# EMPLOYMENT TRIBUNALS

## JUDGMENT

**BETWEEN**

| **CLAIMANT** | | **RESPONDENT** |
|---|---|---|
| **MR G I EKWENUGO** | **V** | **BOMBARDIER TRANSPORTATION UK LIMITED** |

**HELD AT: LONDON CENTRAL** **ON: 25-27 OCTOBER 2021**

**EMPLOYMENT JUDGE: MR M EMERY**
**MEMBERS: MR P ALLEYNE**
**MR S HEARN**

**REPRESENTATION:**
**FOR THE CLAIMANT** **In person/non-attendance**
**FOR THE RESPONDENT** **Mr B Williams (Counsel)**

## JUDGMENT

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

## REASONS

1. Reasons were provided to the respondent in the absence of the claimant at 3.00pm on 27 October 2021.

2. 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."*

3. At 12.50pm on 27 October 2021, the 3rd day of the Hearing of this claim, the claimant emailed an Order rejecting his application for a postponement of the Hearing. The Order also set out a brief chronology of the events over the past 2½ days of the hearing.

4. The Order stated *"The hearing shall recommence at 2.00pm 27 October 2021 to hear evidence from the claimant".*

5. At 2.00pm the claimant was not in attendance. The respondent made its application under rule 47. During the course of the application an email was received from the claimant timed as received at 2.19 pm. We considered its contents during the hearing and in our deliberations.

The application under Rule 47

6. Mr Williams argued that the claimant's email added nothing more to what we have heard already. He argued that there are three potential routes open to the Tribunal:

    a. Postpone the hearing – *"which I strongly submit would be a perverse approach"* because this means that the claimant *"has got what he wants by his behaviour"*
    b. Proceed in the claimant's absence
    c. Dismiss the claim.

7. Mr Williams argued that firstly the Tribunal must consider the reasons for non-attendance. The claimant's reasons are *"not plausible"* on the evidence and are not established on the medical records he has provided, there is *"no evidence"* relating to his ability to participate in the Hearing. It is *"too late for the claimant to provide evidence, the Tribunal has indulged him for 2.5 days - he has also had years to do this. It is telling that he has not been able to provide medical evidence that not fit to participate."*

8. Mr Williams said that the Tribunal has decided that the claimant's reasons for postponement *"were not good reasons .. so the Tribunal is now tied, it cannot postpone".* The options are to go through the hearing which would be *"a charade"*, or the Tribunal exercises its discretion to dismiss.

9. Mr Williams argued that the claimant has attended intermittently and sought to dictate the process, with no deference to the fact this is a Tribunal of law. He referred to some of the claimant's poor conduct during the Hearing.

10. Mr Williams argued I should look at all of the events of the hearing *and "weigh these up and exercise discretion consistently."* The claimant has had significant

adjournments already; he has absented himself because he did not get his own way with his application to postpone. *"He had deliberately absented, as the Tribunal has seen … he can write swathes of emails, but he has not engaged otherwise."*

11. Mr Williams stated that while the claimant's conduct has been poor, this is not an issue of a conduct strike out. There is an obligation to consider any reasons for his absence. But weighing his emails, his behaviour over past few days, *"… this is a deliberate absence."*

12. Mr Williams contrasted this with someone who was struggling and for whom no fault could attach *"… but this is repeated conduct - the claimant repeatedly asks for an adjournment on the same grounds and he's denied this, and he deliberately absents himself."*

13. Regarding the claimant's email received at 2.19 pm, during this application and the referral to *"apparent bias"* on the part of the Judge, *"this is a deliberate and unreasonable attempt to get what he wants"*. There are no grounds for recusal as there is no reasonable perception of bias.

## The Tribunal's decision

14. We adjourned at 2.30pm and deliberated. We came to our unanimous conclusion that the claim should be dismissed.

15. The Tribunal considered carefully the words of Rule 47. We noted the requirement to consider carefully *"the reasons for the party's absence".*

16. We concluded that the claimant had deliberately decided not to attend the hearing. We concluded that there was no good medical reason for his non-attendance at 2.00pm.

17. We came to this conclusion by noting that the claimant was able, between approximately 12.50pm when he received the Tribunal's Order rejecting his request for a postponement, and 2.19pm, to write a detailed email to the Tribunal. It is clear that this email was being written during the hearing which was proceeding in his absence. We concluded that this was a deliberate choice by the claimant to write this email instead of attend the Tribunal Hearing.

18. We noted also our prior conclusion, set out in the Order, that there was no medical evidence to suggest that the claimant was unable to attend the Hearing on medical grounds, that we considered a fair hearing was possible by making adjustments to address the issues of poor concentration and focus outlined by his GP. We noted that we had set out adjustments we believed may could assist in addressing any disadvantage the claimant faced. We had made it clear that if there was disadvantage experienced by the claimant during the Hearing which meant a fair hearing not possible, we would have immediately adjourned.

19. We noted also that the claimant had been able to participate at all prior stages of the Hearing, online on time and ready to proceed each day, able to repeatedly restate his application to postpone. We noted that when he participated, he did so forcefully and at times aggressively and constantly interrupting to make his point.

20. We concluded that there was no good reason for the claimant not to attend the Hearing at 2.00, at a time when he was drafting an email to the Tribunal. We concluded that this was a deliberate decision to absent himself from the Hearing.

21. We considered the points made by the claimant in his 2.19pm email.

    1. *"My postponement application had not been considered before the hearing proceedings commenced."*
       As the claimant was repeatedly informed during the Hearing, his application was initially considered on the morning of 25 October; it was considered again on 26 October when the Tribunal adjourned the Hearing for the whole day awaiting receipt of the medical evidence. We received the medical evidence on 27 October and finally considered the application then. Apart from addressing the claimant's postponement application, the hearing never commenced.

    2. *"My keen attempts to continue in the proceeding have severely impacted my mental disability and exacerbated my symptoms."*
       As a finding of fact, the Tribunal does not accept that the claimant has made *"keen attempts to continue in the proceedings".* He was aggressive, repeatedly saying he was going to leave the cvp room and had to be talked into staying on numerous occasions during the 2.5 day hearing.

    3. *"I am unable to concentrate, and engage and make a rational decision in the proceedings."*
       The Tribunal noted that the medical evidence states that the claimant has poor concentration and poor focus. We accepted that this was an accurate assessment of the claimant. We do not accept that the medical evidence said that he was unable to concentrate, engage, or make rational decisions.

       We also concluded that the statement by the GP that a video process made his concentration worse, was based on what the claimant told his GP, rather than a statement made on the basis of a medical assessment.

       We concluded that the Hearing could proceed fairly, with regular and lengthy breaks while the claimant was giving his evidence. We did not accept that the claimant was unable to concentrate, engage, or make a rational decision in relation to his case. He was able to engage on the issue of his postponement repeatedly during the 2.5 days of proceedings. We considered that the medical evidence showed difficulty

for the claimant, which could be addressed by adjustments to the Hearing.

4. *"The Claimant is not in the right reasoning faculty to proceed any further in hearing."*
   There is no medical evidence saying this. The Tribunal rejects the claimant's statement.

5. *"The Claimant also objects to a less than 3 - day hearing…"*
   The reason it is a 3 day hearing is because the tribunal spent over two days dealing with his application for postponement. The original timetable envisaged one day reading, 3 days evidence, and 1 day for the tribunal to meeting and decide the outcome. The Tribunal would have heard evidence on the 5th day, 29 October 2021 if necessary to ensure all evidence was heard. Unfortunately, the claimant did not attend the hearing at 2.00 on 27 October, when he would have been told this.

6. *"Claimants failure to receive a response and relevant information to his postponement applications (on 22 October 2021 and 25 October 2021) before the hearing commenced on 25 October 2021"*
   The Tribunal files shows that the claimant was sent emails rejecting his postponement applications made in the days before the hearing commenced.

7. *"Claimants failure to receive a response to his suffering proceedings health impact statement and postponement application submitted on 26 October 2021, whilst hearing remained ongoing"*
   This was responded to in the Order dated 27 October 2021.

8. *"The Claimant is unable to continue in the proceedings due to the proceeding's accumulative adverse health impact on the Claimant's mental disability, in his attempts to sit the hearing since 25 October 2021."*
   There is no medical evidence stating that the claimant is unfit to attend the hearing.

9. *"The Claimant is unable to continue in the proceedings due to the accumulative video screening impact on the Claimant's health in his attempts to sit the hearing."*
   As above.

10. *"The Claimant has attempted to participate in the hearing (since 25 October 2021), but the over strenuous and harmful effect has taken a toll on the Claimants mental health and exacerbated his symptoms."*
    As above.

11. *"The Claimant forwarded his medical evidence to the tribunal. With contents of symptoms suffered within his mental disability of; Poor focus,*

*Drowsiness, Fatigue, and Poor Concertation, and Specifically struggling to focus when using screens."*
This was addressed in the Order of 27 October 2021

12. *"The Claimants mental disability symptoms were not fully considered or stated and disclosed in the postponement refusal decision of the tribunal on 27 October 2021."*
The claimant's medical symptoms and the medical records and Med 3 were all fully considered by the Tribunal prior to refusing the application for a postponement.

13. *"The Claimants bus Injury symptoms had not been considered and were not fully stated and disclosed in the postponement refusal decision of the tribunal on 27 October 2021."*
The medical evidence does not suggest that the claimant's bus injury means he is unfit to participate in this Hearing.

14. *"The Claimant's health has become more poor, with the inability to continue into the proceedings. and in particular via video screening, (as identified on Claimants medical evidence".*
There is no evidence that the claimant is unfit to participate in the Hearing. The evidence suggests that the claimant will have difficulty participating, which the Tribunal said would be addressed by making adjustments to the Hearing process.

15. *"The Claimant remains not in the right reasoning faculty to continue in the proceeding, in accordance with receiving a fair trial".*
As above.

16. *"For circumstances beyond my control, The Claimant with relevant reason requests a reconsideration of the postponement and the allowing of reasonable recovery time to self-represent or the retainment of counsel."*
This was dealt with in the 27 October 2021 Order: there is no indication that the claimant will gain counsel if the hearing is postponed.

<u>Application that the Judge recuses himself on grounds of actual/apparent bias</u>

22. The claimant makes an application for recusal based on actual or apparent bias as there is *"… a real possibility that a fair-minded observer would conclude that the judge should not try the case because they cannot be impartial (apparent bias)".*

23. The Tribunal considered this application; we noted the legal test – whether the *"fair-minded and informed observer, having considered the facts"* could conclude that there was a real possibility that the tribunal was biased - *Porter v Magill [2001] UKHL 67, [2002] 2 A.C. 357, [2001] 12 WLUK 382*. We also noted Ansar v Lloyds TSB Bank PLC [2006] EWCA Civ 1462: that the substance of the allegation of bias should be considered.

24. The claimant gives no examples of bias. The Tribunal considers that the claimant was given every opportunity to provide evidence to support his application that he was not medically fit to attend his hearing. He was not able to provide this information, and hence a decision was made to proceed with the Hearing.

25. The Tribunal concluded that a fair minded and informed observer would conclude that we made every effort to enable the claimant to provide the evidence to show he was not capable of taking part in his own hearing, that there was no actual bias or appearance of bias.

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**EMPLOYMENT JUDGE M EMERY**

**Dated: 28 October 2021**

Judgment sent to the parties
On

…28/10/2021
For the staff of the Tribunal office