



EMPLOYMENT TRIBUNALS

Claimant: Ms P Prince

Respondent: The Royal Marsden NHS Foundation Trust

Heard at: London Central (in person)

On: 23 September 2022

Before: Employment Judge E Burns (sitting alone)

Appearances:

For the Claimant: Did not attend

For the Respondent: Samuel Nicholls, Counsel

RESERVED JUDGMENT

The claimant's claims against the respondent are dismissed under rule of The Employment Tribunal Rules of Procedure 2013 (the "Rules")

because of her failure to attend or be represented at today's preliminary hearing.

REASONS

BACKGROUND

1. Following a period of early conciliation between 26 November and 26 December 2020, the Claimant presented a claim to the employment tribunal on 24 February 2021. The Claim Form included claims for race and disability discrimination and arrears of pay, but it was not possible to properly identify all of the claims or the legal basis of the claims. The Respondent raised this concern in its Grounds of Resistance.
2. The tribunal scheduled a private preliminary hearing by video for the purposes of case management at 10 am on 6 October 2021. On 4 October 2021, the Claimant applied for the preliminary hearing to be postponed because of ill health by an email sent at 15:18. She attached a medical certificate confirming she had been signed off as not fit for work by her GP for one month from 15 September 2021 to 14 October 2021 due to "*hip pain and post covid symptoms*".

3. It is relevant to note that in her email the claimant said, "*Documents for the case will follow.*"
4. Although, the medical evidence did not specifically deal with the claimant's fitness to attend and participate in the preliminary hearing, the respondent did not object and the postponement application was granted.
5. The hearing was rescheduled to take place by video on 12 November 2021 at 2:00 pm. On 10 November 2021 by an email sent at 22:30, the claimant applied for a postponement of the hearing due to the unexpected death of a relative due to Covid 19. She said that the funeral would be taking place on 12 November and she would therefore be unavailable for the preliminary hearing. The claimant did not provide any evidence to support her application. The respondent did not object, however, and the application was granted.
6. The hearing was rescheduled to take place by video on 17 December 2021 at 11:00 a.m. On 16 December 2021 the claimant requested an urgent postponement in an email sent at 15:07. The reason for the application was said to be "*based on current sickness of post covid symptoms which has increased, causing hip pain in my bones and flare up of my severe Asthma condition with in turn experiencing shortness of breath.*" The claimant attached a medical certificate confirming she had been signed off as not fit for work by her GP for 2 months from 15 November 2021 to 14 January 2022 due to "*hip pain and post covid symptoms*".
7. As before, although the medical evidence did not specifically deal with the claimant's fitness to attend and participate in the preliminary hearing, the respondent did not object and the postponement application was granted. The letter from the tribunal confirming the postponement reminded the claimant of the provisions of rule 30A of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013.
8. The hearing was rescheduled to take place by telephone on 29 March 2022 at 10 am for two hours. On 25 March 2022, the claimant emailed the tribunal to confirm she would be attending the hearing and attached a document providing additional details of her claim. Although helpful, the statement did not provide the required clarity needed to properly identify all of the claims or the legal basis of the claims.
9. The preliminary hearing was allocated to Employment Judge A Richardson, who used the time available to explain what additional information was required from the claimant and why it was needed. She began the process of going through the statement to identify particular claims, but it was not possible to complete the task.
10. Employment Judge, a Richardson therefore scheduled a further private preliminary hearing for case management on 8 June 2022 to complete the task. In addition, she ordered the claimant to provide specific further information by 22 April 2022. She also ordered the claimant to prepare a written statement containing information about her medical conditions (an

Impact Statement) and to disclose her medical notes to the respondent by the same date. These orders including the date for compliance were agreed with the claimant and in fact, the judge gave the claimant longer than she requested because there was quite a bit of work to do.

11. On 4 May 2022, the respondent made an application by email to the tribunal sent at 15:05 for an unless order on account of the Claimant's non-compliance with the orders. The respondent had written to the claimant about her non-compliance by email on 28 April 2022, but had not received a response from her.
12. On 2 June 2022, in an email sent to the tribunal at 10:27, the Claimant applied for the hearing scheduled to take place on 8 June 2020 to be postponed. She said that the application was "*based on current medical reasons long Covid symptoms which have increased fatigue and bone weakness and breathing difficulties.*" She added that she had an appointment in the respiratory clinic on 6 June 2022 and attached evidence confirming this and a medical certificate confirming she was not fit for work due to hip pain and long Covid for two months from 30 of May to 29 July 2022.
13. It is relevant to note that in her email the claimant said, "Evidence will be provided for the case in the case two weeks."
14. As before, although the medical evidence did not specifically deal with the claimant's fitness to attend and participate in the preliminary hearing, the respondent did not object and the postponement application was granted. In its email to the tribunal, sent at 11:41 on 6 June 2022, the respondent explained that it considered a short postponement was necessary because the claimant had failed to comply with the orders made on 29 March 2022, meaning the case had therefore not progressed as envisaged at the preliminary hearing. It asked that its application made on 4 May 2022 seeking an unless order was dealt with as a priority prior to rescheduling the preliminary hearing.
15. The tribunal wrote to the claimant on 7 June 2022 to seek her comments on the respondent's application for an unless order. In the meantime, a private preliminary hearing for case management was scheduled to take place on 12 August 2022 at 10:00 am by video.
16. On 16 June 2022, the respondent chased for an urgent a response to its application for an unless order in an email sent at 18:15. On 20 June 2022, the claimant wrote to the respondent and the tribunal by email sent at 11:07 to say that the reason she had not previously been able to send documents was due to long covid symptoms. She said that the outstanding documents would be sent by 24 June by 6:00 pm.
17. When no such documents were received by the respondent, it wrote again to the tribunal on 30 June 2022 by email sent at 12:33 asking that its application for unless order be considered. In response, on 4 July 2022, Regional Employment Judge Wade converted the private preliminary

hearing on 12 August 2022 into a preliminary hearing in public to consider whether the claimant should be struck out because the claimant had failed to comply with orders of the tribunal and bleak or to actively pursue the case.

18. In the meantime, on 4 July 2022 (at 09:49) the claimant sent a document to the respondent said to be her Impact Statement. In her email, she said she had previously sent the requested information "a couple of weeks ago." When asked by the respondent to confirm exactly when this was and provide a copy of the email the claimant did not reply.
19. On 4 August 2022, by an email sent at 07:16, the claimant provided an updated statement with further particulars of her claim. Her email said that she had sent the statement multiple times. The statement contained some additional information when compared to the statement sent on 25 March 2022, but not a great deal. In addition, it was not in the format ordered by Employment Judge A Richardson and did not address the specific questions she had wanted the claimant to answer. She then sent a further 6 emails to the respondent attaching her medical evidence and some other documents. She said that she had sent these to the respondent previously multiple times. When asked by the respondent to confirm exactly when this was and provide copies of the previous emails the claimant did not reply.
20. I conducted the preliminary hearing held in public by video on 12 August 2022. We were continuing to develop the list of issues when the claimant began to experience technical difficulties. This resulted in the hearing, having to be abandoned. Before this, as a potential contingency plan, we had discussed the possibility of finishing the hearing in person on 23 September 2022. This was agreed with the parties, including the date.
21. As I envisaged a potential application from the respondent for a deposit order, I ordered the claimant to prepare a short statement setting out information about her means to pay a deposit to be provided to the respondent on or before 16 September 2022. I also ordered the parties to agree a bundle to be used at the preliminary hearing.
22. According to Mr Nicholls, the claimant failed to provide the statement to the respondent even though it reminded her that she needed to do this in a letter dated 9 September 2022. She also did not engage with the respondent's solicitors in relation to the preparation of the bundle. In its letter of 9 September 2022 to the claimant, the respondent told her that it may wish to make an application for a strike out order on several grounds, including that

"you have unreasonably failed to comply or not fully complied with ET Orders - pursuant to Rule 37(c) of the Rules. For example, you failed to comply with the case management orders in paras. 6 and 10 of the Record of a Preliminary Hearing (PH) which took place on 29 March 2022, requiring you respectively to particularise your discrimination allegations/provide a disability impact statement addressing a number of stipulated matters; and

the manner in which the proceedings have been conducted by you has been unreasonable - pursuant to Rule 37(1)(b) of the Rules. For example, you

have repeatedly asserted that you provided the information ordered by the ET at the PH on 29.03.22 prior to your various emails sent to this firm on 04.08.22, yet no such information was not received by us and you have failed to respond to our repeated requests for evidence of your asserted earlier correspondence. As such, the Respondent is concerned that your assertions indicating earlier compliance with the ET's Orders lack candour."

23. On the morning of today's preliminary hearing, at 08:36 on the 23 September 2022, the claimant emailed the tribunal as follows:

"Morning,

I'm requesting an urgent postponement if today's Hearing 24.09.2022 due to to sudden death of a My family member due to the shock this has affected my arthritis in my hip and i'am unable to walk.

Please can you postpone this case . Due to the fact I have to attend in person i'am unable to do so.

I've emailed the Defendants

Please do not strike out this case

Priscilla Prince"

24. The respondent opposed the application for a postponement and asked me to proceed with the hearing and to strike the claim out.

THE LAW

Postponement and Proceeding in Absence

25. The following tribunal rules are relevant.

26. Rule 30A says:

- (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.

- (3) Where a Tribunal has ordered two or more postponements of a hearing in the same proceedings on the application of the same party and that party makes an application for a further postponement, the Tribunal may only order a postponement on that application 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.
- (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.

27. Rule 47 says:

“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.”

28. The overriding objective in Rule 2 of the Tribunal Rules is also relevant at all times when considering applications of this nature. It says:

“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.”

Striking Out Claims

29. The Tribunal's powers to strike out claims in connection with the conduct of proceedings are contained in Rule 37 of the Tribunal rules. I set the rule out in full:
- (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:
 - (a) that it is scandalous or vexatious or has no reasonable prospect of success;
 - (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
 - (c) for non-compliance with any of these Rules or with an order of the Tribunal;
 - (d) that it has not been actively pursued;
 - (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).
 - (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
30. The provisions that are potentially relevant in this case are 37(1)(b) and 37(1)(c) and 37(1)(d). There is a degree of overlap between them. When considering a strike out application under Rule 37(1)(c), the tribunal must identify whether there has been non-compliance with a rule or order. Rule 37(d) applies where the claimant is failing to take steps to enable the litigation to progress. Where there has been a deliberate and/or persistent disregard of tribunal rules and orders, this is likely to amount to unreasonable conduct under rule 37(1)(b).
31. Even where there has been non-compliance and/or unreasonable conduct, strike out will not be justified in every case. A tribunal must consider whether striking out is a proportionate response to the non-compliance taking into account the nature of the non-compliance, the reasons for it and ultimately whether it is still possible for there to be a fair trial (*Blockbuster Entertainment Ltd v James* [2006] IRLR 630, CA; *De Keyser Ltd v Wilson* [2001] IRLR 324, EAT; *Bolch v Chipman* [2004] IRLR 140, EAT). Each case turns on its own particular circumstances.
32. The overriding objective in Rule 2 of the Tribunal Rules is also relevant at all times when considering a strike out application of this nature.

ANALYSIS AND CONCLUSIONS

Postponement Application

33. I decided not to grant the claimant's application for a postponement and to proceed with the hearing in her absence. My reasons were as follows.
34. This was the fifth application made by the claimant for a postponement of a hearing. The provisions in Rule 30(A)(3) therefore apply.
35. On each previous occasion, the claimant's application to postpone the hearing was made at a very late stage, less than 7 days before the hearing. The application for the postponement of today's hearing was consistent with the pattern.
36. Contrary to the previous occasions, the respondent objected to the postponement. The postponement application was not necessitated by an act or omission of another party or the Tribunal and therefore I could only grant it under rule 30A(3)(c) if I was satisfied that there were exceptional circumstances.
37. I was not so satisfied. In my judgment, the application for postponement was not made genuinely. It provided insufficient information about the claimant's circumstances and was not supported with any documentary evidence.
38. I say this for three reasons:
 - First, the claimant did not specify her relationship with the family member that she said had suddenly died or say when this happened in her email. She provided no corroborating evidence of this event. This was the second occasion when the Claimant sought a late postponement due to an unexpected death in her family. Whilst not impossible, I consider this to be unlikely.
 - Secondly, absent any supporting medical evidence, I found it difficult to accept that shock would aggravate the claimant's arthritis with the result that she was unable to walk.
 - Third, if an inability to walk was the genuine reason for the Claimant being unable to attend the hearing, I would have expected her to have been aware of this earlier and not simply on the morning of the hearing and to have asked that the format of the hearing be changed to a video hearing.
39. As I considered the postponement application was not made for a genuine reason, it followed that I could not grant it under the exceptional circumstances power.

Strike Out

40. Before proceeding to hear submissions from the respondent as to why I should strike the claim out, I first considered whether the claimant (a) had had sufficient notice of the fact that strike out would be considered at the hearing; and (b) had had a reasonable opportunity to make representations opposing the application as required by rule 37(2).

41. I concluded that she had sufficient notice of the possibility of her claim being struck out.
42. The preliminary hearing on 12 August 2022 was converted into a public preliminary hearing to consider whether the claim should be struck out on the tribunal's own initiative. That remained a "live" consideration at today's hearing. The notice of the hearing referred to the purpose of the hearing including considering any applications the respondent may wish to make for strike out and the respondent had written to her on 9 September 2022 to say that it was likely such applications would be made. Finally, her email requesting a postponement made express reference to the possibility of a strike out
43. I also concluded that she had had a reasonable opportunity to make representations and in fact had done so when she asked the tribunal not to strike out the claim. Having realised that this was a possibility, and having notice of the arguments likely to be made by the respondent, she could have said more about why the claim should not be struck out in her email, but chose not to do so.
44. Having decided to proceed. I heard submissions from the respondent. I decided to reserve my decision so that the claimant would have my reasoning in writing and could apply for a reconsideration if she wished.
45. Having considered all the circumstances, my decision is that the claimant's claim should be struck out for unreasonable conduct under rule 37(1)(b).
46. It would appear to be beyond dispute that the Claimant has failed to comply with several orders made by the tribunal. She has missed several key deadlines and then when she has complied, her compliance has been incomplete. In isolation, a small amount of incomplete and late compliance cannot justify strike out of a claim, particularly where the claimant is a litigant in person with underlying health conditions. A high degree of flexibility and tolerance is appropriate.
47. In this case, however, the claimant's non-compliance has been persistent and repeated. In addition, and it is this that concerns me the most, I do not think she has been entirely honest with the respondent and the tribunal about a number of matters. Today's application for the postponement is one example. In addition, although her previous applications for postponements were accepted at face value at the time, bearing in mind what occurred today, there is room for doubt about whether they too were made genuinely. I consider it is highly significant that when sending documents late to the respondent, she said that she has sent them previously to the respondent multiple times, but not provided any evidence to corroborate this when asked to do so. It is for these reasons that I consider her conduct involves more than mere non-compliance and tips into unreasonable conduct.

48. Even in the face of unreasonable conduct, strike out should not be an automatic. I have decided, however, that it is a proportionate response to the conduct in this case.
49. The claimant's claim was presented to the tribunal nearly 19 months to the day prior to today's hearing. Despite the tribunal's best efforts to case manage and progress the litigation, we still do not have an agreed list of issues because the claimant has still not articulated her claims and the legal basis for them adequately. The earliest allegations date back to events occurring five years ago in October 2017. The delay is very significant, but I in my judgment, I do not consider we have reached the point where a fair hearing is entirely impossible and I would not strike the claim out if this were the sole basis for it.
50. Strike out is a proportionate response, however, when the claimant's lack of candour is also taken into account. The Claimant has a now well-established pattern of non-compliance with orders and non-attendance at hearings. I have concluded this is not a case where the claimant has had genuine difficulties and been honest about them. Instead, her approach to her claim has been extremely lackadaisical and she has disingenuously sought to rely on her underlying health conditions to excuse for her failure to progress the claim. In my judgment, the threshold for strike out has been met.

Reconsideration

51. It is, of course, possible that I have been unduly harsh in the conclusions I have reached and the claimant is able to provide evidence that supports her application for the postponement of today's hearing and that demonstrates that she did try to send the respondent's solicitors documents multiple times.
52. If this was the case, she is entitled to apply under rule 70 for my decision to be revoked. If she makes an application supported with evidence, one possibility would be for me to conduct a reconsideration hearing so that she can make oral submissions in support of her application.
53. I set out below the relevant provisions dealing with reconsideration of judgments for her information:

"Rule 70

A Tribunal mayon the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Rule 71

... an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written recordof the original decision was sent to the partiesand shall set out why reconsideration of the original decision is necessary.

Rule 72

- (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise, the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.
 - (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.
 - (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision”
54. Unless a well-founded application for reconsideration, supported with evidence, is made within the time limit, my decision brings the claim to an end.

Employment Judge E Burns
23 September 2022

Sent to the parties on:

23/09/2022

For the Tribunals Office