EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr D Harrington **v** Dewlays Cheesemakers Limited

Heard at: Manchester Employment Tribunal (by Cloud Video Platform ('CVP'))

On: 10 December 2020

Before: Employment Judge Johnson

Members: Ms M Dowling
Dr H Vahramian

Appearances

For the First Claimant: did not attend

For the Respondent: Mr Kenyon (managing director)

JUDGMENT

1. The claimant's second application to postpone the hearing, made in his emails dated 9 December 2020 and sent at 20:43 and 20:45 respectively is refused.

2. Upon the claimant not attending to present his case, his claims are dismissed. This decision is made in accordance with Rule 47 and taking into account the overriding objective under Rule 2 of the Employment Tribunal's Rules of Procedure.

REASONS

Background

1. These proceedings arise from the claimant's employment by the respondent as a packing operative from 3 March 2020 until 9 April 2020 when his employment was terminated.

2. A claim form was presented on 7 June 2020 and following a period of early conciliation from 23 April 2020 until 19 May 2020. The claim concerned matters relating to health and safety which could amount to automatic unfair dismissal contrary to section 100 Employment Rights Act 1996 ('ERA') and detriments arising from the same health and safety issue contrary to section 44 ERA.

3. Essentially, the claimant asserted that he had taken time off work because he was concerned that he might be a carrier of Covid19 and because a member of his household had come down with symptoms similar to those of Covid 19. He believed that this was in accordance with government guidelines at the time he should be self-isolating and accordingly, the respondent dismissed him for taking himself out of the workplace to protect others.

4. The respondent presented a response on 15 July 2020 and which rejected the claim, and which argued that the claimant had been dismissed because of reasons connected with his poor performance during his probation period.

5. On 22 August 2020, the Tribunal sent a Notice of Hearing to the parties with a 2-day hearing listed for 10 and 11 December 2020 using CVP. It also provided the usual case management orders for compliance by the parties including a schedule of loss, disclosure by both parties, agreement by parties and consequential preparation of a hearing bundle by the respondent and an exchange of witness statements.

6. The claimant was represented at this stage, but it was not clear whether the parties complied with the case management orders. In any event, there was no hearing bundle or witness statements available at the hearing today.

7. On 5 December 2020, the claimant's solicitor gave notice to the Tribunal that it would no longer represent the claimant and would be coming off the record. On 6 December 2020, the claimant applied for a postponement ('application 1'), explaining that he was no longer represented, that this put him at a disadvantage and he did not have time to find alternative representation.

8. On 9 December 2020, the application was considered by Regional Employment Judge Franey, who decided to refuse a postponement. He noted that the respondent had not been copied into the application and given that the claimant's solicitor had only recently come off the record, the case should be prepared and ready to be heard. He did however, invite the claimant to make a further application at the beginning of the hearing.

9. In the meantime, the respondent provided the claimant and the Tribunal with documentation that it wished to rely upon at the hearing today. It was limited in scope and appeared to relate to the claimant's timesheets.

10. What happened next was after the close of business on 9 December 2020, the claimant sent 2 further emails at 20:43 and 20:45 respectively to the Tribunal and respondent, making a further application to postpone ('application 2').

11. The email sent at 20:43 said the following:

Dear sir/madam,

2406242/20 Harrington

As you will be aware my solicitor has dropped out of representing my case at the tribunal.

I was not forewarned of his intention until late last week.

I have no prepared paperwork or evidence as it is with my solicitor.

I have tried in this short time to find further representation and I have submitted a

GDPR request to gain access to my case files.

I ask once again for a postponement.

However if the opportunity is denied to postpone the hearing, I will have no choice

but to resign my interest in the case.

I will not be attending or participating in the hearing.

Damien Harrington

12. The email sent at 20:45 said the following:

Dear sir/madam,

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Damien Harrington

13. Naturally, these emails were not received by the Tribunal until the start of business today. Employment Judge Johnson asked the clerk appointed to assist with the hearing to contact the claimant and to require his attendance at the hearing. As the case was being heard by CVP, it was not envisaged that this would be a difficult task.

14. The claimant had not provided a phone number for him to be contacted and an email was sent to him requiring his attendance. Additionally, the Tribunal clerk called his former solicitors who were able to provide a telephone number. The clerk called this number and was puzzled by the answer which can be summarised as follows: *'hello? Hello? Can't hear you…'* He then received an invitation from the claimant's phone provider to leave a message. He then called the claimant a further 2 times and left 2 messages. He also asked 3 colleagues to listen on speaker phone and they all agreed that what they heard was a curious phone message which would be played when the claimant was not available. It is not clear why the claimant had used a message of this nature and whether he thought it was humorous, but whatever the reason, it made contacting him all the more difficult.

15. The claimant did not reply to the telephone messages left by the Tribunal clerk and as the Tribunal had already delayed starting the case for an hour, it decided to commence the hearing in the claimant's absence.

16. First, the Tribunal determined the application to postpone the hearing. The claimant had not attended to make submissions in support of application 2 as required by REJ Franey and by EJ Johnson this morning despite numerous attempts to contact him. Mr Kenyon was present and was ready to proceed with resisting the claim. The Tribunal took into account the Presidential Guidance – seeking a postponement of a hearing, in reaching its decision.

17. The Tribunal's decision was to reject the application as it had not properly been made in person by the claimant. He knew that he was required to attend the hearing today and had made no effort to do so. It was

recognised that he felt that his solicitor coming off the record had placed him in difficulties, but he needed to explain why this prevented the claim from proceeding. The Tribunal applied the overriding objective under Rule 2 of the Employment Tribunals' Rules of Procedure and ensuring that it dealt with the case fairly and justly. Both parties were unrepresented, but the claimant had the benefit of representation until recently and the parties had plenty of notice to prepare the case for final hearing. The duty under the overriding objective also applies to the parties and the claimant's failure to attend represented a failure to cooperate. Under these circumstances it was felt that the Tribunal should avoid any further delay or expense and the claimant's lack of cooperation rendered it wholly proportionate and fair and reasonable to dismiss the application to postpone.

18. The Tribunal then considered what should happen to the hearing before it. It considered Rule 47 which dealt with circumstances where there is non-attendance by a party. The Tribunal had a discretion to dismiss the claim or proceed with the hearing in the absence of that party. It also considered the overriding objective under Rule 2.

19. The case was dealing with the claimant's claim and the respondent's role was to provide evidence to rebut the claimant's allegation. Without the claimant attending to present his claim, it was impossible for the Tribunal to consider his case. Consequently, the respondent did not have a case to answer.

20. The Tribunal's decision was therefore that it must dismiss the claimant's claim and that it was in the interests of justice to do so. The parties were on an equal footing being both unrepresented and the Tribunal was prepared to be flexible regarding how the case was heard. However, it was also essential that any further delay was avoided, expense was saved, and the respondent was not unduly prejudiced by the claimant's unwillingness to attend the hearing today.

21. The claimant had effectively made a 'fait accompli' in his two emails sent on 9 December 2020, by declining to attend the hearing if application 2 was refused before the hearing took place. This was unreasonable behaviour, was not cooperative within the meaning of the overriding objective. While the claimant did not formally give notice of his withdrawal of his claim in the email, he clearly did not demonstrate any real willingness to proceed. Accordingly, his claim must be dismissed.

22. At the conclusion of the hearing, Employment Judge Johnson did address Mr Kenyon upon his failure to comply with the case management orders identified in the Tribunal's letter dated 22 August 2020. However, it was confirmed that this was not material to the Tribunal's decisions made

today. He was simply advised that in the event the respondent is involved in Tribunal proceedings in the future involving other claimants, it should pay close attention to Tribunal letters and orders and comply with them within the required time period.

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Employment Judge Johnson

Date: 10 December 2020

Sent to the parties on:

29 January 2021

For the Tribunal Office