EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Miss G Palfrey and **Respondent:** Drop Music Digital Limited

HELD AT Birmingham **ON** 13 January 2022

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: No appearance

For the respondent: Mr D Piddington (Counsel)

JUDGMENT

(1) The claimant's claims for automatically unfair dismissal, disability discrimination, detriment due to public interest disclosure and breach of contract are dismissed.

(2) The claimant is ordered to pay the respondent £900 in respect of costs for the brief fee incurred for today's hearing.

REASONS

1. Following a preliminary hearing held on 14 July 2021 before Regional Employment Judge Findlay the claimant's claims were identified as unfair dismissal on the ground that the only or principal reason for dismissal was a public interest disclosure (section 103A Employment Rights Act 1996), disability discrimination, detriment due to public interest disclosure and breach of contract relating to a pay rise which the claimant says was agreed between the parties to be paid.

2. Whilst Regional Employment Judge Findlay was able to give directions for the future conduct of the case she was not able to explore the claims fully as the

claimant had difficulty concentrating and was becoming upset during the hearing. As such, Regional Employment Judge Findlay set the matter for a further preliminary hearing by video on 3 December 2021 so that the issues could be properly identified and further directions could be given.

3. On 1 December 2021 the claimant emailed the Tribunal to indicate that she was seeking an adjournment of the preliminary hearing as she was not well. No fit note was provided. This was granted on 2 December 2021 by Regional Employment Judge Findlay and the matter was relisted for a preliminary hearing on 13 January 2022.

4. On 12 January 2022 the claimant emailed the Tribunal at 12:19 indicating that she was unable to attendance the preliminary hearing for today due to medical reasons. The claimant indicated that she was not fit due to chronic and neuropathic back pain of which she had a flare up and was currently bed bound. As such she would not be able to attend the hearing. She asked for the hearing to be postponed once more. The claimant produced a fit note dated 13 December 2021 which indicated that she was not fit for work until 23 January 2022 due to severe back pain, neuropathic pain.

5. The claimant's application was objected to by the respondent on the basis that the matter had already been postponed previously and the claimant had had ample time to request a postponement. Making an application an application on the afternoon prior to the hearing was completely unreasonable; that the claimant had no provided any evidence to support her ill health and that due to the fact that the claimant would incur a brief fee due to the late cancellation of the hearing. The respondent indicated that any adjournment would unfairly prejudice the respondent and the claimant's actions demonstrated that she was not taking the proceedings seriously.

6. In response to the claimant's objections the claimant produced a document showing that she was overdue a review by the rheumatology department at Heartlands Hospital.

7. The claimant's application was refused by Employment Judge Dimbylow on the basis that the claimant had not provided adequate medical evidence; that the Tribunal would expect to see a medical note confirming that the claimant could not participate in the hearing, which was being dealt with remotely in any event, and the claimant would not need to leave home. As such, the case remains listed for hearing on 13 January 2022. This decision was communicated to the parties at 16:13.

8. The claimant subsequently emailed the Tribunal at 16:25 to seek clarification of the medical evidence required by the Tribunal as her GP office was currently close. The claimant indicated that she was physically unwell to engage in a 3 hour virtual hearing, was bed bound and unable to sit up for longer than between 10-20 minutes. She also produced an extract from her medical records from the NHS App for 13 December 2021 when she went to see her GP which did not indicate that the claimant was bed bound and unable to sit up for long

periods as indicated. The claimant that her application be reconsidered in light of this further information.

9. The claimant did not attend the hearing. The clerk telephone the claimant twice to advise the claimant that she needed to attend the hearing but the claimant did not answer her phone. As such, the clerk emailed the claimant to advise her that the hearing was proceeding at 10.30am and providing her with the link to the hearing. The claimant did not attend. As such, I put back the start time to 11am but the claimant still did not attend.

10. I considered whether it was possible to progress the clarify the issues in order to progress the claimant's claim in her absence. However, it was not possible to do so as the further information provided by the claimant did not provide sufficient clarification of her claims and her input was required to clarify the issues.

11. Mr Piddington, for the respondent agreed that the claim could not be progressed and the issues clarified in the absence of the claimant made an application that the claimant's claim be dismissed under rule 47 of the Employment Tribunals (Constitution and Rules of Procedure Regulations) 2013 due to the claimant's non-attendance on the basis that the claimant had failed to provide any further information to support her non-attendance notwithstanding the fact that she had been able to email the Tribunal so swiftly after receiving confirmation that her application for an adjournment had been refused, that she had provided no further medical evidence to support her application and had failed to attend the hearing this morning despite the attempts made by the Tribunal to contact her. As the claim could not be progressed it should be dismissed by the Tribunal.

12. I was satisfied that the claimant had failed to provide sufficient medical evidence to support any further application for an adjournment, had failed to provide an explanation for her non-attendance at the hearing this morning, that the Tribunal had made sufficient attempts to make contact with the claimant despite which the claimant had failed to attend the hearing or to provide an explanation to justify her non-attendance. The Tribunal had also delayed the start time of the hearing in order to give the claimant more time to attend the hearing. As such, given that it was not possible to progress the claimant's claim in her absence I was satisfied that it was appropriate to dismiss the claim pursuant to rule 47.

13. Following the dismissal of the claim Mr Piddington made an application for costs in the sum of £750 plus VAT (in total £900) in respect of his brief fee which had been incurred.

14. The Tribunal has power to order the payment of costs under rule 75 of The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Rule 75 (1) provides:

    "A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of proceedings (or part) or the way that the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success; [or
(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins]".

15. Rule 76 provides :

"*A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party".*

16. Rule 78 (1) provides that a costs order may:

"(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party..."

17. Rule 84, headed 'Ability to pay', provides:

"In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay".

18. The purpose of an award of costs is to compensate the party in whose favour the order is made and not to punish the paying party. Questions of punishment are irrelevant both to the exercise of the discretion whether to award costs under Rule 76(1) and to the nature of the order that is made (**see Lodwick v Southwark London Borough Council [2004] EWCA Civ 306, [2004] IRLR 554**, at para 23; and **Davidson v John Calder (Publishers) Ltd and Calder Educational Trust Ltd [1985] IRLR 97, [1985] ICR 143, EAT**).

19. The Court of Appeal in **Yerrakalva v Barnsley Metropolitan Borough Council and ors [2012] ICR 420, CA**, held that costs should be limited to those '*reasonably and necessarily incurred*'.

20. I am aware that the claimant secured alternative employment following her dismissal by the respondent. Given the lateness of the claimant's application, her failure to provide sufficient medical evidence and failure to the attend the hearing today the respondent has incurred a brief fee of £750 plus VAT which could have been avoided had the claimant made a more timely application. In the circumstances I am satisfied that the respondent should be awarded the costs of the brief fee of £900 to include VAT.

Signed on 13 January 2022
Employment Judge Choudry