# EMPLOYMENT TRIBUNALS

**Claimant:** Mr O Oyesanya

**Respondent:** The Pennine Acute Hospitals NHS Trust

**HELD AT:** Manchester **ON:** 9 July 2019 and (in the absence of the parties) 9 September 2019

**BEFORE:** Employment Judge Horne

**REPRESENTATION:**

**Claimant:** Did not attend, but made written submissions

**Respondent:** Mr M Hatfield, solicitor

## RESERVED JUDGMENT FOLLOWING A PRELIMINARY HEARING

The claim is struck out.

## REASONS

### The preliminary hearing

1. By notice dated 14 February 2019, the parties were informed that there would be a preliminary hearing on 9 July 2019. The purpose of the hearing, as stated in the notice, was:

"to consider whether or not to strike out the claim on the grounds that:

It is not being actively pursued,

[the] Claimant has not complied with Case Management Orders, and

A fair hearing may no longer be possible."

**Procedural background**

2. The claimant worked for the respondent for 17 months as a consultant in obstetrics and gynaecology. Prior to joining the respondent, he worked for a different NHS Trust, where (it is alleged) he started making protected disclosures in 2011. Further disclosures, and various alleged episodes of bad treatment, occurred during employment with the respondent. His employment came to an end on 31 July 2013.

3. By a claim form presented on 30 October 2013, the claimant made a large number of vague and unspecified complaints including race discrimination and detriment on the ground of protected disclosures.

4. The early years of the claim were characterised by multiple preliminary hearings, mainly in an effort to clarify the claimant's case and to secure the claimant's compliance with case management orders. By way of summary:

   4.1. Two hearings took place on 12 February and 13 June 2014. On both occasions the claimant was required to provide further information and given deadlines to respond.

   4.2. At a hearing on 4 September 2014, Employment Judge Slater criticised the claimant for non-compliance and late compliance with case management orders. She rejected the claimant's explanation and, although she refused the respondent's application to strike the claim out, she did warn the claimant that any further delays could lead to his claim being struck out. He did not heed the warning and an "Unless" order was made against the claimant on 9 December 2014.

   4.3. The claimant provided 297 pages of further particulars on 9 January 2015.

   4.4. Two further unless orders were made on 10 August 2016 and 11 October 2016.

   4.5. A preliminary hearing took place before Employment Judge Tom Ryan on 9 December 2016. The claimant asked for permission to rely on a supplemental witness statement. His request was refused. The claimant appealed against the refusal. His appeal was ultimately heard by the Employment Appeal Tribunal on 15 December 2017 and dismissed.

**Final hearing 1 March 2017**

5. Eventually, the case reached a final hearing which started on 1 March 2017. I chaired the hearing, assisted by two lay members. The hearing was adjourned part-heard and re-listed for a further 15 days. Before adjourning, the tribunal gave judgment and make case management orders on a great many preliminary matters. These included clarifying the claimant's complaints and recording them in a schedule. Within that schedule there were 17 alleged protected disclosures dating back to 2012. There were also 51 allegations of detrimental treatment. Each of the 51 detriments was said to have been done on 5 different prohibited grounds.

6. It is worth noting that one of the disputed decisions we had to make was whether or not to allow the claimant to rely on a supplemental witness statement. We refused

permission. In coming to our decision, we considered the claimant's explanation for failing to include certain matters in his original witness statement. We found that explanation impossible to believe.

7. The judgment, orders and schedule were set out in a written judgment sent to the parties on 4 May 2017, followed by lengthy reasons sent on 6 June 2017. These reasons contain a more detailed account of what happened at that hearing. It is not necessary to repeat that account in these reasons, except to note in passing that:

   7.1. the tribunal found that the claimant had breached case management orders relating to the content of his witness statement; and

   7.2. the tribunal expressly rejected the claimant's explanation for the breach.

8. The claimant appealed against the judgment and orders, but the appeal was rejected by Langstaff P at the sift stage on the ground that it was totally without merit.

**Relisting the hearing**

9. Initially the hearing was listed to recommence on 5 June 2017, but that hearing was vacated because of the claimant's pending appeal. Further dates were listed to begin in January 2018, but that hearing, too, had to be postponed, this time because of the unavailability of one of the tribunal's lay members. There was then a delay in re-listing the hearing because the claimant applied for extensions of time in which to submit his availability dates. A reconvened hearing was listed to begin on 3 December 2018.

**Reconvened hearing 3 December 2018**

10. Unfortunately the hearing on 3 December 2018 was short-lived. As the discussion note of the tribunal's subsequent case management order records, the claimant arrived at the hearing at 10.36 am. He handed two documents to the clerk.

11. The first document was a detailed application for the hearing to be adjourned, accompanied by supporting evidence. Broadly speaking, the claimant suffers from a number of conditions that affect both his physical and mental health. According to the claimant, his ability to participate in a hearing was impaired by these conditions and by the side-effects of the medication he took for them. Attached to his application was a letter from his general practitioner (GP), Dr Earnshaw. The letter was dated 8 October 2018, some two months prior to the hearing. In his letter, Dr Earnshaw gave the following opinion:

> "His medication is extensive and includes Gabapentin, Diazepam, Sertraline, Co-codamol and Acitretin. These medications cause a number of side effects including a significant impact on his ability to concentrate and it is my professional opinion that this gentleman is not in a situation where he can attend court for the next six months as the medication means he is not able to concentrate to a point where he is able to process and communicate information in a logical and appropriate [manner] when discuss[ing] matters of significant importance such as property and finance.
>
> He remains under our care and we are hoping that there will be a significant improvement over the next six months although we will continually review this."

12. The second document was a note to indicate that the claimant meant no disrespect, but that he would not speak or answer questions.

13. During the hearing itself, the claimant was reassured that he would not have to say anything. He spoke occasionally but twice became very tearful.

14. The respondent did not oppose the adjournment application. Mr Allen on the respndent's behalf did, however, raise the question of whether a fair hearing was still possible. He reminded the tribunal that the claim was presented in 2013 and related to protected disclosures and detriments beginning in 2012.

15. It was agreed that further medical evidence should be obtained. In the first instance, this evidence was to come from the claimant's general practitioner. Depending on what the GP said, the parties recognised that it might be necessary to obtain an opinion from an expert in one or more disciplines.

16. The claimant asked for time to consider whether to agree to a joint instruction and whether to consent to being examined by an expert nominated by the respondent. He claimant told us that he would not be able to afford to contribute towards the cost of a medical report. His GP would be providing a letter free of charge "out of the goodness of his heart".

17. The discussion note also reminded the parties of the tribunal's duties to make adjustments and for the need for the claimant and his GP to give this possibility careful thought. The claimant's attention was drawn to the *Equal Treatment Bench Book* for suggestions for possible adjustments.

18. Following the hearing, the tribunal made a case management order which was sent to the parties on 13 December 2018. It provided as follows:

> "…
>
> 3. By 4pm on 14 January 2019, the claimant must deliver a letter or report from a medical practitioner to the tribunal and the respondent.
>
> 4. The letter or report must state the medical practitioner's opinion as to:
>
> 4.1 when the claimant is likely to be medically fit to participate in a 15-day hearing;
>
> 4.2 whether the claimant's fitness to participate in such a hearing is affected by stress and, in particular, the stress of these proceedings; and
>
> 4.3 what if any adjustments the tribunal could make to enable the claimant to participate in the hearing.
>
> 5. By 4pm on 14 January 2019 the claimant must indicate to the tribunal and the respondent in writing whether or not he gives his consent to:
>
> 5.1 jointly instructing one or more medical experts to provide an opinion on the above questions;
>
> 5.2 if there is no joint instruction, being examined by one or more medical experts nominated by the respondent;
>
> 5.3 releasing his general practitioner records to such an expert (however instructed).

…"

19. Owing to listing pressures it was not possible to accommodate a re-listed hearing until 20 January 2020.

**Procedural steps January to July 2019**

20. At some point after the hearing, the claimant obtained a letter from Dr Earnshaw dated 10 January 2019. Strangely, however, he did not do what he had been ordered to do and deliver a copy of that report to the tribunal and the respondent. (I return later to the contents of the report and to the claimant's reasons for not disclosing it.) Not having heard anything from the claimant, the respondent applied for a preliminary hearing to consider striking out the claim. A hearing was listed for that purpose and the parties were notified that it would take place on 9 July 2019.

**The hearing on 9 July 2019**

21. At the hearing on 9 July 2019 Mr Hatfield represented the respondent. The claimant did not attend. At approximately 10.20am on the morning of the hearing, two envelopes were hand-delivered to the tribunal. They contained written submissions and medical evidence.

22. The written submissions were 27 paragraphs long and engaged with the potential strike-out grounds. They contained multiple repetitive applications which I summarise as follows:

    22.1. An application to set aside the order for a preliminary hearing and to have the hearing postponed;

    22.2. A retrospective application to extend time for compliance with the 13 December 2018 case management order and for relief from sanctions for failure to comply;

    22.3. An application for the preliminary hearing to be held by the fully-constituted tribunal including lay members; and

    22.4. An application to "Strongly Resist the Application to Strike Out" the claim.

23. Much of the claimant's written submissions were taken up with describing his state of health. It was the claimant's contention that he was too unwell to attend the hearing, largely because of the effects of his medication on his ability to concentrate.

24. The claimant's medical evidence included two letters from his GP surgery. Of these, the only letter of substance was date-stamped 21 January 2019 and dictated by Dr Earnshaw. (The second letter, written on 28 June 2019, merely stated that an update was not possible because Dr Earnshaw was away from the surgery).

25. Dr Earnshaw's letter stated that, in the doctor's opinion, the claimant was "not in a situation where he can attend court for the next six months". The letter continued:

> "He attends all appointments and declares good compliance with medication. We continue to monitor the situation and are hopeful for improvement over the next six months."

26. Other than the claimant's attendance record and self-report of medication compliance, Dr Earnshaw's letter did not set out any basis for believing that the claimant's condition would improve. In this respect it was very similar to his previous letter dated 8 October 2018, which expressed the hope of "significant improvement" over the next six months.

27. The claimant's bundle contains numerous GP fit notes declaring him unfit for work over a long period from 2018 to 10 September 2019. It also contained an invitation to attend Nuffield Health Manchester Diagnostics Suite for artery calcium scoring and an angiogram. In his written submissions the claimant described his heart condition as "Severe Angina Pectoris", for which he "had emergency treatment, further urgent consultations and investigations".

28. The claimant's written submissions indicated that his "Recent consultations include, but are not limited to the following". What followed was a list of 26 consultation dates, including 8 since Dr Earnshaw had dictated his letter of 10 January 2019. There was no information about what had occurred during those consultations.

29. The claimant's written submissions offered an explanation as to why he had not disclosed Dr Earnshaw's report by 14 January 2019. His explanation was that he was unable to obtain the report before 10 February 2019, by which time the deadline had passed. What he did not explain was why he had then hung on to the report until 9 July 2019.

30. In his written submissions the claimant belatedly addressed the three questions on which he had been required to comment by paragraph 5 of the 13 December 2018 case management order. In summarising the claimant's position I adopt for convenience the same numbering format as the case management order:

    5.1 He did not agree to the joint instruction of a medical expert. His reason was that, in his view, Dr Earnshaw already met the definition of an expert under Part 35 of the Civil Procedure Rules 1998.

    5.2 He contended that he did not have the capacity to give consent to a medical examination and was therefore unable to agree to being examined by an expert instructed by the respondent.

    5.3 He withheld consent to release of his general practitioner records, again on the ground of incapacity to consent.

31. Having taken some time to read the claimant's written submissions and evidence, Mr Hatfield put forward his own written submissions on behalf of the respondent. These he briefly supplemented by oral arguments. To summarise the respondent's position:

    31.1. The medical evidence did not indicate any reasonable prospect of the claimant recovering in time for the final hearing in January 2020;

    31.2. Over the years, the claimant had demonstrated a consistent pattern of late compliance and non-compliance with tribunal orders. Only when faced with an unless order or a strike-out application had the claimant actually done what he had been ordered to do.

    31.3. Even if the claimant were medically fit to attend the tribunal in January 2020, a fair hearing would still be impossible because of the delay that had occurred to date. In my later case management order I paraphrased the argument this way:

        "The claimant's employment ended on 31 July 2013, nearly 6 years ago. Of the 7 witnesses that the respondent wishes to call, one has moved to the United Arab Emirates, two have retired and three have gone to work for other NHS trusts. Even if these witnesses can all be found and brought to the tribunal, they would have to try and cast their minds back

many years because of the length of time it has taken to get the case to a hearing."

32. The claimant's extensive written submissions did not engage with these latter two points.

33. Having considered both parties' arguments I proceeded to deal with the application to postpone the hearing and to have it relisted before a full panel including lay members. I gave written reasons for my decision and do not repeat them here. I did, however, think it was necessary to give the claimant a final opportunity to obtain further evidence and make further submissions.

**The 17 July 2019 case management order**

34. Following the hearing I caused a further case management order to be sent to the parties. Relevantly, it read:

"

1. Judgment on the respondent's strike-out application is reserved. A decision will be made on 9 September 2019 and sent to the parties as soon as practicable after that date.
2. Neither party is expected to attend on 9 September 2019.
3. By 4pm on 16 July 2019 respondent must deliver to the claimant a copy of the respondent's written submissions for today's hearing.
4. The claimant may rely on further written submissions and medical evidence if he wishes to do so. Any further submissions and medical evidence must be delivered to the tribunal no later than 4pm on 27 August 2019.
5. The respondent may make written submissions in reply if it wishes to do so. If it does, those submissions must be delivered to the tribunal by 4pm on 2 September 2019.
6. The claimant's application for the preliminary hearing to be conducted by a full panel including lay members is refused."

35. Accompanying the case management order was a further discussion note which set out the events of the hearing in detail and made various observations for the claimant's benefit. These included:

35.1. An explanation to the claimant of what the deficiencies appeared to be in the medical evidence and how he might address them:

> "Assuming the facts set out in those paragraphs to be correct, it means that his health has not improved in accordance with Dr Earnshaw's hopes. His condition does not appear to have improved in the six months from October 2018 or in the six months from January 2019. In fact, if anything, the claimant's medical condition appears to have become more complicated, because the claimant has additionally had to undergo emergency treatment and investigation for angina.
>
> …
>
> [12] It may assist the claimant to know my preliminary view of the current state of the medical evidence. My opinion is of course,

provisional and subject to any further representations the claimant might wish to make. As things stand, there does not appear to be any evidence, beyond the claimant's own assertion, that he will be well enough to participate in a 15-day hearing in January 2020. Neither of Dr Earnshaw's letters stated that the claimant would be well enough for a 15-day hearing in six months' time. Even if that opinion could be read into Dr Earnshaw's letters, subsequent events have proved his prediction to be wrong.

[13] Between now and 27 August, the claimant has an opportunity to plug that gap in the medical evidence. It is up to him how he does it. One step might be to ask Dr Earnshaw specifically whether or not he believes that the claimant will be ready for a 15-day hearing by 20 January 2020 and to state the reasons for that opinion. It may or may not strengthen the claimant's case if he provides his general practitioner records for the period since December 2018. They might contain some contemporaneous evidence of the claimant's state of health at the time of the 8 "recent consultations" he has had since Dr Earnshaw dictated his last letter"

35.2. A summary of the points that I believed were at the heart of the respondent's strike-out application, and a reminder that the claimant had an opportunity to make written representations specifically on those points.

35.3. A warning about the consequences of late compliance. The note read, relevantly:

**"Postponements and extensions of time**

21. Despite his medical conditions, the claimant is clearly capable of putting together detailed written submissions and collating medical documents. The claimant's written submissions were hand-delivered after the hearing had already been due to start. He has made a retrospective application to extend deadlines that expired on 14 January 2019 without any real explanation of why he did not apply sooner.

22. This will not be permitted to happen again. The claimant has a deadline of 27 August 2019 for his written submissions and further medical evidence. The claimant should be in no doubt about the consequences of missing the deadline. If he allows the deadline to pass and then makes a retrospective application for an extension of time, it is highly likely that that application will be refused. I may decide to ignore any submissions and evidence received from the claimant after 27 August 2019.

23. Likewise, it is unlikely that the tribunal will agree to postpone the deliberation of the respondent's strike-out application, whether on health grounds or otherwise. The claimant has a full opportunity to present his arguments in writing, which he is clearly capable of doing. The strike-out application needs to be resolved, one way or the other, leaving enough time for the parties to prepare for the final hearing in January 2020 if the claim is permitted to proceed."

**Events since 9 July 2019**

36. The respondent delivered its written submissions to the claimant as required by the case management order. One set of submissions was sent by recorded delivery, which the claimant did not collect. The second set was sent by first class post.

37. At 12.25pm on Friday 6 September 2019, half a working day before the resumed hearing date of the preliminary hearing and 10 days after the deadline had expired, the claimant faxed an application to extend time to rely on further medical evidence. Briefly summarised, his reason for needing more time was that Dr Earnshaw was unwell and the claimant had been unable to obtain a further letter from him. The claimant indicated his intention to seek a meeting with a partner at the surgery on 9 September 2019. He did not explain why he had left it until 6 September 2019 to apply for the extension of time.

38. I considered the claimant's application on the morning of today's hearing. Without formally granting or refusing the application, I decided to wait until 2.00pm to see what the claimant provided. Because the claimant has not provided an e-mail address, telephone number or return fax number, it was not possible to inform the claimant that I would take this course. By 2pm, the claimant still had not provided any medical evidence. I decided to consider the strike-out application on the evidence so far available.

**Relevant law**

39. Rule 2 of the Employment Tribunal Rules of Procedure 2013 establishes the overriding objective, which is defined as follows:

> (1) The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> (2) A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

40. Rule 37(1) provides, relevantly:

> (1) At any stage of the proceedings, … on the application of a party, a Tribunal may strike out all or part of a claim… on any of the following grounds-…
>
> (c) for non-compliance with… an order of the Tribunal;

> …
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim…

41. A claim cannot be struck out unless the claimant has been given a reasonable opportunity to make representations either in writing or at a hearing: see rule 37(2).

42. The general rule is that complaints of discrimination in a diverse society cry out to be tried on their merits and should not be struck out where the facts are in dispute: *Anyanwu v. South Bank Student's Union* [2001] UKHL 14.

43. When considering whether or not to strike out a claim, a tribunal must apply a two-stage test. First, the tribunal must consider whether any of the grounds in rule 37(1)(a) to (e) have been established. If so, the tribunal must go on to decide whether or not to exercise its discretionary power to strike out the claim: *Hasan v. Tesco Stores Limited* UKEAT 0098/16.

44. Where a party has engaged in conduct which is unreasonable, but which does not involve the breach of a tribunal order, the crucial and decisive question will generally be whether a fair trial is still possible: *Weir Valves & Controls (UK) Ltd v Mr J B Armitage* EAT 0296/03.

45. Where a party has breached a case management order, tribunals should not strike out the claim unless that sanction would be proportionate. Where it is still possible to have a fair hearing it will only be a very rare case in which it would be proportionate to strike out the claim: *Blockbuster Entertainment Ltd v. James* [2006] EWCA Civ 684.

46. A tribunal may strike out a claim where the claimant's health prevents him from attending a hearing and there is no realistic prospect of sufficient improvement within a reasonable time. In *Riley v. Crown Prosecution Service* [2013] EWCA Civ 951, Longmore LJ said at para 28:

> "It would, in my judgment, be wrong to expect Tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a Tribunal."

47. When deciding whether the claimant will be fit to attend a hearing within a reasonable time, the tribunal must take into account relevant medical evidence, but such evidence is not conclusive. It is open to the tribunal to disagree with a doctor's predictions on the basis that previous predictions have been proved wrong: *Peixoto v. British Telecommunications plc* UKEAT 0222/07.

48. There is no rule dealing with the use of expert evidence in the Employment Tribunal Rules 2013. Guidance on the use of expert evidence in the Employment Tribunal was given by the Employment Appeal Tribunal in *De Keyser Ltd v Wilson* [2001] IRLR 324 at 330:

> "(i) Careful thought needs to be given before any party embarks upon instructions for expert evidence. It by no means follows that because a party wishes such evidence to be admitted that it will be. [Although the

procedures of employment tribunals differ from those in the civil courts, guidance may be found by way of analogy from the provisions of CPR rr 35.1–35.14 and 35PD.] A prudent party will first explore with the employment tribunal at a directions hearing or in correspondence whether, in principle, expert evidence is likely to be acceptable.

(ii) Save where one side or the other has already committed itself to the use of its own expert (which is to be avoided in the absence of special circumstances) the joint instruction of a single expert is the preferred course.

(iii) If a joint expert is to be instructed the terms which the parties will need to agree will include the incidence of that expert's fees and expenses. Nothing precludes the parties *agreeing* that they will abide by such view as the tribunal shall later indicate as to that incidence (though the tribunal will not be obliged to give any such indication) but the tribunal has for the time being no *power* as to costs beyond the general provisions of [rule 73 of the 2013 Rules].

(iv) If the means available to one side or another are such that in its view it cannot agree to share or to risk any exposure to the expert's fees or expenses, or if, irrespective of its means, a party refuses to pay or share such costs, the other party or parties can be expected reasonably to prefer to require their own expert but even in such a case the weight to be attached to that expert's evidence (a matter entirely for the tribunal to judge) may be found to have been increased if the terms of his instruction shall have been submitted to the other side, if not for agreement then for comment, ahead of their being finalised for sending to the tribunal.

(v) If a joint expert is to be used, tribunals, lest the parties dally, may fix a period within which the parties are to seek to agree the identity of the expert and the terms of a joint letter of instruction and the tribunal may fix a date by which the joint expert's report is to be made available.

(vi) Any letter of instruction should specify in as much detail as can be given any particular questions the expert is to be invited to answer and all more general subjects which he is to be asked to address.

(vii) Such instructions are as far as possible to avoid partisanship. Tendentiousness, too, is to be avoided. In so far as the expert is asked to make assumptions of fact, they are to be spelled out. It will, of course, be important not to beg the very questions to be raised. It will be wise if the letter emphasises that in preparing his evidence the expert's principal and overriding duty is to the tribunal rather than to any party.

(viii) Where a joint expert is to be used, the tribunal may specify, if his identity or instructions shall not have been agreed between the parties by a specified date, that the matter is to be restored to the tribunal, which may then assist the parties to settle that identity and those instructions.

(ix) In relation to the issues to which an expert is or is not to address himself (whether or not he is a joint expert) the tribunal may give formal

directions as it does generally in relation to the issues to be dealt with at the main hearing.

(x) Where there is no joint expert, the tribunal should, in the absence of appropriate agreement between the parties, specify a timetable for disclosure or exchange of experts' reports and, where there are two or more experts, for meetings (see below).

(xi) Any timetable may provide for the raising of supplementary questions with the expert or experts (whether there is a joint expert or not) and for the disclosure or exchange of the answers in good time before the hearing.

(xii) In the event of separate experts being instructed, the tribunal should encourage arrangements for them to meet on a without prejudice basis with a view to their seeking to resolve any conflict between them and, where possible, to their producing and disclosing a schedule of agreed issues and of points of dispute between them.

(xiii) If a party fails, without good reason, to follow these guidelines and if in consequence another party or parties suffer delay or are put to expense which a due performance of the guidelines would have been likely to avoid, then the tribunal may wish to consider whether, on that party's part, there has been unreasonable conduct within the meaning of [rule 76 of the 2013 Rules] (as to costs)."

## Conclusions

Power to strike out - breach of case management orders

49. This case has been characterised by numerous breaches of case management orders on the claimant's part, for which there has either been no real explanation (such as the failure to disclose Dr Earnshaw's report before 9 July 2019) or an explanation which the tribunal has expressly rejected (as on 4 September 2014 and 1 March 2017). Despite being warned about his claim being struck out, and three "unless" orders having been made in the past, the claimant appears to continue to fail to comply with orders. He also continues to make retrospective applications to extend time at virtually the last possible moment without any adequate explanation for the delay. This leads me to conclude that the claimant's breaches of orders have been deliberate and in full knowledge of the potential consequences.

50. The power to strike out the claim therefore arises under rule 37(1)(c).

Power to strike out – fair hearing no longer possible

51. I would in any event conclude that there is no longer a realistic prospect of a fair hearing. This is on two grounds:

    51.1. There is no realistic prospect of the claimant being medically fit to attend a tribunal hearing within a reasonable time; and

    51.2. Even if the claimant would be ready to attend a hearing in January 2020, the respondent would be put to an incurable disadvantage because of the delay that has already occurred.

52. I explain my reasoning on each ground in turn.

*Claimant's health*

53. The claimant has now been medically unfit to participate at two important hearings: the resumed final hearing on 3 December 2018 and the preliminary hearing on 9 July 2019. I now have to decide whether or not there is a realistic chance of the claimant being well enough to attend a hearing within a reasonable period in the future.

54. In order to answer that question, I must first decide what amounts to a "reasonable period". In view of the delays that have already occurred, a reasonable period cannot be any longer than a few months. In reality, what this means is that there must be a real chance of the claimant being well enough to participate in the resumed final hearing in January 2020. If that hearing has to be postponed now on account of the claimant's health, it cannot be relisted until about July 2020. If it is adjourned on the day, it is unlikely to be relisted until late 2020 or early 2021. Whatever one might think of the possibility of a fair hearing in January 2020, those further delays would be intolerable.

55. My task, therefore, is to look at the possibility of the claimant being medically fit to participate in the hearing in January 2020. I have had to make this assessment without the benefit of any expert's report, or at any rate, any report complying with the procedural safeguards mentioned in *De Keyser.* This is because the claimant has not consented to a joint instruction or to being examined by an expert instructed by the respondent. It may be that the reason for his withholding consent is that he lacks capacity, but that reason hardly inspires confidence that the claimant will be ready for a hearing in a few months' time. My decision is also made without the benefit of the claimant's general practitioner records. Again, the reason for not having the records is because the claimant has not given consent.

56. The medical evidence, such as there is, is not encouraging. I set out my provisional view in the 17 July 2019 case management order. Dr Earnshaw was not saying that the claimant would be fit for a 15-day tribunal hearing. All he was doing was expressing the hope of improvement without any apparent basis, other than the claimant's continued compliance with medication. To the extent that Dr Earnshaw's letter of 8 October 2018 could be interpreted as predicting the claimant's fitness to attend a tribunal hearing in 6 months' time, that prediction was proved wrong by the claimant's inability to attend the hearing on 9 July 2019.

57. Nothing that has happened since July 2019 has caused me to change my mind. The claimant has had an opportunity to provide further medical evidence and has not done so.

58. I have considered whether the tribunal might be able to make adjustments that would enable the claimant to participate in the January 2020 hearing. Once again I am hampered by the lack of evidence. There is nothing that suggests that any particular adjustment would enable the claimant to attend or otherwise involve himself. I know that the claimant is well able to make written submissions. It has occurred to me that he might make written submissions instead of attending the final hearing. Such an exercise would not serve the overriding objective. There are a great many factual allegations that turn on disputed oral evidence. A key ingredient of a fair hearing will be an opportunity for the respondent to question the claimant about his version of events. So will a chance for the claimant to question the respondent's witnesses and hear their answers.

59. Overall I think that there is no real chance of the claimant being well enough to make a meaningful contribution to the resumed hearing in January 2020. A

hearing cannot therefore fairly take place within a reasonable time. In my view, the condition set out in rule 37(1)(e) is satisfied.

*Effect of past delay*

60. I also take the view that the delays up to now have had a severe impact on the fairness of any hearing that might take place in the future.

61. By January 2020 it will be over 8 years since the first of the claimant's alleged protected disclosures and over 6 years since the termination of his employment.

62. Many of the claimant's alleged protected disclosures, and allegations of discrimination and detriment, relate to things allegedly said over the telephone or in face-to-face conversations. Evidence of these comments will be particularly susceptible to fading memories.

63. I have taken account of the fact that many of the respondent's witnesses have left the organisation. This factor is not by itself conclusive: I would expect the respondent to take reasonable steps to trace former employees, especially those still working within the NHS, and to make arrangements for video evidence from witnesses who now live abroad. But the factor is nevertheless relevant. Once witnesses stop working for the respondent (and particularly when they leave the country or stop working altogether), they are likely to make a new start and put historic workplace events behind them. It is reasonable to suppose that their memories of these incidents will fade faster once they no longer have a reason to think about them.

64. I have considered whether some of the damaging effect of the delay might have been mitigated by the fact that the parties have exchanged witness statements. This might possibly have saved the day had comprehensive witness statements been exchanged at an early stage. But it took more than 3 years from the termination of his employment for the claimant to make a witness statement. It is unlikely in this case that witness statements effectively preserved witnesses' memories; at any rate, not enough to withstand the effect of a further 3 years' delay.

65. For these reasons, even if the claimant were able to attend the hearing in January 2020 and fully participate, I do not think it would be possible for that hearing to be fair.

66. On this ground, too, I consider that my strike-out powers under rule 37(1)(e) are engaged.

<u>Discretion to strike out</u>

67. I remind myself that, just because I have the power to strike out a claim, it does not necessarily follow that I should do so. I have had regard to the requirement of proportionality. Striking out a claim is a draconian step, particularly so when it raises allegations of discrimination. I have therefore considered some possible alternatives.

68. One possibility might be to do nothing. I could leave the resumed final hearing in the list to begin on 20 January 2020 and wait and see if the claimant attends or not. In my view, this course would defeat the overriding objective. It would put the respondent to what in all probability would be the wasted expense of preparing for and attending a third final hearing. It is also likely to cause additional stress to witnesses being brought back from retirement or their new jobs.

69. I have also thought about adjourning the preliminary hearing further to give the claimant yet another opportunity to obtain medical evidence. Again, this course is not attractive. He has had two opportunities to get medical evidence of his own and a chance to give his consent to being examined by an expert. Both times he has missed the deadline and made a last-minute retrospective application to extend time. On the second occasion his retrospective application was made in the teeth of a very clear warning about the consequences. If I were to adjourn the preliminary hearing further, in all likelihood I would be faced with precisely the same situation in a few weeks' time. The respondent would be put to the expense of attending another preliminary hearing only to find that the claimant does not attend and sends late written submissions asking for retrospective extensions of time.

70. I would not want the claimant to think that I have no sympathy for his situation. His state of health is not his fault. But the time has come to draw a line under this litigation. The claim is therefore struck out.

16 September 2019

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Employment Judge Horne

SENT TO THE PARTIES ON

4 October 2019