



EMPLOYMENT TRIBUNALS

Claimant: Mr B. Austin
Respondent: Arcus FM Limited
Heard at: East London Hearing Centre
On: 25-26 February 2025
Before: Employment Judge Massarella
Mrs M. Legg

Representation

Claimant: In person
Respondent: Mr P. Chadwick (Consultant)

JUDGMENT

The judgment of the Tribunal is that: -

1. the Claimant's claim of whistleblowing detriment is dismissed on withdrawal;
2. the Claimant's claim of race discrimination is struck out because the claim form discloses no arguable basis for such a claim;
3. the Claimant's claim of constructive unfair dismissal is dismissed under Rule 47 because of the Claimant's non-attendance at the hearing.

REASONS

The hearing

1. The claim form was presented on 12 August 2021 after an ACAS early conciliation period between 3 June and 13 July 2021. The Claimant ticked the boxes for constructive dismissal, race discrimination and referred to a claim of bullying and harassment. There was no mention of race in the body of the claim form.

2. At box 10.1 the Claimant indicated that his claim includes a claim that he was making a whistleblowing disclosure and mentioned whistleblowing in the narrative section of the form. The claim was coded as a whistleblowing claim by the Tribunal.
3. There was a preliminary hearing on 14 February 2022 before EJ Goodrich. The Claimant told the Judge that he was not pursuing a whistleblowing claim (the Claimant confirmed that again at the hearing before this Tribunal).
4. The final hearing was originally listed for three days in May/June 2023. EJ Goodrich extended the case to 4 days, adding a day to the original listing. On 8 March 2023, REJ Burgher informed the parties he was considering converting the hearing to a CVP hearing because of a lack of judicial resources. The Claimant objected. By letter dated 15 March 2023, EJ Jones directed that the hearing remain in person. On 26 May 2023, the REJ postponed the final hearing due to lack of judicial resources.
5. By letter dated 11 August 2023, the parties were required to provide their dates to avoid in 2024. By notice of hearing dated 26 July 2024, this hearing was listed.
6. Without objection from either party, the Tribunal sat as a panel of two because no nonlegal member from the employee panel was available to sit on the case.
7. On the first day of the hearing, the Tribunal heard submissions from both parties about the Claimant's claim of race discrimination. For the reasons given orally at the hearing, the claim was struck out. Because oral reasons were given at the hearing, written reasons will not be provided unless they are requested within 14 days of this judgment being sent to the parties.
8. During the case management discussion on the first day of the hearing the Claimant told the Tribunal that he had not confirmed with his two supporting witnesses that they were willing to attend; he undertook to clarify the position by the end of the day; he did not do so.
9. The Claimant also told the Tribunal that he had not prepared questions for the Respondent's witnesses. This came as a surprise, given that this case has been ongoing since 2021 and has already been postponed once. I urged him to do so, explaining that he would find it easier if he organised his questions in writing than if he tried to improvise them as he went along.
10. Mr Chadwick, who represented the Respondent very ably throughout the hearing, while being sensitive to the fact that the Claimant was a litigant in person, completed most of his cross-examination of the Claimant on the afternoon of the first day; the plan was that he would finish it on the morning of the second day. I reminded the parties that they should arrive at the Tribunal no later than 09:30 so that we could make a prompt start. The Claimant did not mention any concerns about his attendance the following day.
11. At 07:28 the next day, the Claimant wrote to the Tribunal as follows:

'By way of an update, I will not be in attendance at court today due to having another hearing related to my housing situation, evidence attached. There was an issue with the application to adjourn and I must attend. I hope the court takes leniency on this matter. I extend my apologies to all parties involved for inconvenience caused.'

12. Attached to the email was a notice of a hearing in the County Court at Clerkenwell and Shoreditch at 10:00, with a time estimate of 60 minutes. The notice had been sent to the Claimant on 20 January 2025.

13. I instructed my clerk to write to the Claimant as follows:

'Your email of this morning is acknowledged. It is unclear from your email why you did not alert the Tribunal yesterday to this conflict, which you have known about since January. I note that the hearing is listed for one hour at 10 a.m. and it is in East London. I can see no reason why you cannot proceed directly to the Employment Tribunal once your housing hearing is completed. Please reply giving your best estimate as to when you will arrive here.

I warn you that your approach to this issue may be regarded as unreasonable conduct of proceedings. Consideration may be given to whether an order for costs should be made against you. Further, if you fail to attend later today, the Tribunal will consider the position under Rule 47, which provides that if a party fails to attend a hearing, the hearing may proceed in his absence or the case may be dismissed for non-attendance.'

14. No reply had been received from the Claimant by 12:30, when the Tribunal saw the Respondent again.

15. Mr Chadwick made an application for the Claimant's case to be dismissed for non-attendance under rule 47. He submitted that there was a history of non-engagement by the Claimant in this case. He reminded the Tribunal that the Claimant had not prepared any cross-examination of the Respondent's witnesses, nor had he informed the Tribunal or the Respondent as to whether his supporting witnesses would be attending. It was clear that the Claimant had known about this clash for some time but said nothing about it until this morning. Mr Chadwick submitted that the Claimant clearly had no intention of attending today. Mr Chadwick had checked the public court listing and established that the housing case was not floating: it was listed against a specific judge, who had another case at 12:00; the Claimant had still not contacted the Employment Tribunal to respond to my enquiry. Mr Chadwick said that his conduct - his failure to attend, his failure to notify the Tribunal earlier of his intention not to attend and his failure to reply to the Tribunal's email - was wholly unreasonable. Mr Chadwick pointed out that one of the Respondent's witnesses was no longer employed by the Respondent, yet he had attended the hearing; another had travelled from Somerset to attend the hearing; and a third had travelled from Scotland. It was at the Claimant's insistence that this hearing not been converted to a CVP hearing.

16. The Tribunal decided to put back the determination of Mr Chadwick's application to 14:00, so that the Tribunal's clerk could contact the Claimant by telephone. The Claimant told the clerk that he had lost his housing case and was being evicted and was 'not in the right mindset to be at the tribunal'; he said he would not be attending that afternoon or the next day. The clerk asked the Claimant to confirm that in writing.

17. The Claimant wrote to the Tribunal at 13:37 as follows:

'Following my housing succession hearing today, it didn't go in my favour and I have been advised I have 14 days to move my newborn and partner. This has been ongoing since 2019 and I'm overwhelmed by emotion and cannot be present at the tribunal.

The judge took the time to explain things to me in a way I could understand and I will be forever grateful for the judge's conduct, he made me feel comfortable in the court. I understand there are implications of me not being present at the tribunal. I respect any decision the judge makes.

I apologise to all parties as I know this isn't anyone's issue but my own. I'm truly sorry.'

18. At the clerk's request, the Claimant followed up with the following email:

'Following on from my last email I confirm I will not be in attendance tomorrow. Again, I'm truly sorry and apologise to all.'

19. The Tribunal saw the Respondent at around 14:10 and gave its judgment and reasons orally on the rule 47 application. Written reasons are provided without application from either party so that the Claimant can understand the judgment, which was reached in his absence.

The law

20. Rule 47 provides:

'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.'

21. We had regard to the Court of Appeal case of *Roberts v Skelmersdale College* [2004] IRLR 69. Although it was decided under the old rules, there is sufficient similarity between the two rules that it remains good law. The following principles emerge (so far as they apply to new rule 47):

21.1. the rule confers a very wide discretion;

21.2. the rule does not impose on an employment tribunal a duty of its own motion to investigate the case before it, nor to satisfy itself that on the merits the Respondent has established a good defence to the claim of the absent employee;

21.3. the Tribunal has a discretion to require the employer to give evidence, but no duty to do so;

21.4. before making a decision the Tribunal shall have regard to the information required under the rule.

Conclusions

22. We start by saying that we are sympathetic to the Claimant's situation: he is clearly facing very significant challenges in his personal life.

23. However, failing to attend a hearing of your own case is a serious matter. The Claimant could have made an application to adjourn the hearing on Day 1, when he must have known already that he would not be able to attend on Day 2, either altogether or until the afternoon; he did not do so. Instead, he permitted the Respondent to incur the costs of attending the hearing.

24. It is clear from the Claimant's emails today that he has made a conscious choice not to attend the hearing of his case today or tomorrow. He was fully aware of the potential consequences of that decision.

25. We bore in mind the guidance in *Roberts* that there is no obligation on the Tribunal to conduct its own investigation into a case where a party fails to attend. We also had regard to the information available to ask from the claim form, response and the Claimant's communications with the Tribunal.
26. We considered whether it would be appropriate to continue with the hearing in his absence and concluded that it would not: he was in the middle of his evidence, which would not now be completed. This is a constructive dismissal case and the burden is on the Claimant to prove that there was a fundamental breach of contract, in response to which he was entitled to resign.
27. We had regard to the fact that the dismissal of a case under rule 47 is a severe sanction. We considered whether it would be right, as an alternative, to adjourn the hearing to another occasion. We decided that it would not. If the case were relisted, given the current caseload being dealt with by the Tribunal, it would be many months before it could come on for hearing. The delay would be inherently undesirable in a case which is already some four years old. Given what we know of the Claimant's personal circumstances, we infer that it is very unlikely that the Respondent could be compensated in costs for the vacation of this hearing and its resumption at a later date, nor for the additional preparation and attendance time which would be required of the Respondent's witnesses, two of whom have travelled long distances to attend. Nor would it be just for them to have the case hanging over them for months to come. They were entitled to assume that the matter would be resolved one way or the other at this week's hearing. We also had regard to Tribunal resources. There is huge demand for hearings in this region. It would not be right, in our view, for further days to be allocated to the Claimant's case in circumstances where the matter could have been dealt with this week.
28. In all the circumstances, we dismiss the Claimant's case under rule 47, because he has neither attended nor been represented on the second and third days of this hearing.
29. Mr Chadwick indicated on behalf of the Respondent that, notwithstanding its view that the conduct of the Claimant had been unreasonable, there was no application by his client for an order that the Claimant pay the Respondent's legal costs.
30. These proceedings are now concluded.

**Employment Judge Massarella
Date: 26 February 2025**