



EMPLOYMENT TRIBUNALS

Claimant: Ms N Toms

Respondent: Greenwich Leisure Ltd

Heard by video On: 1 February 2023

Before: Employment Judge Corrigan
Ms L Lindsay
Mr S Khan

Appearances

For the claimant: No appearance

For the respondent: Ms J Davenport, People Business Partner (HR)

JUDGMENT

1. The claimant's claim is dismissed.

REASONS

1. The claimant did not attend the video hearing today. She had applied for a postponement on 3 January 2023 stating

"I am not currently in a place where I am able to attend the hearing and be able to [put] forward my case with a clear mind.

I have attached medical evidence to support the health issues I have been dealing with the last 3 months which are still ongoing. I would therefore like to request a postponement until I feel more mentally able to put my case forward to the tribunal without feeling overwhelmed and distressed".

2. The medical evidence comprised of two fit notes, one stating the claimant was unfit for work from 28 October 2022 to 8 November 2022, and the other stating

she may be fit for a phased return to work for 28 days from 15 November 2022. This was also confirmed by the occupational health report which said she was fit to return to work from 18 November 2022. She also attached evidence that counselling sessions started on 9 January 2023. She did not provide medical evidence in relation to her fitness to attend the hearing today. Nor did she state when she anticipated she would be fit to attend.

3. She had previously contacted the tribunal on 11 November 2022 explaining the nature of her ill health and stating that on bad days she felt too anxious to go out, be around people and busy places. She said she did not feel in the right state of mind to be able to handle attending court, being in a confrontational situation and be in the presence of the people that caused me so much stress when I worked there. She had asked for guidance about her options. Employment Judge Reed had replied on 22 December 2022 explaining that the tribunal can make adjustments to assist parties to participate and that if she was asking for a postponement she would need to provide medical evidence and instructed her to consider the Presidential Guidance on Postponement Applications (and he provided the link to that guidance). That guidance gives the example of what to do when a party is unable to attend a hearing for medical reasons. It makes clear that medical evidence should include a statement from a medical practitioner that in their opinion the person concerned is unfit to attend the hearing, the prognosis of the condition and when they may be fit to attend.
4. It is unfortunate that initially it appears that the 3 January 2023 correspondence was overlooked leading to Employment Judge Khalil's letter of 25 January 2023 informing the parties that the hearing would be by video and informing the claimant that the respondent had said she had made a postponement application but it had not been received. The claimant replied on 29 January 2023 saying she had sent it. She then wrote again at 17.46 yesterday saying she had sent the supporting documents referred to above and referring only to ongoing health issues and that she was not medically fit to attend.
5. The case relates to events up to June 2019. This final hearing had already been postponed once. Paragraph 7 of the Case Management Order following the previous adjourned hearing stated: "attendance at all times during the [relisted] hearing would be expected and other commitments would have to be covered. This is already an old case and it must be completed next time." I made enquiries of when the case could be re-listed today and the earliest available date was 29-31 January 2024, which will be almost 5 years since the events the case is about.
6. When the claimant did not attend this morning the clerk tried to call her but she did not pick up. The tribunal then wrote the following email to the claimant, sent at 10.44am:

"The tribunal hearing your case has seen your email of 3 January 2023, attaching medical evidence, and your email yesterday evening. Medical evidence accompanying a request for a postponement on health grounds

needs to provide a statement from a medical practitioner stating you are unfit to attend the hearing on the relevant date (rather than whether or not you are fit to attend work), the prognosis of your condition and an indication as to when you may be fit to attend. At the moment you have not provided this information.

The tribunal asks whether you would be able to attend the video hearing, with the respondent's representative and tribunal only in the first instance, to discuss your application.

You should be aware that if the hearing is postponed listing are looking at dates in January 2024. The tribunal are concerned that the case involves matters going back to 2019 and the case management order from the last adjourned hearing emphasized that the hearing was already old and needed to be heard today.

Please reply with any further comments and whether you can attend to discuss by 12pm today."

7. When there had been no reply by 11.55am approximately the clerk tried to reach the claimant one further time and again she did not pick up.
8. The tribunal heard from the respondent that the parties were instructed to prepare new witness statements at the last hearing and that the claimant had not done so. The respondent also said that the bundle was delivered to the claimant yesterday at 4pm and that she had spoken with the respondent's representative and appeared relaxed and in good spirits, she had chatted about work and family and given no indication she would not be attending today. The respondent are now in the position whereby since the last hearing their key witness has left the respondent and is no longer willing to attend to give evidence. She was the claimant's line manager and her evidence is crucial to the issue of knowledge of disability and the claimant makes a number of personal allegations against her.
9. The Case Management Order following the previous aborted hearing did order the parties to provide new statements, with the "new" in capital letters. These were to focus on the issues that had been identified at that hearing. The context of this is set out in that order. The order went on to say that an order could be varied but not by more than 7 days without the tribunal's permission and that failing to comply could lead to strike out.
10. The tribunal drew the following conclusions. The claimant had not complied with the order in respect of the exchange of new witness statements, though she was able to send eloquent messages to the tribunal around the time it was due. This was despite the emphasis that had been put on it at the last hearing and the warning that failure to do so could result in a strike out.
11. She had not provided medical evidence to support the contention that she was not medically fit to attend the hearing, despite having been referred to the relevant guidance. In it's absence we were not satisfied that she is not fit to

attend. We draw no firm conclusions in the absence of medical evidence but note there are some suggestions to the contrary including that the claimant appears to be fit for work, she has been corresponding eloquently with the tribunal and how the respondent describes her demeanour was yesterday.

12. We wanted to give the claimant the opportunity to engage with the discussion including with respect to the medical evidence required and possible adjustments to assist her participation. We noted that some of the concerns she had raised about the hearing had potentially or could potentially be addressed now that the hearing was by video. She did not engage with our efforts to contact her. We noted that given she had not heard that the hearing had been postponed and given her email sent yesterday she should have anticipated we might try to reach her this morning and made herself available. It is therefore relevant that she was not contactable this morning.
13. We were very concerned about the delay in this case, which has already led to prejudice to the respondent as they no longer employ their key witness. They are understandably very concerned about delay of a further year. Having read the statements, oral evidence will be important in this case and the matters are now a long time ago.
14. Rule 47 of the Employment Tribunals Rules of Procedure states that if a party fails to attend a hearing the Tribunal may dismiss the claim or proceed with the hearing in the absence of the 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.
15. Rule 37 provides that a Tribunal may strike out a claim if the manner in which the proceedings have been conducted by a party has been unreasonable, if it has not been actively pursued, or the Tribunal considers that it is no longer possible to have a fair hearing.
16. We did not consider it proportionate to require the respondent to go through a hearing in the claimant's absence. The claimant in this case bears the primary burden of proof. We did not consider it appropriate to postpone as we have not had the required medical evidence and the claimant has not attended to discuss her application to postpone and whether her concerns can be addressed by adjustments now that the hearing is by video. We were not therefore satisfied that an adjournment is necessary. Moreover the respondent has already been severely prejudiced by the delay and we consider it is unlikely there can be a fair hearing by 29 January 2024.
17. We also considered that the claimant has failed to comply with the order in respect of witness statements. Although she had applied for an adjournment on 3 January 2023 and it is unfortunate the tribunal had overlooked this, she had not provided the necessary information despite Employment Judge Reed referring her to the relevant guidance. She did not answer our attempts to contact her this morning and to engage with her in respect to her application, despite knowing the postponement request had not yet been granted and the respondent had delivered the bundle in anticipation of the hearing going ahead.

18. In these circumstances we did not consider the claimant was conducting the matter reasonably or actively pursuing the case (rather than pursuing a postponement). In any event we consider it is no longer possible to have a fair hearing. These matters are also a basis for striking out the claim.
19. In all the above circumstances we considered it appropriate to dismiss the claim due to the claimant's non-attendance.
20. I note that at 12.35, after the decision above had been made and the hearing concluded, the claimant did email the tribunal and the tribunal panel was still together and able to consider whether that email ought to lead to a reconsideration. We decided it did not change our view above. The email stated:

"Thank you for coming back to me regarding my case. I have been trying for over a month to seek guidance from the tribunal regarding my request to postpone and the reasons why. This is the first time I have been advised that I would need to seek a note from my GP advising I am unfit to attend the hearing, if I had of known this, I would have seeked the confirmation from my GP and provided to the tribunal prior to the hearing date.

Please pass on my apologies as I have only just read your email, so have missed the 12.00pm deadline advised in your email below.

It is unfortunate that I am currently experiencing health issues meaning I have had to request a postponement, but it is unavoidable. I appreciate that we have already had to wait a long time to have the hearing heard, but I still stress that I believe strongly in the case I am putting forward. I will leave the decision to the court, but would appreciate if you explain that I have been proactive in trying to seek guidance prior to the hearing, to avoid time being wasted today for both the judge and the defendants. If I had been aware that a medical note would be required, I would have provided one."

21. We noted that in fact the claimant had been told about the need for medical evidence to support a request for postponement and been referred to the Presidential Guidance which states what is required. We noted that again this was an eloquent response and it was likely that the claimant had seen our message not long after 12pm at the latest. She nevertheless had not tried to attend the hearing or indicated that she was willing to attend now to discuss the matter further. She did not say that she would provide the necessary evidence.

Employment Judge Corrigan
London South
1 February 2023

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