



EMPLOYMENT TRIBUNALS

Claimant
Dr. P Mistry

Respondent
v University Hospitals of Derby &
Burton NHS Foundation Trust

OPEN PRELIMINARY HEARING CONDUCTED BY CLOUD VIDEO PLATFORM

Heard at: Nottingham

On: 11th January 2024

Before: Employment Judge Heap (Sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Ms. A Beech - Counsel

This has been a remote hearing which has not been objected to by the parties. A face to face hearing was not held because no-one requested the same and all issues could be determined in a remote hearing.

JUDGMENT

1. The Claimant's application for an Order under Rule 50 Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 that the entirety of this Preliminary hearing be held in private is refused.
2. The Respondent's application to strike out the claim is refused.
3. The Respondent's alternative application for an Unless Order is refused.
4. Case Management Orders are attached.

REASONS

BACKGROUND

1. This Preliminary hearing was listed by Employment Judge Adkinson to deal with an application which was made by the Respondent on 7th November 2023 to either strike out the claim under Rule 37 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013 ("The Regulations") or,

alternatively, for an Unless Order to be made under Rule 38 of the Regulations. That followed on from the Claimant's failure to comply with Order made by Employment Judge Adkinson at a Preliminary hearing on 9th August 2023. Those Orders had required the Claimant to do three things which were as follows:

- 1.1. To provide further information about the disability discrimination complaints that he was advancing;
 - 1.2. To provide a disability impact statement; and
 - 1.3. To provide copies of his GP and other medical records relevant to the question of disability along with any other relevant evidence relating to that issue.
2. In respect of the first two Orders Employment Judge Adkinson set out precisely what was required of the Claimant. Although the Claimant says that he believes that he has complied in part with those Orders in terms of the provision of further information (although he accepts that he would need to provide a proper response in accordance with how was directed by Employment Judge Adkinson to deal with the matter) it is common ground that he has not complied with the vast majority of the Orders nor for any part where there was purported compliance was that done in the way that Employment Judge Adkinson directed. As a result, the basis of the claim still remains unclear and the Respondent is still not in a position to consider and confirm whether the question of disability remains in dispute or is conceded.

THE HEARING

3. As a result of the provisions of Rules 56 and 53(1) of the Regulations this Preliminary hearing was listed to take place in public.
4. On 4th January 2023 the Claimant made an application for an Order under Rule 50 of the Regulations that the entirety of the Preliminary hearing be held in private. That could not be determined before today. The Claimant confirmed at the outset that his application did not go further than having the hearing itself conducted in private.
5. I converted that part of the hearing to a private Preliminary hearing for case management and I heard from both parties in respect of the application. I refused it with reasons given orally at the time. Neither party has asked for written reasons for that decision and so I need say no more about it. Thereafter, the hearing resumed as a public hearing although as it transpired there was no practical difference because no member of the public asked to or did in fact join the hearing.
6. The hearing was conducted via Cloud Video Platform. There were no difficulties, technical or otherwise, during the course of the hearing and I am satisfied that we were able to have a fair and effective hearing.

THE HISTORY TO DATE

7. It is necessary to set out the background and where we are now and how we got there and why the Respondent's applications have been made.
8. The Claim Form was issued on 8th September 2022 following a period of early conciliation via ACAS between 29th June 2022 and 9th August 2022. It related to events – albeit they remain unclear – that took place during the Claimant's employment with the Respondent which commenced on 28th June 2021 and ended on 5th April 2022.
9. At the point that the Claim Form was served on the Respondent the claim was listed for a Preliminary hearing for case management which was to take place on 15th December 2022. On 9th December 2022 the Claimant made an application to postpone that Preliminary hearing on health grounds. The Respondent did not object to the application and the Preliminary hearing was relisted for 25th April 2023. On 20th April 2023 the Claimant again applied to postpone the Preliminary hearing on the basis of his personal circumstances at that time. The Respondent again did not object to the application although they expressed some concern about the lack of case management progress since the Claim Form was presented. The Claimant's application was granted and the Preliminary hearing was relisted for 9th August 2023.
10. That hearing took place before Employment Judge Adkinson. He dismissed on withdrawal a complaint of unfair dismissal that the Claimant had presented at the same time as the existing complaints of disability discrimination on the basis that the Claimant had insufficient service to advance it. Employment Judge Adkinson attempted to clarify the disability discrimination complaints and the issues but set out that this proved difficult and that the Claimant needed additional time as a reasonable adjustment to go through the questions needed to clarify the claim. He also noted that the Respondent had attempted to obtain information and clarify the discrimination complaints by way of having asked for further and better particulars but that had not worked either. It was agreed that the necessary questions would be set out in Employment Judge Adkinson's Orders and that the Claimant would supply that information by no later than 10 weeks from the date on which the Orders were sent to the parties.
11. The Orders were sent by the Tribunal on 10th August 2023 and so the Claimant should have complied with the Orders to provide further information and to supply his medical records and a disability impact statement by no later than 19th October 2023. The Claimant had originally asked for three to four months to supply the information and the Respondent had sought it within 8 weeks. Employment Judge Adkinson set what was effectively a compromise of the ten weeks which I have already referred to and in respect of which he was satisfied was a reasonable period to enable the Claimant to comply with the matters at hand.
12. On 23rd October 2023, that is shortly after the deadline for compliance had passed, the Claimant wrote to the Tribunal effectively indicating that he was unable to comply because of health and personal circumstances. There is no need to detail here what those personal matters were.

13. On 7th November 2023 the Respondent made their application to strike out the claim. I say more about the grounds of that below.

THE GROUNDS OF THE APPLICATION

14. The application was originally advanced on the basis that it is said that the Claimant's conduct has been unreasonable by reason of his non-compliance with the Orders of Employment Judge Adkinson, that there had been non-compliance with Orders and that the claim had not been actively pursued although Ms. Beech's oral submissions have focused on the issue of non-compliance and thus the provisions of Rule 37(1)(c) of the Regulations. All of the grounds of the application essentially overlap in all events because all are focused on the Claimant not complying with the Orders of Employment Judge Adkinson and not providing the necessary information to advance the claim towards a hearing.

15. I have set out the submissions of both parties in brief terms only but they can be assured that I have taken into account all that they have told me before reaching a conclusion on the application whether that is recorded in this Judgment or not.

16. In short, the Respondent says that:

16.1. The Claimant has failed to comply with the Orders made by Employment Judge Adkinson;

16.2. The Respondent still does not have sufficient information to understand the case 16 months after the Claim Form was issued;

16.3. The claim must relate to a period of time on or before the Claimant's employment was terminated which was at least 21 months ago and that will affect the cogency of the evidence;

16.4. Realistically, there was no reasonable prospect of the full merits hearing which was listed to commence on 28th May 2024 taking place and there will be further delay caused;

16.5. The Respondent has been sympathetic to the Claimant's health and personal circumstances but their position was prejudiced by not being able to understand the case and the Claimant not complying with Orders made; and

16.6. There would no longer be a fair hearing and, in particular, a Roger Smith of Human Resources who was specifically mentioned in the claim had left the Respondent's employment and had done so before instructions could be taken on the claim because it was still not fully understood.

17. In the alternative, if I was not with the Respondent that the claim should be struck out then Ms. Beech urged my to make Unless Orders so as to give the Respondent some security that there would be progress in the proceedings.

THE CLAIMANT'S POSITION

18. The Claimant's position, again summarised, is that he has attempted to comply with the Orders made and had done his best but for reasons related to his health and personal circumstances, has been unable to do so. The personal matters are now resolved and he has worked on his health and believes that a further period of six to eight weeks would enable him to comply with the Orders that Employment Judge Adkinson had made.

THE LAW

19. Rule 37 of the Employment Tribunals (Rules of Procedure) Regulations provides as follows:

"37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued; (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).

(2) 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".

20. Whilst the striking out of discrimination claims should be rare because of the public interest importance of such claims being determined after examination of the evidence (see **Anyanwu v South Bank Student Union [2001] 1 W.L.R. 638: UKEAT/0128/19/BA** – albeit in a different context) that will be a permissible step where there can no longer be a fair hearing, including within a reasonable time frame (see **Peixoto v British Telecommunications plc EAT 0222/07** and **Riley v Crown Prosecution Service 2013 IRLR 966, CA**).

CONCLUSIONS

21. By the narrowest of margins I have refused the application to strike out the claim. I should say that I have sympathy with the Respondent as to why the application has been made. However, I have to balance that against the fact that the Claimant's non-compliance has not been deliberate but because of his mental health and the impact of other proceedings which have now resolved themselves and the thought that there may be involvement by the General Medical Council which is also no longer an issue. The Claimant is also a

litigant in person and has not received any legal advice or assistance which may have assisted in him being able to better comply with the Orders made by Employment Judge Adkinson. The Claimant has also worked on improving his mental health and considering ways in which he may be able to better manage compliance with the Orders made by Employment Judge Adkinson. That includes building on work which he has already started so as to do what he has to do and taking each of the three things that he is required to do in turn so that he is working and sending things to the Respondent in bite sized chunks. I have urged him to work in that way if he considers that that will assist and that he can send things to the Respondent at three separate times if that would assist him provided that he has complied with all of the Orders set by Employment Judge Adkinson by the date set in the attached case management Orders.

- 22.** Whilst I note the position on the cogency of the evidence there will be contemporaneous documents to assist and the Respondent is not entirely flying blind as to the allegations that the Claimant makes in the proceedings as he has provided some relatively detailed narrative with the Claim Form. Moreover, in relation to the position with Mr. Smith there is nothing to say that he would not be amenable to assisting the Respondent with regard to his involvement – which in all events appears relatively minimal – notwithstanding that he is no longer employed by them
- 23.** Even if that did transpire to be the case the Respondent can of course for a Witness Order if necessary to compel the attendance of Mr. Smith at future hearings. Equally, there is nothing at this stage to say that the other witnesses will leave the Respondent before a full hearing. Balancing the positions of the Respondent and the Claimant as to the prejudice to be caused to each of them I am not satisfied at this stage that the claim should be struck out.
- 24.** I have also taken into account the fact that the full merits hearing cannot proceed as listed but I have managed to secure a further date without a significant amount of further delay to commence in early December 2024. Whilst there is therefore delay, that has managed to be minimised so that a full hearing can still take place within a reasonable period of time from when it was originally listed.
- 25.** However, I have explained to the Claimant that this is very much a case of him being in the last chance saloon. He must now comply with what is required of him and set out in the attached Orders to the letter and on time.
- 26.** If he does not do so then at the next Preliminary hearing it will be revisited of the Tribunal's own volition as to whether the claim should be struck out because, whilst we are not quite there yet, there will come a time if there is further non-compliance where a fair hearing will no longer be possible.
- 27.** The Claimant may also wish to try and seek advice and assistance, including legal advice, which will remove some of the stress that he is experiencing dealing with these proceedings.
- 28.** I have declined to make any Unless Orders as alternative sought by the Respondent because I am concerned that that is simply likely to lead to satellite argument about whether there has been material non-compliance and

whether relief from sanction should be granted. I have in mind in that and other respects consideration of the comments made at paragraph 33 of the decision in **Minnoch & Ors v Interserve FM Ltd [2023] EAT 35**. My view is that making an Unless Order in these circumstances is simply likely to lead to more problems that it might ultimately solve.

29. However, I do accept that the Respondent is entitled to some reassurance that progress will be made in these proceedings and, also, that something needs to be put in place to make sure that the Claimant realises the importance of compliance and what is likely to happen if he does not comply in full and on time. As therefore touched upon above, I consider that an appropriate way forward is to convert the first half day of what should have been day one of the full merits hearing – because it is clear that that cannot feasibly go ahead – to a further Preliminary hearing where the Tribunal will consider of its own motion whether to strike out the claim in the event that the Claimant has failed to comply with the Orders made. A copy of those Orders are attached and the Claimant must read them carefully and ensure that he complies in full and on time.

Employment Judge Heap
Date: 15th January 2024
REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>