EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Miss Maria Rakova v London North West University Healthcare NHS Trust

Heard at: Watford **On**: 12 June 2023
Before: Employment Judge Bedeau
Members: Mrs A Brosnan
Mr A Scott

Appearances
For the Claimant: Did not attend
For the Respondent: Mr S Nicholls, counsel

RESERVED JUDGMENT

Upon an application by the respondent the claimant's claims are struck out under rule 37(1)(e) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as a fair trial is no longer possible.

REASONS

1. On 5 April 2018, this tribunal issued judgment dismissing all of the claimant's disability discrimination claims against the respondent. The claimant appealed the judgment on liability, and on 17 October 2019, Mrs Justice Eady, in relation to over 40 claims determined by this tribunal, allowed the appeal limited to three of the claims, namely the failure to make reasonable adjustments based on our findings and conclusions that not being allowed to improve her efficiency, the claimant had not suffered a substantial disadvantage. In particular, we concluded with reference to the provisions of: a Livescribe pen; electronic sensitive paper and printer; software updates; Dragon updates; Dragon Medical software; and internet access via Wi-fi to enable her to use her laptop, that these would have made her more efficient but did not amount to a substantial disadvantage, Her Ladyship held,

> "48. For my part, I cannot see that it can be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. Whilst it may be that a Stakhanovite desire for greater productivity would be entirely unrelated to any disadvantage suffered by the employee in question, it is also possible that, where the disability in question means that an employee is unable to work as productively as other employees, adjustments to enable her to

> be more efficient would indeed relate to the substantial disadvantage she would otherwise suffer." See also paragraphs 49-53.

2. On 7 May 2020, Regional Employment Judge Foxwell, at a case management preliminary hearing, at which the claimant was represented by counsel, after hearing submissions, ruled that the remitted matters be heard by this tribunal and that the claimant's disability discrimination claims based on her dismissal, case number 3334352/2018, be heard by a differently constituted tribunal. The Regional Employment Judge also ordered the parties: should provide their dates to avoid over the next six months, by 15 May 2020; they exchange and file skeleton arguments not less than fourteen days before the remitted hearing; and they should file a single bundle of relevant authorities not later than seven days before the remitted hearing. The hearing to be listed for two days within the following six months to be heard at Watford Employment Tribunal (pages 61 to 64 of the respondent's application to strike out bundle).

3. On 2 July 2020, the claimant wrote to the tribunal applying for a postponement of the hearing for a period of six months. She stated that her health was poor and that she had been treated for an infection with antibiotics which had left her feeling very weak and fatigued. The source of the infection was still unknown. She was sleeping approximately 16 hours a day and was finding it difficult to concentrate and engage in her personal care. The infection had a negative effect on her depression, Post-traumatic Stress Disorder, and Ehlers-Danlos symptoms. She stated that her pain was treated with morphine-based medication. She was unable to provide coherent instructions to her counsel but stated that her case was no longer suitable for public access given the deterioration in her health. She would need to instruct a solicitor but was unable to do so at that time. She found it impossible to engage in complying with the tribunal's orders due to her poor health. She had written to a psychiatrist and to her doctor requesting that evidence be provided in support of her application. The parties were in agreement that the remitted matters could be dealt with by way of submissions, paragraph 7 of the case management orders.

4. The application was objected to by the respondent's representatives because it did not satisfy the overriding objective as it would lead to unnecessary delay if granted. They asked the tribunal to order the claimant produce medical evidence in support within 21 days.

5. In an email dated 1 September 2020, attaching a report, Sameer P Sarkar, Consultant Psychiatrist and Forensic Psychiatrist, wrote the following to the tribunal:

> "Dear Sir/Madam,
>
> I write at the request of Miss Maria Rakova who has been under my treatment since July 2016. I last saw her for a review on 30 July 2020. Miss Rakova has multiple medical problems including mental health diagnosis of ADHD, depression and PTSD. She has experienced a number of medical setbacks recently. Some of them were due to the recent coronavirus outbreak and related restrictions, and she further had to attend Emergency department for treatment

> and investigations for an abdominal condition. She tells me that she had not fully recovered from the exacerbation of her medical condition and recovery has been slow.
>
> Recently Miss Rakova experienced adverse effects from her ADHD medication and on medical advice she to stop them completely. While her medication regime is being renewed, this would be a slow process. The medication regime has to be re-established very carefully due to her complex medical history and history of adverse effects with similar medication in the past. Naturally, without the benefit of her ADHD medication, her cognitive abilities have suffered greatly. This in turn had an impact on her depression which also negatively affects her cognitive processing.
>
> I do not consider Miss Rakova to be currently medically fit to meaningfully participate in the complicated litigation process due to her cognitive difficulties. This is likely to be reversible once her medication regime is established. I cannot give an exact timeframe for this but knowing her case well and among multiple medical conditions that interact with each other, I suspect that this will not be a very quick process. In these circumstances, I would support her application to the court for a postponement of proceedings for a period of six months."

6. In furtherance of her postponement application she submitted on 24 August 2020 a letter from her GP surgery, the Fryent Way Surgery, Kingsbury, North West London. In it, Dr Ruth Allenby, wrote:

> "To whom it may concern,
>
> I am writing in support of Miss Rakova's application for a stay in relation to her case.
>
> She is currently unfit to provide instructions or prepare documentation.
>
> Her depression, anxiety and PTSD symptoms have significantly worsened in the last few months and she is currently engaging in counselling as well as seeing a psychiatrist on a regular basis. Miss Rakova is also currently under investigation for severe abdominal pain.
>
> I would support her suggestion that she maybe well enough to fully engage in the process in six months' time."

7. The matter came before Foxwell REJ on 1 October 2020, who directed that in order for the claimant's postponement application to be considered she would need to disclose the supporting medical to the respondent for comment. A letter to that effect was sent by tribunal to the claimant on 23 October 2020.

8. In a letter from the tribunal dated 3 November 2020, referring to listing the case for a two-day hearing, the parties were asked to provide their dates to avoid for the next four months, by 10 November 2020

9. In a notice sent to them by the tribunal dated 24 November 2020, the case was listed on 4 and 5 February 2021 for a hearing.

10. In an application by the respondent's representatives dated 8 December 2020, they asked that the hearing be relisted as their chosen counsel, Mr Nicholls, would be unavailable. In a further notice of postponement dated 11 January 2021, Employment Judge Bedeau granted the respondent's application. The tribunal relisted the case for hearing on 3 and 4 June 2021.

11. The respondent wrote to the tribunal copying the claimant on 23 April 2021, referring to her request in case number 3334352/2018, for that hearing to be postponed for six months due to her medical conditions. They sought clarification from her as to whether the same apply at the remitted relisted hearing. They wrote that in relation to the remitted hearing, the parties were required to serve their skeleton arguments by 20 May 2021 and to agree and file a single bundle of relevant authorities by 27 May 2021.

12. In a further email to the tribunal on the same day, they wrote that the claimant had made an application to the tribunal on 30 March 2021 in respect of case 3334352/2018, for proceedings to be postponed for seven to eight months. It was made on health grounds and supported by a letter from Dr Sarkar. At the preliminary hearing on 31 March before Employment Judge Hyams, in respect of case 333435/2018, the judge ordered that the case be stayed until after 2 January 2022 in view of the claimant's ill-health. The respondent's representatives, therefore, submitted that it was not possible for the claimant to prepare for and attend the remitted hearing on 3 and 4 June 2021 when proceedings in 3334352/2018 have been stayed until 2 January 2022 on grounds of ill-health. They requested that the remitted hearing dates be vacated and relisted after 2 January 2022.

13. On 23 May 2021, Dr Sarkar wrote to the tribunal attaching a report dated 21 May 2021, which was in similar terms to the earlier report. The doctor referred to the claimant's ADHD, depression and PTSD, who had to stop Cognitive Behavioural Therapy sessions because of the Covid-19 restrictions, as well as her worsening mood state. As the case involved complex legal matters and was document heavy, she was unable to participate in the litigation process. The doctor was unable to give an exact timeframe for recovery but supported the claimant's application that proceedings be postponed for six to nine months.

14. The application came before EJ Bedeau who, on 25 May 2021, granted what was a joint application to vacate the hearing in June and invited the parties to consider whether or not a two-day hearing was sufficient.

15. On 27 May the respondent's representatives wrote to the tribunal, copying the claimant, stating that after taking advice from Mr Nicholls, they agree that a four-day hearing would be adequate.

16. By a letter dated 21 February 2022, from the tribunal to the parties, they were required to provide dates to avoid for a four-day hearing by 28 February 2022, covering the period from March to October 2022.

17. Unfortunately, on 14 March 2022, the tribunal listed the case for a two-day hearing on 27 and 28 July 2022, in error. That hearing was postponed by

EJ Bedeau on 28 April 2022 and was relisted on the same day to be heard from 8 to 11 August 2022.

18. On 22 July 2022, the claimant applied to have the hearing postponed for a period of between six to nine months due to her ill health. She stated that she had recently undergone a gynaecological surgery and was receiving treatment. She was also due for further surgery in August 2022 which were having a negative effect on her depression, PTSD, ADHD and Ehlers-Danlos Syndrome. She further stated that she had written to her surgeons requesting that they provide supporting medical evidence. She then wrote:

> "I understand that this is an unusual request and I do want a resolution to my claim. However, I am finding it impossible to engage in complying with the directions required to get my case ready given my overall health presently. It would be in accordance with the overriding objective to grant the postponement for the six to nine months period.
>
> I have requested postponement in line with the advice of my clinicians, to allow me to recover sufficiently and to be able to provide instructions adequately."
>
> (21)

19. References to page numbers in brackets are to the pages as numbered in the respondent's small bundle of documents comprising of 64 pages.

20. In a letter dated 27 July 2022, from the respondent's representatives, in response to the claimant's postponement application, they objected to it. They provided a list of postponement applications made by her; her failure to provide medical evidence; that if the request was granted it would lead to unnecessary delay in the proceedings; and the remitted matters have yet to be determined following the outcome of the appeal on 17 October 2019. The claimant was made aware that they considered matters prevailing at that time meant that the claims were not being actively pursued by her and that she had not complied with orders of the tribunal. They stated that a fair hearing was no longer possible should her application for postponement on medical grounds be granted.

    (24 to 26)

21. In a letter dated 4 August 2022 from the respondent's representatives to the tribunal, copying the claimant, they applied for the hearing to be postponed as their counsel, Mr Nicholls, was very unwell with Covid symptoms and was not in a fit state to attend the hearing on Monday 8 August either in person or remotely by Cloud Video Platform.

22. This was now a joint application for a postponement by the claimant and by the respondent. In support of her application the claimant submitted two short letters from Mr Joseph Yazbek, dated 4 August 2022, Consultant Gynaecologist, and from Mr Garth Allardice, Consultant Orthopaedic Surgeon dated 5 August 2022. The letters are written in similar terms stating that the claimant had multiple medical conditions including the ones already referred to earlier in this judgment. Dr Yazbek stated that the

claimant underwent surgery on 17 May 2022, and that since her surgery she has been undergoing further treatment which has had an effect on her attention and concentration. The doctor then wrote:

> "I understand that Miss Rakova applied for a postponement of legal proceedings. I would support her application to the court for a postponement of proceedings for a period of six to nine months."

23. Dr Allardice stated that the claimant had been under his treatment since July 2016 and was reviewed on 5 August 2022 at Clementine Churchill Hospital, Harrow She was suffering pain in her foot and was due to have foot surgery in the coming week. She would have to deal with the generalised stress of the up coming surgical procedure, "including the recovery period following the surgery, which may take between three to six months." As with Dr Yazbek, he supported the claimant's application for a postponement "until such time as she has made a full recovery from her foot surgery, which I anticipated would take about six months".

24. The joint application came again before EJ Bedeau on 5 October 2022 who granted it and ordered that the parties provide dates to avoid. The claimant was written to on 4 October 2022 by the tribunal in the following terms as directed by the Judge having regard to the passage of time that:

> "Should the claimant be unable to conduct proceedings at the next hearing, it may be listed for a strike out as a fair hearing is not possible."
>
> (49 to 50)

25. The case was listed for hearing from 12 to 15 June 2023 by the tribunal on 2 November 2022. Those dates were chosen because the tribunal invited the parties to give the dates to avoid from June to August 2023 and to respond by no later than 18 October 2022.

26. On 18 October 2022 the claimant wrote to the tribunal stating that she was neither able to attend nor participate in a hearing from July to August 2023. No explanation or evidence was given. She gave her dates to avoid in June being 1, 2, 5 and 28. It follows from this that she would be available between 12 to 15 June 2023. In the respondent's representatives' email to the tribunal dated 25 October 2022, they requested that the claimant should be ordered to provide a full explanation with evidence why she would be unavailable to attend a hearing during July and August 2023.

27. On 3 June 2023 they wrote to the tribunal stating that they would be applying to strike out the remitted matters as well as the disability dismissal claims. This was followed by a detailed application dated 5 June 2023, setting out their grounds. EJ Bedeau directed on 6 June 2023, that the application would be heard on the first day of the hearing, namely 12 June 2023.

28. On the 12 June 2023, the first day of the hearing, the claimant was unable to speak to the clerk to the tribunal, instead she instructed her cousin to speak to clerk on her behalf. The clerk recorded that her conversation with

the claimant's cousin was to the effect that the cousin had stated that the claimant was unable to participate either on that day or the following day by CVP or by telephone. She was unwell and was having problems waking up and being awake during the day. She was suffering from menopausal symptoms and depression.

29. In the claimant's email to the tribunal dated 12 June 2023, the first day of the hearing, she attached Dr Allenby's report and a letter from her dated 8 June 2023, requesting a postponement for a further nine to ten months because of her medical conditions.

30. The medical report from Dr Ruth Allenby, dated 8 June 2023, refers to the claimant's medical conditions of Ehlers-Danlos Syndrome, adult ADHD, dyspraxia, dyslexia, anxiety, depression as well as menopausal symptoms. Dr Allenby wrote:

> "Her inattention and mood symptoms were worsened by menopause which further impaired her cognitive functioning and working memory. Her ongoing depressive state and poor control of her attention difficulties are the main barriers to recovery. As such, she is currently unable to provide instruction, prepare documentation or attend hearings.
>
> Miss Rakova is undergoing treatment, though progress is slow. She would therefore benefit from an adjournment of six to eight months."

31. The respondent prepared a bundle of documents for the August 2022 hearing comprising of nearly 3,000 pages plus a separate bundle of witness statements. Those were produced on the first day of the hearing.

32. The claimant had not submitted her skeleton argument, nor indeed comply with any of the case management orders by Regional Employment Judge Foxwell. She is currently not in a fit state to do so.

The law

33. Rule 37(1)(e) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, "Employment Tribunals Rules of Procedure", provides:

> "(1) At any stage of the proceedings, either on its own initiative or on the application of the parties, the Tribunal may strike out all or part of a claim or response on any of the following grounds –
> ……..
> (c) for the non-compliance with any of these Rules or with an Order of the Tribunal;
>
> ……
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

34. Article 6(1) Of the European Convention on Human Rights and Fundamental Freedoms, incorporated in the Human Rights Act 1998, schedule 1, states that,

> "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

35. The Overriding objective as set out in rule 2, schedule 1, of the Employment Tribunals Rules 2013, requires that the tribunal and the parties should seek to avoid delay and save expense.

36. In the case of Peixoto v British Telecommunications PLC UKAEAT/0222/07/CEA, the tribunal was considering rule 18(7) of the 2004 Rules of Procedure on strike out, the precursor to rule 37(1)(e), which was only possible against claims but not responses. HHJ McMullen QC at the Employment Appeal Tribunal, held that an employment tribunal had not erred in striking out the claims on the basis that a fair hearing was no longer possible. The claimant had stated that she would not be physically able to give oral evidence. There was no prospect of her being able to proceed with her claims at any time in the future, having regard to the medical evidence which was the same and unhelpful. In the absence of any prognosis for recovery the tribunal was unable to establish when a hearing would take place. The tribunal had considered alternative measures apart from striking out the claims. The case could not be decided on the documents alone as the claimant's evidence would be required. Article 6 gives the right to have a fair hearing within a reasonable time.

37. In the case of Abegaze v Shrewsbury College of Arts and Technology [2009] EWCA Civ 96, the Court of Appeal held, Elias LJ giving judgment, that the Employment Judge had erred in striking out the claim at the remedies hearing stage because the Non-legal members at the liability hearing had retired and he was concerned that his impressions of the witnesses may unduly influence the new members, and that the causation problems with regard to personal injury and injury to feelings compensation, were insurmountable.

38. The claimant had succeeded in her race discrimination claim against the respondent on 20 November 2000. A remedy hearing was fixed but the claimant sent in medical reports which stated that she was not well to take part. It was listed on 1 July 2003, but she sent in further medical reports stating that she was unwell enough. On 15 November 2006, her claim was struck out by the Employment Judge on the grounds that it was not being actively pursued, and a fair hearing was not possible.

39. The Court of Appeal held that the change in composition of the members do not go to the issue of a fair hearing. Concerns by the Judge about sharing his impressions could not justify the strike out and the claimant should not be prejudiced by a strike out where the composition of the Tribunal changes. If the Judge had serious concerns about the impressions he may give to the new members, he could have recused himself. The tribunal could conclude that there was evidence of some injury flowing from the unlawful discriminatory act. The claimant's appeal was allowed.

40. In the later Court of Appeal case of Riley v The Crown Prosecution Service [2013] EWCA Civ 951, the claimant, in that case was a senior Crown prosecutor who raised grievances regarding her treatment alleging bullying and harassment by fellow employees in August 2006. She issued proceedings in September 2009 alleging race discrimination beginning in December 2007, disability discrimination and public interest disclosure beginning in September 2008. The case was listed for four weeks beginning in May 2011. She issued further proceedings following her dismissal in September 2010 for gross misconduct. She was unfit to attend the hearing in May 2011 and her claims were struck out as a fair trial was not possible. The medical evidence showed that litigation was severely impacting on her stress and that once resolved it would be a step in her recovery. The medical evidence showed that the claimant would not have been fit enough to attend the hearing in 12 months' time, and not before the expiry of two years.

41. The Employment Appeal Tribunal dismissed her appeal and she appealed to the Court of Appeal. Longmore LJ, giving judgment dismissing the appeal, held that the overriding objective is to deal with cases justly and expeditiously without unreasonable expense. Article 6 emphasises that every litigant is entitled to a fair trial within a reasonable time. That is the entitlement of both parties. Litigants should not be compelled to wait for justice more than a reasonable time and fairness applies to the respondent. His Lordship then held:

> "It would, in my judgment, be wrong to expect tribunal to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that the claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a tribunal."

42. To strike out for failing to comply with a tribunal's order or orders, has to be proportionate, Ridsdill and Others v D Smith and Nephew Medical and Others UKEAT0704/05.

Conclusions

43. We have taken into account article 6 of the European Convention on Human Rights and Fundamental Freedoms on a fair hearing. The fair hearing principle applies both to the respondent as well as to the claimant. The respondent is in a particularly difficult position because each time the case is listed, its representatives and counsel have to prepare for the hearing which is a cost to it. We do bear in mind that on two occasions the listed hearings were postponed at the request of the respondent, although the claimant was not able to attend due to her health on both occasions.

44. The claimant suffers from serious physical and mental impairments affecting her ability to concentrate and participate effectively in a hearing. We also accept that she has been suffering from some of these conditions for several years and we are sympathetic. The reality is, however, that she has

been unable to prosecute her case since the matter was remitted to the tribunal by the EAT. She was unwell when the case came before the Regional Employment Judge and there is no certainty nor a probability that she will be able to conduct proceedings or to give instructions in either in eight or in ten months' time. The most recent medical report does not give a clear, definitive prognosis on her medical conditions. We accept that the remitted matters could be dealt with on the basis of submissions, but the parties are likely to refer to documentary evidence in the bundle of documents in support of their case.

45. As in the case of Riley, this is a chicken and egg scenario. The claimant would need to get better in order to participate in a final hearing, however, there is no date when her conditions would or are likely to improve.

46. Even if this case is listed in ten months' time, that would be April 2024, the claim was presented in 2016 and the remitted matters were in 2019. This would mean that the relisted hearing would be eight years after the matters complained of and five years from the date of the remitted matters by the EAT.

47. We have considered the possibility of the case being decided on the papers, but this is a case in which the parties are likely to refer to the evidence bundle.

48. We considered the claimant participating by Cloud Video Platform but that requires her to be fit and able to do so to which there is no certainty.

49. The case is not even trial ready as the claimant has been unable to comply with case management orders.

50. Article 6 gives a right to a fair hearing within a reasonable time. The claimant is not in a position to conduct her case as her ability to focus and concentrate on proceedings is severely limited.

51. We do follow the approach taken in Riley and having considered the above matters, have come to the conclusion, not with any degree of satisfaction, that a fair trial is not possible. There has to be finality in legal proceedings. The remitted claims are, accordingly, struck out under rule 37(1)(e).

52. We are not persuaded that the claimant's failure to comply with the orders of the Regional Employment Judge are so sufficiently serious as to strike out the remitted matters. Her failure to comply was because of her medical conditions.

53. The only other claims before the tribunal are in respect of the disability dismissal, case number 3334352/2018, which are subject to separate proceedings.

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Employment Judge Bedeau

Date: 12 September 2023

Sent to the parties on:

12 September 2023

For the Tribunal Office

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