Applications to postpone on medical grounds must be made with adequate evidence

By Jo Laxton
3PB Barristers

In its decision in the case of *Kaler v Insights ESC Ltd*, the EAT upheld the findings of an employment tribunal (ET) regarding discrimination arising from disability, and requests made by the Claimant during the final hearing for a postponement.

Background

1. Ms Kaler, the Claimant (C) had worked for the Respondent (R) as a supply teacher between March and June 2013. R is a school, providing education to children with particular educational needs. During that time she was going through the process of being diagnosed with Aspergers Syndrome, and had mentioned this to R.

2. She returned to work for the school in 2017 as a consultant. She did not mention her condition at this stage nor did she request any adjustments to the role of Assistant Vice Principal that she undertook. She did however describe herself to others as being 'aspie' and shared details of her autism with them.

3. In December 2017, C went off work sick and then resigned on notice by email some two weeks later. As a result of the amount of sickness absence she had had, her pay was adjusted, an event which prompted her outrage. She began sending messages to the schools' leadership and teaching staff. The emails were regarded as threatening and abusive, with C making statements such as:

> *"You can choose to pay me or not. If you pay me, you lose a bit of money. If you don't, then you will just have to accept that you will have a few investigations going on and you will lose face with your staff who are secretly loving it because they have wanted to say these things to you for years.*

If I get paid what is owed and fair, I will walk away. If I don't, then I will make sure that if I'm not getting my money, then I'm definitely going to make you work hard for yours!

You don't own my mouth. You either pay for it or you don't have any control over it. That is it. You can't have your cake and eat it. Money=silence, no money=no obligation to be silent. Your call entirely."

4. There were other messages accusing R of poor conduct. She sent the messages (emails and texts) to colleague's personal addresses, and despite being asked to desist from sending such correspondence, C continued.

5. R invited C to a disciplinary hearing scheduled to take place before her notice period expired. C's immediate response to the invite included a comment saying "…..*Stuff your disciplinary, stick it you know where."* She later asserted that she was not fit to attend the disciplinary hearing. The hearing went ahead in her absence and she was dismissed summarily for gross misconduct – namely the nature of correspondence she sent to R in response to the adjustment of her pay.

6. She brought a claim in the ET alleging unfair dismissal and disability discrimination.

ET decision

7. During the course of the hearing C absented herself, and requested a postponement, stating that she was not well enough to continue. This was denied, and the ET determined to hear from R's witnesses. C did then re-join the hearing, however described herself and having encountered a "meltdown" requiring the attendance of emergency responders. She again requested that the rest of the hearing be postponed.

8. The ET declined to postpone the remainder of the entire hearing. While C had advanced a report from the paramedics attending her, it was noted that she had not been taken to hospital, nor treated. She was also advised to self-refer to her GP.

9. The hearing continued, and the ET reserved its decision. C subsequently sent in a note from her GP regarding her health during the hearing. The ET noted that while it did refer to some of C's symptoms, it did not offer comment on the likelihood of recurrence if the hearing had indeed been postponed.

10. The ET went on to give its judgment on the claims made, dismissing them all. With regard the disability discrimination complaint, while the ET found C to be a disabled person for the purposes of the Act, it dismissed her claim under s15 for discrimination arising from disability on the basis that R did not have constructive or actual knowledge of her disability. It further noted that even if it did, the conduct for which C was dismissed was not 'something arising' in consequence of her autism. Again, in the alternative, even if it were, the ET concluded that her conduct was so serious that her dismissal could be objectively justified. It noted, at para 91 of the judgement -

> *"The emails sent by the Claimant were on any analysis unprofessional, deeply offensive, insulting, threatening and some of them clearly blackmailing."*

11. By contrast, R had the legitimate aim of ensuring professionalism in the workplace, maintain respect and dignity for all and ensuring the health, welfare and safety of all employees. Dismissing C was therefore justified on the facts of the case.

C appealed to the EAT

12. C appealed against the ETs' decision on her Equality Act complaints, and further sought to overturn the decision on the basis that the tribunal had been wrong to deny her a postponement.

EAT decision

13. On the Equality Act issues, the EAT disagreed with the ET's finding on knowledge. It said the references C made about herself as being 'aspie' should have put R on notice of the possibility of her condition.

14. Despite that, the EAT upheld the tribunal's findings regarding her correspondence. It noted that the ET had considered matters in the alternative – "*it considered how matters would have stood in relation to justification if it had found that the respondent did know, or constructively knew, that the claimant had ASD, and that the conduct for which she was dismissed did arise in consequence of it.*"

15. Accordingly, the EAT noted that "*the features which led the tribunal to the conclusion that dismissal for the conduct was justified would still have held good*".

16. Accordingly, her appeal in relation to her complaint of discrimination failed.

17. On the issue of the postponement, the EAT highlighted that a ruling such as this can only be challenged on perversity grounds. It also emphasised that, drawing on the decision in ***Teinaz v Wandsworth Borough Council*** **[2002] ICR 1471**, the onus is on the party seeking an adjournment on grounds of ill health to adduce appropriate evidence in support of their application (para 50).

18. At the time of the decision to continue with the remainder of the hearing, the ET only had reports from practitioners offering insight on C's Autism Spectrum Disorder. They did not address the effect of the proceedings on her condition, or the specifics of her application.

19. C had told the ET that she had had to call 999, and relayed the account produced by the emergency responders. That report noted that she was not treated, nor taken to hospital. She was advised to self-refer to her GP, but it was not clear that she had done so. In so far as a description of her condition and symptoms, there appeared only to be a repeat of what C had said herself to paramedics.

20. While the ET received further information after the hearing from C's doctor, the EAT noted that "*the critical question for the tribunal, in relation to the balancing exercise, was then as to the future prospects for the hearing both resuming and successfully concluding within a reasonable timescale*".

21. Again, the EAT was supportive of the ET's commentary on this report – it did not give an indication as to the likelihood of a recurrence in the event of a postponement, and the chances of C being able to see through a later resumed hearing. The EAT said (at para 58) that ET was entitled to take account of that, and of the prospect of there being a fair hearing within a reasonable period of time.

22. Notably, the EAT's judgment points out that even where there is undisputed medical evidence, a party is not automatically entitled to a postponement. An ET can, on the basis of proper reasoning, express reservations about the evidence before it – it is not bound to "*uncritically defer*" to a clinicians' view (para 68).

23. The EAT was satisfied that the ET had considered the impact on C of continuing, and that it had carried out a balancing exercise. It was, said the EAT, proper to take into account the fact that it had been almost four years since the dismissal and that there was prejudice to R if there was a postponement. It could not find perversity in the ET's approach, and as such her appeal on this ground also failed.

Comment

24. The facts of this case make for interesting reading, and the detail is likely to be important for litigants who may wish to rely on this ruling. However, the decision reinforces that applications to postpone of this type must be made with adequate evidence. Furthermore, it underlines that ETs can challenge the material before them, supplying their reasons for doing so.

28 January 2025

Jo Laxton

Barrister
3PB

01865 793736
Joanna.laxton@3pb.co.uk

3pb.co.uk