EMPLOYMENT TRIBUNALS

Claimant: Mr R Ekundayo

Respondent: Jess Murray

Heard at: London Central (remote hearing) **On:** 23 May 2025

Before: Employment Judge B Smith (sitting alone)

REPRESENTATION:

Claimant: Did not attend
Respondent: Mr Ayub

JUDGMENT

The claim is struck out under rule 47 Employment Tribunal Procedure Rules 2024.

REASONS

1. The is claim was listed for a preliminary hearing for case management today. The claimant did not attend. The claimant's implied application to postpone the hearing was refused and the claim was struck out under rule 47 Employment Tribunal Procedure Rules 2024 because the claimant did not attend. It was in the interests of justice to do so and the Tribunal had regard to the information available to it after carrying out those enquiries that were practicable about the reasons for the claimant's absence. These are the Tribunal's reasons for making those decisions.

2. I have had full regard to the Presidential Guidance on postponement of a hearing and the overriding objective. It would be neither fair or just to the

respondent for the hearing to be postponed in all the circumstances. Postponement would cause prejudice and delay to the respondent because there is an inherent prejudice to further delay and there is also no good reason to justify a postponement. It would also mean that the respondent incurs unreasonable costs.

3. By email sent at 01:41am on 23 May 2025, the day of the hearing, the claimant emailed the Tribunal stating '*All the documents required for the* [case] *have been provided as required. Please advise if my presence is required at the online hearing today.*'

4. Shortly before the start of the hearing at 10:00am the claimant was emailed by the Tribunal clerk asking him to attend and he was also telephoned. The claimant informed the clerk that he would not be attending today because he had just been given a flat for the over 55's and had to sort out benefits because he was not working, so was not able to attend. The claimant was invited to join by telephone but he declined, citing a lack of data. The claimant was sent a further email indicating that the hearing was going to start at 10:20am and if the claimant did not attend the claim may be struck out under rule 47. The claimant was also telephoned by the clerk and during that call he was told of the start time and that if he did not attend the claim may be struck out and the claimant said it was not possible for him to attend, and he could not even call out, but still wanted to be part of it.

5. This hearing was on 23 May 2025. The claimant was sent a notice of hearing on 5 December 2024 and there is no indication that that the claimant was unaware of the hearing. In any event, I am fully satisfied that the claimant was on notice of the hearing because the respondent emailed the Tribunal and claimant on 12 May 2025 referring to this hearing due to take place on 23 May 2025 and the claimant must have received that email because he replied on the same day notifying the Tribunal of his change of residential address. The claimant was also expressly aware of the hearing in his email sent to the Tribunal on the morning of the hearing, referring to an online hearing.

6. The claimant has not made an application to postpone the hearing in writing, and it has only been made (by implication) verbally by the claimant to the tribunal clerk. The claimant's email sent in the early hours of the morning does not ask for a postponement or suggest that the claimant is unable to attend for any reason. I am treating the claimant's verbal comments, however, as an implied application to postpone the hearing, and I am bound to consider postponement in any event before taking further steps in relation to the claim.

7. I consider also that the claimant's purported reasons for postponement should also be taken with caution because the claimant has been able to email the Tribunal on the day of the hearing. This does not suggest that he has no data. Also, it was open to the claimant to seek to attend the hearing by other methods and there is no suggestion that, for example, friends or family members could not help him attend remotely. Also, no request was made by the claimant for an in-person hearing. He plainly would have been aware of any real difficulties he might have had attending remotely well in advance. The claimant had also advised the Tribunal by email dated 12 May 2025 that *'I have been moving home from a temporary accommodation to an assured lifetime residence, the contract for which was signed on 25th April, 2024'*. This indicates that the claimant was aware well in advance of the hearing of his move and any consequences that would arise from this.

8. I consider that the claimant was fully aware in advance of the hearing of the requirement to attend given the notice of hearing and reference to the hearing in the respondent's email dated 12 May 2025. The claimant did not ask the question about whether or not he should attend until 1:41am on the morning of the hearing, and in the absence of a reply the claimant must have known that he should attend. The claimant was also made aware of the opportunity to attend on the morning of the hearing by video link or telephone and declined to do so. The claimant also did not indicate to the respondent or tribunal any difficulties relating to data or credit such that he would not be able to attend a hearing in advance.

9. The claimant's ET1 indicated that he could attend hearings by telephone or video hearing.

10. In all the circumstances, I refuse to postpone the hearing. The claimant did not make the tribunal aware of any difficulties in attending the hearing until the morning of the hearing although he must have been aware of those difficulties for some time, the change of address being something he had sufficient notice of. The claimant was fully aware of the hearing taking place and was given substantial notice of that fact. The claimant did not at any stage expressly ask for an in person hearing which was open to him, and the Tribunal was entitled to rely on the claimant's indication on the ET1 that he could attend by video or telephone when listing the case management hearing. To postpone the hearing would be contrary to the overriding objective. I take into account the fact that the claimant is a litigant in person, however he has been in reasonably regular contact with the tribunal by email and there was no indication to the claimant that he did not need to attend the hearing. I appreciate that not postponing the hearing will cause the claimant some prejudice. However, there is less prejudice here than in some cases because there are serious issues with the claimant's case. These are outlined in more detail below. In summary, however, there is more prejudice to a claimant if they have a genuinely arguable claim with reasonable prospects of success compared to those who do not.

11. The claimant having not attended without good reason, and a postponement being refused, I now consider whether I should strike out the claim under rule 47 Employment Tribunal Rules of Procedure 2024, or to proceed with case management in the claimant's absence.

12. I consider that it is in the interests of justice to strike the claims out under rule 47. I have actively considered whether I should proceed to case management without the claimant. However, this would be wholly contrary to the overriding objective and I do not consider that case management in the claimant's absence would be appropriate. This is because there are serious issues with the claims that cannot be resolved without the claimant's input and there was little meaningful process that could be made today in

those circumstances. Those difficulties include: the likely identification of the correct respondent to the claims; the fact that the claimant appears to be making a claim of unfair dismissal against an individual who did not employ him; the fact that the claim makes a claim of unfair dismissal without two years qualifying service; the fact that the claimant makes a claim of wrongful dismissal against someone who did not appear to have contracted with him; and the correct respondent to the direct race discrimination claim also required clarification (and the basis for that claim).

13. The claims at present are made against an individual employee of a local authority ('LA'). However, the claimant claims unfair dismissal and wrongful dismissal (notice pay) against that individual. There is no proper basis pleaded (ie. set out in writing) for the claimant having been employed or contracted with by that individual. Neither does it appear that the claimant was in fact employed or contracted by the LA because, accepting the pleaded response as likely to be correct, he was likely to have been engaged as an agency worker. The claimant also does not have two years' service. It follows that the claims of unfair dismissal and wrongful dismissal have no real prospect of success against these respondents. There is no application to amend the respondent. Even giving the claimant the benefit of the doubt, and assuming that the respondent could be substituted with the LA today (the claim form does not suggest issues with the claimant's actual employer, namely the agency/umbrella company involved), no such claim appears to be likely to have any prospect of success against the LA either. Also, a claim of simple unfair dismissal against the LA has already been made and struck out for lack of service under claim number 6013334/2024.

14. There is minimal prejudice to the claimant in having the claims of wrongful dismissal or unfair dismissal struck out in those circumstances.

15. I note that the claimant did also seek to provide further details for his claim dated 3 April 2025 and so it cannot be said that he has not had that opportunity. Although that was marked as an application to amend the claims, I do not consider that an application was necessarily required and I

have approached today's decisions on the basis that any such application was likely to have been granted if made.

16. Further, whilst the most likely outcome of the hearing was that the current named respondent would be substituted for the LA, or the LA added as a respondent alongside the individual, the likely outcome from today's hearing is that, at a minimum, a deposit order would have been made in respect of any claim for direct race discrimination. This is for the following reasons.

17. A claim for direct race discrimination could be properly made against the LA and or the relevant individual decision maker pursuant to s.41 Equality Act 2010 (contract workers) and taking into account s.109 and 110 EQA for the individual.

18. The burden of proof for the EQA claims is governed by s.136 EQA:

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *[…]*

19. It is not sufficient for the employee to only prove a difference in protected characteristic and a difference in treatment in order to shift the burden of proof: Madarassy v Nomura International Plc [2007] EWCA Civ 33.

20. Once the burden has shifted, the employer must prove that less favourable treatment was in no sense whatsoever because of the protected characteristic: Wong v Igen Ltd [005] EWCA Civ 142.

21. Direct discrimination is prohibited conduct under s.13 EQA:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. […]

22. The comparator's circumstances must be the same as the claimant's, or at least not materially different. This is because s.23 EQA says:

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

[…]

23. The protected characteristic need not be the only reason for the less favourable treatment, or the main reason: London Borough of Islington v Ladele [2009] IRLR 154 (EAT). The decision must be more than trivially influenced by the protected characteristic.

24. I consider that the claimant's claim of direct race discrimination has little reasonable prospect of success. This is because there is nothing in the claimant's case as set out in writing – whether in the claimant's ET1, attached further details (ie. the claimant's grievance about this, or later further details set out in writing dated 3 April 2025) from which the Tribunal could infer that the claimant's treatment had anything to do with race. The fact that the claimant may have felt that this was the case is insufficient, and will be insufficient to shift the burden to the respondent to demonstrate that any treatment had nothing to do with race whatsoever. Taking the claimant's case at its highest, at best he could establish that the reasons he given was insufficient to justify ending the assignment, or that ending the assignment was predetermined. However, this is not enough to suggest that any such treatment (if proven) had anything to do with race. In those circumstances, in my judgment the claim of direct discrimination has little reasonable prospects of success. Whilst it would not be appropriate to make a deposit order without the claimant's input, this is sufficient to find that there is less prejudice to the claimant in taking further steps in relation to the claim. This

because there is less prejudice when refusing a postponement or considering whether to strike out the claim under rule 47 where the claim made has little reasonable prospects of success.

25. The claimant was given a strike out warning by email today and by telephone and so has had, in my judgment, a reasonable opportunity to be heard.

26. I am satisfied that the claimant was able to attend and communicate with the Tribunal and that the claimant is wilfully not attending the hearing in all the circumstances.

27. Given the lack of merits to the claims, I consider that it is appropriate and consistent with the overriding objective to strike out the claims as opposed to proceed with case management or list a further hearing for case management.

28. For all of the above reasons, the claim is struck out.

Approved by:
Employment Judge B Smith
23 May 2025

SENT TO THE PARTIES ON

30 May 2025
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FOR THE TRIBUNAL OFFICE