



EMPLOYMENT TRIBUNALS

Claimant: Mr N P Kumar

Respondent: University Hospitals of Morecambe Bay NHS Foundation Trust

Heard at: Manchester (by CVP)

On: 1 November 2024

Before: Employment Judge Phil Allen

REPRESENTATION:

Claimant: In person

Respondent: Ms L Gould, counsel

JUDGMENT

The application to strike out the claim because it is said it is no longer possible to have a fair hearing under rule 37(1)(e) of the Employment Tribunal Rules of Procedure is not successful and does not succeed.

REASONS

Introduction

1. This was the decision reached in the respondent's application to strike out parts of the claim made under rule 37(1)(e) of the Employment Tribunal rules of procedure (only). The decision in the deposit application is recorded in a separate deposit order. The Judgment in the respondent's application that the claim be struck out under rule 37(1)(a) has been recorded in a separate Judgment.

Issues

2. The respondent made an application that the claim should be struck out under rule 37(1)(e) because it was no longer possible to have a fair hearing.

Procedure

3. The claimant represented himself at the hearing. Ms Gould, counsel, represented the respondent.

4. The hearing was conducted by CVP remote video technology.
5. An agreed bundle of documents was prepared in advance of the hearing.
6. Each of the parties made oral submissions.
7. After an adjournment, I informed the parties of my decision and the reasons for it. Written reasons were requested by the respondent and so this document has been provided.

Facts

8. The key facts as they related to the strike out application are recorded in the decision below. The matters relied upon in the claim date back to 2017. Some of the evidence in the case relates to the period of the Covid pandemic and the operation of an NHS Trust during that period. The claim was entered in September 2021. The respondent's decision maker in the dismissal has, sadly, deceased. She died in March 2023. For the final hearing, the respondent has called the HR person who provided support to the decision-maker but highlighted the difficulties in them being able to do so and in recalling those matters. The case was listed for a final hearing in June 2024, but that hearing was postponed due to an application by the claimant accompanied by medical evidence. The final hearing has been relisted for February 2026. The claimant's position at the preliminary hearing was (in summary) that he hoped he would be fit enough to attend the final hearing. He had tried to obtain legal representation, but he had not been able to do so.

The Law

9. I have the power to strike out a claim under rule 37(1)(e) if I consider that it is no longer possible to have a fair hearing.

10. The respondent's counsel referred me to the relevant chapter of the IDS handbook, which I read. She also referred to two authorities: **Leeks v University College London Hospitals NHS Foundation Trust** [2024] EAT 134 and **Mukoro v Independent Workers' Union of Great Britain** UKEAT/1028/19 and I considered what was said in those Judgments. In the latter, the Employment Appeal Tribunal said:

"we consider that it was an error of law for the Employment Tribunal to take into account an irrelevant factor, namely its view of what was in the Claimant's best interests"

The conclusions – applying the law to the facts

11. I focussed in particular on exactly what was said in the Rule at 37(1)(e) of the Employment Tribunal Rules of Procedure. That says that I may strike out the claim on the grounds that I consider that it is no longer possible to have a fair hearing in respect of the claim.

12. I considered the relevant part of the IDS Handbook to which I was referred by the respondent's counsel and I also looked at the cases of **Leeks** and **Mukoro** to which I have already referred.

13. I particularly noted what was said in the **Mukoro** decision. I was very concerned by the claimant's statement in his submissions at the hearing that he might consider suicide and die before the final hearing, albeit I understood that the claimant made that statement really to illustrate a point rather than as a genuine statement of his mindset at the hearing. Nonetheless, I noted that what I was told in **Mukoro** was that I must not decide whether it is in the claimant's best interests to strike out his claims, so I have not taken that into account.

14. I am very concerned about whether the claimant will be fit and able to conduct the final hearing, which is now listed in February 2026. Unfortunately, based upon what the claimant said at the hearing, it appears unlikely that he will be able to obtain representation for that hearing. As a result, he will need to represent himself in a hearing conducted over ten days. It is entirely possible that the adverse health reaction which occurred in May 2024 will be repeated in February 2026.

15. As the respondent's representative highlighted, that could mean that the respondent and its witnesses will need to re-prepare for, and set aside time from NHS duties for, another hearing which may not go ahead, and there will be significant costs incurred. However, based upon the limited medical evidence that was provided and primarily based upon what the claimant said at the hearing, I did not reach the decision that it was no longer possible to have a fair hearing. It may be that ultimately it transpires that it will not be, but in fairness (applying the overriding objective and dealing with the case fairly and justly) I decided it was not the right decision for me to strike out the case under rule 37(1)(e).

16. I would add that, should it in fact not be possible to conduct the final hearing on the dates listed in February 2026, the arguments for the respondent on this point may then be very strong.

17. I considered all the matters that the respondent's representative raised at the hearing. I have not addressed them all point by point. I did take into account the respondent's position and the impact that having this claim hanging over the respondent's witnesses will have, when it will hang over them far longer than it should. I did note that a key witness is very sadly deceased and, whilst she would not have been available to have given evidence even had the case gone ahead in June of this year, I understood that others giving evidence about her decision was made even more difficult by the further delay.

18. The historic nature of many of the facts and some of the disclosures was also troubling. Recalling decisions made in the height of Covid will be even more difficult in 2026, than it would have been in June this year.

19. The evidence from May was that the claimant's condition worsened prior to the previous hearing. That was noteworthy. However, nonetheless, the claimant said at the preliminary hearing that he wanted his case to be heard, there must clearly be some genuine prospect that it will be possible for it to be heard in February 2026, and on that basis I decided not to strike out the claim under rule 37(1)(e).

Employment Judge Phil Allen

Date: 6 November 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
8 November 2024

FOR THE TRIBUNAL OFFICE

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