the interests of justice, not achieving the overriding objective and

disproportionate to strike out. However, the Claimant / Representative be on notice that any further breaches in bringing the matter to a Hearing, by that the Tribunal means failure to comply with an Order, will lead to the claim being Struck Out and a Costs Order being made.

64. Insofar as costs are concerned, the Tribunal are of the view that these should be revisited pending the outcome of the Full Merits Hearing.

Employment Judge Postle

Date: 16 August 2023

Sent to the parties on: 22 August 2023

For the Tribunal Office.