



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr D Phelan**

**v**

**Kettering General Hospital NHS  
Trust**

## (OPEN) PRELIMINARY HEARING

**Heard at:** Cambridge

**On:** 21 May 2018

**Before:** Employment Judge G P Sigsworth

### Appearances

**For the Claimant:** Did not attend and was not represented.

**For the Respondent:** Mr R Moretto, Counsel.

## JUDGMENT

1. The Judgment of the Tribunal is that the Claimant's claim is struck out and dismissed.

## RESERVED REASONS

1. The preliminary hearing listed today (21 May 2018) was to determine the following issues:
  - 1.1 Was the Claimant an employee of the Respondent in his role as governor?
  - 1.2 If not, was the Claimant a worker in respect of the governor role in accordance with s.47K of the Employment Rights Act 1996?
  - 1.3 In respect of the substantive role, was it reasonably practicable for the Claimant to present his claim for unfair dismissal within the relevant time period?

2. This hearing on 21 May 2018 was listed at a closed preliminary hearing on 8 December 2017, and the record of that hearing was sent to the parties on 30 December 2017. The Claimant was present representing himself at the closed preliminary hearing. On 3 May 2018, the Employment Tribunal's administration wrote to the parties with Regional Employment Judge Byrne's direction that any failure by the Claimant to comply with case management orders made by Employment Judge King at the hearing on 8 December 2017 (sent to the parties on 30 December 2017) should be considered at the start of the hearing on 21 May 2018. The direction went on to state that, if the Tribunal found that the Claimant had failed to comply with the orders sent to the parties, the Tribunal could consider what sanction may be appropriate in all the circumstances, including strike out of the claim.
3. The Claimant failed to attend the open preliminary hearing listed today, Monday 21 May 2018. On Thursday 17 May 2018, I rejected the Claimant's application for a postponement of the hearing, that application being made on 4, 5 and 14 May 2018. Although the application was rejected, the Claimant was expressly notified that he could renew his application in person at the hearing of 21 May 2018. On Friday 18 May 2018, when contacted by the Employment Tribunal administration on the telephone, the Claimant stated that he would not be attending the hearing on 21 May 2018.

### **Facts and background**

4. The Claimant issued proceedings in the Tribunal on 30 August 2017, claiming unfair and discriminatory dismissal, race and/or religious discrimination, and detriment on the ground of making protected disclosures. Substantial issues of jurisdiction arose – as to the Claimant's employment status (latterly he was a governor of the Trust only), as to his length of service (less than two years), and whether his claims were brought out of time. At the closed preliminary hearing on 8 December 2017, these jurisdictional issues were listed to be determined at an open preliminary hearing on 21 May 2018. The Claimant was present representing himself at the hearing. Further, the Claimant was ordered to provide further and better particulars of his discrimination and protected disclosure detriment complaints by 22 December 2017.
5. The Claimant has failed and continues to fail to comply with that order. On 15 January 2018, Employment Judge Ord issued a strike out warning to the Claimant – for failing to comply with Employment Tribunal orders and for failing actively to pursue his case. The Claimant responded on 16 January 2018, objecting to a strike out and requesting an urgent hearing at which he could give his reasons why his claim should not be struck out. By reason of Regional Employment Judge Byrne's direction (referred to above) that hearing was listed today. Not only has the Claimant not attended, but he has not provided – since the strike out warning – anything in writing explaining his failure to comply with the order for further and better particulars. The Respondent is therefore no nearer

to understanding what his complaints of discrimination and protected disclosure detriment are, five and a half months on from the original closed preliminary hearing. Further, the Claimant has failed to comply with the Tribunal's order for disclosure of documents for the listed open preliminary hearing and for the exchange of witness statements for the open preliminary hearing. There is thus no witness statement from the Claimant before the Tribunal today, setting out his evidence as relevant on the issues listed to be determined.

6. Further, the Respondent has suffered substantial prejudice as a result of costs and resources expended in order to defend the claims, and to prepare for and attend the hearings so far listed. They argue also that the claims have little or no merit. As associate general manager, the Claimant resigned from his role on 24 January 2016 (after one year's employment). Not only does he have insufficient service to bring a claim for unfair dismissal, but his claim for unfair dismissal in respect of that role is a long way out of time. No arguments have been presented by the Claimant to support an extension of time. The Respondent also argues that the Claimant's position of governor of an NHS Trust from 1 October 2016 to 21 June 2017 was a statutory position, elected by the parties, with no contract, no pay and no obligation on the Trust to provide work, or obligation on the Claimant to accept it, etc. In other words, the Respondent says that the Claimant was not an employee or a worker when he acted as governor of the Trust. As already stated, the Claimant has failed to particularise his other complaints of discrimination and protected disclosure detriment.
7. On 4 May 2018, the Claimant wrote to the Tribunal – in response to Regional Employment Judge Byrne's directions of 3 May – saying that it was the first time that he had known there was a hearing on 21 May 2018. He referred to another Tribunal case that he brings, against NHS England, listed for a merits hearing at Watford on 10-18 May 2018, and a lack of time and energy to prepare for the 21 May hearing in this case. In a second email of 5 May 2018, the Claimant referred to an appeal in his other case on the basis of a lack of a court approved stenographer or court digital recording systems generally in the Tribunal system, arguing that his case here, against Kettering General Hospital, should be stayed pending a determination of that appeal. On 14 May 2018, the Claimant sent a fit note from his GP, signing him off work from 8–22 May 2018, on account of his type two diabetes. The Respondent objected to that application – for a postponement of the hearing on 21 May, as they understood it to be. I refused the application, but allowed the Claimant to renew it in person at the start of the hearing – see paragraph 3 above.

### **The Law**

8. Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 provides that, 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) and b) are not relevant here

- (c) for non-compliance with any of these Rules or with an order of the Tribunal, or (d) that is has not been actively pursued. Rule 37(2) provides that a claim or response may not be struck out unless the party in question had been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

Rule 47 of the Rules provides that if a party fails to attend or be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable about the reason for the party's absence.

The Respondent's counsel referred to two cases. The first of these was Roberts v Skelmersdale College [2004] IRLR 69, CA. There it was held that when an applicant fails to attend or to be represented at an Employment Tribunal hearing, rule [47] does not impose on a tribunal a duty of its own motion to investigate the case that is before it, nor does it impose a duty on it to be satisfied that, on the merits, the respondent to a case has established a good defence to the claim of the absent applicant. Rule [47] confers on Employment Tribunals a very wide discretion. The Tribunal may adjourn a hearing to a later date, dismiss the application or dispose of it in some other way. Although a Tribunal is entitled to require the respondent to produce evidence, in a proper case it is entitled to use its discretion to dismiss the application without having to investigate further the evidence on the merits of the case, having considered the documents referred to in the rule, all of which would be before the Tribunal. Rule 47 replaces rule 9(3) of the 1993 Rules, and rule 11(3) of the 2001 Rules.

The second case referred to by the Respondent is Andreou v Lord Chancellor's Department [2002] IRLR 728, CA. There it was held that the fact that a person is certified on medical grounds as not fit to attend work does not automatically entail that that person is not fit to attend a tribunal hearing. Whether that is the case is a matter for evidence. In that case, the medical certificate which accompanied the employee's application for an adjournment did not address the question of whether the employee was or was not fit to attend a tribunal hearing.

## Conclusions

9. The case is now no further on than it was nearly six months ago at the closed preliminary hearing. The Claimant has failed to provide particulars as ordered, and has failed to comply with orders so as to get ready for this open preliminary hearing. The Respondent still does not know the case it has to meet with regard to the Claimant's claims of discrimination and protected disclosure detriment. The dismissal claims are potentially barred by jurisdiction issues of time and employment status. The Claimant has not provided any documentation – a witness statement, written submissions or otherwise – as to his case on these jurisdiction points. He is not here in person to make his arguments orally, or at least to apply in

person for a postponement of the hearing on medical grounds or otherwise.

10. In those circumstances, to postpone the hearing and re-list it would be prejudicial to the Respondent and not in the wider interests of justice as it would not be likely to move the case forward, having regard to the history. We are quite likely to be in the same position at the next hearing. Nor do I conclude that it is necessary to hear full evidence and argument from the Respondent on the jurisdiction issues listed to be determined today. On their face, the dismissal claims appear to be barred by reason of being out of time and/or because the Claimant was not an employee or a worker. The Claimant has not provided any argument to the contrary. He has not complied with Tribunal orders and, he having been warned that the Tribunal was considering it, I can strike out his claim on that basis alone.
11. I therefore strike out and dismiss his claims, both under rule 47 and, as necessary, under rule 37(1)(c) and (d). In making that determination, I have considered all relevant documentation that I have seen, including the Claimant's claim form, and his various relevant emails and letters to the Tribunal. I have also in mind that he knows that the Tribunal did not postpone this hearing at his original request, and that the Tribunal said that he might re-open his application today, but he has chosen not to attend, and indicated to the Employment Tribunal administration that he would not be attending. The case of Andreou makes it clear that a fit note obtained for the purpose of the employee's fitness for work does not mean that he is automatically not fit to attend a Tribunal hearing. The Claimant has to establish that he is not fit to do so and he has not done this.
12. The Respondent made an application for costs. However, that application has not been fully particularised for the Claimant (or the Tribunal) so that he can respond to it, even if he has been given some notice of it. I decline to hear that application today. The Respondent indicated that it would make the application fully in writing after the written reasons for the decision today have been sent to the parties. The Claimant will then be given an opportunity to respond in writing to it, and I will make a decision on it thereafter without a hearing.

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Employment Judge G P Sigsworth

Date: 24 / 5 / 2018

Sent to the parties on: .....

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For the Tribunal Office