EMPLOYMENT TRIBUNALS

Claimant: Ms K Kilraine

Respondents: 1) Henry Fawcett Primary School & Children's Centre;
2) London Borough of Lambeth;
3) Mayor & Burgesses of the London Borough of Lambeth

OPEN PRELIMINARY HEARING

Heard at: London South (in public; by CVP) **On:** 5 July 2022

Before: Employment Judge Tsamados (sitting alone)

Appearances
For the claimant: Did not attend and was not represented
For the respondent: Mr Kennedy, Counsel (Ms Persad, Solicitor, in attendance)

JUDGMENT

1) The Claimant's request for a postponement of today's hearing is refused;

2) The Respondents' application for a strike out of the Claimant's claim is granted.

3) The claim is struck out.

REASONS

Essential Background to the claim

1. There is some history to this matter and the fuller background is set out at length in my Record of the Preliminary Hearing held on 1 March 2022. The essential background is set out below.

2. The claimant is employed as a Teacher at the first respondent's school and has been since 1 September 2018 (although the respondents state that more correctly this should be 2017). She has brought a claim against the school, the local education authority and the Mayor & Burgesses of the local authority.

3. Her claim was presented to the Tribunal on 24 March 2020 and relates to events going back to at least 2018 (although this may well be 2017). It raises complaints of race, disability and religion or belief discrimination, detriments in respect of protected interest disclosures and monetary claims in respect of wages and other payments. It is fair to say that the claim form contains insufficient particulars of the various complaints such that it has not been possible for the respondents to set out their grounds of resistance within their responses.

4. Today's hearing was listed at the previous preliminary hearing held on 1 March 2022 to deal with the respondents' strike out/deposit order application dated 27 August 2021 and any resultant case management.

5. At the same hearing I issued an Unless Order requiring the claimant to comply with a previous order for further and better particulars by 12 April 2022.

Further developments

6. The claimant's cousin sent an email timed at 21:56 on 12 April 2022 attaching a letter from a medical practitioner of even date seeking an extension of time to 12 May 2022. This was not dealt with by the Tribunal at the time and in the event the claimant had still not complied with the order by that date. In an email dated 4 July 2022, the Tribunal wrote to the parties at my instruction extending the time limit for compliance with that Order to 4.30 pm today, so as to allow the claimant the opportunity to make representations on any further extension and also to consider the respondents' strike out application.

7. The claimant had made a previous application to postpone today's hearing. This was dealt with by the Regional Employment Judge and refused on the basis that the matter has been seriously delayed and the application had not been accompanied by up-to-date medical evidence and did not include any prognosis.

Today's hearing

8. This morning the claimant sent an email to the Tribunal timed at 08:06 making a further request for a postponement of today's hearing. This attached a letter from a medical practitioner dated 4 July 2022.

9. In a subsequent telephone conversation with a member of the Tribunal's administrative staff, the claimant wanted to know whether the hearing had been postponed or not because if it was not then she withdrew her claim under duress.

10. I instructed my clerk to phone the claimant back and explain to her that her request for a postponement could not be determined without first hearing from the respondents and so to that extent, at least, the hearing needed to go ahead. In that telephone conversation the claimant repeated that if the hearing proceeded she withdrew her claim under duress.

11. On my instruction a letter was sent to the parties explaining to the claimant that we have to proceed with the hearing in order to hear from the respondents as to their position regarding her application and so that I could reach a decision whether to postpone or not.

12. I found out during the course of the hearing that the claimant had sent a further email timed at 10:54 again repeating her contention that if we did not postpone the hearing then under duress her claim is withdrawn.

13. The claimant has indicated quite clearly that she is not able to attend today's hearing and that she awaits confirmation that it has been postponed.

14. The hearing proceeded in her absence.

The claimant's postponement application

15. I heard oral submissions from Mr Isaacs in which he objected to the claimant's postponement application.

16. After an adjournment I decided to refuse the claimant's request for the following reasons (given in truncated form at the hearing but more fully below):

    a. The claimant principally seeks a postponement on the basis of her inability to attend due to a number of medical conditions although her email and previous emails refer to a misunderstanding as to when the hearing was due to take place, that her laptop was not working and that her mobile phone was not an adequate device on which to conduct a video hearing (although she had previously stated that she was not able to attend a hearing be it video or otherwise);

    b. I accept the medical evidence of 4 July 2022 and I do appreciate that the claimant has been diagnosed with a number of serious impairments that impact upon her ability to carry out day-to-day activities as well as to participate in court proceedings. Indeed this letter very much restates what we have already been told in previous letters from her medical practitioners. The final sentence states in effect that it is very difficult to give any prognosis although the claimant is due to be reviewed by her treating clinician in the next week for a more formal assessment;

    c. Mr Isaacs opposes the postponement request on the following grounds: again there is a last-minute flurry of emails containing last-minute doctors letters stating that the claimant is unable to attend but with no analysis of when she might be able to; the final sentence of the letter does not give any prognosis; the claimant has had every opportunity to respond to the strike out application, she has failed to do so, and yet has been able to generate lengthy emails on a variety of other matters; whilst it is of course unfortunate that she cannot attend and accepting that that is right, it is not fair to postpone the matter to an uncertain date when we might be in the same position again; the fairness of the application has to be considered for both parties; whilst there is a full hearing date listed for an estimated 5 days in September 2023, there is no indication of whether this is a sufficient amount of time and in her email of 4 July 2022 timed at 13:46, the claimant states that it is not; whilst the claimant has raised other reasons why she cannot proceed today, it is clear that the principal reason also stated in that email is that her inability to attend a hearing video or otherwise is because of her medical incapacity;

d. Rules 30 & 30A of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (the Rules of Procedure) contain general guidance as to the Tribunal's powers to consider whether to postpone or adjourn a hearing. This covers the position of the ill-health of a party and is a matter of discretion for the Tribunal, that discretion being informed by the duty to make reasonable adjustments and the right of both parties to a fair hearing. There is also Presidential Guidance on postponing for medical reasons which I have also considered;

e. In Teinaz v London Borough of Wandsworth (2002) ICR 1471, the Court of Appeal said that although postponement is a discretionary matter, some postponements must be granted, if, not to do so amounts to a denial of justice. The Tribunal is entitled to be satisfied that the inability to be present at the hearing is genuine and the onus is on the party making the application to prove the need for the adjustment. If the Tribunal is not satisfied, it can give directions to enable any doubts to be resolved;

f. In Andreou v Lord Chancellor's Department [2002] IRLR 728, the Court of Appeal said that it is necessary for the Employment Tribunal to balance the fairness to the claimant with the fairness to the respondent and anyone else named in accusations of discrimination;

g. In O'Cathail v Transport for London (2013) ICR 614, the Court of Appeal said that there are two sides to a trial and the proceedings should be as fair as possible to both sides. The Employment Tribunal has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within a reasonable time and the public interest in the prompt and efficient adjudication of cases;

h. In Phelan v Richardson Rogers Ltd & Anor (2021) ICR 1164, the Employment Appeal Tribunal (EAT) said that an application on medical grounds engages the right to a fair trial (under Article 6 of the European Convention on Human Rights). Proper weight must be given to the serious implications for the claimant in refusing a postponement. These serious implications would usually outweigh the inconvenience and cost to the other party of granting the postponement, such that an Employment Tribunal properly carrying out the balancing exercise would be bound to grant the application. However, the implications for the respondent's right to a fair trial and the wider public interest of not postponing, must also be weighed in the balance and may tip the scales the other way. The assessment of when the matter is likely to come to an effective hearing if the application is granted and what the medical evidence indicates about that will often be important considerations. Also other relevant evidence and information, including in relation to the course and conduct of the litigation hither to;

i. This claim was first brought on 24 March 2020 and there have been attempts to move it forward on a number of occasions. However, for medical reasons it has not been possible. The respondents' application for a strike out/deposit order was made on 27 August 2021 and is still outstanding. The claimant was ordered to provide further and better particulars of her claim which is insufficiently set out in her claim form, in an order dated 20 June 2021. The

claimant did not comply with this and I made an unless order on 1 March 2022 ordering the claimant to comply by 12 April 2022. She did not do so but sought an extension of time which I granted to 4:30 pm today. Her recent emails do not deal with the position of compliance with that order.

j. Having considered the above factors including the issue of fairness to both parties and acknowledging the serious implications for each in either allowing or refusing the request , I find that the prejudice to the respondents in this matter being postponed with the uncertainty of when and possibly even if the claimant will be in a position to participate at some future date is greater than the prejudice caused to the claimant.

k. The claim has simply not advanced in the last two and a half years and to a put a hearing off without being clear of any prognosis beyond it being difficult to assess at present and there being a review by her treating clinician next week, given what has gone before, does not provide a sufficient degree of certainty as to when the claim can progress further. Moreover the respondents' strike out application has now been outstanding for almost a year.

l. For these reasons, the request is refused.

<u>The respondents' strike out application</u>

17. The hearing therefore proceeded and I dealt with the respondents' strike out application originally made on 21 August 2021. The respondents did not pursue their application for a deposit order.

18. After an adjournment I decided to strike out the claimant's claim for the following reasons (which were given in truncated form at the hearing and are set out in full below):

a. The respondents have made an application that under rule 37(1)(e) of the Rules of Procedure a Tribunal may strike out a claim or response (or part) where it considers that 'it is no longer possible to have a fair hearing'.

b. Having considered the respondents' written application and Mr Isaacs' oral submissions I have decided to strike out the claimant's claim.

c. The claimant first brought her claim to the Tribunal on 24 March 2020, although it appears to relate to events going back to at least 2018 (according to her claim form, although the respondents' grounds of resistance indicate that her employment commenced in 2017, so most likely 2017). Her claim form raises complaints of race, disability and religion or belief discrimination, detriments in respect of protected interest disclosures and monetary claims in respect of wages and other payments. It is fair to say that the claim form contains simply insufficient particulars of the various complaints and this in turn has impacted upon the respondents' ability to set out their grounds of resistance within their responses.

d. Indeed, in their responses presented on 1 July 2020, the respondents requested that the claimant provide sufficient particulars of the various complaints and enclosed template tabular documents in which the claimant could do so. The claimant failed to do so and on 8 June 2021 the respondents requested an order from the Tribunal. The Tribunal made an order on 28 June 2021 for the claimant to provide the further and better particulars sought. The claimant did not comply. On 27 August 2021, the respondent made its application for a strike out. At the hearing I conducted on 1 March 2022, I made an Unless Order for the claimant to provide the further and better particulars by 12 April 2022, extended to 4.30 pm today in the light of her request for an extension of time. As of today there has been no indication from the claimant of her position with regard to that order.

e. The difficulty for the respondents is that they simply do not know what case they have to meet, attempts to clarify the claim have not been complied with, the respondents do not know which witnesses they might need to call and whether those witnesses are still employed by them. The claimant was employed and at work for a period of approximately 6 months before she was suspended from work. However, in her email of 4 July 2022 timed at 13:46 she makes reference to events going back at least 20 years. The respondents have no idea what this is a reference to. Indeed it is hard to conceive how this could be the case if her employment commenced in 2018 or 2017 and goes to underline the dilemma faced by the respondents in not knowing the case it has to meet.

f. In addition, there is the difficulty and the question of the claimant's ability to participate in the proceedings and to attend further hearings. I was referred to two cases, Peixoto v British Telecommunications plc UKEAT 0222/07 and Riley v Crown Prosecution Service [2013] IRLR 966, CA, which relate to the issue of whether there was any foreseeable time in the future when a case could continue.

g. In Peixoto, the Employment Appeal Tribunal ("EAT") held that an Employment Tribunal had not erred in striking out claims of unfair dismissal and disability discrimination made by a claimant suffering from chronic fatigue syndrome on the basis that it was no longer possible to have a fair hearing. The claimant in that case had asserted that she would not be physically able to give oral evidence, the case could not be decided on the documents alone and there was no prospect of the case being able to proceed at any time in the future, particularly given the nature of the medical evidence, which had persistently predicted a sufficient recovery that did not in fact materialise. In the absence of any prognosis for recovery, the Tribunal was unable to establish any point in the foreseeable or even distant future when a trial could take place and concluded that a fair hearing was no longer possible. This conclusion was rooted in Article 6 ECHR, which lays down the right to a fair trial, including the right to have a trial within a reasonable time. The Tribunal had considered less draconian measures but was entitled to strike out the claims on the ground that a fair trial was impossible. Accordingly, the EAT could find no error of law in the Tribunal's decision and the appeal was dismissed. In reaching its conclusion, the EAT commented that those who know most about

whether a fair trial is possible in an Employment Tribunal are those specialist members and Employment Tribunal Judges who are there day in and day out.

h. Similarly, in Riley, the EAT upheld a Tribunal's order striking out claims of discrimination and whistleblowing brought by a claimant suffering from depression on the basis that a fair hearing was no longer possible. The Employment Judge had reached this conclusion having taken account of (i) the fact that there was no prognosis of when, if ever, the claimant would be well enough to take part in the proceedings, and (ii) the balance of prejudice in respect of each party. On appeal, the Court of Appeal found no error of law in this decision and dismissed the claimant's appeal against the order. The Court of Appeal felt it would be wrong to expect Tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. It held that if doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a Tribunal.

i. In the present case, the difficulty is that we are again in a position as we were at my hearing on 1 March 2022, where, notwithstanding a last-minute flurry of emails, we still do not have clear evidence of when the claimant will be fit to participate in the proceedings. Whilst I set a scratch date of 5 days for the full hearing from September 2023, based on a guesstimate of how long it might need, simply to get it in the Tribunal's diary, the claimant's email of 4 July 2022 indicates that this may well have to be vacated because the claimant views it as a completely inadequate listing and references matters going back 20 years. I cannot envisage another way forward beyond simply to wait and see and frankly that is not an appropriate or reasonable option and would prejudice the respondents further. There have already been a number of previous estimates by the claimant's medical practitioners as to when she might be fit to participate and these have all proved unrealistic.

j. As Mr Isaacs said in submissions, and with which I agree, this is a paradigm of a case where it is simply no longer possible to have a fair hearing. The respondents do not know what case they have to meet, they do not know what witnesses to call or even if those witnesses are still within their employment, there is no indication of when the claimant will be fit to participate and even the scratch date for the hearing is in question. So it is impossible to even set any case management orders or identify any certain date on which the case can be heard. The events in question occurred either approximately five years ago or perhaps even approximately 25 years ago. The previous attempts to progress the case have been unsuccessful and each time a step is taken the claimant applies for an extension of time or a postponement at the last moment, the majority of which have been supported by inadequate medical evidence.

k. I accept that it is wholly in accordance with the Tribunal's overriding objective under rule 2 of the Rules of Procedure to strike this claim out. I appreciate that this is a serious step to take but I feel that it is simply no longer possible in these circumstances for there to be a fair hearing.

l. In the alternative, Mr Isaacs submits that the claim should be dismissed under rule 52 of the Rules of Procedure on the basis of the claimant's repeated contention that if this hearing was not postponed as she requested she was withdrawing it under duress. Whilst he appreciates that she stated it was under duress he did not accept that it actually was. There was a further repetition of her withdrawal under duress in her further email received at 10:54 today. For the sake of completeness I have considered the position and I form the view that despite what the claimant says and has repeated in several emails it is simply not safe to rely on what she says by way of an ultimatum rather than an actual indication of withdrawal.

m. In conclusion the claim is struck out and the hearing dates set for 11 to 15 September 2023 are vacated.

Employment Judge Tsamados
Date: 5 July 2022