



EMPLOYMENT TRIBUNALS

Claimant: Mr J Vydelingum

Respondent: Oxleas NHS Foundation Trust

Heard at: London South Employment Tribunal, Croydon (by video)

On: 14 August 2024

Before: Employment Judge Abbott (sitting alone)

Representation

Claimant: representing himself

Respondent: Miss J Whiteley, solicitor-advocate

JUDGMENT having been sent to the parties on 20 August 2024 (reasons having been delivered orally on 14 August 2024) and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claimant, Mr Vydelingum, advances complaints of failure to make reasonable adjustments, harassment related to disability and unlawful deductions from wages against the respondent employer, Oxleas NHS Foundation Trust.
2. The claim form was presented on 28 January 2021. The respondent applied to strike out the claim in its entirety as early as 23 March 2021, at the time of presenting its response. There was then a considerable delay in the claim being progressed, primarily resulting from the claimant's ill health. Eventually the strike out application came before EJ Reed at a preliminary hearing on 23 October 2023; however, in circumstances where the claimant had provided a very extensive document supplementing his claim (running to 155 pages) shortly before that hearing, the judge declined to rule on many aspects of the application pending consideration of whether the claimant should be permitted to amend his claim. The amendment application was considered, and allowed, by EJ Richard Wood at a preliminary hearing on 10 June 2024. The strike out application was listed then to be determined by me.

3. At the beginning of the hearing, Miss Whiteley (who appeared for the respondent) clarified that, in light of the considerable developments since the strike out application was first made, the respondent was pursuing strike out only of the harassment claim, which involves allegations made against a former manager of the claimant, Mr Stephen Jones. I heard submissions from Miss Whiteley, and from the claimant in response, before delivering my decision orally.
4. Upon receipt of the written judgment on 20 August 2024, the claimant requested written reasons. I have included a summary of the parties' submissions within my discussion below.

Relevant law

5. Rule 37(1) provides, insofar as relevant, as follows:

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— [...] (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).

6. It is rare for applications to be brought under this rule. Nevertheless, it is appropriate for me to consider all of the circumstances and make a determination as to whether a fair trial is possible of this particular complaint.
7. One must always consider the balance of prejudice but, as the Employment Appeal Tribunal recognised in *Elliott v Joseph Whitworth Centre Ltd* EAT 0030/13, 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. What the Tribunal 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 etc (*Elliott*, paragraph 16).
8. 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. I am satisfied that the claimant had a reasonable opportunity to make representations at the hearing.

Discussion

9. It is important to note at the outset that this is a claim that was brought in January 2021 and will come to a Final Hearing only in May 2025. The core reason for the delay is the claimant's ill health. No fault can be laid at the door of the claimant for that. Further, as Miss Whiteley explained, the allegations that now form the harassment complaint were particularised only in October 2023 in a very detailed further information document prepared by the claimant. They were allowed into the claim by an amendment for which permission was granted by EJ Richard Wood at a hearing on 10 June 2024.

10. Looking at the claimant's document, the allegations relating to the conduct of Mr Jones appear to date from the period May 2018 to April 2019. It is common ground that Mr Jones retired in April 2019. Accordingly, if the harassment allegations proceed to a final hearing currently scheduled for May 2025, Mr Jones will be required to give evidence as to events dating back 6-7 years. Miss Whiteley explains that (and I accept), as a consequence of IT policy, Mr Jones' emails and electronic documents were deleted 3 months after his retirement, so will not be available to assist in jogging his memory. Equally, as the allegations were made only recently, Miss Whiteley explains (and I accept) that Mr Jones was never interviewed about them contemporaneously. She submits that this substantially prejudices the respondent. However, Miss Whiteley acknowledges that the respondent has now made contact with Mr Jones and he has expressed a willingness in principle to give evidence at the final hearing. She says that strike out of the harassment complaint will cause only limited prejudice to the claimant because he can still pursue the other aspects of his claim.
11. For the claimant's part, he says that his own account, plus the accounts of 3 other witnesses who have provided written statements, should serve to jog Mr Jones' memory. He regards the allegations against Mr Jones as a key aspect of the overall narrative of his claim.
12. In reaching my conclusion, I must balance the prejudice that will be caused to the respondent if the claims are allowed to proceed and to the claimant if the claims are not allowed to proceed. It is not straightforward, but in my judgement, a fair trial is still possible of the harassment complaint. Mr Jones is available to give evidence in defence of the allegations against him. The Tribunal can take account of the delay in the allegations being raised when considering Mr Jones' evidence and, one would expect, will be sympathetic towards any professed lack of recollection in the circumstances. The prejudice to the respondent is, to that extent, somewhat limited. By contrast, there is real prejudice to the claimant of this part of his claim being dismissed in that he is unable to pursue these aspects, which he regards as a substantial part of his case. I take account of the fact that, in determining the application to amend, EJ Richard Wood must have taken account of the balance of prejudice and come down in favour of the claimant in that balancing exercise, and I am not persuaded that I should come to any different conclusion based on what Miss Whiteley has submitted today.
13. Accordingly, for these reasons, I refused the application for strike out of the harassment complaint. It will proceed to final hearing with the rest of the claim.

Case No: 2300386/2021

REASONS SENT TO THE PARTIES ON
23 August 2024

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