



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms M Montana

**Respondent:** Care Quality Commission & Others

**HELD:** by Video in Leeds      **ON:** 22 April 2024

**BEFORE:** Employment Judge Miller

## REPRESENTATION:

**For the claimant:** In person (assisted by Ms R Ward, McKenzie Friend)

**For the respondent:** Mr T Brown – counsel

**JUDGMENT** having been sent to the parties on 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. The purpose of this hearing was decide whether the claimant's claim should be struck out on the basis that it was no longer possible to have a fair hearing because of the claimant's inability to attend the hearing because of her mental ill health.
2. The last hearing which was listed (on 29 February and 1 March 2024) to consider the respondent's application to strike out the claimant's claim relating to the manner in which the proceedings have been conducted was postponed the day before that hearing because the claimant was not well enough to attend.

3. Ms Ward, the claimant's representative who describes herself as a McKenzie friend, wrote to the Tribunal and the respondent on the claimant's behalf and said that she was concerned that the claimant was in crisis and mentally immobilised. The claimant subsequently provided medical evidence from her GP in support of her inability to attend the hearing which said

*"I am writing this letter at the request and with consent of Nicola Bell [which as I observed in my case management orders is probably the previous name of the claimant or a name by which the claimant is otherwise known] in my capacity as one of the GPs in our practice and having seen her over the years. Nicola has a history of mental health problems with anxiety and elements of PTSD. We saw her in 2016 for heightened symptoms relating to an attack by a dog. She has been seen in GP and by emotional well being in the last two years and tells me is waiting further assessment in mental health team next month. She is compliant with the prescribed medication of Mirtazapine 45mg a day. She has contacted myself as duty GP 27/2/2024 [which was two days before the hearing was due to commence] finding it difficult to cope in last 2 weeks with the impending court date, describing heightened anxiety, poor concentration, poor sleep, feeling overwhelmed and distressed with flashbacks. She struggled with short notice for additional reading given."*

4. The previous final hearing on 22 – 26 May 2023 had also been postponed because of the claimant's ill health. A GP letter at that time said

*"This letter is at request and consent of Nicola to disclose relevant medical history. Nicola has been supported by the practice for anxiety and post traumatic stress with medication and psychological approaches. She had been stable but in May 2023 was getting increasingly anxious and not sleeping related to her preparation of witness statements in relation to the court hearing. At the same time she was iron deficient due to menorrhagia affecting her physical well-being. She saw our advance nurse practitioner who increased the medication for anxiety and low mood, due to the ongoing stress she was encountering. The nurse was supportive of the request to the court for deferring of the court date as allowing 6 – 8 weeks for medication to take effect and allow her stress to be under control she would be able to better cope with forthcoming court issues."*

5. It also seems likely that the claimant's health was a factor, although not decisive, in the decision to postpone the re-listed final hearing that was due to start on 29 November 2023. I therefore considered that it was proportionate to decide if in reality it was ever going to be possible to have a hearing of the respondent's strike out application or a final hearing in the claimant's claim. I initially listed the case to decide the question on the papers following provision of information by the parties but at the claimant's request I listed this hearing.
6. The claimant provided some medical evidence and submissions in support of her assertions that she would be able to continue, and the respondent presented written submissions supported by a bundle of additional documents.

7. The claimant said there are effectively two matters that prevented her from attending the last hearing. One was the late provision of the witness statement by Amy Stokes. The claimant wanted the time to properly respond in writing to what she says were the false assertions in that statement, and she said that my initial refusal of the postponement to provide that additional preparation time in February caused the claimant a high level of anxiety which made her unwell. The second influencing factor was the claimant's medication which she says she believes was then exacerbating her anxiety. The claimant said that increased anxiety is a well-known side effect of Mirtazapine. The claimant's medication has now been changed and she has the benefit of additional support from her mother as well as ongoing support from Ms Ward.
8. What has not changed is the possibility of the late provision of documents or the need to consider and respond to evidence and assertions that the claimant does not agree with that she receives in the course of these proceedings and which is given at any subsequent hearing. This is a feature of litigation and will continue.
9. I consider Rule 37 of the Employment Tribunal Rules of Procedure 2013. This says (as far as is relevant to this issue):
  - (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—  
...
    - (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).
10. This is a draconian step. In the case where the claimant may be too ill to continue there is no suggestion of fault and striking out the claim in such a case is not a sanction or punitive step. It is also not the role of the Tribunal to protect the claimant from themselves in these circumstances. Even if I thought it might be damaging to the claimant's health to continue, for example because she said her therapy will be delayed until the end of the proceedings, that is a matter for the claimant. I cannot end proceedings on that basis.
11. I must therefore be slow to strike out the claim where there is a reasonable possibility that the hearing can proceed within a reasonable timescale.
12. In my judgment the presence of the claimant today at this hearing, her detailed submissions, the change in her medication, the additional support she is now receiving and the reasonably focused way in which she conducted the hearing leads me to conclude that it is possible to have a fair hearing and particularly with adjustments.
13. The final hearing could be concluded by the end of this year but for the respondent's outstanding strike out application. I invited the respondent to consider withdrawing their strike out application to enable the final hearing to go ahead, but Mr Brown did not have instructions on that point and, in any

event, felt it would be unlikely that the respondent would want to do so. In those circumstances, the respondent is entitled to have their application heard. I am not criticising the respondent for their position, but the consequence of this is that the claimant's ill health is not the reason for delaying this case past the end of the year and it would certainly not be appropriate to strike out the claimant's claim because of that additional delay arising from the respondent's application.

14. In my judgment, therefore, it is not right to say that the claimant's health means that the hearing cannot be held within a reasonable period and I do not strike out the claim.
15. The respondent does raise the legitimate concern about what happens next time if the claimant is too ill to attend. I cannot make an Order binding a future Tribunal even if I hear the respondent's application in September. I cannot say that if the claimant does not attend her claim will be dismissed. There is no application for Unless Order before me and it would not be proportionate in the circumstances to make such an order in any event.
16. There have, however, been many preliminary hearings in this case and the claimant has been given a high degree of latitude. The claimant is warned that if she unable to attend the next hearing for the same or similar reasons to her inability to attend the hearing in July 2023 and the hearing in February 2024, there is a very real possibility that the hearing will go ahead in her absence. That carries with it the high possibility that her claim will be either struck out or unsuccessful depending on what the particular hearing is.

Employment Judge Miller

Date: 3 May 2024

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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