EMPLOYMENT TRIBUNALS

Claimant: MISS M. PUAR

Respondent: HFIS PLC.

Heard at: Watford (by hybrid CVP/in person) **On: 27 June 2022**

Before: Employment Judge Skehan
Ms C Grant
Mr R Clifton

Appearances
For the claimant: No Attendance
For the respondent: Ms S Cowen, counsel

JUDGMENT

1. The claims are struck out under Rule 37 of the Employment Tribunal Rules.

REASONS

1. The judgment and reasons were provided orally on 27 June 2022. These written reasons are provided as the claimant did not attend. This is a unanimous decision of the tribunal.
2. This matter had been listed for an in person five-day final hearing between 27 June 2022 and 1 July 2022. The claimant did not attend Watford Employment Tribunal as directed. The respondent, represented by Ms Cowan and the respondent's witnesses were in attendance. It was noted from the documentation made available to the tribunal that:
   (i) The claimant had made an application for a postponement of the final hearing on 5 June 2022. This application was considered by EJ George and refused on 16 June 2022.
   (ii) The claimant emailed the tribunal on 24 June 2022 requesting a reconsideration of the refusal. This was rejected by EJ Quill on 24 June 2022.
   (iii) The claimant had emailed the employment tribunal on 25 June (the previous Saturday) at 8.13pm stating:

> Through my various communications and applications, I have made it clear that my application for postponement is not based on medical grounds. I have provided medical evidence to evidence that I have been signed off sick over various periods since March 2021. Further I have requested an oral hearing for the postponement applications, it is unclear why the Tribunal fails to understand this or provide this request? Please note I have made it clear I request an oral hearing for a postponement application via CVP link but the Tribunal seems to ignore this. I again request an oral hearing via CVP to make oral submissions supporting my written submissions to the Tribunal as to why a postponement is required. Said that considering this is an Employment Tribunal, I am concerned about the lack of sympathy and accordance of the overriding objective the Tribunal actually is. I look forward to receiving a CVP link.

3. As the claimant had not attended our hearing, the tribunal forwarded a CVP link to the claimant, to facilitate her participation within the hearing and the hearing was put back to commence at 12 noon. The CVP link was sent to the claimant by email at 11.38. This email was headed 'Subject: CVP Hearing Link - 3300470/2019 - Hearing 27.6.2022 - day 1 of 5 - TO START AT 12PM'. 'Time was spent by the tribunal, the Tribunal clerk and the respondent searching for potential contact numbers for the claimant. On the direction of the tribunal, the Tribunal clerk repeatedly tried to contact the claimant by telephone but received no reply. The tribunal requested that the respondent also sought to contact the claimant by telephone and the tribunal was informed that the respondent had done so repeatedly and received no reply.
4. The tribunal sought to commence the hearing at 12 noon, however there was still no attendance by the claimant. It was noted that there were two preliminary issues that the tribunal was required to deal with prior to commencing the substantive hearing:

    (i) it appeared that the claimant wished to make a further application for a postponement;
    (ii) the respondent wished to make an application to have the claims struck out. Its application was set out in writing within its opening submissions, that had been sent to the claimant that morning at 10:31 and resent at the direction of the tribunal.

5. At the direction of the tribunal, the Tribunal clerk and the respondent again sought to contact the claimant. The claimant emailed the tribunal at 12.24 stating:

> I have just noted a missed call from Watford ET, I have tried calling back but I am receiving the auto message. Please note I had requested an CVP link for my postponement application to be heard and I have not received a response to the same.

6. The tribunal considered it in line with the overriding objective, to give the claimant a further opportunity to attend the hearing by CVP. For this reason, the case was put back to commence at 2 PM. The tribunal emailed the claimant in the following terms @ 12.33:

> The ET has contacted the claimant and provided a CVP link for her to attend today's hearing remotely at 12.00. The claimant has not attended. The respondent, who has attended in person as was ordered by the Tribunal, has indicated that it intends to make an application to strike out the claimant's claims. This shall be dealt with @ 2pm and the claimant may attend either by way of the CVP link (already provided to her) or in person. Should the claimant not attend the hearing, the tribunal will proceed, in accordance with the overriding objective, to determine the respondent's applications and all other matters in the claimant's absence.

7. At the direction of the tribunal, the clerk made continued repeated attempts to contact the claimant without success. The hearing resumed at 2pm. Ms Cowan and the respondent's witnesses were in attendance in person. The claimant did not attend by CVP link or in person. The tribunal made additional efforts to contact the claimant by phone and requested that the respondent did likewise. There was no response from the claimant. The tribunal was satisfied that all reasonable efforts had been made to allow the claimant a reasonable opportunity to participate within the hearing either in person or by CVP link. In the claimant's absence, the tribunal considered the application for a postponement and the respondent's application for strike out of the claimants claims.

Law -Postponement

8. Rule 30A of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, provides insofar as material:

> 30A. Postponements
>
> (1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.
>
> (2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—
>
> (a) all other parties consent to the postponement and—
>
> (i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
>
> (ii) it is otherwise in accordance with the overriding objective;

(b) the application was necessitated by an act or omission of another party or the Tribunal; or

(c) there are exceptional circumstances.

9. The exercise of discretion on a postponement application was addressed by the Court of Appeal in Teinaz v Wandsworth LBC [2002] ICR 1471, per Peter Gibson LJ:

> 21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under article 6 of the European Convention on Human Rights demands nothing less. But 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….

10. Peter Gibson LJ ruled on another appeal in postponement case shortly after Teinaz, namely Sandra Andreou v The Lord Chancellor's Department [2002] EWCA Civ 1192:

> 46. The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to [the Claimant] (of course, an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights , having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that complaints such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The Tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened employment tribunals are these days. Fairness to other litigants may require that indulgences given to those who have had the opportunity to justify an adjournment but have not taken that opportunity adequately are not extended. It was a matter of particular concern that no indication was given in the evidence of [the Claimant] either as to when the medical evidence which she required from the consultant would be available, nor as to when it might be that this case could come on for trial. Viewing the case in the round and considering all the circumstances referred to by the Tribunal, I cannot see how it could be said that in refusing the application the Tribunal was perverse or otherwise plainly wrong in refusing a further adjournment.

11. The exercise of discretion on such an application does, of course require fairness to both parties; see O'Cathail v Transport for London [2013] I.C.R. 614 CA, Per Mummery LJ:

> 45. Overall fairness to both parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment.

Deliberations and decision - postponement application

12. We noted that:

(iii) This was the claimant's third application for a postponement.

(iv) The hearing had been listed for five days due to commence today on 9 June 2021, and the notice of hearing was sent to the claimant on 27 June 2021.

(v) The litigation commenced in January 2019, over three years ago.

(vi) The claimant's application for a postponement, originally submitted on, 5 June 2022 appeared to be made on the basis of threats made to the claimant and her family members and that the claimant had been under severe distress and ongoing health issues which have affected her ability to prepare and participate in the trial listed. The claimant makes reference to ongoing health issues. And states that her application for a postponement is based on 'health and safety issues'.

(vii) The claimant's original application of 5 June 2022 supported by a four-page witness statement supported by three exhibits relating to an exchange of What's App messages. In respect of these exhibits we note:

a. they appeared to be dated '16/22 May'.
b. They appear to be sent between the claimant and some other unidentified third party.
c. The alleged threat is unconnected in any way with the respondent.
d. We are unable to identify any evidence of any threat made by reference to these messages. The messages use the words '….I an prepared to take them on legally. I consider approaching my family as a threat…' .. 'I am going to do something about this but not yet …' '..how dare they threaten my pind!'.. ..' keep doors etc locked closed etc'.
e. There is a voice recording and we do not know what is said.
f. There is no comprehensible explanation from the claimant in respect of any threat that would prevent her from attending tribunal.

(viii) Notwithstanding the references to medical issues mentioned by the claimant within her application for a postponement, the basis of the further application for postponement was stated not to be medical grounds. For the sake of completeness, we record that the medical evidence supplied by the claimant with her application is insufficient to support any postponement in any event. Further, it can be seen

that the claimant had unsuccessfully sought to obtain a postponement of a final hearing in a previous claim earlier this year within the tribunal, *Paur v Duncan Lewis Case Number: 3323750/2017,* 'the Duncan Lewis litigation', relying upon the same medical evidence.

13. The claimant's application for a postponement appeared to be based upon the claimant's concerns in respect of her 'health and safety'. The onus is on the claimant to prove the need for such an adjournment. We have concluded that the claimant has provided insufficient evidence to indicate that the claimant is subject to any form of threat to her health and safety. Further, even in the event that the claimant could demonstrate that she was subject to some form of threat by a third party, there is nothing to evidence that this should prevent the claimant from attending the tribunal, particularly when the employment tribunal building itself has a significant security presence.
14. We note that the claimant has had the opportunity to be heard by CVP link. It is more likely than not that the claimant has seen a substantial number of missed calls from the tribunal and the tribunal's email correspondence. The claimant has not attended as requested. Taking the entirety of the evidence into account we conclude that there is no genuine health and safety issue preventing the claimant's attendance and participation today.
15. Balanced against the claimant's application for a postponement is the substantial prejudice and unfairness that will be experienced by the respondent by a further delay. The tribunal checked with the listing department and it was likely that should this matter be postponed it would not be possible to relist the final hearing until 2024. Some of the respondent's main witnesses no longer work for the respondent and they are relying upon the goodwill of the individuals to defend this matter.
16. We conclude that there are no exceptional circumstances in this matter. The claimant does not have a genuine reason for her absence. We consider the claimant's non-attendance to be unreasonable conduct of the litigation on her part. It is not in accordance with the overriding objective to deal with the matter fairly and justly to postpone this hearing. The tribunal refused the claimant's application for a postponement of this matter.

Strike out Application

17. The respondent provided written submissions in respect of its application for strike out and further oral submissions were made by Ms Cowan.

The Law - Strike Out

18. So far as material, rule 37 provides:

> 37. Striking out
>
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

19. The need for caution when considering whether to strike out, especially in discrimination or whistleblowing cases, was emphasised in Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108 EAT, per Langstaff P:

> 33. We would add this final note. Applications for strike-out may in a proper case succeed. In a proper case they may save time, expense and anxiety. But in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not.

20. Default with respect to Tribunal orders will not automatically result in a strike out and the Tribunal must consider whether there may still be a fair trial; see De Keyser Ltd v Wilson [2001] UKEAT/1438/00. The question of whether there can be a fair trial may fall to be considered within the current window; see the decision of the EAT in Emuemukoro v Croma Vigilant (Scotland) Ltd [2021] EA-2020-000006-JOJ. In Bolch v Chipman UKEAT/1149 Burton P offered guidance as to the questions which must be answered on an application for strike out under the predecessor to rule 37(1)(b). Presidential Guidance has also been given in this regard.

Deliberation and decision-strikeout application.

21. Prior to considering the strikeout application, we ensured that we were aware of the issues to be determined within the litigation. We were referred to the pleadings and list of issues within the documentation and took time to familiarise ourselves with them. While it appeared that an agreed list of issues were in existence, we note we were unable to identify any express consent to the final agreed list of issues from the claimant.

22. The claimant has had notice of today's hearing date for over a year and the tribunal has made all reasonable efforts to allow the claimant to participate, including providing a CVP link for the claimant. The claimant has failed to attend or to be represented at the hearing. We consider it in line with the overriding objective to continue to hear the respondent's applications.

23. There has been considerable case management in this matter and we refer in particular to the CMOs made by EJ George on 9 June 2021 which included the following:

    (a) Mutual disclosure by 30 July 2021.
    (b) Any specific disclosure application to be made by 24 September 2021.
    (c) Liability bundle (Respondent to complete, paper and electronic) – 29 October 2021.
    (d) Remedy bundle (Claimant to prepare, electronic and paper) – 29 October 2021.
    (e) Mutual exchange of witness statements – 6 May 2021.

24. The claimant has failed to comply with the case management orders to the following extent:

    (ix) Disclosure: claimant has not disclosed any documentation to Respondent. We note that it is commonplace for the respondent to have the lion's share of the liability disclosure and failure to engage with the process is potentially a problem, should documentation exist. However we do not consider this to be a breach of tribunal orders that necessarily prejudices the possibility of a fair trial. We address remedy separately below.

    (x) Specific disclosure: the respondent contends that it has complied with its obligation to provide disclosure as ordered. The claimant appears to refer to a failure on the respondent side to provide to disclosure, but is disputed. EJ George ordered that any application for specific disclosure must be made before 24 September 2021, some 8.5 months ago. No application has been made by the claimant. We conclude that any alleged failure on the respondent's part to provide specific disclosure in these circumstances cannot constitute reasonable grounds for non-compliance by the claimant with any of the tribunal orders, particularly the provision of a witness statement.

    (xi) Liability bundle: the claimant has not engaged with preparation of the bundle. A disclosure list was provided to claimant on 22 July 2021.

The claimant did not disclose any documentation or engage about its content. Therefore, on Respondent provided the final bundle to claimant after no meaningful response to its provision on 12 October 2021 (despite such a response having been chased) on 4 November 2021. We consider that failure to engage with the bundle preparation is unhelpful, however we do not consider this to be a breach of the tribunal orders that prejudices the possibility of a fair trial.

(xii) Remedy bundle: claimant has failed to prepare, file and serve a remedy bundle despite indicating to Respondent that it was going to be forthcoming on 8 November 2021. This is a claim where the claimant claims career limiting losses in excess of £1 million. In the event that the claimant's claim is successful in whole or in part, it is not possible to meaningfully address issues relating to remedy without any disclosure and/ evidence from the claimant. The provisional timetable as communicated to the claimant on 9 June 2021 clearly envisages that remedy will be dealt with, if required, during this trial window. This matter is serious breach of the case management orders that has the potential to render a fair trial impossible and is considered further below.

(xiii) Witness statements: claimant has not provided a witness statement. This was chased by Respondent who contacted claimant on 6 May to arrange for an exchange. The claimant has indicated that the reason for failing to supply witness statement is related to alleged non-compliance on the respondent's part with their disclosure obligations. In light of the claimant's failure to comply with EJ George's order are set out above we do not accept that the claimant is put forward any reasonable or comprehensible reason for failing to provide a witness statement. This is a serious breach of the case management orders that has the potential to render a fair trial impossible and is considered further below.

25. We note that the claimant is acting as a litigant in person however the claimant is a very experienced litigant in person, in particular she has a high level of experience of the employment tribunal rules and procedures through her involvement in previous claims most recently being the Duncan Lewis litigation, where a seven-day final hearing was conducted earlier this year.

26. There is little comprehensible information available from the claimant. It is not clear why she has failed to comply with the case management orders as detailed above. It can be seen there is considerable non-compliance with tribunal orders on the claimant's part. The most troublesome of these non-compliance issues is the failure on the claimant's part to attend, provide any witness statement or remedy documentation. Allegations of discrimination are fact sensitive and the claimant's witness statement is of fundamental importance. The claimant's conduct of this litigation is similar to her conduct in the Duncan Lewis litigation. In that claim the claimant had also failed to prepare a witness statement or remedy documentation within a claim said to be worth in excess of £1 million. We conclude that the claimant is fully aware of the

importance the tribunal places upon the provision of witness statements and remedy documentation, yet she has chosen not to comply. The claimant's conduct of this litigation is obstructive and unreasonable. By reference to the available documentation and the previous litigation, that this is well known to the claimant.

27. The claimant has also, for the same reasons, failed to actively pursue this claim.

28. While we acknowledge that the claimant has shown considerable disrespect to the tribunal in her approach to this litigation, this is not our focus. Our consideration is focused whether or not it is still possible to have a fair trial.

29. While within the previous Duncan Lewis litigation, it was possible to patch together the claimant's pleadings to be used in place of her witness statement. However the absence of a witness statement coupled with the absence of the claimant make such a potential course of action unworkable and ultimately unfair. We are unable to identify any alternative reasonable way of proceeding in the circumstances. We conclude that in light of the claimant's unreasonable conduct of this litigation, failure to comply with case management orders and a failure to actively pursue this claim has resulted in a scenario whereby it is not realistic or possible to have a fair hearing within the present listing.

30. For the sake of completeness, we have considered, whether or not it is possible for the hearing to be heard outside of the current trial window. Should this matter be relisted, the first available date is in 2024, the tribunal would be tasked with determining serious allegations of discrimination arising from October/ November 2018 over five years after the event. The effect of this delay is compounded by the fact that the claimant has not, as of July 2022, prepared and exchanged any evidence she relies upon in support of her claims of discrimination. The delay alone creates obvious prejudice for the respondent, with the evidence being considerably distant from the events. This disadvantage is compounded by the fact that a number of the respondent's witnesses no longer work for the respondent, forcing the respondent to rely upon third party goodwill. We conclude that all the reasons set out above it is now no longer possible to have a fair trial should the matter, even if the matter is relisted.

31. For the reasons set out above we conclude that it is in accordance with the overriding objective to deal with matters justly and fairly that the claimant's claim be struck out in accordance with Rule 37 because:

    (xiv) the manner in which the proceedings have been conducted by the claimant is unreasonable;

    (xv) the claimant has not complied with the case management orders are set out above;

    (xvi) the claim has not been actively pursued by the claimant; and fundamentally

    (xvii) it is no longer possible to have a fair hearing in respect of this claim.

32. The sake of completeness we note the provisions of rule 47 of the Employment Tribunal Rules in respect of. Non-attendance:

> 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.

33. We repeat the entirety of our findings are set out above and conclude in the alternative that it is not in line with the overriding objective or reasonable, practical or realistic to seek to determine the substantive litigation in the claimant's absence and the claim would be dismissed under Rule 47 in the alternative.

_____18 July 2022_____
Employment Judge Skehan

Sent to the parties on:

21/7/2022

For the Tribunal:

N Gotecha