



EMPLOYMENT TRIBUNALS

Claimant: Mrs G. Alexander-Wight
Respondent: Barts Health NHS Trust
Heard at: East London Hearing Centre
On: 21 August 2019
Before: Employment Judge Massarella
Representation
Claimant: Did not attend
Respondent: Mr C. Edwards (Counsel)

JUDGMENT

The judgment of the Tribunal is that: -

1. The Claimant having failed to attend or to be represented at the full merits hearing, listed to commence on 21 August 2019, her claims are dismissed under rule 47, schedule 1 of the ETs (Constitution & Rules of Procedure) Regulations 2013.

REASONS

Background

1. By a claim form presented on 23 January 2019, after an ACAS early conciliation period between 19 October and 15 November 2018, the Claimant claimed constructive (unfair) dismissal, breach of contract (notice pay), a redundancy payment, holiday pay and other payments.

2. The Claimant was a midwife. In founding her constructive dismissal claim she makes a series of allegations against the Respondent in respect of the way that issues in relation to her conduct and performance were dealt with, some going back to 2013. She resigned with immediate effect on 1 October 2018.
3. The Respondent lodged its ET3 on 2 April 2019, resisting the Claimant's claims in their entirety. The Respondent denies, in particular, that there had been a fundamental breach of contract such as to entitle the Claimant to resign and claim constructive dismissal.
4. The case was originally listed for a one-day hearing in June 2019 which was insufficient, given the scope of the case. By letter dated 25 April 2019 the Respondent asked for a three-day listing. On 14 May 2019 the June hearing was vacated and the present three-day listing confirmed. On 10 July 2019 EJ Gilbert gave directions, including orders for an agreed list of issues by 29 July 2019 and for exchange of witness statements on 12 August 2019.
5. On 12 August 2019, the date on which the Claimant ought to have exchanged her statement, she made an application to postpone the hearing on the basis that she had applied to the High Court for a review hearing of earlier decisions made by the Nursing and Midwifery Council. She asked that the Tribunal hearing be postponed until after that hearing. No mention was made of any health concerns. In her letter she refers to a legal adviser, Mr Oba Nsugbe QC, and gives his address at his London chambers. Mr Nsugbe is not on record as representing the Claimant in these proceedings.
6. The Respondent, by email dated 14 August 2019, strongly objected to the postponement. Amongst other points they argued that the Claimant had not said whether her petition for a review hearing had actually been accepted or when she anticipated that she would receive the outcome.
7. The application came before Regional Employment Judge Taylor who, on 15 August 2019, decided as follows:

‘the application to postpone the hearing is refused. The reasons given by the Claimant do not explain the relevance of the review hearing and why she considers it necessary to postpone the Employment Tribunal until after a review hearing is held [...] The hearing remains as listed’
8. Meanwhile, on 13 August 2019, the Claimant had contacted the Respondent to say that she was not able to complete her statement by 12 August 2019 but would be ready to exchange on Friday 16 August 2019. The reason given was that she was still dealing with recent disclosure from the Respondent. No mention was made of any health concerns. The Respondent agreed to the extension and sent its statements to the Claimant at the allotted time, although they were password-protected so that she could not access them until she had provided her own statement. The Claimant did not provide it on 16 August 2019 and did not respond to chasing correspondence from the Respondent.
9. Towards the end of the day on 16 August 2019 the Respondent made an application for an Unless Order: that unless she exchange by 4 p.m. on the following Monday, 19 August 2019, her claim should be struck out.

10. That application was copied to the Claimant and came before me on 19 August 2019. As I was considering it, a letter from the Claimant was passed to me, dated 19 August 2019, which the Claimant had hand-delivered to the Tribunal. In response to the Respondent's application for unless order she wrote [original format retained]:

'I refer to the above subject matter and hereby say as follows:

From Monday night (11/08/2019) I felt very unwell and was diagnosed with Severe Sciatic Pain.

I seeked medical attention as outlined in the Hospital's 6 paged discharge summary attachment.

I am currently advised to take a full rest and referral to my GP to seek further appointment for physiotherapy arrangements.

For medical reasons, I am therefore unable to complete and exchange Witness Statements today neither am I able to attend and effectively contribute to the proceedings of the Hearing Scheduled for 21-23/08/2019'.

11. The attached medical evidence consisted of an 'Inpatient Discharge Summary' dated 19 August 2019. It contained a diagnosis of '?Sciatica' [sic]. The summary recorded that the Claimant complained of 'right buttock, right leg and left thigh pain, pins and needles sensation'.
12. The discharge plan consisted was as follows:
- 'Stop oral codeine
 - Oral ibuprofen 400 mg every six hours
 - To take adequate rest, avoid lifting anything heavy, to avoid carrying weights for the next five days till pain settles.
 - To review with GP in case symptoms persist.
 - GP to review and arrange Physiotherapy appointment in case symptoms persist.'

13. I directed that the parties be written to as follows, in an email sent on 19 August 2019 at 16:29:

'The Respondent's application for an Unless Order is refused. It is not in the interests of justice to make such an order so close to the hearing.

The Claimant has today attended the Tribunal in person and handed in a letter stating that she is unwell due to 'severe sciatic pain'. The Claimant asserts that she is 'therefore unable to complete and exchange witness statements today neither am I able to attend and effectively contribute to the proceedings of the hearing scheduled for 21 August 2019.'

Although not expressly stated, the Tribunal assumes this is an application for a postponement. The Claimant has already made one application to postpone on different grounds, which was rejected by the

Regional Employment Judge. Although there is some medical information attached to the latest letter, there is nothing which states that the Claimant is not fit to prepare for, and attend, the hearing.

The application for a postponement is refused. The hearing will go ahead on 21 August 2019. On receipt of this letter the Claimant must immediately arrange exchange of statements with the Respondent. If she fails to do so, the Tribunal hearing the case on Wednesday 21 August 2019 may consider striking her case out for failure to comply with Tribunal Orders and/or making a costs order against her.'

The hearing

14. At 10 a.m. this morning I was informed by the Tribunal clerk that the Respondent was present, represented by counsel and solicitor, with a witness and an observer. The Claimant was not present.
15. I asked the Respondent to provide me with any further information it may have as to the Claimant's reason for not attending. The Respondent confirmed that the Claimant had not provided a witness statement. As the Respondent's solicitor was concerned that the Claimant may not have read my email of 19 August 2019, she had arranged for a copy of it to be sent to her by recorded delivery, which had been signed for on 20 August 2019 by someone called 'Wight'. There had been no further communication from the Claimant.
16. I asked the Tribunal clerk to try and contact the Claimant by phone, which she did several times both on the Claimant's mobile and home numbers. There was no reply. I also asked that the Tribunal system be checked for any further correspondence from the Claimant. There was none.

The Respondent's application

17. The hearing resumed and Mr Edwards made an application under rule 47 that the case be dismissed by reason of the Claimant's failing to attend or to be represented at the hearing.
18. He made an application in the alternative under rule 37 that the claim be struck out for non-compliance with the Tribunal's orders, unreasonable conduct and the fact that it was not possible to have a fair hearing. I will not summarise that application as it was not necessary for me to determine it in the light of my decision under rule 47.
19. Mr Edwards submitted that, although the Claimant presented herself as a litigant in person and may even have intended to represent herself at this hearing, she plainly had access to legal advice, as was clear from her correspondence. She had made two postponement applications, neither of which were well-founded and both of which were quickly rejected.
20. He pointed out that, in her second application, she gives the date of the onset of her health difficulties as 11 August 2019, in other words before her first application for a postponement, yet there was no mention of those health concerns in it. He submitted that the attached medical evidence does not state that the Claimant was not well enough to attend. The Claimant was on notice that her claim might be struck out if she did not provide a witness statement

because of the Tribunal's letter to the parties of 19 August 2019. He submitted that it appears to have been a deliberate, indeed tactical, decision on the Claimant's part not to attend.

21. If I was not minded to dismiss the claim, Mr Edwards invited me to hear it in the Claimant's absence, although he pointed out the inherent difficulties in doing so, which I will refer to in my conclusions below.

Conclusions

22. 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.'

23. I 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):

- 23.1. the rule confers a very wide discretion;

- 23.2. 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;

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

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

24. I considered the medical evidence which was available to me. In my view, there was nothing in it to support the Claimant's assertion that she was not fit to prepare for the hearing and/or not fit to attend it. The fact that she attended the Tribunal on 19 August 2019 to deliver that medical evidence suggested otherwise, as did the content of the medical evidence itself: it did not order her, as she suggested in her covering letter, to take 'full rest', it ordered her to take 'adequate rest'; it reduced the prescribed medication from codeine to ibuprofen; none of the activities that she was advised to avoid were ones which would necessarily have arisen from preparing for and attending the hearing; the symptoms described were not suggestive of a condition which was such that it would prevent the Claimant from attending and participating in the hearing.

25. The Claimant was clearly informed that today's hearing would be going ahead and the inadequacy of the medical evidence she had provided was highlighted in my letter of 19 August 2019. She took no steps to provide any further information, medical or otherwise, nor to communicate with the Tribunal in response to that letter. Nor did she ask anyone to contact the Tribunal on her behalf to say that she would not be attending despite the letter of 19 August 2019. Nor did she make herself available to respond to telephone enquiries

from Tribunal staff. I find on the balance of probabilities, that the Claimant simply elected not to attend because her previous attempts to delay the hearing by way of the postponement applications were unsuccessful. In the light of the evidence available to me today, I accept the Respondent's submission that it appears to have been a tactical decision.

26. I had 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. However, I also had regard to the information available to me from the claim form, response and list of issues.
27. It appears to me that this is not a case that could properly be determined with only the Respondent present. It is a case of some complexity, covering a chronology dating back to 2013. The Claimant's account in her ET1 is not detailed and there are many gaps in it. It is, as Mr Edwards points out, not even clear what precise breach of contract the Claimant relies on. Although it might be inferred that it is a breach of the implied term of trust and confidence, that is not expressly stated in the material before me.
28. Crucially it is primarily a constructive dismissal claim, in which the initial burden of proof rests on the Claimant. Unlike the *Roberts* case, which was a case of direct dismissal in which it might have been possible (although the Court of Appeal found in no sense mandatory) for the Tribunal to make findings as to the reason for, and fairness of, the dismissal in the claimant's absence, that is not the case here. It is for the Claimant to prove that there was a repudiatory breach of contract and for her to prove that she resigned in response to it. Plainly, the reason for the Claimant's resignation is a matter that could only properly be determined having heard evidence from her. The Respondent's case is that there was no dismissal. It cannot reasonably be expected to prove a negative, without the opportunity of cross-examining the Claimant.
29. I had regard to the fact that the dismissal of a case under rule 47 is a severe sanction. I considered whether it would be right, as an alternative, to adjourn the hearing to another occasion. I decided that it, in the circumstances, it would not be right to do so. 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 where some of the allegations are already historic. Although the Respondent could be compensated in costs for the vacation of this hearing and its resumption at a later date, it could not be compensated for the additional preparation and attendance time which would be required of the Respondent's witnesses, two of whom are frontline healthcare professionals. Not only would they need to attend a relisted hearing, but a further conference would (in Mr Edwards submission) be required, once the Claimant's statement had been produced. 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. I also had regard to Tribunal resources. There is huge demand for hearings in this region and some parties are having to wait until 2020 for their cases to come on. It would not be right, in my view, for a further three days to be allocated to the Claimant's case in circumstances where the matter could have been dealt with this week.

30. In all the circumstances, I dismiss the Claimant's case under rule 47, because she has neither attended nor been represented at this hearing.

Other matters

31. After I gave my judgment and reasons orally, the Respondent asked for written reasons, which I hereby provide. Mr Edwards also asked me to record that the Respondent reserves its position as to costs, both in respect of this hearing and any future applications which may be made.

Employment Judge Massarella
22 August 2019