



EMPLOYMENT TRIBUNALS

Claimant: Mr M Rahid
Respondent: Tesco Stores Limited

Heard at: London Central (Remotely by CVP)
On: 28 March 2022

Before:
Employment Judge Heath
Mr U Hoque
Mr I Allwright

Representation
Claimant: Did not attend
Respondent: Ms E Wheeler (Counsel)

JUDGMENT

The claimant's claims are dismissed on his failure to attend, pursuant to Rule 47 of the Employment Tribunal Rules of Procedure 2013 ("the Rules").

REASONS

Factual background

1. This matter has been listed for final hearing on two occasions prior to today, and it has been postponed twice for lack of judicial resources (reasons for which the claimant bears no responsibility). This particular hearing was listed by a Notice of Hearing dated 8 October 2021 following, we were told by Ms Wheeler, both parties having provided dates to avoid.
2. On 9 March 2022 the claimant applied for a postponement of the hearing by email in the following terms:

"I have recently started full time work and will be on a probation period till end of May 2022. Due to being on probation I'm unable to take time off for

the hearing commencing this month 28th March.

I am asking for this hearing to be postponed to a later date after May 2022 as would be able to take time off for attendance.”

3. The respondent resisted this application, and it came before Employment Judge Spencer, who refused it on 21 March 2022 saying: -

“The Claimant’s application to postpone the hearing listed to begin on 28th March 2022 is refused. The case has been listed on the above dates, and with the agreement of the parties, since 8th October, and the parties are expected to give priority to their litigation.

The Claimant should have discussed his need to take those dates as leave with his employer in good time. It is not clear that the Claimant has sought, and been refused, permission to attend this hearing.

Further the claim is already over 2 years old and has already been postponed twice. It is not in the interests of justice for there to be any further delay.”

4. At 7.57 am on the morning of this hearing the claimant emailed the tribunal as follows: -

“I write in response to the objection of a postponement request to the final hearing which is due to take place today 28th March 2022 – 1st April 2022 by CVP.

I apologise for my attendance and any inconvenience caused. I strongly request again for a postponement of the final hearing due to take place today. As stated briefly in my previous email I was unable to take this week off work due to being on probation period till end of May 2022 as well as other personal reasons.

I have and still am committed to seeing this case through to the end. I have paid a deposit after the second hearing to the Tribunal in order to carry forward the allegation of discrimination against the respondent. Furthermore, I have also been fully cooperative towards the case from the beginning and this is the only time I’ve requested for a postponement as previous two postponements were carried forward by the Tribunal.

The first postponement was notified to both parties literally on the day 14th April 2021 hours after the fixed start time due to lack of judicial resources. I was further notified a day before of the second postponement of the hearing which was re-listed for 22nd – 28th September 2021 again due to lack of judicial resources.

I have been suffering immense stress and anxiety on and off from the day I was unfairly dismissed from my position at Tesco September 2019.

I therefore strongly request the Tribunal for a postponement of the hearing commencing today 28th March 2022 and to kindly re-list the hearing for a future date convenient for all parties.”

5. The claimant did not attend the hearing when it was due to start at 10am. Our

clerk made attempts to telephone the claimant twice, but both calls were unanswered.

6. At 10.30 the respondent's counsel and its witnesses were admitted to the CVP room. Ms Wheeler, for the respondent said that she was aware of the claimant's email earlier that morning. She made an application under Rule 47 of the Rules for the tribunal to dismiss the claimant's claims following his non-attendance. She submitted: -
- a. The claimant's reason for not attending was that he was unable to take time off work. He has been aware of the hearing since 10 October 2021.
 - b. There had been two previous postponements in April and September of 2021, albeit for lack of judicial resources which was not the claimant's fault.
 - c. If the matter were postponed, it was unlikely that the final hearing would be listed for a long time and the cogency of the respondent's witnesses evidence is likely to be affected. They would be giving evidence about what had taken place possibly 3 ½ to 4 years previously.
 - d. One of the respondent's witnesses (Ms Stephenson) no longer worked for the respondent. Also, having this matter hanging over them was stressful for the respondent's witnesses.
 - e. The respondent had already incurred 3 brief fees in this matter, as well as other legal expenses.
 - f. These are claims with little merit. The discrimination claims are subject to deposits, and the dismissal was after the claimant's admitted breach of the respondent's policies (which constituted gross misconduct under the respondent's disciplinary policy), and in the face of witness statements showing that the claimant had urged colleagues to make false statements.
 - g. The respondent's primary position was that the matter should be dismissed, but in the alternative the respondent's evidence could be tested if the tribunal proceeded to hear the case in the claimant's absence.
7. The tribunal did not grant the application to postpone, but considered that it would be appropriate to give the claimant a final chance to participate in the hearing. We decided that we would take the morning to read into the case and would return at 2pm. We asked the clerk to email the claimant to let him know that his application to postpone had not been granted, and that the tribunal would resume at 2pm when the hearing would continue, and that the tribunal would proceed to hear evidence from the respondent, or consider an application to dismiss the claims. An email was sent as follows at 11.11am: -

"The application to Postpone today hearing is not granted. The Tribunal has decided to resume the hearing at 2 PM. If the Claimant does not join the hearing will continue and the Tribunal will be hearing evidence from the Respondent and also applications to dismiss the Claim".

8. At 12.26pm the claimant emailed our clerk to say: -

“I regret to inform I would not be able to join at 2pm as will be still at work. However if a postponement is granted after May 2022 I will be able take time off.

My wife and I are expecting our baby this year so it’s imperative I hold on to my current job least until my probation period is over.

Once again I apologise for any inconvenience caused and stay hopeful for a postponement.”

9. We resumed the hearing at 2pm having read the witness statements in the case, and we updated the respondent on the claimant’s communication with the tribunal. Ms Wheeler observed that the claimant had made it clear that he did not intend to attend the hearing despite twice being told it would not be adjourned. She reiterated her previous submissions and urged the tribunal to dismiss the claims.

The law

10. Rule 47 of the Rules provides: -

“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”.

11. Ms Wheeler referred us to Mason v Hamer EAT/161/81 in which the EAT observed that there is no duty on the tribunal to “enter the arena” turn itself into an investigating forum when a party did not attend. We also referred to Roberts v Skelmersdale College [2004] IRLR 69 in which the Court of Appeal held that as long as a tribunal exercises its discretion properly and fairly under the predecessor to Rule 47, then it is a matter for the tribunal as to whether it dismisses a claim, or proceeds to hear evidence in the absence of a party.

Conclusions

12. The claimant’s application for postponement made on 9 March 2022 was refused by Employment Judge Spencer on 21 March 2022. She made it clear that the claim was old, and she set out observations that the claimant should have discussed these matters with his employer in good time and that had not indicated that he had sought and been refused time off. The claimant, in renewing his application to postpone by email at 7.57am on the day of the hearing, essentially repeated the application that had not persuaded Employment Judge Spencer to postpone, adding that there were other unspecified “personal reasons”, that he intermittently experienced stress and anxiety, and pointing out that the previous adjournments were not his responsibility.
13. What the claimant did not do is set out any attempts he had made to seek leave, or any refusals by his employer. The reference to the reasons for previous postponements does not really add anything, as Employment Judge

Spencer had not attributed these to the claimant. His references to personal reasons and stress and anxiety are vague and not evidenced and cannot advance his application to postpone.

14. The claimant was warned by email at 11.11am by the tribunal clerk that his application for a postponed was refused and he was clearly warned that the tribunal would either hear the claim in his absence or dismiss it.
15. The claimant's email to the clerk at 12.26 did not take matters further, beyond indicating that the claimant and his wife were expecting a baby at some point this year. This was advanced as a reason why he wishes to stay in employment rather than as a reason for not attendance today.
16. If this matter were adjourned it would not be relisted before November 2022 at the very earliest. This is an old matter which has already been postponed twice (albeit that the claimant was not responsible for this) and further postponement would cause further delay and cost to the respondent, difficulties in terms of calling one of their witnesses and continued anxiety for those with serious allegations levelled against them. The claimant has not really added anything of substance to the application he made on 9 March 2022, and has, in particular, not sought to address the issues about what attempts he may have made to discuss leave for the hearing dates which had been listed since 8 October 2022. In all the circumstances the tribunal concluded that it was not in the interests of justice to postpone the case further.
17. The tribunal caused further inquiries (by telephone and email) to be made on the claimant's non-attendance this morning. It considered the information he provided by email. The claimant was informed on 21 March 2022 that his application to postpone had not been successful. He has not informed the tribunal of any attempts he has made, at any stage, to seek or agree leave. If the consequence of not attending the tribunal was not clear to him having received the decision of 21 March 2022, it would have been crystal clear following the email from our clerk at 11.11am. The claimant indicated that he would not attend, and simply gave the option of granting him a further adjournment.
18. In the light of this information, and in the light of the history of this matter as set out above, the tribunal dismisses the claimant's claims. The claimant made the decision following the refusal of his application to postpone on 21 March 2022 not to attend the hearing. He chose to make another application to postpone by email at 7.57am on the morning of the hearing. He chose not to attend the hearing. After he was emailed by our clerk, and having been warned clearly of the consequences of not attending, he chose again not to attend the hearing. Although it is right to say that the choices he was making today not to attend may well have been difficult ones, we have been presented no evidence of steps the claimant could have taken either prior to his new employment, or at an earlier stage, to seek leave to attend the tribunal.

Employment Judge **Heath**

Date 28 March 2022_____

JUDGMENT SENT TO THE PARTIES ON

29/03/2022.

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.