EMPLOYMENT TRIBUNALS

Claimant: JS

Respondent: Accenture (UK) Limited

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: London Central (in private, by video) **On:** 28 September 2021

Before: Employment Judge Stout

Appearances
For the Claimant: NS (litigation friend/representative)
For the Respondent: Laura Bell (counsel)

JUDGMENT ON STRIKE-OUT APPLICATION

Re-issued 7 October 2022 following making of an Order under Rule 50

1. This was an Open Preliminary Hearing by Video (Cloud Video Platform) listed by me at the last Closed Preliminary Hearing on 25 July 2021 for the purpose of determining:
    a. Whether the Claimant has capacity to conduct these proceedings;
    b. What further case management orders should be made, which may include:
        i. Staying the proceedings for a period;
        ii. Listing a final hearing;
        iii. Striking the claim out under rule 37 if there is insufficient prospect of the claim being heard in a reasonable time or a fair trial is otherwise not possible;
        iv. Any other applications that the parties may make;
        v. Any other case management directions.

The Claimant's capacity / representation

2. The hearing began on the basis that the Claimant's state of health had not changed significantly since the last hearing on 25 July 2021. However, after Ms Bell had made her submissions, NS indicated that the Claimant's health had in fact improved significantly and the Claimant had read the bundle for this hearing and was assisting her with making submissions. The Claimant then came on screen to speak to the Tribunal. She said that she is feeling a bit better, and she is shocked to see what has happened on this litigation while she has been 'out of it'. She said that she had been overwhelmed and had broken down. She apologised to the Respondent and the Tribunal that she had not been able to deal with the litigation. She thanked everyone for their help. She wants the Respondent to know that although she feels she should litigate her claim, she does not want the Respondent to waste money or time or resources. She explained that although she had read the bundle, she had done so without looking at the ET1 or the substantive issues that are 'triggers' for her. She feels that she needs therapy before she can dive into the issues. She agreed that as she was feeling better and able to give instructions to her sister, it was right that NS should now be simply her 'representative' rather than 'litigation friend'.

The strike-out / stay applications

3. At this hearing, Ms Bell (on behalf of the Respondent) applied to strike out the Claimant's claim under Rule 37(1)(e) on the basis that it is no longer possible to have a fair hearing in respect of the claim. She relied on the Respondent's detailed letter of 14 September 2021, supplemented by oral submissions. NS resisted the strike-out application and applied for a stay of proceedings, relying on her letters of 26 April 2021, 7 and 23 September 2021.

4. These applications are two sides of the same problem, and I have considered them together. I have to consider the over-riding objective, in particular the need to avoid delay (so far as compatible with the proper consideration of the issues), save expense and deal with the proceedings justly and fairly. I also have to ensure that, so far as possible, the parties are on an equal footing. I have to consider the right of both parties under Article 6 of the ECHR to a fair trial within a reasonable time. I have to consider the prejudice to both parties of the two courses of action open to me. Ms Bell has also referred me to the authorities of *Osonnaya v South West Essex Primary Care Trust* (UKEAT/0629/11/SM), 20 March 2012, *Abegaze v Shrewsbury College of Arts & Technology* (UKEAT/0176/07/ZT) and *Riley v The Crown Prosecution Service* [2013] EWCA Civ 951, [2013] IRLR 966.

5. I have been case managing these proceedings for some time, and the general history of them is set out in my previous case management orders. I have taken that history into account. In particular, I have borne in mind the following factors:-

    a. The Claimant has been unwell for some considerable time. The Respondent has produced a chronology and medical evidence going back to 2017. She had long periods of absence from work before commencing

these proceedings. She is still employed by the Respondent but has not attended work since 3 April 2020.

b. On 4 April 2020 when the Claimant commenced these proceedings, she was well enough to prepare the claim herself and to set out a coherent narrative of events. It was, however, difficult to work out what the actual legal claims were intended to be. Efforts to get the Claimant to provide the necessary further particulars have not been successful because she has been unwell. There have been a large number of preliminary hearings and significant correspondence on the case.

c. At the beginning of this year, and up until the hearing on 15 July 2021, it was clear that the Claimant was unwell, so unwell that I concluded at that hearing that she did not have capacity to litigate. Dr Zoha considered that her condition was treatable, but at that point there was no treatment plan for her. The Claimant had exhausted the Respondent's health insurance for in-patient treatment and had been referred back to community mental health services but was not receiving treatment.

d. Dr Gidley provided a letter of 25 August 2021. Dr Gidley is a GP who has been treating the Claimant, although she is not apparently privy to treatment plans from the community mental health team. She does refer to therapy being due to commence shortly and that this is the only treatment. Dr Gidley's view is that although the Claimant can conduct litigation to an extent, it would currently be detrimental to her health to attempt to prepare a witness statement. She states that *"it is difficult to comment on time frames but potentially six months or spring 2022 as mentioned would be more realistic"*. The way this is phrased indicates that this is a timeframe that has been suggested to the GP, possibly by the Claimant, but nonetheless the doctor has adopted it as her view. Dr Gidley's view is that because the Claimant wishes to continue with proceedings, dismissing them would not provide the appropriate resolution for her.

e. The letters of 7 and 23 September from NS indicate that the Claimant remains very unwell, her condition is unstable, efforts by her to speak to the Claimant about the claim were not successful and distressed the Claimant, and on 22 occasions she was not well enough to speak to the GP. However, the letter of 23 September indicates that therapy commenced last week in the community and that there is an intention to provide intensive in-patient therapy to the Claimant at the Nightingale Hospital as Dr Zoha recommended when a bed becomes available. At this hearing, NS clarified (and I accept, notwithstanding the lack of documentary evidence) that the Claimant is due to receive three types of therapy (CBT, psychotherapy and trauma-based therapy) and will receive 28 days in-patient treatment. NS indicated that the Claimant would have completed two of the therapies by January 2022 and felt she would be ready to engage with the claim again then, although she will still be receiving therapy into February 2022.

6. Although the medical evidence is not as detailed as it could be, it seems to me that, taking Dr Zoha's and Dr Gidley's evidence together with the current medical treatment plan, that there is a reasonable prospect that the Claimant will be well enough to engage with the substance of this claim by spring 2022. The fact that she has been able to attend today, and cope well with doing so, provides some further support for the positive prognosis of the treating professionals.

7. Against that, I must consider the prejudice to the Respondent of further delay. The course of the proceedings to date has undoubtedly prejudiced the Respondent in terms of the amount of work and time that has been put in to reach this point, but the Respondent has not been able to point to any specific prejudice that will be suffered from a further delay. Memories may fade, there may be issues with documents or witnesses, but there are no specific issues raised at this point. Although the claim does involve consideration of events going back to 2017, the claim itself is only 18-months' old. Many other cases take much longer to get to hearing, for a variety of reasons. A stay, or period in which 'nothing happens' on the case, will not in itself cost the Respondent anything. In my judgment that is the right course in this case. Based on her current prognosis by March of next year the Claimant will be in a position in terms of her health to conduct this litigation on an equal footing with the Respondent and the delay will not mean that is not possible for there to be a fair trial of this matter. The Respondent's application for strike-out is therefore dismissed.

CASE MANAGEMENT ORDERS

(1) The proceedings are stayed until **28 February 2022**. Neither party should take any step in the proceedings between now and then.

(2) There will be a Final Hearing in the case to determine liability and remedy on **31 October – 11 November 2022** (time estimate 10 days). Whether or not that remains the appropriate listing, and whether it should be in person or by video can be reviewed in March 2022. I have provisionally listed it as a video hearing.

(3) There will be a **Closed Case Management Preliminary Hearing** by video before Employment Judge Stout on **30 March 2022** at **10am** (3 hrs). In advance of that hearing:-

   (i) The Claimant is **by 23 March 2022** to complete the Draft List of Issues prepared by the Respondent and/or amend it as necessary to reflect the claims she wishes to take forward;
   (ii) The Respondent is by **28 March 2022** to send to the Tribunal and the Claimant an electronic bundle for the purposes of that hearing.

_____

Employment Judge Stout

28 September 2021

Sent to the parties on:

10/10/2022

For the Tribunal:

OLU