EMPLOYMENT TRIBUNALS

Claimant: Ms V Nwosu

Respondent: St Mungo Community Housing Association

Heard at: London South in person. On: 6/3/23.

Before: Employment Judge Mclaren
Members: Ms N Christofi
Ms S Evans

Representation
Claimant: Nor Present
Respondent: Mr M Green, Counsel

JUDGMENT

The unanimous decision of the employment tribunal is as follows: –

1. **The claimant's application for a postponement fails**
2. **the claims are struck out in their entirety for failure to comply with tribunal orders and because the claimant has acted unreasonably in the way in which the proceedings have been conducted.**

REASONS

Background

1. The Respondent describes itself as a not-for-profit community housing association preventing homelessness and promoting recovery across England. It works with rough sleepers, homeless people and vulnerable adults at risk of homelessness.
2. The Respondent operates a rapid response service, known as 'No Second Night Out' (NSNO) which aims to rapidly intervene to try to prevent individuals from needing to sleep rough. The Respondent employs a team of Assessment & Reconnection Workers as part of the NSNO service who are based at a number of assessment hubs.
3. The Claimant was employed by the Respondent under a contract of employment as an Assessment & Reconnection Worker from 9 July 2019 and was based at the Respondent's NSNO South Hub in London.
4. By a claim form dated 15/8/20 the Claimant brought complaints of unfair dismissal, wrongful dismissal, direct race discrimination, indirect sex

discrimination, indirect religious discrimination, direct age discrimination and unlawful deduction from wages. The claim of unfair dismissal was dismissed on withdrawal.

Applications

5. We heard two applications. One from the claimant in writing asking for postponement and the second from the respondent, asking that the claim be struck out if the postponement request did not succeed.

Application for postponement

Findings of fact

Previous application for a postponement

6. There had been a preliminary hearing on 17 December 2021 in which the claimant represented herself. That hearing set the date for the final hearing and made a number of orders in order to make sure that the claim was progressed and was ready for its final hearing. That included an agreed bundle to be prepared by 11 March 2022 and witness statements to be exchanged by 20 May 2022.
7. The file indicates that the claimant obtained representation from CP Law associates on 14 July 2022. A Mr Andrew Otaru , a legal executive, appeared to be the individual that had conduct of the matter.
8. On 19 January 2023 the tribunal carried out a prehearing check and wrote to both parties asking them to confirm that the matter was still going ahead and that they were ready for the hearing having complied with case management orders.
9. The respondent replied on 27 February advising the tribunal that they were not clear on the claimant's position in terms of representation. They had been made aware that Mr Otaru left the firm CP Law associates on 23 February but were not aware if the claimant had ongoing representation.
10. The respondent also advised that the claimant had not complied with the case management orders. The claimant had not confirmed the list of issues and there had been no exchange of witness statements at that point. Nor, despite being invited to do so, the claimant confirmed whether she intended to rely on her particulars of claim only. This put the respondent in some difficulty as it was still unclear as to the case it had to answer.
11. In a second email of 1 March sent by the respondent, the respondent advised the tribunal that the claimant had told them she was uncertain of the position regarding her representation.
12. That seem to be resolved because, on the same day, 1 March, Victory at Law solicitors sent in a notice of acting confirming that they were instructed by the claimant. They also requested a postponement in order to give them time to take detailed instructions on the claimant effectively represent her.
13. The respondent replied identifying that Mr Otaru had moved to Victory at Law and therefore, the same individual was acting for the claimant, albeit having left employment to work at a different law firm.

14. The respondent opposed the application on the basis that the only thing that had changed was the firm at which the claimant's lawyer and papers were housed. Further, the respondent submitted that if a lawyer chooses to take on a case one week prior to commencing the hearing, that is a matter for them and it was not acceptable for them to accept instructions when it did not have the capacity to support that instruction.
15. The application for postponement was refused on 2 March by Regional Employment Judge Balogun. The response set out that the claimant had plenty of time to find representation, had been aware of the hearing date since February 2022 and that a postponement is granted only in exceptional circumstances. No such exceptional circumstances had been set out and therefore the hearing would proceed as listed.
16. As at 6 March, the first day of the hearing, the claimant has still not agreed the issues list nor provided her written witness statement although the respondent has sent the claimant their witness statements. The respondent has prepared these and the bundle on the basis of an outline draft list of issues only.
17. We accept that this default is prejudicial to the respondent. As the claimant was represented until very recently, there is no reason why the steps could not have been taken in accordance with the tribunal's directions.

Second application to postpone

18. The claimant did not attend today's tribunal hearing. We were not aware of any second application before we began today's hearing and consequently asked the clerk to contact the claimant. She did not answer her telephone and a message was left explaining that we required her attendance.
19. She subsequently responded to this telephone message and called the tribunal and stated that she was applying for postponement on the basis set out in her written application. That application was then located and we considered it.
20. It was sent at 23.54 on 5 March. It set out that Victory at Law had withdrawn their services because of the limited or no time to prepare her case. She stated "neither Victory at Law solicitors, nor CP Law Associates have any fault in the representation".
21. We find that the claimant is not prepared for today's hearing as she has not agreed this issues list nor sent her witness statement. We cannot go behind the claimant's assertion as to the reasons for the failure to be prepared, and we therefore accept what she tells us, that it was her fault and not her representatives that the case is not properly prepared. This is against a background of the claimant having been legally represented for many months and the tribunal orders having been made over a year ago. No reason is given for this failure.
22. The claimant then went on to explain that she suffers from depression and anxiety which had suddenly become worse and she was not in the right frame of mind to go to the hearing. She would not understand proceedings and would not be able to express herself at the hearing because her condition has suddenly worsened.
23. The claimant set out that she had an appointment with a GP today and she asked that the tribunal consider her medical condition and give her the opportunity to represent herself effectively as she was not in a

position to do so. Her previous solicitors were closing down and did not have the capacity to continue to represent her and she had tried to instruct Victory at Law, but their application was refused. Her application was for the tribunal to revisit the matter and grant her postponement for legal representation. This was a repeat of the application that had already been refused.

24. Having considered this second application, we asked the clerk to contact the claimant and let us have any relevant medical information what she intended to rely in support of application by 3 PM today.
25. The medical evidence was provided by 12:30. It consisted of a photograph of a box of medication which appears to been prescribed on 6 February 2023. The claimant also submitted a fit note from her GP which stated that her case was assessed on 6 March, that she was "under a lot of stress/mental health issue". It certified that she was not fit for work and this would be the case from 20 February to 10 March 2023.
26. We note that no prior evidence of the claimant's ill health had been provided. Her former line manager who was present at the hearing confirmed that she was unaware that the claimant suffered from stress anxiety or depression. This had not been raised as part of the previous application to postpone.
27. While the claimant stated that her condition has suddenly worsened we note that her prescription started a month ago and that her sick note is backdated to 20 February. It is due to expire on what would be the last day of this hearing. It does not state that the claimant is unable to attend an employment tribunal, that she is not fit for work. It does not state that she would be unable to comprehend the proceedings or to deal with them. It does not give us sufficient information that she is unable to attend the hearing.

Relevant law/submissions on postponement

28. Rule 29 of the Employment Tribunal Rules states that the tribunal may at any stage of the proceedings make a case management order. This includes an order to postpone the hearing.
29. The Court of Appeal established in *Teinaz v London Borough of Wandsworth 2002 ICR 1471, CA* that while there is a broad discretion to postpone cases, that discretion must be exercised judicially. It is subject to the overriding objective to deal with cases fairly and justly which includes avoiding delay, so far as compatible with proper consideration of the issues, and saving expense. The overriding objective requires fairness to both parties.
30. Accordingly, the tribunal should take into account a number of factors which include the degree of prejudice to the other side, whether the parties had any say in the original listing date, whether the case has previously been postponed or adjourned and the length of time the case has been waiting to be heard, and in the case of a party who is unable to attend though illness, the prospect of that party being well enough to attend within a reasonable time.
31. The nonavailability of the party's representative may justify an application for a postponement. The Presidential Guidance states that the representative has withdrawn from acting details should be given as to when this happened and whether alternative representation has been

or is being sought. The desire to instruct a representative, is not, however, sufficient in itself to justify a postponement.

32. Where a postponement is sought on the basis of ill-health or the inability to attend the hearing the right to fair trial must be particularly considered
33. In *Phelan v Richardson Rogers Ltd and anor 2021 ICR 1164, EAT*, the EAT set out some 'important guiding principles' regarding postponement applications on medical grounds, having reviewed the relevant case law. It noted that where a party seeks to postpone a hearing on medical grounds, his or her right to a fair trial is engaged (at least where the outcome of the hearing may determine the complaint). In such a situation, proper weight must be given to the serious implications for him or her of refusing a postponement. These serious implications would usually outweigh the inconvenience and cost to the other party of granting the postponement, such that a tribunal properly carrying out the balancing exercise would be bound to grant the application.
34. However, the implications for the other party'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 tribunal's assessment of when, realistically, 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. The tribunal may also properly draw on other relevant evidence and information, including in relation to the course and conduct of the litigation hitherto, when forming a view on that question.
35. On behalf the respondent Mr Green identified that the application to the stone on the basis of lack of representation had already been refused.. Further, the respondent witness (one of two) who dealt with the appeal matter is on sabbatical from May 2023 for nine months. They will be travelling and will be unable to attend either remotely or in person to give evidence.
36. The respondent is a small charity and has already incurred costs from today. If the matter is delayed it may be in difficulty with witness attendance.

Conclusion

37. The claimant's application is made on two linked grounds. First she asked for a postponement to obtain legal representation. Her second ground is that she is currently unwell and not in the right frame of mind because of her depression and anxiety to go to the hearing.
38. We conclude that the claimant is raising a new issue, her health, to ask again for a postponement related to her lack of representation which has already been refused. To the extent that any part of application is a request to postpone in order to obtain representation this is refused. This is not an appropriate ground for a postponement. Tribunals are designed for unrepresented parties and we find that the prejudice the respondent of any delay caused by granting the postponement outweighs the difficulty in an unrepresented party attending hearing.
39. Turning then to the medical condition which is relied upon, while we do not doubt the GPs note, that the claimant is suffering from anxiety (depression is not mentioned), we do have some concerns about this

evidence.

40. As set out above, we have noted that information about her medical condition is a new matter that was not previously relied upon. Contrary to the claimant's assertion it is not on record that she suffers from anxiety and depression. There remains no evidence that she suffers from depression. We were given an information as to what the box of medication which was photographed is for, and in the absence of that information cannot determine if that is an antidepressant.
41. If, as the claimant says this is a long-standing condition then there is no reason why the claimant could not have raised this matter sooner if it was indeed impacting her ability to attend. Given the claimant was applying for a postponement via her representative on the basis the case was not ready, had her health been an issue we would reasonably have expected that also to have been referred to. It was not and we conclude that her health was not a cause of concern as recently as 1 March.
42. We also found that the medical information does not address the relevant question, that is can she come to a hearing understand what is said and answer questions . It has simply signed her off work for what is a comparatively short period. We conclude that this is not therefore a long-term issue as she suggests. There is no medical evidence of the severity of the anxiety the claimant says she is suffering from and insufficient medical evidence to support her position that she cannot attend.
43. Overall we have found that the medical position is new and has not been foreshadowed. This could have occurred if, it were a pre-existing matter as the claimant has suggested. In addition, the information provided is not adequate. We conclude that the claimant was not ready for the hearing and this is not linked to any medical issue. She has accepted that any default is hers and not that of her representatives.
44. We also bear in mind that claimants are generally anxious about attending a tribunal hearing and, while the fit note expires at the end of this week, we are concerned that the state of anxiety may continue indefinitely until such time as the case is concluded. We conclude that, at best, the claimant is anxious because of the impending tribunal which is a state of mind that will always continue. We also conclude that this is not the genuine reason for her application which is motivated because she has not prepared for the case as she was required to be.
45. We are mindful that proper weight must be given to the serious implications of not granting a postponement which, if the claimant continued not to attend, would effectively mean that the claim would be struck out.
46. In accordance with the overriding objective we must also balance that against the respondent's right to a fair trial. The respondent relies on two witnesses and we accept that both are necessary. The second, who dealt with the appeal hearing, is taking a nine month sabbatical from May this year. She will be out of the country and unable to attend either in person or virtually. As the date of this hearing was set over a year ago it is not unreasonable for the respondent's witness to have made plans well after this hearing should have concluded.
47. The state of the lists coupled with the unavailability of the respondent's witness means that we will be unable to hear this matter before 2024. Even though the respondent's witness statements are ready, given they

do not yet understand the issues, nor have they seen the claimant's witness statement, we consider that they will be prejudiced by this delay.

48. In balancing the interests of both parties, on this occasion because we consider that the application is based on being unprepared rather than being unwell, we are refusing the claimant's application.
49. The clerk notified the claimant of this decision immediately and she confirmed that nonetheless, she would not attend tomorrow or the rest of the week. We therefore addressed the respondent's application.

Application to strike out the claim

Relevant law/submissions

50. The respondent submitted that it was appropriate to strike out the claim in its entirety. Mr Green relied on rule 37(b) and (c). It was submitted that the claimant had acted unreasonably in the conduct of proceedings and had not complied with orders of the tribunal.
51. In particular the claimant had not confirmed the issues list and had not provided a witness statement. This course respondent significant prejudice since it was unclear because it had to meet at the start of what should have been the full hearing. The claimant had been legally represented for over a year. Neither she nor her representatives had ever given any explanation for this default and the respondent had raised the request for this information on a number of occasions.

Conclusion

52. We are conscious that striking out a claim is a very serious step. However, given our findings and conclusion that the claimant has simply not prepared for hearing which she has known about for over a year, the most part of which she had legal representation, we conclude that it is an appropriate step in this case.
53. No explanation has been given for this failure to act, other than the claimant accepting that her legal representatives are not at fault. In the circumstances we find that the claimant is in default of tribunal orders and that this has caused the respondent significant prejudice. We conclude that this amounts to unreasonable conduct.
54. The claims are therefore struck out in their entirety both for failure to comply with tribunal directions and for unreasonable conduct in the manner in which the proceedings have been conducted.

Employment Judge McLaren

Date 6/3/23

JUDGMENT & REASONS SENT TO THE PARTIES ON
Date 6/3/23

FOR EMPLOYMENT TRIBUNALS