EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4105707/12 and 4110993/15

Held in Edinburgh on 11 March 2019

Employment Judge: Iain F. Atack

Mr Noor Ahmed Ebbiary	Claimant Represented by: Mr I Wells Solicitor
NHS Lothian	First Respondents Represented by: Mr R Davies Solicitor
Dr Paul Dewart	Second Respondent Represented by: Mr R Davies Solicitor
Lothian Health Board	Third Respondent Represented by: Mr R Davies Solicitor

ETZ4(WR)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is to refuse the application for strike out of the claimant's claims under Rule 37(1)(e) of the first schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

Reasons

Background

1. The claimant has two claims against the respondents. These are claims of direct discrimination on the basis of race, harassment, victimisation and also less favourable treatment on the grounds of being a fixed term employee. There are also claims of breach of contract and for an unlawful deduction from wages.

2. This open preliminary hearing was to consider the respondents' application to strike out both cases on the grounds that it is no longer possible to have a fair hearing in respect of the claims, in terms of Rule 37 (1)(e) contained in schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Rules").

3. In both cases little substantial progress has been made due to the ill-health of the claimant.

4. No evidence was led and both parties were content to rely upon their submissions.

5. Mr Wells, for the claimant, produced a bundle of documents extending to 139 pages. Mr Davies produced a procedural timeline showing what had happened to both cases since their commencement. Mr Wells accepted the timeline as being accurate. Both parties very helpfully produced detailed written submissions and I set out below the main points made in those submissions.

Submissions

Respondent

6. Mr Davies outlined the history of both cases and stated that no substantial progress had been made in respect of either of them, the principal reason for that being the illhealth of the claimant. The cases had been sisted from the outset and there had been repeated extensions of the sist on the basis that the claimant might be fit enough to participate in a matter of months, however on each expiry of the sist a further extension had been required for reasons relating to the claimant's ill health. It was his submission that it was now simply too late to have a fair hearing. That was regardless of when or whether the claimant might be fit to participate.

7. Mr Davies submitted that any final hearing would probably not take place until the summer or autumn of 2019 taking account of the time required to deal both with an outstanding internal grievance process and the usual case management required for both cases. If the cases were not heard until late in 2019 that would be more than 7 years since the first claim was lodged and some 8 years since the initial events relied upon by the claimant.

8. He submitted that in respect of the claims of direct discrimination on the basis of race, harassment, victimisation and less favourable treatment on the grounds of being a fixed term employment the respondent would have to prove substantial matters: the non-discriminatory reason for the decisions, or that section 26 actions were not related to the claimant's protected characteristic, or that the section 27 detriments were not due to a protected act. It was his position that the credibility and reliability of the respondents' witnesses evidence would be central to discharging the burden of proof.

9. The respondents' witnesses in responding to the claim of less favourable treatment would have to explain the reasons why they did various things in the course of their work 7 to 8 years ago. The witnesses would have to accept that after 8 years their recollection of the events and the reason why they did things was not as good as it might be.

10. Although documents might play a role in this case no case relied entirely on documents and witness evidence was also essential. Mr Davies explained that statements had not been taken from the witnesses because it had never been clear that the case was proceeding and the respondent wished to minimise expense. Although there was a detailed discrimination questionnaire response that related only to the first claim and in any event did not mean that evidence in chief would not be required. There was no discrimination questionnaire in respect of the second claim.

11. It was Mr Davies's position that there was a strong likelihood the respondents would be prejudiced by the inevitable effect of the passage of time on the memories of their witnesses and as a consequence the parties would not be on an equal footing. It was unfair to expect the respondent to enter a merits hearing at a disadvantage.

12. Mr Davies referred to the case of *Elliot v The Joseph Whitworth Centre Ltd* UKEAT/0030/13/MC and submitted that following that case a two-year delay could be considered **"inordinate***"* and make a fair hearing impossible. He also referred to in paragraph 16 of that case and submitted that what matters 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 and that cost."** He also referred me to paragraph 14 of that judgement which stated that fading memory may be a reason why there cannot be a fair trial.

13. Mr Davies also referred me to the case of *Riley v The Crown Prosecution Service* [2013] IRLR 966 and in particular to paragraph 27 which stated " **It is important to remember that the overriding objective in ordinary civil cases (and employment cases in this respect are ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to a "fair trial within a reasonable time***."* That is an entitlement of both parties to litigation.

Claimant

14. Mr Wells accepted that the delays in this case had come about at the claimant's request. He submitted that the medical evidence was not that the claimant would not be in a position to appear and give evidence at any stage. His mental health was better

now than it had been 2 years ago. He referred to the medical reports at pages 133-136 and 137-8 of the bundle. Although these reports had been prepared for the claimant's hearing before the General Medical Council it was his submission that they were relevant and provided the best possible evidence that the claimant would be capable of proceeding to a full hearing in early course.

15. The claimant had in any event been able to appear and to give evidence at the General Medical Council hearing.

16. Mr Wells submitted that it was not enough for the respondents simply to suggest that memories may fade. He submitted that they required to be able to convince the employment tribunal that that had in fact occurred or there was at least a substantial risk that a fair hearing could no longer take place. He referred to the case of *Abergaze v Shrewsbury College of Arts and Technology* [2010] IRLR 238. He submitted that the employment tribunal should take an analytical approach to matters and consider if there is factual justification for the reasons being put forward that a fair trial is not possible. It was his position that the respondent had not produced any witnesses to confirm their position.

17. He also submitted that Dr Dewart was a party in respect of the claimant's claims and it was unlikely he would have forgotten key elements of what occurred at material times given the nature of the allegations.

18. This was not a case which had come out of the blue many years after the event given that the first action had been raised shortly after the key incidents relied upon and where detailed grievances had been raised. He did not accept that these were cases where potential witnesses would not be aware of the claimant's claim.

19. The fact that time had passed did not necessarily mean that memories had faded and that would be a factor for the employment tribunal hearing the final hearing to take into account. He referred to the case of *Mannas v Chief Constable of the Police Service of Scotland* [2018] CSOH 126 and particular to the comments of Lord Tyre at paragraph 19. It was Mr Wells submission that the best and most fair way to test the reliability of any potential witness would be at a full hearing rather than the tribunal basing its decision simply upon submissions and running the risk of speculating as to what can

or cannot be remembered. It was for the claimant to make out his claim and he should be allowed to do so unless there are very good reasons for striking it out.

20. Mr Wells also submitted that the tribunal should not conclude too readily that a fair trial is no longer possible but should strive to keep proceedings alive if it is reasonably feasible to do is. He referred to the case of *Blockbuster Entertainment v James* Ltd [2006] IRLR 630 in which the Court of Appeal had referred to the power to strike out as being "draconian".

21. It was his position that a fair trial is still possible and the claimant would rely on documentary evidence. The respondent had ready provided a detailed response to the first case and answered an equality questionnaire. The respondents were aware that the claimant required further information and had refused a request for such which had been made in December 2017. The respondents were fully aware the claimant would be seeking further documentation.

22. It was Mr Wells submission that the case may turn on an analysis of the documentary evidence and records and consideration of any patterns that can be drawn from those documents. It was in the interests of justice that the claimant should be allowed to proceed with his claims. There would be prejudice to the claimant if the claims were struck out and that prejudice would be far greater than any suffered by the respondent if they were to proceed.

23. Mr Wells also referred to the case of *Osonnaya v South West Essex Primary Care Trus*t UKEAT/0629/11.

Decision

24. Rule 37(1)(e) of the Rules provides that the employment tribunal may strike out all or part of a claim on the grounds "**that the tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or part be struck out).**"

25. That is a two stage test. The first stage is to ascertain if one of the specific grounds under Rule 37(1)(e) has been established and if so the second is for the Employment Tribunal to decide, as a matter of discretion, whether to strike out the claim- *HM Prison Service v Dolby* [2003] IRLR 694.

26. The power to strike out was stated in *Blockbuster* to be "**a draconic power, not to be readily exercise**d". In this case the respondent's argument was that with the passage of time the memories of witnesses might fade. As the case of *Abergaze* illustrates, before the tribunal strikes out a claim under this rule, it should carefully analyse the reasons why it is alleged that a fair hearing is not possible and ensure that there is a proper factual justification for those reasons, however long the delay. In this case the respondent has known about the claims since 2012 and had responded in detail to the first claim. Dr Dewart had taken part in the GMC hearing relating to the claimant.

27. The respondents have not stated that the witnesses were unavailable or untraceable but have merely asserted that their memories will have faded. They have taken no steps to mitigate any fading memory such as witness statements and, as Mr Davies candidly admitted in his submissions, statements have not been taken because it had not been clear that the case was proceeding and the respondents wanted to minimise expense.

28. I was not persuaded that it had not been clear that the case was proceeding. All the delays that have taken place had been due to the claimant's ill health and there has been no suggestion that the claimant did not intend to pursue his claim. The respondents have deliberately chosen not to take witness statements to save expense.

29. I accept that fading memory may be a reason why there cannot be a fair trial but in this case I am not satisfied that memories have indeed faded as that was simply speculation based on the fact that a number of years have passed since the incidents relied upon and the claims were made. There is no question here of witnesses going missing or of any documents being, for whatever, reason unavailable and the only reason put forward by the respondents is the suspected one of fading memories. The respondents could have taken witness statements at the time of the raising of the first claim but chose not to do so.

30. I was not persuaded that there was a factual basis for stating that a fair trial was no longer possible simply due to the effect of the passage of time on witnesses' memories. Other than the suggestion that memories would fade no evidence was produced.

31. In this case although the claimant has been ill for some considerable time, on the evidence available at this hearing it appeared that his mental health was improving. He had been able to take part in the GMC hearing and as Mr Wells pointed out the medical report produced for that hearing indicated an improvement in his mental health. There was no suggestion that the claimant would be unable to participate in this case if it was allowed to proceed.

32. I took into account the fact that the delays were not caused by any fault of the claimant but were purely due to his ill-health.

33. The case of *Elliott* stated in paragraph 16 "**it is axiomatic in the exercise of discretion on a strikeout that there will be an equal and opposite balance of prejudice as a matter of routine in such a case**." I fully accept that in this case given the nature of the claims brought against the respondents they may well face a burden of proof in relation to the claims of race, harassment, victimisation and less favourable treatment on the ground of being a fixed term employee. They have however known of the nature of the claims for some considerable time. In my opinion if they had not taken steps to secure relevant information from witnesses then that is not something from which they can now benefit by having the claims struck out. They could have taken statements when the claim was first raised and the reason they did not was purely financial.

34. Whilst the extent of any fading of witnesses' memories with the passage of time may be speculative the fact that memories may well have faded is well known. I accept that the respondents may have a difficulty if the burden of proof shifts to them but I do not consider that that potential prejudice outweighs the actual prejudice to the claimant in granting this application.

35. In *Blockbuster* it was stated at paragraph 18, "**the first object of any system of justice is to get triable cases tried"**. In this case I was not persuaded that it was not possible to get this case tried. It appears that the claimant is recovering and as he has been able to take part in the GMC hearing there is no evidence at this stage

to suggest that he is unable to take part in the final hearing of this case in due course.

36. Taking into account all that was said by Mr Davies and Mr Wells I was not satisfied that it was no longer possible to have a fair trial of the two cases the claimant has brought. The specific ground in Rule 37(1)(e) has not been made out. Accordingly I refuse the application for strike out.

37. With regard to the future disposal of these cases, they should be listed for case management in the usual way as soon as possible so that they may proceed to a final hearing without delay.

Employment Judge: Iain F Atack
Date of Judgement: 04 April 2019
Entered in register: 08 April 2019
And copied to parties