Case Number: 3327554/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms A Wendessere	v	Sainsbury's Supermarkets Limited

Heard at: Watford **On**: 15 March 2018

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Not present, and not represented

For the Respondent: Mr M Khoshdel, of Counsel

JUDGMENT

The claim is dismissed.

REASONS

1 The claimant's claim is of unfair dismissal. She was dismissed for misconduct. The hearing of her claim of unfair dismissal was listed and notified to the claimant by a "Notice of Hearing" dated 23 October 2017.

2 No document of any sort was placed in the Tribunal's file after that notice of hearing before a telephone note dated 14 March 2018 was placed there. The

note was made by the Listing Officer, and it recorded that the claimant had said that she would not be attending the hearing on the following day, 15 March 2018.

3 There was no indication of the time when that note was made, but on the same page there was a note that the Listing Officer had spoken to the respondent's representative at 10.30am, and that the representative had confirmed that the respondent would be attending the hearing.

4 The next document in the file was an email from the claimant sent at 11.07 on 14 March 2018, in (precisely) these terms:

> "Dear Sir, Madam,
>
> I am scheduled to appear for a hearing in the above matter on Mar. 15, 2018.
>
> Unfortunately, will be at work on that date due to my employer's insistence that I attend my work until school holiday (Thursday 29 March 2018 to Friday 13 April 2018) because there is no one to replace me of my duty in the school.
>
> I therefore request that the hearing be continued end of March to beginning of April 2018.
>
> Please inform me as to whether the continuance will be granted and when my hearing will be occur.
>
> Sincerely
>
> Arlette Wendessere"

5 At 12:13 on 14 March 2018, Mr Khoshdel sent a reply to that application (which was, in effect, for a postponement of the hearing of 15 March 2018), copying it to the claimant. Among other things, he wrote that the claimant had "failed to comply with an order to provide her witness statement". He continued:

> "The order required witness statements to be filed and served on or before 8 March 2018, the parties between themselves agreed to provide witness statements 12th March 2018. However, it is now the eve of the final hearing and the claimant has not yet provided her witness statement. ... This is the first mention of an adjournment."

6 On 14 March 2018, Employment Judge Manley refused the claimant's application for a postponement of the hearing, for these reasons:

> "The claimant's email was sent around 11am the day before a hearing which has been listed since October. No good reason is given as attendance at a Tribunal hearing must take precedence over work commitments.
>
> The case remains listed for hearing on 15 March 2018."

7 That decision was communicated in a letter which was, it was recorded in the file, sent by email. The claimant did not attend on 15 March 2018, when the case came before me. I referred myself (and was referred by Mr Khoshdel) to rule 47 of the Employment Tribunals Rules of Procedure 2013, which is in these terms:

> "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."

8 That rule is part of a series of rules in a section which is stated in the heading to the section to contain "Rules common to all kinds of hearing". Thus, rule 47 applies both to a preliminary hearing and to a final hearing.

9 I referred myself to, and read carefully, paragraphs PI[827]-PI[830] of *Harvey on Industrial Relations and Employment Law*. I noted that rule 47 confers a power to do two things: it does not impose a duty to do either of them. However, the only alternative to doing either of those things was to adjourn the hearing. Whether there should be such an adjournment had effectively been dealt with by Employment Judge Manley on the day before, and there was no relevant change in the circumstances since then, so it was not open to me even to consider whether there was justification for doing so in the circumstances. In coming to that conclusion, I took into account the extensive discussion of His Honour Judge Hand QC in *Serco Ltd v Wells* [2016] ICR 768 about the power in rule 29 to "set aside an earlier case management order where that is necessary in the interests of justice". I noted that he said (among other things) this in paragraph 43(d):

> 'The draftsmen of the current Employment Tribunals Rules have used the expression "necessary in the interests of justice"; in my judgment that should be interpreted through the prism of the principle I have just articulated; variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement (of fact and possibly, in very rare cases, of law, although that sounds much more like the occasion for an appeal) or an omission to state relevant fact and, given that definitions cannot be exhaustive, there may be other occasions, although as Rix LJ

put it [in paragraph 39 of his judgment in *Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)* [2012] 1 WLR 2591] these will be "rare" and "out of the ordinary".'

10 I could see no material change in the circumstances and nothing which might otherwise justify the setting aside of the decision that the hearing should not be postponed. I therefore could see no alternative to doing one or other of the two things referred to in rule 47. I could see that if I heard the claim in the absence of the claimant, then I would make findings of fact about the claimant's conduct without the claimant having been present to cross-examine the respondent's witnesses and herself give evidence. Given that

10.1 the reasons stated in the respondent's response to the claim were on their face cogent,

10.2 the claimant had accepted in her ET1 form that she had done the thing for which she was dismissed but asserted that it was an accident, and

10.3 the claimant had not even made a witness statement,

I concluded that the just thing to do in the circumstances was to dismiss the claim in effect because it had not been properly pursued.

11 For those reasons, I concluded that the claim should be dismissed.

____
Employment Judge

Date: 15 / 3 / 2018

Sent to the parties on: ....

....
For the Tribunal Office