Case Number: 2304518/2018

EMPLOYMENT TRIBUNALS

Claimant	Mr A Bennett
Represented by	Mr B Bennett (Claimant's father)
Respondents	Royal Borough of Greenwich
Represented by	Mr N Porter (counsel)

Before: **Employment Judge Cheetham QC**

15 March 2023 at London South
Employment Tribunal by Cloud Video Platform

JUDGMENT

1. The claim is struck out pursuant to Rule 37(1)(e) as it is no longer possible to have a fair hearing in respect of the claim.

REASONS

2. This Preliminary Hearing was listed to hear the Respondent's application to strike out the claim pursuant to Rule 37, on the basis that it is no longer possible to have a fair hearing in respect of the claim.

3. I have had the benefit of both written and oral submissions from counsel for the Respondent and have heard from the Claimant's father, as well as reading recent email correspondence from him. I have also read the witness statements of Fiona Apio-Matanda and Tim Watkins for the Respondent, which explain how they are affected by these ongoing proceedings. They were present and available for questioning, but Mr Bennett did not wish to challenge them and I take at face value what they have said.

<u>The law</u>

4. Rule 37 states:

> *(1) 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).*

5. Also relevant is the Overriding Objective of the Rules, which is:

> *"… to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a)ensuring that the parties are on an equal footing;*
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> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.*

6. I am also required to consider Article 6.1 of the European Convention on Human Rights, which states:

> *In the determination of his civil rights and obligations […] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

7. Mr Porter referred to three authorities. First, **Riley v Crown Prosecution Service** [2013] EWCA Civ 951, in which Longmore LJ stated (with those passages emphasised by Mr Porter in bold):

> *27 It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect 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.*** *It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. Judge Hall-Smith correctly found assistance in remarks of Peter Gibson LJ in Andreou v The Lord Chancellors*
> *Department which are as relevant today as they were 11 years ago:-*
>
> > *"The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights, having regard to the terms of Article 6): they had to include fairness to the respondent.* ***All accusations of racial discrimination are serious. They are serious for the victim. They***

> ***are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period…"***
>
> *27 It would, in my judgment, be wrong to expect tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a tribunal. Like Wilkie J I can see no error of law and would dismiss this appeal.*

8. In **Peixoto v British Telecommunications plc** UKEAT/0222/07, [2008] All ER (D) 240 (May), the EAT emphasised the requirement that, for a fair trial to occur, it must be within a reasonable time as stated in Article 6. Mr Porter also referred to **Osonnaya v South West Essex Primary Care Trust** UKEAT/0629/11 (20 March 2012, unreported).

The claim and the procedural background

9. The Claim Form was received by the tribunal on 17 December 2018. It relates to events that occurred between March and July 2018, so some 5 years ago. There are significant factual disputes around what is said to have occurred, particularly around a key incident on 25 July 2018. In other words, the tribunal will need to determine the facts from disputed witness evidence.

10. Preliminary Hearings were held on 2 July 2019, 3 August 2020 and 30 November 2020, when the claim was listed for a final hearing on 21 and 22 September 2021. That hearing was postponed after an application on the Claimant's behalf, which referred to the impact of these proceedings on his mental health. It was re-listed for 15 and 16 August 2022, but postponed on the first morning, again owing to C's health. A third set of dates was given for 11 – 13 January 2023 (3 days), but once more the hearing could not go ahead because of the Claimant's ill health and hospitalisation.

11. It also relevant to refer to a case management hearing that took place on 13 October 2022, because the Judge made clear that the issues in the case have still to be finalised, which therefore might also mean that fresh evidence will be needed.

12. Therefore, as things stand today, there have been three postponed final hearings, three Preliminary Hearings (not including today's) and also a case management hearing, plus of course a very considerable amount of correspondence.

13. I should add that were the tribunal to list a further final hearing today, that would be unlikely to take place before early next year.

The application and the Claimant's response

14. The Respondent's application is that a fair hearing is no longer possible, for these reasons.

15. First, the Respondent refers to the amount of time that has passed. This means that it is unrealistic to expect witnesses to recall with any precision matters that are in dispute. It would be nearly 6 years before the hearing and that is simply too long in these circumstances.

16. Secondly, there is no medical evidence giving a clear prognosis as to the Claimant's health. It is no criticism at all of the Claimant to say that the history of the litigation shows both that his ill health has prevented his claim from being actively pursued, but also that the proceedings have contributed to that ill health. However, that also means that any future hearing is also likely to be at risk of postponement.

17. Thirdly, the Respondent's witnesses have themselves found and continue to find this process very stressful. As mentioned earlier, I take at face value what they have said.

18. Fourthly, the issues in the case have still not been finalised, which means there would need to be at least one further case management hearing and that could also lead to further delays. Witness evidence would need to be supplemented and it is relevant that two of the witnesses no longer work for Respondent. I am also told that two witnesses are themselves disabled.

19. Fifthly, there are issues over proportionality. These relate to the value of the claim, which at its highest is £11,234 and which therefore makes it a claim of relatively low value, and also to the extensive costs to the Respondent, which is of course a local authority.

20. In reply, Mr Bennett said that the evidence from Mr Watkins has already been taken and, as he said in his email, he questions whether the Respondent's witnesses should find this as stressful as they claim.

21. He said that the prognosis for his son is good, as he is taking new medication and he does not think he will need to be hospitalised again and he should therefore be able to attend future hearings.

Conclusion

22. Applications such as these are difficult for everyone. This application does not contain any criticism at all of the Claimant, rather a recognition of the great difficulties that have been caused by his ill health, primarily for him and for his family, but also for this case.

23. In my view, it will not be possible to have a fair trial in this case, which is a conclusion I reach reluctantly, but at the same time consider to be based on very strong arguments, which taken together make this outcome inevitable.

24. First, while Mr Bennett's positive words about his son's condition are obviously encouraging, there is no clear prognosis based on medical evidence. The history of the litigation does show, as the Respondent submits, that his ill health has not only prevented his claim from being actively pursued, but also that unfortunately the proceedings have contributed to that ill health. I agree that any future hearing is also likely to be at risk of postponement, which would lead to yet further delays.

25. Secondly, I also agree that it is unrealistic to expect witnesses to recall with sufficient precision matters that are in dispute, when it will be nearly 6 years after the incidents in issue. I also take into account that R's witnesses have themselves found and continue to find this process stressful, as well as that two have left the Respondent's employment. As I have been reminded, it is important that I take into account the impact of the continuing litigation on both parties.

26. Thirdly, it troubles me that the issues in the case have still not been finalised, which means there would need to be at least one further case management hearing and one can easily see further delays as a result.

27. Fourthly, I consider that there are serious issues of proportionality. The claim, at its highest, is valued at £11,234 and is therefore a claim of relatively low value. Further, I take into account the extensive costs to the Respondent.

28. Therefore, I am bound to reach the conclusion that these factors taken together, but particularly the amount of time that has now elapsed, mean that a fair trial is no longer possible and the claim must be struck out. I know that will be disappointing for the Claimant and repeat that this reflects no criticism of him or his father, but simply the unfortunate consequence of this long history of delays and postponements.

Employment Judge S Cheetham QC
Dated: 15 March 2023