Appeal No. UKEAT/0076/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 11 September 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR M MVULA APPELLANT

THE CO-OPERATIVE GROUP LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	DR ROLAND IBAKAKOMBO (Representative) International Faith Assembly 83 The Box Hill Stoke Aldermoor Coventry West Midlands CV3 1ET
For the Respondent	MR GARETH GRAHAM (of Counsel) Instructed by: TLT LLP 3 Hardman Square Manchester M3 3EB

SUMMARY

PRACTICE AND PROCEDURE – Postponement or stay

There was no error in the ET's decision not to postpone a costs hearing, even though it meant the hearing took place in the Claimant's absence. The medical evidence was vague and did not provide sufficient evidence that the Claimant was unfit to attend the hearing. The line of Authorities from **Teinaz v London Borough of Wandsworth** [2002] IRLR 721, **Andreou v The Lord Chancellor's Department** [2002] IRLR 728, **Beardshall v Rotherham Metropolitan Borough Council and others** UKEAT/0073/12/ZT considered, followed and applied.

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HER HONOUR JUDGE STACEY

1. This is an appeal from the Employment Tribunal's Judgment sitting in Birmingham before Employment Judge Dimbylow and Members Mrs RA Forrest and Mr PR Trigg on 24 July 2017(the Costs Hearing) which was sent to the parties on 28 July 2017 (the Costs Judgment). The Appellant, Mr Mvula, was the Claimant below and the Respondent to the appeal, the Co-Operative Group Limited, was the Respondent below. I shall continue to refer to the parties as they were before the Employment Tribunal ("ET") consistent with **Practice Direction** paragraph 16.4.

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2. The appeal raises a narrow point that was carefully delineated by Her Honour Judge Eady QC at the Appellant only Rule 3(10) Hearing on 19 March 2018 as to whether or not the Costs Hearing, which resulted in the Costs Judgment, should have been postponed. The Claimant did not attend and was not represented at the Costs Hearing.

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3. If the Claimant's case had been presented to the ET on or after the 6 April 2016, Rule 30A of the Employment Tribunals Rules of Procedure would have been in force and applied, but since proceedings were commenced before that provision came into force, the general rules about postponements apply.

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Background to the Appeal

4. The Claimant had pursued three claims against the Respondent who had employed him as a Warehouse Operative from 15 July 2012 to the summer of 2017. The first claim was lodged in January 2015 and concerned events of November 2014. Details of the substantive three cases

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A were helpfully summarised by Her Honour Judge Eady QC in the Rule 3(10) Judgment as follows:

> **"8. The first claim - determined by the ET at the hearing on 5 to 7 June 2017 - was lodged on 6 January 2015. A large number of the complaints made by the Claimant in that claim had earlier been struck out, leaving a complaint of victimisation which was recorded as arising from a verbal exchange on 4 November 2014. The Claimant's case was that he had been suspended for having said that the night shift manager was bullying and harassing him. The first claim was originally listed for a Full Merits Hearing to commence on 26 October 2015, but the Claimant did not attend on that day and the hearing was postponed apparently due to his ill health. There were then various case management and other Preliminary Hearings but the next relevant part of the chronology took place on 22 May 2017, when the Claimant's representative wrote to the ET seeking a postponement of the Full Merits Hearing on the grounds of the Claimant's health conditions (work-related stress). He asked for the hearing to be put back after August 2017. A fit note was attached to that application, showing the Claimant had been assessed by his GP on 15 May 2017 advising that he was suffering "stress at work" and was not fit for work until 15 July or 15 August 2017. I understand the Claimant's GP had also written a letter dated 19 May 2017, in which it was stated as follows:**
>
>> **"This is to confirm that the above-mentioned person is a patient of our surgery since January 2008.**
>>
>> **From Mateus's records I can confirm that he suffers from the following clinical problems:**
>>
>> **Impaired Glucose Tolerance**
>> **Feeling Stressed**
>> **Alpha trait thalassemia [sic]**
>>
>> **At a recent consultation with me, he was issued with a MED3 (Statement of Fitness for Work) due to 'Stress at Work' related problems, a copy of this is attached.**
>>
>> **I understand from Mateus that he has a tribunal hearing on 5th, 6th and 7th of June this year, I would recommend that this hearing is postponed until he has received a 'Fit for Work' assessment by myself, or until any valid MED3's expire. Adding further stress and pressure at this time would not help him to recover from his condition at all.**
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>> **If you require any further information, please do not hesitate to contact me at the above address."**
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> **9. The Respondent's comments were sought on that postponement application. It replied on 24 May 2017, resisting it.**
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> **10. Considering the application on the papers, Regional Employment Judge Findlay refused the postponement, sending her explanation to the parties on 30 May 2017, which included the following statement:**
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>> **"If the claimant wishes to renew his application to postpone the hearing, he must provide medical evidence that he is not fit to attend the hearing (the medical evidence is currently directed to fitness for work) and if he is not fit to attend the hearing, when he is likely to be fit, and whether any adjustments can be made to allow him to participate in the hearing, and if so what adjustments are required.**
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>> **The (brief) medical evidence is not detailed and does not actually address [the] claimant's fitness to give evidence at the tribunal, nor any adjustments that can be made to allow him to do so." (ET Judgment, paragraph 4)**
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> **11. At the outset of the hearing on 5 June 2017, the Claimant again made an application for a postponement. No further medical evidence was provided, but it was said that the Claimant had been to his GP the previous Friday afternoon for a further consultation. It was further contended that Regional Employment Judge Findlay could not have read the GP's letter attached to the fit note as, if she had, she would not have come to the conclusion she had. The Respondent resisted the further application for a postponement, citing the**

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history of previous applications and the fact that costs have previously been awarded against the Claimant for similar conduct. It also seems that, at some point, the Claimant handed to the ET two boxes of prescription drugs as to which the ET observed as follows:

> **"7. … These were: (1) Mirtazapine, one to be taken at night, with 28 tablets prescribed, and (2) Morphine, to be taken one tablet twice a day, with 56 tablets prescribed. The date on the labels on the boxes was 24 October 2016, just before the start of a CPH [closed Preliminary Hearing]. Therefore, on the face of it, these tablets had not been used because both boxes still contained a seemingly large number of tablets. The claimant explained that he had received later prescriptions; but had discarded the new boxes for those tablets and had put the new tablets in the old boxes. This made no sense whatsoever. We had handed the boxes back to the claimant before we retired to consider the application. Later, we asked to see them again, but the claimant refused to hand them back up. He would not allow the respondent's representative to touch the boxes. …"**

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12. Having thus retired to consider the application, the ET refused it, explaining that this was the fair and proportionate response: this was an old case dating back to November 2014; there was nothing new in the application for the postponement - something that was surprising given Regional Employment Judge Findlay's specific guidance - and the ET further took into account the long and complex history of the case, including the previous late applications for adjournments.

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13. The ET having announced its decision in this regard, the Claimant was then asked to give his evidence, but he refused to do so, stating to the ET that he was stressed and could not remember anything. Though indicating he still wished to continue with his case, the Claimant and his representative then left and did not return. After hearing from the Respondent, the ET determined that the fair and proportionate course was to continue with the hearing in the Claimant's absence, which it then proceeded to do.

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14. The appeal against the first decision is solely put as a challenge to the decision to refuse the application for postponement, and I need not, therefore, recite the ET's detailed findings on the merits of the case. I do, however, record that the ET held that the Claimant's claim was a false allegation and had been made in bad faith.

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15. At the end of the hearing, it is apparent that the Respondent applied for its costs and the ET gave directions as to how this application should be dealt with, allowing for the Claimant to serve a response and, if he wished, to provide a statement of his means. The ET also listed the costs application for a further hearing on 24 July 2017. That is the subject of the second of the Claimant's appeals before me today.

16. Neither the Claimant nor his representative attended before the ET on 24 July. No submissions or other correspondence had been provided by the Claimant before the hearing pursuant to the ET's earlier directions, and he had chosen not to provide any information as to his means. On 20 July 2017, the Claimant's representative had, however, written to the ET in the following terms:

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> **"Further to the forthcoming costs hearing listed on 24th July 2017, we write to inform that the Claimant is currently unfit to attend that hearing because he is suffering from impaired Glucose Tolerance, feeling stress[ed] and Alpha trait Thalassemia [sic] (refer to attached Medical Reports dated 19/05/2017 and 12/07/2017) secondly; the claimant's current health conditions are the reasons why he could not comply with the ET's Order sent to Parties on 8 June 2017.**
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> **The Claimant invites the tribunal to postpone the forthcoming costs hearing listed on 24th July 2017 and to re-list it until the attached MED3 will expire."**

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17. The letter from the Claimant's GP that was attached, dated 12 July 2017, was in the following terms:

> **"Mateus was unable to attend his tribunal hearing from the 3rd of July till 7th of July 2017 as he was unwell.**
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> **Mateus had a consultation with of one our GP's today complaining of backache and was treated accordingly.**

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> **I would recommend that all hearings are postponed until he has received a 'Fit for Work' assessment by myself, or until any valid MED3's expire. Any further stress and pressure at this time would not help him to recover from his condition at all.**
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> **If you require any further information, please do not hesitate to contact me at the above address."**

18. The Respondent objected to this application, which was considered on the papers by Regional Employment Judge Findlay, who refused it by letter of 21 July 2017, stating:

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> **"… the claimant and his representative should attend on Monday with any further medical evidence and make the application then if so advised. The case remains listed for hearing on 24 July 2017." (ET Judgment, paragraph 4)**

19. As the ET recorded, neither the Claimant nor his representative did attend but his representative had written to the ET again on 21 July 2017, complaining that the medical evidence had not been properly considered and stating that he would not be attending as "he will not give evidence on behalf of the claimant" (ET Judgment, paragraph 4). The ET took the view that the Claimant had had the opportunity to attend the hearing but had decided not to do so. It proceeded to hear the Respondent's application, noting the observations made by an earlier ET (Employment Judge Hughes presiding) when making a costs award against the Claimant previously and taking into account the findings that had then been made regarding the Claimant's evidence relating to his means.

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20. The ET reminded itself of its earlier finding that the Claimant had made a false claim in bad faith, and was satisfied that he had held no genuine belief in the truthfulness and validity of his case:

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> **"7. … The claimant held no genuine belief in the truthfulness and validity of his case; being driven by spite, wanting to be hurtful and potentially damaging towards the respondent, its staff and their reputations. …"**

21. Finding that the Claimant's conduct had been vexatious, abusive and unreasonable at the point of both bringing the proceedings and then continuing with them, the ET found his conduct had amounted to an abuse of process. It noted he had recently been dismissed by the Respondent, but estimated that he had 20 years of working life ahead of him. The ET was satisfied both that its costs jurisdiction was engaged and that it was appropriate to make an Order for costs in these circumstances. Noting that the total of the Respondent's costs amounted to nearly £29,000, the ET summarily assessed the costs to be paid by the Claimant at £19,733.15."

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5. Judge Eady QC then concluded that it was reasonably arguable that the ET ought to have itself considered whether the hearing should have been postponed:

> **"44. I now turn to the second appeal which relates to the costs decision. Although it is not entirely clear from the grounds of appeal, it seems to me that the real issue here is whether the ET erred by failing to itself consider the question of whether the hearing should be postponed.**

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> **45. It is apparent that the ET referred back to Regional Employment Judge Findlay's decision to refuse the application on 21 July, and it is also apparent that neither the Claimant nor his representative had then attended. That non-attendance was, however, forewarned and arguably explained in the letter from the Claimant's representative of 21 July, and I allow that it is reasonably arguable that the ET ought to have itself considered whether the hearing should have been postponed. That was all the more so given that arguably different considerations arose to those that had existed at the earlier Full Merits Hearing: the ET was no longer having to hear evidence from the Respondent's witnesses, so fair hearing issues relating to their ability to recall events from nearly three years before did not arise. The ET was, rather, concerned with an application for costs. It was, moreover, made aware that the Claimant's circumstances had changed; he had since lost his job. There was, therefore, arguably a reason as to why the ET might want to give him a further opportunity to give evidence as to his means.**

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> **46. I therefore permit the appeal in the second appeal - UKEATPA/0587/17 - to proceed, but only on the basis of grounds which accord with the reasoning I have just explained."**

6. This is the Full Hearing of that appeal.

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The Judgment of the Tribunal

7. This appeal is not concerned with the substantive issue and the order that the Claimant pay a contribution to the Respondent's legal costs but the fact of the hearing having taken place

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in the Claimant's absence and the Tribunal's approach to postponement. The relevant paragraphs are paragraphs 4, 6 and 9 of the Judgment.

> **"4. We received nothing in writing from the claimant in relation to his means; notwithstanding the order we had made, wherein we directed that if the claimant wished the tribunal to have regard to his ability to pay he should provide us with details of his: income, outgoings, assets and liabilities. We do note from the tribunal file that the claimant applied for an adjournment of this hearing on 20 July 2017. The application was opposed by the respondent in a detailed letter dated 21 July 2017. The claimant's application was considered and refused by Acting Regional Employment Judge Findlay on 21 July 2017. In a letter to the parties confirming the refusal of the application, Judge Findlay stated that: "…the claimant and his representative should attend on Monday with any further medical evidence and make the application then if so advised. The case remains listed for hearing on 24 July 2017." Neither the claimant nor his representative attended today and no further medical evidence was produced by them. Dr Ibakakombo sent in a further letter to the tribunal later on 21 July 2017, complaining that the medical evidence had not been properly examined by the tribunal when refusing the request for a postponement. Dr Ibakakombo also said that he: "…cannot attend the hearing because he will not give evidence on behalf of the claimant."**

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8. The subject of the non-attendance of the Claimant was returned to at paragraph 6:

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> **"6. The claimant has had the opportunity to attend at this hearing; but has taken the decision not to attend. There was nothing before us from the claimant by way of submissions. Bearing in mind the specific orders we made on the subject, we found and concluded that the claimant positively decided not to give his financial information to us. We noted the comments made by Employment Judge Hughes in her decision involving the same claimant, following a hearing on 3 and 4 May 2016, and 9 and 10 August 2016. Paragraph 50 on page 46T of our main trial bundle sets out her findings and conclusions in respect of the claimant's evidence with regard to his means."**

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9. In paragraph 9, the Tribunal notes that it has done the best it can to assess the Claimant's means but noted that "It is difficult for the Tribunal to assess ability to pay, or lack of it when the Claimant has failed to cooperate with the process."

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<u>The Appeal Grounds</u>

10. The grounds of the appeal put forward today have three aspects. Firstly, that the Claimant was denied the right to a fair hearing under **Article 6** of the **European Convention of Human**

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Rights as required to be applied in these courts by section 3 of the **Human Rights Act 1998**, and the Tribunal failed to conduct a proper examination of the medical evidence. Secondly, the Tribunal did not consider afresh the postponement request and did not consider whether different considerations applied. Thirdly, which perhaps conveniently fits into ground 2, failed itself

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require further medical evidence. Mr Graham graciously today allowed that third matter to proceed, although he had made a fair point that it is not clearly identified in the grounds of appeal. Given Mr Graham's concession and since Dr Ibakakombo attaches considerable importance to

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it, I shall consider it. But Judge Eady QC only permitted the appeal to proceed on the ground that it was reasonably arguable that the ET ought to have itself considered whether the hearing should have been postponed, so the points have been considered insofar as they are relevant to

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the issue.

<u>The Law</u>

11. The law in this area in "adjournment refusal cases" as they were dubbed by Cox J in

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<u>Beardshall v Rotherham Metropolitan Borough Council and others</u> UKEAT/0073/12/ZT is well-established. The starting point is the Tribunal's overriding objective at paragraph 2 of the **Rules of Procedure** to deal with cases fairly and justly, which includes, so far as practicable (a)

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ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper

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consideration of the issues; and, (e) saving expense.

12. Under rule 47 "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."

13. A Tribunal has the discretion to postpone a hearing at the request of one or other of the parties or indeed its own motion as part of its general case-management powers.

14. The often quoted paragraph 21 of **Teinaz v London Borough of Wandsworth** [2002] IRLR 721 sets out the principle to be applied:

> **"21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment."**

15. The Claimant relied particularly on two cases: **Beardshall v Rotherham Metropolitan Borough Council and others** UKEAT/0073/12/ZT heard by Cox J, which applied **Teinaz** and **Andreou v The Lord Chancellor's Department** [2002] IRLR 728 and **Solanki v Intercity Technology Ltd & Anor** [2018] EWCA Civ 101. **Solanki** was of less direct relevance since it dealt with the specific provisions of CRP 39.3(5) which is not mirrored precisely in the ET **Rules of Procedure**, but is a useful reiteration of the general principles in **Teinaz** and a reminder that these cases are fact sensitive.

Material Facts, Context and Circumstances

16. As is apparent from the chronology of events set out by Judge Eady QC in the Rule 3(10) Hearing quoted above, the medical evidence of 15 May 2017, 19 May 2017 and 12 July 2017 was considered by the Tribunal in relation to the various postponement requests on each occasion

when a postponement was requested and on each occasion, it was found to be insufficient to prove the need for an adjournment.

17. The evidence relied on in support of the postponement requests did not address directly why he was unfit to attend the Tribunal and attend to the preparation and comply with the case management directions. The Acting Regional Employment Judge had helpfully pointed out that the test was not of fitness for work, but fitness to attend a Tribunal. The Claimant's GP's subsequent letter, purporting to provide further information did not assist. It confirms that the Claimant had been a patient since January 2008 and lists from the Claimant's records that he suffers from three clinical problems; firstly, Impaired Glucose Tolerance; secondly, Feeling Stressed and; thirdly, Alpha trait thalassemia. It concluded:

> **"I would recommend that all hearings are postponed until he has received a 'Fit for Work' assessment by myself, or until any valid MED3's expire. Adding further stress and pressure at this time would not help him to recover from his condition at all."**

18. That information was not sufficient for the Tribunal's purposes to succeed in a postponement application and both hearings proceeded in the Claimant's absence. The 5 to 7 June 2017 hearings resulted in the claim being struck-out and the Tribunal on the Respondent's application listing the case for a Costs Hearing on 24 July and making various case-management Orders in preparation, which required the Claimant to provide information and submissions in relation to the application.

19. On 20 July 2017 at 12.32pm, the Claimant applied, page 166 to 170 of the bundle, for a postponement. It relied on the three impairments listed in the GP's letter already mentioned and observed that the Claimant's current health conditions are the reasons why he could not comply with the Tribunal's Order sent to the parties on 8 June.

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20. The enclosures to that letter consisted of a Med3 that said that the Claimant was not fit for work and no details as to the effects or reasons for that. A letter, the one already sent on 19 May referenced at page 160, a further copy of it is at page 179, and one dated 12 July, which repeats the wording set out earlier with the recommendation that all hearings are postponed and that adding further stress and pressure at this time would not help him to recover from his condition at all.

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21. On the basis of that information, the Tribunal, Acting Regional Employment Judge Findlay again, refused the postponement request. In her letter of 21 July at page 146, she stated that the Claimant and his representative should attend on Monday, a reference to 24 July, with any further medical evidence and make the application then if so advised. The Hearing remained listed for 24 July.

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22. The Claimant did not follow the Acting Regional Employment Judge's advice. However, instead later that afternoon Dr Ibakakombo sent an email at page 179 reiterating that the Claimant was unfit and that there would be insufficient time to obtain any further or new medical evidence before Monday 24 July. In addition, asserted that the reports had not been properly examined by the Tribunal and suggested that further medical evidence be produced to the Tribunal. Dr Ibakakombo explained that he would not attend the hearing because he would give evidence on behalf of the Claimant. Therefore, the Hearing duly proceeded on 24 July, as set out above and the relevant paragraphs of the Tribunal's Decision have already been quoted.

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23. When the Tribunal reconvened on 24 July 2017 for the Costs Hearing there was therefore no new information before it. From the Liability Hearing in early June it had detailed knowledge of the full procedural history. It knew of the delays in the claim, which was lodged in January

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2015, in coming to a Full Hearing and that the first Full Hearing was scheduled to take place in October 2015. It knew of the full history of the unsuccessful postponement applications. Judge Eady QC has summarised this Tribunal's findings and conclusions about the postponement application at the start of the hearing on 5 June 2017 and the medication boxes he had shown to the Tribunal in support of his application which the Tribunal noted had been prescribed 8 months previously yet still contained a large number of pills. It was aware of the long and complex history of the case including previous late applications for adjournments. The Claimant had left the hearing after the adjournment request was refused and the Tribunal continued with the hearing. It made findings of fact on the basis of the evidence before it which included his statement. Since he had not presented himself for cross-examination he was arguably at an advantage to the Respondent witnesses who had been subject to cross examination by Dr Ibakakombo. The Tribunal concluded that the Claimant was "not open and honest….was not credible and at the very least mistaken" (paragraph 33 of the Liability Judgment).

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24. Those are the material facts. I find, applying the law to the facts, that the ET has made no error of law in refusing the Claimant's application to postpone the hearing. The medical evidence, such as it is, is wholly insufficient to support a claim that the Claimant was too ill to attend his hearing. What is more, the Claimant knew that the letter would not succeed in obtaining the requested postponement because exactly the same letter had been previously used and had been found to be unsuccessful not once but twice.

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25. There is no mention of any symptomology of any of the three conditions identified. There is no discussions of the ways in which the Claimant was affected by any of those conditions and how they might be relevant to a hearing of his case. Dr Ibakakombo today was unable to assist with what condition 1 and 3 are in layman's terms or the symptomology. There was nothing to

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A assist the Tribunal at all in understanding the severity of the conditions. Feeling stressed is a particularly vague term. It is interesting that the doctor does not make any reference to the ICD classifications or whether the stress that the Claimant was feeling amounted to a diagnosis of depression or such like.

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26. The letter is careful only to make a recommendation, it does not say that he is too ill to attend the hearing, but that it "would not help him to recover from his condition at all" which is

C a different matter entirely. It does not address or explain why the Claimant has not complied with any of the case-management Orders sent to the parties on 8 June. There is no proper explanation for why the helpful advice of the Acting Regional Employment Judge, diligently ensuring that

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27. The facts of this case can easily be distinguished from that of **Solanki** and **Beardshall Andreou.** There was a paucity of medical evidence to support the postponement application as had previously been explained. On the facts in this case there was no duty on the Tribunal to

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28. In the Costs Judgment the Tribunal recorded that the Claimant's representative had submitted a further letter after receiving the Acting Regional Employment Judge's letter refusing the postponement request on 21 July (Dr Ibakakombo's second letter of 21 July) in paragraph 4 from which it is apparent that the Claimant has not produced any new evidence or information relevant to the postponement application. The Costs Judgment then concludes at paragraph 6 that the Claimant has "decided not to attend" and furthermore, decided not to provide any information as to his means to assist the Tribunal at the Costs Hearing. It is therefore apparent that the Tribunal had considered the issue and decided that Claimant's non-appearance at the Costs Hearing was not through inability to attend on health grounds. The Tribunal has therefore complied precisely with Rule 47 and had all the information necessary to decide whether to proceed in his absence, and there was no need and nor would it be practicable to make further enquiry. The Tribunal could not have been expected to do anything more.

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29. For the above Reasons, I dismiss this appeal.

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