



EMPLOYMENT TRIBUNALS

Claimant: Mr K Hurry

Respondent: Prime Steak & Grill

HELD at Watford

ON: 5 April 2022

BEFORE: Employment Judge George

REPRESENTATION:

Claimant: No attendance

Respondent: Ms T Matthews, Director

JUDGMENT

1. The claimant's application for a postponement is refused.
2. The claims are dismissed.

REASONS

1. This hearing has been listed to consider whether the claim should be struck out on the basis that it has no reasonable prospects of success or for a deposit order. This hearing was listed following the postponement on 19 October 2021 of the hearing which was scheduled to take place before Employment Judge Bloom by CVP for reasons which he set out in his Order sent to the parties on 1 November 2021. In brief they were that the claimant shortly before the hearing (by email dated 13 October 2021), notified the Tribunal that he was unable to participate in a video hearing.

2. The notice of hearing was sent to the email address provided by the claimant by the Tribunal on 9 January 2022 explaining that this hearing would take place at 2 o'clock on 5 April 2022. The Tribunal sought confirmation from the parties yesterday that they were going to attend and Mrs Matthews responded to say that she was going to attend on behalf of the respondent.
3. At 12:51 on 5 April 2022 an email was received from the claimant requesting a postponement saying that he had never attended anything like a Tribunal hearing and,
"I feel very nervous and am, hence, experiencing a very upset stomach".
He said that he planned to see his GP and had taken appropriate medicine for diarrhoea but "my mid-section is churning and I'm still having to use the toilet quiet frequently".
4. The Tribunal responded at about 13:40 to tell him that his postponement application would be considered at the hearing and if it was unsuccessful then the judge may either hear the claim in his absence or dismiss it. This, in essence, is as provided for in Rule 43 of the Employment Tribunals Rules of Procedure 2013.
5. The application for postponement is objected to on the grounds that it is unreasonable for the claimant at such short notice to have applied a second time for a postponement. I have taken into account the Presidential Guidance on seeking a postponement of a hearing (2013) which is based upon the relevant caselaw, including that particularly applicable to cases where the postponement is sought on the basis of medical condition.
6. The claimant did not notify the respondent of this application and did not discuss with the respondent in advance the need for this application to be made. As Mrs Matthews says it is not something that he is likely only to have become aware of today. There is no medical evidence supporting this and the application does not rely on a specific health condition.
7. I am mindful that this is a disability discrimination claim where the claimant relies upon the disability of depression within the context of the claim. However I also notice that in answer to the question in Box 12 of the ET1 when the claimant was asked whether he has a disability that would require a particular assistance with the Tribunal process, he has ticked no.
8. There is nothing in the subject matter of the claim as explained in the claim form or in the emailed application which suggests that his depression is connected with the upset stomach which is the reason relied on for his non-attendance. I am mindful that I can make further enquiry for relevant information but given that he is not relying upon a particular health condition I do not see that any further enquiry about his reasons for absence are relevant or necessary and he has been put on notice both that the postponement application would be decided at the outset of the hearing (which he could therefore have attended) and about the options available to the Tribunal are if the postponement is not granted. The information provided by the claimant suggests a short term

problem associated with the hearing itself rather than something which is likely to significantly affect his ability to conduct himself at it.

9. I also take Rule 30A of the Employment Tribunals Rules of Procedure 2013 into account. By that, when the application for postponement is made at short notice (specifically fewer than 7 days before the hearing) and is not consented to I need to consider whether there are exceptional circumstances which merit a postponement. I do not consider that there are such exceptional circumstances and refuse the application.
10. Following the refusal of the application for a postponement I went on to consider the provisions of Rule 47 of the Rules of Procedure 2013. I invited Mrs Matthews' submissions on whether I should proceed to hear the claim or should dismiss it.
11. She addressed the underlying merits of the claim. She explained that the respondent's position is that although they regularly have people who are on benefits working for them, they generally need to work an agreed number of hours, usually 16 hours per week. She further explained that the average rate of pay, taking into account the hourly rate and the division of the independently administered tronc, works out at nearly £14 an hour. Because the tronc is independently administered, the respondent's management cannot and should not manipulate the amount that is paid to the staff from it. From the respondent's point of view, the claimant's stipulation that he was limited to earning no more than £140 per week, meant that the respondent risked having to manipulate the tronc system to keep him under a particularly hourly total. Mrs Matthews' argued that this would have been improper.
12. Consequently, the claimant's desired weekly total pay meant that he could only work a maximum of between eight to 10 hours which the respondent considered to be unfeasible. She argued that the case had been going on for such a long time and that the respondent still did not understand how it was said that their actions had amounted to disability discrimination.
13. This is a 2020 claim. It does not explain on the face of the claim form how the respondent's actions are said to have been disability discrimination. That could, potentially, have been clarified had the claimant attended at one of the two hearings which have been listed. Even taking into account the importance of discrimination claims generally and the public interest in providing a method for enforcement of equality rights, I do not consider it to be in accordance with the overriding objective for there to be further delay in resolution of the claim which is not understood despite its age.
14. The claimant's application for a postponement was unsuccessful and I do not accept that his reasons put forward for his non-attendance justified it based on the information available to me. I am not deciding the case today, but it is relevant to the prejudice to the claimant that the arguments and explanations raised by the respondent suggest that their application for the claim to be struck out as having no reasonable prospects of success or a deposit ordered as condition of being able to proceed with the claim were applications with good prospects.

15. I decided that, rather than decide the preliminary issues, I would dismiss the claim under rule 47 Employment Tribunal Rules of Procedure 2013 because the claimant has not attended and it was not in the interests of justice that there be further delay to the conclusion of this claim.

Employment Judge George

Date 27 June 2022

JUDGMENT SENT TO THE PARTIES ON

29 June 2022

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