



## THE EMPLOYMENT TRIBUNALS

**Claimant : Mr J Edward**

**Respondent : Tavistock and Portman NHS Foundation Trust**

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT:** London Central

**ON:** 8<sup>th</sup> February 2019

**EMPLOYMENT JUDGE:** Ms S. Sharma

#### *Appearances*

**For the Claimant: In Person**

**For the Respondent: Mr W. Young, of Counsel**

### JUDGMENT OF THE OPEN PRELIMINARY HEARING

1. The Respondent's application to strike out the Claimant's claims under Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules") is denied .
2. The alternative application of the Respondent to require the Claimant to pay a deposit under Rule 39 ET Rules is also denied.

The Claimant's claims will be heard at hearing **at London Central Victory House,30-34 Kingsway, London, WC2B 6EX** from **18<sup>th</sup> to 26<sup>th</sup> June 2019**.

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**EMPLOYMENT JUDGE SHARMA**

**JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON  
8 February 2019**

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**JUDGMENT SENT TO THE PARTIES ON**

**11 February 2019**

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**FOR SECRETARY OF THE TRIBUNALS**

**REASONS FOR JUDGMENT OF THE OPEN PRELIMINARY HEARING**

1. The Claimant has brought claims against the Respondent by issue of his claim form received by this Tribunal on 23 August 2018. Some of these have been withdrawn and/or struck out. The two remaining claims before this Tribunal for resolution are the Claimant's claims for unlawful age and race discrimination and harassment, pursuant to sections 5,9,13 and 26 of the Equality Act 2010 ("EA").
2. At this Open Preliminary Hearing, I first dealt with the Claimant's two applications.

**Claimant's Application to Postpone this Open Preliminary Hearing**

3. On 6 Feb 19, 08.16, the Claimant requested a postponement to this hearing. This was rejected by my colleague, Employment Judge Glennie, where he stated that the Claimant could put forward arguments for a postponement at today's hearing. I gave the opportunity for both the Claimant and Mr Young to address me on this application. The Claimant, having taken the oath, stated that he has not had the opportunity to make written representations, as are referred to in this Tribunal's letter dated 4 February 2019.
4. I believed it was not in the interest of justice or in line with the overriding objective to postpone this hearing, particularly because this preliminary hearing was fixed and made known to the Claimant at the preliminary hearing of 19 December 2019, (albeit that this was referred to as a provisional preliminary hearing) as recorded in Employment Judge Grewal's Order of 27 December 2018.
5. Further, on 4 December 2018, My Young submitted that the Respondent had wrote to the Claimant putting him on notice of the Respondent's applications to strike out or in the alternative, to make a deposit order. At today's hearing, the Claimant confirmed that he knew about the applications but he thought that written directions would be given to him.

**Claimant's Application to Amend his Claim to Include Victimisation**

6. The Claimant, by e-mail to this Tribunal, dated 28 January 2019,22.29, also sought permission to amend his claim to include a victimisation claim. This application has been rejected on the basis that this amendment had already been considered by my colleague, Employment Judge Grewal at the preliminary hearing dated 19 December 2018. At paragraph 9 of the Notes of Discussion, she set out in detail her reason for refusing to grant the Claimant leave to amend his claim. This matter was therefore dealt with then and I do not propose to address this again. Mr Young submitted that a claim needs to be properly particularised; relying on a section number or referring to "victimisation" is not sufficient for such a claim to be properly particularised.

**Respondent's Applications to Strike out the Claims: Rules 37 and 39**

7. The Respondent has brought an application for a strike out or in the alternative, a deposit order under Rules 37 and 39,respectively, of the Employment Tribunals

(Constitution and Rules of Procedure) Regulations 2013 (“ET Rules”) on the basis that the Claimant’s claims have no or in the alternative little prospect of success.

8. The Respondent brought these applications because it is the Respondent’s case that there is a lack of evidence of unlawful age or race discrimination. It was the Respondent’s position that the Claimant should thus not be permitted to proceed with his claims merely by the fact that he is of an age or of a race (*Madrasas v Nomura International Plc*). Further, it was the Respondent’s position that a difference in age profile in the Claimant’s team and an alleged comment relating to immigration will not shift the burden of proof to the Respondent.
9. The Respondent saw this as an exceptional case where it would be appropriate for the Tribunal to exercise its discretion to strike out the discrimination claims at this preliminary stage.

### **Application to Strike Out under Rule 37**

10. In relation to Rule 37 (1) (a), ET Rules, the Respondent stated that the claim should be struck out because it has no reasonable prospect of success.
11. Mr Young submitted that in relation to the claim of direct age discrimination and harassment, there are no pleadings on age discrimination. Thus, this claim has no reasonable prospect of success.
12. In relation to direct race discrimination and harassment, paragraph 26 of the Claimant’s amended claim refers to what the Claimant describes as a racially motivated comment by Kerri Johnson Walker (“KJW”). Mr Young submitted that this is the only allegation of race discrimination and this is not much to base a race claim on. Indeed, Mr. Young submitted that this is not a racist comment but reflects a main stream political opinion. Mr Young submitted that this comment is not capable of amounting to facts from which the Tribunal can conclude that other people’s actions were motivated by race.
13. Mr Young submitted that the Claimant’s later complaints, namely of downgrading him, no alternate employment, rejection of appeal was done by other parties other than KJW.
14. In relation to Louise Lyon and para 53 of the Claimant’s amended claim,, Mr Young submitted that there was an allegation of discrimination because of a difference in treatment but the Tribunal cannot conclude discrimination as this shows a difference in status. This is not enough to reverse burden of proof. Referring to para 54 of the Lord Justice Mummery’s judgment in *Madressey*, it was held that a difference in status or treatment is not enough to make burden of proof shift.
15. Para 53 of the amended particulars does not show any adverse treatment. Nothing in addition to show a difference in treatment. In relation to SM, HF, KJ, there is no allegation of discrimination against them. Any allegation of discrimination other than KJW is bound to fail.

16. In relation to some of the claims being out of time, Mr Young submitted that the ET1 was received by this Tribunal on 23 Aug 18, The Claimant was dismissed on 8 May. The Claimant knew of the 3-month deadline as the e-mail from Ms Haselton dated 31 July 2018,16.17 informed him that the deadline for a claim is 7 August 2018.

17. Further, in relation to whether it was just and equitable to extend time, Mr. Young submitted that it was not just and equitable to extend time under s123 (2)(a), Equality Act 2010. The Claimant had not given any reason for the delay. Mr Young submitted that the claims are weak and thus time should not be extended.

18. The Respondent's application for a strike out was denied for the following reasons: -

(a) The Court of Appeal in Robertson v Bexley Community Centre trading as Leisure link (2003) IRLR 434 held that: -

“The exercise of the tribunal's discretion is the exception rather than the rule.”

That was noted. However, it is not possible to determine that there is no reasonable prospect of success of these claims without all the evidence being presented before a Tribunal at a full merits hearing and the Tribunal be given an opportunity to consider the evidence.

(b) In so far as any claims are out of time, then in this case it is just and equitable to extend time. Applying s 33 Limitation Act 1980 and the checklist (modified by the EAT in British Coal v Keeble (1997 IRLR 336, EAT):

(i) In relation to the prejudice each party will suffer because of the decision, I do not believe that one party will suffer more prejudice than the other by extending time on a just and equitable basis.

(ii) In relation to a consideration of all circumstances of the case, this was considered, and specifically the affect on the Claimant in not being given an opportunity to present his case.

(c) The other factors were considered including the length and reason for the delay and the promptness of the Claimant's actions. In relation to the steps taken by the Claimant to take legal advice, I received no information on this.

### **Application for a Deposit Order**

19. If the Tribunal is not minded to strike out the claims, then the Respondent requests, in the alternative, that this Tribunal make an order, under Rule 39 ET Rules, for the Claimant to pay a deposit order in order to be able to continue with these proceedings on the basis that it is the Respondent's case that the claims have little reasonable prospect of success. Mr Young submitted that I should consider making even a nominal deposit order as an indication that I believe the claims to have little reasonable prospect of success.

20. This application is was denied for the following reasons: -

(a) On oath, Mr Edwards gave evidence of his means, namely, he had £2 in his current account and £6 in saving account. Taking this into account, it is not in the interest of justice to make such an order.

(b) Again, it is not possible to determine that there is little prospect of success without the full facts and evidence being reviewed.