



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Phipps

Respondent: Priory Education Services Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal

On: 3 July 2019

Before: EJ Kelly

Appearances

For the Claimant: Mr B Symons of counsel

For the Respondent: Mr J Meichen of counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The Judgment of the Tribunal of 4 Jan 2019 is varied so that it will state that 'the claimant had not complied with the Order of the Tribunal dated 9 March 2018' instead of 'the claimant had not complied with the Order of the Tribunal dated 18 September 2017'.
2. Save as above, the Judgment of the Tribunal of 4 Jan 2019 is confirmed.
3. One Assist Legal Services Ltd (OASL) is ordered to pay the respondent the sum of £11,906.17 by way of a wasted costs order under Regulation 81 of schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('ET Rules').

REASONS

1. The claimant originally applied for written reasons within the required time limit. The Tribunal responded on 29 November 2019 asking the claimant to confirm and explain her request within 14 days given the pressure on Tribunal resources. The

claimant did respond within the required time frame. However, we were not made aware of this until 2 March 2021.

2. The hearing was to consider the following applications:
 - 2.1. An application by the respondent of 11 Jan 2019:
 - 2.1.1. for a costs order against the claimant under rule 76(1)(a) of the ET Rules on the grounds that she or her representative had acted vexatiously, abusively, disruptively or otherwise unreasonably in conducting the proceedings; or under rule 76(2) of the ET Rules on the grounds that the claimant had been in breach of an order; or
 - 2.1.2. for a wasted costs order against the claimant's representative, OASL, under rule 80(1) of the ET Rules.
 - 2.2. An application by the claimant of 14 Jan 2019 for reconsideration of a judgment of 4 Jan 2019 striking out her claim.
3. We heard evidence from the claimant and we were referred to a bundle of documents and skeleton arguments for the claimant and the respondent.
4. The Tribunal order of 9 March 2018 granted an application made by Mr Johnstone of OASL for a postponement of the final hearing listed to start on 12 Mar 2018 on the grounds of the ill health of Mr Johnstone. It ordered OASL to provide medical evidence to the Tribunal, by 23 Mar 2018, that he was unfit to attend the hearing listed for 12 – 15 Mar 2018, a diagnosis of his condition and how long he would be unfit to attend the hearing.
5. On 9 Mar 2018, OASL provided a medical letter which did not provide the information required by the Tribunal order. In particular, it did not provide evidence that Mr Johnstone was unfit to attend the hearing of 12 Mar 2018. The Tribunal chased for the required information on 9 Apr 2018.
6. No further information was received and the Tribunal issued a strike out warning on 4 Jun 2018 on the basis of the failure to comply with the Order of 9 Mar 2018 and the manner in which the proceedings were being conducted was unreasonable.
7. Mr Johnstone wrote to the tribunal on 7 Jun 2018 suggesting that medical evidence had been sent in compliance with the order but this had been sent to the wrong address. The medical evidence he referred to was the same as that which he had already sent to the Tribunal and so did not comply with the order. Documentation to supposedly show that it had been sent to the wrong address was illegible.
8. On 11 Oct 2018, the Tribunal directed OASL to provide hard legible copies of the evidence supposedly showing that the evidence was sent to the wrong address. This was not done.
9. The Tribunal again ordered that the relevant medical evidence be provided, this time by 3 Dec 2018. The order was not complied with. The Tribunal issued a strike out warning on 17 Dec 2018 in respect of the failure to comply with the

Order and not actively pursuing the claim, a response to be received by 27 Dec 2018. There was no response.

10. A Judgment of 4 Jan 2019 stated that, by a letter dated 17 Dec 2018, the Tribunal gave the claimant an opportunity to make representations or request a hearing as to why her claim should not be struck out because the claimant had not complied with a Tribunal order of 18 Sep 2017 and it has not been actively pursued. The claimant failed to make representations and therefore the claim was struck out.
11. The reference to a Tribunal order of 18 Sep 2017 should have been to the Tribunal order of 9 March 2018.
12. The case had been due for final hearing on 7 Jan 2019 to 10 Jan 2019 and this hearing did not take place.
13. The claimant's evidence was that OASL did not take any steps to prepare for the hearing which was due to start on 12 Mar 2018, and that she did not know about this hearing. She said she did not know about the application to postpone the hearing of 12 Mar 2018. She said she was aware of the hearing listed in Jan 2019 but was not expecting to attend it. She said she was unaware of Tribunal's order of 9 Mar 2018, OASL's failure to comply with the tribunal's order and she was unaware of the strike out warnings and OASL's failure to respond to it. The first she was aware what was happening was when she received a judgment striking out her claim. She complained that OASL deceived her and constantly fed her lies and then made it impossible for her to speak to them. We accept all the claimant's evidence on this.
14. The respondent submitted that it could be inferred from this that OASL's real motivation for applying for a postponement of the March 2018 hearing was that it was not ready for trial and that the postponement application made was dishonest.
15. OASL was copied with the respondent's application heard today which included a wasted costs application, with the tribunal's correspondence listing a costs hearing, and with an updated costs schedule from the respondent, but it did not attend the hearing or submit any evidence or submissions.
16. The respondent provided a schedule of its costs incurred in defending the claim. OASL provided no evidence of means.

Relevant law

17. Under Rule 70 of the ET Rules, a judgment may be reconsidered where it is necessary on the interests of justice to do so. Judicial discretion as to reconsideration should be exercised having regard to the interests of both parties and the public interest in finality in litigation (*Outasight VB Ltd v Brown 2015 ICR D11*). Failings of a party's representative will not generally constitute grounds for review (*Lindsay v Ironsides Ray and Vials 1994 ICR 381*).
18. The law on the award by a Tribunal of costs against a party is set out in rule 76 of the ET Rules. Rule 76(1) refers to unreasonable conduct where the Tribunal must determine if there has been unreasonable conduct by the claimant or their representative and then consider whether to exercise the discretion to make an award and, if so, in what amount of the costs incurred. Rule 76(2) refers to a

breach of an order or where a hearing has been postponed on the application of a party.

19. The law on making a wasted costs order is set out in Rule 80. A wasted costs order can be made against a representative as a result of any improper, unreasonable, or negligent act or omission on the part of the representative and which the Tribunal considers it unreasonable for the receiving party to pay. The case of *Ridehalgh v Horsefield and ors 1994 3 All ER 848* set out a test as follows:
 - 19.1. Has the representative acted improperly, unreasonably or negligently?
 - 19.2. If so, did such conduct cause the applicant to incur unnecessary costs?
 - 19.3. If so, is it just in the circumstances to order the representative to compensate the applicant for the whole or any part of the relevant costs?
20. Under Rule 84, the Tribunal is permitted but not obliged to take into account the paying party's means.

Conclusions

Reconsideration application

21. We do not consider it in the interests of justice to reconsider the Tribunal judgment of 4 Jan 2019 striking out her claim. The claimant did not comply with the Order of the Tribunal of 9 Mar 2018 and failed to respond to a strike out warning from the respondent. The claimant relied on the default of her representative, OASL. However, under the principles in *Lindsay*, failings of a party's representative will not generally constitute grounds for review.

Costs/wasted costs application

22. There was unreasonable conduct of the claimant or her representative under Rule 76(1)(a) of the Regulations in that the claimant or her representative failed to comply with an order of the Employment Tribunal of 9 March 2018, and a breach of the said order under Rule 76(2) of the Regulations.
23. We are not persuaded that the claimant is implicated in the unreasonable conduct and the breach of the order. It was her representative who failed to provide evidence of his inability to attend the hearing listed for 4 March 2018, not the claimant. We accept the claimant's evidence that her representative did not keep her informed on developments in her case and that she did not know of the Tribunal's order of 9 Mar 2018 or the strike out warning nor her representative's failure to respond to it. The fact she was told in or after April 2018 that there was a hearing listed for January 2019 does not mean that she was told of the requirement for her representative to provide medical evidence or of its failure to do so.
24. We find that the claimant's representative acted improperly, unreasonably and negligently. The only reasonable inference from its failure to provide the medical evidence ordered is that there was none and it had misled the tribunal into postponing the hearing listed for with an untrue reason 12 March 2018. If in fact

there was no deception and medical evidence was available, the failure of OASL to provide it was improper, unreasonable and negligent.

25. OASL's conduct caused the respondent to incur unnecessary costs because it had to defend a claim and prepare for its hearing listed on two different dates when, in fact, the hearing never went ahead.
26. Given the claimant's lack of culpability and her representative's entire culpability, it is just for the respondent's costs to be paid entirely by the claimant's representative, OASL.
27. Correspondence sent by the respondent to the tribunal and the respondent to the claimant's representative shows it was aware of the wasted costs application and had a chance to make submissions on it.
28. In terms of ability to pay, the claimant's representative would be expected to have insurance covering its liability and so have the means to pay. We heard no representations from the claimant's representative that it did not have the means to pay.
29. For reasons given orally, we consider the appropriate amount of the respondent's costs claim which should be paid to it to be £11,906.17. We order OASL to pay the respondent this sum.

Employment Judge Kelly

Signed on: 5 March 2020