EMPLOYMENT TRIBUNALS

Claimant: Ms A Hernandez

Respondent: Utility Savings Group Ltd

JUDGMENT

The claimant's application dated 25 January 2023 to set aside the decision not to postpone the final hearing on 24 January 2023 and for reconsideration of the judgment of the Tribunal made at that hearing is refused.

REASONS

Background to applications

1. By a claim form that was originally received at the Tribunal on 22 June 2022 the claimant made complaints of unfair dismissal; breach of her contract of employment by dismissing her without giving notice; and failure to pay holiday pay. The claimant named the respondent as Mr Moore. On her claim form the claimant ticked the box indicating she would prefer the Tribunal to contact her by email.

2. The claim form was rejected by Employment Judge Sweeney under rule 12 because the respondent named on the claim form (Mr Moore) was different from the name of the proposed respondent in the early conciliation certificate relied on by the claimant (Utility Savings Group Limited).

3. A letter was prepared by the Newcastle Employment Tribunal dated 23 June 2022 notifying the claimant of the rejection of her claim form, as required by Rule 12. The Tribunal file contains a hard copy of an email addressed to the email address provided by the claimant, dated 23 June 2022 and to which the letter of 23 June appears to have been attached.

4. On 22 September 2022 the claimant emailed the Employment Tribunal in Watford asking for an update on her application. Shortly afterwards the claimant spoke to an Administration Officer at Newcastle Employment Tribunal by telephone. That person then forwarded to the claimant by email the email of 23 June and its attachment. Later that day, the claimant sent an email to the Tribunal saying she had not received the email of 23 June and wished to amend the name of the respondent. She said the respondent was Utility Savings Group Limited, not Mr Moore and that she was 'unsure as to why it did state Philip Moore and 'as I didn't receive this email I was looking for correspondence through the post.'

5. On 4 October, Employment Judge Jeram decided that the claim form should now be accepted because (although the decision to reject the claim had been right) the defect had been corrected. EJ Jeram also directed that the name of the respondent be amended to Utility Savings Group Limited. The Rules provide that the claimant's claim form is to be treated as having been received on 22 September 2022 rather than 23 June 2022.

6. The Tribunal then served the claim form on the respondent by letter of 4 October 2022. That letter also gave the parties notice that the claimant's case would be heard on 24 January 2023 at a video hearing and set out the steps the parties had to take to prepare for the hearing, including exchanging relevant documents and witness statements.

7. The respondent subsequently filed a response stating that the claimant had been dismissed for gross misconduct and was not entitled to notice pay. The response made no reference to holiday pay although confirmed that the respondent wished to defend the claims.

8. On 30 November 2022 the claimant's complaint of unfair dismissal was struck out. The parties were notified of that decision on the same date and were told the time estimate for the final hearing of the claimant's remaining claims (for holiday pay and notice pay) was reduced from one day to three hours and that they must still comply with the Orders dated 4 October. By letter of 5 December the parties were informed that if they had not yet complied with the Orders set out in the letter of 4 October they must do so without further delay.

9. On the morning of 23 January 2023 (the day before the final hearing) the claimant sent an email to the Tribunal in which she said 'I am writing today to request a court date extension as I have been faced with an emergency and my father who suffered with Multiple Sclerosis has passed away.' She then sent a second email in which she said 'In the meantime can Utility Savings Group email over payslips including dates of holidays granted and remaining?'

10. The claimant's application was considered by Employment Judge Sweeney who directed the claimant to (a) clarify what the emergency was; (b) confirm when her father passed away; and (c) confirm whether she had previously asked the respondent for the information she sought and, if so, when. The claimant was directed to reply by return. Those Orders were emailed to the parties at 14.32 on 23 January. At 14.44 the parties were sent an email with joining instructions for the final hearing the following day. The claimant did not comply with EJ

Sweeney's Orders. She did, however, copy the Tribunal in on an email she sent to Mr Moore at 16.29 on 23 January.

11. The hearing was due to start by 10am on 24 January. The claimant did not attend, however. Nor had she complied with EJ Sweeney's Orders. I waited until after 10.15 to start the hearing, in case the claimant was having difficulty joining for some reason. However, by that time the claimant had still not joined, had not contacted the Tribunal to explain her absence or any difficulties she might be having joining, and the CVP helpline had not been in contact to say the claimant had contacted them for assistance with technical difficulties.

12. I considered whether to agree the claimant's request to postpone the hearing, dismiss the claims under 47 or proceed with the hearing in the claimant's absence.

13. Where (as here) a postponement application is made less than 7 days before the date of the final hearing, the Tribunal may only order the postponement in the circumstances set out in Rule 30A(2) of the Employment Tribunal Rules ie where (a) all other parties consent to the postponement and certain other conditions are met; (b) the application was necessitated by an act or omission of another party or the Tribunal; or (c) there are exceptional circumstances.

14. The respondent had not consented to a postponement and there was no suggestion that the claimant's application had been necessitated by an act or omission of the respondent. That left (c), whether there were exceptional circumstances. What will constitute 'exceptional circumstances' and whether they warrant a postponement must be considered in light of the need to give effect to the overriding objective to deal with cases fairly and justly. That includes, so far as practicable, ensuring that the parties are on an equal footing; dealing with cases in ways that are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

15. The claimant had not provided any detail at all of the emergency that she said had occurred and nor had she explained how it affected her ability to attend the hearing. It appeared from the claimant's email that the claimant might have been suggesting that an emergency had occurred that was connected with her father recently having passed away. However, no further information had been provided and the claimant had failed to comply with EJ Sweeney's Order of the previous day. I had no reason to think she had not received that Order given that she had been active on email later in the day. I was satisfied that the claimant had known about the hearing date for some time. In the circumstances, and bearing in mind the overriding objective to deal with cases fairly, I was not satisfied that there were exceptional circumstances of a kind that might justify a postponement of the hearing (such as an emergency that prevented the claimant's attendance).

16. Rather than dismiss the claimant's claims under rule 47 I decided to proceed with the hearing in the absence of the claimant. Having considered the information on

the file I concluded that the Tribunal did not have jurisdiction to consider the claimant's claims because they had been made out of time.

17. My judgment was sent to the parties by email at 10.03 on 25 January. That evening the claimant sent two emails to the Tribunal. In the first she said 'I am writing today to request you withdraw your decision immediately. I have notified the court through email 24 hours prior to this same email that I was unable to attend and requested the date be extended so therefore no case should have been conducted and no decision should have been made. This is unfair and not in line with the law. Please find evidence within your emails and provide me with another court date as this is unacceptable…' In the second email she said 'Please withdraw your decision immediately. Please find the email below where I had requested such extension and advise of the next possible court date.'

18. I treated the claimant's email as an application for a review of my decision not to postpone the hearing on 24 January 2023 and reconsideration of the decision to dismiss her claims. I caused a letter to be emailed to the parties on 27 January 2023 saying the following:

> *'Employment Judge Aspden has made the following direction.*
>
> *Before I consider the claimant's application, I wish to give the claimant a further opportunity to:*
>
> *- explain in full why she was unable to attend the hearing;*
>
> *- provide any evidence she has to support what she says about not being able to attend the hearing;*
>
> *- explain why she did not provide that full explanation/evidence before the hearing;*
>
> *- explain why she did not comply with the Order made by EJ Sweeney on 23 January 2023 (a further copy of which is enclosed).*
>
> *The claimant has until 8 February 2023 to provide those further explanations and evidence.'*

19. On 27 January the claimant emailed the Tribunal saying this:

> *'Thankyou for your letter.*
>
> *I have provided evidence within my previous email where I had forwarded an email to the Court.*
>
> *My father died, He suffered with multiple sclerosis and I shared caring duties for him. I appreciate the Court did not know of this information prior but I had recently laid him to rest.*
>
> *I do also have a young baby I would hope the court would understand.*
>
> *I am unsure as to what evidence the Court wishes to receive.*
>
> *I appreciate your understanding during this difficult time.*

Please can the Court provide a date to reschedule the hearing I did notify through email prior to the hearing.'

20. On 7 February the Tribunal sent a letter to the parties in the following terms.

'Employment Judge Aspden has made the following direction:

'Before I consider the Claimant's application to reconsider the judgment dismissing her claim, I wish to give her a final opportunity to explain why she could not attend the hearing on 24 January 2023.

I have read Ms Hernandez's emails of 23 and 27 January but it is still not clear to me why Ms Hernandez could not attend the hearing.

In her email of 23 January, Ms Hernandez said 'I have been faced with an emergency' and referred to her father having passed away. Judge Sweeney directed Ms Hernandez to clarify what the emergency was and confirm when her father passed away. Ms Hernandez did not respond. I gave Ms Hernandez a further opportunity to provide this information (and explain why she did not do so sooner). However she has not yet done so.

I note what Ms Hernandez says about having recently laid her father to rest and having a young baby. However, this does not help me to understand the nature of the emergency that prevented Ms Hernandez from attending the hearing.

If Ms Hernandez has any other information or evidence she wishes me to take into account she must send it to the Tribunal within one week of the date of this letter (and send a copy to the Respondent at the same time).'

21. By 14 February no response had been received from the claimant. However, on 22 February the claimant emailed the Tribunal saying:

'I have missed the deadline to provide evidence in which the Judge has requested. This was due to myself attending the police station after a brutal attack. Please can the judge extend this?

Phillip Moore has agreed to send over remaining funds for holidays owed through an agreement on DocuSign.'

22. As at 10 March 2023 the claimant has still not provided any further evidence or information in support of her application.

Reviewing a Tribunal's decisions – legal framework

23. A tribunal has power to reconsider any judgment where it is necessary in the interests of justice to do so: Rule 70. An application by a party for reconsideration must set out why reconsideration of the original decision is necessary: rule 71.

24. Rule 72 requires me first of all to consider whether the claimant's application for reconsideration has any reasonably prospect of success. If I consider there is no reasonable prospect of the original decision being varied or revoked, I must refuse the application. If I consider that there is some reasonable prospect of the original decision being varied or revoked I must seek a response from the respondent and seek the views of the parties on whether the matter can be determined without a hearing.

25. In deciding whether it is necessary to reconsider a judgment in the interests of justice, the tribunal must seek to give effect to the overriding objective to deal with cases fairly and justly. That includes taking into account established principles. Those established principles mean the tribunal must have regard not just to the interests of the party seeking the review, but also to the fact that a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final and to the public interest requirement that there should, as far as possible, be finality of litigation. As the court stressed in Flint v Eastern Electricity Board [1975] IRLR 277, QBD 'it is very much in the interests of the general public that proceedings of this kind should be as final as possible.'

26. The claimant's application to reconsider the judgment contains an implicit application to set aside my decision not to postpone the final hearing. That decision was a case management order. Rule 29 says a Judge may 'vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.'

27. Although the power to vary, suspend or set aside an earlier case management order appears, on its face, to be very broad, it has been construed in a restrictive manner. In Serco Ltd v Wells [2016] ICR 768, EAT Judge Hand QC derived the following principles from the authorities:

> *"… (a) The draftsmen of both sets of Rules [ie the Employment Tribunal Rules and the Civil Procedure Rules] must be taken to have drafted them with the same universal principle in mind, namely what I have described as finality and certainty of decision and orders and the integrity of judicial decisions and orders; this principle, as the authorities in both jurisdictions illustrate, usually directs any challenge to an order towards an appeal to a tribunal of superior jurisdiction and discourages seeking the same judge or another judge of equivalent jurisdiction to look again at an order or decision, save in carefully defined circumstances.*
>
> *(b) Although the only reference in either set of Rules to a 'change in circumstances' is in a Practice Direction to the CPR and not in the CPR itself (and there is no explicit reference to a 'material change in circumstances' in either), the principle, as it emerges from the authorities referred to above, is that before a judge can interfere with an earlier order made by a judge of equivalent jurisdiction there must be either a material change of circumstances or a material omission or misstatement or some other substantial reason, which, taking account of the warning Rix LJ gives [in Tibbles v SIG plc (trading as Asphaltic Roofing Supplies) [2012] 1WLR 2591]*

against attempting exhaustive definition, it is not possible to describe with greater precision.
(c) When it comes to long standing procedural principles such as this, unless the rubric of the Rules clearly indicates the contrary, that principle should be taken to have been in the mind of the draftsmen when the Rules were drafted and the Rules must be interpreted so as to take account of such a principle.
(d) The draftsmen of the current Employment Tribunals Rules have used the expression 'necessary in the interests of justice'; in my judgment that should be interpreted through the prism of the principle I have just articulated; variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement (of fact and possibly, in very rare cases, of law, although that sounds much more like the occasion for an appeal) or an omission to state relevant fact and, given that definitions cannot be exhaustive, there may be other occasions, although as Rix LJ put it these will be 'rare' and 'out of the ordinary'": para 43."

28. One circumstance in which it may be appropriate to set aside a judgment or Order is where there is new evidence which the Judge was unaware of at the time of the decision.

29. Where a party is seeking to persuade a Judge, in the interests of justice, to reconsider a judgment on the basis of new evidence the test set out in Ladd v Marshall applies. Normally that means showing:
    29.1. that the evidence could not have been obtained with reasonable diligence for use at the original hearing;
    29.2. that it is relevant and would probably have had an important influence on the hearing; and
    29.3. that it is apparently credible.

My decision

30. On 24 January I refused the claimant's application to postpone the final hearing because I was not satisfied that there were exceptional circumstances of a kind that might justify postponing the hearing, such as an emergency that prevented the claimant's attendance. That being the case, my decision to dismiss the claimant's claims was made without hearing live evidence from the claimant.

31. If the claimant contends that there were exceptional circumstances that warranted a postponement of her case, the claimant has had ample opportunity to explain what they were (and explain why she did not provide that information ahead of the hearing). She has not done so. In her request for postponement the claimant said she had encountered an emergency. Despite the Tribunal's clear directions and prompting, the claimant has failed to identify what that emergency was and how it prevented her from attending the hearing. The only new information provided by the claimant is that she had recently laid her father to rest and that she has a young baby. The claimant has not explained how either of those matters prevented her attending the hearing, or even if they did at all.

32. In the circumstances, it would not be appropriate to set aside my decision not to postpone the final hearing. Furthermore, in the absence of a compelling explanation for the claimant's failure to attend the hearing (and failure to explain the reason ahead of the hearing) I consider there is no reasonable prospect of the judgment dismissing the claimant's claims being varied or revoked. That the claimant may have assumed that the hearing would not go ahead would not provide adequate grounds for revoking the judgment given that the claimant cannot have had reasonable grounds for making such an assumption. It follows that I must refuse the application to set aside the judgment.

Employment Judge Aspden

Date____10 March 2023_____