# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **Mr D Phelan** | **v** | **The National Health Service Commissioning Board** |

**Heard at**: Watford **On**: 9 to 14 May 2018
(15 & 17 May 2018 in Chambers)

**Before:** Employment Judge Bedeau
Ms S Hamill
Mr R Leslie

**Appearances**

**For the Claimant:** In person
**For the Respondent:** Mr M Purchase, Counsel

## JUDGMENT

1. The claims against the respondent are dismissed under rule 47 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

2. Alternatively, the claims are struck out under rule 37(1).

## REASONS

1. In this case the tribunal dismissed and/or struck out the claimant's claims because of his conduct. We set out below the background, our rulings in relation to the preliminary issues he raised and our judgment.

2. By a claim form presented to the tribunal on 16 December 2016, the claimant made claims of: public interest disclosure detriment; direct sex discrimination; race discrimination; fixed term worker's detriment; and failure to be accompanied. He was employed by the respondent from 16 February 2016 on a two years' fixed term contract as a programme manager but resigned in October 2017.

3. To these claims the respondent denied liability and asserted that he failed to provide sufficient particulars in his claim form.

4. A preliminary hearing was held on 22 March 2017 before Employment Judge Smail who clarified the claims and issues. The case was set down for a preliminary hearing on 21 July 2017 before an employment judge to hear and determine whether the claimant made any protected disclosures.

5. On 23 May 2017, the respondent served its amended response. It denied that the claimant made a qualifying and protected disclosure on 5 August 2016 and applied for an Unless Order requiring him to specify precisely the basis upon which he put his public interest disclosure detriment claim.

6. On 11 December 2017, before Employment Judge Henry at a preliminary hearing, the judge listed the case for a final hearing on 22 to 26 January 2018 before a full tribunal and gave case management orders including the preparation and service of a joint bundle and witness statements.

7. The final hearing was before EJ Heal and members but the first two days were taken up with preliminary issues. The tribunal heard arguments about a concession made by Mr Purchase, counsel on behalf of the respondent, at the December 2017 preliminary hearing. The claimant alleged that at that hearing Mr Purchase agreed that he, the claimant, made a protected disclosure on 5 August 2016. Mr Purchase responded by saying that he mistakenly believed that the respondent had previously made that concession but he did not make a formal concession. The respondent would still argue that the claimant did not have reasonable grounds for believing that the information breached a legal obligation and that any disclosure was not in the public interest. Accordingly, the tribunal allowed the issue of whether there was a protected disclosure to be determined at the re-listed final hearing. The claimant was refused permission to add new claims of suffering detriments on health and safety grounds under the Employment Rights Act 1996 and not being permitted to take breaks under regulation 12, Working Time Regulations 1998.

8. The tribunal carefully and meticulously went through the various matters raised and made cogent orders covering 32 paragraphs, in relation to witnesses and the disclosure of documents.

9. On 26 January 2018, EJ Heal gave further directions. The judge refused to grant a further preliminary hearing and a witness order as requested by the claimant on 25 January 2018. Witness orders were, however, granted for Ms Liz Hart and Ms Roz Lindridge to attend at another hearing venue.

10. On 27 April 2018, the claimant wrote to the respondent and copied in the tribunal in which he put the respondent on notice that he would be applying to petition the judge under section 9 Contempt of Court Act 1981, to request

that he be allowed to use a Dictaphone to record these proceedings. He also stated that he would apply to have the response struck out and the respondent be dismissed from these proceedings because of the alleged failure to comply with EJ Heal's disclosure order.

11. On 1 May 2018, EJ Heal responded to the claimant's various email correspondence sent to the tribunal. The learned judge, in 25 paragraphs, addressed many of the matters raised by the claimant. Of note were paragraphs 5, 9, 11 and 15. In paragraph 5, the judge wrote,

> "5. I do not order disclosure of notes taken by the respondent's legal representatives during the course of the hearing on the 22 – 23 January 2018. These belong to the legal representative in question and are not documents in the respondent's control. In any event the notes are not necessary to disclose [sic dispose] fairly of the claim."

12. Paragraph 9,

> "9. The claimant applied for a witness order for Mr Morrison on 23 January on the ground that he had made a disclosure to Mr Morrison. The respondent confirmed that this was not in dispute and that it was not in dispute that the claimant went through the correct procedures to make the disclosure. We did not order Mr Morrison's attendance on that basis. The claimant renews his application, in part, on the same ground. It is still unnecessary to order Mr Morrison's attendance on that ground."

13. Paragraph 11 states,

> "11. On 23 January the claimant made an application for a witness order for Razia Wilson. He said that she was the candidate in the interview who was 'cheated out of job' and she put in a Freedom of Information request. Upon discussion about this matter with the claimant, he said that he would be guided by what the tribunal said. We did not make the order because we did not consider that Ms Wilson had relevant evidence to give. The claimant raises nothing new in this application."

14. In relation to paragraph 15, the judge ordered and highlighted in bold,

> "15. **The claimant does not have leave to use a Dictaphone or any other recording device in a tribunal hearing.** Section 9 of the Contempt of Court Act 1981 applies. It is a contempt of court to use in the tribunal, or bring into the tribunal for use, a tape recorder or other instrument for recording sound, except with the leave of the tribunal."

15. On the first day of this hearing, Thursday 10 May 2018, and as we were in the process of getting a timetable from the parties on the cross-examination of witnesses and submissions, the claimant asked that we consider his 8 applications made on 27 April and 2 May 2018 as he was questioning EJ Heal's 25 orders issued on 1 May and said that he was considering an appeal.

16. He asked permission to use a dictaphone to record our proceedings. He said that as a litigant in person he was unable to take notes and had a slight hearing problem. He told us that he corresponded with the President of the Employment Tribunals and was advised that he could cite section 9, Contempt of Court Act 1981.

17. We were satisfied having regard to how the claimant conducted himself before us, that he is able to read, write and articulate himself. His hearing problem was addressed as he wore a hearing aid. On occasions when the judge's voice dropped, he asked that the judge should raise his voice. He interrupted counsel on more than one occasion while counsel was speaking. He was, in our view, clearly able to hear and understand what was being said.

18. On 1 May 2018, EJ Heal addressed a number of issues and we do not seek to go behind judge's rulings. In one of the judge's rulings the judge directed that there should be no leave given to the claimant to record these proceedings. We informed the claimant that we did not intend to depart from that direction and refused his application.

19. The claimant applied for the response to be struck out and effectively the respondent to be debarred from these proceedings. He asserted that the respondent did not produce the mobile phone records of contacts between Ms Michelle Lake and Professor Aly Rashid. EJ Heal heard representations in relation to the mobile telephone records and ordered the respondent to disclose those documents with any suitable redactions.

20. In the claimant's bundle of correspondence, at page 40, the respondent's representatives wrote to him on 20 February 2018. In paragraph 6, referring to EJ Heal's order in paragraph 10, they wrote, "We are instructed that the respondent is no longer in possession of this material as it had changed its telephone service provider and the previous telephone records were not retained". Mr Purchase said that a date was not given but believed it to be the records for May 2016.

21. We were satisfied that at that time there was only one telephone provider and in the claimant's bundle of documents, at page 261, he was sent an email from the respondent's representatives on 8 May 2018, Ms Susan Johal, Senior Lawyer, stating, "I am instructed that it is no longer possible for my client to retrieve the mobile phone records directed by the Employment Tribunal as the department's old supplier, O2 only retain records for 18 months. My client is checking whether it can retrieve landline records as these are held by a different supplier."

22. The claimant said that he would like the answers to a number of questions to which Mr Purchase was able to reply. They were: Who was the mobile phone service provider in the afternoon, namely May 2016? The respondent's answer was O2. How long did this mobile phone service provider ordinarily keep records of outgoing and incoming calls? The answer was 18 months. When was this service provider contacted to confirm how long it ordinarily keeps records? The response, 4 May 2018. Was the service provider asked to check its records to see if information ordered by the Employment Tribunal still exists regardless of the duration it ordinarily keeps such records? Mr Purchase told us that further enquiries could be made in respect of that. Has a search been carried out at NHS England of hard copy mobile phone records in relation to J Heal's January 2018 order? Mr Purchase did not know. In relation to the sixth question, the claimant asked, please confirm in keeping with its legal obligations such as the

Freedom of Information and data protection legislation, how long NHS England is obliged to keep records of this nature? The answer to that question Mr Purchase did not know but said that enquiries could be made over the weekend without prejudice to any negative connotations in taking on that task. The seventh was in the nature of a request to provide emails, letters or other documentation in support of 1 to 6 above.

23. We were satisfied that in relation to the order for the disclosure of the mobile phone records, made by EJ Heal, the respondent had responded appropriately. The provider at the time was O2, the records are kept for 18 months, thus no records were provided by way of disclosure in compliance with that order. The respondent's statement that they will explore the matter further was something that we have taken into account, but that is in relation to its policy not the wording of the order. We accepted the respondent's statement that they cannot disclose the records as 18 months has since expired. Accordingly, his application to strike out the response and to debar the respondent from taking part in these proceedings was refused.

24. After repeatedly questioning the policies and practices of the respondent in retention of their mobile phone records, the claimant was asked by the judge to move on to the next point which he refused to do asking the judge if he was going to instruct the respondent to check when their records were destroyed. The respondent said, without prejudice, that they would take instructions over the weekend and the claimant was content with that approach.

25. The claimant submitted that the respondent did not disclose its change in position in relation to what he described, as the qualifying disclosure made on 5 August 2016. We went back to EJ Heal's order, at page 50J, volume 1, of the bundle of documents. We were satisfied that this matter was addressed in paragraphs 6 to 10 inclusive. As referred to earlier, Mr Purchase was under the misapprehension that a concession was made in relation to whether or not there was, firstly, a qualifying disclosure and, secondly, that the disclosure became protected. It was discussed before EJ Heal, who ordered that it was an issue for this tribunal to hear and determine. In any event, the respondent's position was clearly set out in its amended response. This tribunal saw no reason to re-open this issue as the matter was clarified at the earlier hearing in January.

26. The claimant applied for the disclosure of the judges' and lay members' notes and the notes of the respondent's representatives. We were not persuaded that he had advanced a cogent, good reason why the notes in relation to the earlier hearings should be disclosed. They have little or no relevance in relation to the claims and issues we had to determine. Evidence was not given on the earlier occasions in relation to the claims and issues. The case was set down for a final hearing in January, that had to be postponed, as the first two days effectively were taken up dealing with preliminary issues. We were not told that he had made a formal subject access request. Our role at the final hearing was to hear the evidence, consider the documentary evidence and come to a determination

independent of what had gone on before. We, therefore reject the application for the judges' and members' notes to be disclosed.

27. Mr Purchase referred to the case of Wendy Comfort v Department of Constitutional Affairs UKEAT/0137/05/DA. The Judgment by the Employment Appeal Tribunal does **not lay down**, as a general rule, that notes taken by a representative should be disclosed to the other side. There must be an exception that would allow for disclosure to take place. In the head note the EAT held,

> "Full notes of evidence taken by a solicitor at an ET hearing, excluding any comments or annotations, are not protected by privilege: but are not ordinarily to be the subject of an order for disclosure or exchange. On the facts of this case, where (i) a rehearing of some of the Applicant's claims is to be heard after remission by the Court of Appeal, (ii) the Chairman's notes are inadequate, (iii) there has already been voluntary disclosure of the notes of evidence relating to 2 witnesses (which were patently full and not the subject of selectivity or selective judgment) and (iv) there may be a case of previous inconsistent statement to be put, an order for disclosure for the notes of evidence given by the two further witnesses to be recalled was made as potentially relevant, but they were not to be included into the hearing bundle, their use if any at the remitted hearing being subject to the case management decision of the fresh Tribunal."

28. The claimant did not provide a good and sufficient reason for the disclosure of the respondent's representatives' notes of proceedings and had not established an exception to the normal course of action against disclosure. Consequently, his application for the disclosure of the notes taken by the respondent's representatives at the earlier hearings be copied and disclosed to him, was refused.

29. In relation to the issue of witnesses, the claimant asked that all witnesses irrespective of whether they were the subject of witness orders, should attend to give evidence the following week and that appropriate orders should be issued in advance of his formal appeal to the EAT.

30. This issue of witnesses was addressed by EJ Heal in January 2018 and in response to the claimant's emails sent in March and April 2018. Precisely why there should be witness orders for witnesses' attendance to be confirmed or otherwise was not entirely made clear to us by the claimant. As we understood when we considering the timetable at the start of the hearing, the claimant and Mr Purchase stated the witnesses to be called. The whistleblowing issue was already resolved by EJ Heal and it was for the respondent to decide who to call in support of its case.

31. The claimant finally applied for the hearing to be postponed until the outcome of his appeal to the EAT. We considered this but the difficulty as we saw it was that the claimant had not appealed to the EAT EJ Heal's orders and had not applied for the judge's orders to be reconsidered. If he should subsequently appeal the matter will have to be considered at the sift stage by the EAT judge and at that stage, we would know whether there would be a hearing or not. All we had from the claimant was his intention to appeal. We, therefore, refused his application.

32. In relation to all of his applications, we have found against him. Our view was that the case must now proceed to a final hearing. In January it had to be adjourned. There should be finality in proceedings.

33. After giving our rulings the following day, Friday 11 May 2018, we said to the claimant that we were about to hear evidence and that he would be called to give evidence first. At that point he said that he was not feeling well; that he suffers from Diabetes Mellitus Type 2 and was taking Metformin and another medication, which he was unable to identify to us. He produced a fit note issued to him on 8 May 2018 and which covered him from 8 to 22 May 2018. In it his doctor noted that he was not fit for work. There was no reference to him being unable to conduct himself in these proceedings. What was of concern to us was that the fit note was not drawn to our attention by him at the start of this hearing, if he was feeling unwell. He was in a position to articulate himself when he made his applications before us and did not tell us about his condition.

34. The claimant then said,

> "You are saying that my sick note is deficient. Is there a specific form of certificate that the tribunal requires from GP to demonstrate that I am not fit to participate in proceedings?"

35. We did, however, take into account what he has said about how he was feeling and decided to adjourn at 3.37 pm, to reconvene the following Monday 14 May 2018 at 10.00am. We made it clear that we would hear his evidence on that day and would afford any adjustments he required.

36. The claimant responded by saying that he would not be attending as he would be going back to his doctor and again complained that the judge was not telling him what he needed to do to satisfy the tribunal that he could not participate. The judge said that we were going round in circles whereupon the claimant, left the room and said, "Yes because of you."

37. On Monday 14 May 2018, he informed the tribunal that he had lodged an appeal against EJ Heal's ruling in relation to a witness order. He submitted his appeal at 11.15 the previous evening. Accordingly, there would be no immediate response from the Employment Appeal Tribunal. The procedure involves an Appeal Judge considering the grounds of appeal to determine whether or not it would pass the sift stage. If it does, it would be listed for a hearing. He handed to the tribunal a document comprising of 13 typed pages of which 5 were his record of proceedings which was surprising in view of the fact that he had earlier said that he required the use of a Dictaphone. His notes contained disparaging remarks about the judge's conduct, for example, that the judge was "not up to date with the law of the land"; "the judge had used his hearing impairment in a cynical way in dismissing his application to record proceedings" and "the judge guillotined proceedings on Friday afternoon". All of which did not reflect the reality of proceedings as understood by this tribunal.

38. The claimant's grounds of appeal were that EJ Heal unreasonably refused a request for a witness order to secure the attendance of Mr Morrison, Regional Director of Human Resources and Organisational Development. He faithfully recited what the judge wrote, "The claimant applied for a witness order for Mr Morrison on 23 January on the ground that he had made a disclosure to Mr Morrison. The respondent confirmed that this was not in dispute that the claimant went through the correct procedures to make the disclosure. We did not order Mr Morrison's attendance on that basis. The claimant renews his application, in part, on the same ground. It is still unnecessary to order Mr Morrison's attendance on that ground."

39. In light of the fact that he had emailed his appeal, he applied for the hearing to be adjourned pending the outcome of the appeal process. He said that Mr Morrison had an overview of the whistle-blowing procedures and that he, the claimant, made qualifying and protected disclosures while employed by the respondent using the respondent's procedures.

40. Mr Purchase submitted that the respondent would object to an adjournment. This would be the second adjournment as the case was adjourned in January of this year. It had been listed in January 2018 for five days and the first two days were taken up dealing with preliminary matters. The cost involved in a final hearing being relisted, the respondent would have to withstand. A delay was likely to cause memories to fade having regard to the listing position in this region as a further hearing may not be listed for several months.

41. We considered the claimant's application. According to the respondent there was no dispute that the claimant followed the respondent's procedures when he made his alleged protected disclosure on 5 August 2016. The respondent did not accept that the disclosure was a protected disclosure. There was no allegation of unlawful conduct on the part of Mr Morrison. It was a question of the legal construct of the correspondence under Part IV Employment Rights Act 1996.

42. The claimant raised two matters of correction. The last postponement in January 2018, he said, was because the respondent did not comply with the disclosure orders. The second, was that any delay would not have been caused by him unless he had made vexatious appeals or applications. He said that was the advice given to him by his barrister.

43. We concluded that the position was clearly set out by EJ Heal when she gave her ruling to the claimant. Mr Morrison's evidence was of little relevance in relation to the concession made by the respondent. The tribunal was mindful of the fact that a further adjournment would necessitate this case being relisted and was unlikely to be heard for several months. This would add further pressures on the witnesses in recalling events last year and would add to the respondent's costs. We have to bear in mind the overriding objective to deal with cases fairly, justly, proportionately and to have regard to saving expense. For these reasons the claimant's application was refused.

44. After refusing the claimant's application for an adjournment, he again informed us that he was feeling unwell and produced a document entitled Appendix 2, in which he stated that he had a consultation with his general practitioner on 8 May 2018 and had mentioned to the doctor the pending Employment Tribunal hearing. He repeated that he had been diagnosed as suffering from Type 2 Diabetes in August 2017 was on Metformin tablets, 500mgs and takes Lipitor 40mgs. The latter being a statin medication to lower his cholesterol. He referred to blood tests and said this his doctor advised that the fit note she gave him on 8 May was the only script NHS doctors are required to follow, namely that he was unfit for work from 8 May to 22 May 2018.

45. He did not produce a further fit note going beyond the statement that he was unfit for work nor did his doctor, if he or she was required to follow a script, issue a short letter stating that the claimant was unfit to conduct proceedings or unable to attend. A distinction is drawn between being unfit for work and being unable to conduct proceedings before a court or a tribunal. The distinction was clearly acknowledged by the Court of Appeal in the case of Andreou v Lord Chancellor's Department [2002] IRLR 728. The claimant sought again to renew his application for a postponement based on the same grounds, relying on the same fit note and referring to the consultation with his GP on 8 May. We saw no material change in his circumstances or demeanour. We considered the guidance given in the Presidential Guidance – seeking a postponement of a hearing (2013).

46. The claimant came across to us as a highly articulate person who was able to challenge many of the statements made not only by Mr Purchase, but by this tribunal. He was capable and competent to conduct his case. We, therefore, again refused his application for a postponement based on being unable to conduct his case because of his condition.

47. After giving the tribunal's ruling at 11.00 am Monday 14 May, the judge informed the parties that the tribunal was ready to hear the case. The claimant responded by saying that "You are breaking the law." The judge said that "We call on you now to give evidence." The claimant said that we did not offer him a toilet break and that he was leaving to go to the toilet. At 11.05am, the tribunal stood the case down for 10 minutes and the judge said that the case would start at 11.15am. The claimant said, "Unfortunately, I am going to the toilet then home to my sick bed." He then continued by saying that he was willing to go to any hospital or medical practitioner to take any tests to satisfy the tribunal that he was not able to continue and was not coming back to the hearing room. The judge said that the hearing would re-convene instead at 11.20am. At 11.20am only the respondent attended. The claimant did not return.

48. In addition to the above matters, during the hearing the claimant, on many occasions, failed to show due respect to the judge and his role during these proceedings, for example, on the first day of the hearing at or around 12.25pm, he accused the judge of talking down to him when the judge was explaining to him why tribunal proceedings are not generally recorded but

that it may change in the future. The claimant repeatedly, at least a dozen times, failed to comply with the judge's instructions to stop interrupting him, that is, the judge or Mr Purchase. The judge reminded him on more than one occasion that the tribunal were in charge of proceedings and not him. He was also instructed not to question Mr Purchase and to address the tribunal. His responses included such phrases as: "But you are stopping me from speaking"; "you are talking down to me"; "you are not being fair"; "My interruptions are due to your lack of process" and "That was why there is a need for verbatim records of proceedings."

49. After giving our rulings on his 8 applications, he referred to the tribunal as a "kangaroo court. It's a joke or it would be if the consequences were not so serious for me if I lose. I can't afford to lose, I would be bankrupt and lose my house".

50. At one point, after Mr Purchase had addressed the tribunal, the claimant was invited to speak. At that point he made sarcastic comments, such as, "How kind", "Yes Mr Chairman, or mister judge or whatever you call yourself."

51. He accused the judge of putting his hand over his mouth and of having to lip read. This was challenged by the judge who said that his hand was under his chin.

52. The claimant said for the first time during the course of the hearing that he is an Irish citizen, raised and educated in Ireland with Irish as his first language. He asserted that he needed verbatim records of all prior hearings to be able to translate those proceedings in his native Irish language. Failing that he needed to have from all prior hearings the judges' minutes, notes, the minutes/notes of the lay panel members, the minutes/ notes of the respondent's legal team, and the notes of any party present at the public hearings on behalf of or for NHS England.

53. He did not refer to his need for the notes to be translated into Irish as part of his application before. It was raised after our ruling given on Friday 11 May. As previously stated, the claimant displayed excellent comprehension in and use of the English language. This was borne out having considered the lengthy correspondence in the bundles of documents. His request was not acceded to.

54. Although the claimant repeatedly applied for an adjournment, he went on to say that he wanted his case concluded in order that he could get on with his life.

<u>The respondent's application for dismissal and/or strike out</u>

55. The judge asked Mr Purchase whether he had anything to say. He replied that he would first ask for a dismissal under rule 47 and a strike out under rule 37.

56. In relation to the application to dismiss, he submitted that there was no point in proceeding in the absence of the claimant as the burden of proof lies on

him. To hear the respondent's case with witnesses, would put the respondent to unnecessary cost and inconvenience.

57. With regard to the strike out application, the claimant did not intend to call any witnesses, therefore, there was no reasonable prospect of succeeding in his claims. His refusal to participate no longer in these proceedings was unreasonable.

58. The third option was an Unless Order for the claimant to produce medical evidence in three days that he was unfit to conduct his case. Mr Purchase stressed that he was not canvassing this as the respondent's preferred approach as he and the respondent were of the view that the claimant was capable of conducting his own case.

**Conclusion**

59. The tribunal deliberated and then gave judgment dismissing the claims under rule 47 and/or striking out the claims under rule 37.

60. Rule 47 on the non-attendance of a party states,

> "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."

61. We considered the case of **Teinaz v Wandsworth London Borough Council [2002] ICR 1471; Andreou v Lord Chancellor's Department [2002] IRLR 721; Kotecha v Insurety plc and others UKEAT/0537/09/JOJ and** Cooke v Glenrose Fish Co [2004] ICR 1188.

62. The claimant was disingenuous in his assertions that he wanted to finish with this case and get on with his life. However, when his 8 applications were dismissed, he raised further matters taking up more hearing time. Most of the 8 applications were already addressed by EJ Heal either 22 and 23 January or 1 May 2018 and also took up, unnecessarily, valuable tribunal time.

63. In his document entitled Appendix 2, he gave an account of his consultation with his doctor on 8 May 2018 during which they discussed his diabetes. He was on medication for his condition. He wrote that he told his doctor about his tribunal hearing due to start on Thursday 10 May. However, the only medical information provided by him was the fit note stating that he was "not fit for work" despite informing the doctor that he was no longer working. The doctor made no comment in the comments box about the claimant's ability or fitness to attend or conduct his case before the tribunal. The tribunal noted that the fit note was only produced when his 8 applications were turned down and the judge indicated that the tribunal would move to hear his evidence.

64. The claimant did not produce the fit note on the first day of the hearing nor did he inform the tribunal of any adjustments to be made.

65. On Monday 14 May, he did not produce a letter from his doctor stating that he was unable to conduct his case notwithstanding the fact that he had been in touch with the doctor.

66. The claimant was able to articulate the matters he wanted to raise clearly and fluently in an assertive manner. The tribunal saw no obvious signs that he was having any difficulty coping with proceedings. He wanted to control our proceedings and was reluctant to accept that the tribunal was in charge.

67. He again attempted to frustrate our proceedings by seeking an adjournment on the third day of the hearing by informing the tribunal that he had lodged an appeal against EJ Heal's order for refusing to issue witness order for the attendance of Mr Stephen Morrison.

68. We have concluded that the claimant was capable of presenting his case but deliberately chose to absent himself. In respect of all of his claims the burden of proof is on him. We cannot say having regard to the witness statements and documentary evidence, that he would have been able, on the balance of probabilities, to prove his claims. Accordingly, his claims are dismissed under rule 47.

69. Rule 37 states,

> "(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 a claim or response on any of the following grounds –
>
> (a)…has no reasonable prospect of success;
> (b) the manner in which the proceedings have been conducted by or on behalf of the claimant …has been scandalous, unreasonable or vexatious, or
> (d) that it has not been actively pursued."

70. The claimant deliberately absented himself from these proceedings, therefore, there was no evidence to establish his claims. They have no reasonable prospect of success.

71. The claimant's conduct before this tribunal over the three days and the fact that he deliberately absented himself was unreasonable conduct of proceedings.

72. We have come to the conclusion based on the claimant's behaviour before us that he attempted to avoid commencement of the final hearing by making weak applications which took up the tribunal's and the respondent's time and in failing to attend to start his evidence. In addition, his claims were not actively being pursued by him.

73. Having regard to the above, the claimant's claims are struck out.

74. In arriving at our conclusion, we took into account and did have regard to the overriding objective, rule 2.

75. Mr Purchase informed the tribunal that a costs application was likely.

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Employment Judge Bedeau

Date: ……10.09.18……..

Sent to the parties on: ...13.09.18.....

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For the Tribunal Office