EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4105707/2012 and 4110993/2015

Held in Edinburgh on 16 December 2021

Employment Judge A Jones

Dr Noor Ahmed Ebbiary	**Claimant** **In person**
Lothian Health Board	**First Respondent** **Represented by** **Mr R Davies** **(solicitor)**
Dr Paul Dewart	**Second Respondent** **Represented by** **Mr R Davies** **(solicitor)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Tribunal that the claims should be struck out in terms of Rule 37(1) (e) of the first schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

E.T. Z4 (WR)

REASONS

Procedural background

1. The claimant lodged a claim against the first and second respondent on 21 May 2012 and a further claim against the first respondent only on 18 September 2015. The claimant was formerly a consultant gynaecologist at the Royal Infirmary of Edinburgh on a fixed term contract from 12 September 2011 until 30 September 2012.
2. The claimant makes claims of direct race discrimination, harassment related to race, victimisation, breach of the Fixed Term Employees Regulations 2002 ('FTER') and being subject to a detriment in breach of Regulation 6 FTER.
3. Previous preliminary hearings in this case have taken place on
    a. 15 July 2014
    b. 26 November 2018
    c. 11 March 2019
    d. 17 December 2019
    e. 14 September 2020
    f. 19 May 2021, and
    g. 18 October 2021
4. The Tribunal first raised the possibility of strike out of the claimant's claim in 2014 when he did not respond to correspondence, which transpired was due to him moving and not updating the Tribunal with his contact details. A strike out hearing was listed to take place in 2015 following an application by the respondent, but the application was then withdrawn following a medical report being received indicating that the claimant would be able to participate in the Tribunal proceedings within three to six months.
5. A further hearing to consider the strike out of the claimant's claims was scheduled to take place in November 2018. That hearing was postponed on the request of the claimant as he was involved in proceedings before the GMC and was having an operation in late January 2019. A further hearing was listed to take place on 11 March 2019. There was a request by the claimant for that hearing to be postponed and a request of reconsideration of the refusal to postpone that hearing which was also refused. The hearing took place on 11 March 2019 and the application for strike out was refused. At that time

Employment Judge Attack stated (at paragraph 31) "In this case although the claimant has been ill for some considerable time, on the evidence available at this hearing it appeared that his mental health was improving. He had been able to take part in the GMC hearing and as Mr Wells pointed out the medical report produced for that hearing indicated an improvement in his mental health. There was no suggestion that the claimant would be unable to participate in this case if it was allowed to proceed."

6. At the preliminary hearing on 19 May 2021, a timetable was set for preparations towards a final hearing in the matter. This included an order for the claimant to lodge a consolidated claim properly specifying the allegations being made and against which respondent they were being made and providing further particulars sought by the respondent. It is worth pausing at this stage to emphasise that although the claims have been ongoing since 2012 and 2015, they have never been adequately specified in the view of the respondents.
7. A further case management hearing was set for 16 August 2021 to discuss further steps and in particular whether the claimant required permission to amend in order to allow any of the allegations contained in the consolidated claim and if so, whether such permission should be granted.
8. That hearing was postponed because of the delay in the claimant providing the respondent with a consolidated claim. The claimant had also failed to address the issue of amendment or provide other information which had been ordered at the hearing on 19 May. This was as a result of the claimant's continuing ill health.
9. The hearing listed for 16 August was then relisted to take place on 18 October. A request was made on behalf of the claimant to postpone that hearing, which was refused.
10. At the hearing on 18 October, it was recognised that the orders made in May had not been complied with due to the claimant's ill health. Further, the claimant's solicitor was seeking further advice as to whether the claimant was able to give him instructions at all that stage.
11. In these circumstances, the question of whether it was still possible to have a fair hearing in terms of Rule 37 (1)(e) was raised by the Tribunal. It was determined that a hearing would take place to consider the matter and arrangements were made for parties to agree a joint inventory for use at that hearing and to exchange

skeleton submissions in advance of the hearing. The claimant's representative had indicated that the claimant may wish to take part in the proceedings if he was well enough, but that it may be necessary for him to do so remotely as he now lives in England.

12. Skeleton arguments were exchanged between the parties and provided to the Tribunal. A joint bundle of documents was also provided.

13. The claimant has been represented largely by a firm of solicitors in relation to his claims, having initially been represented by the Ethnic Minority Law Centre, who withdrew from representation when the claimant moved outwith their funded area. However representation has been withdrawn and reinstated during this period. Agents for the claimant advised the Tribunal by email on 10 December 2021 that they had withdrawn from acting on the basis that they had received a medical opinion that the claimant was not capable of giving instructions. That email also stated "We understand his intention will likely be to continue to contest the strike out hearing, but he will need to confirm this and when he will be in a position to do so, and as a result we would suggest the hearing currently set should be postponed to allow for this."

14. The Tribunal responded to the parties later that day indicating "Should the claimant wish to request a postponement of the hearing of 16 December 2021, he should make an application in the normal manner, taking into account that the Tribunal has already received skeleton submissions from both parties in the matter and previous directions that any hearing will only be postponed in exceptional circumstances."

15. The Tribunal received an email from the claimant on 15 December requesting that the hearing on the question of strike out be postponed. That request was refused.

16. The claimant then made a request to take part in the hearing remotely by video. However, the Tribunal was not able to make the necessary arrangements for the hearing to take place in a hybrid format at that late stage. Therefore arrangements were made for the claimant to take part in the hearing by telephone with the Employment Judge and the respondent's representative in the Tribunal room.

Medical reports

17. Numerous medical reports have been provided in relation to the claimant's health and his likely ability to participate in the Tribunal proceedings. The claimant has principally been under the care of a Dr Moosa, consultant psychiatrist, since 2014 in relation to his mental health.

18. In a report dated 16 April 2015, Dr Moosa indicated that the claimant would require a further six to twelve months for his depressive symptoms to improve significantly. (page 260 joint bundle).

19. In a report dated 7 May 2015, Dr Moosa stated 'I would estimate timescale of between three to six months in which there is likely to be a significant improvement in Dr Ebbiary's mental state to a level that he can start to take part in the proceedings.'

20. On 30 July 2015, Dr Moosa indicated that he was still optimistic that Dr Ebbiary would be reasonably likely to have recovered sufficiently by November 2015 to be able to take part in Employment Tribunal proceedings. (p269).

21. On 26 January 2016, Dr Moosa stated that he was optimistic that Dr Ebbiary's mental health would improve over the next six months with the additional treatments recommended and he recommended that Dr Ebbiary be given a period of six weeks to do some preparatory work in advance of an actual tribunal hearing. (p278).

22. On 28 July 2016, Dr Moosa recommended a period of six months before Dr Ebbiary would be able to participate in preparatory work in advance of an actual tribunal hearing. (p284).

23. In a report dated 25 April 2017, Dr Moosa stated that there had been 'minimal change' to Dr Ebbiary's health in the last six months and that in fact he had developed additional physical health problems. (p293). He went on to say 'I anticipate some improvement over the next twelve months. However, I am unable to confidently predict complete recovery to the extent that he would be able to participate in preparatory work in advance of the Tribunal Hearing.'

24. On 3 May 2018, Dr Moosa reported that 'Dr Ebbiary is not currently fit to engage with the Tribunal. However, I anticipate that over the next three months he should be able to have further meetings with his Solicitor and prepare for the Tribunal. I

would anticipate that by six months he should be ready to commence tribunal proceedings.' (page 307)

25. On 30 October 2018 a letter from Dr Moosa stated 'On mental state examination, there were no features of depression or anxiety.'

26. On 28 September 2021, in a letter to support an adjournment application of an appeal against a decision in relation to the outcome of a Fitness to Practice Hearing, Dr Moosa outlined some examples of significant physical health problems being suffered by Dr Ebbiary which required additional investigations. He indicated a period of six months would allow him to recover in full from the moderate to severe depression he was suffering. In response to a question about when Dr Ebbiary might be in a position to instruct a representative, Dr Moosa responded "This is very difficult to predict at this moment in time. Clearly you will need a report from a consultant neurologist in relation to his physical health. Some age-related effect on memory is not unexpected, however, so far, we are not certain about the long-term effects, if any, of Dr Ahmed recent neurological incident on his long-term wellbeing, thus in an ideal world, we should allow him time to recover from the recent acute physical health incidents before we make any further judgement. In fairness, I would suggest allowing him some six months to complete the ongoing assessment and possible treatment before making any further judgment. Depending on the outcome of his further clinical assessment, I advised Dr Ahmed to consider an independent expert neurological advice in due course.' (p425)

27. Dr Moosa then provided a report dated 1 December 2021 which was provided to the Tribunal by Dr Ebbiary. This report outlined Dr Ebbiary's current physical health issues and stated that "It is my opinion that at this moment in time he is not fit to instruct his lawyer and participate in legal proceedings as his concentration is so impaired that he will not be able to do this in a meaningful way. I recommend that he is given six months to allow further investigations in relation to physical health and for his symptoms to be treated accordingly."

Submissions from parties

28. Parties had lodged skeleton submissions which were read by the Tribunal in advance of the hearing. Dr Ebbiary also made oral submissions. While Dr Ebbiary appeared to be upset at times during his submissions, he made cogent

and logical points. He appeared to be following the arguments being discussed and actively taking part. Although he thought he had been sent the submissions which had been lodged on his behalf and those of the respondent, he did not have these to hand. He also thought he had been sent productions, but did not have these to hand either. He made reference to the correspondence which he had sent to the tribunal over the last few days which set out his position. Essentially, Dr Ebbiary's submission was that no decision should be taken on the question of strike out until he was well enough to instruct an agent to act on his behalf. If such a decision was to be taken, Dr Ebbiary should be given a period of time in which to recover to allow him to pursue his claims. He said that the case had affected his life, and that he would not have persevered if he did not think he had a case. He said that while he accepts that memories were fading, most of his evidence was in writing and his memory was clear. He would like to proceed as soon as possible. He said he was shocked at Dr Moosa's most recent report although he did not disagree with it as Dr Moosa has been his psychiatrist for seven or eight years. He said he needed time to recover his physical health and that a period of six months in which to restart proceedings would be reasonable. He is seeing a neurologist, a heart specialist and a spinal surgeon and does not want to go through the proceedings for the rest of his life. He said that he could obtain a report on his physical health if that were required. He couldn't say for sure but thought that his mental health was affecting his physical health. He said that if in six months' time he was not coping he might just let go, part of him was saying as he is aggrieved he should take the case forward but part also saying that he has had enough. He said that he could not mislead any potential legal representative given the content of Dr Moosa's report so would not be able to get a representative in the near future. He said he would instruct an agent as soon as he could and that the claims would be his top priority. At present however, his hands were tied by the terms of Dr Moosa's report.

29. Mr Davies, for the respondents made reference to his written submissions. He highlighted that there was a historical pattern of prognosis by Dr Moosa which was unreliable and the tribunal should not place store on the possibility of recovery of the claimant within six months. Mr Davies made reference to the case of *Peixoto v BT plc UKEAT/0222/07* and *Elliott Joseph Whitworth Centre Ltd*

UKEAT/0030/13. He then took the tribunal through the chronology of medical reports and the prognoses therein.

30. Mr Davies said it was significant the claimant remained on the highest dose of antidepressant medication, which was reported to be supplemented with diazepam. He also highlighted that the most recent report seemed to suggest that the claimant's position should be considered in six months, rather than a prognosis of six months for the claimant's recovery. He said that that the trend of the reports was that Dr Moosa was not able to speculate with any certainty a period of recovery of the claimant and that six months is not a reliable forecast and given the history of prognoses was in fact entirely unreliable.

31. While Mr Davies accepted that there was documentary evidence which would be available to witnesses, they would still be subject to cross examination and likely challenged on any lapse in their memories of events. He said that the issue of documents being available was a red herring. It was fantasy to suggest that witnesses would be able to remember events more than ten years ago.

32. Mr Davies addressed another issue which had been raised in the written submissions of the claimant. He said that it seemed to be suggested that the tribunal should just press on with the case and determine whether the issue of a fair trial was possible at the final hearing itself. He said that he was virulently opposed to such a course of action. Rather, the tribunal should assess the question of fairness before a hearing commenced. He also highlighted that the claims had not yet been adequately specified. While a consolidated claim had been lodged, further particulars were required and the question of the extent of an amendment application was still live. Therefore being realistic, even if the claimant recovered within six months sufficiently to take part in the proceedings, it would be a further six months before the claims could proceed to a final hearing, and therefore the earliest any hearing was likely to take place was in 2023.

33. I then gave the claimant an opportunity to respond to Mr Davies' submissions. The claimant indicated that he had not heard most of what Mr Davies had said, which the tribunal found surprising given that the claimant had sought to interrupt a number of times and also on a number of occasions had asked Mr Davies to speak up, which he did. He had been asked if he could hear on a number of occasions too. It seemed to the tribunal that if the claimant had not been able to

hear parts of the submission, he would have said so, as he did raise this on a number of occasions during the hearing. Moreover, the claimant responded to a number of matters raised by Mr Davies in his submissions, which suggested to the tribunal that he had indeed heard what Mr Davies had said.

34. Dr Ebbiary indicated that it was unfair to him in that he did not have a solicitor who could present his case in the expert manner it had been presented by Mr Davies on behalf of the respondents. He said the theme of the respondent's submission seemed to be that Dr Ebbiary was suffering from a chronic condition and that he would never recover. He disagreed with that characterisation. He highlighted that he had recovered between 2018 and 2019 which was evidenced by the psychiatrist to whom he was referred by the GMC. He said that reports say that he is improving and getting better so the position was not as grim as painted by Mr Davies. He said that he cannot present his case at this stage but in around two to three months he should be able to instruct an agent on his behalf. He highlighted that there was a difference between his ability to instruct an agent and his ability to take part in a tribunal hearing. He said he is coping with his mental health issues but that it is his physical issues which are particularly challenging just now. He said he will see Dr Moosa again in two to three months and then he would be able to say whether he was in good shape to instruct someone. He had been trying to get an appointment with another psychiatrist but they are all booked up for months.

35. Finally he said that he appreciated that he needed time to recover his physical health which might be up to six months and then he would be in a better position to know what to do next.

Discussion and decision

36. Rule 37(1) provides that:

> 'At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all of part of a claim or response on any of the following grounds -
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

Rule 37(2) provides that a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

37. In *Peixoto v BT plc* UKEAT 222/07, in dismissing an appeal against an order of a Tribunal to strike out the claimant's claim in terms of Rule 37 (1) (e), His Honour Judge McMullen stated at paragraph 54 "In our judgment the principal finding by the Tribunal is firmly rooted in Article 6. This Tribunal held that it could not find any point in the foreseeable or even the distant future, when a trial might be likely. The requirement of Article 6 is that a trial must take place within a reasonable time. On that basis the Tribunal was correct. If it could not in 2007 see any time in the future when this case arising in 2003 could be tried, then it was correct to form the view that a fair trial was not possible and to strike it out."

38. In *Abegaze v. Shrewsbury College of Arts and Technology* [2010] IRLR 238, the Court of Appeal found that a Tribunal had erred in striking out a claim on this basis. In that case, the claim was struck out after the hearing on the merits but before a remedies hearing took place. The claimant in that case argued that the Employment Judge had taken into account improper considerations when striking out his claim. Those improper considerations included, amongst others, the Employment Judge's concerns about the causation issues, and in particular the relevance of evidence of a specific witness who was said to be a reluctant witness, who was to give evidence on the question of the claimant's injury to feelings.

39. At paragraph 45 of that judgment, Lord Justice Elias stated: "In the circumstances I agree that this would not be a justification for striking out these aspects of the claim. In any event, so far as injury to feelings is concerned, whilst it is correct to say that there must be evidence of injury to feelings (see *Chief Constable of West Yorkshire Police v Vento (No.2)* [2003] IRLR 102), a tribunal could readily conclude that there had been some injury necessarily flowing from an unlawful discriminatory act, even if they rejected the claimant's apparently somewhat exaggerated claim. At the very least it might reasonably be anticipated that the claimant would recover a sum at the lower end of the *Vento* scale."

40. In *Riley v Crown Prosecution Service [2013] IRLR 966, CA*, the Court of Appeal dismissed an appeal against a Tribunal's order striking out claims of discrimination and whistleblowing brought by a claimant suffering from depression on the basis that a fair hearing was no longer possible. The employment judge had reached this conclusion having taken account of (i) the fact that there was no prognosis of when, if ever, the claimant would be well enough to take part in the proceedings, and (ii) the balance of prejudice in respect of each party. In that case at paragraph Lord Justice Longmore stated at paragraph 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."

41. In *Elliott v Joseph Whitworth Centre Ltd* EAT 30/13 Judge McMullen QC dismissed an appeal against an order striking out the claimant's claim and stated at paragraph 16 that "The Judge also considered that the step she was taking was draconian. She also considered the relevant balance of prejudice. I reflected with the advocates this morning on what this means and in my judgment it is axiomatic in the exercise of discretion on a strike out that there will be an equal and opposite balance of prejudice as a matter of routine in such a case. The Claimant, who let us say, has a strong case which is struck out, is prejudiced at that loss, and the Respondent receives a windfall because it can escape justice. On the other hand, if the strike out application is refused and a weak case, let us say, goes on, the Respondent is put to task of preparing and defending a case at length. So that kind of prejudice occurs in every exercise such as this. What the court is looking for is something more to do with the case itself, such as memories fading, documents and witnesses going missing, the business going insolvent, a change of representation and that cost."

42. In determining the question before me, I took into account these authorities, the other cases referred to by parties and the written and oral submissions which had been made by the parties.

43. It is an exercise of the discretion of an Employment Tribunal considering all the material before it to make a determination as to whether or not there can be a fair hearing.

44. The Tribunal should take into account all relevant factors and not take into account any impermissible factors.

45. The Tribunal should have at the forefront of its mind that striking out of a claim is a draconian step which should only be taken in very limited circumstances.

46. In determining whether a fair hearing can take place the Tribunal should consider the relevant balance of prejudice of the parties.

47. The Tribunal should consider whether it is realistic that a hearing on the merits could take place within a reasonable period.

48. The Tribunal should consider whether strike out is proportionate or whether there is a less draconian measure available to it.

49. In applying these principles I took into account the following factors.

50. In the first instance it is important to note that there is no question as to the genuineness of the claimant's illness which has been the cause of the delay in these proceedings. It is clear that the claimant has suffered very poor mental health for many years now and that is now being exacerbated or indeed the cause of additional significant physical health issues.

51. Further, while the respondent makes some criticism of the accuracy of Dr Moosa's predictions as to when the claimant would have been able to take part in proceedings, there is no suggestion that the prognoses given at every stage were given in good faith. It is clear to the Tribunal that medical experts have a difficult task in seeking to predict how a person will react to treatment and that this must be particularly difficult in cases such as this involving the claimant's mental health.

52. The claims relate to the claimant's employment with the respondent which was between September 2011 and April 2012.

53. The claims themselves include allegations of direct discrimination, victimisation and harassment on grounds of the claimant's race. The nature of such claims is that a Tribunal may draw adverse inferences from a witness' inability to remember events or conflicts between the evidence of witnesses.

54. The claims have not yet been properly specified. Although a consolidated claim was lodged in recent months, this did not comply with the orders which had previously been made and despite running to fifty two pages, did not specify the exact claims being made or against which respondent these were being made.

55. The respondent has already sought to argue that some of the claimant's claim is out of time.

56. There is no certainty as to which witnesses might be called to a final hearing. The claimant had previously indicated he wished to call expert witnesses and was ordered to give details of the identity of any such witnesses and why they would be required. He failed to comply with this order.

57. The claimant has not complied with an order to set out his losses.

58. The claimant has not specified the documents he wishes to be disclosed to him by the respondent.

59. The medical prognoses which have been provided have been inaccurate. Periods of three to six or twelve months have been provided since April 2015.

60. The most recent medical report indicates that the claimant is unlikely to be fit to instruct agents for six months.

61. There is force in the respondent's submission that at best a final hearing might be possible at the beginning of 2023. I cannot accept the claimant's position that as much of his case was based on documentary evidence, the ability to remember events was not crucial. In the first instance, it is not clear that is an accurate position, given that he says he wishes to recover documents from the respondent which have not yet been requested and there is no draft inventory of documents for use at the final hearing. It seems to me that this is speculation on the part of the claimant. Further, even if that were an accurate position, it is not the whole picture, particularly in a claim which involves allegations of discrimination, harassment and victimisation. It is, in my view, self-evident that witness evidence will be required whether to speak to the circumstances surrounding the creation of documents, or why they were created. The very significant delay between these events and the giving of evidence is potential prejudicial to the respondents.

62. Moreover, it is in my view self-evident that all but those with the very best memories might have difficulty in remembering events which occurred eleven or

twelve years ago. Adverse inferences can be drawn from such matters in a discrimination claim and this may result in particular prejudice to the respondents.

63. A striking feature of the claimant's claims is that at least part of them are against an individual as well as an organisation. For such allegations to be hanging over an individual over such a long period where there is no clarity as to what aspects of the claimant's claims he may be required to answer is a relevant factor to take into account when considering the balance of prejudice.

64. There is no reasonable indication as when a final hearing might take place. It seems to me that the medical position is that the claimant's physical health requires further investigation, before addressing issues of his mental health and the extent to which that might prevent him taking part in the proceedings. Therefore 2023 is a very optimistic timescale for a final hearing.

65. I have considered whether there is force in the claimant's suggestion that no consideration should be given to whether or not a fair hearing is possible until he is able to instruct agents. I have considered whether this would be a less draconian step to take but I cannot accept that submission for the reasons set out above. I also do not accept the claimant's agent's submission that the question of whether a fair hearing can take place should be delay until the final hearing itself. The decision as to whether a fair hearing can take place should take place in advance of that hearing.

66. I have also given consideration to whether the requirements of Rule 37(2) have been met in relation to my consideration of this question. While I acknowledge that the circumstances of the hearing of 16 December 2021 which took place were not ideal, I am nonetheless satisfied that the claimant has had a reasonable opportunity to make representations. Written submissions were provided on his behalf by his agent prior to his withdrawal from acting and the claimant was given an opportunity to make additional submissions and respond to the respondent's submissions. There was a joint inventory extending to 436 pages.

67. I did not accept as credible for the reasons set out above that the claimant had not heard much of the respondent's submissions. I was also mindful that the claimant had been advised on 10 December that if he wished to make an application for postponement of the hearing, he would be required to set that out

and address various matters in so doing. It is clear from the report of Dr Moussa that had this hearing been adjourned, the claimant would have been unable to arrange for further representation for some time. There would therefore have been further significant delay to the question of whether a fair hearing was possible.

68. In all of these circumstances I am satisfied that this is one of those extreme set of circumstances where it is no longer possible to have a fair hearing of the claimant's claims and it is therefore proportionate to strike out the claimant's claims in their entirety.

Employment Judge: Amanda Jones
Date of Judgment: 22 December 2021
Entered in register: 23 December 2021
and copied to parties