

Procedural history

3. The Claimant commenced employment on a temporary fixed term contract with the Respondent, an international law firm, on 4 March 2019. He was assigned to a project being undertaken on behalf of a client of the Respondent's in Luxembourg. His employment was of short duration with it being terminated on 8 March 2019. He was paid in lieu of one week's notice. He subsequently contended that he had been subject to sex discrimination. He also claimed that he had been subjected to victimisation. He initiated Employment Tribunal proceedings on 30 June 2019. There was a case management hearing before Employment Judge Taylor on 5 March 2020, during which the claim for indirect sex discrimination was withdrawn and dismissed. The Respondent served amended grounds of resistance on 19 March 2020.
4. There was a further case management hearing before Employment Judge Burns on 15 July 2020. This would have been the commencement of the original full merits hearing but that was postponed because of the pandemic and the case relisted for a four-day hearing scheduled to commence 13 April 2021.

The Claimant's health and postponement application

5. The Claimant was diagnosed with ADHD in 2015. He made an application for the postponement of the hearing in an email of 7 April 2021. He referred to his inability to concentrate for long periods being impaired and he wished the Tribunal to order that he would not be subject to cross examination by the Respondent. He variously referred to conditions to include his ADHD, depression and distress and contends that his stress has been exacerbated because of what he contends to be the threatening and aggressive litigation tactics deployed by the Respondent.
6. An email was sent to the Tribunal in an email of 2:53 PM on 8 April 2021 from a Dr Noor. He had assessed the Claimant on 8 April and advised that he suffers from ADHD and anxiety. He said that the Claimant has had several appointment reviews for his mental health especially in the last 3 months. His anxiety is impacting on his ability to concentrate and he said that he would be grateful if the Tribunal could please take the Claimant's circumstances into consideration.
7. The Respondent's solicitors opposed the Claimant's postponement request setting out its reasons in detail in an email of 8 April 2021. This outlines some of the procedural history and in relation to the Claimant's disability says the Respondent was first aware of this on the exchange of witness statements. The Respondent opposed the Claimant's request not to be cross examined by the Respondent's representative. The Respondent rebutted the contention that its conduct had in any way been responsible for exacerbating the Claimant's mental health condition. The Respondent says that it would suffer significant prejudice if an already stale claim from a short period of employment in March 2019 were to be further postponed. There are various other applications which need not concern the Tribunal in the context of this application.
8. In an email from the Claimant of 20:40 on 12 April 2021 to Employment Judge Nicolle's Skype email address, but not copied to the Respondent, he advised that

he was unable to attend the following day's hearing. Employment Judge Nicolle had taken the relatively unusual step of communicating directly with the parties from his Skype email address given the short notice of the hearing and the Tribunal's current limited administrative staff. In this email the Claimant referred to various matters to include what he considered to be aggressive correspondence pertaining to costs from the Respondent's solicitors.

9. In an email from Employment judge Nicolle to the parties at 07:51 on 13 April 2021 he advised the Claimant that he had received a total of 5 emails from him the previous evening, but not copied to the Respondent in accordance with Rule 92. He advised the Claimant that it would be inappropriate for him to consider this correspondence given that it had not been sent to the Respondent but advised the parties that no decisions would be made on any element of the claim, or applications in relation thereto, prior to the commencement of the hearing at 1130 that day.
10. In an email of 08:26 on 13 April 2021 the Claimant said that since January 2021 he had been treated for depression and distress, acutely with sleeping tablets and antidepressants.
11. A further doctor's note dated 13 April 2021 was produced by the Claimant on the morning of the hearing. This was from a Dr Lutterodt and referred to the Claimant's worsening mental health symptoms and recommended a period of two weeks off work and his hearing until his mental health has improved.

Relevant law

12. 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. 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.
13. Rule 37(1) (a) provides that where there is no reasonable prospect of success and (d) the claim is not being actively pursued and (e) that a fair hearing is no longer considered possible the Tribunal may strike it out.

Attempts to communicate with the Claimant

14. On initially being assigned to the case late on the afternoon of 12 April 2021 Employment Judge Nicolle wrote to both parties notifying them of his involvement and asking them to provide him with a copy of the bundle. The Claimant subsequently sent a plethora of emails relating to his postponement application and what he contends to be the bullying behaviour of the Respondent. Employment Judge Nicolle made it clear to the parties that no decision would be made on the application to postpone prior to the hearing which was scheduled for an 11:30am start the following day. The Claimant continued to communicate with the Tribunal, and directly with Employment Judge Nicolle, and in many of emails did not copy the Respondent in accordance with Rule 92.

15. The Claimant did not join the CVP hearing at the allotted time of 11:30. Employment Judge Nicolle sent him an email reminding him that the hearing was underway, and the Tribunal Clerk phoned and left a voicemail message to this effect and a text message. She reported that the Claimant responded by saying that he asked the Tribunal to consider his medical evidence and rule appropriately. No indication was given he was experiencing any technical difficulties logging in to the CVP hearing. It is therefore apparent that he had decided that he could not, or would not, participate.

Conclusions

16. The Tribunal decided that on the evidence provided in advance of the hearing that it would not be appropriate to grant a postponement.
17. The Tribunal carefully considered the medical evidence. The evidence produced whilst confirming that the Claimant has ADHD and suffers from depression and stress did not provide any specific reliable time in which he would make a recovery. The medical evidence, whilst arguably appointing to a deterioration in the Claimant's mental health since January 2021, did not involve a significant and sudden deterioration in his health but rather his having very long-standing mental health conditions.
18. Further, the Tribunal did not consider that the evidence provided was such that it provided justification for the Claimant's failure to attend the hearing to make an application for a postponement in person. It is apparent from the Claimant's voluminous email correspondence in the preceding days that he could communicate coherently, and the Tribunal took this into account in reaching its decision. The Tribunal was also mindful of the fact that the Claimant had been advised that his application for a postponement would not be considered in writing and would be considered at the commencement of the hearing.
19. Given this the Tribunal is concerned that if the case were to be postponed and relisted for a further four days probably later in 2021, or possibly early 2022, the situation could be repeated. This would be unsatisfactory and whilst there is inevitably prejudice of dismissing a claim that must be balanced against prejudice to the Respondent.
20. The Tribunal decided that the most appropriate course was that the entirety of the claim should be dismissed because of the Claimant's non-attendance pursuant to Rule 47. It would not in the Tribunal's view be an effective use of its time, or indeed that of the Respondent and its witnesses, to have a hearing in absentia particularly given the Tribunal's preliminary view of the substantive merits of the claim. Having read the pleadings and witness statements the Tribunal's provisional view is that any hearing in absentia was unlikely to provide any basis to infer that the dismissal of the Claimant was related to his sex.
21. Further, the Tribunal does not consider that any basis exists for the Claimant's contentions that he has been subject to bullying or harassing behaviour by the Respondent in the conduct of the litigation.

Rule 37

22. The Tribunal further considered whether it be appropriate to strike the claim out on the basis that it had no reasonable prospect of success.
23. The Tribunal reminded itself of the well-established principles in relation to strike out under Rule 37(1) on the basis that a case has no reasonable prospect of success. Mechkarov v Citibank NA [2016] ICR 1121 is authority for it should only being in the clearest case that a discrimination case should be struck out and that a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.
24. In Anyanwu v South Bank Students' Union [2001] IRLR305, HL per Lord Steyn at para 24 to the effect that it should be only in the most obvious and plainest cases that a discrimination claim should be struck out and that such cases are generally fact sensitive.
25. Tribunals should be reluctant to strike claims out other than in the clearest cases and as set out in Citibank a claimant's case must ordinarily be taken at its highest.

Reconsideration by the Tribunal

26. Whilst in its oral judgement the Tribunal was of the view that the striking out of the claim on the basis that it had no reasonable prospect of a success was appropriate the Tribunal subsequently reconsidered this of its own initiative under Rule 73 on the basis that the Respondent had not given prior written notice of an application to strike out under Rule 37 and nor under Rule 37 (2) had the Claimant being given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing. Under Rule 72 (1) the Respondent is given 7 days from this judgement being sent to the parties to give any response to the Tribunal's proposed reconsideration of this element of its judgement.

Employment Judge Nicolle

14 April 2021

Sent to the parties on:

15th April 2021.

For the Tribunal: