



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss O Phelan

**Respondents:** (1) Richardson Rogers Limited  
(2) Mr Michael Rogers

**Heard at:** Reading **On: 8 January 2019**

**Before:** Employment Judge Gumbiti-Zimuto  
Members: Ms PA Breslin and Mr M J Selby

**Appearances**  
**For the Claimant:** Not attending and not represented  
**For the Respondent:** Mr P Lockley (Counsel)

## JUDGMENT

The claimants' complaints are dismissed pursuant to rule 47 of the Employment Tribunals Rules of Procedure.

### REASONS

1. In a claim a form presented on the 9 June 2017 the claimant made complaints of direct sex discrimination, arising in the period 31 December 2016 to 30 January 2017, against Richardson Rogers Limited, Mr Michael Rogers and Volvo Car Corporation. On the 7 July 2017 Richardson Rogers Limited and Mr Rogers (the respondents) presented a response to the claim and on the 13 July 2017 Volvo Car Corporation presented a response to the claim: the respondents resisted the claimant's complaints on various grounds.
2. A telephone preliminary hearing took place on the 31 August 2017 at which a further preliminary hearing was listed to consider the employment status of the claimant and, among other matters, to clarify the factual and legislative basis of the claims. An open preliminary hearing was listed to take place on the 8 December 2017.
3. The claimant was to serve a skeleton argument setting out the legal and factual basis of the claims by the 28 September 2017: the claimant failed to do so and applications to strike out the claimant's claims were made by the respondents.

4. On 3 October 2017 solicitors acting for the claimant wrote to the Tribunal stating that the claimant had been admitted into the Emergency Department of the Cork University Hospital on 28 September 2017 and that this had prevented the solicitor from obtaining “final instructions on the draft skeleton argument that has been prepared on the claimant’s behalf”.
5. On the 30 October 2017 the Tribunal wrote to the claimant stating that: “Unless a skeleton argument is provided by the claimant to the respondent by 6/11/2017 the claim shall be dismissed without further order”. A skeleton argument was provided by the claimant’s solicitor on the 6 November 2017.
6. On 15 November 2017 solicitors acting for the respondents made a further application to strike out the claim or postpone the preliminary hearing on the grounds that the skeleton argument failed to comply with the case management order made on the 31 August 2017. The claimant objected to the strike out application but supported the application to postpone the preliminary hearing. The Tribunal converted the open preliminary hearing listed for the 8 December 2017 to a telephone preliminary hearing. The telephone preliminary hearing was subsequently postponed by the Tribunal on the direction of the Regional Employment Judge and relisted to take place on 15 March 2018.
7. On 15 November 2017 the claim against Volvo Car Corporation was withdrawn and subsequently dismissed pursuant to rule 52 on 8 December 2017.
8. A telephone preliminary hearing took place on the 15 March 2018 when Employment Judge George directed that there should be an open preliminary hearing to consider whether the claimant was a contract worker; whether complaints of sex discrimination and or harassment against respondents were presented in time. The open preliminary hearing was listed to take place on the 27 September 2018.
9. On 20 September 2018 solicitors acting for the claimant made an application to postpone the open preliminary hearing listed to place on the 27 September 2018. The reason the postponement was sought was stated as: “the Claimant is medically unfit to attend, as ... GP Dr Bolarum, confirms.” The handwriting in the letter from Dr Bolarum is in parts difficult to decipher but appears to read as follows: “*This lady who 37 year is under [indecipherable word] stress & needed time off for last 2 weeks & needs this week off too. She is awaiting counselling.*”
10. The respondents at this stage, 21 September 2018, objected to the postponement application on the grounds that “there is no evidence to support the proposition that the claimant is medically unfit to attend the Tribunal next week.”

11. The postponement application was refused by Employment Judge Lewis because; "There is no indication of the claimant's inability to attend the listed hearing."
12. The claimant obtained a MED3 statement of fitness for work from her GP on 24 September 2018. This stated that the claimant was not fit to work from 21 September 2018 to 30 September 2018. The document also included a reference to: "*anxiety / having IAPT counselling / not medically fit to attend court*". A further application to postpone the hearing was made on the grounds that the claimant was not medically fit to attend the hearing.
13. The application was considered by Employment Judge Manley who postponed the hearing. The parties subsequently agreed directions that included further disclosure, the preparation of a trial bundle and exchange of witness statements. The preliminary issues that should have been considered at the open preliminary hearing were to be considered at the full merits hearing listed to take place 8 to 11 January 2019.
14. In a letter dated 11 October 2018 the respondents' solicitor made an application for an unless order. Resisting the application solicitor acting for the claimant stated: "the claimant has supplied evidence that she has been unwell and unfortunately has not been medically able to respond as effectively as she had hoped." It was said that the claimant is willing to provide further medical evidence to the Tribunal should this be required. In this letter dated 19 November 2018, the claimant's solicitor also stated the following: "We have advised the Claimant for the evidence which the Respondents' Solicitors require and the Claimant is fully aware of when the evidence is due."
15. On the 23 November 2018 the Tribunal was sent a statement made by the claimant about her employment status, one of the preliminary issues.
16. On 27 November 2018 the respondents' solicitor wrote to the claimant a lengthy letter dealing with various aspects of the claimant's case. In a section of the letter with the heading "concerns about postponement arising from your letter of 19 November to the Tribunal" the respondent wrote as follows:

"Our clients' concern, which we share, is that given your client's background and her admitted state of health and personal issues, she will once again seek to delay the hearing.

If she is likely to do so we need to know urgently and your client needs to support any such application with cogent medical or other evidence. Our clients will not unreasonably oppose an application that is made in good time and supported by cogent evidence. However, please do not wait until shortly before the hearing, when most of the acts of hearing preparation will have been incurred, in order to make any such application.

It is essential for us in understanding the position if your client were able to supply further details of her medical condition, her prognosis, and the crimes she says has been committed and how these are affecting her. Our clients do not wish to intrude unduly into her privacy, but this information would be helpful in guiding their response to any further applications she may make.”

The claimant has not provided further details of a prognosis of her medical condition.

17. On 17 December 2018 Taylor Rose solicitors, who had been acting for the claimant, wrote to the Tribunal stating that: “from today, we are no longer acting on behalf of the claimant.”
18. On 18 December 2018 the respondents’ solicitors made an application for an unless order requiring the claimant to exchange witness statements.
19. On 19 December 2018, Donna Cartwright, a friend of the claimant, wrote to the Tribunal stating that the claimant is unable to deal with this matter due to severe ill health. She requested that the case is postponed until Mid-February to allow the claimant to get alternative representation. A letter from Dr R Turner (dictated on 4 December 2018 and Typed on 6 December 2018) included the following:

*“I would like to confirm that we are currently treating Miss Orla Phelan for severe anxiety. She is currently under the care of the Crises Team and having counselling.*

*Unfortunately due to the severity of her symptoms I feel that it will take her a long time to recover. We are currently reviewing her on a regular basis and as part of her treatment we are giving her Fit notes on a 4 weekly basis if we do not feel she is fit for work or fit to attend court.*

*We do not feel we can predict whether she will be fit in February, however, in view of the severity of her symptoms I feel it is unlikely that she will be fit to attend court for the foreseeable future. I will continue to review the situation and provide notes as appropriate.”*

The respondent was asked to comment on the application made on the claimant’s behalf.

20. In their letter dated 31 December 2018 the respondent objected to the postponement application.
21. In an email received 2 January 2019 the claimant, or somebody on her behalf, expressed their objections to the respondents’ solicitors letter of the 31 December 2018. The claimant was stated to be “incapacitated and under the care of the Crises team and undergoing counselling”. It was

stated that the “claimant will not be able to meet any court deadlines whilst recovering and until alternative representation is found.” It was requested that the claimant be given “reasonable time” to find alternative representation.

22. The claimant’s application was considered by Employment Judge Vowles who refused the application and directed that the applications made by the claimant and the respondent could be renewed at the hearing listed on the 8-11 January 2019.
23. The claimant provided to the Tribunal an email which shows that she had approached Lawson West Solicitors about representing her in these proceedings. The claimant appears to have approached these solicitors by 4 January 2019. A further email was sent to the Tribunal on behalf of the claimant on 7 January 2019 at 9:32. A request was made for a postponement of the hearing on the basis that representation had not been secured by the claimant because of a lack of time and indicating that a solicitor had expressed a willingness to take on the claimant’s case subject to having time to review her case.
24. On 7 January 2019 at 15:50 there was forwarded to the Tribunal an email from FRU to the claimant stating that “because the hearing is tomorrow ... there is insufficient time” for FRU to take on the claimant’s case.
25. Dr Ruth Turner sent the Tribunal an email, 7 January 2019 at 8:50, stating that the claimant “*will not be fit to attend court tomorrow*” and due to her mental health the claimant “*needs support /advocate to support her through the legal process*”.
26. The claimant did not attend the hearing listed to take place today. The respondent made an application based on rule 47 of the Employment Tribunals Rules of Procedure 2013.
27. Rule 47 of the Employment Tribunals Rules of Procedure provides that: “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 enquiries that may be practicable, about the reasons for the party’s absence.”
28. We have also had regard to the Presidential Guidance on Postponement (issued on 4 December 2013) which includes the following passages
  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.

4. If a representative has withdrawn from acting details should be given as to when this has happened and whether alternative representation has been or is being sought.
29. We have reminded ourselves that the overruling objective when making a decision in the circumstances such as those in this case is overall fairness to both parties and that is not necessarily predetermined by the situation of one party, such as a potentially absent claimant who was denied an adjournment. The Tribunal have to balance the adverse consequences of proceedings with the hearing in the absence of one party against the right of the other to have a trial within a reasonable time and the public interest in the prompt and efficient adjudication of cases.<sup>1</sup>
30. We first considered whether we should adjourn and postpone the hearing to another date. We have come to the conclusion that a postponement is not in the interests of justice in this case. The reason for postponing would be the claimant's unavailability because she is unwell. However, the claimant has not set out more than that she is suffering severe anxiety. The information from the claimant's GP is that the claimant's is currently not fit to attend the hearing. We have no specific explanation or understanding of the claimant's condition beyond this.
31. The medical certificates and supporting medical evidence provided do not explain the nature of the condition concerned beyond describing it as anxiety and severe anxiety. While the medical information provided includes the GP's opinion that the claimant is unfit to attend the hearing, it does not set out a prognosis of the condition or any clear indication of when that state of affairs may cease. It is stated that "*due to the severity of her symptoms I feel that it will take her a long time to recover*" and "*I feel it is unlikely that she will be fit to attend court for the foreseeable future*".
32. We have also considered the history of this case. The case was adjourned in August 2017 the case was listed for an open preliminary hearing on 8 December 2017: this was converted to a telephone preliminary hearing because there had been a failure to comply with the Tribunal's directions for reasons by the claimant. When the open preliminary hearing was re-listed for hearing on 27 September 2018 the claimant was unable to attend and there had been a failure to comply with the directions for that hearing.
33. We note that the respondents anticipated the problems the situation which arose when in the letter of 27 November 2018, they expressed "concern ... that given [the claimant's] background and her admitted state of health and personal issues, she will once again seek to delay the hearing." The respondent asked that they be informed "urgently" of any postponement application and that any such application have "cogent medical or other evidence". The respondents stated that they "will not unreasonably oppose an application that is made in good time and supported by cogent

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<sup>1</sup> O'Cathail v Transport for London [2013] EWCA Civ 21, [2012] ICR 614

evidence". The claimant was asked not to wait until shortly before the hearing when the preparation for the hearing will have been done.

34. The respondent having stated a reasonable position to adopt was then faced with exactly the situation that they had sought to avoid. The claimant's application for a postponement was made very late. Cogent medical evidence beyond the GP's statement that the claimant suffers anxiety or severe anxiety has not been provided.
35. The claimant has not complied with the Tribunals orders in respect of preparation for the hearing. There is some history of non-compliance from the claimant, the correspondence from the claimant's solicitors indicates that in September 2017 the claimant's admission into Cork University Hospital played some part. It is not a complete explanation for the failure to comply with the requirement to provide a skeleton argument by the 28 September 2017 and there has been no explicit explanation for the failure to comply with the more recent directions.
36. If this case was re-listed for hearing with a time allocation of four days, the Judges' listing calendar would allow this case to be re-listed for hearing in Reading from 11 November 2019. Attempts to find an earlier date are not possible unless the availability of the parties is known. The claimant's availability for a hearing is not known.
37. The claimant's application asks for a reasonable time to find an alternative representative. The explanation of why the solicitors acting for the claimant come off the record is not clear. The solicitors come off the record on 17 December 2018 when the case is listed for hearing to commence on 8 January 2019. A new solicitor was approached but they have made no application to the Tribunal on the claimant's behalf asking for more time and no indication is given by the claimant that they need more time to decide whether they can act for her and if so what amount of time is required. We note that the claimant had approached Lawson West Solicitors Limited by 4 January 2019. The claimant has also approached the FRU and appears to have made an unrealistic request that they take on her case on 7 January 2019 for a hearing commencing at 10am on the 8 January 2019: they were unable to do so. FRU has not asked for more time to consider the claimant's case. The claimant's application makes reference to a postponement until Mid-February. While this may be a realistic period of time for the claimant to obtain new representation there is no indication that the claimant would be fit to proceed with her case then.
38. Taking into account the fact that the claimant's claim is in respect of a short period of engagement by the second respondent between 31 December 2016 and 30 January 2017 (or about 21 working days). The matters giving rise to this claim occurred in 2017, two years ago. There is no indication when the claimant is likely to be in a position to proceed with the hearing. In addition we note that the claimant's application for a postponement was considered and refused by EJ Vowles and that there

has been no real change in circumstances since that application was made.

39. If this matter were postponed it would be approaching 34 months after the relevant events occurred before a final hearing can take place. The respondent is ready for hearing today. But for the claimant's failure to comply with directions and illness by now the parties could have been in position where at least the preliminary issues had been determined. Had that occurred it would allow the claimant and respondent to have a better understanding of the strength or weakness of their cases.
40. A postponement of the hearing is not in the interests of justice.
41. Rule 47 provides that 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. We have considered the information which is available to us and note the reasons for the claimant's absence.
42. The respondents are in attendance with the witnesses and ready to proceed with their defence of the claimant's case.
43. The claimant has provided a witness statement about employment status. This is not agreed by the respondents. Whether the Tribunal were to accept that the claimant is an employee or not we would still be required to consider whether the claimant has shown facts from which we could conclude that she has been discriminated against on the grounds of her sex or harassment. In the absence of evidence from the claimant the claimant's claim really has no prospects of success and so for the reasons set out above we dismiss the claimant complaint pursuant to rule 47.

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Employment Judge Gumbiti-Zimuto

Date: 9 January 2019

Sent to the parties on: .....

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For the Tribunals Office