EMPLOYMENT TRIBUNALS

Claimant: **Mrs Sylvia Umunna**

Respondent: **London Borough of Tower Hamlets**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **30 June 2021**

Before: **Employment Judge Housego**
Members: **Mr J Webb**
Ms P Alford

Representation
Claimant: Onuwa Joe Aniagwu
Respondent: Amy Stroud, of Counsel, instructed by Carole Bowes, solicitor, of the Respondent.

JUDGMENT

1. **The claims are struck out under Rule 47.**
2. **The Claimant is ordered to pay costs of £4,500 to the Respondent.**

REASONS

Background

1. At 09:45 today the Cloud Video Platform hearing was locked. Someone was waiting to be admitted, with the name of the Claimant. By 09:50 that person had disconnected from the Cloud Video Platform hearing.

2. I opened the hearing at 10:00 am, and the Claimant's representative was shown as present as was Counsel for the Respondent. I enquired as to the Claimant, who was not in the Cloud Video Platform hearing. It transpired that Mr Aniagwu was able to see and hear everyone, but no one could see or hear him.

3. Counsel for the Respondent said that at 10:01 today, the Claimant's representative emailed the Respondent's solicitor:

"Dear Ms Bowes

I am sorry I am just picking up your email and I am sorry about the omission. I attach it herewith.

But more urgently, the Claimant has just been reported ill by her husband. I am not sure she is able to join the conference"

4. I obtained Mr Aniagwu's telephone number from the ET1, and telephoned him. He was unable to join the cvp hearing, despite multiple attempts, and so he was heard, and was able to hear, via my phone.

5. I asked what he knew about the Claimant. He said he had tried to contact her himself this morning, and had spoken to her husband who had told him that he would try to get her to speak to him (the Claimant's representative). Mr Aniagwu said he had wondered why he had not been told that the Claimant was unwell.

6. I enquired what he had been told about her ill health. Mr Aniagwu said that he was told that she felt faint and had flu like symptoms. He understood that she had not yet been to the doctor, and had been feeling down, had hoped to be better for today, but was not.

7. I indicated that Rule 47 dealt with absent parties, and the claim might be struck out for non attendance, and that medical evidence was key to such applications. I read out the entirety of that Rule for Mr Aniagwu. At 10:30 the hearing was adjourned for half an hour for Mr Aniagwu to make further enquiries.

8. At 11:00 am Mr Aniagwu emailed the Tribunal, and shortly afterwards confirmed orally what he had written:

"I have just confirmed with the Claimant's husband that the Claimant is now at the Accident & Emergency, Croydon University Hospital. The Claimant herself does not appear to be well enough to speak with me. According to the husband, her symptoms may well be those of Covid-19 which puts the rest of her family at very high risk.

Therefore, any consideration of a strike-out in these circumstances would be undermining the overriding objectives of fairness and justice. Sickness certificates are not usually available until a patient has started receiving treatment or after full diagnosis."

9. I enquired whether the Claimant had taken a Covid test, as these were readily available. Mr Aniagwu did not know. I asked how she had got to hospital. Mr Aniagwu said that he was told that she was taken there by ambulance. Mr Aniagwu did not know whether or not the Claimant had been vaccinated against Covid-19.

10. Ms Stroud asked that the claim be struck out. It was unfair to delay this case yet further. One of the Respondent's witnesses had died. The Respondent was unable to secure the attendance of another one of its witnesses. There had been multiple issues with the Claimant's lack of progression with her claim, and she had also failed to attend occupational health meetings: there was, in short a track record of non-attendance or non-compliance. If this was a genuine illness it would not have been notified after the hearing was due to start. There was no objective evidence of illness.

11. Mr Aniagwu responded that would be unfair to strike out her claim when she was unable to attend by reason of illness. It was simply an unfortunate coincidence. She might have underlying health conditions, and she was from an ethnic group badly affected by the virus.

12. I enquired whether there was any medical evidence, either of an underlying condition or of her claimed present illness. There was not: Mr Aniagwu said that this was impractical as it was current.

13. Mr Aniagwu said that only medical experts could say about her illness, and she should not be prejudged: the Tribunal should not speculate and should be limited to the evidence before the Tribunal.

Law

14. Rule 47 provides:

> *"**Non-attendance***
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> ***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."*

15. The case law about non-attendance in regulatory proceedings is helpful: General Medical Council v Hayat [2018] EWCA Civ 2796, at paragraphs 32-43. That case stresses the need for medical evidence, and that such evidence must address the issue of whether the person is or is not fit to attend a hearing.

16. In the Employment Tribunal the older case of Teinaz v London Borough of Wandsworth [2002] EWCA Civ 1040, at paragraph 21 and 22 is similar in tenor: *"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"*

Reasons

17. There is no medical evidence to support the application to adjourn the hearing by reason of claimed illness. Such evidence is important if an application is to succeed.

18. The submissions of Mr Aniagwu at the start of the hearing were only that shortly before 10:00 am the Claimant was feeling faint, with flu like symptoms. It is inherently unlikely that the Claimant's health worsened so fast.

19. It is inherently unlikely that an ambulance would be commissioned to bring a person thought to have Covid to an Accident and Emergency department. It is unlikely that an ambulance for a non-emergency case would be called, would arrive and then get the Claimant to hospital all within an hour or so. If someone does go to A&E then they will be swabbed for Covid on arrival

(whatever the reason they went to A&E). If the Claimant had gone to hospital as claimed and had got Covid 19 there would have been a test available by 11:30.

20. The initial statement, at 10:01 am was only that she was feeling unwell with no specificity, and no suggestion that there was anything seriously wrong with her.

21. It was only after the Tribunal stated that it would be considering striking out the claim under Rule 47 was it said that the Claimant had gone to hospital. The Tribunal does not accept that this was a likely scenario: rather it is likely that the excuse given for non-attendance was exaggerated when this was communicated to the Claimant.

22. The Claimant has not attended all hearings in this case.

23. The Respondent has prepared fully for this hearing. It will be inconvenienced by an adjournment. More, it will be prejudiced by further delay. It has lost two witnesses already. This is not a case that will turn on documents, and oral evidence will be important. The case goes back to 2018, and further delay will be prejudicial to the Respondent.

24. If the Claimant is genuinely so ill that she cannot attend today, it will be open to her to supply the evidence that is lacking today and ask for this judgment to be reconsidered.

25. The Tribunal has made all reasonable enquiries, and offered time for the Claimant to provide some more evidence, or explanation, but none has been forthcoming.

26. Accordingly and for these reasons the Tribunal decided to strike out the claims.

Costs

27. Counsel sought a costs order, limited to her brief fee, of £4,500 including vat. It was, she said, unacceptable simply not to attend and give no notification before the start of the hearing, when on her own account she knew for some days that she was feeling unwell.

28. Mr Aniagwu submitted that the decision to strike out the claim of someone too ill to attend was unfair, and it would be even more unfair to order costs. While he did not know about her finances, he thought that she could not afford to pay costs. The Tribunal should have waited to see if she could resume in a day or two.

29. The Tribunal considered that the way the absence had been explained – feeling a little unwell for days but hoping to get better, then the same this morning, followed by an explanation of going to hospital only after the Tribunal indicated that it was going to consider striking the claim out, and with no medical (or other) evidence – made it unlikely that there was a genuine illness preventing the Claimant from attending, which she would do from her home.

30. In these circumstances a costs order was entirely appropriate, under Rule 74, which provides:

> **"When a costs order or a preparation time order may or shall be made**
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> **76.**—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
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> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) …
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
>
> …"

31. Non-attendance at the hearing without notice is unreasonable conduct of the proceedings.

32. The costs application was modest, being confined to the brief fee of Counsel. Counsel indicated the amount of the brief fee, and the Tribunal did not ask for proof of it: Counsel is to be relied upon to be correct about this. The brief fee was incurred solely by reason of the Claimant's non-attendance today, ordering it is entirely appropriate.

33. The Tribunal records that the Claimant, through her representative, was accorded the opportunity (and took it) to make representations at the hearing, as required by Rule 77, and that the sum awarded is within Rule 75(1)(a) – costs incurred by the Respondent - and that the Tribunal has made enquiry of the ability of the Claimant to pay (Rule 84).

Employment Judge Housego

5 July 2021