Case Number: 2200786/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms N Mukoro		**(1) Independent Workers' Union of Great Britain** **(2) Jason Moyer-Lee** **(3) Catherine Morrissey** **(4) Maritza Calisto Calle**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON A PRELIMINARY HEARING

HELD AT: London Central **ON: 26 September 2018**

BEFORE: Employment Judge A M Snelson (sitting alone)

On reading an email sent to the Tribunal at 08:18 on 26 September by Ms Romany Mukoro on behalf of the Claimant;
And there being no appearance or representation by or on behalf of the Claimant;
And on hearing Mr N Caiden, counsel, on behalf of the Respondents;

The Tribunal adjudges that:

(1) The Claimant's application for the preliminary hearing to be postponed is refused.
(2) On the Respondents' application, the entire proceedings are struck out.

REASONS

Introduction

1. The Claimant, a legally qualified woman in her mid-fifties, describes herself as black west African and claims to be disabled by anxiety, depression and panic attacks. The Respondents have conceded that she is so disabled and the Tribunal proceeds on the footing that the concession is correct. She was employed by the First Respondents ('the union') in the capacity of Legal Department Co-ordinator

from 15 July 2015 until 6 November 2016, when she was dismissed.

2. By a claim form presented on 4 April 2017, the Claimant brought complaints against the First Respondents and six individuals of discrimination on grounds of race, disability and sex, victimisation, disability-related harassment, unfair dismissal and wrongful dismissal and a claim for arrears of pay.

3. The sex discrimination claim was struck out in July this year, the Claimant having failed to pay a deposit in accordance with an order of Employment Judge Grewal made in March.

4. The racial discrimination claim rested on two alleged detriments and the dismissal. By a judgment sent to the parties on 19 September this year I dismissed the detriment claims, judging them to be out of time and accordingly outside the Tribunal's jurisdiction. I also made a deposit order in respect of the dismissal-based claim. Time for payment of the deposit has not yet expired and that claim remains 'live'.

5. The matter came before me in the form of a public preliminary hearing on 26 September this year, for consideration of the Respondents' application for the remaining claims to be struck out. The opportunity had also been extended to the Claimant to pursue such application as might be advised, but no notice was given of any desire to do so (except for the last-minute email asking for a postponement, to which I will return).

6. The Claimant did not attend the hearing and was not represented at it. Mr Caiden, counsel, appeared for the Respondents.

7. In circumstances and for reasons which I will more fully explain in due course, I elected not to postpone the hearing and, having heard the Respondents' application fully argued, to strike out all outstanding claims. I gave that decision orally but considered it fair to the Claimant to reserve my reasons so that they would be received by both sides at the same time. It is now necessary to set out the background in a little more detail.

Procedural history to date

8. I have mentioned that the proceedings began on 4 April 2017. Although causes of action were identified, the claim form failed to particularise the claims.

9. A first preliminary hearing (case management) was fixed for 25 August 2017. That date was vacated by mutual consent but it is noteworthy that the Claimant relied on her poor mental health.

10. The matter was re-listed for 9 October 2017, before EJ Grewal. The Claimant did not appear and her psychiatric problems were cited as the reason. Although her daughter, Ms Romany Mukoro, attended on her behalf, it was impossible to make any progress in clarifying the dispute. In a document sent to the parties on 10 October 2017 the judge included the following observations:

> **1. … The Claimant did not provide any particulars of [her] claims and claimed that she was medically incapable of doing so. The Tribunal ordered her to notify the Tribunal by 29 June 2017 as to when she anticipated that she would be in a position to provide particulars of her complaints or to provide medical evidence that she was not fit to provide such details.**
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> **2. On 13 June the Claimant served a medical report from her GP dated 29 June 2017. In that report Dr Bailey said that the Claimant was suffering from depression and anxiety, was unable to manage or participate in legal proceedings, [and] was unable to recall and document events. He said that it would be in her best interests for the proceedings to be temporarily postponed until she was well enough to engage. He said that she had been receiving counselling and was on the waiting list for a psychological assessment.**
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> **3. There was a further letter from Dr Gibson dated 4 July 2017. That dealt with the history of the Claimant's anxiety and depression. There was also a letter dated 4 August 2017 from Dr Sparrow, a Consultant Psychologist/Senior CBT Therapist at Richmond Wellbeing Service inviting her to a face-to-face assessment on 9 August 2017. The Claimant's daughter said that she did not attend that appointment or any other sessions at the Richmond Wellbeing Service.**
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> **4. A preliminary hearing listed for 25 August was postponed partly because [of] the Claimant's doctor's recommendation that the proceedings be postponed.**
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> **5. The Claimant did not attend today. Her daughter said that her mother was now engaged in substance abuse and had an initial appointment tomorrow with Richmond Integrated Recovery Services in respect of that. She said that her mother was currently not well enough to give particulars of her complaints. Unfortunately, I did not have up-to-date medical evidence before me to decide whether I should stay the proceedings and, if so, for how long. I made an order for the provision of such medical evidence and will make a decision on receipt of that and the Respondents' comments on it.**

11. On 1 December 2017, EJ Grewal made an order requiring the Claimant to provide further particulars of her discrimination claims by 18 December 2017. She did not comply within the period prescribed but the particulars were delivered in January following a warning from the Tribunal that she was at risk of a striking-out order.

12. A further preliminary hearing (case management) was held by EJ Grewal on 16 March 2018. On this occasion the Claimant did attend and it was possible for the judge to identify the issues in the case and set a timetable for a final hearing, which was fixed for five days between 20 and 26 September 2018. In addition, the judge struck out claims against three individuals on the basis that the further particulars identified no allegation of discrimination against any of them. The Claimant had opposed this measure, arguing that she had it in mind to seek to amend her claim to add fresh allegations which would warrant the three individuals remaining parties. (No such amendment application has been made.) Finally, EJ Grewal made the deposit order relating to the sex discrimination claim to which I have already referred.

13. On 12 July 2018 a preliminary hearing was held in public before me who determine jurisdictional and merits-based challenges to the racial discrimination claims clarified by EJ Grewal on 16 March. The Claimant attended (late), accompanied by her daughter. Initially, she sought a postponement on the ground

that she was unwell but after some discussion another way forward was agreed: the Respondents' submissions (supported by a full skeleton argument) were heard and the Claimant was allowed until 27 July to set out her response in writing. In granting her that latitude, I stressed that I was determined to preserve the final hearing date.

14. The Claimant did not deliver her written representations by the due date. Again, her mental ill-health was cited as the reason. Eventually a telephone hearing was set up for 7 September 2018, at which the Claimant was represented by her daughter. On that occasion I granted a final extension of time for the delivery of written representations to 10 September. By this time it had become common ground that the final hearing could not stand and I reluctantly agreed to vacate it. But I acceded to the Respondents' request for 26 September to be retained for the purpose of holding a public preliminary hearing to consider any application which either side might intend to make and, if applicable, further case management.

15. Minutes before expiry of the final deadline, the Claimant's written representations were received.

16. In accordance with a direction given by me on 7 September, the Respondents on 17 September delivered a reply to the Claimant's written representations and detailed submissions in support of their application, to be pursued on 26 September, for the surviving claims to be struck out.

17. On 19 September the Tribunal promulgated my judgment dismissing the race-based detriment claims and my deposit order in respect of the race-based dismissal claim.

The postponement application

18. By email sent at 08:18 today (26 September) the Claimant's daughter wrote to the Tribunal as follows:

> **My Mother has had to seek an emergency appointment with her Dentist due to developing an excruciatingly painful abscess. Therefore, due to unforeseen and unavoidable medical circumstances, the Claimant asks for an adjournment of today's hearing as she is in pain and too unwell to attend and has had to prioritise self-care and seek immediate medical attention.**

No further information was supplied. No corroborative evidence (medical or otherwise) was submitted.

19. When the case was called on for hearing we began with the postponement application. Mr Caiden strongly opposed it. He pointed to the absence of any medical (or other) evidence to support it. He outlined the procedural history of this dispute and the delays to date and argued that the Tribunal was eminently entitled to regard the application with suspicion and to reject it as unsubstantiated.

20. It seemed to me that it would be precipitate to take a decision at once. Instead, I put the hearing back to midday and caused an email to be sent to the

Claimant's daughter in (so far as material) these terms:

> **The case was called on 10:08 this morning. Counsel attended with Ms Corriero of the Respondents. No one appeared for the Claimant. You were due to be representing the Claimant and your own absence is unexplained. EJ Snelson has put the hearing back to 12.00 today to enable you to attend to seek to make out a good ground for adjourning the matter to a fresh date. At the moment the application to adjourn is unsupported by evidence. The Tribunal will not grant an adjournment on mere assertion. If it is not practicable to produce medical evidence, your own evidence could at least be offered. You must be taken to have first-hand knowledge of your mother's present condition and any treatment she is undergoing. Such evidence *might* persuade the judge that it [is] in the interests of justice and in keeping with the overriding objective to grant the application. (It would, of course, be open to the Respondents to test your evidence in cross-examination.)**
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> **If no sustainable ground for adjourning to a fresh date is shown, the hearing will proceed.**

The email was sent at just after 11:00. I also caused the Tribunal's clerk to telephone Ms Mukoro (junior) to apprise her of the action which the Tribunal had taken. Unfortunately, she did not answer the call and so he left a message drawing attention to the email and pointing out that it required urgent attention.

21. The Tribunal received no communication in response to its email and telephone message, from the Claimant or anyone acting on her behalf.

22. I first had regard to the relevant provisions of the Employment Tribunals Rules of Procedure 2013 ('the 2013 Rules'). These begin with r2, which directs the Tribunal to interpret and exercise its powers in accordance with the overriding objective of dealing with cases fairly and justly, which is stipulated to include ensuring that parties are on an equal footing, dealing with cases in ways that are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, so far as compatible with proper consideration of the issues, and saving expense. The power to postpone hearings is governed by r30A. In this context, a postponement includes an adjournment to a later date (r30A(4)(a)). A postponement sought less than seven days before the date set for the start of the hearing may only be granted if the other parties consent and it is otherwise in accordance with the overriding objective, the application is necessitated by an act or omission of another party or the Tribunal, or there are exceptional circumstances (r30A(2)). Non-attendance is governed by r47, which states:

> **If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any inquiries that may be practicable, about the reasons for the party's absence.**

23. Presidential Guidance on seeking postponements was issued by the former President of the Employment Tribunals (England & Wales) on 4 December 2013, pursuant to the 2013 Rules, r7. Under 'Examples' the Guidance includes this:

> **1. 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 an indication of when that state of affairs may cease.**

24. In *Teinaz-v-London Borough of Wandsworth* [2002] ICR 1471 the Court of Appeal offered some general observations on adjournment applications based on medical grounds. Giving the lead judgment, Peter Gibson LJ said:

> **22. If there is some evidence that a litigant is unfit to attend … but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly.**

Arden LJ added:

> **I agree with Peter Gibson LJ that applications for adjournment may raise difficult problems requiring practical solution. While any tribunal will naturally want to be satisfied as to the basis for any last minute application for an adjournment and will be anxious not to waste costs and scarce tribunal time or cause inconvenience to the parties and their witnesses, it may be that in future cases like this a tribunal or advocates for either party could suggest the making of further inquiries and a very short adjournment for this purpose.**

25. In *Riley-v-Crown Prosecution Service* [2013] EWCA Civ 951 CA, another case concerning adjournment on medical grounds, Longmore LJ (with whom the other members of the court agreed) observed:

> **27. It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to "a fair trial within a reasonable time". That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. Judge Hall-Smith correctly found assistance in remarks of Peter Gibson LJ in Andreou v The Lord Chancellors Department which are as relevant today as they were 11 years ago:-**
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> > **"The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights, having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. … The Tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened Employment Tribunals are these days."**

28. I concluded that the Claimant had failed to make out a good reason to further adjourn or postpone the hearing. She had had the opportunity to seek to obtain supporting medical evidence but none had been supplied. In addition, her daughter, now experienced in representing her interests, had had, but not taken,

the opportunity to attend the Tribunal (if only to present and attempt to make good the postponement application) or to respond in any other way to the Tribunal's email and telephone message. Postponement would result in significant prejudice to the Respondents, leaving them with the burden of facing already stale litigation for a significant further period (the Tribunal would not be able to re-list a preliminary hearing for some months and no final hearing would be possible before summer 2019 at the earliest – well over three years after the earliest matters complained of and more than two-and-a-half years since the last). The union is not large and its membership consists mostly of people on modest incomes. I considered it safe to assume that postponement of the preliminary hearing would result in exposure to costs in terms of money and management time which it could ill-afford. And, perhaps more importantly, three flesh and blood individuals would be put to the stress and anxiety of facing serious allegations of discrimination, stalled and with no progress made, for months to come. Delay is the enemy of justice. It prejudices not only the immediate litigants but also other service users. If any case is postponed or adjourned, the inevitable consequence is that access to justice for those behind them in the (ever-lengthening) queue is also delayed. In all the circumstances, I was quite satisfied that it was in keeping with the overriding application to refuse the application.

The strike-out application

29. The nub of the Respondents' application what that there was no realistic prospect of the Claimant being in a position to deal with the litigation in the foreseeable future and that accordingly a fair trial was no longer possible.

30. Mr Caiden relied on the procedural history which I have outlined above. He also drew attention to letters from members of the Claimant's GP practice. The first that it is necessary to mention is a letter from Dr Bailey, dated 29 June 2017. It includes the following:

> **This lady has a long history of depression. She has been receiving medical treatment through us for the last 13 months due to an exacerbation of her anxiety and depression, predominantly triggered by her recent issues at work. …**
>
> **She appears to be in a very vulnerable mental and emotional state and is therefore unable at this time to manage or participate in any stressful processes including legal proceedings. In particular, her issues with impaired concentration and memory, and high anxiety levels which are all symptoms of her mental health condition, mean that she finds she is unable to accurately recall and document events and in fact doing so severely exacerbates her depression and anxiety and triggers panic attacks.**

In a letter of 30 October 2017, Dr Gibson wrote:

> **With reference to the capacity of the claimant to progress her case personally, I am not in a position to confidently confirm this will be the case. The extremely protracted nature of this case [reflects], in part, the intense anxiety she has experienced since it started and which has contributed to her limited engagement in the process. There is little evidence to date that the work she has done with [Richmond Wellbeing Service], or the medication she has taken, has equipped her to deal with it any more effectively. The recent recourse to alcohol is likely to reflect further anxious/avoidant behaviour. …**

> **With regard to prognosis, my view is, as I have indicated in the past, that there may well not be any significant improvement in Ms Mukoro's psychological health until this legal case is resolved. I would also be guarded about the prognosis thereafter, given her premorbid psychological health and because it has been such a protracted confrontational process. Her experience of the process and her psychological inability to handle it may have a longer term impact on her psychological health.**

On 27 July 2018, Dr Gibson wrote a further report which included this:

> **I wrote a report on 22/10/17 and was due to see Nancy yesterday but she felt unable to attend because of her high anxiety so I saw and spoke with her daughter Romany on her behalf. Romany explained that Nancy is struggling to meet the court imposed deadlines for submission of substantial documentation and asked if I could write to reiterate that her mental health difficulties impact on this and to request leeway in this regard. I understand Nancy is representing herself in proceedings.**
>
> **As I have previously indicated, I have little expectation that Nancy's mental health is going to improve or stay stable during the litigation process. Legal proceedings are gruelling on anyone and more so on someone with an existing mental disability … Nancy's mental health issues [mean] that she finds adapting to new situations asked of her difficult. All I can do in this situation is keep reiterating my opinion that Nancy's cognitive functioning is impaired and will remain so.**

31. Mr Caiden pursued a secondary argument based on the Claimant's breach of the Tribunal's orders but in the end did not press that as a separate ground for striking-out; rather, her failure to comply with directions was relied upon as additional evidential support for the central submission that a fair trial was no longer possible.

32. By the Employment Tribunals Rules of Procedure 2013, r37 it is provided (so far as material) that:

> **(1) At any stage of the proceedings … a Tribunal may strike out all or part of the claim or response on any of the following grounds:**
>
> **…**
> **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response …**

The higher courts have frequently stressed that the power to make striking-out orders is one which must be exercised with considerable caution, particularly in discrimination cases (see *eg Anyanwu & another-v-South Bank Students' Union & another* [2001] ICR 391 HL).

33. My conclusion was that this was one of a small class of cases in which the exceptional measure of striking-out was appropriate and in accordance with the overriding objective. I have already referred to the delay which has occurred to date and the fact that, if listed now, a final hearing would not be scheduled to start until more than three years after the earliest of the matters complained of. That by itself is not conclusive but it is a material factor. What seals the matter for me is the medical evidence, which is written by practitioners who know the Claimant and have her interests at heart. That evidence is compelling and persuades me to a high standard that there is no realistic prospect of this matter being brought to an effective final hearing within a reasonable period. It also persuades me that, the

longer this litigation continues, the greater becomes the likely damage to the Claimant's own wellbeing. Of course, the Tribunal has a duty to her to make reasonable adjustments but such adjustments do not include taking steps to prolong the destructive effects of this litigation upon her. On top of these considerations is the self-evident fact that I owe an obligation to do justice by all parties to this dispute. The Respondents, who face serious allegations, are entitled to see an end to their jeopardy. The observations in the *Riley* case are entirely in point. For all of these reasons, I held that all surviving claims must be struck out.

Disposal

34. All claims having been struck out, the proceedings are at an end. The Tribunal will archive the file in the usual way.

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EMPLOYMENT JUDGE SNELSON
28 Sep. 18

Judgment entered in the Register and copies sent to the parties on 28 Sep. 18

..... for Office of the Tribunals