



EMPLOYMENT TRIBUNALS

Claimant: Mr S Rice

Respondent: North West Ambulance Service

HELD AT: Manchester

ON: 20 December 2017

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Mr R Carter, Counsel

Respondent: Mr P Spencer, Solicitor

JUDGMENT ON APPLICATION TO POSTPONE

It is the judgment of the Tribunal that the claimant's application to postpone the hearing listed for 3 and 4 January 2018 is refused.

REASONS

1. The claimant has made an application to postpone the substantive hearing of his claims which are listed for 3 and 4 January 2018 on the grounds that he is unavailable, as he will be out of the country on a pre-booked holiday. The respondent objects to that application and consequently the Tribunal has heard submissions this morning on behalf of the claimant in support of the application and on behalf of the respondent in opposition to it. In order to determine the application it is relevant to go through the history of the claims, and how they came to be listed for the beginning of January 2018.

2. The claim form itself was presented to the Tribunal on 14 February 2017, the claimant being a GMB Branch Secretary and complaining in that claim of unlawful deduction from wages and/or detriment by reason of his status as a trade union member. Consequently he brings these claims against the respondent, the North West Ambulance Service.

3. The Tribunal listed the claims at an early stage, in fact before the response was due, and , it being noted that the type of claims they were were such that more than one day would be likely to be required, the initial listing in the notice of claim of 7 March 2017 was for two days on 13 and 14 June 2017. Case Management Orders were made at that time in the notice of hearing of that date , and the response was then received on 31 March 2017. In the response a point was taken by the respondent that the claims were out of time and they sought a preliminary hearing to determine that issue. Consequently the Tribunal postponed the substantive hearing listed for 13 and 14 June 2017 , because in the meantime a preliminary hearing was to be held on 7 June 2017 to determine the time limit issues. It was then that the claimant made an application to postpone that hearing, not of course then the final hearing but the preliminary hearing listed in its stead, due to a holiday at that time, and the preliminary hearing was accordingly re-listed and indeed heard by myself on 7 July 2017, the respondent reluctantly agreeing to that postponement in correspondence of 31 May 2017.

4. So that is how the first substantive hearing came to be postponed. Following the determination of the preliminary hearing on 7 July 2017, however, the substantive claims were then re-listed, if not on the day then certainly by the time the judgment was sent to the parties on 17 July 2017, and the Tribunal accordingly fixed the dates of 19 and 20 October 2017 for the substantive hearing.

5. It was then the respondent who sought to postpone that listing by communication to the Tribunal of 26 July 2017. The respondent sending that application to the Tribunal , it was duly copied to the claimant's representative, the claimant being represented by Messrs Simpsons, solicitors, and they were invited to provide comments upon the respondent's application in a communication from the Tribunal of 15 August 2017. No reply was received to that request for comments, in which the parties were required to provide dates to avoid, and indeed in the absence of hearing from the claimant's representative on 29 August 2017 the Tribunal did postpone the hearing for 19 and 20 October 2017. Both parties' representatives were asked to provide dates of non availability in the period of November 2017 to January 2018 within seven days of that letter. The respondent duly did provide dates to avoid for the re-list by a letter to the Tribunal of 4 September 2017. That does not appear to have been copied directly to the claimant's representative, however, albeit the Tribunal may well have done so.

6. In the meantime, given that the Tribunal had made an award of costs at the conclusion of the preliminary hearing, I made enquiries of the parties as to the position in relation to a potential costs hearing and consequently the Tribunal wrote to the parties enquiring of that position. Consequently a reply was received from the claimant's solicitors on 27 September 2017, in relation to the position as to costs and confirming that a costs hearing would be required. Nothing was said in that letter, however, about dates to avoid , or any re-listing of the substantive hearing.

7. Thereafter, on 2 October 2017 the respondent's solicitors wrote to the Tribunal, copied to the claimant's representative, dealing with the costs aspect of the case, but also, in the final paragraph, setting out dates of availability in relation to the substantive hearing, making the observation that the substantive hearing had not yet been fixed and providing an update on counsel's availability, it if course being the reason for the respondent's application to vacate 19 and 20 October 2017 that their

counsel was unavailable for that hearing. That was copied to the claimant's representative as well. Consequently, on 24 October 2017 the Tribunal fixed firstly the costs hearing for today but also by a separate notice of hearing sent out the listing of the substantive hearing for 3 and 4 January 2018.

8. In terms of any further communications thereafter, whilst the Tribunal did not write directly to the claimant's solicitor, by an email sent to the Tribunal by way of copying the Tribunal in on communications between the respondent and the claimant, because this had originally been sent to the claimant's solicitors, the respondent's solicitor enclosed the respondent's list of documents, and also in that email asked for documents to that he could prepare the hearing bundle, and made reference to having a hearing date of 3 and 4 January 2018.

9. Thereafter nothing was heard from the claimant's solicitors until 8 December 2017 when in an urgent email that day, in fact shortly after close of business as it was at 5.33pm that that was sent, the claimant's solicitors sought to postpone the hearing of 3 and 4 January 2017. In terms of the reasons that they gave in that letter they said that "unfortunately due to a malfunction of their IT system the notice of hearing letters delivered by email were received but not opened until today" (that day being 8 December 2017). They go on to say that remedial work had been taking place all week but they say in the next paragraph this: "The claimant has a longstanding holiday commitment from 29 December 2017 to 8 January 2018 when he will be out of the country on holiday". The respondent will be aware of this holiday from the claimant booking these dates. Pausing there, Mr Spencer for the respondent has confirmed that those dates are indeed booked out in terms of annual leave from the respondent as the claimant's employer, but in terms of where the claimant will be during that time they have no specific knowledge, merely that he has indeed booked those dates as dates of annual leave. They carry on in this letter to request an urgent postponement of the substantive hearing to allow the claimant to attend. They then go on to say: "The Tribunal did afford the same courtesy to the respondent where their counsel was not available", which, of course, is correct. They had copied that to the respondent's representative and by email of 11 December 2017 Mr Spencer indeed did respond to the Tribunal, copied again to the claimant's representative, making objection to the application and setting out the timetable which I have largely been through in this judgment, but at the conclusion of that email he says this:

"In order to consider the claimant's application I would be grateful if the Tribunal would request the claimant to provide as a matter of urgency –

- Evidence of the holiday abroad
- Evidence of the date it was booked
- From his solicitor evidence of the IT issues which apparently resulted in the Tribunal's email of 24 October not being received."

10. Pausing there, of course, the claimant's solicitors did not suggest the tribunal's notice of hearing was not received, they suggested that it had not been opened at that time and was not opened until 8 December 2017. In relation to that request the tribunal did not make any orders at that time, saying that the matter

could be raised at the hearing today , but in the meantime that email was sent to the claimant's solicitors who have not responded to it, and indeed in terms of counsel, Mr Carter, being instructed today, he too has not been provided with any of the three items requested in the bullet points set out in the email of 11 December 2017. Consequently in terms of the details of the holiday, when it was booked, where it is to, and any consequences of the claimant having to cancel it at this late stage, Mr Carter is sadly unable to provide the Tribunal with that information .He maintains the application on behalf of his client on the basis, as one would expect, that the interests of justice require him to be able to attend this hearing; he will be the only witness for the claimant, there is one witness it appears for the respondent, a Mr Forrest, and if the claimant is put in the invidious position of having to choose between potentially losing large amounts of money if he has to cancel this holiday at short notice and attending his Tribunal hearing, it may put him in a difficult position which may result in him not attending and , of course suffering the injustice, in those circumstances, of his claim not being heard. Very frankly and fairly Mr Carter throws himself, or rather throws his client, on the mercy of the Tribunal, accepting that there is a dearth of information upon which the Tribunal is being asked to act but pointing out that the respondents indeed have had one previous postponement for the convenience of their counsel and that the prejudice to them of having the matter re-listed is not terribly great , and can easily be accommodated , as opposed to the prejudice that the claimant will suffer if his application is not granted.

11. Mr Spencer for the respondent equally candidly accepts that he cannot urge upon the Tribunal any great hardship in the terms of the non availability of his sole witness, Mr Forrest, who could doubtless be made available for the adjourned hearing if the Tribunal accedes to the application, but he does object to it on the basis that this is effectively the second application the claimant has made for a postponement because of a holiday, although it is of course right to observe that the first one was in relation to the preliminary hearing and was a relatively short one as opposed to an application for the substantive hearing which was, of course, postponed from October at the respondent's request. He does make reference to what he has termed the "lack of engagement" on the part of the claimant's solicitors and is concerned by that. He ultimately invites the Tribunal not to accede to the request and for the hearing to remain listed for the first week of January 2018.

12. So that , in essence , is the application and the objection to it, and as ever in such applications the Tribunal has a discretion which it has to exercise judicially and to weigh up the balance of hardship upon the parties of either granting the application or refusing it, but in all cases of discretion of course, as it clear from the Presidential Guidance on the applications for postponement , and indeed all the case law upon the exercise of discretion, a Tribunal has to have before it material upon which to exercise that discretion. The difficulty in this application for the claimant is that the material before it is very sparse indeed. It would behove the claimant to advance argument and material before the Tribunal in any event, and that is material which would have been required before the Tribunal regardless of the fact that the respondent in any event put the claimant and his solicitors on notice, on 11 December 2017, of the material that would reasonably be expected to be before the Tribunal. For reasons that have not been explained, that material is wholly absent and therefore the only information upon which the Tribunal can proceed is that provided in the solicitor's letter of 8 December 2017 which simply refers to a longstanding holiday commitment , and that the claimant would be out of the country

on holiday at the time of the hearing. That stops very short from giving the Tribunal the sort of necessary information it needs to determine the potential prejudice to the claimant if the claim remains listed. It is not even said where he will be, whether he could return, what the effect would be upon , either cancellation or indeed perhaps early return (because that period of absence is, of course, some two weeks or so and sometimes people can return perhaps alone leaving their family to holiday in the destination but they have to cut the holiday short themselves), but no such information is provided to the Tribunal. Nor is there any information as to what the consequences of seeking to cancel that holiday would be, or indeed would have been had that application been made, say, on 8 December 2017. The Tribunal does not know what enquiries have been made , and whether anything can be retrieved from that situation if the claimant is required to attend his Tribunal claim. Thus the sort of hardship there may be has not been established , and the Tribunal is left guessing as to what the effect of refusing the postponement would be, when the letter from the solicitors of 8 December is the only material presently before it.

13. In those circumstances, whilst appreciating that the prejudice to the respondent may be relatively minimal , in that it is not being said that Mr Forrest would not be able to attend a resumed hearing, the Tribunal in considering such applications has to bear in mind not only the effect on the parties , but upon those other parties who have not had a hearing on 3 and 4 January 2018 because this case was listed on those days. The claimant now seeks to have that listing postponed. Those dates will not now be available at this short notice to list any other substantive hearing, and consequently the Tribunal's time and indeed the time of other litigants has been rather wasted . Judicial time that could have been deployed on other parties' cases will now not be available, and that is a very relevant consideration that goes beyond the parties, but goes to the administration of justice as a whole.

14. The Tribunal has come to the view, with sympathy for Mr Carter who is in a difficult position today because of the absence of material provided to him as well, that the claimant effectively has to make a choice. He has holiday booked, he has his claims which, it is pointed out, as a senior trade union official he will be well familiar with, or should be, and he has to choose as to which he prefers to pursue on 3 and 4 January 2018. If there are financial consequences of him either not going on holiday, cancelling it or indeed returning early, so be it. As to whether or not the responsibility for that lies truly with him , or his solicitors , is a matter between them. Doubtless if it is his solicitors' fault that he is in this position and he suffers financially then that will be raised with them, but as between the parties and the Tribunal in the absence of any information as to why the claimant cannot reasonably be expected to be here on 3 and 4 January 2018 to prosecute these claims, this application is refused and the hearing remains listed.

Postscript

15. Following the hearing the Employment Judge was made aware of an email received by the Tribunal at 11.55 that morning. This contained by way of attachment the document sent from the claimant to his solicitors dated 13 September 2017 in which flights to Faro in Portugal were confirmed for Friday 29 December 2017 with a return flight on 6 January 2018. This was obviously a document not available to Mr Carter in the hearing. The claimant is, of course, free to make an application for

reconsideration, but by way of assistance to the parties the Employment Judge has considered this document, its likely effect upon the judgment of the Tribunal , and makes these preliminary observations.

16. From this document it would appear that the claimant has made this booking for himself only, as only one person is referred to in it. Further, the total cost of the booking is some £408. Nothing in the document that has been provided in this manner gives any information as to whether, and if so, when and upon what terms, the claimant could either cancel this booking, or bring forward his return date, it being the case that he is currently due to return on Saturday 6 January 2018, which would be some three days later than the date scheduled for the start of the hearing. From these details it would seem that the maximum that the claimant may lose if he cancels this booking would be the £408 that he has paid for it. Nothing is said about any accommodation costs.

17. The Employment Judge's view is that were this information to have been before him in the hearing, it would not have affected the outcome, and his decision to refuse the application for a postponement would have remained the same. It is, however, appreciated that argument has not been advanced upon this document, and Mr Carter was without instructions upon it. There is no explanation in this documentation as to when it was first available to the claimant's solicitors, and why, the booking having apparently been made on 13 September 2017, this information was not acted upon before 8 December 2017. For the application to have any better prospects of success, clearly more needs to be explained. The Tribunal therefore, is not minded to reconsider its judgment on the basis of this further information.

Employment Judge Holmes

Dated: 20 December 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

20 December 2017

FOR THE TRIBUNAL OFFICE