



EMPLOYMENT TRIBUNALS

Claimant

Mr J Brink

Respondent

MSI Reproductive Choices

v

Heard at: Sheffield (by CVP)

On: 27 September 2022

Before: Employment Judge A James
Ms R Hodgkinson
Mr A Senior

Representation

For the Claimant: Did not attend and was not represented

For the Respondent: Dr M Ahmad, counsel

JUDGMENT

- (1) The claimant's request for a postponement is refused (Rule 30A Employment Tribunal Rules of Procedure 2013).
- (2) The claim is dismissed due to the claimant's non-attendance at the hearing (Rule 47 Employment Tribunal Rules of Procedure 2013).
- (3) Alternatively, the claim is struck out because it has not been actively pursued (Rule 37(1)(d) Employment Tribunal Rules of Procedure 2013).

REASONS

The issues

1. The final hearing of the claimant's claim was due to be heard by CVP today and the following three days. For the reason set out below, the claimant did not attend today's hearing. Instead, he applied to postpone it. That application was opposed by the respondent. Alternatively, if the postponement of the claim was refused by the Tribunal, the respondent indicated its intention to pursue an application that the claim be dismissed under rule 47 because of the claimant's non-attendance; or in the alternative,

that the claim should be struck out because it was not being actively pursued (Rule 37(1)(d)).

The proceedings

2. Acas Early Conciliation commenced on 22 September 2020. An Acas Early Conciliation Certificate was issued on 21 October 2020. The claim form was issued on 17 November 2020, and raised claims of unfair dismissal, race discrimination, arrears of pay and a redundancy payment.
3. A preliminary hearing for case management purposes took place on 9 April 2021. The issues were identified. In order to pursue an unfair dismissal claim, the claimant had to have been an employee. The 'employee issue' was determined at a preliminary hearing on 11 and 12 August 2021. It was concluded that the claimant was not an employee and therefore his claim for unfair dismissal was dismissed. The claims for a redundancy payment and arrears of pay were dismissed on withdrawal by the claimant.
4. A final hearing was listed between 14 and 16 February 2022. Unfortunately, it was not possible for the hearing to proceed on that occasion, because a Tribunal Panel was not available to hear it. The hearing was therefore adjourned until dates in May 2022. The respondent applied to postpone that hearing, on the basis that it had, as requested, provided unavailability dates to the Employment Tribunal beforehand; but the hearing had been listed on dates when the respondent's representative and/or witnesses were not available. The claimant opposed that application. In the circumstances, the application was granted. The hearing was relisted for four days, commencing today.

Findings of fact

5. The parties were notified on 28 March 2022 that the adjourned hearing would take place between 27 and 30 September 2022. The first indication from the claimant that he was not available for the hearing was received by the Tribunal in an email sent by him at 09:40 hours on 26 September. In that email the claimant states:

I regret to inform you that, for medical reasons, I will no longer be able to attend the tribunal scheduled for this week.

6. The Tribunal responded at 12:54 hours on 26 September as follows:

The hearing is due to take place by video link (CVP). The claimant states that he is not able to attend the hearing 'for medical reasons'. The claimant has not provided any detail as to what those medical reasons are, or any evidence to support his contention that he is not fit to attend the hearing.

Before agreeing to postpone the hearing again, the Tribunal needs:

1. *to know what the medical reasons are;*
2. *understand why those medical reasons prevent the claimant from attending the hearing, even though it is to take place by video link; and*
3. *to consider any medical evidence in support of the application to postpone.*

The claimant is ordered to respond as soon as possible, providing answers to the above questions.

7. The respondent objected to the application. That objection was maintained before the Tribunal today.

8. At 22:22 hours on 26 September, the claimant emailed the Tribunal as follows:

My apology for not being clearer in my email from this morning. I hereby explicitly request that the tribunal is postponed.

My understanding was that the tribunal cannot proceed with me not being present. I cannot see how this can be conducted fairly in my absence without me having legal representation.

Mr English wrongly states that I have to give details of the medical reasons for not being able to attend, which are personal and therefore I am not obligated to share this information. I will be willing to share this information with the judge if I am ordered to do so at a later stage.

Due to having medical treatment, I will not be able to respond to any further emails this week.

9. Then at 22:35 hours a further email was received from the claimant stating:

I have now read the tribunal's response from earlier today.

I require surgery and am in South Africa, where I have been visiting, hence I am unable to attend the tribunal as I will be recovering from the procedure here and am therefore requesting it being postponed.

I trust you will receive this information in good faith.

10. A further letter was sent by the Tribunal today, before the hearing commenced, which states:

The email sent to the Tribunal by the claimant on 26 September 2022 at 22.22 hours has been considered by Employment Judge James.

The hearing has already been postponed on one occasion. The Tribunal will not postpone the hearing without there being a valid reason to do so.

The claimant will be expected to join the hearing by 10 am, and explain to the Tribunal the medical reasons why he is not able to attend. The respondent is entitled to know the medical reason, so it can make representations about the request for a postponement. If the claimant does not attend the hearing, without a valid reason being given, the respondent will be entitled to request that the claim is struck out, because it is not being actively pursued.

11. Prior to sending that email, the Judge had not seen the email sent at 22:35 hours the evening before. Had the Judge been aware of the fact that the claimant was in South Africa, it would have been apparent that there was a potential issue about the claimant giving evidence from abroad. As the claimant did not attend however, that issue did not arise

12. The claimant responded at 9.24 am as follows:

I cannot make it any clearer that I cannot attend the hearing today or for the [r]est of the week as I am having surgery and having my pre-operative assessment today, with surgery scheduled for tomorrow morning.

Not accepting this as a “valid” reason will be shocking at the least. Again I request that it be postponed.

I am not responsible for the previous tribunal hearing that was cancelled at short notice, hence refusing my request (with a valid reason) will be entirely unfair in my opinion.

I will forward medical evidence from my surgeon in due course after my recovery.

13. A further reply was sent to the claimant by the Tribunal this morning which informed the claimant:

The claimant's email of 27 September 2022 sent at 9:24 am has been considered by Employment Judge James. He directs that the claimant provide the following information by return:

- 1. When did the claimant first receive notification that he would be undergoing a pre-operative assessment today, with surgery scheduled for 28 September 2022?*
- 2. Why has the claimant waited until the day before the hearing was due to commence, to inform the tribunal that he is not able to attend on the days scheduled as a result?*
- 3. The claimant is ordered to provide all documentation received from the relevant medical provider, with regard to the pre-operative assessment and planned surgery.*

Noting that the claimant has raised issues about confidentiality, Employment Judge James informs the claimant that the respondent is entitled to know the details of the reason for the postponement application, namely the surgery that is to be undergone; but as the respondent will be aware, that information must be used for the purposes of these proceedings only, and not circulated more widely than is necessary.

14. The Tribunal is not aware of any further communication being received from the claimant since that email was sent.

Relevant law

15. Rule 2 Employment Tribunal Rules of Procedure 2013 contains the overriding objective, which states:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*

- (d) *avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) *saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

16. Rule 30A Employment Tribunal Rules of Procedure 2013 provides:

(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.*

17. Rule 47 Employment Tribunal Rules of Procedure 2013 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.

18. Rule 37 (1) Employment Tribunal Rules of Procedure 2013 provides:

(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—*

(d) *that it has not been actively pursued;*

19. Harvey's Encyclopaedia on Employment law states in relation to this rule:

*Where the failure to actively pursue a claim or response is intentional and contumelious ('contumelious' indicating a disdain for the judicial process), this will fall within the meaning of **SI 2013/1237 Sch 1 r 37(1)(d)**. Such an intentional and contumelious default may arise where there has been a failure to comply with a peremptory order of the tribunal (the most obvious example being an 'unless' order), or where the failure to actively pursue the claim or response amounts to an abuse of the process of the tribunal.*

In Rolls Royce plc v Riddle [2008] IRLR 873, EAT, Lady Smith pointed out that it is quite wrong for a claimant 'to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures' (at [20]). Although striking out a claim is the most serious of outcomes for a claimant, she commented that 'it is important to avoid reading the warnings in the authorities regarding its severity as indicative of it never being appropriate to use it' (at [35]). In that case, her Ladyship, on appeal, struck out the claimant's unfair dismissal claim on the basis of intentional and contumelious default on his part, in particular that he had misrepresented to the tribunal that he could not attend the hearing on medical grounds, causing it to be adjourned, and had thereafter failed to give reasons as to why his claim should not be struck out, and had failed to take any steps to communicate with the tribunal or otherwise progress his claim in the four months prior to the PHR at which the strike out was considered. All of this indicated 'a persistent disregard for the tribunal, its procedures, and the respondents' interests', making a strike out of the claim 'inevitable'.

20. In relation to alleged inordinate and inexcusable delay by a party Harvey notes that it is necessary to show:
- (a) that there has been inordinate and inexcusable delay on the part of the [claimant] or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiffs or between each other or between them and a third party' (Birkett v James [1978] AC 297 at 318, per Lord Diplock).*

Conclusions on the issues

21. Bearing in mind the facts found, and the relevant legal principles, the conclusions of the Tribunal on the three applications are set out in turn below.
- (1) Postponement application
22. There being no agreement to postpone, and the application not being the result of an act or omission of another party or the Tribunal, the claimant needs to demonstrate that there are exceptional circumstances (Rule 30A(2)(c)). The fact that a party or witness is undergoing surgery, when a hearing is due to take place, may well amount to exceptional circumstances, justifying postponement of a hearing. However, it will always depend on the particular facts of the case.
23. The circumstances of this case are that the claimant appears to have left it until the last minute to make the application – barely 24 hours before the final hearing was due to commence. There is no suggestion that the surgical procedure has arisen as a result of an emergency. Rather, the details that are before the Tribunal suggests that the surgery is planned surgery, and that it has been planned for some time. Despite the requests by the Tribunal to the claimant to provide medical evidence in relation to the postponement request, the claimant has failed to provide any medical evidence at all. It should have been relatively easy for the claimant to provide such information

by email. The Presidential Guidance on postponement applications has not been followed.

24. The scant details provided by the claimant have only been provided following further prompting. The Tribunal does not know when the claimant was informed of the planned surgery; nor when he booked flights to South Africa; nor when he plans to return. There should be documentary evidence regarding these matters. None of that has been received.
25. The Tribunal notes that it could adjourn this application, in order for the claimant to provide such documents. The Tribunal has concluded however that it would not be just in the particular circumstances of this case to do so. That would incur further time and costs for the Tribunal panel and for the respondent, and result in further delay. In the Tribunal's judgment, it was incumbent on the claimant to make a timely application for postponement of the hearing, and to provide the relevant evidence in support of that. The claimant has failed to do so. Further, the claimant's actions, as evidenced by his recent emails to the Tribunal, demonstrate a lack of respect for the Tribunal and the judicial process.
26. As to the suggestion by the claimant that it would be unfair for the hearing to proceed without him having legal representation, Tribunals are used to dealing with unrepresented parties. The fact that a party is not represented it is not a valid reason, in most cases, to postpone a hearing. It is not a valid reason in the circumstances of this case.
27. The Tribunal conclude therefore that it is just and fair to refuse the postponement application.

(2) Application to dismiss the claim - Rule 47

28. Having decided to refuse to postpone the hearing, it is necessary to consider whether or not to dismiss the claim, or alternatively, to proceed in the claimant's absence (or list a further final hearing). The Tribunal notes that the tribunal should take into account the information that is available, having made whatever enquiries are practicable, as to the reasons for the claimant's absence.
29. Dr Ahmad argued, on the respondent's behalf, that this was not an appropriate case to proceed in the absence of the claimant. In a discrimination claim, it is usual for a claimant to give evidence first. In the claimant's absence, the facts necessary for his claim to succeed are unlikely to be established. Whilst it is open to the Tribunal to ask questions of the respondent's witnesses, it is not the role of an Employment Tribunal to cross examine witnesses, or pursue a particular party's claim in a partisan manner. In those circumstances, the Tribunal concludes that it would not be a proportionate use of the Tribunal's resources to proceed in the claimant's absence.
30. As to whether or not to dismiss the claim, the Tribunal notes that all of the respondent's witnesses made themselves available for the hearing. A number are surgeons, and therefore would not therefore have been available to carry out any surgery this week.
31. From the information before the Tribunal, as noted above in relation to postponement application, it is not clear when the claimant became aware

that the planned surgery clashed with the dates for this hearing; when he made arrangements to travel to South Africa for that surgery; or what attempts the claimant made to rearrange the surgery, given that the dates for this final hearing had already been set. This lack of information results from the claimant leaving it until the last minute to make a postponement application. The application should have been made by the claimant as soon as possible after he was notified that the planned surgery had been arranged; assuming that it was not possible or practicable to postpone the operation.

32. In the circumstances, the Tribunal concludes that it is just to dismiss the claim.

(3) Application to strike out - Rule 37(1)(d)

33. Given the Tribunal's decision in relation to rule 47, it is not strictly speaking necessary to consider whether to strike out the claim pursuant to Rule 37(1)(d) i.e. that the claim has not been actively pursued. However, in case the Tribunal's decision in relation to rule 47 is found to be erroneous, the Tribunal would in any event had decided to strike out claim under this Rule.
34. The Tribunal concludes that the claimant's delay in making the postponement application is intentional and contumelious i.e., it shows disdain for the proceedings of the Tribunal and for the judicial process. The respondent has turned up for the hearing, with its instructing solicitor, counsel, and four witnesses. A full panel has been arranged to hear the claim, over four days. The claimant's behaviour demonstrates disregard for the costs, time and effort involved for all those concerned.
35. By making the postponement application so late in the day, the claimant has shown disdain and disrespect for the procedures of the Tribunal, as well as for the respondent and witnesses, who have postponed other work in order to make themselves available. Having been asked to provide documentary evidence yesterday in support of his postponement application, the claimant's response has been to say that he would provide that after his recovery from the surgery.
36. Had the Tribunal not concluded that the delay in making the postponement application was intentional and contumelious, the tribunal would not have struck the claim out on the alternative ground that there had been inordinate and inexcusable delay. This is because the Tribunal was not convinced, given that a bundle had been prepared, and witness statements prepared, that a delay of a further few months, to list and deal with a further hearing, meant that a fair trial was no longer possible.

Costs

37. The Tribunal having given its decision orally, Dr Ahmad indicated that the respondent intended to make an application for costs. A written application will apparently be submitted in due course. Dr Ahmad indicated that the respondent was content for that application to be dealt with in writing. Once that application is made, the tribunal will give appropriate directions so that it can be dealt with in a proportionate manner, within a reasonable timescale.

Employment Judge A James

Case Number: 1806735/2020

Dated 27 September 2022