



EMPLOYMENT TRIBUNALS

Claimants

Respondent

Mr Babatunde Abayomi

∨ East London NHS Foundation Trust

PRELIMINARY HEARING BY TELEPHONE

Heard at: Watford (Hybrid hearing) On: 17 December 2021

Before: Employment Judge Bedeau

Appearances:

For the Claimant: In Person (by Cloud Video Platform)

For the Respondent: Mr H Sheehan, Counsel

STRIKE OUT JUDGMENT

Upon application by the respondent the claimant's claims are struck out under rule 37(1)(e) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as a fair trial is no longer possible.

REASONS

1. By the claim form presented to the tribunal on 16 October 2018, the claimant made claims of unfair dismissal; direct disability discrimination; discrimination arising in consequence of disability; indirect disability discrimination; failure to make reasonable adjustments; and harassment related to disability. He worked for the respondent from 1 April 2005 to his summary dismissal for gross misconduct on 27 July 2018. At all material times he worked as a Band 3 Social Therapist, at the respondent's Hoxton Ward, Wolfson House. Green Lanes, north London.

2. In the response presented to the tribunal on 29 November 2018, all claims are denied. The respondent avers that the claimant was summarily dismissed for gross misconduct, in that, he was involved in a physical altercation with a service user and did not comply with its policy on how to deal with the de-escalating a potentially violent situation. The evidence obtained following an investigation, suggested that the claimant might have been the aggressor. A fair procedure had been followed and dismissal fell within the range of reasonable responses.
3. At a preliminary hearing held on 5 April 2019, before Employment Judge Foxwell, as he then was, the claims and issues were identified. The Employment Judge listed the case for a final hearing, over six days, from 30th March to 6 April 2020. In addition, case management orders were issued, such as, the claimant to clarify in writing what was the something arising in consequence of disability in respect of his section 15 Equality Act 2010 claim, by not later than 12 April 2019. In addition, he was to provide further information on the date when he was first diagnosed with sleep apnoea, by 26 April 2019. By the same date he had to serve a schedule of loss.
4. I was told by the respondent that it had only received the claimant's schedule of loss.
5. The claimant, initially through his solicitors, and latterly himself, requested that the final hearing be vacated, and all case management orders be stayed as he was unfit to participate in these proceedings.
6. On 10 July 2020, the respondent's representatives applied to the tribunal for the claims to be struck out as the claimant was unable to actively pursue his claims because of illness. A further application was made on 29th of March 2021 adding that a fair hearing was no longer possible. The application was repeated on 16 December 2021.

The issues

7. The issues for me to hear and determine were as follows:

7.1 to consider the respondent's strike out application, and

7.2 whether a deposit order should be made?

The evidence

8. I heard evidence from the claimant. A witness statement was submitted by the respondent from Mr Anthony Eversley Ward, Agenda for Change, Band 8a. In addition, the respondent prepared a bundle of documents comprising of 126 pages. The claimant submitted a letter from his doctor dated 15 December 2021.

Findings of fact

9. What I have found are not in contention. The respondent is an NHS Foundation Trust providing mental health and community healthcare services to people living in the City of London, the London boroughs of Hackney, Tower Hamlets, Newham, and in Luton and Bedfordshire. It provides specialist services including psychological therapy services to a wider population.
10. Hoxton Ward is a 17 bed, male only Ward, within Wolfson House which is a Low Security Service. The Low Security Service provides care for patients who pose a significant risk to others and require physical security preventing them from leaving the hospital. All patients on the ward have been sectioned under the Mental Health legislation and require various levels of supportive observation and intervention. The ward provides rehabilitation and recovery services for patients.
11. The claimant commenced employment with the respondent on 5 April 2005. At all material times he worked as a Band 3, Social Therapist. His main duties included undertaking direct or indirect nursing care of a patient or group of patients and working as part of the nursing team under the supervision of registered mental health nurses.
12. An incident occurred on 25 November 2017 involving a patient and the claimant during which they appeared to be physical violence with both the patient and the claimant sustaining minor injuries. The matter was recorded and reported, and an investigation ensued, the outcome of which was that the claimant should be the subject of disciplinary proceedings. The allegations he faced involved: refusing to give the patient milk; requiring the patient to say please when he asked a nurse for milk; grabbing the patient's risks and pushing him into the corridor and onto the floor, and then holding the patient's hands while on the floor; and having regard to the allegations, failed to follow the respondent's guidelines on managing violence, de-escalation, or breakaway techniques.
13. Following a disciplinary hearing held on 20 July 2018, at which the claimant attended and was represented, he was informed, in writing, by letter dated 27 July 2018, that the allegations had been proved and that he would be summarily dismissed by reason of gross misconduct. He was informed of his right to appeal which he exercised through his legal

representatives, on 14 August 2018. I am told that the outcome was that his appeal was dismissed.

14. His legal representatives presented the claim form on 16 October 2018 referring to the claims above. It states that, at all material times, he was suffering from high blood pressure, the diagnosis being malignant hypertension and sleep apnoea. He then gave a list of his symptoms to the respondent's representatives on 29 November 2018, which included fatigue and confusion as well as lapse of concentration. (pages 2 – 39, 40 - 63 of the bundle)
15. As stated earlier, the preliminary hearing was held on 5 April 2019 when the judge issued case management orders. However, by 9 October 2019, there had been partial compliance by the claimant. He told me that during that time he was suffering, medically, from malignant hypertension and sleep apnoea, making him tired and lacking in concentration.
16. In a letter dated 23 October 2019, sent by his legal representatives, they applied for the hearing and case management orders to be vacated because he was feeling "low and depressed" and that they found it difficult getting information from him concerning his case. He was not able to prepare and serve his witness statement by 27 January 2020, as ordered by EJ Foxwell on 5 April 2019. They attached a copy of a letter from his general practitioner Dr N Hadid, Rosewood Practice, Stoke Newington, north London, which was sent to his legal representatives, dated 9 October 2019.
17. In the letter, Dr Hadid wrote the following:

"Medical Problem

1. Malignant hypertension, very high blood pressure not responding to multiple medications. He is under close regular review by the hospital endocrinologist. The blood pressure is volatile and triggers further with stress, anxiety and unexpected events. This sudden rise in the blood pressure can lead to serious health sequelae in the form of sudden death, heart attack and stroke.
2. Ongoing investigations to exclude serious neurological problem. Mr Abayomi is already stressed with frequent hospital appointment to rule out serious diagnosis.
3. Chronic backache: ongoing recurrent backache with frequent flares up that limits his mobility and interferes with his sleep.
4. Anxiety with depression, feeling low with poor ability to focus, disturbed sleeps which affect his day-to-day function.

In my opinion, Mr Abayomi is unfit to attend the hearing, based purely on the above medical reason. Any added stress and anxiety might trigger serious health sequelae."
(76 – 78)

18. The respondent's legal representatives did not object to the claimant's application but noted in their email dated 24 October 2019, to the tribunal

and to the claimant's legal representatives, that the medical evidence did not provide a future prognosis or an estimate of when the claimant may be able to partake in the tribunal process. They noted that any significant postponement would inevitably prejudice the respondent as the cogency of the evidence and availability of witnesses, diminishes over time. (79)

19. Dr Hadid sent an amended letter dated 2 December 2019, which did not give a prognosis, namely the likely duration of the claimant's illness. The doctor added at the end of the 4th paragraph, after copying the content of the letter of 9 October 2019, the following:

"All the above problems are ongoing and chronic; which will not resolved soon.

In my opinion, Mr Abayomi is unfit to attend the hearing on the allocated date and also will not be able to cope and participate with the lengthy tribunal case, based purely on the above medical reasons. Any added stress and anxiety might trigger serious health sequelae" (81 - 82)

20. On 5 January 2020, Employment Judge Manley, vacated the hearing listed on 30 March to 6 April 2020. (83)

21. On 8 July 2020, the respondent's representatives wrote to the claimant's representatives asking whether the claimant "wishes to proceed with his claim and if so when he is likely to be in a position to do so." This was responded to on the same day by his legal representatives confirming that after taking instructions from him, he was willing to pursue his claims, but they were unable to provide a date when it was likely that he would be in a position to proceed due to his medical conditions. (84)

22. On 7 July 2020, the claimant's representatives forwarded another letter from Dr Hadid dated 3 July 2020. In it she added a 5th paragraph,

"Chronic kidney disease"

23. She also wrote that all the claimant's problems were ongoing and chronic which would "not resolve soon". (86)

24. At this point the respondent's representatives became concerned about their case in light of the delay in not having a final hearing date. They applied to the tribunal on 10 July 2022, for the claims to be struck out. They wrote:

"... The above claim was stayed and the case management orders vacated following an application by the claimant's representative and on the basis of the claimant's ill health. The Postponement Order issued by EJ Manley dated 5 January 2020 (attached) directed the claimant's representative to inform the ET of the claimant's ability to take part in proceedings by 6 April 2020

We have not had received an update on the claimant's health or ability to take part in ET proceedings nor had we been copied to any correspondence from the claimant's

representative to the ET since the date of the Postponement Order. We therefore wrote to the claimant's representative to seek an update.

The claimant's representative has confirmed that the claimant is still too unwell to partake in ET proceedings but that he nevertheless wishes to proceed with his claim (attached). As far as we are aware, the claimant's representative has not updated the ET on this position.

Further the medical evidence produced on behalf of the claimant (attached) is vague and does not give any indication as to the extent to which the claimant's conditions prevent him from partaking in the proceedings nor does it provide any future prognosis/estimate of when the claimant may be able to partake in the proceedings. It therefore appears that the claimant is seeking an indefinite stay of proceedings until some unknown future date when he may well be enough to proceed, if ever.

It is clearly unsatisfactory that the claim be stayed indefinitely and this demonstrably prejudices the respondent as the cogency of the evidence and the availability of witnesses (who may leave an organisation) diminishes over time. The matters complained of in this claim relate to the claimant's dismissal in July 2017 and the circumstances surrounding his dismissal. These matters are already two and a half years old.

The respondent therefore makes an application, in accordance with rule 37 of the ET Rules, that the Tribunal strike out the claimant's claim on the basis that the claimant is unable to actively pursue his claim. The respondent considers this to be in the interests of justice and in line with the overriding objective given the prejudice caused to the respondent and its ability to defend this claim in the circumstances where there has already been a significant stay of seven months and where the claimant appears to be asking for further indefinite stay of proceedings." (87)

25. The application was opposed by the claimant's representatives on the same day. They stated that his health had not improved, which was something out of his control, and that he was shielding during the lockdown following the Government's advice. They also referred to an earlier report by Dr Hadid, dated 21 April 2020, not disclosed at the time to the respondent's representatives and to the Tribunal because of an oversight. The content is similarly worded as in her 3 July 2020 letter with the final paragraph stating that the claimant was unfit to attend the hearing and any added stress may trigger serious health conditions. (89 – 93)
26. On 21 August 2020, the claimant's representatives came off the record and asked the respondent representatives and the Tribunal to communicate directly with the claimant. (94)
27. On 3 October 2020, EJ Lewis instructed that the parties be written to as he was proposing to stay proceedings until 31 January 2021 considering the medical evidence submitted on behalf of the claimant. He asked for their comments by 19 October 2020. (96)
28. EJ Manley on 24 November 2020, directed that the case be stayed to 31 January 2021 and requested an update from the parties. (97)

29. The claimant responded on 30 January 2021 requesting a postponement of the hearing as he was “experiencing extreme difficulties finding a new representative” and on medical grounds. He attached a letter from Dr Hadid dated 29 January 2021, repeating what she had said in her earlier letters, in particular, that the claimant’s problems were ongoing and chronic, and would not be resolved soon. (100 -101)
30. The response from the respondent’s representative on 1 February 2021, was to repeat its application for a strike out as proceedings had been stayed, by then, for over a year and it was unsatisfactory for the matter to be stayed indefinitely as it was prejudicing the cogency of the respondent’s evidence, the availability of witnesses and that memories diminishes over time. (98)
31. On 29 March 2021, the respondent’s representatives again repeated its application for a strike out for the reasons given in earlier correspondence. This application was on the basis that it was no longer possible to have a fair hearing. (102 – 103)
32. Notice of a hearing preliminary hearing with case management by telephone, was sent to the parties by the tribunal on 8 April 2021. It stated that the judge would consider whether the case should be stayed for a further period; whether it should be listed for a final hearing with case management orders; or whether it should be listed for a public preliminary hearing to decide the respondent’s application for a strike out or deposit orders. The time allocated was two hours. (104 – 105)
33. The parties were to agree a bundle of documents for the hearing by 3 August 2021. (106)
34. In a letter dated 30 July 2021, Dr Hadid repeated the claimant’s conditions and that his chronic ongoing problems “will not resolve soon”. (107)
35. The parties were ordered to agree the content of the bundle. The claimant submitted a Disability Impact Statement, dated 2 August 2021; a Universal Credit claim dated 7 October 2020; and a decree of divorce, dated 17 April 2021. (111 – 120)
36. He did not participate at the preliminary hearing on 6 August 2021 before Employment Judge Postle. In the record of proceedings, the Judge noted that having dialled the claimant’s landline number on three occasions, the calls went unanswered. The respondent was represented by Ms B Greatrex, Solicitor. In the absence of any representations or response from the claimant, and having discussed with Ms Greatrex how to proceed, the case was set down for a preliminary hearing in public on 17 December 2021 to consider the respondent’s strike out and/or deposit order applications. The respondent was ordered and serve a bundle of documents by 3 December 2021, as well as its skeleton argument by 10 December 2021. (122 – 124)

37. The respondent's representative sent to the claimant a copy of EJ Postle's case management summary and orders on 11 November 2021. (126)
38. The bundle was served on him on 25 November 2021. (125)
39. In the most recent letter from Dr Hadid dated 15 December 2021, she repeated the previous three paragraphs in her earlier letters and added a 4th paragraph, namely
 - “4. Chronic kidney causing swelling of both legs with difficulty walking. Currently under the urologist for undergoing review.”
40. The doctor repeated that the claimant's problems were chronic which would not be resolved “soon”, and that he would not be able to cope and participate in a lengthy tribunal case because of his medical conditions, adding, “Any added stress and anxiety my trigger serious health sequelae.”
41. In the claimant's Disability Impact Statement, he wrote that he was experiencing a sense of hopelessness; low mood and morale, including lack of self-esteem, depression, blurred vision, chest pain, difficulty breathing, dizziness, numbness, severe headache, nose bleeding, shortness of breath and sleep apnoea. He stated that he had lost respect and dignity among his long-term friends due to his loss of income and that he was facing a long period of unemployment due to his underlying health conditions. He feels tired, inactive and have reduced mobility caused by breathlessness and feelings of blackouts because of the medication. He is currently taking 12 different medications daily. (111 – 114)
42. The claimant participated by video. I observed him closing his eyes while Mr Sheehan, counsel on behalf of the respondent, was speaking. I asked him, that is the claimant, whether he heard and understood Mr Sheehan's submissions. He replied that he was not paying attention and was expecting me to explain to him what was said by Mr Sheehan.
43. He was using a breathing machine and required after every 15 to 20 minutes, a 10-minute break. It appeared to me that his ability to concentrate and focus on the hearing, particularly what was being said, was severely limited.
44. He told me that he could only remember, in his word, “some” of the events following the incident on 25 November 2017.
45. In Mr Anthony Eversley Ward's witness statement, he stated that he line managed the claimant and heard his appeal against his dismissal. His recollection of events since the incident and the claimant's dismissal, has faded. Where there is documentary evidence for supervision meetings with the claimant and in respect of his interview for the disciplinary process, and the comments the claimant provided for the appeal, he would be able to refresh his memory to some degree. He remains concerned that he may struggle to remember the details of what was discussed in verbal

conversations with the claimant at the relevant time or in respect of any other matters not expressly recorded at the time.

46. He further stated there are five witnesses to be called evidence on behalf of the respondent. They include those involved in also the line management of the claimant; in the investigation; disciplinary, and appeal. They were all notified of the original hearing date in March 2020 to April 2020 which was postponed. The delay is causing a lot of stress, and if the claims are allowed to continue, there is no clear indication as to when the final hearing can take place, which adds to their stress. One witness is due to retire in March 2022 which may have an impact on their willingness to give evidence at a future hearing. “The more time that passes”, Mr Ward wrote, “the higher the risk that more witnesses trust or be unavailable for other reasons. For example,.... maternity leave”.
47. In addition, the respondent only keeps some documents including handover sheets and timesheets, for two years and while some documents have been kept for the hearing, any documents not already identified as relevant and not stored and disclosed the claimant, are likely to have been destroyed.

Submissions

48. Mr Sheehan prepared written submissions and spoke to those in his address to me. The claimant briefly submitted that it is possible to have a fair hearing and that he was looking at legal representation but was concerned about his inadequate means. The proposed that the hearing be by video.

The law

49. Rule 37(1)(e) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, provides:

“(1) At any stage of the proceedings, either on its own initiative or on the application of the parties, the Tribunal may strike out all or 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).”

50. Article 6(1) Of the European Convention on Human Rights and Fundamental Freedoms, incorporated in the Human Rights Act 1998, schedule 1, states that,

“ everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

51. The Overriding objective as set out in rule 2, schedule 1, of the Employment Tribunal Rules 2013, requires the Tribunal and the parties should seek to avoid delay and save expense.
52. In the case of Peixoto v British Telecommunications PLC UKAEAT/0222/07/CEA, the tribunal was considering rule 18(7) of the 2004 Rules of Procedure on strike out, the precursor to rule 37(1)(e), which was only possible against claims but not responses. HHJ McMullen QC at the Employment Appeal Tribunal, held that an employment tribunal had not erred in striking out the claims on the basis that a fair hearing was no longer possible. The claimant had stated that she would not be physically able to give oral evidence. There was no prospect of her being able to proceed with her claims at any time in the future, having regard to the medical evidence which was the same and unhelpful. In the absence of any prognosis for recovery the tribunal was unable to establish when a hearing would take place. The tribunal had considered alternative measures apart from striking out the claims. The case could not be decided on the documents alone as the claimant's evidence would be required. Article 6 gives the right to have a fair hearing within a reasonable time.
53. In the case of Abegaze v Shrewsbury College of Arts and Technology [2009] EWCA Civ 96, the Court of Appeal held, Elias LJ giving judgment, that the Employment Judge had erred in striking out the claim at the remedies hearing stage because the Non-legal members at the liability hearing had retired and he was concerned that his impressions of the witnesses may unduly influence the new members, and that the causation problems with regard to personal injury and injury to feelings compensation, were insurmountable.
54. The claimant had succeeded in her race discrimination claim against the respondent on 20 November 2000. A remedies hearing was fixed but the claimant sent in medical reports which stated that she was not well to take part. It was listed on 1 July 2003, but she sent in further medical reports stating that she was unwell. On 15 November 2006, her claim was struck out by the Employment Judge on the grounds that it was not being actively pursued, and a fair hearing was not possible.
55. The Court of Appeal held that the change in composition of the members do not go to the issue of a fair hearing. Concerns by the Judge about sharing his impressions could not justify the strike out and the claimant should not be prejudiced by a strike out where the composition of the Tribunal changes. If the Judge had serious concerns about the impressions he may give to the new members, he could have recused himself. The tribunal could conclude that there was evidence of some injury flowing from the unlawful discriminatory act. The claimant's appeal was allowed.

56. In the later Court of Appeal case of Riley v The Crown Prosecution Service [2013] EWCA Civ 951, the claimant, in that case was a senior Crown prosecutor who raised grievances regarding her treatment alleging bullying and harassment by fellow employees in August 2006. She issued proceedings in September 2009 alleging race discrimination beginning in December 2007, disability discrimination and public interest disclosure beginning in September 2008. The case was listed for four weeks beginning in May 2011. She issued further proceedings following her dismissal in September 2010 for gross misconduct. She was unfit to attend the hearing in May 2011 and her claims were struck out as a fair trial was not possible. The medical evidence showed that litigation was severely impacting on her stress and that once resolved it would be a step in her recovery. The medical evidence showed that the claimant would not have been fit enough to attend the hearing in 12 months' time, and not before the expiry of two years.

57. The Employment Appeal Tribunal dismissed her appeal and she appealed to the Court of Appeal. Longmore LJ, giving judgment dismissing the appeal, held that the overriding objective is to deal with cases justly and expeditiously without unreasonable expense. Article 6 emphasises that every litigant is entitled to a fair trial within a reasonable time. That is the entitlement of both parties. Litigants should not be compelled to wait for justice more than a reasonable time and fairness include fairness to the respondent. His Lordship then stated;

“It would, in my judgment, be wrong to expect tribunal 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 the 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.”

Conclusion

58. The consistent theme in Dr Hadid's letters is, because of the claimant's medical conditions, he is unfit to attend and be able to cope with a lengthy Tribunal hearing. Of importance is “Any stress and anxiety might trigger serious health sequelae.” Her most recent letter again repeats that the claimant's medical conditions are chronic and ongoing and would “not be resolve soon.”

59. As in the case of Riley, this is a chicken and egg scenario. The claimant would need to get better in order to participate in a final hearing, however, there is no date when his conditions would or are likely to improve, and to list the case would trigger serious health conditions.

60. The recent report from Dr Hadid, dated 15 December 2021, states that the claimant's medical conditions are chronic and will not be resolved soon. There is, therefore, no prognosis on when he is likely to recover sufficient to participate in these proceedings.

61. I have considered the possibility of the case being decided on the papers, but this is a case in which much of the evidence is in dispute and the claimant would need to give oral evidence and be cross-examined. He would also need to cross-examine the respondent's witnesses.
62. He suggested that he could participate by Cloud Video Platform but that requires him to be fit and able to do so according to Dr Hadid.
63. He has been requesting postponements since October 2019 for health reasons. As at the date of this hearing there is no prognosis.
64. The case is not even trial ready. There is no agreed bundle of document and witness statements. Even if it were to be given a listing date it is likely to be from 5 December 2022 or even in the spring of 2023, on the assumption that the claimant would be able to attend and participate.
65. Article 6 right to a fair hearing within a reasonable time, applies to both parties. The incident which led to the claimant's dismissal occurred on 25 November 2017, over 4 years ago. If the case is listed in December 2022, it would be a further year. From reading Mr Ward's witness statement he and the respondent's other witnesses' memories are fading and the existing documents provide limited assistance. Even the claimant told me that he could only recall some of the events after the 25 November 2017. The passage of time has, in my view, already adversely affected the cogency of the evidence each party is likely to rely on.
66. The claimant is not in a position to conduct his case as his ability to focus and concentrate on proceedings is severely limited.
67. I do follow the approach taken in Riley and having considered the above matters, I have come to the conclusion, not with any degree of satisfaction, that a fair trial is not possible. The claims are, accordingly, struck out under rule 37(1)(e).
68. It was no part of the respondent's submissions that it was also, in the alternative, applying for a deposit order. A deposit order would not be appropriate in this case in view to the state of the medical evidence.

Employment Judge Bedeau

22 December 2021

Sent to the parties on: 26 January 2022

L.Omotoso
For the Tribunal Office