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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss H B Bajwa		Ormuco Limited

Heard at: London Central **On**: 20 March 2017

Before: Employment Judge Glennie
Members: Mr D Schofield
Ms L Moreton

Representation
For the Claimant: Ms E Sole, Counsel
For the Respondent: Mr I Maclean, Consultant

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1 The hearing of this matter is postponed to 18 September 2017 for seven days.

2 The Claimant's application to strike out the response is refused.

3 The Respondents shall pay to the Claimant the sum of £5,117.64 by way of a costs order.

REASONS

1 On 7 October 2016 this matter was listed for a seven day hearing to commence today, 20 March. The case management orders included provision for trial bundles and witness statements. The Respondents were to be responsible for providing copies of the bundle. Witness statements were due to be exchanged on 13 January. They were in fact exchanged on 10 March and no complaints have been made about that to the Tribunal. This morning the matter

was called on for hearing and the Tribunal had to consider an application to postpone the hearing. That application has some history, as follows.

2 On 15 March (Wednesday of last week) the Respondents' representatives sent an email to the Tribunal, copied to the Claimant's solicitors, seeking a postponement of the hearing. This email said that the named individual Respondent, Mr Orlando Bayter, was based in Canada and would not be able to attend the UK on the trial date. The email said "due to medical reasons he may not take long flights for a period of two weeks" and it said that confirmation of this had been attached. What was attached was a letter from Dr Amy Szyszko of the Swedish Medical Centre in Seattle in the United States which read as follows:

> "To whom it may concern
>
> Due to medical reasons Orlando Bayter Fontalvo may not take long flights for two weeks."
>
> Then there were contact details. That letter did not say, and the email did not say, what the medical reasons were.

3 That application, which was opposed by the Claimant's solicitors, was referred to Employment Judge Lewzey who refused the application giving the following four reasons for doing so:

(1) Rhetorical question: why can the witness not give evidence by video link.

(2) The application was very late.

(3) The Claimant objects.

(4) The application was not in accordance with overriding objective."

4 On 17 March the Respondent sent further information in support of the application in an email timed at 12.30. That was not copied to the Claimant's solicitors and it had attached to it some medical notes from Zoom Healthcare in Seattle, United States, which in outline form said that Mr Bayter had attended complaining of back pain on 14 March, that he was there from Montreal in Canada, and was supposed to leave on that day. He was concerned that he could not travel and he had fallen that morning while running in the rain. The notes said that he was experiencing numbness and tingling in the right leg and thigh and later related that he appeared to be hunched, he was in severe pain and was unable to stand due to the pain. He was unable to stand on his toe and heels. The diagnoses were of acute midline and thoracic back pain and the conclusion said that he had suffered a fall, he had a history of scoliosis and was now in severe pain. As we have said, that information was provided to the Tribunal and further representations were made about the matter, not copied to the Claimant.

5 These representations addressed the points made by Employment Judge Lewzey and included the statement that Mr Bayter was heavily sedated on medication and was not in a fit state to attend or give evidence at a hearing, whether in person, or by video link, or otherwise. There was a further email of 17 November timed at 6.27 pm which was sent to the Tribunal and again not copied to the Claimant. That email contains substantially the matters that have been put before the Tribunal in support of the application today. This morning Mr Maclean showed that email and its attachments to Ms Sole and copies were made and provided to her.

6 In that email the Respondents' representative, Mr Ruari Smith, a litigation executive, makes a number of points, some of which have already been set out in relation to the fall and the back injury. Mr Smith made the point that Mr Bayter was the main witness for the Respondents and it is he who is the person who is said to have discriminated against the Claimant and subjected her to detriment as a result of raising a protected disclosure. He is also the person who is said to have dismissed the Claimant, and so it is true to say that he is at the centre of the claims that the Tribunal has to adjudicate upon. In paragraph 11 of his email Mr Smith said that Mr Bayter had supplied a letter from (he said) "his client's" neurosurgeon, which must mean his neurosurgeon, and said that it confirmed that he was currently being treated with hydrocodone and methocarbamol.

7 The Tribunal has a number of comments to make about the evidence and the material that has been put before us this morning. In relation to the neurosurgeon, this is a letter from Dr Fernando Ponce Iglesias, who is signs himself as a neurosurgeon in Cartagena, Colombia, South America - demonstrably not in Seattle or in Canada. This letter, which is dated 17 March, i.e. last Friday, says (and the following is verbatim):

> "I have received Mr Bayter's information from the Swedish Medical Centre in Seattle as I have been his neurosurgeon for several years. He was there because he is suffering lower back pain from a fall when he was jogging. He was in ER, received a CT scan and was medicated with hyrocodone and methocarbamol to treat the pain. Due to medication and patient condition he is unable to do stressful cross-examination or been expected to provide coherent information."

8 It appears from this that Dr Fernando Ponce Iglesias is not treating Mr Bayter, nor does it appear that he has actually seen him in connection with this particular incident. Strictly speaking his letter does not confirm that Mr Bayter is currently being treated with those drugs. It says that he was medicated with them, apparently basing that on the information that we have already referred to from the Medical Centre in Seattle.

9 Mr Smith goes on to make certain assertions about the side effects of these two drugs, saying that hydrocodone has side effects including impairment in thinking and reactions and the methocarbamol has side effects including dizziness, spinning sensation, drowsiness, headache, confusion, memory problems, loss of balance or coordination etc. He asserts that in those

circumstances it would be unreasonable to expect Mr Bayter to give evidence. He says Mr Bayter is heavily sedated on medication and repeats that he is not fit to give evidence under any method. The assertion about the side effects seems to be a general statement of what the side effects of those drugs can be. It does not say in terms that Mr Bayter is suffering from any of those side effects and Mr Smith does not state the source of his information about what the side effects can be.

10 The neurosurgeon, it has to be said, does assert that Mr Bayter is unable to undertake the process of being cross-examined or should not be expected to provide coherent information, but again, it is not clear what it is that enables him to say that and whether he is in fact saying anything more than what the side effects of these drugs can be. In the light of all this the Tribunal raised the possibility of further medical evidence being obtained in order to bring up to date Mr Bayter's condition. The Claimant through Ms Sole opposed that and Mr Maclean declined to pursue that. So both parties asked us to go ahead and decide the application on the basis of what was put before us.

11 We should add that the Respondents' position was that if the matter was not postponed then they would take no further part in the proceedings. Mr Maclean said that his instructions were that in that event he should simply depart and leave the matter to proceed in whatever way the Tribunal considered fit. Further to this the Respondents, although charged with providing the bundles for the hearing, have not brought them, nor have they brought their other witnesses over from Canada.

12 So far as the bundles are concerned, the Tribunal enquired why that was, and essentially it seems to be the case that the Respondents take the view that if they were not going to take any part in the proceedings come what may, then the bundles should not be brought. We were told that the physical location of the bundles was Glasgow. That it seemed to us to be an entirely unsatisfactory position and it might be thought as opportunistically seeking to put the Tribunal in the situation where it would be prevented from going ahead, or would have difficulty doing so, if it decided to reject the application for a postponement.

13 Indeed, the Respondents' whole approach to the application has been unsatisfactory. The Presidential guidance on seeking a postponement contains at paragraph 1 of the section on "action by the parties" the statement that the application should ordinarily be made in writing to the Tribunal, setting out the reason why it is made and why it would be accordance with the overriding objective to postpone the hearing. Paragraph 2 says that when an application is made in writing the other parties should be notified that any objection should be sent to the Tribunal as soon as possible and paragraph 3 that all documents relevant to the application should provided. We have no doubt that the latter means that in the ordinary run of cases the medical evidence that is relied on in support of an application for a postponement should be provided to the other party. As we have explained, that has not been done and information has been provided prior to the hearing to the Tribunal but not copied to the Claimant.

14 This is not, we find, a situation where the medical condition relied on is one of such sensitivity that a party may legitimately ask the Tribunal not to share the information with the other party. No doubt back injuries can be painful and delibilating but they are not in the sort of category where one would expect a party to say that they did not want the nature of their injury to be revealed beyond the Tribunal itself.

15 Under the heading of "Example" the Presidential guidance says this about medical reasons:

"When a party or witness is unable for medical reasons to attend a hearing all medical certificates and supporting medical evidence should be provided in addition to an explanation of the nature of the health condition concerned. Where medical evidence is supplied it should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and indication of when that state of affairs may cease."

16 The Tribunal's view of the situation ultimately is this. The original letter from the Swedish Medical Centre is, to say the least, terse, but it does say that Mr Bayter is unfit to travel to the hearing and it does give a timescale for when that state of affairs may be expected to cease. It says that he is not fit for medical reasons and that this would continue for a period of two weeks. It does not explain the nature of the health condition concerned, but that has been explained by the medical notes from the Zoom Healthcare Centre as the back injury that we have set out above. That being so, we have concluded that the Respondents have shown that Mr Bayter is unable for medical reasons to attend the hearing.

17 As to the question of video link evidence, we consider that this would not be a satisfactory way in which to proceed given that Mr Bayter is the primary witness for the Respondents. It is clear that the issues involve significant disputes of disputes of fact as between the Claimant and Mr Bayter. If it can be achieved, those issues ought to be canvassed by way of oral evidence with both parties present. It is possible for video link evidence to be taken, and the Tribunal is familiar with doing so, but there could be difficulties for the Respondents in taking instructions from Mr Bayter in the course of the hearing which could affect the justice of that way of proceeding.

18 We taken into account that this is the first application for a postponement: the situation might be different if it were not the first. Ultimately, however, we are satisfied that there has been an accident and that as a result of injury suffered in that accident Mr Bayter is not able to travel to the hearing, and with some reluctance given the way in which the matter has been approached, we have concluded that the prejudice to the Respondents in not granting the postponement outweighs the prejudice to the Claimant in the delay that would follow with the matter being postponed to a later date.

19 Following the delivery of these reasons Ms Sole on the part of the Claimant made two applications: one was to strike out the response, the other

for a costs order. The application to strike out was presented on two grounds by reference to Rule 37(1). The first ground was under paragraph (b), that the manner in which the proceedings had been conducted was unreasonable etc, and the second under paragraph (c), non-compliance with an order of the Tribunal, the latter referring to the failure to bring the bundles.

20 So far as unreasonable conduct of the proceedings is concerned, we have already outlined why we found that the way in which the application was put to the Tribunal was unsatisfactory, and for the same reasons we would find that the Respondents' conduct in relation to the application was unreasonable in those respects.

21 That said, however, it seemed to the Tribunal that it would be curious to grant the postponement application, having taken that conduct into account, but nonetheless then strike out the response on the same grounds. It would then seem to be the case that, if we were to find that that we should exceed to the application to strike out, then it would follow that we should not have allowed the postponement but instead should have refused it. Having decided the matters as we have, we find that, although there has been unreasonable conduct, in the exercise of the discretion that arises, we should not strike out the response.

22 Turning to the question of the non-production of the bundles, it is important that we put to one side the Tribunal's feelings about the apparent discourtesy that this involved. In doing so, we comment that one is bound to ask what Mr Maclean on behalf of the Respondents thought that the Tribunal was going to do, as opposed to what he was going to do, if we did not allow the postponement. He was going to leave because he was under instructions not to continue to represent the Respondents, but had we not allowed the postponement then we would have been in a position of not having the bundles that there were necessary for us to go ahead and hear the claim on the basis of the Claimant's evidence only.

23 But ultimately what is more important than the Tribunal's own feelings about the matter is the question of whether there was any prejudice to the Claimant in the particular circumstances. Ultimately there was not, because we have decided to postpone the hearing, and therefore whatever we think about the decision not to bring the bundles it has not had any practical prejudicial consequence for the Claimant in the circumstances that have occurred. In those circumstances we find that it would be excessive to strike out the response because of that particular failing. We do not therefore strike out the response. In doing so we have also taken into account the decision that we have made about costs, in the sense that we are going to make a costs order. We find that the fact that we can compensate the Claimant in costs for what has been lost today and in connection with the application mitigates against striking out the response.

24 So far as the costs application is concerned, that is brought under Rule 76 and there are two grounds that potentially apply. Under Rule 76(1)(a), it is that the party or that party's representative has acted unreasonably in the way in which the proceedings have been conducted. Then Rule 76(1)(c) applies where a hearing has been postponed on the application of a party made less than

seven days before the date on which the relevant hearing begins, which is the case here given the chronology that we have explained. Under Rule 76(1)(c) it is the case that there should still be a degree of fault on the part of the party who has had to apply for the postponement in order to invoke the discretion. However, it is a slightly different test from that of unreasonable conduct.

25 Again, for the reasons that we have already given in relation to the history of matter we find that both of those criteria are fulfilled. We find that the approach to the postponement application has been unreasonable and that in connection with a late application there has been fault on the part of the party seeking it. Not fault in causing the need for the application, because we have found that that has come about because of injury to the central witness on the Respondents' side, but false in relation to the way that the matter has been put before the Tribunal. If the application had been made promptly and properly (and with all the relevant information) than the Claimant would have had time to consider the application in full last week and the Tribunal would have the opportunity to decide the application last week and not on the first morning of the hearing. It is only this morning that the Claimant and her representatives have been properly equipped to deal with the application. That could have been avoided if everything had been put forward in proper form and in good time last week.

26 Our finding that there has been unreasonable conduct means that the discretion to make an order arises: it is not automatic that a costs order must be made. In the circumstances and for the same reasons we find that the discretion should be exercised in favour of making that order.

27 So far as the amount of costs is concerned we have been referred to a schedule which sets out three items, being the time spent by the Claimant's solicitors on the postponement application, counsel's refresher fee for today's time (not the brief fee) and the time spent by counsel on conference on the postponement application.

28 So far as solicitor's time is concerned, that has been clarified as being 12.5 hours for Ms Devgon who has attended with the Claimant and counsel today and 1.6 hours for Mr Mansfield, those two giving rise to claims for £2,750 and £427.20 respectively. We can see that Ms Devgon has been present throughout the hearing today which began at 10 o'clock and will end at around 3 o'clock.

29 In the circumstances of the lack of information and the whole history of the matter we find the amount time spent in dealing with the application for a postponement to be reasonable. There would have been a need to look into what was being put forward, limited though it was, on the part of the Respondents, and no doubt there would have been a need to have fairly extensive discussions with the Claimant herself and with counsel about the postponement application. The same goes for the time spent in conference by counsel which is estimated at 30 minutes. Counsel's refresher fee of £1,000 for the day we find to be entirely reasonable. Looking at the claim for costs overall it is for £4,264.70 plus VAT of £852.94.

30 We find this to be an entirely reasonable claim to make in the circumstances. No arguments about ability to pay have been advanced on behalf of the Respondents. Therefore we make a costs order in favour of the Claimant in the sum £5,117.64.

31 Finally, Ms Sole indicated an intention to make an application for specific disclosure. Following discussion she agreed that the correct approach would be to request this in correspondence and to follow that up with an application if so advised.

Employment Judge Glennie
11 April 2017