



EMPLOYMENT TRIBUNALS

Claimant: AB

Respondent: The General Council of the Bar of England and Wales

Heard at: London Central (conducted by video using CVP)

On: 17-19 April 2022

Before: Employment Judge Khan
Ms J Holgate
Mr M Ferry

Representation

Claimant: No attendance

Respondent: Ms A Greenley, counsel

JUDGMENT

The claim is dismissed under rule 47 of the Employment Tribunals Rules of Procedure 2013.

REASONS

1. The claimant failed to attend this hearing. She made an application for an adjournment on the first morning. The respondent objected to this application and applied for the claim to be dismissed under rule 47.
2. We should also record that having applied to set aside the anonymity order granted by the tribunal on 11 April 2023, the respondent did not advance this application in the circumstances in which we dismissed the claim and has reserved its position should these proceedings be restored.

The relevant law

3. Rule 30A(2) provides that where a party makes an application for postponement of a hearing less than 7 days before the date on which the hearing begins, a tribunal may only order the postponement in specified circumstances which include, materially, where there are exceptional circumstances. Rule 30A(4) explains that “exceptional circumstances” may

include ill health relating to an existing long term health condition or disability.

4. Rule 47 provides that:

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 the party. Before doing so, it shall consider any information which is available to it, after making enquiries that may be practicable, about the reasons for the party's absence.

5. In **Sokolik v Kobre & Kim (UK) LLP** [2022] EAT 111, an appeal which was concerned with a decision of a tribunal to refuse a postponement application and dismiss the claim under rule 47, the EAT (Eady J (P) presiding) gave the following guidance: (1) in determining an application for a postponement the tribunal is exercising its general case management powers; (2) the Presidential Guidance on Seeking a Postponement of a Hearing sets out the procedure which is to be followed and makes clear that any application on the grounds of ill-health will require medical evidence; (3) although a tribunal has a broad discretion as to whether to grant a postponement, the approach to be taken when considering an application on medical grounds has been the subject of guidance laid down by the Court of Appeal in **Teinaz v London Borough of Wandsworth** [2002] ICR 1471 and **Andrea v The Lord Chancellor's Department** [2002] IRLR 728. As was made clear in **Teinaz** (at paras 21 and 22): (i) the onus is on the applying party to prove the need for an adjournment; (ii) a tribunal must be satisfied that there is a genuine basis for the party's inability to attend; (iii) if there is some medical evidence that the party seeking the adjournment is unfit to attend but the tribunal has doubts as to whether the evidence is genuine or sufficient, it has a discretion as to whether to make directions to resolve such doubt, for example, by directing that further evidence be provided promptly.
6. Even once a claimant's unfitness to attend a particular hearing has been established, it does not automatically follow that the adjournment or postponement shall be granted. In **Riley v The Crown Prosecution Service** [2013] EWCA Civ 951 the Court of Appeal warned against adjourning cases in the hope that the claimant's medical condition will improve.
7. In **Phelan v Richardson Rogers Ltd and anor** [2021] ICR, the EAT underlined the need to balance the claimant's right to a fair trial and the implications of refusing to grant a postponement on medical grounds, which would usually outweigh the inconvenience and cost to the other party of granting the application, with the respondent's right to a fair trial and the wider public interest in the expeditious administration of justice. The tribunal's assessment of when, realistically, the case is likely to come to an effective hearing if the application is granted, and what the medical evidence indicates about that, will often be important considerations. The tribunal may also draw on other relevant evidence and information.

The claimant's application and the tribunal's orders for further information

8. The claimant's application for an adjournment was made on her behalf, by a third party, Alexi G, by an email sent at 09:16 on the first morning of the hearing, as follows:

"Dear Employment Tribunal, I am writing to you on behalf of Laura Fox. I regret to inform you that Laura was admitted to A&E this morning. In light of the severity of her condition, I am seeking an emergency adjournment on Laura Fox's behalf. Yours faithfully, Alexis"

9. Having commenced the hearing and canvassed the views of Ms Greenley, for the respondent, we adjourned until 1pm and made the following order which was sent to the parties by email:

"The claimant has applied for an adjournment on medical grounds, however, the claimant has failed to provide any information relating to her medical condition or its prognosis. Nor is it clear whether this application is to adjourn for today only or for the entire hearing. The hearing has been adjourned until 1pm when it shall resume and, subject to the information below which the claimant has been ordered to provide, the claimant's application will be determined.

The claimant is ordered to write to the tribunal and the respondent by 12.30pm today to confirm the following (i) is her application to adjourn the hearing today or the entire five-day hearing? (ii) in either case, what are the medical reasons for this application and what is the prognosis for recovery (if known)."

10. When, for a reason unrelated to the parties, it was necessary to adjourn the hearing for the remainder of the day, a further order was made in the following terms (which was, as before, sent to the parties by email):

"The hearing has been adjourned for the day and will resume at 10am tomorrow morning. This is because of a family emergency.

The deadline by which the claimant is ordered to provide the tribunal and respondent with details of her relevant medical condition and prognosis, if she is applying for the remainder of this week's hearing to be adjourned, is extended to 4.30pm today. If the claimant will be able to take part in the hearing from tomorrow so that a further adjournment is not sought then the claimant must also confirm this by 4.30pm today."

11. Alexi G sent a second email at 11:58 on the same day:

"Dear Employment Tribunal, I'm writing on Laura's behalf since she is in the hospital and unable to respond to emails currently at this time while she is being treated. She was admitted this morning with chest pains and severe breathing difficulties. She will need at least a number of months to recover. Therefore the entire five day

hearing must be adjourned for the foreseeable future. Yours faithfully, Alexis”

Alexis G was thereby confirming that the claimant sought an open-ended adjournment.

9. Before we resumed on the second day of the hearing, the respondent emailed the tribunal attaching a letter setting out its objections to the claimant’s application and applying for the claim to be dismissed under rule 47; in the event that we decided to make a further order to request medical information from the claimant, the respondent invited the tribunal to make an Unless Order for such information, under rule 38.
10. When we resumed the hearing, having heard further representations from Ms Greenley, we were satisfied that in the circumstances, justice was served by directing the claimant to provide further information by 9am the next day. The following order (which was not an Unless Order) was sent out to the parties by email:

“It has been necessary to adjourn the hearing until 10am tomorrow, 19 April 2023, in order that the claimant is given a further, and final, opportunity to provide the tribunal and the respondent with all relevant information to support the application to adjourn this hearing (as per the Presidential Guidance on Seeking a Postponement of a Hearing).

The claimant is ordered to provide the tribunal and the respondent with the following information **by no later than 9 am on 19 April 2023**:

1. A full explanation of the medical reasons for the claimant’s inability to attend the hearing from 17-21 April 2023.
2. Supporting medical evidence including (i) a statement from a medical practitioner as to the claimant’s fitness to attend the hearing from 17-21 April 2023 and the prognosis of the condition and an indication of when the claimant is likely to be sufficiently recovered to attend a hearing in the future; (ii) a discharge summary or other document referable to the claimant’s attendance at A&E on 17 April 2023.

Any failure by the claimant to comply with this order may result in the claimant’s adjournment application being refused and the claim being dismissed under rule 47, on the basis of the information which is available to the tribunal about the reasons for the claimant’s non-attendance.”

11. Before we resumed on day three, Alexis G sent a further email attaching a discharge summary from University Hospitals Sussex dated 17 April 2023 and a letter from Dr Springgay, the claimant’s GP, dated 18 April 2023. The discharge summary recorded that the claimant had complained of “sudden onset of chest pain today morning...left sided, stabbing type, associated with sweating. felt pins and needles sensation. Hyperventilation present. ? panicky”, there were no physiological issues

on examination and she was discharged home and advised to return to the Emergency Department “In case of any red flag signs”. There was no reference to any psychological symptoms or history. Whereas the letter from Dr Springgay explained:

“...She [the claimant] has a diagnosis of PTSD depression and anxiety. She is experiencing acute psychological symptoms which is leading to physical symptoms and has needed an A&E admission with chest pain this week. In my opinion Ms Fox is unfit to attend the tribunal hearing. This will be the case until she can complete a course of psychotherapy for her mental health conditions and have appropriate follow up with medical professionals. This state of affairs is likely to continue for several months.”

12. What we have recorded above is the extent of the information provided on the claimant’s behalf regarding the reasons for her non-attendance at this hearing and her prognosis.
13. We also had regard to the report of Professor Dalgleish, Specialist Clinical and Research Psychologist, dated 7 January 2023, in the hearing bundle [1192-1200], insofar as it related to the claimant’s PTSD, as follows:
 - The claimant met “the criteria for PTSD with respect to her experiences at work described above...[the claimant] described recurrent intrusive and distressing recollections of these experiences...[which] are triggered by reminders of the events and of the ongoing proceedings; for example, the need to prepare a witness statement.” [1196]
 - The claimant “reported feeling psychological distress when reminded of these events including fear, anxiety, worry, guilt, shame, and also described physiological reactions including heart racing, feeling hot, and shaking...[and] described persistent avoidance of stimuli related to her traumatic experiences. She said that she tries to avoid thoughts, feelings or recollections of the events.” [1196]
 - “With respect to her PTSD, this can be challenging to treat in a context where the affected individual continues to be exposed to the context in which the distressing events occurred as in the present case where there are ongoing legal proceedings that require [the claimant] to engage extensively with her employers or their representatives and with the circumstances of the case.” [1199]
 - “These mental ill-health reactions...have made it difficult for her to proceed with her case against her employers as simply engaging with the facts is very distressing and part of the clinical response that is marked avoidance and withdrawal which she must then endeavour to overcome...The reliving or reactivation of memories of the original distressing experiences in people with PTSD involves a reactivation of the body’s threat response. This threat response is commonly heightened by high stress levels, threats in the person’s current environment and a perceived lack of safety and stability. A particular difficulty in situations where the individual is unable to move beyond the context in which the distressing events occurred is that the PTSD will persist.” [1199]

- “I would be optimistic that once ongoing proceedings are resolved [the claimant’s] PTSD...would remit and accompanying symptoms of anxiety and depression would improve if she was provided with appropriate help such as a course of cognitive behaviour therapy (CBT)...CBT will be far less effective while the proceedings are ongoing although more general therapeutic support during this period would potentially be helpful” [1200]

14. The respondent confirmed that the claimant has been on sickness absence since February 2022 because of stress and anxiety. The claimant had three episodes of sick leave before that on 2 – 4 June, 24 June – 9 July and 14 September – 19 October 2021 owing to work-related stress.

The respondent’s evidence and submissions

15. We heard the evidence of Wilf White, Director of Communications and Public Engagement, and the respondent’s principal witness in that he is alleged by the claimant to have discriminated against and harassed her in relation to all 11 allegations that are brought. Mr White prepared a supplementary witness statement signed on 19 April 2023 in relation to the claimant’s application in which he states (materially) that: in September 2021, not long after he found out about the claimant’s complaints about his alleged conduct he was taken to hospital with chest pain and has since been diagnosed with probable atypical angina and coronary heart disease (para 4); his chest pains have been more frequent and severe in the last two months and he has had issues with his breathing which he attributes to the stress of these proceedings (para 6); he attended Dr Lyon, Senior Lecturer and Honorary Consultant Cardiologist, on 2 March 2023, who advised him to avoid stress to prevent an aggravation of cardiac conditions and that there is a small risk of serious cardiac complications which could be life-threatening (paras 7, 11 and 12); he has found the current proceedings very distressing with chest pain and disturbed sleep (para 9); he is concerned about his physical health and mental well-being if the claimant’s adjournment application were granted (para 11). Appended to this statement was a letter from Dr Lyon to Mr White’s GP dated 2 March 2023 and a second letter from Dr Lyon dated 18 April 2023. Mr White was sworn in and we permitted Ms Greenley to ask him a short number of supplementary questions in which he amplified the contents of his statement.

16. We also read the following documents which were forwarded by the respondent on the third day of the hearing: an email chain between the respondent and Royal Holloway University regarding a request for a reference for the claimant in relation to a new post starting on 24 April 2023; an email from the claimant to the tribunal dated 14 April 2023 resisting the respondent’s application to set aside the anonymity order; an email chain between the claimant and the respondent’s solicitor which included correspondence from the claimant dated 11 April 2023 in relation to the provision of documents to the tribunal.

17. We also considered the respondent’s letter dated 18 April 2023 and Ms Greenley’s oral submissions.

Conclusions

18. We refused the claimant's application to adjourn and dismissed the claim, under rule 47, for the following reasons:

- (1) Having considered the discharge summary and GP letter, together with Professor Dalglish's report, we found that the claimant has established that she was unfit to attend the hearing. Although the discharge summary recorded that there were no physiological issues on examination and that the claimant was discharged without further intervention, which on its own would not show that she was unwell or unable to attend the hearing for the remainder of the week, and whilst it is likely that Dr Sanggay's opinion was not based on an examination of the claimant, because her letter omitted what would have been a very relevant and standard detail, had this been the case, we accepted her opinion that the claimant was not fit to attend the hearing this week for the reasons she has given because the claimant's complaint of left-sided chest pain, sweating, and hyperventilation is consistent with the physical symptoms of PTSD listed by Professor Dalglish in his report.
- (2) However, in relation to prognosis, we were not satisfied, from the information and medical evidence provided by the claimant to support her application and the other material we have considered, that there is a reasonable likelihood of the claimant being fit to take an active part in trial should a final hearing be listed within a timeframe that affords fairness to both parties. Whilst Dr Sanggay's opinion is that the claimant will remain unfit to take part in a hearing "for several months" until she can complete "a course of psychotherapy and have appropriate follow up with medical professionals" this timescale is imprecise, there is no reference to a specific treatment plan, no confirmation that a referral has been made for psychotherapy, or of the claimant's agreement to the same, nor any clarification about the expected timescale for a referral, the expected duration of a course of psychotherapy or the likelihood of success of such treatment. In respect of prognosis, we therefore place little weight on Dr Sanggay's opinion and place greater weight on Professor Dalglish's report, from which it is clear that these proceedings will continue to present a significant challenge to the claimant's mental health and her capacity to engage with a trial, for as long as they remain ongoing in that she would remain susceptible to having her PTSD being retriggered with little prospect of effective therapeutic intervention.
- (3) It is relevant that the claimant has applied for an open-ended adjournment and not one for a specified duration. Given the respondent's objection and the reasons we set out below we do not find that it would be in the interests of justice to grant such an application. Notwithstanding the terms of the application before us, we did, for completeness, explore how soon a final hearing could be relisted: whilst Ms Greenley was not available until 2024, it seemed likely that all of the respondent's witnesses would be available from September 2023; we found that there was no basis on which we could conclude that there was a reasonable likelihood

of the claimant being fit for trial in September 2023 and because of our findings in relation to Mr White, we do not find that adjourning to that date, or to January 2024, was tenable because of the uncertainty concerning the claimant's prognosis.

- (4) We accepted Mr White's evidence about the impact these proceedings have had on his health, that the frequency and severity of his cardiac symptoms have increased over the last two months and of the risk of ongoing adverse impact on his physical wellbeing and mental health of an open-ended or lengthy adjournment to these proceedings.
- (5) We therefore found that the prejudice to the claimant of refusing the application was outweighed by the prejudice to the respondent of a potentially open-ended adjournment, and their right to have a trial within a reasonable timeframe, and the wider public interest in the prompt and efficient administration of justice.
- (6) Having refused the claimant's application, we decided that was necessary to dismiss the claim under rule 47 having considered the information available to us in relation to the claimant's non-attendance and taken reasonable steps to procure further information and evidence; we were satisfied that this was not a case where it would be appropriate to hear the claim in the claimant's absence, because the burden is on the claimant to establish a prima facie case of discrimination; and there was no other basis for exercising our residual discretion to adjourn the case, having refused the claimant's application on medical grounds, for the reasons set out above.

Employment Judge Khan

Date 25.04.23

REASONS SENT TO THE PARTIES ON

26/04/2023

FOR EMPLOYMENT TRIBUNALS