



EMPLOYMENT TRIBUNALS

Claimant: Miss T Pogiene

Respondent: Debach Enterprises Limited

Heard at: Norwich Tribunal (by CVP)

On: 11 May 2023

Before: EJ Cowen

Representation

Claimant: Miss Kolentsova (solicitor)

Respondent: Miss Criddle KC (counsel)

RESERVED JUDGMENT

1. The Respondent's application for strike out is dismissed.
2. The Respondent's application for unless orders is dismissed.
3. The Respondent's application for deposit orders to be made by the Claimant is allowed (see separate order).
4. The Claimant shall pay the Respondent's costs, assessed in the sum of £16,077.67

REASONS

1. This case was listed for an Open Preliminary Hearing to address four remaining issues;
 - a. Whether the remaining claims should be struck out, and/or
 - b. Whether an unless order should be made, and/or
 - c. Whether the Claimant should be ordered to pay an increased deposit, and/or
 - d. Whether the claims are struck out or an unless order and/or an increased deposit order is made (or none of them) the Respondent's application for costs or wasted costs.

2. A final merits hearing has been (re) listed for five days in person at Norwich Employment Tribunal, starting on 12 June 2023.
3. I received a bundle (797 pages) and a skeleton argument from the Respondent in advance of the hearing. On the morning of the hearing I received a bundle (125 pages), a witness statement from Elena Donaldson (Claimant's previous representative), a draft list of issues and a witness statement, from the Claimant. During the course of the hearing I received further emails from both sides; The Claimant sent me a list of applications and the outcomes for each side. The Respondent sent me five screenshots said to be taken from the Claimant's Facebook page showing her and various HGV vehicles. The writing was not in English and so I was unable to verify the content, but I could see the dates these photos were posted on Facebook.
4. The Claimant had made an application the day before the hearing to postpone it. This was on the basis that the Claimant's representative had only recently taken on the case and wanted time to familiarise herself. This application was refused. At the start of the hearing, I asked the Claimant's representative if she wished to renew her application. She did not wish to do so.
5. The parties agreed that the issues for today were as listed in paragraph 1 above. The parties also made it clear that there is a dispute over which claims remain 'live' within this case. I have therefore added to my list of issues for today a preliminary issue of deciding which claims I am dealing with.
6. The Respondent's counsel made her representations with reference to her skeleton argument:-
7. In respect of the claims which remain 'live' in these proceedings, the Respondent said that the decision on amendment in the CMO of 17 January 2022, when EJ Hyams decided the Claimant's application to amend her claim makes it clear at paragraph 8 that *"permission to amend to claim that the claimant was dismissed constructively rather than expressly should be given because it seemed to me that the inescapable effect of the application of Folkestone Nursing Home Ltd v Patel [2019]ICR 273 was that the claimant here was not dismissed within the meaning of section 95(1)(a) of the ERA 1996 and that if she was dismissed at all then it was a constructive dismissal, ie. A dismissal within the meaning of section 95 (1)(c)."*
8. Ms Criddle accepted that the claim for holiday pay remains and asserted that a claim for unauthorised deduction from wages (s.13 ERA 1996) also remains, in accordance with the decision of EJ Hyams.
9. With regard to the applications made by the Respondent, Ms Criddle outlined a long and complex procedural history in this case, some of which

is directly relevant to the applications and some of which serves as background.

10. In respect of strike out, Ms Criddle said that the Respondent relied upon rule 37 of the Tribunal Rules 2013 and in particular;

(b) that the manner in which the proceedings have been conducted by or on behalf of the Claimant have been scandalous, unreasonable, or vexatious.

(c) Non-compliance with ET orders,

(d) that the claim has not been actively pursued.

11. In support of her application Ms Criddle referred to a number of examples of the behaviour of the Claimant and/or her previous representative Mrs Donaldson. She asserted that they have conducted themselves unreasonably. In particular she referred to the fact that the remaining claims are all those which have been added by amendment and that the case has turned into one which is being fought over the orders made and not about the substantive issues in the claim. In respect of failing to comply with ET orders, she drew my attention to the fact that the Claimant has applied to adjourn every hearing of the claim, including the final merits hearing, and today's hearing and that the Claimant does not seem interested in pursuing the actual claims made.

12. With respect to the manner of conduct and the non-compliance with ET orders, Ms Criddle outlined the Claimant's reference to diary entries in her witness statement served on 17 May 2022 which had not been part of her disclosure in February 2022. In response to this the Respondent first requested the full diaries from the Claimant and then subsequently applied to the Tribunal for disclosure of the originals. EJ Welch responded to the application by ordering the Claimant to bring the originals to the final merits hearing.

13. The Respondent submitted that the Claimant then applied to have the final merits hearing converted to CVP which left significant problems with the inspection of the diaries. The Claimant went on to withdraw her discrimination claims, to avoid having to rely upon the diaries at all. The Respondent asserted that this was inappropriate conduct and that it should not detract from the issue about the Claimant's credibility and failure to disclose relevant documents, which remain live.

14. Ms Criddle also asserted that the Claimant appears to have no interest in the remaining claims. She noted that the Claimant has never attended a hearing of the Tribunal and that her representative thinks she left the UK in Summer of 2022 and was not certain of her whereabouts for some time between then and December 2022. She asserted that this amounts to a failure to actively pursue her claim.

15. Ms Criddle also pointed out that the Claimant's witness statement does not address the substantive matters on why she resigned, what has not been paid and what holiday pay remains outstanding. Instead she focused on the claims which have been removed by her, from the case. Ms Criddle's concern was that the issues remain unaddressed and that there are 'real issues about the Claimant's credibility'.

16. On behalf of the Respondent, Ms Criddle said that the evidence provided by the Claimant shows a contradiction. The Claimant's letter to the Tribunal for the Preliminary Hearing in January 2022 stated that the Claimant had "*already spent about £5000 on all researches, investigations, paperwork and for lawyer's assistance*". Whereas Mrs Donaldson, her representative at that time said that the Claimant had not paid that sum. The Claimant's current representative Ms Kolentsova said in her email dated 9 May 2023 to the Tribunal that Mrs Donaldson had been instructed "on a private basis (not as part of International Law Connection Ltd) and free of charge".

17. She also pointed out that the Claimant's witness statement for the hearing today indicates (para 13) that the Claimant had borrowed money from a friend to "*pay my expenses on legal assistance from the preparation of the appeal, which included translating services, specialists' advices, legal advice, my travel expenses to those specialists and solicitors, and payments for access to online scientific libraries*". The Claimant went on to say that she still owed £6,470 as he had "*not been working since August 2022 (when I left the UK)*". Ms Criddle said that this is in direct contrast to the fact that she also says (para 17) that Mrs Donaldson assisted her to prepare and submit her claim form to the Tribunal. "*Elena knew that I already had substantial debts at that moment, and that I was unable to pay for assistance of any legal representative and for representing me in the proceedings and Elana agreed to represent me free of charge*". Miss Criddle said that either her statement to EJ Hyams in January 2022 was untrue, or her witness statement today must be untrue, as they are contradictory statements.

18. Miss Criddle also pointed out the inconsistency between the Claimant's witness statement which said (para 75) that she was advised to withdraw her discrimination claim as all her witnesses had left England. Whereas Mrs Donaldson's witness statement says (para 17) that she spoke to the Claimant on 5 December 2022 and that she decided to withdraw her discrimination claims. Ms Criddle highlighted that there was no mention of advice and that this indicates that the Claimant is attempting to avoid having to disclose her diaries.

19. Miss Criddle asserted that due to these inconsistencies and the concerns over the Claimant's credibility, there can be no prospect of a fair hearing.

She urged the Tribunal to strike out all the claims.

20. In the alternative she asserted that there ought to be an unless order that the Claimant;
 - a. Produce the original diaries for inspection by the Respondent,
 - b. Produce the email of 17 May 2022 with a signed witness statement of Mrs Donaldson or Ms Kolentsova on behalf of International Law Connection Ltd
21. The second point, refers to the fact that on 5 July 2022, Mrs Donaldson asserted that two further witness statements were served on 17 May 2022. The Respondent did not receive these. The Respondent asks for the Claimant to provide the evidence that they were sent.
22. In relation to the deposit order the Respondent asserts that the amount paid on deposit orders for the unfair dismissal claim is not an amount which would cause the Claimant to stop and consider whether to proceed. As this is part of the purpose of a deposit order, the Respondent asks that the amount be increased.
23. The Respondent also asserts that there ought to be a deposit order for the wages and holiday claims, as there is no evidence about them and no explanation for the delay in bringing the claims.
24. In support of the Respondent's claim for costs, or wasted costs, Ms Criddle referred to her skeleton argument. She claimed the costs of the aborted hearing in July 2022 when the Claimant applied to adjourn after the close of business on the Friday before and then sent no representation to the hearing.
25. She also referred to the fact that the Claimant has failed to comply with the orders of 11 July 2022. She asked that there be wasted costs if there is distinction between the Claimant and her representative.
26. Ms Kolentsova on behalf of the Claimant reminded the Tribunal that the test to be applied for strike out is contained in section 37 Tribunal Rules.
27. She said that she disagreed that it was necessary or appropriate to strike out the Claimant's case, saying that there were a number of reasons why the Respondent had also acted inappropriately and therefore it would be wrong to strike out the Claimant.
28. Ms Kolentsova referred to the Respondent having submitted multiple applications – most of which have been ignored by the Tribunal.
29. Secondly, she said that the Claimant had explained why she had not provided her diaries by saying that they contained personal information she did not want to disclose. She said that this was not the reason for

withdrawing her discrimination claims; it was because her witnesses were no longer in the UK.

30. Thirdly, she said that the fact that the Claimant has not attended the hearing does not mean she is not interested in the claims. Ms Kolentsova said that the Claimant intends to travel to the UK for the final hearing. She asserted that the Respondent's application for strike out is made out of fear.
31. Ms Kolentsova said of her own participation in the case, that she had no obligation to take over the client's case and that she did not have to explain it to the Tribunal. She said that she was too busy to help the Claimant until 2 days prior to the hearing and she did so to help the Claimant and Mrs Donaldson, whom she respects. Ms Kolentsova said there was no retainer between her and the client and she was not aware that the Claimant had any retainer with International Law Connection Ltd. Ms Kolentsova said that she works for Efolg solicitors and that Mrs Donaldson joined them when she qualified as a UK solicitor. Ms Kolentsova asserted that she is not employed by International Law Connection Ltd.
32. Ms Kolentsova said that the Respondent had disrespectfully quoted her and that it was unprofessional of counsel to do so, as accusations about lying are serious. She also indicated that Mrs Donaldson was not a qualified UK solicitor until 11 April 2023, so could not be the Claimant's professional representative.
33. Ms Kolentsova explained that the Claimant's reference to having paid for pre-litigation services was not about the advice of Mrs Donaldson.
34. On behalf of the Claimant, she asserted that the scandalous and vexatious behaviour had come from the Respondent side. She said that the Respondent had concealed the Claimant's true date of dismissal as 19 April 2020. She also said that the Respondent's application to amend their ET3 to say that the date of dismissal was 16 July 2020 led to an appeal and to the Claimant amending her claim to add constructive dismissal, holiday pay and unlawful deduction from wages.
35. It was also asserted that the Respondent made applications to the Tribunal repeatedly where EJ Welch refused the application, it was renewed before EJ Warren.
36. Ms Kolentsova also submitted that the Respondent had not acted professionally in compiling the bundle and had failed to provide information. She also described the Respondent as inhumane for not having expressed condolences to the Claimant at the time of her bereavement in January 2022 and for demanding costs.
37. On behalf of the Claimant it was also submitted that the Respondent had failed to comply with their own undertaking of April 2021. She referred to p122 of the bundle – a reference to paragraphs 46 to 53 of the decision of

EJ Warren on 22 April 2021. There is no reference in these paragraphs to the Respondent making any undertaking.

38. It was also suggested that EJ Warren's strike out warning of 12 April 2023 was not usual practice, as it was said to be made of the Tribunal's own initiative.
39. The Claimant also sent an email to the Tribunal listing all the applications which had been made, outlining which were successful and which refused. This was relied upon to show that the Claimant was actively pursuing her claim.
40. Finally, Ms Kolenstsova asserted that both the Claimant's applications to adjourn were as a result of 'force majeure' events i.e. that they were beyond the control of the Claimant.
41. In relation to the costs order, it was submitted that rule 80 applies only to those who are acting in pursuit of a profit and Mrs Donaldson was not.
42. Ms Kolenstsova also said that the Claimant's application to postpone was made on 8 July and a reasonable professional would save costs, but that the Respondent did not act reasonably in attending the hearing on 11 July. Specifically she said it was unreasonable for the solicitor to travel to the Tribunal, when they knew on 8 July that the Claimant would not be attending. She also asserted that the level of costs applied for was too high.
43. In response Ms Criddle for the Respondent said that International Law Connection Ltd were the Claimant's appointed solicitors, as they asserted in a letter dated 28 May 2020.

The Law

44. Rule 37 says that a Tribunal, on its own initiative or on application from either party, may strike out a claim at any time, on the grounds that-
 - 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 — [rule 37\(1\)\(b\)](#)
 - for non-compliance with any of the tribunal rules or with an order of the tribunal — [rule 37\(1\)\(c\)](#)
 - That it has not been actively pursued – Rule 37(1)(d)
45. The Tribunal is also aware of the decision of the CA which says that a Tribunal must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; It must consider whether such an order is a proportionate response to the noncompliance.— [Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA.](#)

46. In deciding whether to strike out a party's case for non-compliance with an order under [rule 37\(1\)\(c\)](#), a tribunal will have regard to the overriding objective set out in [rule 2](#) of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including:
- a. the magnitude of the non-compliance
 - b. whether the default was the responsibility of the party or his or her representative
 - c. what disruption, unfairness or prejudice has been caused
 - d. whether a fair hearing would still be possible, and
 - e. whether striking out or some lesser remedy would be an appropriate response to the disobedience — see [Weir Valves and Controls \(UK\) Ltd v Armitage 2004 ICR 371, EAT](#).
47. In considering whether the Claimant has failed to actively pursue the claim, there is an overlap with both the manner in which the proceedings have been conducted, and also the non-compliance with ET orders. The failure must be intentional and contumelious. In the case of *Rolls Royce plc v Riddle* [2008] IRLR 873, EAT it was said that it was appropriate to strike out where the Claimant had misrepresented to the court that he could not attend on medical grounds and then failed to give reasons as to why his claims should not be struck out, and failed to take steps to communicate or progress the case for four months prior to the PHR hearing.
48. In relation to a deposit order, the Tribunal must consider rule 39(1) Tribunal Rules, where there is little reasonable prospect of success, the Tribunal may make an order for a deposit to be paid. Such a decision must be made having regard to all the circumstances and in accordance with the overriding objective.
49. In respect of costs, the Tribunal referred to rule 775,76 and 78. It referred to rule 80 in relation to the consideration of wasted costs. For a wasted costs order to be made, the culpable conduct must be on the part of the a party's legal or other representative.
50. The grounds for a costs order set out in rule 76 include where the Claimant has acted "vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted", or where " a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date of which the relevant hearing begins".

Decision

51. The first decision to be made was in respect of which claims remain live. I accept the Respondent's submission that the unfair dismissal claim is one of constructive dismissal, as the order of 17 January 2022 by EJ Hyams said "*permission to amend to claim that the claimant was dismissed constructively rather than expressly should be given*". This makes it clear that the unfair dismissal claim is replaced (not

supplemented) by a constructive unfair dismissal claim.

52. The Respondent's application for strike out is based on three separate limbs of rule 37. The first of which is the Claimant's conduct has been unreasonable. The Respondent asserted that the conduct of the proceedings is the focus of the Claimant's actions, rather than the substantive claims and that this is not reasonable.
53. In considering whether the behaviour is deliberate and persistent, I considered that it is not ideal that the Claimant's claims are not now any of the ones which were contained in the ET1 originally. However, the claims which have been added have been accepted by the Tribunal and cannot be treated differently because they have been added by amendment.
54. The Respondent also relies upon the fact that the Claimant has applied on a number of occasions to postpone a hearing at short notice. One of these was due to a bereavement and another due to Covid illness. Neither of these can be predicted, prevented, or ignored. It cannot therefore be said that to have caused two postponements in these circumstances is unreasonable conduct of the claim.
55. The Claimant also asserted correctly in her submission that there is no requirement for the Claimant to attend a preliminary hearing, if she is represented by someone who is able to respond to the issues being addressed, on her behalf (i.e they have cogent instructions).
56. For the sake of completeness I note that there are two points which the Claimant relied upon which I do not consider to be correct. Firstly, it is entirely within the jurisdiction of the Tribunal to issue a strike out warning letter of its own initiative – rule 37. Secondly the Claimant asserted that the Respondent has not complied with an undertaking which it had given. I can see no such undertaking in paragraphs 46 to 53 of the decision of EJ Warren on 22 April 2021.
57. The Claimant has been represented by International Law Connection Ltd from the start of her claim. They were named on her ET1 as her representative and the contact there was named as Mrs Donaldson. On 3 May 2023, Mrs Donaldson wrote to the Tribunal and removed herself from the record, giving an email address for the Claimant. Her email did not specifically say that the firm was no longer instructed. The Claimant's new representative Ms Kolentsova started to act on her behalf on 9 May 2023. She asserts that she works for Erfolg solicitors, but also appears on the website of International Law Connections Ltd. Ms Kolentsova denies that she represents the Claimant via International Law Connection Ltd and says that she does not work for them, but has consulted with them on a couple of occasions. Some confusion has therefore arisen and the Respondent submits that this is unprofessional and potentially undermines the credibility of the Claimant.

58. The basis of the professional relationship between the Claimant, Ms Kolentsova and International Law Connection Ltd, is not clear. Without the Claimant to explain the situation, it is difficult to be sure which firm is representing the Claimant. What is clear is that apart from a short period in May 2023, the Claimant has been represented throughout. I do not consider that the nature of the relationship between the Claimant and her representative, nor whether she is paying them is relevant to the issue of strike out. It may be a matter of credibility of the Claimant at any further hearing.
59. Whilst the actions of the Claimant via her representative have not been co-operative throughout and raise some unanswered questions about the nature of the representation the Claimant is receiving, the specific points relied upon by the Respondent to show unreasonable behaviour by the Claimant, do not fall so far below the standard expected of a party in litigation that they amount to unreasonable behaviour. None of them individually would warrant a strike out.
60. The Respondent also asked the Tribunal to consider strike out on the basis that the Claimant has shown that she is not acting in compliance with the orders of the Tribunal. Firstly, the Claimant failed to disclose her diaries with her general disclosure. The diaries only came to light upon the exchange of witness statements. This is a failing on the part of the Claimant, who was represented at the time by Mrs Donaldson via International Law Connection Ltd at the time. She was subsequently ordered to produce the original diaries at the final hearing. Had there been any previous doubt as to what the order for disclosure required, that was irradicated by the specific order to produce them. The fact that the hearing did not occur for legitimate reasons does not detract from the fact that the Claimant has not complied with the order. The July 2022 order made it clear that there were doubts over the Claimant's credibility and the authenticity of the documents.
61. The Claimant herself has said that she does not wish to produce the diaries and has taken the step of withdrawing her discrimination claims, so that the diaries are no longer required to support her claim. This does not obviate the need for the Claimant to comply with the two orders by the Tribunal to produce the diaries. It does however, impact on whether it is still possible to have a fair trial. As the diaries were relevant to the discrimination claims and these have been withdrawn, it would be possible to proceed to a fair trial without them.
62. A further issue in relation to compliance with orders of the Tribunal is the failure of the Claimant to provide a witness statement which asserts her remaining claims. The Claimant has provided a witness statement, although it does not appear to address the unauthorised deduction from wages or holiday pay claims and deals with the constructive dismissal in three paragraphs. (The Claimant asserted that she had an unfair dismissal claim – although I have found that to be incorrect – but it is not referenced in this statement).

63. The final point which the Respondent raised was the fact that the Claimant has failed to actively pursue her claim. The Respondent relies upon the Claimant's repeated attempts to postpone hearings at short notice and by making an application out of office hours. Even where the Claimant has been forced to make the application due to legitimate illness or bereavement, the fact that she has done so after office hours is inappropriate conduct. However, there is no indication that due to these two postponements the Respondent cannot now have a fair trial.
64. Furthermore, whilst it has not been a requirement for the Claimant to attend the hearings, the fact that she left the UK in Summer 2022 and that her own representative had to track her down on social media in December 2022 is an indication that she did not wish to continue to engage with the process. The fact that the Claimant's witness statement does not address the claims also indicates a lack of interest in pursuing the claims. It is of concern that the Claimant's representative has changed and the evidence with regard to the basis of the Claimant's representation is not clear. However, there is no indication that this prevents a fair trial.
65. It is the accumulated effect of these various inappropriate and inadequate actions by the Claimant, which must be considered. The ultimate consideration for the Tribunal is whether a fair trial can now proceed, or whether the actions of the Claimant amount to a contumelious disregard for the process of litigation.
66. I have concluded that this is a very finely balanced situation. The Claimant has failed to follow one order of the Tribunal and has not acted straightforwardly in relation to her pursuit of the claim. However, her failure to attend hearings and to set out her claim in her witness statement are matters which do not breach an order or rule. There are other, less draconian measures which can be applied to address these issues. It cannot therefore be appropriate to strike out the claim at this time.
67. I do note that any further application by the Claimant in relation to postponing the hearing listed on 12 June 2023, is likely to lead to further consideration of strike out by the Tribunal.
68. In respect of the Respondent's application for a deposit order, they assert that the Claimant's constructive dismissal claim has little prospect of success, on the basis that there is little evidence to support it and that the Claimant's credibility is in doubt.
69. I have considered the pleadings, the Claimant's witness statement and the order of EJ Hyams in January 2022 (paragraphs 10 -17 and 22). I conclude that the Claimant's case on constructive dismissal is unclear and that the lack of detail in the witness statement does not provide any clarity. For these reasons, the prospect of success based on the current position is weak and I consider that a deposit order is the appropriate order to ensure that the Claimant signals her commitment to the claim

and the Respondent is provided some security.

70. The evidence I have seen indicates that there is some doubt raised by the Respondent as to whether the Claimant is currently working in Lithuania. I have taken into account the statement of the Claimant's income and liabilities sent to the Tribunal in February 2023, but note that these do not declare any income since she left the UK in Summer 2022. I also note that a deposit order of £100 was made in 2022 which was paid by the Claimant.
71. The circumstances have altered since that order was made, these applications having occurred and the Claimant having provided her witness statement. I will require to see evidence from the Claimant if she wishes to suggest that I make an order for a sum other than £900 in relation to the constructive dismissal claim. Any such evidence to be provided by 25 May 2023.
72. In relation to the claims of unauthorised deductions and holiday pay claims, there is little evidence present. I am minded to also make an order in respect of these claims in the sum of £500 each. If the Claimant wishes to make submissions on her means she must do so as set out above.
73. In relation to the application for an unless order:- I have concluded above that the requirement for disclosure of the diaries was ignored by the Claimant and her representative. This is not acceptable behaviour. Their absence may not prevent a fair trial, but the Respondent should still have the opportunity to see them. I do not consider that this should be the subject of an unless order. An order for disclosure is contained in the attached case management order.
74. Similarly there needs to be agreement on the List of Issues for the final hearing of this case. The issues for the claim have now been clarified and hence it can be finalised. This will assist the parties and the Tribunal to focus their preparation for the final hearing. However, I do not consider that the failure to agree a List of Issues is a matter which ought to be subject to an unless order. An order for completion of the List of Issues is contained in the attached case management order.
75. In respect of the Respondent's costs application – the application is made on the basis of the Claimant's unreasonable conduct in relation to the postponed hearing in July 2022.
76. I note that Mrs Donaldson first informed the Tribunal that she had contracted Covid on 5 July 2022. A further email on 8 July at 9.46pm said that the Claimant also had Covid and could not attend. A medical certificate dated 8 July 2022 in relation to the Claimant was attached which indicated that she should not attend work. It did not refer to whether the Claimant was able to attend the Tribunal or give instructions to her legal representative. A sick note for Mrs Donaldson was also

provided dated 10 July 2022.

77. The evidence supplied on behalf of the Claimant does not indicate that the Claimant is too ill to attend a hearing- either in person, or online. I note that the hearing had already been changed to a hybrid hearing. There is therefore no evidence to suggest that the Claimant could not have attended online.
78. The evidence in relation to Mrs Donaldson indicates that she did not obtain a medical certificate until Sunday 10 July 2022. No application to postpone was made until the Sunday. This was not in sufficient time to ensure that the Tribunal could take a decision to postpone. It was therefore entirely professionally appropriate and courteous that the Respondent's representatives should attend the hearing, ready to start the final merits hearing.
79. Whilst I take into account the fact that a postponement was inevitable for reasons which I accept on the evidence were genuine Covid illness, I consider that the manner and timing of the notification of the illness was not reasonable. An application could and should have been made on Friday 8 July within business working hours which would have avoided the Respondent incurring at least some of their costs.
80. Rule 76(1)(c) gives the Tribunal the power to make a costs order where the hearing has been postponed on the application of a party made less than 7 days before the hearing begins. In accordance with rule 78 I have considered the Schedule of Costs submitted by the Respondent. Costs should be limited to those incurred directly in connection with attending on 11 July 2022 and the postponement of the hearing. I assess those to be £16,077.67.

Employment Judge Cowen

Date 18th May 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 May 2023

GDJ
FOR EMPLOYMENT TRIBUNALS