



EMPLOYMENT TRIBUNALS

Claimant: Mrs Margaret James

Respondent: Ms Georgina Brown & London Borough of Southwark

Heard at: London South (Croydon) in person, in public

On: 10 October 2022

Before:

Employment Judge Tsamados
With members: Mr J Hutchings
Mr W Dixon

Representation

Claimant: Did not attend and was not represented

Respondent: Mr P Linstead, Counsel

JUDGMENT

The **unanimous** Judgment of the Employment Tribunal is as follows:

- 1) The Claimant's claims are dismissed under Rule 47 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, the Claimant having not attended the hearing.
- 2) The Claimant is ordered to pay the Respondents' legal costs in the sum of £1250.

REASONS

Background

1. The Claimant is still employed by the second Respondent. She has brought 5 claims against the two Respondents, the first Respondent being her former line manager. These claims raise complaints of direct race discrimination,

harassment related to race and victimisation. The Agreed List of Issues runs to 17 pages containing 44 alleged detriments many of which are sub-divided into further separate factual allegations. The Respondents deny the claims.

2. We were provided with a bundle of documents containing nearly 2,000 pages as well as a supplemental bundle of 155 pages. The Claimant intended to give evidence and call two further witnesses and the Respondent intended to call six witnesses including the first Respondent.
3. The case was listed originally for 9 days between 7 and 17 March 2022. The history of what occurred during the hearing is set out in more detail below. In essence, the following happened. The first day was a reading day, the Claimant did not attend due to ill-health on 8 March, attended by CVP on 9 March, attended in person and gave evidence on 10 and 11 March and did not attend due to ill-health on 14 and 15 March 2022. Whilst we attempted to utilise 16 and 17 March, which were intended to be for deliberation by the Employment Tribunal, as hearing dates, this was not possible due to the Claimant's continuing ill-health. We adjourned the hearing on 15 March 2022 on the basis of the Claimant's medical condition as supported by a medical certificate from her GP dated that same day.
4. By 15 March 2022, the Respondents' Counsel, Mr Linstead, had not completed his cross-examination of the Claimant and we had not heard from the Claimant's witnesses or the Respondents' witnesses.
5. In liaison with the parties, the Tribunal set further hearing dates for 5 days from 10-14 October 2022. The Tribunal met on 7 October 2022 in chambers for a re-reading day. We had intended to meet again on 17 and 18 October 2022, after completion of the evidence and submissions, so as to reach our decision.
6. Notice of the resumed hearing was sent to the parties by letters dated 14 April and 11 May 2022. A further letter dated 4 October 2022 was sent reminding the parties that the hearing was in person.

Today's hearing

7. By 10 am today Mr Linstead and his Instructing Solicitor, the first Respondent and 2 of its witnesses were present in the Tribunal building. However, the Claimant was not.
8. I made enquiries of our clerk which revealed that the Claimant had not made any contact with the Tribunal to advise of her non-attendance. Our clerk telephoned her on the mobile telephone number provided on two occasions during the morning. There was no answer and our clerk left voicemail messages notifying the Claimant that she should be at the Tribunal and to make contact.
9. I instructed our clerk to send an email to the Claimant at the email address that she provided. This is as follows:

"I have been instructed by Employment Judge Tsamados to write to the claimant.

The hearing was due to resume at 10 am today for a further 5 days. You are not present and have not contacted the Employment Tribunal to explain your absence.

If you do not attend or we do not hear from you by 12 pm today with a satisfactory explanation for your non-attendance, the hearing will proceed in your absence. Please be advised that the options are that we will either continue hearing your claim in your absence or dismiss it. As you are aware, the Respondents' have already made a costs application in respect of the previous hearing. They may well make a further costs application in respect of today's hearing."

10. By 12 noon, there was no response from the Claimant and we in fact commenced the hearing at 12.15 pm.
11. I explained to Mr Linstead that we could either continue in the Claimant's absence or dismiss the claims under Rule 47 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the 2013 Regulations). Mr Linstead initially asked us to proceed with the case on the basis that we took the Respondents' witnesses' evidence as read. However, we indicated that if we were minded to proceed, we would have to be able to ask the witnesses questions although we would be hampered in as far as we would not be able to in effect cross examine them in the Claimant's absence and thereby step into the arena. We also expressed our concerns as to the practicability of hearing a discrimination case in the absence of the Claimant and whether it was proportionate to do so.
12. After a short adjournment, Mr Linstead asked us to dismiss the claims given the Claimant's lack of attendance. He then made submissions in respect of the Respondents' costs application which had already been sent to the Employment Tribunal and the Claimant by email on 30 September with a further supporting bundle sent this morning. This contains documents which have already been sent to the Claimant in the process of the case.
13. I do not propose to set out Mr Linstead submissions in this judgment but they have been taken fully into account.
14. We then adjourned to consider our decisions firstly on how to proceed and then on the costs application.

The Claimant's non-attendance

15. The Claimant did not inform the Employment Tribunal that she was not going to attend the hearing today. She did not respond to voicemail messages left on her mobile phone by our clerk. She did not respond to our email giving her until 12 noon to contact the Employment Tribunal.
16. The Claimant has a history of non-attendance, late notification of non-attendance and late attendance as we witnessed during the hearing dates in March 2022. This is explained in more detail in the costs application set out below.
17. The Claimant is still employed by the second Respondent. We were told that she has been absent from work, presenting medical certificates indicating

that she was suffering from stress, since late February 2022. Her last medical certificate expired on 4 October 2022. During this time she attended the Employment Tribunal as a witness for Mr Stennett who she intended to call as a witness to her own claims. She has not returned to work or provided the second Respondent with any further medical certificates covering her absence or responded to attempts by her line manager to contact her both by telephone and email.

18. Under Rule 47 of the 2013 Rules, where 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.
19. Having made practicable enquiries, considered the surrounding circumstances, including the information from the second Respondent as to the Claimant's continuing and latterly unauthorised absence from work and her lack of contact with her own employer, we have reached the conclusion that her claims should be dismissed.
20. Given the operation of the burden of proof in discrimination cases and that we have only heard partial cross examination of the Claimant's evidence, we decided that it would simply not be in accordance with the Tribunal's overriding objective and indeed disproportionate to proceed to hear her claims in her absence.
21. On this basis the Claimant's claims are dismissed as a result of her failure to attend without providing any warning or explanation for her non-attendance.

Costs application

22. By email letter dated 30 September 2022 sent to the Employment Tribunal and copied to the Claimant, the Respondents' made an application for costs in respect of the hearing in March 2022. At today's hearing, Mr Linstead made oral submissions in support of that application and extended it to cover today's hearing. I do not propose to set the submissions out in this Judgment but we have considered them fully in reaching our decision.
23. In essence, the Respondents seek their legal costs in respect of the Claimant's unreasonable conduct in her late notification of her inability to attend the Tribunal on certain days of the March 2022 hearing, in producing a further and substantially different witness statement after exchange had taken place and in disputing the contents of the bundle of documents. In addition, Mr Linstead extended the application to include the Claimant's unreasonable conduct today in not attending the hearing and not notifying of her absence. However, the Respondents had already limited the amount of costs sought to £3,750 plus VAT in respect of Mr Linstead's daily refresher fees of £1250 for three days and did not seek any further amount notwithstanding the Claimant's non-attendance today.

Findings

24. At a preliminary hearing held on 15 February 2021, the parties were ordered to exchange witness statements on 6 December 2021. The parties agreed to extend this date. The Claimant finally served her statements on 1 March 2022, as ordered by Employment Judge Wright, the Respondents having indicated that they were ready to do so on 24 February 2022.
25. The first day of the hearing, 7 March 2022, was a reading day and the parties were not required to attend.
26. On the morning of that day, the Claimant sent a further witness statement to the Respondent in two tranches. As a result the Respondents had to consider the contents, take instructions and prepare an application for it to be excluded. We did not see this document until our hearing on 9 March 2022.
27. By 10 am on 8 March 2022, the first day that the parties were required to attend the hearing, the Respondents were present but the Claimant was not. Enquiries of our clerk revealed that the Claimant had sent an email to the Employment Tribunal that morning timed at 9.07 am advising that she was unable to attend due to medical issues that she did not wish disclosed to the Respondents. A later email timed at 10.31 am indicated that she would provide an update on her position later that afternoon but she could attend the hearing by video rather than the hearing proceeding in her absence. We did not see this email at the time.
28. We commenced the hearing at 11.35 am and advised the Respondents that for reasons we were not able to disclose, the Claimant was unable to attend the hearing today but she had indicated that she could attend by Cloud Video Platform ("CVP") tomorrow. On that basis we adjourned the hearing for that day and stated that we would resume tomorrow.
29. After the hearing I instructed my clerk to write to the Claimant advising her of the position regarding adjournment and attendance tomorrow by CVP and requested that she provide medical evidence by 4.30 pm that day. CVP joining details were sent separately.
30. On 9 March 2022, the Respondents were present in person and the Claimant attended by CVP, albeit not until 10.20 am. We were then able to commence the hearing.
31. The Claimant said that she had not received the email letter sent to her as referred to above although (oddly, as I put it) she did receive our email providing the CVP joining details. She gave some evidence as to her medical condition and in effect disclosed to the Respondents the reason for this. She explained that she was suffering from bleeding which caused her to lose energy and iron and that travelling could be difficult. I directed her to provide medical evidence by 4.30 pm that day.
32. We then dealt with timetabling and housekeeping matters. However, we spent the remainder of the day dealing with the Respondents' application to

exclude the Claimant's revised witness statement and her initial assertion that there were 400 pages missing from her paper copy of the bundle.

33. With regard to the revised witness statement. This was in two parts and we had to ask for this to be forwarded to us because we had not seen them. After listening to submissions from both parties and considering the revised witness statement we decided to exclude it for the following reasons:
- a. We had already done all our reading based on the witness statement exchanged last week and the Respondents had prepared on that basis.
 - b. The revised witness statement appeared quite different to her exchanged statement and refers to pages that are not in the agreed bundle.
 - c. Whilst the Claimant said that the reason she produced this was that there are pages missing from her paper bundle, she was also sent the electronic bundle which is complete (the Claimant disputed this and again I was concerned that she appears to selectively receive emails and relied on building works as affecting her Wi-Fi connection which I did not accept to be a valid explanation).
 - d. Whilst she said the bundle was not agreed with her, it was agreed with her then representative.
 - e. If we allowed her revised witness statement in, then we would have to adjourn to fully read it by reference to the documents she has referred to and the Respondents would need time to consider whether to adduce supplemental witness statements and to prepare. This would clearly mean that we would not even finish the evidence in the time available.
 - f. So we refused to allow her to adduce the revised witness statement and gave her until 2.30 pm (subsequently extended to 3 pm) to reflect upon her original statement and to provide copies of any documents which she says are not in the bundle that she wished to rely upon and then the Respondents can then indicate whether they object to them being admitted in evidence or not.
34. We then adjourned from 12.20 until 3.05 pm at which time the Claimant requested a further 30 minutes and I granted this but made it clear we would be starting her evidence tomorrow morning with or without her information as to the missing documents.
35. An email finally arrived from the Claimant timed at 3.48 pm attaching six enclosures containing documents. Mr Linstead had not had the opportunity to fully review the contents but was of the view that the attachments were not particularly long and some of them were already in the agreed bundle. In view of the time, I indicated we would deal with this in the morning.
36. On 10 March 2022, the Respondents were present at 10 am but the Claimant did not attend until 10.25 am due to travel delays. I told her to set off earlier tomorrow morning. The Claimant had not been able to obtain medical evidence. The Respondents did not object to the additional documents being adduced in evidence by the Claimant. We then commenced the Claimant's

evidence and Mr Linstead spent the day cross examining her.

37. On 11 March 2022, the Respondents were present at 10 am but the Claimant did not attend until 10.10 am. Mr Linstead spent a further day cross examining her.
38. At the end of the day, Mr Linstead indicated that he would possibly need a further day to complete his cross examination and I expressed concern as to whether we would finish her case and then the Respondents case within the remaining two days.
39. On 14 March 2022, the Claimant sent an email to the Employment Tribunal timed at 9.43 am on 14 March 2022 advising that her bleeding had reoccurred and she was in pain and unable to attend the hearing or sit down for long periods. She attached a letter from her GP confirming that she had been referred to hospital urgently under the 2 week wait referral and a medical certificate dated 11 March 2022 indicating that she has post menopausal bleeding for the period 7 to 14 March 2022, although the sections stating “you are not fit for work” and “you may be fit for work taking account of the following advice” were blank.
40. I instructed our clerk to telephone the Claimant to ask her if she could attend that day by CVP or for the rest of the week if needs be. Her response was that she had been trying to get a medical appointment today, may need to go for surgery and is not able to carry on today and is unsure about the rest of the hearing. She gave her permission to share the medical information with the Respondents.
41. We brought Mr Linstead and his Instructing Solicitor into the hearing without the Respondents or its witnesses. I explained the position to them and later forwarded the Claimant’s email to the Instructing Solicitor. I advised them that we had reached the decision that we had no choice but to adjourn today and to seek further evidence from the Claimant given that what she has provided is far from ideal – a fit note that does not say whether she is fit or unfit, does not say she is unable to attend a hearing and which expires today, and a hospital letter that just says it is a 2 week urgent referral.
42. After the hearing, I instructed our clerk to write to the Claimant expressing our concerns as to the medical evidence and stating that we cannot continue to adjourn the hearing simply because she might get a call from the hospital to attend an appointment. The letter suggested that it made more sense for her to attend the hearing in person or by CVP tomorrow and to leave her phone on and if called away we can adjourn at that point, rather than to lose what little is left of the hearing time. We asked for a response by 4.30 pm that day.
43. The letter ended:

“I need to make it clear to you that whilst the Tribunal and the respondents might be sympathetic to your medical condition, people are in effect left waiting around with no certainty that you will attend or even if it is reasonable of you not to attend. This does raise the issue of the respondents making an application for costs to be awarded against you.”

44. The Claimant sent a further email to the Employment Tribunal cc the Respondents timed at 4.23 pm in which she explained the difficulties in obtaining medical evidence from her GP surgery and that they were more concerned with the urgency of the referral but she would now contact them to rectify the certificate. The email further stated that she was in pain, unable to sit for any length of time and would not be able to concentrate on the hearing. The email also stated that this made CVP an unsuitable option and she could not attend in person because movement makes the pain worse.
45. I instructed our clerk to write to the Claimant stating that we accept what she says in her email on face value but still require supporting medical evidence and on that basis the hearing stands adjourned on 15 March. The letter asked her to tell us whether she could attend on 16 and 17 March (thereby utilising our deliberation days) either in person or by CVP and if not why not?
46. The parties did not attend on 15 March 2022.
47. The Claimant sent an email to the Employment Tribunal cc the Respondents timed at 11.18 am that morning. This indicated that she was in pain and taking pain killers and so not able to attend the hearing. The email attached a further medical certificate dated that day. This stated that because of postmenopausal bleeding, abdominal pain, the Claimant is unable to work or attend the Tribunal and has been urgently referred to gynaecology for investigation and covers the period 7 to 20 March 2022.
48. In the circumstances, we decided to adjourn the hearing for the remaining hearing days and proposed to relist for a further 5 days in which to complete the evidence and submissions and gave dates of availability. This was communicated to the parties in a letter of that date.
49. As we have considered above, the Claimant did not attend the hearing today, provided no prior notification of her non-attendance and did not answer our telephone calls or email.

Relevant Law

50. Under rule 75(1)(a) of the 2013 Rules, the Employment Tribunal has the power to make an order against one party to proceedings (“the paying party”) to pay costs incurred by another (“the receiving party”) which had been incurred whilst legally represented or whilst represented by a lay representative. Rule 74(1) defines costs as fees, charges, disbursements or expenses incurred on or by the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing).
51. Under rule 78, the Employment Tribunal has the power to make an order in a specified amount, not exceeding £20,000, in respect of the costs of the receiving party or to refer the matter to the County Court for detailed assessment or to carry out a detailed assessment itself.

52. Under rule 76(1)(a), a costs or preparation time order can be made where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conduct of the proceedings (or part). The Employment Tribunal should determine whether any of the categories in which it can award costs/preparation time orders apply, then determine whether to use its discretion to award such and if so in what amount (Monaghan v Close Thornton Solicitors UKEAT/3/01).
53. It is appropriate for a litigant in person to be judged less harshly in terms of his conduct than a litigant who is professionally represented. The Employment Appeal Tribunal in AQ Ltd v Holden [2012] IRLR 648 held that an Employment Tribunal cannot, and should not, judge a litigant in person by the standards of a professional representative. Justice requires that Tribunals do not apply professional standards to lay people, who may well be embroiled in legal proceedings for the only time in their life. Lay people are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser. The EAT stressed that Tribunals must bear this in mind when assessing the threshold tests in the then equivalent to rule 76(1) of the Rules of Procedure 2013. It went on to state that, even if the threshold tests are met, the Tribunal still has discretion whether to make an order. That discretion should be exercised having regard to all the circumstances. In this respect, it was not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice. This was not to say that lay people are immune from orders for costs/preparation time order: far from it, as the decided cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.
54. We have also taken into account that costs orders should not be lightly awarded on the basis of unreasonably bringing a claim. The 2013 Rules place a high threshold on the award of costs orders, and the word “unreasonable” should be interpreted in the context of the other words in that rule (Ganase v Kent Community Housing Trust UKEAT/1022/01).
55. Under rule 84 of the 2013 Rules, the Employment Tribunal may have regard to the paying party’s ability to pay when considering whether to make a costs order, and, if so, in determining in what amount. We are not obliged to take account of means and having made the enquiry of the parties and received no response, I feel that I have taken the matter as far as I am obliged to do so.

Conclusions

7 March 2022

56. We do not find the late service of a new and wholly different witness statement to be unreasonable conduct. Whilst we did not allow the statement to be admitted at the time, we take the view that the Claimant as a litigant in person believed that what she was doing was to assist what she saw as shortcomings in the cross references to the issues and to the documents and

to documents absent from her paper bundle. Whilst this might have been ill-thought out and ultimately unhelpful, we take into account that the Claimant was acting in person and it would be wrong to expect the same standard from her as from a professional representative.

8 March 2022

57. The Claimant did not attend the hearing and initially we thought this was without notice. However, the Claimant had mailed Employment Tribunal at 9.07 am. She provided an update at 10.31 and asked to attend by CVP. This was not brought to our attention at the time and when it was the request was not processed until the next day. The Claimant showed willingness of accommodated her attendance.
58. The Respondents' submission is that the Claimant could have emailed the Tribunal/them on 7 March or earlier on 8 March to save having a wasted day. They make the point that if she was unwell then it would have been at a point before she travelled and so she could have let the Employment Tribunal know sooner.
59. We have taken into account that the Claimant was at this time unwell and personal nature of her ill-health, and her inability to attend was subsequently covered by medical evidence which we accepted. We also take into account that she was a litigant in person.
60. We conclude that whilst what she did was perhaps not helpful it did not amount to unreasonable conduct in the circumstances.

9 March 2022

61. The Claimant did attend by CVP albeit late. We spent some time dealing with her additional witness statement and the missing pages from the bundle. Whilst we lost some time this was not all down to the Claimant. As indicated above we do not find the production of the further witness statement to be unreasonable conduct. Whilst the Claimant could perhaps have looked at the electronic bundle as well as her paper bundle to determine whether there were documents missing and ultimately there were significantly less than 400 missing pages, she did not do so. We again take into account that the Claimant was a litigant in person and of course was at this stage was unwell albeit able to attend the hearing that day.
62. We therefore conclude that this whilst again perhaps not helpful does not amount to unreasonable conduct.

10 & 11 March 2022

63. The Claimant attended the hearing in person albeit slightly late.

14 March 2022

64. The Claimant sent an email timed at 9.43 am notifying that she was unable

to attend due to ill-health.

65. We do accept that there is some force in the Respondents' submission that if the Claimant was incapacitated it would have been better to have let the Employment Tribunal and the Respondents know sooner. However, we take the view that the Claimant was not well and the circumstances of her ill-health and that in any event her inability to attend was down to medical reasons, evidence of which was subsequently provided and we accepted.

66. We therefore conclude that this did not amount to unreasonable conduct.

15 March 2022

67. We decided to adjourn on the basis of the Claimant's continuing ill-health as supported by the medical evidence provided that morning. We accepted that her medical certificate was adequate.

68. We therefore conclude that what she did and the resultant postponement of the hearing did not amount to unreasonable conduct.

Today (10 October 2022)

69. We refer to our findings above. Clearly, in the absence of any explanation, failing to attend the resumed hearing without warning and without responding to attempts to contact her amounts to unreasonable conduct. The Respondents' Counsel and Instructing Solicitor, the first Respondent and two of its witnesses were present having prepared and expecting the hearing to continue for the further 5 days.

70. In the circumstances we decided it was appropriate to make a costs order. Of course we are not able to ascertain the Claimant's ability to pay an award of costs but that is a consequence of her failure to attend.

71. We have considered what sum to award and we believe it appropriate to make an award reflecting Mr Linstead's refresher fee for one day. Whilst the Respondents have claimed VAT, it is not appropriate for us to include that.

72. Having made enquiries after delivering oral judgment, my understanding is that where the receiving party is registered for VAT and able to recover the VAT liability as an input from HMRC, no amount in respect of VAT is due from the paying party.

73. We therefore order the Claimant to pay the Respondents' costs in the sum of £1250.

74. Mr Linstead asked that we record that the Respondents expressly reserve their right to make a further costs application in respect of their full costs given the Claimant's non-attendance.

Employment Judge Tsamados
14 October 2022

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