



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Miss S Akhtar

Department for Work
and Pensions

Heard: By CVP in Leeds

On: 5 January 2024

Before: Employment Judge JM Wade

Appearance:

For the Claimant: No attendance

For the Respondent: Ms E McIlveen, counsel

JUDGMENT

The claimant's claims of disability related harassment and a failure to make reasonable adjustments are dismissed pursuant to Rule 47 upon the claimant's failure to attend or be represented at today's hearing.

REASONS

1 The claimant presented a claim form on 27 March 2023. She was then (and still remains I understand) employed by the respondent as a PIP Case Manager. The claimant had ticked boxes indicating, "I am owed other payments", saying, "asked to work from home for health reasons but management refused and office environment was unhealthy and dirty". The claimant did not assert she was a disabled person.

2 A case management hearing took place on 7 June 2023, attended by the parties by telephone, and a further preliminary hearing was arranged by video link to consider whether to strike out or deposit the allegations. The claimant was invited to consider whether or not she wished to withdraw her claims or wished to apply to amend her claim, the date for compliance with that order was 23 June. The claimant sought an extension of that order to take legal advice, that was granted and on 30 June, the last date of the extension she indicated she did not withdraw her claims and wished to pursue complaints of disability related harassment and a failure to make reasonable adjustments. She indicated, "I am disabled", and was happy to provide medical records. She further indicated that not being allowed to work from home had worsened her health and her pay and her "anxiety and depression".

3 On 26 July 2023 solicitors acting for the claimant indicated they had been instructed that day and sought postponement of the public preliminary hearing the following day. That application was refused.

4 At the hearing the claimant represented herself, and permission to amend the claim to add disability related harassment and a failure to make reasonable adjustments, was granted. Further orders were made for clarification of the disabled person status, and confirmation of PCPs and harassment - aspects of the complaints identified by the Employment Judge. There were also orders for a schedule of loss and preparation for a final four day hearing arranged for 16 to 19 January 2024 – less than two weeks away.

5 On 11 August the respondent confirmed it did not accept the claimant was a disabled person at the material times by reason of 1) respiratory difficulties and/or 2) anxiety and depression and sought compliance with the case management orders made: medical records by 15 September 2023 and impact statement by 8 September 2023.

6 The claimant's medical records were obtained through subject access request using the date range 1 January 2018 to 5 September 2023 and these were before me today.

7 On 21 September the claimant notified the respondent and the Tribunal that her solicitors were no longer acting and she sought an extension of the dates to provide her disability evidence. On 8 September the respondent presented its amended response to the disability discrimination claims, noting the claimant had not given the further clarification ordered and that there might need to be further amendment to the grounds of resistance.

8 The claimant provided her impact statement on 23 September and 128 pages of medical notes on 1 October 2023. The respondent sought a hearing on the disability question and that was listed for today with a one day time estimate.

9 The claimant had provided her schedule of loss on 6 October (the parties agreeing an extension to the time ordered) and she further provided details of the unwanted conduct relied upon said to relate to disability, which contained a further amendment application – the last allegation arising after the presentation of the ET1. This information had been due on 11 August 2023.

10 The respondent's reasons for seeking determination of the disability question included: "*The OH report dated 12 July 2022 specifies that the claimant does not have a previous diagnosis of anxiety or depression, but states that she was suffering from both at the time of the appointment. Further the claimant's GP records do not contain a diagnosis of anxiety and/or depression during the relevant time, although there appear to be diagnoses in 2020 and 2019 of mixed depressive disorder.*" This is a fair summary. I add to it that the records include a single brief spell of antidepressant medication.

11 Further the medical notes provide no respiratory condition diagnosis, other than the claimant reporting her own diagnosis of "long covid" to the clinician, and the claimant in her impact statement describing respiratory symptoms as having cleared.

12 As to evidence of a substantial adverse effect on day to day activities from depression – the claimant includes such evidence, principally about sleeping, household chores and socialising, but an assessment of that evidence for longevity, and substance – more than minor or trivial – would need to be made.

13 On 20 December 2023 the respondent notified the Tribunal that the claimant had not sent her statements in the main case. Without the claimant's evidence the respondent was concerned about readiness for the main hearing, having invested considerable time in preparing for it.

14 On 2 January 2024 the respondent notified the Tribunal that it had sent the claimant its witness statements in the main case and uploaded the final hearing file as well as the preliminary hearing file for today's hearing.

15 After the respondent's email, the claimant wrote saying she requested "an extension for the hearing on 5th January 2024 please". She indicated being unable to meet the deadline for witness statements in the main case, and with a lack of sleep and anxiety and concentration deficit. She indicated willingness to provide her GP fit notes, which show "I haven't been working due to my health".

16 On 3 January a Judge directed that if a postponement of today was being sought the claimant must provide medical evidence. He further directed that the claimant had complied with the disability evidence orders and nothing further was required from her for today's hearing other than attendance – that is the gist of the direction.

17 At 10am today the respondent's counsel and I attended the hearing by video link. The claimant did not attend and I directed the Tribunal inbox be checked to see if there was further medical evidence from the claimant, or a further postponement application. I also directed a call to the claimant to alert her to the hearing taking place. There was no further evidence sent to the Tribunal; two calls resulted in the claimant's voicemail connecting and a third call appeared to have been connected and then terminated. The Tribunal's clerk today also emailed the claimant to remind her of the hearing.

18 The hearing resumed and the information above was relayed to Ms McIlveen, She contended for pressing on with the hearing in the claimant's absence, in light of the difficulties in the claimant's disability case, the hearing due to commence in less than two weeks, and the ongoing costs for the respondent in defending this case. I invited her submissions on the other possibility in Rule 47 – dismissal in circumstances of non attendance.

19 During those submissions, our clerk provided the following email exchange: "good morning, I am contacting you on behalf of Leeds Employment Tribunal – the Employment Judge is currently waiting for you to join the preliminary hearing by CVP. Please join the hearing now or ring the Tribunal to explain why you cannot attend. Many thanks". The reply to that email was: "Hi [...] I emailed asking for an extension as my health is currently very bad and I am not well enough for this. I explained the status of my health in my previous email. Please accept my apologies".

20 It appeared to me that this email was a further application for a postponement on the same or similar grounds to the previous correspondence. I would, in any event faced with non attendance of a party, typically consider whether postponement is in the interests of justice as an alternative to the Rule 47 options of continuing in the party's absence or dismissing the claim.

21 The claimant had been directed that a postponement application would require medical evidence and had not provided any. Granting such an application requires exceptional circumstances and I do not consider there are such exceptional circumstances. The claimant was able to write a short, considered and polite email within three minutes of the Tribunal's email. Being unfit to work is not necessarily the same as being unfit to attend a video hearing in your own case - I do not have medical evidence confirming the latter, nor do I have evidence of when the claimant will be fit to attend this hearing. I do not grant a postponement.

22 Pressing on and determining the discreet disability issue in the claimant's absence is not, it seems to me, in the interests of justice for a number of reasons.

23 I have indicated the evidential assessment that is required above – that her evidence of substantial adverse effect from depression needs to be tested. The material period is 28 January 2022 (the first refusal of permission for working from home) until 13 January 2023 (or 30 March 2023 if permission is granted for further amendment). There is, during or before that period little medical note corroboration of impact on day to day activities. There is evidence of the GP reviewing the provision of further fit notes – these are then provided by a pharmacist, which in my judicial experience is unusual – these are further reasons why it is not safe to determine the issue on the papers in the claimant's absence and without discussing the evidence with her.

24 Further the claimant remains employed and her employer has an ongoing duty of care to provide a safe working environment on advice if the claimant is able to return to work. She has union membership or support should she consider there has been a breach of that duty and has suffered an injury as a result. A judgment in her absence about disability during a period of mental ill health in the past, which may now be ongoing, does not necessarily take the parties any further in terms of the future, nor is it in the interests of justice in my view.

25 The claimant faces has an almost overwhelming uphill struggle on establishing physical disability - by reason of an undiagnosed respiratory condition with resolved symptoms – and it is this disability on which she relies at the start of the chain of events to justify her need to work from home, the main case in her reasonable adjustments and harassment case.

26 Leaving the disability question until the final hearing will put all the respondents' witnesses in the position of being held available at public expense for a final hearing which may or may not be effective. Equally a Tribunal of three members being made available to determine a case which may prove ineffective, may well result in further wasted public funds and in other effective cases going unheard.

27 Directing that the final hearing be reduced to consider only the disability question is an alternative but there is no guarantee the claimant will attend that hearing in less than two weeks' time. The original refusal of home working occurred

two years' ago. This case is becoming stale and with further delay a fair hearing may become difficult or impossible. It also hangs over all those involved.

28 The overarching impression is that the claimant has an uphill struggle. The prejudice to her in dismissal today, because of her non attendance and without a final judgment on disability, is less than would be the case if her disability status **at the material times** was more likely to be established. There is also a more fundamental difficulty with her main case – namely her assertion that the respondent discriminated by requiring office attendance during a period of training and consolidation, before home working would be permitted for some of the week. The claimant sought to work from home within two weeks of starting a new role which was office based during training and consolidation, having previously worked from a job centre.

29 Furthermore, it may well be that having seen the respondent's statements in the main case, and the uphill struggle she faces generally, the claimant's non attendance today is symptomatic of a wish to take stock, which is understandable, but not fair to the respondent which has this case hanging over its witnesses and over the provision of public services at public expense.

30 For all these reasons I consider dismissal pursuant to Rule 47 is the just decision today.

Employment Judge JM Wade

Dated: 5 January 2024

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Hearings are recorded where equipment permits and there is a practice direction available on the Tribunal's website containing further information.