



EMPLOYMENT TRIBUNALS

Claimant: Mr N Ashford

Respondent: Grecon Limited

HELD at Newcastle CFT

ON: 6 December 2022

BEFORE: Employment Judge Johnson

Members: Mr P Curtis
Mrs S Don

REPRESENTATION:

Claimant: No attendance, no appearance

Respondent: Mr R Taylor (Solicitor)

JUDGMENT

1. The claimant's application for a postponement of today's hearing is refused.
2. The respondent's application to strike out the claimant's complaints of unlawful disability discrimination and unauthorised deduction from wages is well-founded and succeeds. Those claims are struck out and dismissed.

REASONS

1. This hearing took place by way of CVP. At 10am the Tribunal panel, Mr Taylor for the respondent and Mr Taylor's witnesses had all joined the CVP hearing. The claimant failed to attend. The matter was stood down until 10.30 to see whether the claimant joined the hearing. By 10.30 the claimant had failed to do so.
2. By a claim form presented on 12 May 2021 the claimant brought complaints of unauthorised deduction from wages in the sum of £750.01 and of unlawful disability discrimination. The respondent defended the claim.
3. There have been several case management hearings, the dates of which were:-
 - (i) 18 August 2021.
 - (ii) 13 October 2021.
 - (iii) 3 February 2022.
 - (iv) 28 March 2022.
 - (v) 25 April 2022.

At the hearing on 28 March 2022, the parties were informed that the final hearing of the claimant's complaints would take place by CVP on Tuesday, Wednesday and Thursday the 6th, 7th and 8th December 2022.

4. The claimant applied to postpone the hearings on 18 August 2021, on the grounds that he had been unable to secure funds to obtain representation and on 3 February 2022 due to unexpected work commitments.
5. At the hearing on 28 March, case management orders were made, including orders for disclosure of documents, inspection of documents and preparation of a file of documents. Those orders were to be carried out and an agreed bundle prepared for the final hearing, by 6 June 2022. Witness statements from both sides were ordered to be prepared and exchanged by not later than 24 October 2022.
6. The respondent has complied with the orders made by the Employment Tribunal. The claimant has not complied with those orders. In particular, the claimant has not disclosed the documents to the respondent by the due date and has at the date of today's hearing, failed to provide any witness statement on his own behalf or for any witnesses whom he intends to call to give evidence at the final hearing.
7. By letter dated 15 November 2022, the respondent applied to the Tribunal to strike out the claims on the grounds that the claimant was in breach of the Employment Tribunal's orders and on the grounds that the claim is not being actively pursued. The claimant's response was to submit the letter dated 23 November 2022, requesting a postponement of the hearing on the grounds that the respondent had by then received the claimant's documents and also that the claimant's "mental health is in a very deteriorated state currently and I would not be able to sufficiently represent myself at a hearing at this current time. This is the subject matter the doc was preparing to confirm and describe

my current conditions and circumstances. Due to medical reasons, I ask that the final hearing be delayed for at least two months.”

8. By a letter dated 24 November the Tribunal informed the claimant he must provide an explanation as to why he had failed to comply with the order for disclosure of documents and was also told that, before the Tribunal would consider his application for a postponement, he must provide a letter from his GP or other medical evidence stating whether he is fit to attend the hearing on 6 to 8 December and if not, the condition which prevents him from attending the final hearing on 6 to 8 December and finally when he would be fit to attend a final hearing.
9. By a letter dated 24 November, the respondent’s representative again wrote to the Tribunal highlighting that the claimant had failed to provide any witness statements or any further disclosures. By a further letter dated 28 November, the respondent’s representative again wrote to the Tribunal stating that they had not received any documents from the claimant nor any witness statements. The respondent repeated its application to strike out the claims.
10. By a letter dated 28 November, the claimant informed the Tribunal that he had re-sent his documents some three hours after the deadline of 4pm on 28 November fixed by the Tribunal in its letter to the claimant dated 24 November.
11. In his letter of 28 November, the claimant states, “Regarding my application for postponement of the hearing due to medical reasons, my formal application will be with the Tribunal before the end of this week. I actually requested the documentation from my doctor to support this application three weeks ago (this is the time required to obtain a letter of this nature from my GP practice). Further to this it would not have been practicable to make this application sooner as I could not have known I would not be fit for the hearing at any earlier date.”
12. By a letter dated 29 November, the respondent’s representative informed the Tribunal that they had “received the claimant’s purported disclosure at 19:25 on 28 November 2022. The respondent pointed out that no new documentation had been forward which was not already in the respondent’s original paginated bundle which had been served on the claimant on 9 May 2022. The respondent again pointed out that the claimant remained in breach of the order about the witness statements and again repeated its application for a strike out order.
13. Employment Judge Arullendran refused the strike out application on the grounds that the documents had now been served, but informed the claimant that he must reply by return and say whether he had exchanged witness statements. The Employment Tribunal’s letter is dated 30 November. The claimant failed to reply. By a letter dated 5 December the parties were informed that the Tribunal would consider the respondent’s strike out application at the start of the hearing on Tuesday 6 December 2022. By the time that letter was sent by the Tribunal administrative staff, the claimant had submitted a letter dated 5 December timed at 8:27am, stating as follows:-

“I am writing to officially request postponement of the hearing scheduled tomorrow 6 December 2022. Firstly I must apologise for latency of this application, but as you can see from the GP letter, this is due to my usual GP being sick and not being able to complete the request of providing medical confirmation, to assist my application. As per Dr Baines’ letter,

I am currently unfit to attend and represent myself at the hearing scheduled for 6/12/2022. Whilst it is difficult to provide an exact date of my being fit again to attend, due to the nature of my condition, the doctor indicated it would be likely to be a period of two months I would need a postponement for. Please see attached for your consideration. Regarding witness statements, I have requested a statement from the individual I wished to obtain a witness statement from, who has ignored these requests. I therefore need to reply to the Tribunal to sanction the individual to provide a statement, I will do this ASAP, but please be mindful of my current medical state.”

Attached to that email is a letter from Dr Mhairi Baines, GP, which states as follows:-

“Nathan has been under review with my colleague Dr Quinton since August 2022 for problems with anxiety. Unfortunately Dr Quinton is on sick leave so I have been asked to provide a letter for Nathan. I understand that Nathan has an Employment Tribunal from 6 December 2022 to 8 December 2022. Due to Nathan’s ongoing problems with anxiety, he considers himself unfit to attend the hearing. Nathan is having ongoing treatment and support for his anxiety. He therefore does not feel he would be fit to attend the hearing within the next two months. I would be grateful if this information could be considered and if the hearing could be rescheduled for a time when his anxiety is better controlled.”

That letter and request for postponement were considered by Employment Judge Loy, who refused the application for postponement on the grounds that the letter from Dr Baines did not advise that the claimant was unfit to attend the hearing, rather it relayed the claimant’s own assessment, which is not the same thing. The letter made it clear that the case remained listed for hearing on 6 December 2022.

14. The claimant’s response was to send a letter the same day, at 13:38 on 5 December stating as follows:-

“In response to your ruling on the application for postponement, I have spoken with my GP. The letter will be amended and re-sent before close of business today. With this matter being so time critical, are you able to give a provisional decision based on receiving satisfactory evidence from my GP, giving their (opinion) on my fitness to attend, before the close of business today?”

15. 14.21. On 5 December the respondent’s representative reminded the Employment Tribunal that the claimant had still failed to serve any witness statement and that the respondent required their application for a strike out order to be considered. By a letter dated 5 December the Tribunal wrote to the parties in the following terms:-

“Employment Judge Loy has considered the claimant’s email of today’s date timed at 13:38 and the respondent’s email of today’s date timed at 14:21. Employment Judge Loy directs that:-

- (i) This matter remains as listed for full hearing commencing Tuesday 6 December 2022 for three consecutive days.

(ii) It appears that the claimant has not produced a witness statement of his evidence. That evidence is plainly fundamental to the fair disposal of these proceedings and was ordered on 28 March 2022 by Employment Judge Martin to be exchanged by 24 October 2022. Employment Judge Loy is unaware of any explanation for this delay that may have been given to the respondent or the Tribunal.

(iii) As the Presidential Guidance on seeking a postponement makes clear, a certificate to the effect that a person is unfit to attend is not conclusive evidence of that fact.

(iv) The respondent's application to strike out the claimant's claim will be heard at the start of the hearing on Tuesday 6 December 2022."

At 8:47am on the morning of 6 December (the first day of the final hearing) the claimant sent a further letter to the Tribunal in the following terms:-

"I write to renew my application for postponement and attach the amended letter from my GP. I would ask that this postponement is reasonably granted and it should be noted that the GP's medical opinion is that attending the hearing today would be detrimental to my mental health. I would like to respectfully point out that the anxiety mentioned in this letter is not the standard anxiety that the average person feels but is a serious, almost decade long illness that seriously affects me on a daily basis and qualifies as a disability under the Equality Act 2010. I would like to point out that the condition is incapacitating and debilitating, further exacerbation of this condition by attending today (as stated by my GP) could have serious long term implications on my life. I therefore ask that the hearing date of 6 December 2022 is postponed for at least two months at this point, to be reviewed at a later date, when further information about the status of my condition is known. I believe I have now satisfied the criteria laid out by the Tribunal for having a postponement application granted. If the application for postponing is rejected, I would like to respectfully ask that a full reason is given and the reasons for knowingly continuing with the knowledge of the implications of attending today would further have on my health. Thank you for your consideration".

16. Attached to that letter was a second letter from Dr Baines which states as follows:-

"Nathan has been under review of my colleague Dr Quinton since August 2022 for problems with anxiety. Unfortunately Dr Quinto is on sick leave so I have been asked to provide a letter for Nathan. I understand that Nathan has an Employment Tribunal from 6 December 2022 to 8 December 2022. Due to Nathan's ongoing problems with anxiety, he considers himself unfit to attend the hearing. From speaking with Nathan it is evident that he is struggling a great deal with anxiety currently and I think it would be detrimental to his mental health if he were to attend the Tribunal. I therefore feel it would be more appropriate to defer the Tribunal for a few months until Nathan's anxiety is better controlled. He is having ongoing treatment and support for his anxiety."

17. The claimant failed to attend this morning's hearing. It is clear from his letter dated 6 December that he had no intention of doing so, even though his application for a postponement had not been granted or considered. The

Tribunal was not satisfied that the claimant was unable to join in to the CVP hearing to present his application to postpone the hearing. The claimant would have done that from his home or other place of safety and would by so doing have had the opportunity to persuade the Tribunal that his application should be granted.

18. The Tribunal was not satisfied that the medical evidence provided by the claimant was sufficient to justify as postponement at this late stage, or at all. The Tribunal was extremely concerned at the contents of the claimant's letter of 5 December timed at 13:38 when he says, "I have spoken with my GP. The letter will be amended and re-sent before close of business today." No explanation or reason has been given as to why Dr Baines' second letter is different to the first one, when there appears to have been no change in circumstances in the intervening period. Furthermore, the second letter does not state in clear and unequivocal terms that the claimant is unfit to attend the hearing, nor is there any basis for such a conclusion. Dr Baines simply says that, "I think it would be detrimental to his mental health if he were to attend the Tribunal." Dr Baines does not say what that detriment would be or how any such impact would meant that the claimant was unfit to attend the hearing at all. As is said in the Presidential Guidance about requesting postponements, this is an important matter, as the fact that the person has a medical condition does not necessarily mean that he cannot attend a hearing. The Tribunal was not satisfied that the claimant had provided sufficient evidence to justify this hearing being postponed. The case has been in the list since March 2022 and if postponed it will not be able to go back in to the list until May 2023 at the earliest.
19. The claimant has failed to set out why it would be in accordance with the Overriding Objective (to deal with cases fairly and justly) for this hearing to be postponed. That Overriding Objective requires the Tribunal to deal with the case fairly and justly which includes so far as practicable –
 - (a) Ensuring the parties are on an equal footing;
 - (b) Dealing with cases 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
 - (f) Saving expense.
20. In considering the application, the Tribunal takes into account the claimant's failure to comply with earlier case management orders, particularly those relating to disclosure of documents and preparation of witness statements. As at today's date, the claimant has failed to properly set out what is his case on the claims for unlawful disability discrimination. His claim for reasonable adjustments is simply that he preferred to have any negative feedback to be given at the end of the working day rather than during the working day. Whilst there is a suggestion in the claim form ET1 that there might be a complaint of unfavourable treatment because of something arising in consequence of disability (contrary to section 15 of the Equality Act 2010), that allegation has

still not yet been properly set out. The claimant has failed to serve a witness statement containing his own evidence or that of any other witnesses. Accordingly, the respondent does still not know the nature of the case which it is expected to meet. Nowhere in any of the correspondence or documents submitted to the Tribunal by the claimant is there any explanation as to why he has failed to comply with the order to prepare and exchange witness statements. The Tribunal notes that the respondents sent their witness statements to the claimant on 14 November 2022, having repeatedly asked the claimant to confirm that he was ready to exchange statements.

21. The Tribunal further notes that the claimant says in his letter of 28 November that he had requested documentation from his doctor to support his postponement application “three weeks ago”, which would have been 7 November or thereabouts. The claimant did not make his application for a postponement until 28 November.
22. The Tribunal is not satisfied that there is a genuine medical reason which makes the claimant unfit to attend the Tribunal hearing. The Tribunal is not satisfied that the claimant has established that it is in accordance with the Overriding Objective for the hearing to be postponed. The claimant’s application for a postponement is refused.
23. The Tribunal is satisfied that the claimant has failed to comply with the case management orders throughout the course of these proceedings. Whilst there could well have been a fair trial if only those documents disclosed by the respondent had been used, the Tribunal was satisfied that there cannot be a fair trial without the claimant having first disclosed to the respondent his own statement and that of any witness or witnesses whom he intended to call. The Tribunal is satisfied that the claimant is in breach of orders made by the Employment Tribunal. The Tribunal is not satisfied that the claimant has provided any meaningful or acceptable explanation for its failure to comply with those orders.
24. The Tribunal is satisfied that the claimant has failed to actively pursue his claims to the Tribunal. Throughout these proceedings, the claimant has made applications to postpone preliminary hearings, has failed to comply with straightforward orders about disclosure of documents and has failed to prepare and exchange witness statements. The Tribunal is satisfied that the manner in which the claimant has conducted these proceedings is totally unreasonable.

25. Pursuant to Rule 37 of the Employment Tribunal (Constitution of Rules of procedure) Regulations 2013, the Tribunal is satisfied that the claimant's complaints of unlawful disability discrimination and unauthorised deduction from wages should be struck out and dismissed.

G Johnson

Employment Judge Johnson

Date 15 December 2022

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