EMPLOYMENT TRIBUNALS

Claimant: Mr P Framjee

Respondent: Crowe UK LLP (1)
Nigel Bostock (2)
Peter Varley (3)

Heard at: London Central **On:** 30 January 2024

Before: Employment Judge Akhtar
Mr S Pearlman
Mr C Tansley

REPRESENTATION:

Claimants: Mr J Susskind (Counsel)
Respondent: Mr J Crozier (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. No order for costs is made on the Claimant's application for costs dated 30 January 2024.

Relevant Background

1. This case was due to be heard over 13 days at London Central Employment Tribunal, starting on 30 January 2024

2. On the day of the hearing, the Tribunal was asked to consider an application for postponement, which had been submitted to the Tribunal and the Claimant's representative shortly before midnight on 29 January 2024. The application was not opposed by the Claimant, however, it was not consented to.

3. The Tribunal concluded that whilst the application had been presented very late in the day, there were "exceptional circumstances" justifying postponement on the basis of the ill-health of Mr Varley, a Respondent and witness in these proceedings.

4. As a result of the postponement of the final hearing, The Claimant makes this application for costs under Rule 76 (1)(c) and/or Rule 76 (2) Employment Tribunal Rules of Procedure 2013.

Relevant Law

5. Rule 76 Employment Tribunal Rules of Procedure 2013 provides in relevant parts:

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

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success; or

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

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

6. Under rule 76(1) therefore, the Tribunal must consider making an order for costs where it is of the opinion that any of the grounds for making a costs order has been made out.

7. A Tribunal must therefore consider making a costs order where a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins, rule 76(1)(c). However, the decision whether or not to make an order under rule 76(1) is discretionary.

8. The purpose of a costs order is compensatory, and not punitive, and ought only to be made in respect of costs incurred as a result of the adjournment or postponement; it should not, therefore, cover the general costs of preparing the case, as these will be costs attributable to the adjourned or postponed hearing when it takes place ***(Cooper v Weatherwise (Roofing and Walling) Ltd [1993] ICR 81, EAT).***

9. Rule 84 Employment Tribunal Rules of Procedure 2013 provides:

   84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

Application & Submissions

10. Mr Susskind submitted, on the facts available, the application for postponement of the final hearing should have been made sooner, for the following reasons:

    a. The occupational health report submitted in support of the application to postpone, stated that Mr Varley has been suffering with anxiety since September of last year and that it *"has reached a heightened level in the*

last week". Yet Mr Varley did not seek medical advice until the day before trial.

b. Mr Varley was off work on Friday. But no explanation has been given for why he did not seek medical attention then either, or on Saturday or Sunday (during which days a considerable amount of work was being done on this case by both sides).

c. The application for postponement was made without notice at 23.37 the night before the hearing.

d. Given that Mr Varley's appointments with the GP and occupational health advisor had presumably taken place earlier in the day, it is plain that the Claimant could have been notified on a preliminary basis – i.e. after the medical advice had been received and before the application was drafted. That would have saved considerable expense.

e. In any event, Mr Varley should have sought medical advice the week before, if not sooner.

11. Mr Susskind further submitted that someone has to pay for the costs of this postponement. The question for the Tribunal is whether it should be the Claimant, or the Respondents. He submitted, Rule 76(1)(c) is a "no fault" costs jurisdiction. There is no need to find that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably. As the IDS Handbook (Practice and Procedure) observes at 18.96, it is sufficient that responsibility for the delay can be clearly attributed to the paying party. Even on a 'no fault' basis, the delay and associated cost is attributable only to the Respondents. Crowe (UK) LLP is well able to pay a modest costs order. It is a professional services firm whose most recent company accounts show an operating profit of nearly £40million. Unlike the Claimant, it is assumed that the firm is insured for these kinds of costs.

12. However, to avoid yet further cost and delay, the Claimant invites the Tribunal to summarily assess his costs at the lesser sum of **£20,000.00** (the maximum for

summary assessment under Rule 78(1)(a)) to be paid by the Respondents (jointly and severally) within 14 days.

13. In response Mr Crozier submitted that rule 76(1)(c) and 76(2) relied on in respect of the application state that the Tribunal 'may make' and 'shall consider', none of that requires unreasonable vexatious etc conduct, it is described as no fault. The Tribunal are left with a wide discretion.

14. Mr Crozier submitted it was the wrong approach for the Tribunal to consider costs in terms of someone should pay or apportionment. He submitted, the correct approach is for the Tribunal to consider whether to make a costs order, in the circumstances of a postponement. Costs are the exception not the rule in the employment tribunal. Litigation may well be expensive for everyone but in general terms each party bears their own costs.

15. Ultimately, the Tribunal is required to consider which party is responsible for the postponement by its conduct. It can't be said that Crowe or Mr Bostock had responsibility for the deterioration of Mr Varley's health. There is no evidence that Crowe should have known, it found out on Friday. Equally, Mr Varley can't be said to be responsible for the late deterioration in his health and it would be erroneous for this Tribunal to take that view. The circumstances are deeply unfortunate, but certainly no one else's responsibility.

16. It is accepted by the Respondents that the application was very late and that the evidence, could well have been stronger but this was due to the late deterioration in Mr Varley's health. The application was late because of the exceptional circumstances that the Tribunal found existed when granting the postponement.

17. Mr Varley first notified Crowe on Friday that he was unfit to attend work. It was not possible for Mr Varley to see his own GP yesterday, but he attended a remote telephone consultation with a BUPA GP who signed him off work for a week with stress and anxiety. Mr Varley was then seen by an Occupational Health Nurse who advised that he was not well enough to attend the Tribunal at this stage and

not for the next 4-6 weeks. The reports were sent to counsel at 20.42 last night, shortly after they had been received by Crowe.

18. It is apparent from the Occupational Health report that there is a history of anxiety dating back a couple of years, but this was not known by Crowe. However, what is clear is that the anxiety Mr Varley experienced previously became heightened.

19. Mr Crozier submitted even if all of the same efforts had been taken on Friday the overwhelming likelihood is that the tribunal would have said the application was be dealt with by the tribunal on the first day of the hearing. It is impossible to see how an earlier notification could have made any real difference.

Decision

20. This is a case where the Tribunal *'must consider'* making a costs order as a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins. However, the decision whether or not to make an order is discretionary.

21. In general, costs awards are fact specific. The discretion should be exercised in accordance with the overriding objective to achieve the outcome which is fair and just in the circumstances.

22. We note that Mr Varley went off sick from work on Friday and the lateness of the postponement application. However, as we found in our decision to postpone the hearing, the first respondent was not previously aware of Mr Varley's stress and anxiety history. In light of this, we conclude that it would be unfair to place the responsibility for the postponement and/or the delay at the door of the first respondent and most certainly not the second respondent. Equally, we also accept that the Claimant has been heavily inconvenienced and in no way responsible for the postponement.

23. In respect of Mr Varley, whilst we agree with Mr Susskind's submissions that Mr Varley was under a duty to get his medical evidence to the parties and the

Tribunal earlier than 11.37PM last night; we must balance this against Mr Varley's symptoms and the deterioration in his health since Friday. Mr Varley made efforts to speak to a GP and occupational health on Monday and details of these were sent to the Respondent's solicitors late on Monday evening, shortly after which a postponement application was sent to the Claimant's solicitors and the Tribunal. We agree with Mr Crozier's submissions that in such circumstances, it is very unlikely the Tribunal would have dealt with the postponement application any earlier than it did.

24. Whilst we agree with Mr Susskind, in that Mr Varley's illness can't be an excuse for the lateness of the postponement application, it is nevertheless a relevant part of our considerations. There appears to have been a late deterioration in Mr Varley's health, which is unfortunate but not something that he can ultimately be held responsible for.

25. We also considered the first respondent's ability to pay, however, for the reasons set out above we did not find that it would be fair to order costs simply on the basis that the first respondent has the ability to pay.

26. We took into account that there is no requirement for the party against whom costs are sought to have acted unreasonably, in order for costs occasioned by a postponement to be awarded against them. Nevertheless, we did not exercise our discretion to award costs, where we have accepted that one of the respondents was not fit to engage in the litigation, we conclude it would not be fair to do so.

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Employment Judge Akhtar

12 March 2024

Sent to the parties on:

28 March 2024

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For the Tribunal Office:

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Note

Public access to employment tribunal decisions

Judgments (apart from judgments under rule 52) 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.