EMPLOYMENT TRIBUNALS

Claimant: Mr H Bouheniche

Respondent: The Commissioners for HM Revenue and Customs

Heard in person at Newcastle **On:** 22 May 2023

Before: Employment Judge Aspden
Mr D Cattell
Ms S Don

Appearances
For the claimant: No attendance
For the respondent: Mr J McHugh, Counsel

JUDGMENT having been sent to the parties on & June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was the final hearing of the claimant's claims. It was listed for five days starting on 22 May. The claimant did not attend on 22 May. Nor did he arrange to be represented.

2. Rule 47 of the Employment Tribunal Rules of Procedure 2013 says this: 'If 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.'

3. On 27 April the claimant wrote asking for the final hearing to be postponed, saying he was unable to attend because he was 'rather ill'. Judge Morris directed that it was inadequate for him to ask for a postponement on the basis that he was 'rather ill'. He said if the claimant wished to renew his application he must do so promptly and attach relevant evidence from his GP or other treating practitioner confirming his state of health is such that he would be unable to participate in a hearing even if reasonable adjustments were made to accommodate him.

4. On 15 May the claimant sent an email attaching a fit note in the name of a Dr Potter. It said the claimant was unfit for work due to 'Stress related to Health and Work Tribunal'. Judge Arullendran treated the claimant's email as a renewed request to postpone the final hearing. She refused that request for reasons set out in a letter dated 17 May. In that letter she explained that the fit note the claimant had produced did not explain why the claimant was unable to attend or participate in the hearing and did not deal with the issue of reasonable adjustments.

5. On 18 May the claimant wrote in saying he considered the decision not to postpone to be arbitrary, unjust and unfair. He said 'I am very ill to attend the hearing and my illness is both physical and mental and linked to my blood and colon cancer.' Judge Sweeney reconsidered the request to postpone the final hearing and refused it again on the basis that there had been no change since Judge Arullendran refused the request on 17 May and the same reasoning applied.

6. The claimant did not contact the tribunal again. Mr McHugh confirmed that the claimant had not been in touch with the respondent or the respondent's representative recently.

7. We considered whether to ask the administration to try to make contact with the claimant by telephone to ask him about his non-attendance. After considering the history of the case, however, we decided that was unnecessary. In particular:

    a. We had no doubt that the claimant knew the hearing was scheduled to start on 22 May.
    b. There was no reason for us to think that the claimant's circumstances had changed since his application for a postponement had been refused just a few days earlier. If they had, the claimant knew that he needed to provide evidence to the tribunal of that fact.
    c. If the claimant's circumstances had not changed then there would have been no basis for us to adjourn this hearing. Doing so would have entailed setting aside the decisions of Judges Arullendran and Sweeney not to postpone the final hearing. The Employment Appeal Tribunal has made it clear in the case of Serco Ltd v Wells [2016] ICR 768 that that should only be done where there has been either a material change of circumstances or where the order has been based on either a misstatement (of fact and possibly, in very rare cases, of law) or an omission to state relevant fact. None of those circumstances applied here.
    d. The claimant had previously demonstrated a reluctance to attend the final hearing. The hearing dates were fixed by Judge Arullendran at a hearing for case management in January that had been arranged following a postponement of the originally scheduled final hearing at the claimant's request. According to Judge Arullendran's record of that hearing, the claimant became argumentative when he was told the claimant the dates of this hearing in May. Her record of the hearing says the claimant suggested that he might want to go on holiday, that he would not have enough time to prepare for the hearing and that he might be unwell. Although the claimant made an application to postpone this hearing on the

basis of ill health, he has not provided the information in support of his application that he was directed to provide.

8. Under rule 47, one option open to us would have been to hear the case in the claimant's absence. Another option was to dismiss the case. We decided on the latter. In reaching that decision we took account of the following matters in particular.

   a. There has been a history of non-compliance with Orders by the claimant. He has demonstrated an unwillingness to abide by the tribunal's Orders. On 12 May Judge Sweeney reviewed the file. He caused a letter to be sent to the claimant saying he was considering striking out the claims for failing to comply with the tribunal's orders and failing to actively pursue his claims. He directed the claimant to respond to the tribunal's earlier correspondence of 3 May by return. The claimant did not do so. Instead he applied to postpone the hearing, which application was refused.

   b. There were indications that the claimant may never have intended to attend the final hearing for the reasons explained above.

   c. If we had proceeded to hear the claimant's claims that would have taken up the time of the respondent and the tribunal. Yet the outcome would almost inevitably have been the same. The claimant had not prepared a witness statement or any documentary evidence in support of his claims. The claimant contends that his dismissal was unfair because his manager doctored his holiday records to make it look like he was absent without leave. He also claims this was race discrimination. Without evidence from the claimant there was no prospect of the tribunal concluding that is what happened. As far as the claims for money he says he is owed, again these would not succeed without evidence from the claimant. In any event, the money claims were made outside the primary three-month time limit for claiming. Without evidence from the claimant the tribunal would not be able to conclude that it had not been reasonably practicable for him to bring those claims in time.

   d. The overriding objective to deal with cases justly requires us to consider the interests not only of the parties in this case but also the many other cases the tribunal has to deal with. Parties are entitled to their fair share of the tribunal's resources but no more. We decided that the overriding objective would not be served by spending any more time on this case than was necessary.

Employment Judge Aspden

Date signed 21 August 2023