



## EMPLOYMENT TRIBUNALS

<b>Claimant Represented by</b>	Mr P Sridhar in person
<b>Respondents</b>	(1) Kingston Hospital NHS Foundation Trust (2) Kevin Cheatle
<b>Represented by</b>	Mr R Moretto (counsel)
<b>Before:</b>	<b>Employment Judge Cheetham QC</b>

**Preliminary Hearing held on 20 August 2020 at  
London South Employment Tribunal by telephone**

### JUDGMENT

1. The complaint of indirect discrimination against the Second Respondent is struck out as having no reasonable prospect success and Ms Jane Wilson is therefore dismissed as a Respondent to the consolidated claims.
2. The Claimant is allowed to amend his claim by adding a claim for direct race discrimination (only), as set out in his application dated 22 June 2020, and to add Mr Kevin Cheatle as an individual Respondent to that complaint (only).
3. The Claimant's application for specific disclosure is refused, on the basis that standard disclosure has yet to be completed, so any application for specific disclosure is premature.
4. The Respondents' application for postponement of the hearing listed from 7-16 September 2020 is allowed.
5. The Claimant's application to dismiss the ET3 is dismissed.

## REASONS

1. *This has been a remote hearing on the papers, which the parties have not objected to. The form of remote hearing was: A - audio. A face to face hearing was not held because it was not practicable and the issue of the future determination of the claim could be resolved from the papers. The documents that I was referred to are those contained in the Tribunal case file. The directions given are set out below.*
2. This Preliminary Hearing was listed to hear 5 applications, as follows:
  - a) The Respondents' application for the removal of Ms Jane Wilson as a Respondent (16 March 2020)
  - b) The Claimant's application to add a fresh claim of direct race discrimination and a further Respondent (22 June 2020).
  - c) The Claimant's application for specific disclosure in respect of that fresh claim (17 June 2020).
  - d) The Respondents' application for postponement of the hearing listed from 7-16 September 2020 (24 July 2020).
  - e) The Claimant's application to strike out the Respondents' ET3 (3 August 2020).

### The removal of Ms Wilson as a Respondent.

3. This application was made on 16 March 2020. It said that the claim of indirect race discrimination against the Second Respondent, Ms Jane Wilson, should be struck out on the basis that it holds no reasonable prospects of success (Rule 37). The application noted that EJ Wright's Order of 12 December 2019, following a preliminary hearing that had taken place on 30 September 2019, consolidated these proceedings with claim number 2303639/2019. Ms Wilson was added as a party to these proceedings by virtue of the decision to consolidate the claims.
4. At the preliminary hearing, the First Respondent sought a further preliminary hearing dealing with strike out, but the judge did not consider it proportionate to have one. Ms Wilson was not a party to the proceedings at the time of the preliminary hearing, so was not able to make representations. She did not become aware of these matters until they were drawn to her attention by the First Respondent. In those circumstances, it seems reasonable to me that I should vary the previous case management order and hear this application. Given all the other issues that I have to deal with day, it is proportionate to include this one as well.
5. Mr Moretto's submission on this first issue was straightforward: Ms Wilson must, as a matter of law, be dismissed as a Respondent as there can be no indirect discrimination claim against her. There is no prejudice to the Claimant in any event as his claim can and will still proceed against the Trust. He referred me to the recent Employment Appeal Tribunal decision in ***Murray v Maclay Murray & Spens LLP*** UKEATS/0044/18, which makes

clear that when the employer is applying a provision criterion or practice (“PCP”), it will be inappropriate to join individuals to a claim for indirect discrimination. In any event, the First Respondent does not mount any statutory defence and concedes that it is liable for the actions of Ms Wilson insofar as those actions amount to discrimination (which it denies).

6. The PCP in question is permitting only consultant surgeons, as opposed to associate specialist surgeons like the Claimant, to have private practising privileges in its private patient unit. The Claimant argued today that, although this was a Trust policy, the Second Respondent Ms Wilson was “*the will and mind of the Trust*” and was a member of the Advisory Committee and Board of Directors. The Trust policy, he said, was applied by Ms Wilson.
7. In my view, although she may have been applying the Trust policy (as were others), nevertheless the policy was made by the Trust. Applying the judgment in **Murray**, there is no basis upon which Ms Wilson could be liable as an employee of the Trust. In those circumstances, this application succeeds and the complaint of indirect discrimination against Ms Wilson is struck out as having no reasonable prospect success. Ms Wilson is therefore no longer a Respondent in these proceedings.

The Claimant’s application to add a fresh claim of direct race discrimination and a further Respondent

8. This application was made on 22 June 2020. It stated that the Claimant was seeking to amend his existing ET1 to add a new claim and a new Respondent. The new claim he described as “ongoing racial discrimination” and the new Respondent was Mr Kelvin Cheatle, the director of workforce at the trust. He explained at this hearing that this was a claim of direct discrimination only and the allegations – which I need not set out – are contained in that lengthy application.
9. Mr Moretto did not object to this new claim, subject to confirmation of the scope of the amendment. Although the application rather confusingly refers to “*direct racial discrimination as the PCP was not neutral*”, the Claimant stated that he was not adding a claim of indirect discrimination. If he were, then on the same reasoning as above, Mr Cheatle could not be a named Respondent. However, if it is a claim for direct discrimination, then Mr Cheatle could be added, even though one might think there would be little point in doing so, given that the first Respondent is not mounting a statutory defence.
10. Therefore the application to add a new claim is allowed to that limited extent. The First Respondent has permission to amend its grounds of response to deal with these further allegations, as does Mr Cheatle (who is now the Second Respondent).

The Claimant’s application for specific disclosure in respect of that new claim.

11. Disclosure has been overtaken by events, namely this amendment to the claim and also the appeal proceedings. Such disclosure that has taken place to date relates to those claims that were originally not struck out, although I understand there has been some disclosure relevant to the reinstated claims. Rather than order specific disclosure, it makes sense to allow time for disclosure to be completed. If there are still issues to be resolved regarding disclosure, they can be dealt with at the next case management hearing.

The Respondents' application for postponement of the hearing listed from 7-16 September 2020.

12. Although the Claimant objected to a postponement, there is no possibility of the claim being heard on these dates, not least because of the successful application to amend, as well as the impact of the appeal proceedings. We do not at present have the Respondents' full response, nor do we know what evidence will need to be called. As we have listed another case management hearing very shortly, the final hearing can be relisted with greater accuracy regarding its duration on that occasion.

The Claimant's application to strike out the Respondents' ET3.

13. Finally, the Claimant applied on 3 August 2020 to strike out the ET3. This was on the basis that the Respondents had misled the tribunal by making factually incorrect statements and had not been dealing with the evidence correctly. As a result, it was no longer possible to have a fair hearing and the response had no reasonable prospects of success.

14. Issues such as whether a party has misled the tribunal or has made factually incorrect statements can only be tested by hearing the evidence, unless there is the clearest and most obvious evidence showing that to be the case. I accept that may appear to be the case from the Claimant's perspective, but there are other perspectives and an application to strike out the response is not the way to resolve the dispute. The application is dismissed.

15. The agreed directions are set out in a separate case management order.

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Employment Judge S Cheetham QC  
Dated 8 September 2020