



EMPLOYMENT TRIBUNALS

Claimant: Mr S Zaidi

Respondent: Tavistock & Portman NHS Foundation Trust

Heard at: by telephone

On: 15 May 2020

Before: Employment Judge Adkin (sitting alone)

Appearances

For the Claimant: Claimant in person
For the Respondent: Mr A. Sugarman

WRITTEN REASONS

1. These reasons given for a refusal of the Respondent's application to stay or postponement of disclosure of documents and to postpone a hearing listed to commence on Wednesday, 23 September 2020.
2. The Respondent's application was made by letter dated 31 March 2020. This application was amplified by Counsel, Mr Sugarman, in the telephone hearing on 15 May 2020.
3. The application was made on the basis that a number of the Respondent's likely witnesses were "frontline staff" and one of its key witnesses, Julia Stacey, was project managing a change/expansion of Children and Young People mental health crises service. The Respondent argued that social distancing and the requirement for self isolation was impacting upon the Respondent's ability to comply with orders in a timely way, collating disclosure in particular. The Respondent stated that these difficulties would increase as the pandemic escalated. The Respondent's solicitor wrote:

"Any prejudice to the Claimant – who is an employee of the respondent – resulting from the post delay to disclosure, is outweighed by the prejudice that will be suffered by the respondent if it is required to continue with these proceedings at a time when it is unable to promptly and effectively defend itself due to its resources needing to be prioritised elsewhere. It is otherwise not comparable to the greater need to preserve life."

4. The application was opposed by the Claimant, who continues to work within the NHS for the Respondent. He makes the point that the work of both the Respondent's clinicians (who deal with mental health) and also corporate services/business development has been transitioned to online working. The Claimant himself works within business development. He notes that the application for a stay was only made two days before the deadline for disclosure, which at that point was 3 April 2020.

The Claim

5. The Claimant's claim is of race discrimination. The allegation are serious. He contends that his career progression within the Respondent's business development team affected because of his race. He alleges that he was demoted following a restructure whereas his white colleagues were promoted. He remains working in the team at present.

Disposal of the application

6. Employment Tribunal Presidential Guidance, issued in response to the Covid-19 crisis provided for all hearings listed up until 26 June 2020 to be automatically converted to case management. At present the Guidance does not require hearings beyond that date to be so converted or cancelled. The 'Frequently Asked Questions' document issued on 3 April 2020 stated in respect of hearing listed from 29 July 2020 onward "Hopefully it can still proceed as planned."
7. The overriding objective under rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 requires the Tribunal to avoid delay, so far as compatible with proper consideration of the issues.
8. I am not aware of a particular policy on NHS cases, as was alluded to in the Respondent's application and therefore my approach to an application for a stay or postponement is each application should be dealt with on a case-by-case basis.
9. The situation described in the Respondent's application letter of 31 March is different to the position by the time of the 15 May 2020 hearing. Mr Sugarman in his submissions acknowledged that by 15 May the situation was different, although he maintained the central thrust.
10. This application was written at a time one week after "lockdown", which described the situation at that stage, namely the NHS service being short of staff, the escalating nature of infection rates and the exposure of the Respondent's staff to patients with coronavirus. At that time there was of increasing infection, increasing death rates and increasing clinical activity. I certainly make no criticism of the Respondent for not complying with the order for disclosure to take place by 3 April.

11. By 15 May 2020 the position was different. This hearing was after the peak, at a time when it seems from all available news sources that infection was beginning to decline and that NHS capacity to deal with acute patients is not the concern that it had been.
12. The Respondent's application referred to "frontline" staff. I recognise that the Respondent is undoubtedly dealing with challenges arising from the Covid-19 crisis. It seems that Julia Stacey has a role in that from an organisational point of view. I am mindful however that the Claimant's complaint relates to the business development function within an NHS Trust dedicated to mental health, which to my mind is somewhat removed from the "frontline" of dealing with infected patients. Viewed as at 15 May rather than the date on which the application was submitted, based on the timescales I have ordered for disclosure and witness evidence I consider it unlikely that there will genuinely be a tension between the progress of this litigation going forward and the need to preserve life. If I considered that there was such a tension I would order a general stay of proceedings.
13. I discussed with the parties that the reality of postponing the hearing listed in September 2020 would be that it would be listed at some (indeterminate) time in 2021.
14. Any significant delay in litigation is unsatisfactory. It seems to me however that it is particularly so in a case in which, as in this one, the Claimant is making serious allegations about his immediate colleagues impacting on his career and continues to work for the Respondent and the same team. The core of the dispute relates to a consultation process that commenced in October 2018 and reached an outcome in September 2019. He (and presumably his colleagues) will continue to work with the prospect of litigation hanging over them.
15. Memories fade with the passage of time. The longer that elapses before disclosure takes place, the more likely it is that disclosure will be complete or that documents are lost, or that the departure of colleagues poses difficulties in disclosure. The recollections contained within witness evidence will become stale.
16. I anticipate that much of disclosure will be done electronically, and can be done by the relevant individuals checking documents and their email accounts working remotely.
17. Furthermore, the Respondent is not being directed to take any actions in this matter until July 2020. I ordered disclosure by 15 July 2020, two months after the Preliminary Hearing, and nearly 3 ½ months after the original deadline for disclosure on 3 April 2020. To that extent the Respondent's application for postponement of the original deadline for disclosure has succeeded. It is only the application for a stay that is refused.
18. Looking forward, Government policy is directed towards an increasing relaxation of lockdown. In my judgment it should be possible over the course of the two months since the hearing on 15 May, even allowing for remote working, for the disclosure exercise to be completed by that stage.
19. Additionally, the directions given provide for the parties to attend a further case management hearing on 30 July 2020, with a specific direction to update the Tribunal on readiness for hearing by 24 July. I consider that this provides a

sufficient safeguard to enable the parties to raise genuine practical problems posed by the pandemic when both parties and the Tribunal will be much better informed about the likely position by the third week of September 2020. For these reasons I consider that a general stay of these proceedings and a postponement of the final hearing is unnecessary.

Employment Judge Adkin

Dated:

28.5.20.....

Sent to the parties on:

28.5.20.....

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For the Tribunal:

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