



EMPLOYMENT TRIBUNALS

Claimant: Mr C A Roman

Respondent: Toyoko Inn UK Limited

Heard at: Manchester

On: 10 March 2022

Before: Employment Judge Leach

REPRESENTATION:

Claimant: In person

Respondent: Mr B Uduje (Counsel)

JUDGMENT ON PRELIMINARY HEARING

The claim is dismissed as a result of the claimant's failure to attend the final hearing on 20 and 21 August 2020.

REASONS

Introduction

1. The claimant brings complaints of unfair constructive dismissal, automatic unfair dismissal (section 104 Employment Rights Act 1996 – whistleblowing), race discrimination and being subjected to detriments because of protected disclosures.
2. The case was listed for final hearing over ten days beginning 10 August 2020. The claimant did not attend on the final two days (20 and 21 August 2020) of that hearing. He sent an email to the Tribunal timed at 08:44am on 20 August in the following terms:

“Application for an adjournment of the final hearing today Thursday 20 August and for tomorrow Friday 21 August 2020.

I am writing to let you know that I am unwell and unfortunately I cannot attend today's hearing. I am very sorry for the short notice.

Could you please allow me an adjournment of the proceedings for today, Thursday 20 August 2020, and tomorrow, Friday 21 August 2020. I am very sorry for the inconvenience.

I will update the Employment Tribunal later if my health situation improves, however I do not to cause more inconvenience due to short notice.

I will be seeking to submit evidence as soon as possible.

Thank for your kind consideration."

3. In the light of the claimant's non-attendance, the respondent applied:
 - (1) for dismissal of the claim, pursuant to rule 47 of the Employment Tribunals Rules of Procedure 2013;
 - (2) in the alternative for the Tribunal to proceed with the hearing in the absence of the claimant (again, as provided for by rule 47).
4. The Tribunal (Employment Judge Holmes) refused to continue with the hearing in the claimant's absence. He ordered the claimant to provide further information about the claimant's symptoms and what condition had prevented him from attending and to provide medical evidence compliant with the Presidential Guidance on seeking an adjournment. The respondent's application for dismissal would be then be determined.
5. The claimant initially provided information (including a note from his GP) on 24 August 2020. EJ Holmes was not satisfied with the extent of information provided and ordered more detailed medical information.
6. By 14 December 2020 EJ Holmes decided to issue an Unless Order requiring detailed medical information to be provided by 29 January 2021, failing which the claims would be struck out without further order.
7. On 18 January 2021 the claimant provided the Tribunal with a letter (also dated 18 January 2021) from his GP, which he relies on as complying with the terms of the Unless Order.
8. The respondent disputes that the claimant has materially complied with the terms of the Unless Order and says therefore that the claims have been automatically struck out as a result. The claimant disputes this. (Application One)
9. The respondent has not at any stage withdrawn its application for the claim to be dismissed as a result of the claimant's non-attendance on 20 and 21 August 2020 (Application Two).
10. The claimant makes an application to allow him to provide additional statements of evidence. Since the hearing in August 2020, considerable additional statements have been submitted by the claimant (a 9 page statement on 7 December 2020, a 44 page statement on 28 March 2021, a two page statement on 21 July 2021, a six page statement on 27 July 2021, a nine page statement on 10 September 2021, a five page

statement on 24 September 2019, a nine page statement on 14 February 2022). (Application Three)

11. This Judgment deals only with Application Two. Applications one and three are appropriate for a Case Management Order.

This Hearing

12. By a letter dated 25 February 2021 (page 227) the Tribunal informed the parties of EJ Holmes' direction that a preliminary hearing would be listed in order to determine the three applications identified above. This was initially listed for 27 July 2021 but due to a number of delays the hearing did not take place until today.

13. By a letter from the Tribunal dated 17 August 2021 (page 330) the parties were informed of EJ Holmes' direction that the hearing would not be before him and would be before another Judge. The applications therefore came before me for determination.

14. At the beginning of the hearing I expressed some reservations about being required to determine applications 2 and 3 as I had not been the judge at the final hearing. Both parties addressed me on this. Both expressed their wish that I hear all applications today. At this stage of the hearing I also read the Tribunal's letter dated 17 August 2021. I agreed to proceed with all 3 applications.

15. Much of the hearing was taken up with hearing the claimant's account of the final hearing and his account of 20 August 2020 when he decided not to attend the hearing. Case Management Orders made on and in the weeks following 20 August 2020 were clearly there to ensure that the claimant provided sufficient information so that an informed decision could be made about the claimant's non-attendance, in particular whether the claim should be dismissed under rule 47. I refer to the evidence provided and my findings below.

16. The respondent had prepared and provided a file of documents for use at this hearing. The claimant did not have a copy in front of him. I asked the claimant whether he had received a copy. The claimant confirmed that he had but not until Monday 7 March 2022 (so 3 or so days before the hearing). He said that it should have been provided at least 7 days in advance of the hearing and he had not had time to review it. I noted that it contained documents that were either his or had already been received by him and that it was an assembly of documents for the purposes of this hearing and to assist the hearing. The claimant had a laptop with him and I suggested he access the file (which had been sent electronically). The claimant did not do so. The claimant had not provided an alternative file (bundle) of documents.

17. In order to ensure fairness to the claimant, Mr Uduje and I referred, not just to the page number but also the date and description of each document that was referred to during the hearing.

Respondent's application to dismiss the claim (Application Two).

18. The application was made under rule 47 of the Employment Tribunals Rules of Procedure 2013 ("ET Rules"):

“47. Non-Attendance

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.”

19. As I had not been the judge at the final hearing (and recognising my obligation under Rule 47 to consider any information available and make enquiries about the reasons for the claimant’s absence) I asked the claimant to provide evidence, under oath, about the relevant events and to answer questions that Mr Uduje and I may have.

20. The claimant confirmed his willingness to provide evidence. Paragraphs 35-39 of his new statement dated 14 February 2022 had been identified by me as providing evidence potentially relevant to his response to application 2. He confirmed the truth of those paragraphs and the truth of a verbal explanation he had provided regarding his communications with his GP and his decision not to attend the Tribunal on 20 August 2020. I also provided the claimant with an opportunity over a lunchtime break, to identify other paragraphs in his various additional statements that he wished to be taken in to account when considering application 2.

Facts relevant to the claimant’s non-attendance on 20 and 21 August 2022

21. There is little dispute about the relevant facts. Where there are areas of dispute, then set out below are my findings, having considered the evidence.

22. The final hearing was in person. It took place during the Covid pandemic but at a time when there was a “lull” in infection rates and some in person hearings were taking place.

23. Day one was taken up with some initial “housekeeping” but then, from about 11am, the Tribunal spent the rest of the day continuing to read into the case.

24. Day 2 was interrupted at noon. A member of staff in the Tribunal building had/was suspected to have contracted Covid. The building was closed that afternoon and the next day (Day 3).

25. Days 4 and 5 were taken up with various disputes and applications and it was decided that the claimant would not begin giving evidence until Day 6 (Monday 17 August)

26. Day 6. The whole of this day was taken up with the claimant’s evidence.

27. Day 7 and 8, respondent’s witnesses started to give evidence. 2 witnesses were giving their evidence remotely from Japan. There were some issues which caused delay (1) there were some connection problems and (2) one of the witnesses did not have a copy of the bundle (3) one of the witnesses required a translator.

28. By the end of day 8 (19 August 2020):-

- a. 2 of the respondent witnesses were part way through their evidence

- b. The claimant was also part way through his evidence. He had provided the vast majority of his evidence but had been given some tasks to do by EJ Holmes (who had reminded the claimant that it was for him to prove his case) and EJ Holmes had some additional questions for the claimant once he had undertaken further tasks in relation to the evidence.

29. The claimant was tired at the end of day 8. He had found giving evidence as well as representing himself, to be hard work.

30. The claimant was also frustrated about how the hearing was going. Mr Uduje referred him to paragraph 30 of his statement dated 14 February 2022 where he states:-

“ During the giving of evidence in the Final Hearing in August 2020 at the Tribunal, Judge Holmes had requested me to proof the case claims and facts to explain with logical argumentation, the reasons that were justifying acts and omissions caused by perpetrators. Allegations and claims were already explained at the time and there were no grounds of resistance or responses attempted to be made or able to contradict the important factual allegations and claims. The preparations and conduct during the Final Hearing had proved that the case cannot be resisted to by respondent side. It was clear then that they have no chances to defend the case and therefore their grounds of resistance could have been strike out on that basis.”

31. In summary, the claimant felt that he had demonstrated his case, the Tribunal should have been able to see that and grant him judgment. Instead, EJ Holmes was reminding him that the burden of proof was with the claimant and was asking him to complete various tasks in the course of the proceedings. The claimant was frustrated. Further, in the course of his evidence the claimant told me that by the end of 19 August 2020, he had a feeling of anger caused by the same – a belief that he had demonstrated his case and yet was being told that he needed to keep trying to prove it.

32. The claimant was also dissatisfied at being told that the hearing would not finish in the allocated 10 days. In addition to the disruption caused by the Covid related closure of the Tribunal building, there had been some disruption to the timetabling of the hearing due to delays in starting the evidence and then, once the evidence had started, difficulties with remote attendance of respondent witnesses as noted above.

33. By day 7 or 8 it was clear to EJ Holmes that the hearing was not going to finish in the 10 days allocated and 2 further days would be needed. (as it was, the Tribunal provided 4 further days being 14-17 December 2020 given the claimant’s non-attendance on 20 and 21 December 2020. (The hearing did not resume on those dates however. The claimant had not by that stage provided the information required by EJ Holmes and which became the subject of the Unless Order and a Japanese interpreter had not been found for these days)

34. On the morning of 20 August 2020, the claimant sent an email to the Tribunal office, the terms of which are at paragraph 2 above.

35. By letter dated 20 August 2020 (but sent to the Tribunal on 24 August 2020) the claimant's GP stated as follows:-

"Mr Roman is currently suffering from acute anxiety, lack of sleep and stress due to the demanding schedule of proceedings. In my opinion Mr Roman is currently unfit to attend the tribunal hearing for 2 days, the 20 and 21 August."

36. The claimant has since informed the Tribunal (including at today's hearing) that the diagnosis of acute anxiety in the letter of 20 August 2020 is incorrect and that the claimant did not have a medical condition.

37. The medical information and presence (or absence) of any medical condition was considered in detail at today's hearing when dealing with Application One. For the purposes of Application Two, the following are relevant:-

- a. On 20 August, the claimant contacted his GP to request a medical note for the 2 days 20 and 21 August 2021 (claimant's letter dated 11 January 2021 at page 215 and confirmed at today's hearing).
- b. The claimant obtained this letter from his GP following a telephone consultation. It is well known that telephone consultations became more common during the pandemic and I accept, as the claimant has said, a telephone appointment was really his only option on that morning. As noted above, he specifically asked for a note to excuse him for the next 2 days of the hearing and told the doctor that he had anxiety.
- c. The doctor issued the letter on the terms he did, having taken into account what the claimant told the doctor over the phone.
- d. The claimant later undertook tests, with his GP, the results of which showed that he does not have acute anxiety and is fit to continue with the hearing.
- e. As well as feelings of frustration and anger, the claimant also had feelings of pressure due to the demands of the hearing and felt very tired. However, there was no medical reason for his absence.

38. I asked the claimant why he did not discuss with the Judge during the hearing, that he was tired and/or had some concerns about the timetabling in the hearing. The claimant said that he had. We then discussed the following observations of EJ Holmes in the Tribunal's letter to the parties dated 20 August 2020 *"I do note that he has exhibited no symptoms during this hearing and at no stage in the hearing other than to seek a slightly earlier break one day, has he indicated any unwellness or any stress or symptoms of that nature."* The claimant did not seek to dispute this observation. I accept that the claimant did ask on one occasion for a slightly earlier break but did not raise further with the Judge that he was tired.

Submissions

Respondent's submissions

39. Mr Uduje noted that when the claimant had failed to attend on 20 August 2020, the respondent applied to either proceed with hearing the case in the claimant's absence or for the Tribunal to dismiss the claim altogether.

40. EJ Holmes decided that he should not continue with the hearing, in the claimant's absence. He also decided that the correct course of action was to provide the claimant with an opportunity to explain his reason(s) for non-attendance so that an informed decision may then on whether the claim should be dismissed.

41. Mr Uduje noted that is what rule 47 requires and what EJ Holmes then sought to do by the terms of the initial letter from (and orders of) the tribunal dated that same day (20 Aug 2020) and further orders and subsequent correspondence up to and including the unless order.

42. Only after an Unless Order had been issued and the claimant had replied further to this had the position been reached that the respondent's application under rule 47 could be fairly considered.

Respondent's submissions

43. Mr Uduje submitted that it was now very clear that the reason the claimant did not attend on 20 August 2020 was that the case was not going his way. He had been told it was for him to prove his case and he was not doing so. He became frustrated that it was not going his way and did not attend.

44. Mr Uduje also opined that litigation is stressful even for seasoned professionals.

45. I asked Mr Uduje whether, in considering the application under Rule 47, I should have regard to the case law on strike out under rule 37, particularly asking myself the question as to whether a fair hearing is still possible. Mr Uduje replied I need not and should not. The rules are not the same. If the same tests/considerations were to be applied to the 2 rules then there would be no need for 2 separate rules. Non-attendance by one party effectively denies the other party the opportunity to put their claim/response and either achieve or move towards finality in the litigation. It makes the administration of justice almost impossible. The Tribunal must consider the conduct of not attending (without good reason) as of greater seriousness than potentially unreasonable conduct under rule 37. Once a Tribunal is not satisfied that there is a good reason for non-attendance then strike out/dismissal of that party's case should be almost automatic.

46. Mr Uduje reminded me that the Overriding Objective at Rule 3 of the ET Rules including a requirements for proportionality, avoiding delay and saving expense. The claimant's actions had been contrary to all of these.

Claimant's submissions

47. This application is an attempt by the respondents to avoid responding to the allegations.

48. The claimant has explained the reason why he did not attend and Mr Uduje is merely speculating when he says that the case was not going the claimant's way. The claimant had no reason not to attend,

49. Further, the claimant has not had any previous involvement in legal proceedings and had assumed that the case would not drag on for more than a few months.

My decision

50. The claimant did not have a good reason not to attend the Final Hearing on 20 and 21 August 2020. He had become frustrated and angry about the way that the case was proceeding and that he was being told that he still needed to prove his case.

51. I accept that the claimant was also very tired. Litigation sometimes involves hard work. On the Monday of week 2 of the hearing, the claimant had spent the whole day giving evidence and therefore answering questions from respondent's counsel and probably also some questions from the judge. I do not accept Mr Uduje's reference to litigation being stressful although I do accept that it places pressure on individuals involved in litigation and can require significant amounts of work as representatives strive to present the best case for their clients. The same is true of litigants representing themselves such as the claimant. I accept that the claimant will have had tasks to do throughout the hearing including an ongoing review of the evidence, preparing his cross examination of the respondent's witnesses. I have no doubt that these were difficult tasks for the claimant and took up significant amounts of time. However, I also note:-

- a. The litigation was by then some 2 years old. The claimant had plenty of time to prepare for a hearing.
- b. The hearing itself included an unexpected break of a day and a half. This was time that was available to the parties to further their preparations that would not normally be available to parties in the middle of a hearing.

52. Understandably EJ Holmes was not satisfied with the information provided in the GPs letter of 20 August 2020. We now know that the doctor supplied this letter having spoken to his patient by phone and being told by that patient that he needed a doctors note to support his non-attendance for 2 days. The claimant told the doctor that he had acute anxiety and stress. He did not tell the doctor that he was frustrated about the way that litigation was going and that he felt anger about this. Following an insistence By EJ Holmes for further information, we now know that the claimant had no medical conditions.

53. The claimant made no attempt to speak with EJ Holmes and explain that he was tired. Allowance could have been made in the Tribunal's timetable, for example for a later start time or an early finish.

54. Having decided that the claimant did not have a good reason not to attend the Final Hearing on 20 and 21 August 2020, I have considered whether I should exercise my discretion under Rule 47 and dismiss the claim.

55. Although Mr Uduje submitted that I was not required to take in to account the same types of factors as might be considered when determining a strike out application under Rule 37(1)(b) of the ET Rules (Scandalous, Unreasonable or Vexatious conduct) I have decided that I should consider the impact the claimant's non-attendance has had on a fair trial. (I would generally need to consider this in a strike

out application under rule 37(1)(b) – see for example, **Abegaze v Shrewsbury College of Arts & Technology [2009] EWCA Civ 96**).

56. On the issue of fair trial, I note the following passage commenting on strike out applications in the EAT's decision (Choudhury J) in **Emuemukoro v Croma Vigilant (Scotland) Ltd and another UKEAT 14/20**

I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.

57. In not attending on the 2 dates of the final hearing, the claimant withdrew himself from the Tribunal process. He left the respondent, its counsel and legal advisers, “high and dry” in attendance at the tribunal (no doubt at substantial cost to the respondent) ready to progress and take steps towards finality in the litigation, but unable to do so. The 2 respondent witnesses were unable to continue and conclude their evidence (thus remaining in “witness purdah”). The Tribunal assigned to continue to hear the claimant's case over that 2 days (paid for by public funds) could take no action except to deal with the application under Rule 47 made by the respondent's counsel. The claimant paralysed the process.

58. The final hearing would not have finished by the end of 21 August 2020. However, the time allocated over those 2 days would have ensured that the case would have been closer to finishing, witnesses would have continued and completed their evidence and the continuation of the final hearing for an additional 2 days, would have been far more straightforward.

59. I also agree with Mr Uduje that the claimant's actions were contrary to those parts of the overriding objective identified by him – proportionality, avoiding delay and saving expense. The claimant also disregarded his duty to cooperate with the tribunal and the other party. Had there been a concern about tiredness to the extent that the claimant was worried that he may be unable to continue, he should have raised it and a solution could have been explored with the involvement of the Judge and the other party.

60. For these reasons, under rule 47 of the ET Rules, I dismiss the claim because the claimant failed to attend the final hearing on 20 and 21 August 2020.

Employment Judge Leach
Date: 15 March 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
18 March 2022

FOR THE TRIBUNAL OFFICE

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