



EMPLOYMENT TRIBUNALS

Claimant: Mr B Asogu

Respondent: Huddersfield Student Union

Heard at: Leeds

By CVP video link

On: 21 August 2020

Deliberations: 26 August 2020

Before: Employment Judge Shepherd

**Members: Mr D Wilks
Mr Priestley**

Appearances:

For the Claimant: Mr Olu

For the Respondent: Ms Gould

RESERVED JUDGMENT ON RECONSIDERATION

The unanimous judgment of the Tribunal is that:

1. The judgment of the Tribunal dated 29 October 2019 is confirmed.

REASONS

1. The Tribunal heard submissions from Mr Olu on behalf of the claimant and Ms Gould on behalf of the respondent. It had been agreed by the parties that this hearing was suitable for a CVP video hearing.

2. The claimant applied for a reconsideration of the judgment of the Tribunal on 29 October 2019. The application was not refused under rule 72 (1) of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 and it was determined that the matter should be listed for a reconsideration hearing which was before the full Tribunal panel who made the decision on 29 October 2019. The relevant chronology is as follows:

3. This case was listed for a four-day hearing commencing on 29 October 2019.

2. On 28 October 2019 at 11:11 the claimant applied for an adjournment of the hearing due to his ill-health. He referred to his mental health and pains in his right knee for which surgery was scheduled for 4 November 2019. That application was refused by Employment Judge Cox on the basis that the claimant's knee surgery was not due to take place until 3 days after the hearing. It was indicated that the Tribunal would discuss with the claimant, at the beginning of the hearing, what adjustments could reasonably be made to ensure that he had a fair opportunity to take part in the hearing in the light of his health issues.

3. The claimant sent a further email on 28 October 2019. In that email the claimant made an application for reconsideration. That application was also refused by Employment Judge Cox as no new matters had been raised and the Employment Judge saw no reason to depart from her earlier decision.

4. The claimant sent a further email to the Tribunal on 28 October 2019 once again, asking for the hearing to be postponed. He referred to a heart condition, a knee condition and severe depression and anxiety as a consequence of what he alleges the respondent had done to him.

5. The evidence the claimant had provided had been considered. The claimant referred to knee surgery. Employment Judge Cox had indicated that the surgery was not due to take place until three days after the hearing and adjustments could be made at the beginning of the hearing. The medical information provided showed that claimant had been referred for an arthroscopy in order to have a more detailed evaluation of what was referred to as a "vague ache deep within the knee". The appointment for an arthroscopy had been rearranged from 28 October 2019 to 4 November 2019.

6. The claimant had referred to his mental health. He had provided a GP assessment dated 28 October 2019 indicating that because of anxiety and depression the claimant was not fit for work. This had been considered by Employment Judge Cox in making her decision and refusing the application for a reconsideration.

7. On 29 October 2019, the day of the hearing, at 10:50 The claimant provided a further assessment from his GP dated 29 October 2019, which was the same as the assessment dated 28 October 2019 apart from the section setting out the condition which stated " anxiety and depression – unable to attend court proceedings", and it was, once again, indicated that the claimant was not fit for work. The wording of that assessment was as follows:

"I assessed your case on 29/10/19 and, because of the following condition(s):

anxiety and depression – unable to attend court proceedings I advise you that: you are not fit for work.”

8. The claimant also referred to a heart condition. He provided a copy of a notice of an appointment for a 24-hour ECG on 22 October 2019.

9. The assessment or ‘fit note’ only referred to anxiety and depression. It said nothing about a heart or knee condition.

10. The claimant had provided a letter from South Kirklees Mental Health Support Services dated 22 October 2019. in which there was reference to issues including having lost his job, which had further exacerbated his mental health issues. There was no prognosis or indication as to when the claimant might get better. The claimant referred to his mental health issues which he said were all as a result of what he had faced when working for the respondent. The respondent had indicated that the claimant’s argument as to his mental health was circular. His stress was due to the employment history and proceedings and, naturally the proceedings reaching their conclusion would be a necessary step for his recovery.

11. The claimant had failed to attend the hearing and had not provided medical evidence which satisfied the Tribunal that the claimant was not fit to attend the hearing. The Tribunal considered all the medical evidence that was provided and the contents of correspondence with the Tribunal. The claim was dismissed pursuant to rule 47.

12. The medical evidence provided to the Tribunal shortly before the hearing was considered, together with the other evidence and the Tribunal considered it to be insufficient grounds for the hearing to be adjourned. It was essentially the same medical assessment as had been provided on 28 October 2019 although it referred to the condition as anxiety and depression – unable to attend court proceedings, it provided the same assessment that the claimant was not fit to work.

13. On 9 November 2019 the claimant submitted an application for reconsideration. His application referred to the reasonable prospects of success of his claim and serious acts of discrimination. He referred to mental/psychological illness, severe depression, anxiety, sleeping disorder and low mood as a consequence of what the respondent had done to him. He also referred to a heart condition and his knee condition.

14. The respondent provided comments indicating that the claimant’s application disclosed neither new evidence nor any legal basis which would render the Tribunal’s decision either unlawful or contrary to the overriding objective. It was indicated that, notwithstanding the claimant’s contentions about his health, both immediately preceding the hearing, and on the day of the hearing, he was physically and mentally able to quickly and persistently obtain GP notes and prosecute his application to the Tribunal in writing with reasonable cogency.

15. It was submitted that the claimant's applications for postponement before and during the hearing were plainly unsatisfactory, not least because of the reliance on the surgery which post-dated the hearing, and an alleged heart condition for which evidence was no more than an exploratory 24 hour ECG monitor. Employment Judge Cox's order rejecting the postponement application and her further order rejecting the reconsideration application on 28 October 2019 made it absolutely clear to the claimant that he was required to attend the hearing. He made no attempt to do so even in circumstances where he was quite capable of leaving the house, sending emails and telephoning the Tribunal on the day.

16. The application for reconsideration was listed for hearing on 18 February 2020, unfortunately, due to the respondent's counsel's unavailability, it had to be postponed. It was relisted for 7 May 2020. That hearing was then postponed upon the application of the claimant because of the Covid-19 pandemic. The reconsideration hearing was then relisted as a hearing by CVP video link on 21 August 2020.

17. On the afternoon of 20 August 2020, the day before this hearing, legal representatives wrote to the Tribunal and the respondent's representatives indicating that they had been instructed on behalf of the claimant and providing a medical report dated 19 August 2020 from Dr Alikhan, Consultant Psychiatrist. The claimant has also provided a copy of his letter of instruction to the psychiatrist. In that letter he referred to his grounds for seeking an adjournment in respect of severe depression and anxiety, his heart condition and his knee condition. He also set out general principles of adjournment in an Employment Tribunal on health grounds. He referred to an indication that, if there was evidence on medical grounds and that a litigant had been advised by a qualified person not to attend, but, if the Tribunal or Court has doubts as to whether the evidence is genuine or sufficient, the Tribunal or Court has discretion whether or not to give directions such as would enable the doubts to be resolved.

18. The report from Dr Alikhan included a review of the claimant's medical records It was stated that the claimant's GP records contained entries for 28 March 2018 and 2 July 2019 in respect of anxiety and depression. There was reference to an entry dated 14 October 2019 in which is stated:

“14 October 2019 – anxiety and depression – came for a planned review – taking a 25mg Promethazine at night, not felt this has helped sleeping – alert, chatty, looks well, good eye contact. Reassurance given.”

19. The entry closest in time to the dates on which the case was listed for hearing, 29 October 2019, is dated 21 October 2019 in which there is reference to a telephone consultation in which it is stated:

“21 October 2019 – needs evidence regarding his mental health to support his reasons why he is struggling financially.”

20. Dr Alikhan's review of the claimant's medical records made no reference to any medical issues on or around 28 or 29 October 2019.

21. Following the review of medical records it is stated that:

"There were no other entries of psychiatric significance in the medical records."

22. Dr Alikhan made comments with regard to the claimant's mental state upon examination via video link on 8 August 2020 and indicated of the claimant:

"He was orientated in time, place and person, with good attention and concentration throughout the interview. He had good insight into his difficulties although struggled to appreciate the limits of the extent to which psychotropic medication could be of help during his present circumstances."

23. Dr Alikhan then provided his opinion and recommendations in which it is indicated that the claimant's depression:

"Is likely to persist while his current tribunal case remains unresolved however, in my opinion, he would benefit from cognitive behavioural therapy..."

24. The Tribunal gave careful consideration to all the medical information that had been before it on 29 October 2019 and the further medical evidence provided by the claimant for the reconsideration hearing. The Tribunal finds that medical evidence provided by the claimant did not support his claim that he was medically unfit to attend the hearing. The report from Dr Alikhan provided no evidence with regard to the claimant's medical condition on the day of the hearing, 29 October 2019. It indicated that there were no other entries of psychiatric significance in the medical records.

25. The submissions on behalf of the claimant were largely with regard to his general mental health. He had mental issues from 2017. He had been prescribed five different types of medication. In his submissions Mr Olu referred to the case of *Teinaz v London Borough of Wandsworth* [2002] IRLR 721 and *Andreou v Lord Chancellor's Department* [2002] IRLR 728.

26. In the case of *Teinaz* the Tribunal suspected the basis of a medical certificate and refused an adjournment. The EAT held that the treatment of such applications was a practical matter and each such occasion was to be assessed on its own facts. In that case the Tribunal had taken into account an unallowable factor, namely its own suspicions about the medical certificate. The Court of Appeal held that the EAT decision could not be criticised and dismissed the appeal.

27. In the case of *Andreou* the claimant had requested a postponement of the Tribunal hearing on the basis of a medical certificate which stated that she was unfit to attend work. The Tribunal adjourned the proceedings for one week with directions that a medical report be produced detailing the nature and prognosis of the illness and the reasons why the claimant was unfit to attend the Tribunal hearing. The claimant failed

to produce adequate information about her inability to attend the hearing and as a result the Tribunal struck out her claim on the ground that she had failed to comply with the direction. It was held that it was necessary for a Tribunal to balance fairness to the claimant with fairness to the employer and with that in mind, the Tribunal's decision had not been perverse. Deference should be given to the exercise of judicial discretion by the inferior Tribunal, particularly in circumstances where it is clear that all the relevant matters have been weighed up

28. The submissions of Ms Gould on behalf of the respondent were to the effect that all the documents had been considered by the Tribunal including the GP assessment or 'fit note'. There was no new evidence that would not have been available to the claimant at the time of the original decision. The recent medical report was essentially based on the evidence from the claimant relaying his history (the claimant had been examined via video link on 8 August 2020 in order to prepare a psychiatric report). There was nothing new provided with regard to the medical condition of the claimant as at the date of the hearing.

29. Employment Judge Cox had made the initial decision not to postpone the hearing and it had been indicated that the Tribunal could offer the claimant adjustments to ensure he had a fair opportunity to take part in the hearing in the light of his medical issues. The application for a reconsideration had been considered and the claimant had provided the same medical evidence. Employment Judge Cox had refused to reconsider her decision as no new matters had been raised in the reconsideration application and she saw no reason to depart from her earlier decision.

30. The only issue to consider on 29 October 2019 was the assessment or 'fit note' provided at 10:50 on the morning of the hearing. This referred to the claimant being unable to attend court proceedings and was inconsistent with the claimant indicating that he could not attend because of his knee surgery. This provided that the claimant was unfit to attend work. This did not mean the claimant could not attend the Tribunal and it had been indicated to the claimant that adjustments could be put in place.

31. Nothing had changed, nothing indicated that it was in the interests of justice to alter the decision previously made. The documents had been considered at that time.

32. The Tribunal has carried out a thorough review of all the evidence that was before it on 29 October 2019 and the further evidence and submissions made in respect of this hearing.

33. The Tribunal had reached the judgment, having considered all the evidence before it and concluded that there was insufficient medical evidence of incapacity to attend the Tribunal hearing on 29 October 2019. The further medical evidence provides no information that would alter that judgment. The report from the consultant psychiatrist provided no evidence of the claimant's capacity to attend the Tribunal on 28 or 29 October 2019. It indicated that there were no entries on those dates in the GP records and there were no other entries of psychiatric significance after that date.

34. The Tribunal has reconsidered the judgment on 29 October 2019. It is not in the interests of justice to vary or revoke that judgment and it is confirmed.

Employment Judge Shepherd

Dated: 27 August 2020