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EMPLOYMENT TRIBUNALS

Claimant: Mr F Iloghalu
Respondent: Amey Services Ltd
Heard at: East London Hearing Centre
On: 25-26 April 2022
Before: Employment Judge Ross
Members: J Houzer
Dr J Ukemanen

Representation

Claimant: Neither present nor represented
Respondent: Ms J Wright (Solicitor)

JUDGMENT

1. Claim dismissed pursuant to Rule 47 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

1. This is the decision of the Tribunal following the Respondent's application to dismiss the Claimant given the non-attendance of the Claimant today.

Procedural Background:

2. The Claimant made three applications to postpone on grounds of ill-health. These have been refused.
3. The first application was dealt with by Employment Judge Russell at the Preliminary Hearing on 14 March 2022. This was refused. An extension of time was granted for witness statements to be exchanged; and in response to concern raised by the Respondent, EJ Russell directed that if the Claimant failed to provide a witness

statement, his evidence would be limited to the contents of the claim form or any previously provided statement.

4. The most recent application to postpone was received yesterday. The application was made on the same basic grounds of ill-health - stress and severe depression. This application was refused for reasons given at time.

5. After the postponement application was refused, the Tribunal informed the Claimant by email (to same address he had used to make the postponement application on the first morning of the hearing) that case would proceed 10am on 26 April 2022.

6. The Claimant did not attend the Employment Tribunal this morning by CVP or otherwise.

7. As a preliminary point, the Respondent applied to dismiss the Claim because the Claimant had not attended and not filed any evidence. Ms. Wright argued that his Claim form was not evidence. The Respondent relied on Rule 47 of the Rules of Procedure 2013.

Law:

8. Turning to the relevant law, Rule 47 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.'

9. The Employment Tribunal had regard to the Court of Appeal case of *Roberts v Skelmersdale College* [2004] IRLR 69. Although it was decided under the old rules, there is sufficient similarity between the two rules that it remains good law. The following principles emerge (so far as they apply to new rule 47):

9.1 the rule confers a very wide discretion;

9.2 the rule does not impose on an employment tribunal a duty of its own motion to investigate the case before it, nor to satisfy itself that on the merits the Respondent has established a good defence to the claim of the absent employee;

9.3 the Tribunal has a discretion to require the employer to give evidence, but no duty to do so;

9.4 before making a decision, the Tribunal shall have regard to the information required under the rule.

10. From *Roberts*, Ms. Wright relied on the following extract at paragraph 15:

For example, in an unfair dismissal case where, as here, it is common ground that there has been dismissal, the burden of establishing the reason for the dismissal is on the respondent/employer. But, rule 9(3) does not require the Employment Tribunal to hear evidence from the respondent in order to determine for itself substantively the reason for the dismissal, or to satisfy itself as to whether, if the dismissal was for a potentially fair reason, it was fair and reasonable to dismiss the applicant/employee for that reason.

11. *Houghton v Unilever UK Ltd ET/2409198/15* was also relied upon by Ms. Wright, especially paragraphs 20-27. As in this case, it was case where constructive unfair dismissal and discrimination (disability discrimination) were alleged. The Tribunal in that case concluded that the Claimant's absence meant there was no evidence from the Claimant before it. At para 23:

23. We decided that Ms Daniels was correct about the difficulty in proceeding in the absence of the claimant. Although we had read her witness statement it did not stand as evidence until she had taken the oath and confirmed that it stood as her evidence in chief. Technically, therefore, the claimant had not put any evidence before us. In an ordinary unfair dismissal where the employer accepts that it dismissed the claimant, that is not necessarily an insuperable problem because once the respondent shows a potentially fair reason there is no burden on the claimant to prove unfairness. However, in a constructive dismissal complaint the claimant must first prove that her resignation was a dismissal before fairness arises, and in a complaint under the Equality Act 2020 the claimant must prove facts from which the Tribunal could conclude there has been a contravention. Without any evidence the claimant cannot prove anything. Proceeding in her absence would therefore have resulted in the claim being dismissed in any event. Dismissal under rule 47 was appropriate.

Decision:

12. The Tribunal decided to exercise its power under Rule 47 to dismiss the Claim for the following reasons:

- 12.1 Before making a decision, the Tribunal must have regard to the information required under the rule. We have done this, having fully considered all evidence in support of the postponement application.
- 12.2 Pleadings are not evidence. There is authority to support that proposition, and also the reasoning explained in *Houghton* above is relevant. No witness statement at all has been filed by the Claimant for the Tribunal to take into account. We adopt the approach taken in *Houghton* in paragraph 23. There was no evidence from the Claimant to be given on oath or affirmation.
- 12.3 The position had changed since Employment Judge Russell made her decision on 14 March 2022, at which point her comments and decision were based on the premise of the Claimant attending the Final Hearing, with proposed adjustments if required, and with a further opportunity to prepare a witness statement or at least to confirm on oath/affirmation the

contents of the Claim Form or any earlier statement. The position after refusal of the postponement application yesterday is that the Claimant has not attended again, despite being informed the application to postpone was refused and that the hearing would proceed today.

12.4 The nature of complaints meant that it was inevitable that in those circumstances, the complaints would fail because:

12.4.1 In respect of constructive unfair dismissal and breach of contract, the burden of proof was on the Claimant and required the Claimant to prove his case on the balance of probabilities, which he was unable to do given he had filed no evidence.

12.4.2 In respect of the complaints of race discrimination and victimisation, the Tribunal considered the burden of proof provisions at section 136(2) Equality Act 2010. The Claimant is unable to prove facts from which the Tribunal could conclude the treatment was discrimination.

12.4.3 There was no need to investigate whether the Respondent has a good defence to the Claim; but the Respondent had filed five witness statements, and the witnesses all deny key facts relied upon in the allegations set out in the List of Issues (of Employment Judge Gardiner at the PHC of June 2020) and as further particularised. Moreover, the Respondent had provided a bundle of documentary evidence which from our reading tends to corroborate its witness statements.

12.4.4 The Claimant had not played a role in the preparation of the case for Final Hearing. He had not provided documents for inclusion in the bundle, not attended or been represented at recent hearings, as well as not providing a witness statement.

12.4.5 To continue and hear the evidence of the Respondent's witnesses today would serve no real purpose and simply increase costs for the Respondent and delay conclusion of this Claim.

13. For all those reasons, the Claim is dismissed.

Employment Judge Ross

Date: 27 April 2022