



EMPLOYMENT TRIBUNALS

Claimant: Mr H Amin

Respondents: (1) Manchester Airports Group PLC
(2) Francesca Abbott

Heard at: Manchester **On:** 9 January 2024

Before: Employment Judge Holmes (sitting alone)

Representatives

For the claimant: Mr M Broomhead, Non – practising Solicitor
For the respondents: Ms K Barry, Counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that :

1. Claim no. 2400799/2022 stands struck out for non – payment of the deposit orders made by the Tribunal and sent to the parties on 5 May 2023
2. The claimant’s application for a postponement of the preliminary hearing, is refused, and his application for relief from sanction, or reconsideration of the striking out of the claims, is dismissed.

REASONS

The procedural history

1.This preliminary hearing arises out of the last of six claims which the claimant had presented to the Tribunal. The claim was presented on 4 February 2022, and is made against only two respondents, Manchester Airports PLC and Francesca Abbott. This claim is made against both respondents for (in the case of the first respondent) constructive dismissal, disability and race discrimination, including claims of victimisation

2. By letter dated 6 September 2022 the respondents made application to the Tribunal that (amongst other things) the Tribunal make an order of strike out, or for a deposit order, in respect of this claim.

3. The application was considered at a preliminary hearing which was held on 24 February 2023. Further deliberations were held on 24 March 2023, and a reserved judgment was promulgated on 5 May 2023. The Tribunal made deposit orders in respect of the 10 claims before it in this claim, in the sum of £25 per claim, to be paid by 31 May 2023.

4. The claimant did not pay the deposits ordered by the Tribunal by 31 May 2023. He contends that he attempted to do so, but was not successful. On 2 June 2023 HMCTS Finance confirmed to the respondent that no deposit payment had been received. On 5 June 2023 the claimant applied for an extension of time for compliance with the deposit orders as he was seeking reconsideration and possibly making an appeal, but this was after the date for compliance .

5. By email of 7 June 2023 the claimant's representative stated that the claimant had sent a cheque for the deposits dated 14 May 2023, but it had not yet been cashed. The respondent pointed out in a letter in response , dated 8 June 2023 , that the Tribunal had no jurisdiction to grant an extension of time, and maintained that the claims stood struck out.

6. On 18 July 2023 the Tribunal wrote to the claimant , stating that there was no record of any payment of the deposits, and requiring the claimant to make a witness statement , and produce any supporting evidence, dealing with his attempt to pay the deposits that had been ordered.

7. On 4 August 2023 the claimant sent to the respondent (it seems not to the Tribunal, although it was then copied by the respondent to the Tribunal) a witness statement, unsigned and undated from the claimant , to which a copy of a cheque book stub was exhibited.

8. The respondent responded to this evidence by letter of 10 August 2023, pointing out that the witness statement was not signed or dated, and other matters, and seeking the opportunity to cross – examine the claimant upon this evidence.

9. The Tribunal accordingly by letter of 31 October 2023 listed this preliminary hearing, the purpose of which was to determine whether the claims stood struck out . The claimant was directed to attend to give evidence, and to produce the original cheque book and the stub that had been exhibited.

10. Whilst not expressly stated (for which the Employment Judge apologises) the hearing was listed, in effect, to provide the claimant with an opportunity, if the Tribunal did determine that the claims stood struck out, to make immediate application for relief from sanction, and reconsideration of the striking out of the claims.

The postponement application

11. Nothing further was heard from the claimant (the notification of 31 October 2023 being sent to his representative) until 4 January 2024, when at 09.07 the Tribunal received an email from Mr Broomhead in these terms:

“Please accept this as our application for an adjournment of the above hearing.

The grounds for this application are that the Claimant is in Pakistan concerning the health of his father and cannot return to this country to attend the above hearing, He is in Pakistan for the foreseeable future and will not be able to return for some time.

We apologise for the lateness of this application but the Claimant has found it difficult to obtain access to his e-mails.

We look forward to hearing from you as a matter of urgency.”

12. The respondent responded to this application by email on 4 January 2024 . This is a lengthy email, but its main points are as follows:

“Insufficient information and evidence provided

The postponement application has been made on the basis that the Claimant is in Pakistan “concerning the health of his farther” (sic) . No information/evidence has been given as to when the Claimant’s representative informed the Claimant about the hearing date, when the Claimant booked his flight to Pakistan, when he arrived in Pakistan, why his father’s health necessitates his attendance in Pakistan, why the postponement application is being made so late or why it is considered that it would be in accordance with the overriding objective to grant the postponement. Further, reasons for not providing this information have not been given, nor has it been explained why there are exceptional circumstances for not providing this information / evidence.

Presidential Guidance – Application should not be considered

Pursuant to the Presidential Guidance on Postponements, the Claimant is required to take certain steps when making a postponement application, failing which (by paragraph 4) the application will not ordinarily be considered unless there are exceptional circumstances. The requirements include:

(i) stating why the granting of the application is in accordance with the overriding objective (paragraph 1.2); and

(ii) providing all relevant documents (paragraph 3), examples of which expressly include:

a. If the postponement is for medical reasons – “All medical certificates and supporting medical evidence should be provided in addition to an explanation of the nature of the health condition concerned”; and

b. If a party or witness is unable to attend – “what attempts have been made to make alternative arrangements; the reason for the unavailability... Any supporting documents should also be provided”.

As set out above these requirements have not been complied with. If “exceptional circumstances” are to be relied up, paragraph 4 of the Presidential Guidance requires

an explanation from the Claimant as to the reasons for noncompliance, and what the exceptional circumstances are. These requirements have not been complied with either. In light of the above it is the Respondents' position that the application should not, pursuant to the Presidential Guidance, be considered.

Rules – Application should be rejected

The Employment Tribunal is also respectfully reminded that pursuant to Rule 30A of the Employment Tribunal Rules of Procedure 2023, where an application is made less than 7 days before the hearing, the Tribunal is only permitted to order a postponement (and even then has discretion to decline the application) if:

- (i) the parties consent to the postponement (which the Respondents do not);*
- (ii) the application was necessitated by an act/omission of the Respondents or the Tribunal (which it was not); or*
- (iii) there are exceptional circumstances.*

Whilst the Respondents are mindful and sorry to learn of the suggestion that the Claimant's father has a health condition, it is averred that this does not, on its own, amount to "exceptional circumstances". As above, there is no evidence as to the nature or seriousness of the condition, the date on which the Claimant became aware of this, why his attendance is necessitated (and could not wait until after the hearing). In short, it is respectfully submitted that there are no exceptional circumstances set out within the application to allow the Tribunal to go on to consider whether to use its discretion to grant a postponement. The application should therefore be rejected on this basis."

13. The respondent goes on to refer to previous findings of the Tribunal as to the reliability of the evidence of the claimant, and general observations why it would not be in accordance with the overriding objective to all the claims to proceed any further at this late stage. The email continues:

Further enquiries

Without prejudice to the above, if the Employment Tribunal is minded to consider the postponement application without rejecting it, the Respondents respectfully submit that before it does so, the Claimant should be ordered to provide the following forthwith, failing which the hearing will proceed as listed:

- evidence of the date on which the Claimant's representative confirmed to the Claimant the date of this hearing and that he was required to attend to give evidence;*
- evidence of when the Claimant's plane ticket to Pakistan was purchased;*
- the plane ticket;*
- any evidence to demonstrate a return date;*

- *evidence to demonstrate the Claimant's father is unwell and the extent of the health concern / prognosis (GP records/hospital records);*
- *evidence to demonstrate that the Claimant's attendance in Pakistan is necessitated on account of his father's ill health."*

14. The claimant's response from Mr Broomhead , at 22.55 on 4 January 2024 was :

"The Claimant has been in Pakistan concerning the illness of his father. We do not have evidence of this except that the Claimant expects not to return to the United Kingdom until March 1st at the earliest. The reason for the late application is that the Claimant contacted the writer on 26 December 2023, however the writer was suffering from diabetes over the Christmas period, from which he is just recovering. The Claimant has not applied for adjournments previously in this matter. The Claimant is essential to this hearing , he has been ordered to attend to give evidence personally it follows it cannot proceed without him."

The hearing

15. The claimant was again represented at the hearing , as he has throughout the proceedings, by Mr Broomhead, a non – practising solicitor (see the Tribunal's letter of 18 July 2023 for why this term has been used) . The respondents were represented by Ms Barry of counsel. There was a hearing bundle, and references to page numbers are to that bundle.

16. At the outset of the hearing Mr Broomhead made an application the Employment Judge recuse himself from this hearing. The basis upon which he did so was, firstly, that the Employment Judge had shown bias (that was the implication, although the word was not used) in a previous preliminary hearing by , of his own motion, taking into account whether a fair trial was possible in considering whether to strike out other claims. He did not identify where in any judgment this had been done, and the Employment Judge recalled that, as a matter of law, any Employment Judge is always required to consider whether a fair trial is still possible before considering whether to strike out any claim. He did not, therefore , see this as any basis for recusal. The other matter raised, which had previously been raised in the course of these proceedings, was that Mr Broomhead had some time ago made a complaint about the Employment Judge Holmes to the then Acting Regional Employment Judge Russell, which had not been actioned. As had been previously explained in the Tribunal's letter of 18 July 2023 (not in the bundle for this hearing) the Employment Judge was unaware of any such complaint, and saw this as no basis for him to recuse himself. Mr Broomhead did not press the application any further.

17. The Employment Judge opened the hearing by then addressing the issue that it was listed to determine, namely whether the claimant's claims stood struck out by reason of his non – payment of the deposits that had been ordered.

18. After some prevarication , and assertion that the claimant had tried to pay the deposits , which was not the issue, Mr Broomhead agreed that the claims indeed did stand struck out by reason of the non – payment of the deposits. The Tribunal was thus able to determine the issue that it was listed to determine.

19. What was to follow, therefore was, in effect (and this could have been better expressed) the claimant's application for relief from sanction. Whilst Ms Barry pointed out that this was not expressed in the notice of hearing, she accepted that, were he in a position to proceed, the claimant could have then proceeded with such an application, and the respondents were prepared to deal with it.

20. His absence, therefore, particularly as he had been required to attend and give evidence, and to produce the original document relied upon, meant that Mr Broomhead could not proceed, and had to seek a postponement.

21. Mr Broomhead's position was that the application made first on 4 January 2024 had complied with the Presidential Guidance, and the rules, and should have been granted. The claimant was not required to provide anything else in support of the application. Mr Broomhead had provided as much information as he could, having only been notified by the claimant of his absence abroad on 26 December 2023. Thereafter, having recovered sufficiently from a diabetic episode by 4 January 2023, he notified the Tribunal and the respondent.

22. He could give the Tribunal no more information than he had provided in his two emails. He produced no supporting material such as emails, texts, a file note or anything else to show that the claimant was in Pakistan, when he went, or when he might be back. The most he said was that the claimant's father was ill, and that things did not look good, the implication being that he may be critically ill.

23. He objected to the Tribunal's letter of 8 January 2024, on direction from the Employment Judge, which strongly advised that he produce some evidence of the claimant's absence abroad. There was no requirement on the claimant to do so.

24. The postponement should have been granted, without the need for this hearing. He could do nothing more, and the claimant would be prejudiced if the Tribunal denied him this postponement.

25. In reply Ms Barry adopted, and expanded upon the arguments advanced in the letter from the respondents' solicitor of 4 January 2024. She disagreed with Mr Broomhead on the requirements of the Presidential Guidance and the rules, which she submitted did require much more information to be provided. Applications within 7 days of a hearing require, under rule 30A, exceptional circumstances to be shown, and the claimant had failed to show any.

26. There was no information before the Tribunal as to when the claimant went to Pakistan, why, and how long he would be there. There was no evidence of when he was told of the hearing date, when he decided to go to Pakistan, and why he could not have waited until after the hearing date.

27. She submitted that the Tribunal should not even consider the application as it did not comply with the Guidance or the rules, but if the Tribunal did, it should refuse it for the deficiencies that she and those Instructing her had identified.

28. In terms of any alternatives, such as making the claimant provide the missing information and evidence as a condition of considering or granting the application, as

had been suggested in the alternative in 6 bullet points in the respondent's letter of 4 January 2024, she urged the Tribunal against taking such a course. If the claimant were to be allowed a postponement, there would be further delay, in a case which has already been considerably delayed with the prospect, if the claimant succeeds in having the claims reinstated, of a final hearing now well into 2025.

29. In reply, save that the claimant have given him the date of 1 March 2024 for a possible return to the UK, Mr Broomhead had nothing to add.

30. The parties were given the option of an oral judgment after deliberation during the morning, but Mr Broomhead preferred to receive a reserved judgment, as he was still suffering the effects of his diabetes, and had not had much sleep. Judgment was accordingly reserved.

Discussion and ruling

31. The starting point must be the Presidential Guidance and rule 30A. The former states:

Action by parties

1.

1.1 Whilst any application for a postponement can be made either at the hearing or in advance of the hearing it should ordinarily be made in writing to the Employment Tribunal office dealing with the case. That application should state.

1.2 The reason why it is made; and

1.3 Why it is considered that it would be in accordance with the overriding objective to grant the postponement.

2. Where a party applies in writing, they shall notify the other parties that any objections to the application should be sent to the Tribunal as soon as possible. Here the expression 'the party' is referring to all parties in the case.

3. All relevant documents relevant to the application should be provided.

4. If any of the requirements set out above are not complied with the application will ordinarily not be considered unless there are exceptional circumstances. If however the matters as set out above are not complied with then an explanation as to why it has not been so complied with and the exceptional circumstances should be given.

5. The party wishing to make the application for postponement of hearing should wherever possible try to discuss the proposal either directly with the other parties or through their representatives. If that discussion has taken place then the detail should also be provided to the Tribunal. If the other parties are in agreement that also should be indicated in the application to the Tribunal.

6. Where the hearing concerned has been fixed with agreement by the parties that matter will be taken into account by the Employment Judge considering the application.

7. Set out below are some specific examples of additional information that would be of assistance depending on the nature and the basis upon which the application for postponement is made.

Action by the Employment Judge

1. Where the appropriate information has been supplied then the Employment Judge will deal with the matter as soon as applicable. If the information has not been supplied any application may become the subject of further enquiry from the Employment Judge for relevant information which will have the effect of delaying the consideration of the application.

2. Once all the relevant information is available to the Employment Judge he/she will take into account all matters and information now available to them and consider whether to grant or refuse the postponement. The decision however remains in the discretion of the Employment Judge concerned.

3. The decision of the Employment Judge will be notified to all parties as speedily as possible after the decision has been made.

32. Rule 30A provides:

(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.

(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—

(a) all other parties consent to the postponement and—

(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or

(ii) it is otherwise in accordance with the overriding objective;

(b) the application was necessitated by an act or omission of another party or the Tribunal; or

(c) there are exceptional circumstances.

[N/A]

(4) For the purposes of this rule—

(a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;

(b) “exceptional circumstances” may include ill health relating to an existing long term health condition or disability.

33. Whilst at one stage the Employment Judge did consider, as a final possible concession to the claimant, making an Unless order, requiring him to provide the information set out in the 6 bullet points in the respondent’s letter of 4 January 2024, and then considering the application further, the short answer to this application is that

the claimant has failed to show that there are any exceptional circumstances which would justify the Tribunal in departing from the requirements of the Guidance and, in particular, rule 30A. Whilst noting that rule 30A(4) does include ill health as an exceptional circumstance, and that is not limited to the ill health of a party, no evidence has been adduced to the Tribunal of anyone's ill health.

34. The position that the Tribunal has been presented with is simply this. Having been notified on 31 October 2023 that the hearing of what was in effect the claimant's application to reinstate his claims following his failure effectively to meet the deposit orders, at some unknown date (even possibly before that notification) , without informing his representative, the claimant has gone abroad, possibly to attend his sick father, and has made no , or no adequate , arrangements to ensure that he either could return for the hearing , or could make a timely application for a postponement. Leaving it until 26 December 2023 to inform his representative that he would not be available for this hearing was far too late. Whatever the position in Pakistan, once the claimant was aware he might be away at the time of this hearing , he should have alerted his representative. In the absence of any more information the Tribunal does not know if the claimant went to Pakistan several weeks ago, or went more recently , in response to an emergency. Either way, given the importance of the hearing, and the relatively brief and quick action that was required of him to take steps about this hearing (which he managed to do on 26 December 2023), the Tribunal cannot understand why he did not take the necessary action sooner.

35. This is all the Tribunal knows , and it can hardly amount to any exceptional circumstance. The Tribunal knows far too little about the circumstances to find them exceptional. The application to postpone is therefore refused.

36. In the absence of the claimant to give evidence about his attempts to pay the deposit, and of even a signed witness statement with adequate details (the draft does not even give the date that he posted the cheque) , any application for relief from sanction or reconsideration of the strike out of his claims is doomed to failure, and to the extent that there is such an application before the Tribunal, it is dismissed.

37. Whilst it may be premature , as the respondent has raised the issue of costs, the Employment Judge would observe that had the claimant succeeded in his application for a postponement, it would have been difficult, if not impossible , for him to resist an application for costs. The power to award costs , of course, arises whenever there has been a postponement on the application of a party, for which the threshold conditions of unreasonable conduct or breach of Tribunal orders are not required.

38. Whether the respondents intend to pursue an application is a matter for them, but as the postponement has been refused, the Tribunal would have to apply the tests under the other limbs of rule 76. If any such application is to be pursued, it should be made within 28 days of this judgment being sent to the parties, and, if a summary assessment is sought, a breakdown of the sums claimed should be included.

Employment Judge Holmes

DATE: 9 January 2024

JUDGMENT SENT TO THE PARTIES ON

16 January 2024

FOR THE TRIBUNAL OFFICE