



# EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr V Constantin

Bramley Health Ltd

Heard at: London South Employment Tribunal    On: 21, 22 & 23 August  
2019

Before: Employment Judge Hyams-Parish  
Members: Mrs S V MacDonald and Ms S Evans

Representation:

For the Claimant: Mr Constantin (representing himself)

For the Respondent: Viktorija Kanasonkaite (HR Officer and employee  
of the Respondent)

## JUDGMENT

1. The claim brought under s.103A of the Employment Rights Act 1996 is not well-founded and is dismissed.
2. The claim of direct race discrimination brought under s.13 Equality Act 2010 is not well-founded and is dismissed.

## REASONS

### Claim

1. By a claim form presented to the Tribunal on 23 July 2018, the Claimant brings two claims: the first that he was dismissed because he made a protected disclosure, contrary to s.103A Employment Rights Act 1996 ("ERA"); the second that his dismissal was an act of direct race discrimination contrary to s.13 Equality Act 2010 ("EqA").

2. The claims are denied by the Respondent. They say that the Claimant was dismissed because he failed to give full disclosure relating to an incident which involved an assault on a resident where the Claimant worked.

### **Legal Issues**

3. The legal issues were agreed at a Case Management Hearing in November 2018 before Employment Judge Sage. The questions that this Tribunal therefore has to answer in order to determine this claim, are as follows:
  - a. Did the Claimant make a protected disclosure within the meaning of s.43A of the ERA?
  - b. If so, was the Claimant dismissed because he made the protected disclosure?
  - c. Was the Claimant dismissed because of race?

### **Preliminary issues**

4. At the beginning of the first day of the hearing, the Tribunal was asked by the Respondent to postpone the hearing because two witnesses could not attend. The first witness is a person called James Phillips (Registered Manager at another home owned by the Respondent, known as Croham Place) and the second witness is a person known as Susan Hill, who conducted the disciplinary hearing and dismissed the Claimant.
5. The application was refused, for reasons which are set out at paragraph 59 onwards below. The Tribunal did, however, agree to postpone the start of the hearing until the second day to give the Respondent a further opportunity to arrange for the attendance of witnesses. If the Respondent could arrange for witnesses to attend, the Tribunal ordered that witness statements be prepared for them and served on the Claimant by 6pm on day one of the hearing.

### **Hearing**

6. On the second day, the Tribunal heard evidence from the Claimant and two witnesses for the Respondent, Mr Olugbade Adeyemo and Ms Darsana Karki. Mr Adeyemo is the Registered Manager at Ballater House, and Ms Karki is the Director of Nursing and Safeguarding Lead for the Respondent. Mr Adeyemo conducted the investigation into the Claimant's conduct whilst Ms Karki conducted the appeal hearing.
7. The Tribunal was also invited to read and take into account a witness statement prepared by the Respondent for Mr Phillips, notwithstanding his non-attendance. The Tribunal did read his witness statement, the content of which was corroborated by documents in the bundle, but was still cautious about attaching too much weight to that evidence alone, bearing in mind he was not at the hearing to be cross examined by the Claimant.

The Tribunal therefore reached its conclusions primarily based on the live evidence heard during the hearing and documentary evidence relied on by those witnesses.

8. The Tribunal was referred to documents in a hearing bundle extending to 124 pages. References in square brackets in this judgment are to page numbers in the hearing bundle.
9. The live evidence was heard and completed on the second day of the hearing. The Tribunal met on the third day to consider its decision and gave an oral judgment at 2pm that day. These written reasons are given at the request of the Claimant.

### **Findings of fact**

10. The following findings of fact were made by the Tribunal, on the balance of probabilities, based on the evidence.
11. Bramley Health is a specialist health and social care provider based in South London and the South East of England. Its focus is to support individuals with complex and challenging needs to become more independent.
12. The Respondent runs a number of hospitals and residential homes. One such home is Ballater House where the Claimant worked until his dismissal.
13. Ballater House has approximately 16 residents at any one time, aged between 18-65. Most have complex needs; some also have challenging behaviour and mental health problems.
14. As required by law, Ballater House is registered with the Care Quality Commission ("CQC"). The CQC registration is held by a director, Mr G Phillips. As stated above, Mr Adeyemo is the Registered Manager of Ballater House.
15. The Claimant commenced employment with the Respondent on 26 March 2018 as a support worker under a contract of employment signed and dated by him on 13 March 2018 [22]. Under his contract of employment, it was expressly stated that he could be required to work at other "Bramley Health locations" as required.
16. On 18 May 2018 there was an incident ("the incident") at Ballater House involving a resident referred to in this judgment as "JS". The Tribunal finds that whilst Mr Ajani (also known as "Ola") was attempting to get to a nursing station, the door was blocked by JS. Mr Ajani asked JS to move and this resulted in Mr Ajani being pushed by JS and punched on the shoulder. JS was agitated and angry. This resulted in a scuffle between Mr Ajani and JS during which Mr Ajani assaulted JS by hitting him on the face. He was then put on the floor and restrained by a number of staff.

17. A number of people were involved in the incident albeit at different times; these were the Claimant, Mr Ajani, Anica Waite, Humphrey Oluoma, Joseph Kbebi and an agency nurse. In terms of who witnessed the actual assault, the Tribunal finds that this included the Claimant, Mr Ajani and Mr Oluoma, as well as JS.
18. Mr Adeyemo was informed about the incident by Mr Ajani but importantly Mr Ajani did not admit in the report that he assaulted JS by hitting him. Mr Adeyemo visited Ballater House on Saturday 19 May 2018 and looked at the incident report. He considered that since a resident had been restrained by staff, he needed to investigate the use of restraint so that he could fully understand why this had been necessary and whether the incident could have been avoided. At that point Mr Adeyemo did not know about an assault.
19. Mr Ajani was working on 19 May 2018 during Mr Adeyemo's visit, and so Mr Adeyemo took the opportunity to interview him. During the interview, Mr Ajani did not mention any assault or refer to any beating of JS.
20. On 22 May 2018 Mr Adeyemo met with the Claimant, Mr Oluoma and an agency member of staff mentioned in the incident report. He was accompanied by a Dora Afrane, nurse on duty, who took notes of the meetings.
21. In his evidence to the Tribunal, the Claimant said that he gave Mr Adeyemo (during their meeting on 22 May 2018) a full and accurate account of the incident on 18 May 2018 which included an account of Mr Ajani punching JS.
22. Mr Adeyemo prepared a witness statement for the Claimant, which he said in evidence to the Tribunal, accurately reflected what the Claimant said to him at the meeting on 22 May 2018 and contained no allegation that Mr Ajani had punched JS. The witness statement read as follows:

***Joshua was very angry. He came to me to try to punch me three days or five days ago.***

***Ola wanted to go to the office. Joshua put himself in front of him. Ola asked to pass. He said, "no what are you going to do". Ola again asked him to allow him to pass. Again, he said "No, what are you going to do" and punched Ola. Ola then put him on the floor and other members of the floor came to join.***
23. Mr Adeyemo spoke to Mr Oluoma *after* his interview with the Claimant. During that interview, Mr Adeyemo says that he was told by Mr Oluoma that Mr Ajani had punched JS.
24. Within approximately 48 hours of their meeting on 22 May 2018 the Claimant was asked to meet with Mr Adeyemo during which he was presented with a written statement of the verbal account Mr Adeyemo says

that the Claimant had given on 22 May 2018. This is the statement at paragraph 22 above. Mr Adeyemo says that he asked the Claimant to read the statement and change anything about it that he wanted. The Claimant read and signed the statement notwithstanding, according to his evidence to the Tribunal, it not being accurate as to his verbal account and missing vital detail about the assault on JS by Mr Ajani. The Claimant told the Tribunal that he knew at the time that the statement was incorrect but that he didn't correct it because there were four people in the room and he was frightened he would lose his job if he did not sign the version given to him. Mr Adeyemo told the Tribunal that only he and the Claimant were at this meeting.

25. Mr Adeyemo was asked during his evidence why he did not re-interview the Claimant given that it was apparent after his interview with Mr Oluoma that the Claimant had not said anything about Mr Ajani punching JS. Mr Adeyemo said he felt it was in the hands of the police and authorities.
26. Following on from disclosures made to Mr Adeyemo by Mr Oluoma on 22 May 2018, a number of steps were taken by the Respondent, namely:-
  - a. A meeting was held with JS;
  - b. Mr Ajani was suspended and subsequently dismissed;
  - c. A referral was made to Reigate and Banstead safeguarding team;
  - d. The incident was reported to the police;
  - e. A statutory notification was made to the CQC;
  - f. The funding authority for JS was made aware of the safeguarding alert;
  - g. The next of kin for JS were informed; and
  - h. Ms Karki was made aware.
27. The police arrived a week later and spoke to Joshua Kbebi and Mr Oluoma. They did not interview the Claimant.
28. During a supervision meeting with Mr Adeyemo on 29 May 2018, the Claimant said that he attempted to provide details of the incident that he had not felt able to provide during his initial interview on 22 May 2018, but the Claimant said that Mr Adeyemo did not want to hear anything about it. Mr Adeyemo says that there was no discussion about the incident and the Claimant did not raise it.
29. There is a record of the supervision meeting (referred to at paragraph 28 above) at page 58 of the bundle that is signed by the Claimant. There is no record of the Claimant having attempted to discuss the incident or any comment by the Claimant to this effect. There was a discussion about his performance, time keeping and attitude and reference to a separate safeguarding incident that had been investigated. The meeting ended with Mr Adeyemo asking the Claimant to consider moving to another home within the group which was more suitable for him and where he would be happier. His own comments reflected that he was not happy at the home. It

was suggested that he visit another home called Croham Place with a view to working there.

30. On 4 June 2018 the Claimant wrote to the CQC giving his account of the incident, including the allegation that JS had been punched by Mr Ajani.
31. On 8 June 2018, the Claimant visited Croham Place where Mr James Phillips was the Registered Manager. During this visit the Claimant told Mr Phillips what he witnessed on 18 May 2018, namely that JS had been blocking the door and when Mr Ajani asked him to move, JS punched him on the shoulder. He said Mr Ajani then lost his temper and punched JS in the face. The Claimant admitted to Mr Phillips that he had not given all of the facts of the incident when interviewed about it.
32. Mr Phillips was immediately concerned about what he had heard from the Claimant and emailed Ms Karki as the safeguarding lead.
33. On 8 June 2018 the Claimant was suspended from work pending an investigation for failing to provide a full and thorough disclosure of the incident involving an assault on JS when interviewed about it.
34. On 9 June 2018 the Claimant reported the incident to the police [65].
35. On 11 June 2018 the Claimant was interviewed as part of an investigation into his misconduct. The Tribunal finds as fact that during this interview he admitted that he did not give full disclosure of the incident when he was initially interviewed on 22 May 2018.
36. On 14 June 2018 the Claimant reported the incident to the police again.
37. On 21 June 2018 a disciplinary hearing was held, which was chaired by Registered Manager, Susan Hill. During this hearing the Claimant said that he was rushed into making the witness statement on 22 May 2018 and that it was not a real statement of his.
38. The Claimant was summarily dismissed by letter dated 21 June 2018. The reasons for his dismissal were that (i) he failed to provide an honest, true and full account involving JS in his statement provided on 22 May 2018 (ii) that he was in breach of his duty of care to present a true and honest account of the incident; and (iii) he was in breach of his Duty of Candour as a health care professional.
39. The Claimant appealed against his dismissal on 21 June 2018. The appeal was heard on 12 July 2018 by Ms Karki. The outcome of the appeal, given on 21 July 2018, was that the dismissal should be upheld.

**Assessment of witness evidence**

40. The Tribunal found the Claimant to be wholly inconsistent in his evidence

and unable at times to give specific detail about important matters, particularly relating to times and dates of events. The Tribunal concluded that for these reasons he was an unreliable witness in many respects. On the other hand, the Tribunal found the evidence of Mr Adeyemo to be clear, concise and credible. The Tribunal also found Ms Karki to be an impressive and reliable witness.

**Resolution of particular disputed facts**

41. Given the importance of certain key disputed facts, the Tribunal has addressed these specific factual issues below:

**(a) Did the Claimant provide a full and accurate verbal account of the incident to Mr Adeyemo at their meeting on 22 May 2018 notwithstanding this is not reflected in the written statement referred to at paragraph 22 above; or did the verbal account match the written statement as contended by Mr Adeyemo?**

42. The Tribunal finds that the verbal account of the incident given by the Claimant to Mr Adeyemo was as set out in the written witness statement at paragraph 22 above and was not a full and accurate account that included reference to JS being hit or punched in the face. The Tribunal finds that the fact that the police did not interview the Claimant when they arrived at the home to interview witnesses supports the Respondent's case that he did not provide any more than the brief account provided in his witness statement. Had he provided full disclosure on 22 May 2018 the Tribunal concludes that he would have been interviewed by the police during their visit. Furthermore, the Tribunal finds that the Claimant told Mr Phillips, during their meeting on 8 June 2018, that he had not disclosed all that he should have done on 22 May 2018. It is also documented in the notes of the investigation at page 67 of the bundle that the Claimant admitted that he did not give a full disclosure of the incident when initially interviewed on 22 May 2018.

**(b) What occurred at the meeting when the Claimant was asked to sign his statement?**

43. The Tribunal finds that this was a meeting between Mr Adeyemo and the Claimant only, not a meeting where four people were present on behalf of the Respondent, as alleged by the Claimant. At that meeting, the Claimant was asked by Mr Adeyemo to read and sign his witness statement if he agreed with it. The Tribunal concludes that the Claimant was given an opportunity to change the witness statement if he wanted to. The Tribunal finds that he did not seek to change it because it did in fact reflect accurately what he said at the meeting on 22 May 2018. The Tribunal rejects the Claimant's assertion that he was frightened that he would lose his job if he didn't sign it. The Tribunal did not find this statement credible: if the Tribunal were to accept what the Claimant said in evidence, namely and that he was confident enough to provide a full account verbally on the 22 May 2018, the

Tribunal concludes he would not have been frightened to have taken issue with the inaccuracy of the witness statement and ask that it be corrected.

**(c) Did the Claimant attempt to raise the issue at the supervision meeting?**

44. The Tribunal finds that the issues that were discussed at the supervision meeting on 29 May 2018 were those set out in the note of that meeting, which was signed by the Claimant. The Tribunal accepts the evidence of Mr Adeyemo that there was no attempt by the Claimant during that meeting to discuss the incident or his witness statement.

**(d) Did Mr Phillips ask the Claimant to change his statement?**

45. The Tribunal concludes that Mr Phillips was concerned that the Claimant had given an inaccurate verbal account of the incident on 22 May 2018. It is the witness statement given by the Claimant on 22 May 2018 which Mr Phillips considered was inaccurate, bearing in mind what he was told by the Claimant, that needed to be changed, quite rightly in the Tribunal's view.

**Law**

46. The law giving protection to workers making a protected disclosure is set out in Part IVA of the ERA:

***43A. Meaning of "protected disclosure".***

***In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.***

***43B.— Disclosures qualifying for protection.***

***(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—***

***(a) that a criminal offence has been committed, is being committed or is likely to be committed,***

***(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,***

***(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,***

***(d) that the health or safety of any individual has been, is being or is likely to be endangered,***

***(e) that the environment has been, is being or is likely to be damaged, or***

***(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be***



*deliberately concealed.*

47. Sections 43C-H list the different methods of disclosure which are conditions which must be met for the disclosure to be “protected” under the ERA. Subsections (C) to (E) were not relied on for this case:

43(C) Disclosure to employer or other responsible person

43(D) Disclosure to legal adviser

43(E) Disclosure to Minister of the Crown

48. Two methods of disclosure that are potentially relevant to this case are provided by sections 43F and 43G:

**43F.— Disclosure to prescribed person.**

**(1) A qualifying disclosure is made in accordance with this section if the worker—**

**(a) makes the disclosure [...] to a person prescribed by an order made by the Secretary of State for the purposes of this section, and**

**(b) reasonably believes—**

**(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and**

**(ii) that the information disclosed, and any allegation contained in it, are substantially true.**

**(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.**

**43G.— Disclosure in other cases.**

**(1) A qualifying disclosure is made in accordance with this section if**

**(a) [...]**

**(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,**

**(c) he does not make the disclosure for purposes of personal gain,**

**(d) any of the conditions in subsection (2) is met, and**

**(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.**

**(2) The conditions referred to in subsection (1)(d) are—**

**(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,**

**(b) that, in a case where no person is prescribed for the purposes of**

*section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or*

*(c) that the worker has previously made a disclosure of substantially the same information—*

*(i) to his employer, or*

*(ii) in accordance with section 43F.*

**43H.— Disclosure of exceptionally serious failure.**

**(1) A qualifying disclosure is made in accordance with this section if—**

**(a) [...] 2**

**(b) [ the worker ] 3 reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,**

**(c) he does not make the disclosure for purposes of personal gain,**

**(d) the relevant failure is of an exceptionally serious nature, and**

**(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.**

**(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.**

49. Section 103A ERA states:

***An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.***

50. The burden is on the employer to show the reason for dismissal. The employer can discharge this by showing that the reason for dismissal was one of the potentially fair reasons under S.98 ERA. It will therefore normally be the employee who argues that the real reason for dismissal was an automatically unfair reason. Where the employee lacks the requisite two years' continuous service to claim ordinary unfair dismissal, he will acquire the burden of showing, on the balance of probabilities, that the reason for dismissal was because he made a protected disclosure.

51. The EqA sets out the provisions prohibiting race discrimination. The relevant sections are as follows:

**13 Direct discrimination**

**(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

**9 Race**

**(1) Race includes—**

- (a) colour;**
- (b) nationality;**
- (c) ethnic or national origins.**

**(2) In relation to the protected characteristic of race—**

**(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;**

**(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.**

**(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.**

**136 Burden of proof**

**(1) This section applies to any proceedings relating to a contravention of this Act.**

**(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**

52. There is a two-stage test to proving discrimination: -
- a. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination.
  - b. Only if that burden is discharged would it then be for the Respondent to prove that the reason they dismissed the Claimant was not because of race.

**Conclusions**

53. The Tribunal reached the following conclusions applying its above findings of fact at paragraphs 10-45 and to the law at paragraphs 46-52 above.

**(a) Did the Claimant make a protected disclosure?**

54. The Tribunal concludes that the Claimant did make a disclosure which was a protected disclosure within the meaning of the ERA. It was a disclosure that the Claimant reasonably believed tended to show that a criminal offence had been committed. It also tended to show that a colleague had failed to comply with a legal obligation to which he was subject. The Tribunal accepts that such a disclosure was in the public interest.

**(b) Was the Claimant dismissed because he made a protected**

**disclosure?**

55. The Tribunal concludes that the reason the Respondent dismissed the Claimant was because he had not given full disclosure of the assault on JS during his meeting with Mr Adeyemo on 22 May 2018. Safeguarding is extremely important in the business operated by the Respondent and if there are failings, they could, at worst, be reported to the CQC and closed down. In order to comply with safeguarding requirements, the Tribunal accepts that the Respondent places great importance on what it refers to as the "Duty of Candour". Put simply, if staff do not report incidents like this, then that poses risks to residents and places the business at risk.
56. The Tribunal accepts that the Claimant's failure to report what he had seen at the meeting at 22 May 2018 is a valid reason to discipline the Claimant and that was the reason for his dismissal. The Tribunal unanimously concluded that the Claimant was dismissed due to this misconduct and that it was justified.
57. The Claimant has not proved a set of facts that convinces this Tribunal, on the balance of probabilities, that the Respondent's reason for dismissal should be displaced by the Claimant's contention that it was because he made a protected disclosure. Indeed, it is clear that the Respondent was aware from Mr Oluoma's evidence provided on 22 May 2018 of the assault on JS by Mr Ajani and therefore the Tribunal sees no reason why the Respondent would wish to punish the Claimant for reporting something which they were aware of and which they had reported to a number of bodies, including the police, on 22 May 2018.

**(c) Was the Claimant dismissed because of race?**

58. The Tribunal is not satisfied that there is any evidence of race discrimination or that the decision was racially motivated. There is no evidence whatsoever which persuades the Tribunal that the burden of proof should shift to the Respondent to prove that the dismissal was not because of race. Even if the burden had shifted to the Respondent, the Tribunal is satisfied the reason for dismissal was for the reason already outlined above and not because of race.
52. In those circumstances, both claims must fail and are dismissed.

**Reasons for refusal of postponement**

59. In November 2018, the case was listed before Employment Sage for a Case Management Hearing when directions for the preparation of the case were given and the case was listed for hearing. The case was listed for three days on the basis that the Claimant had indicated he may have 6 witnesses and the Respondent had indicated it would have 4 witnesses. The Claimant attended the hearing in person and the Respondent was represented at the hearing by Mr James Phillips.

60. On 4 June 2018, Mr Phillips wrote to the Tribunal asking for a postponement of the hearing as he said he would be out of the country on the date of the proposed hearing. In his letter he states:

*....this year I turned 40 and we have planned as a family to attend South Africa for a Safari. In making arrangements for this, the only dates that we have been able to opt for which coincide with the children's summer school holiday is the 16<sup>th</sup> to 29<sup>th</sup> August 2019. I respectfully request that the Employment Tribunal provide a new date for the hearing to commence.*

61. The application was considered by Employment Judge Hyde on 30 July 2019 and notification sent out to the parties on 19 August that the application had been refused.

62. On 12 July 2019 the Tribunal received a further letter from Mr Phillips stating as follows:

*I write regarding my request for the hearing scheduled for 21 August 2019 to be rescheduled due to myself being out of the country on that day.*

*We have just been informed, that one of our witnesses, Susan Hill, has been requested to attend Croydon Magistrates Court on 20 August 2019 for the trial of [ ]. Due to this trial taking place so close to the Tribunal hearing date, it may potentially overlap, thus Susan Hill may not be able to attend as a witness.*

*Therefore, in addition to myself being out of the country I kindly ask for the Employment Tribunal to provide a new date for the hearing to allow one of our key witnesses to be present at the hearing.*

63. This further application came before Acting Regional Employment Judge Davies on 19 August 2019 and the parties were informed that the case remained listed for hearing and any further application to postpone should be made at the hearing itself.

64. The Respondent was represented by its HR Officer, Victorija Kanasonkaite. When asked by the Tribunal whether she had any witnesses with her, she said that she did not have any, which was the reason for her application to postpone. She did not have any witness statements either. She could not explain why, when Mr Phillips had attended a preliminary hearing in November 2018, and had agreed the date of the hearing, he then decided to book a holiday that coincided with this hearing. Ms Kanasonkaite could also not explain why there was no witness statement for Mr Phillips other than because he wouldn't be at the hearing, he didn't think that he would have to provide one.

65. As far as Ms Hill is concerned, the Tribunal learned that there had been little contact with her prior to the hearing and that she had since left the employment of the Respondent. Ms Kanasonkaite could not tell the Tribunal

when she was needed to give evidence at the Magistrates Court or how long she would be required. Indeed, the Tribunal was informed that the case had actually commenced on 20 August and Ms Kanasonkaite could not confirm whether or not Ms Hill had completed her evidence.

66. The Tribunal considered the application very carefully given the obvious implications for the Respondent's case, notably that it had no evidence to be considered by the Tribunal. However, the Tribunal noted that the date of the hearing was already more than a year after the incident which resulted in the Claimant's dismissal. Given the current situation with the listing of cases, the best-case scenario, in the Tribunal's view, would be that the case would not be listed again until the first half of 2020, which would mean the case being heard 18 months to 2 years after the incident. That would, in the Tribunal's view, risk affecting even further the quality of the evidence on both sides and would, in the Tribunal's view, prejudice the Claimant.
67. The Tribunal considered the Claimant's representations that he wanted the case to proceed. The Tribunal had in mind the overriding objective which includes the need to avoid delay.
68. In all the circumstances and having weighed up the potential prejudice to both parties, depending on which decision the Tribunal chose to make, the Tribunal concluded that the application should be refused and the case should proceed.
69. However in order to give the Respondent the opportunity to address any disadvantage caused by the Tribunal's decision, the Tribunal agreed to postpone the commencement of the hearing until 10am on 22 August 2019 (the second day of the hearing) to allow the Respondent to prepare witness statements in support of their case and to serve them on the Claimant by 6pm on 21 August 2019.
70. The Tribunal made clear to the Respondent that it would be much better for the witnesses, for whom statements have been prepared, to attend the hearing where possible. The Respondent was invited to make contact with Ms Hill and try to arrange for her to be at the hearing, even at the very worst, if that was on Friday, the final day of the hearing.
71. The Respondent was warned that in the absence of witnesses attending the hearing, whilst the Tribunal could consider the evidence, it may give such evidence little or no weight bearing in mind they would not be present to be questioned by the Claimant.

**Employment Judge Hyams-Parish  
11 September 2019**

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