



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Nyathi

**Respondent:** Secretary of State for Justice

**Heard at:** Leicester **On:** Wednesday 31 May 2017

**Before:** Employment Judge Hutchinson (sitting alone)

**Representatives**

**Claimant:** No Appearance

**Respondent:** Ms E Hodgetts of Counsel

## JUDGMENT

The Employment Judge gave judgment as follows:-

1. The application to reconsider the judgment dated 20 March 2017 striking out the complaints of race discrimination, disability discrimination, notice pay and holiday pay has no reasonable prospects of succeeding. The application is refused.
2. The complaint of unfair dismissal is struck out.

## REASONS

### Background to the Hearing

1. The Claimant presented his claim to the Tribunal on 6 October 2016. He initially presented his claim against the Ministry of Justice National Offender Management Services and a number of other Respondents. Only the claim against the Ministry of Justice National Offender Management Services was accepted. There was no early conciliation certificate in respect of the other Respondents. The Claimant said he had been dismissed on grounds of capability on 16 June 2016.
2. At a Preliminary Hearing on 5 January 2017 it was agreed that the correct name of the Respondent was the Secretary of State for Justice and the name of the Respondents was therefore amended.

3. His claims were as follows:-

- 3.1 Unfair dismissal.
- 3.2 Race discrimination.
- 3.3 Disability discrimination.
- 3.4 Notice pay.
- 3.5 Holiday pay.
- 3.6 Other payments not specified.

4. The claim form provided very little detail about the nature of the complaints. Matters he did complain about though included:-

- Unjustifiable poor performance management over a period of 2 years, 6 months
- Racial discrimination, harassment and victimisation
- Unfair dismissal

5. The only details he provided about his claims are contained in paragraphs 8.1 and 8.2 of his ET1.

6. What he said in respect of his unfair dismissal was as follows:-

“I felt unfairly dismissed from my employment on what was described as “dismissal on grounds of medical inefficiency by the Acting Governor Ian West on 16 January 2016. I had been subjected to too prolonged poor performance management by my former Line Manager Ms Nicola Brown which ran from 10 February 2014 until my dismissal. I was over punished. This was a breach of our work place procedures. The punishment was so severe to me. I became increasingly unsettled most of the time and suffered stress related illness which has had a serious psychological impact on me. Knowing very well I did not have any difficulties in carrying out my duties – it is stressful and painful I got dismissed unceremoniously after a good service of slightly over 10 years and having gone past the minimum retirement age of (60). There was no consideration of medical evidence given to them – and the fact I was under the care of a psychiatrist, a cardiologist, my GP, notes from our NOMS Employee Support Counsellor and reports from our Occupational Health Adviser.”

7. As can be seen from the above it was very difficult to make out what the basis of his claim was. In the claim form he referred to obtaining help from a legal practitioner. He had not appointed anyone at that time.

8. The Claimant had previously brought proceedings against the Respondent under case number 2601118/14. The claims in that case were of:-

- Direct race discrimination
- Harassment
- Victimisation
- Breach of Section 10 Employment Relations Act 1999

That claim was made and heard whilst he was still employed by the Respondent and was dealt with by way of a Reserved Judgment dated 11 March 2016. The judgment was sent to the parties on 14 March 2016. It followed a 14 day hearing which had been conducted by my colleague Employment Judge Ahmed sitting with members. The Claimant had represented himself at that hearing. In paragraph 177 of the reasons Employment Judge Ahmed found with the members as follows:-

“Although this case does not hinge on the credibility of the witnesses, there have been several occasions when we have found the Claimant’s evidence and arguments to be wholly unreliable or simply implausible. The suggestion and strongly held belief that there was a widespread conspiracy against him involving up to 30 people including the Governor and Deputy Governor is plainly absurd. The suggestion that Ms Brown attempted to force him into ill health retirement is factually inaccurate. It was the Claimant who was in fact seeking ill health retirement and he signed the forms for the application. At the hearing he said that Ms Brown was seeking to pressurise him into early ill health retirement which is simply not the case. Ms Brown simply went through the forms with him as his Line Manager. His oft repeated allegation that matters were not investigated is not borne out in the documentary evidence.”

9. Whilst the Claimant had provided little in the way of detail as to the basis of his claims it appeared that he was referring to matters that had already been litigated in these previous proceedings.

10. The Respondent’s filed their ET3 on 12 December 2016 and I conducted a Case Management Preliminary Hearing which was attended by the parties on Thursday 5 January 2017. Mr Nyathi produced an agenda which he had filed with the Tribunal on 3 January 2017 in respect of that hearing. In it he appeared to be referring again to matters already dealt with by the Tribunal and I expressed my concern at the hearing that he was attempting, in his list of issues, to expand his claim from that contained in the ET1.

11. In his agenda he suggested that various other people should be added as Respondent’s namely those people who were in his original ET1 against whom the claims were rejected.

12. The Respondent’s pointed out that they were not seeking to rely on the statutory defence and that there was no advantage to the Claimant by adding additional Respondents. I told him that if he wished to add other Respondents he must make an application and set out in writing the basis for him having these added to the proceedings.

13. That Preliminary Hearing had been subject to a request by the Claimant for a postponement. That request had been made and the basis for it was:-

“I have to take legal advice and additional time to prepare what will be appreciated.”

That request for a postponement was refused by my colleague Regional Employment Judge Swann who pointed out that he had not provided any medical evidence in support of the request.

14. At the hearing on 5 January I pointed out to the Claimant that he had not provided a schedule of loss in accordance with the case management order made on 14 November 2016. This should have been provided by 12 December 2016.

15. I decided to cancel the 3 day hearing that was listed for 3, 4 and 5 April and to make further case management orders. I also listed the case for an attended Preliminary Hearing on 3 April 2017. That would consider the following matters:-

15.1 Whether the Claimant suffered from a disability.

15.2 Whether any of the claims should be prevented from continuing or be struck out by virtue of res judicata or an abuse of process.

15.3 Whether any of the claims should be struck out as having no reasonable prospect of success under Rule 37 of the Rules of Procedure 2013.

15.4 Whether any of the claims were out of time and therefore whether the Tribunal had jurisdiction to hear the claims.

15.5 Whether the Claimant should be ordered to pay a deposit under Rule 39 of the Rules of the Procedure on the grounds that any of the claims had little reasonable prospect of success.

16. I also made a number of orders and in particular:-

16.1 That he should provide a schedule particularising his claims of race and disability discrimination by 2 February 2017.

16.2 That he should provide further details of the pay that he was claiming also by 2 February 2017.

17. The orders were sent out to the parties on 17 January 2017.

18. The Tribunal and the Respondent's did not receive any response to the order and a letter was sent to Mr Nyathi on 6 February 2017 asking him to reply with the information by return. On 7 February the Tribunal received a response from Mr Nyathi saying that he had sent the information by post to the Tribunal and the Respondent on 1 February 2017. There was no record of the Tribunal receiving the same. He said that he was in the process of tracking the letter with the Post Office but the Tribunal received no further information from him about that. The Claimant did not resend the documentation to the Tribunal. The Tribunal received an e-mail from the Respondent's solicitor on 9 February with a copy of a scanned document received from the Claimant. The documentation only addressed the Claimant's claims regarding the alleged none payments of notice pay, holiday pay, wages and other payments. He had not provided a schedule, or indeed any information relating to his claims of race and disability discrimination as required by the order.

19. I had pointed out to the Claimant at the hearing on 5 January 2017 which was attended by him exactly what was required with regard to the schedule. The Claimant was also familiar with what was required because he had prepared a schedule in his previous Employment Tribunal claim.

20. On 14 February 2017 the Claimant wrote to the Tribunal saying that he was not in a position to prepare and present his case without advice from a legal person. He had of course referred to obtaining such advice more than 4 months earlier when he had submitted his ET1. He went on to say:-

“Medical advice on hands cited my condition it was detrimental to try and proceed with this case without being assisted by a legal person.”

21. He referred then to his medical condition but did not provide any detail of it, nor did he provide any evidence in support.

22. The correspondence was reviewed by my colleague Employment Judge Britton. He wrote to the Claimant on 15 February 2017 saying:-

“The explanation of the Claimant and his request for general stay in terms of further compliance are reminiscent of the history of his claims which were dismissed by the Employment Judge Ahmed Tribunal on 11 March 2016. Furthermore those particulars that he has now given of the monetary relate to matters from 2 years ago which means that they are out of time and also could have been raised in the preceding case in the 2 year span post its presentation to the end of the hearing and which was preceded by a number of Preliminary Hearings.

Therefore pursuant to Rule 27 of the Tribunal’s 2013 Rules of Procedure I am considering striking out the monetary claims as having no reasonable prospect of success them being so long out of time. Unless by 4 pm, Monday 27 February the Claimant provides persuasive reasons to the contrary this will occur. If he does not comply then the issue will be revisited as already directed at the Preliminary Hearing on 3 April 2017.

Second unless he provides the further and better particulars of the race and disability discrimination claims as directed by Employment Judge Hutchinson on 5 February 2017, those claims will be dismissed for non compliance with the Tribunal orders.”

23. On 23 February 2017 Mr Nyathi wrote again. He did not provide reasons as to why the monetary claims were out of time. He said he was doing his best to be compliant. He referred to deterioration in his health:-

“as a result of bad treatment by the Respondent.”

He said that he had a medical certificate issued by his General Practitioner on 27 January 2017 but did not provide details of the certificate. He also said that he was under the care of a consultant psychiatrist since November 2016 but provided no details of the psychiatrist or a copy of any medical evidence. On 27 February Mr Nyathi wrote again seeking a stay of the proceedings whilst he continued to obtain legal representation.

24. On 6 March 2017 the Respondent's replied to this correspondence. They pointed out that the Claimant had not provided any medical evidence in support of his position and submitted that the Claimant did not require legal representation to assist with this part of the legal exercise. They objected to the stay of the proceedings and the postponement of the hearing of 3 April.

25. As the Claimant had not complied with the unless order; the complaints of race discrimination, disability discrimination, notice pay and holiday pay were automatically struck out. Notification was sent to the parties on 20 March 2017. The only claim remaining was that of unfair dismissal which remained listed for a Preliminary Hearing on 3 April.

26. On 27 March the Claimant wrote to the Tribunal. His letter said:-

"I am submitting to you the following medical reports to substantiate my inability due to ill health problems. I appeal to have the judgment reviewed. It is difficult for me to have to go against medical advice."

27. Attached to that letter were various medical reports which comprised:-

27.1 A fitness note dated 9 November 2016 saying that he was not fit to work and would be so "indefinitely".

27.2 A fitness note dated 17 June 2015 saying at that time that he suffered from depression.

27.3 A letter from Occupational Health dated 19 April 2015.

27.4 A letter from Occupational Health dated 4 April 2016.

27.5 The front page of an assessment review dated 4 October 2016.

27.6 A letter from a consultant psychiatrist Dr Villanova dated 9 February 2016.

28. There are a number of points to be made about the information provided. These are:-

28.1 It was not current information.

28.2 It did not comply with the presidential guidance relating to postponement applications.

29. Notwithstanding the Respondent's objection to a postponement of the hearing Regional Employment Judge Swann directed that the Preliminary Hearing be converted to a telephone Preliminary Hearing to assess the current position of the Claimant and the Claimant's fitness to continue to pursue the claim.

30. That hearing was conducted by me on the telephone on 3 April 2017. I was satisfied that the letter amounted to an application to reconsider my judgment striking out all claims other than the unfair dismissal claim.

31. As I pointed out in the telephone discussion I am required to consider such an application and decide whether there are reasonable prospects of the original decision being varied or revoked. Before I can consider that I needed the Claimant to provide me with the medical evidence. I pointed out to him what was said in the Presidential Guidance, namely:

“When a party or witness is unable for medical reasons to attend a hearing, all medical certificates and supporting medical evidence should be provided in addition to an explanation of the nature of the health condition concerned. Where medical evidence is supplied, it should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease.”

32. I decided to list a further Preliminary Hearing for 31 May 2017 at 10 am. This would consider:-

32.1 Whether the claim of unfair dismissal should be struck out as having no reasonable prospect of success under Rule 37 of the Rules of Procedure 2013.

32.2 Whether the Claimant should be ordered to pay a deposit under Rule 39 of the Rules on the grounds that the claim for unfair dismissal had little reasonable prospect of success.

33. I pointed out that I would consider the reconsider application once the Claimant had provided me with the medical evidence which should deal with the matters as I directed at the hearing.

34. I made an order that the Claimant provide the medical evidence in support of his application to stay the proceedings and in respect of his reconsideration application by 2 May 2017.

35. On 2 May 2017 the Claimant provided his medical evidence. There was a report from Dr J Villanova dated 25 April 2017. It was not clear whether he had in fact seen the Claimant recently but he said:

“Currently Mr Nayathi still suffers from anxiety and apart from the psychological symptoms of feeling anxious, he also complains of different physical symptoms like pains in his body. He also complains of feeling exhaustion, lack of concentration and increased sweating. He also noticed poor sleep and frequent nightmares.

I believe that all these signs are symptoms of chronic anxiety and there appear to have happened following the different incidents that Mr Neath has been complaining about in his employment.”

36. Also attached was a letter dated 7 April 2017 from his General Practitioner Dr R K Tsar. He also does not say whether he had seen the Claimant recently. His General Practitioner said that the Claimant had received a diagnosis from a psychiatrist of “adjustment disorder”.

He also said that the Claimant was suffering from “chronic depression”. The Consultant Psychiatrist did not refer to these conditions. He said that the Claimant was suffering from anxiety which he later in the letter describes as “acute”.

37. Neither of the reports contained an opinion that the Claimant was unfit to attend any hearing or give any prognosis of the condition or an indication of when the state of affairs may cease. All this should have been provided in accordance with the presidential guidance.

38. In his letter to the Tribunal of 2 May he referred again to obtaining legal representation. It was now some 7 months after he had made his claim. He said that he was struggling to obtain legal representation and asked that his case be put on hold.

39. On reviewing the Claimant’s correspondence I wrote to the Claimant on 22 May. I said:

“The application for a postponement of the hearing is refused. There is no medical evidence that the Claimant cannot proceed with the hearing. The matters to be dealt with are those set out in the record of the Preliminary Hearing dated 3 April 2017. It will include whether there are grounds for reconsidering the strike out of the Claimant’s claims other than the unfair dismissal claim and will also consider striking out that claim.”

### **The Hearing Today**

40. The Respondent was represented by Ms Hodgetts of Counsel and the Claimant did not attend and gave no explanation for his non attendance. I waited approximately 15 minutes to see if the Claimant would attend late but he did not. I heard representations from Ms Hodgetts and I considered the correspondence on the file and a bundle of documents produced by the Respondent’s. I also considered an e-mail from the Claimant dated 13 May which comprised an urgent application to have his employment matter postponed until he found legal representation. His correspondence still did not comply with the presidential guidance. He acknowledged that he had received the documentation from the Respondent’s but did not feel he was well enough to attend.

41. I decided that I should proceed in the Claimant’s absence.

### **The Law**

#### Reconsideration

42. Reconsideration of judgments is dealt with under Rule 70 of the Employment Tribunal Rules of Procedure. That says:

“A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision (“the original decision”) may be confirmed, varied or revoked. If it is revoked it may be taken again.”



43. Under Rule 72(1) I am required to consider the application. If I consider there is no reasonable prospect of the original decision being varied or revoked the application “shall” be refused and the Tribunal shall inform the parties of the refusal.

44. I am not undertaking a reconsideration hearing at this stage but simply deciding whether there are reasonable prospects of the original decision being varied or revoked. A further hearing would be necessary if I did think there was a reasonable prospect of the decision being varied or revoked.

#### Striking Out

45. Rule 37 of the Employment Tribunal provides as follows:

“(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of the claim or response on any of the following grounds:-

(a) That it is scandalous or vexatious or has no reasonable prospects of success.”

46. Ms Hodgetts referred me to the case of **Ezsias v North Glamorgan NHS Trust** 2007 ICR 1126. In that case the Court of Appeal stressed that it will only be an exceptional case that claims should be struck out as having no reasonable prospect of success where the central facts are in dispute.

47. She also referred me to the case of **DB Shenko Rail (UK) Limited v Doolan** UK EAT S/0053/09/BI. She referred me also to the cases of **Iceland Frozen Food v Jones** [1982] IRLR 439 and **East Lynsey District Council v Daubney** [1977] ICR 566. Also produced for me were the following documents:-

47.1 An occupational health report dated 4 April 2016.

47.2 Capability hearing meeting notes dated 20 May 2016.

47.3 Capability hearing meeting notes dated 16 June 2016.

47.4 Capability meeting outcome letter dated 21 June 2016.

47.5 Notification of formal grievance dated 28 June 2016.

47.6 Disciplinary appeal notification form dated 15 July 2016.

47.7 Notification of appeal decision letter dated 3 August 2016.

48. It can be seen from the occupational health report that he had been off sick since December 2015 and it was the ninth such absence since January 2013. It said:

“Mr Nyathi remains unfit for work in any capacity, and I cannot say exactly when he might be well enough again so there is no planned return date. It is unlikely that any work place adjustments would help at this stage.”

49. At the capability hearing the Claimant's position was that his mental and physical condition had deteriorated and he could not foresee a return to "Gartree or any other prison".

50. As a result he was dismissed on grounds of capability with notice.

## **My Conclusions**

### Reconsideration

51. I am satisfied that there is no reasonable prospect of the original decision to strike out the claims being varied or revoked. The Claimant has been given ample opportunity to pursue his case and he has not done so. Whilst he says he needs legal advice because of his medical condition there is no evidence to support that contention. There is also no medical evidence to support any contention that he could not attend this hearing.

52. The Claimant has had the opportunity to provide further and better particulars of his claims prior to the Unless Order being made and when he still did not provide those details the claims were automatically struck out. I have seen no evidence to support any contention that he should be given relief from that striking out.

53. I particularly have in mind that the Respondent here is a public body. It was put to considerable expense in respect of the 19 day hearing conducted by the Claimant before Employment Judge Ahmed's Tribunal only last year and I am satisfied that what the Claimant is trying to do is to re-litigate that matter and putting this public body to considerable further expense in doing so.

54. I am satisfied that the Claimant has been unwilling to progress his claim and has failed to provide any good reason as to the lack of progress or indeed for his non attendance at the hearing today. When I am considering whether it is in the interests of justice to reconsider a striking out of a claim I have to balance the interests of both parties. From the information that the Claimant has provided there is no reason why I should reconsider striking out those claims and the application for reconsideration is therefore refused.

### Unfair Dismissal Claim

55. I have considered the ET1 which is the only information that the Claimant has provided, I have also considered the ET3 and the representations of Ms Hodgetts. The Claimant has chosen not to attend the hearing and has not made any representations, written or otherwise. Nothing in the ET1 contradicts what is said in the ET3. I am satisfied that the claim of unfair dismissal has no reasonable prospect of success.

56. It is clear and not in dispute that the Claimant had been absent from work since 2013 for long periods of time. There were eight short periods of absence due to depression and stress and he had been off work suffering from depression since 7 December 2015. At the time of the dismissal an occupational health report had been obtained. The report indicated that he was unfit to work in any capacity and the physician could not say when he would be well enough to return to work. There were no workplace adjustments he could suggest. He was likely to be permanently incapacitated for the normal duties of his employment.

57. At the capability hearings the Claimant did not dispute this. He stated that his condition had deteriorated. The Claimant himself could not foresee a return to HMP Gartree or any other prison. The Respondent had explored the possibility of ill health retirement. He had already passed the age of retirement and was not eligible. As can be seen above in paragraph 8 of these reasons he has already aired these matters before the Tribunal. The Claimant himself was seeking Ill Health retirement. He appealed against that decision and he was unsuccessful with the appeal.

58. It is clear from the papers that I have seen that the claim of unfair dismissal really has no prospects of success. It is not in dispute that the Claimant was dismissed because of capability. In his ET1 he shows no reason as to why the decision to dismiss him fell outside the band of reasonable responses. On the basis of the papers and the representations I have heard dismissal was the only option open to the Respondents. I am satisfied that the case viewed at it's highest has no reasonable prospects of success. This is a case which is exceptional. That claim is therefore struck out also.

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Employment Judge Hutchinson

Date 12 July 2017

JUDGMENT SENT TO THE PARTIES ON  
19 July 2017

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FOR THE TRIBUNAL OFFICE