EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr N Shipley	DL Insurance Services Ltd

Heard at: **CVP** **On: 20 January 2022**

Before: **Employment Judge Davies**

Appearances
For the Claimant: **Mr P Cruickshank (counsel)**
For the Respondent: **Mr J Cook (counsel)**

JUDGMENT having been sent to the parties on 21 January 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was an application to strike out these claims brought by Mr N Shipley against his employer DL Insurance Services Ltd. The Claimant was represented by Mr P Cruickshank, counsel, and the Respondent was represented by Mr J Cook, counsel. Both counsel had provided detailed skeleton arguments. I was greatly assisted by both counsel's clear written and oral submissions, but I express my particular thanks to Mr Cruickshank, who was acting pro bono for the Claimant.

2. The Respondent had produced a file of documents and everybody had a copy. I also had before me medical evidence provided on the Claimant's behalf on 17 January 2022.

Facts

3. On the basis of those materials, the factual position is as follows.

4. The Claimant developed a lung condition in 2013/2014. He had an operation, but that left him with permanent, significant health issues. He says that those have caused him problems at work ever since. His father and son also had serious health issues and the Claimant had problems with his mental health too. One of the Claimant's lasting conditions is pain, for which he is treated at the pain management clinic. For 12-18 months before he presented his Tribunal claim he

had been having nerve blocking injections. He would be absent from work for 4-5 days after each injection, but they did improve his quality of life greatly.

5. On 11 August 2019 the Claimant presented this claim. He attached a long narrative of events, including setting out his grievance and grievance appeal. On 10 September 2019 the Respondent filed a response. A preliminary hearing for case management was listed for 22 November 2019, but was postponed in response to an application by the Claimant when his father passed away on 14 November 2019. It was re-listed for 24 January 2020.

6. At the preliminary hearing, EJ Rostant partially clarified the Claimant's claims with him. He produced an annex setting out the claims as discussed and gave the Claimant the chance to add anything in writing, which he did. That led EJ Rostant to issue a further annex on 10 March 2020. It noted that the claim included a narrative of events stretching back over 4 ½ years. EJ Rostant had been able to identify complaints of unfavourable treatment under s 15 Equality Act and failure to make reasonable adjustments for disability. They included complaints about failure to make reasonable adjustments in respect of the application of the absence management procedure, the process for purchasing extra holiday, the holiday booking procedure, the treatment of the Claimant's absences after his injections as sick absence, the operation of the performance bonus policy, the assessment of the Claimant's compliance with the "assurance" aspect of his role, the provision of parking spaces and other equipment, and the requirement for the Claimant to attend work at the office. They also included complaints of victimisation following the bringing or intimation of these proceedings and a complaint of unfavourable treatment (failing to achieve pay progression) because of absence caused by disability. EJ Rostant noted that the Claimant identified numerous complaints of harassment in his additional written document. Some of them were in vague terms. There was a difficult to understand complaint about a disciplinary process in 2016.

7. A number of the complaints clearly dated back over a long, but indeterminate period. Although EJ Rostant was not in a position to identify the issues the Tribunal would have to decide to determine the complaints, it appears that they will include the question whether there was conduct over a period and, if not, whether it is just and equitable to extend time for bringing some of the complaints.

8. I note that the first lockdown was introduced in March 2020. The Claimant stayed at home shielding after that and did not attend work.

9. On 26 March 2020 EJ Rostant made case management orders to prepare the claims for a six day hearing, which was listed for August 2020.

10. On 28 May 2020 the Claimant emailed the Tribunal to say that he was struggling to meet the deadlines. He was unable to get his nerve block injection, because the pain management clinic was closed as a result of the COVID pandemic. He was taking medication instead, but that was making him tired and affecting his ability to focus. Also, he did not have a printer and could not get to the library. EJ Wade postponed the hearing that was listed in August, because of the

pandemic, and listed a telephone hearing instead. EJ Rostant stayed the case management orders in the meantime.

11. At the telephone hearing on 24 July 2020 EJ Little noted that the parties had exchanged lists of documents, but nothing more. The Claimant told EJ Little that he was unwell and shielding. He had been unable to have his injections because the pain management clinic was closed. He did not have a computer or tablet and could not go to the library. It was agreed that it was not appropriate to set a new timetable in the circumstances.

12. Another telephone hearing was listed for 9 October 2020. At that stage EJ Smith noted that the Claimant was due to have an injection on 29 October 2020. It was agreed that he would be able to participate in timetabling after his injection. EJ Smith made case management orders, but ordered that there should be another telephone hearing on 15 February 2021, to fix the final hearing. EJ Smith emphasised that the delay was not the Claimant's fault. The Respondent did not take issue with any of the delay.

13. Unfortunately, the pain management clinic was again closed and the Claimant did not get his injection. He emailed to say that he could not comply with the orders without the injection, and that his mental health was worse too. The Respondent indicated that some progress had been made with disclosure and suggested liaising with the Claimant in early January 2021, to see whether the Claimant would be able to prepare his statements.

14. The telephone hearing went ahead on 10 February 2021. EJ Parkin noted that the Claimant's injection had not gone ahead and he was once again shielding, in the third lockdown. The Claimant had not been able to study the Respondent's documents. No further orders were made, and another telephone hearing was listed for June 2021.

15. The Claimant presented another claim, with the assistance of solicitors, on 11 May 2021. That claim has not been struck out. The solicitors were only instructed to deal with that claim. That claim indicated that the Claimant had been off work since the first lockdown. His claim for permanent health insurance had been accepted in January 2021, backdated to October 2020.

16. The preliminary hearing appears to have been moved because of the new claim. It was listed for 16 July 2021. In an email the day before, the Claimant's solicitors said hat he remained extremely unwell. His mental health was worse. They said that the proceedings should be stayed until the Claimant was well enough to deal with them. They did not know when that would be.

17. The medical evidence provided on 17 January 2022 indicates that the Claimant had in fact received a nerve blocking injection on 17 June 2021.

18. The hearing was postponed on 16 July 2021 because of a lack of judicial resource. It was re-listed for 20 September 2021.

19. On 13 September 2021 Mr Weldrick from Leeds Free Legal Representation Unit made an application to postpone the hearing on the Claimant's behalf. LFLR

formally came on the record a few days later. The postponement application said that the Claimant was unable to attend because of his ill-health. It referred to COPD, emphysema, depression and anxiety. The depression and anxiety were partly caused by the issues to be addressed in the Tribunal. Medical evidence was not provided. The Respondent objected to this application and raised concerns about the impact of the significant delay on the cogency of the evidence and the Respondent's ability to defend the claims. Mr Weldrick sent a further email saying that the Claimant had "recently" restarted his injections, which would soon begin taking effect.

20. On 17 September 2021 EJ Jones ordered that the hearing should be postponed. He noted that the first claim had been presented more than 2 years ago and that it was imperative that progress was made before such time that a fair hearing was no longer possible. He ordered the Claimant to provide medical evidence by 6 October 2021 about his current state of health and prognosis, and a medical opinion about his ability to participate in a hearing, with a timescale and any adjustments the medical expert thought might assist. That order was plainly about the whole Tribunal process and final hearing, not the Claimant's ability to participate in a preliminary hearing.

21. On 11 October 2021 LFLR informed the Tribunal that the Claimant had been unable to obtain medical evidence because he had been required to self-isolate when a family member tested positive. No explanation was given for why that prevented him from seeking the medical evidence. LFLR told the Tribunal that the Claimant was to have another injection on 18 October 2021 and would be able to participate no more than two days later. He asked for the hearing to take place in the afternoon because of his medication. Mr Cruickshank's instructions at the hearing this morning were that the Claimant had told LFLR that he had asked his doctor for the required information on about 11 October 2021, after being reminded. The Tribunal did not see any request made by the Claimant on or about 11 October 2021. What the Tribunal did see was a handwritten note made at the surgery. The Claimant had requested information, and the surgery called him back to ask what he needed. He told them. The handwritten note was dated 25 November 2021. I accept that the Claimant had made his request at an earlier date and that this note was made when he was called back. He did not ask the doctor to provide the information EJ Jones had ordered. He asked for confirmation of his conditions and that he was anxious at the thought of attending the Tribunal; a request for breaks; ideally a video call from home would be more advantageous; and a note that he struggles on focussing for more than 10 minutes per day. A letter in essentially those terms was written by the Claimant's doctor on 23 December 2021. That letter was not sent to the Tribunal at that stage.

22. Meanwhile, the telephone hearing on 20 September 2021 was re-listed for 3 December 2021. It appears that the notice of hearing was emailed to LFLR but was missed when there was a change of caseworker and email address. The Claimant did not attend the hearing on 3 December 2021. EJ Lancaster therefore ordered today's hearing, to decide whether the claims should be struck out because it was no longer possible to have a fair hearing. He ordered the Claimant to explain by 13 December 2021 why he had not attended the hearing.

23. The Respondent provided its detailed strike-out application on 15 December 2021. It was made on the basis that the Claimant had failed to comply with EJ Jones's order and the order requiring him to explain why did not attend the preliminary hearing, had failed actively to pursue his claim and that a fair hearing was no longer possible.

24. LFLR emailed the Tribunal on 30 December 2021 to provide the doctor's letter referred to above, together with confirmation dated 10 December 2021 that there was a 6-8 week waiting period for medical evidence. LFLR said that the Claimant had been in poor health over Christmas, and had been in and out of hospital with cellulitis and that his health would prevent him from participating in a preliminary hearing in the near future. Tribunal Legal Officer Rose informed LFLR that a preliminary hearing was listed today and that the Claimant's representatives were expected to deal with the matters in his absence.

25. As I understand it, the Tribunal's emails to LFLR from 3 December 2021 onwards were not forwarded to the correct case worker until about 13 January 2022. The delays that caused do not materially affect the issues I have to decide today. On 17 January 2022 some further medical evidence was provided, namely: the 23 December 2021 letter; the note made of the callback on 25 November 2021, a letter confirming the Claimant had a nerve block injection on 17 June 2021 and would have another in around 4 months; an undated, handwritten letter with no letterhead, apparently from a doctor, requesting a video hearing; and confirmation of a chest radiology report from March 2020.

26. None of that material answered the questions posed by EJ Jones, and his order was not complied with. There simply is no proper medical evidence explaining what the Claimant's state of health and prognosis is, nor when he might be fit to participate in a hearing and with what adjustments. As of 30 December 2021, the Tribunal was told that he would not be fit to participate in a preliminary hearing in the near future. The evidence before me suggests that the nerve blocking injections have not had the hoped-for effect. Although he has now had two nerve blocking injections, the Claimant remains unfit to participate in a Tribunal. He told me through Mr Cruickshank this morning that he would need "a few" injections or "several rounds" before they had the desired effect. That is obviously different from previous suggestions that he would be fit a few days after an injection. Given that they take place at four-month intervals, "a few" or "several" injections will give rise to substantial, further delay. The medical evidence says that the Claimant cannot concentrate for more than ten minutes per day. The Claimant told me through Mr Cruickshank that that is incorrect. He says he cannot concentrate for more than 10 minutes without a break, and that this is particularly so when he has to talk. I note that he was able to provide instructions to Mr Cruickshank and answer questions during this morning's hearing. Nonetheless, it would not be practicable to have a hearing with breaks every ten minutes, even just for the Claimant's cross-examination. Under normal circumstances, his cross-examination would be expected to last one to two days. Taking a break every ten minutes is not workable.

27. The position before me is that the Claimant has not been fit to participate to any significant extent in these proceedings since May 2020. He has not provided medical evidence of when he is likely to be fit to do so. The history of these

proceedings; the lack of improvement following two nerve block injections and the suggestion that he will in fact need several to see the desired effect; the suggestion that, in some circumstances, including when being cross-examined, he cannot concentrate for more than 10 minutes without a break; his depression and anxiety, which are partly linked to the unresolved proceedings; the lack of any substantive progress during the four months he has been represented by LFLR; and his evident, ongoing difficulties (e.g. two weeks in hospital in December 2021 and an indication that he would not be fit in the near future at that stage) all lead me to conclude that he will not be fit to participate in these proceedings for the foreseeable future.

Legal principles

28. The Tribunal's power to strike out a claim is contained in rule 37 of the Employment Tribunal Rules of Procedure 2013. A claim can be struck out if it has not been actively pursued or there has been non-compliance with Tribunal orders (rule 37(1)(c) and (d)). In those cases, case law establishes that the Tribunal must in almost all cases also be satisfied that a fair hearing is no longer possible: see *Bolch v Chipman* [2004] IRLR 140. Under rule 37(1)(e), a claim can be struck out on that basis alone, i.e. that the Tribunal considers it is no longer possible to have a fair hearing. The Tribunal must be satisfied that a fair hearing is no longer possible and that striking the claim out is proportionate: see *Blockbuster Entertainment Ltd v James* [2006] IRLR 630. The Tribunal must have regard to the overriding objective. That includes having regard to the impact on the Tribunal's resources and its need to share those resources between all the claims before it: see *Harris v Academies Enterprise Trust* [2015] ICR 617.

29. The Tribunal must have some proper basis for concluding that a fair hearing is no longer possible. A party's inability to pursue their case because of long-standing ill health may amount to such a reason. The Tribunal should remember that the Article 6 right of both parties to a fair trial within a reasonable time will be engaged. The Tribunal must balance a number of factors, including fairness to *both* sides; the importance of determining serious complaints such as this promptly, as illustrated by the short limitation period; the date on which the matters complained of took place; and the fact that other litigants are waiting to have their cases heard. Tribunals should not adjourn heavy cases, fixed for a substantial amount of time many months ahead merely in the hope that a Claimant's medical position will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable timeframe and the case itself deals with matters that are already in the distant past, striking out must be an option: see *Riley v Crown Prosecution Service* [2013] IRLR 966.

Application of legal principles

30. I am satisfied that a fair hearing of the Claimant's first claim is no longer possible and that striking it out is proportionate.
31. For the reasons I have explained, I have concluded that the Claimant will not be fit to participate in these proceedings for the foreseeable future. The position really is that he hopes he will improve, but the history of his ill health and these

proceedings, together with the medical evidence, indicate that this is no more than a hope. Given that his anxiety is partly caused by these proceedings, there is the further difficulty in that respect that it is unlikely to resolve until the proceedings are over. The Claimant has not been able to provide any medical evidence showing that there is a realistic prognosis of sufficient improvement within a reasonable timeframe.

32. This case deals with matters that are already in the distant past. The matters referred to in the claim form date back to at least 2016. Some complaints, most notably the reasonable adjustments complaints, have been fairly clearly articulated by EJ Rostant and there may be relevant documentary evidence. However, the timescales relevant to those complaints are not identified. The Tribunal may have to decide whether there was conduct over a period and whether they were brought in time. This would include consideration of when the Respondent would have taken relevant steps, if acting reasonably. Questions such as those will depend on the evidence of the people involved at the time, and not just on the documents. So too will the question of whether taking a particular step was reasonable at the time. Other complaints have not been clarified at all, most notably the harassment complaints. Witnesses would now be asked to recollect events at least three and in some cases six or more years ago. That is against the primary limitation period of three months. I therefore consider that there would be significant prejudice to the Respondent in having to defend these already stale claims at some, indeterminate future date a year or more from now. That would be unfair and inconsistent with its Article 6 rights.

33. Of course, I must weigh against that, the prejudice to the Claimant and the impact on his Article 6 rights. In doing so, I have given particular weight to the fact that delays during the pandemic were outside his control. However, the Tribunal's concern is not about apportioning blame or criticism for delay, it is to look at the medical position and decide whether the claim can be concluded within a reasonable timeframe. I am satisfied that it cannot, and that it is now no longer possible to have a hearing that is fair to the Respondent.

34. I also weigh in the balance the impact on other cases. There have already been seven preliminary hearings in this case, and there is undoubtedly an impact on the Tribunal's ability to deal with other cases. That is a modest, but relevant matter.

35. I do not consider that there is some lesser step, short of dismissal, that could be taken instead. No step will overcome the Claimant's inability to participate effectively in preparing for and attending a final hearing. He remains unable to attend to the Respondent's documents. There are claims that still need properly clarifying. It is not realistic to suppose that he will be fit enough to provide detailed instructions so as to draft a witness statement. There is no purpose in making an unless order in those circumstances. And none of those matters overcomes the hurdle of having to attend a lengthy Tribunal hearing and be cross-examined, in circumstances where he cannot do so for more than 10 minutes at a time.

36. For all these reasons, the first claim should be struck out.

37. I reached a different decision in respect of the second claim, because the matters complained of are much more recent. They date from October 2020 to January 2021. Furthermore, the claims are concise and clear and not in need of further clarification. Those factors shift the balance in favour of delaying for a further period, to see whether the Claimant's health recovers.

Employment Judge Davies
26 January 2022