



EMPLOYMENT TRIBUNALS

Claimant: Mr C Day
First Respondent ('R1'): Lewisham and Greenwich NHS Trust
Second Respondent ('R2'): Health Education England

RECORD OF A PRELIMINARY HEARING

Heard at: London South Employment Tribunal (by CVP)
On: 19 March 2021
Before: Employment Judge Kelly (sitting alone)

Appearances

For the claimant: Mr Allen QC
For the first respondent: Mr Tatton Brown QC
For the second respondent: Mr Basu QC
For the putative third respondent: Mr Kemp of counsel

CASE MANAGEMENT SUMMARY

Circumstances of hearing

- 1) This has been a remote hearing. The parties did not object to a remote hearing format. The form of remote hearing was video - V. A face to face hearing was not held because it was not practicable and no-one requested it.
- 2) The efficiency of the hearing was greatly impeded by the failure of the parties to agree a bundle of documents relevant to the hearing and to send this to the Tribunal. The hearing was subject to an entirely unnecessary series of breaks to wait for further documents to be sent in piecemeal.

Applications

- 3) We considered the following applications:

- a) By the claimant to amend his claim to include the claims raised in his fourth claim to the Tribunal presented on 4 Jan 2021. The principles in Selkent were considered.
- i) The claimant acknowledged that the claim was out of time; it related to alleged detriments set out in para 5 of the fourth claim Grounds of Complaint relating to the alleged failure of R2 to correct alleged misleading information/impressions provided by Dr Frankel to Sir Norman Lamb in December 2018 and as set out in a letter from Sir Norman Lamb to Prof Cummings in May 2019.
 - ii) The claimant's case was that he was unaware that R2 had circulated Dr Frankel's paper internally and considered Dr Frankel's paper was misleading until he saw R2's disclosure documents at the end of 2020. Therefore, he could not have made his application to amend prior to that date.
 - iii) The claimant saw the amendment as beneficial because it would remove the complex issue from the claim as to whether Dr Frankel was acting as an agent of R2. Given the postponement of the hearing, there was time for the new issues raised to be dealt with. It was in the interests of justice for the complaint raised to be aired.
 - iv) R2 pointed to an email from the claimant to Sir Robert Francis of 11 Jun 2019 in which he said that R2 had not been prepared to give a clear position to Sir Norman Lamb on the public statements in their ET3. R2 said that the claimant was aware of the R2's failure to correct misleading information since June 2019 and should have made his claim at that time. Since that time, the claimant had had copious correspondence with R1 and R2 and with Sir Norman Lamb and had litigated to the Court of Appeal with the assistance of counsel and solicitors. On the time point, the relevant law was the reasonable practicability test. R2 would have to get evidence from a new witness, Prof Cummings, who had now left its employment, he being the person who received Sir Norman Lamb's letter referred to above. Apparently, going to the merits of the claim, R2 said that it was reasonable for R2 not to comment on Dr Frankel's paper because the claimant had, by that time, raised legal complaints. The claimant could potentially recover the same compensation if he succeeded in a claim against Dr Frankel which he was trying to add to his claim.
 - v) There were no submissions from R1.
 - vi) Conclusion: The amendments sought relate to factual matters which happened about 18 months prior to the new claim being presented and so they are substantially out of time. The claimant has had substantial legal assistance during that period. We consider that it was reasonably practical for him to have brought the claim he wishes to add in June 2019 when he knew he had a complaint about what R2 was saying to Sir Norman Lamb, as shown by his comments to Sir Robert Francis referred to above. This claim was ready for hearing at the start of March 2021 and it would put the parties to further expense to have to potentially enter into discovery and exchange

of new witness evidence about the new proposed claim. R2 would need to take witness evidence from Prof Cummings as to his failure to act on the letter of 22 May 2019 when Prof Cummings is no longer an employee and, assuming he will give evidence, it will be almost two years since the events in question which he would have to recollect. This is potentially highly prejudicial to R2. If the amendment is not allowed, the claimant can still continue with his existing claim, meaning that the prejudice to him if the amendment is not allowed is limited.

vii) Therefore, we refuse the amendment application.

- 4) By R2, for an order for the claimant to provide information relating to a complaint against Mr Milsom, his former representative. Subject to an amendment suggested to the terms of the order by claimant, this order is made by consent below.
- 5) By the claimant, for witness orders. The other parties accepted that they had no requirement to see the terms of the order sought and the order sought is separately.
- 6) By the claimant, for specific discovery of documents relating to an alleged Board Meeting of R1 of 14 October 2018, including its organisation. R1 said there were no such documents; there was no board meeting. R1 accepted there was a telephone discussion, but does not accept that communications setting up the meeting were not relevant.
- 7) By R2, for a PH on the issue of whether Dr Frankel was a worker or agent of R2 at the relevant time.
 - a) R2 said that this was a discrete issue and that, if Mr Frankel were found not to have the relevant status, that would be the end of the only detriment claim which was in time and so significantly reduce the time of the final hearing. Any time spent in a PH on this issue would reduce the time dealing with it at the final hearing.
 - b) The claimant objected saying that it was a factually and legally complex point which would require four witnesses and that it needed to be determined with all the other issues. Whichever way the decision went, the outcome may well be appealed which would mean the final hearing would be adjourned and there would be further significant delay to the claimant. The claimant said that this was exactly what had happened when there had been a preliminary issue in his first claim.
 - c) R1 supported the application saying that, if Dr Frankel were found not to have the relevant status, the final hearing would be shorter and that, if there were an appeal against the preliminary hearing point, the final hearing could still go ahead without postponement.
 - d) There was a dispute over the length of such a preliminary hearing with R2 saying it would take two days and the claimant saying it would take 5 days. It was not possible to list a 5 day hearing until March 2022 and a previous discussion with the parties about their available dates in 2022 had indicated that

no 5 day slot would be found prior to the day agreed for the final hearing. It would be possible to have a three day hearing in January 2022.

- e) We decided that it would be appropriate to list the issue for a preliminary hearing. The claimant would not be able to proceed with a significant element of his claim unless he could show Dr Frankel's worker/agent status. The time to be taken for this issue would have to be spent at the final hearing if it were not determined at a PH. If the PH decision went against the claimant, it could significantly reduce the length of the final hearing. Tribunals are used to dealing with complex factual and legal scenarios at PHs on status. We considered it a reasonable compromise to list the PH for three days. This could be heard in January 2022. If the decision went against the claimant, this may result in a final determination of the claims (through settlement) significantly sooner than dealing with all issues at a final hearing in June 2022.

Other matters

- 8) The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/
- 27) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- 28) If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.
- 29) The following case management orders were made and the disputed ones are referred to above:

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. One day preliminary hearing

- 1.1 There will be a Preliminary Hearing on **10 May 2021** starting at 10.00am by **CVP** before **EJ Kelly** to consider:
- 1.1.1 The claimant's application to add Dr Frankel as a party;
- 1.1.2 Finalisation of the issues
- 1.2 If the claimant does not pursue the application to add Dr Frankel as a party, the hearing will be vacated and the Tribunal will consider an application on the papers on the finalisation of the issues, in which case any party who wishes to make submissions on this must send them to the tribunal by **4 May 2021**.

- 1.3 The claimant will prepare a paginated and indexed bundle of all the documents relevant for this PH and send it to R2 and Dr Frankel's legal representative by **12 April 2021**. (R1 indicated that it would not attend the hearing.)
- 1.4 The claimant will send the bundle electronically to the Tribunal two days prior to the hearing.
- 1.5 The parties will exchange and skeleton arguments and legal authorities on the PH issue no later than **4 May 2021**. The claimant will file with the Tribunal an electronic copy of all these documents two days prior to the hearing.

2. Three day preliminary hearing

- 2.1 There will be a preliminary hearing of **3 days** starting on **17 January 2022** before any judge to determine: whether Dr Frankel was at the point of any alleged detriments from 14 Dec 2018 to 8 Jan 2019 a worker or an agent of R2 acting in the course of his employment or with R2's authority either precedent or subsequent.
- 2.2 By **5 July 2021** the parties will agree the hearing bundle for this issue and R2 will produce a paginated and indexed bundle for it and send it to the other parties.
- 2.3 By **6 September 2021**, the parties will exchange the written witness evidence on which they wish to rely for this issue.
- 2.4 The parties will exchange any skeleton arguments and legal authorities relating to the issue no later than **10 January 2021**. R2 will file with the Tribunal an electronic copy of all these documents two days prior to the hearing.
- 2.5 The parties will agree a timetable for the hearing to be concluded (including Tribunal decision making and promulgation of decision) by **10 January 2021**.
- 2.6 The parties will agree a neutral chronology and cast list (or in the absence of agreement, exchange their respective final versions) relating to the issues for consideration at this hearing by **10 January 2021**.
- 2.7 **If the hearing takes place at the tribunal hearing centre:** By 9.30am on **17 January 2022**, the following parties must lodge the following with the Tribunal:
 - 2.7.1 two copies of the bundle(s), by R2;
 - 2.7.2 two hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in accordance with rule 44), by whichever party is relying on the witness statement in question;

2.7.3 one copy of all the skeleton arguments and authorities of all parties, plus the agreed timetable and chronology and case list, by R2

Note: In the event that virus precautions are still necessary, either appropriate gloves must be provided for the witnesses to use when handling the bundle or sufficient copies of the bundle must be provided so that each witness has their own bundle.

2.8 If the hearing is by video conference:

2.8.1 By no less than 2 working days before the start of the hearing, the parties must send electronic versions to the Tribunal of the witness statements, hearing bundle, skeleton arguments and any authorities to be relied on, in compliance with the Presidential Guidance on remote hearings accessible here: <https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PG-Remote-and-In-Person-Hearings-1.pdf>. Please note in particular para 24 of the Guidance.

3. Final hearing

3.1 All outstanding issues in the case, excluding remedy, will be determined at a final hearing before an Employment Judge sitting with members at the London South Employment Tribunals, for **15 days**, starting at 10 am or as soon as possible afterwards on **20 June 2022**.

3.2 The first day of the hearing will be for reading and the parties need not attend until 9.30am on the second day of the hearing.

4. Remedy Hearing

4.1 There will be a **two day** remedy hearing if required starting on **3 October 2022**. Any directions for preparation can be made at the final hearing.

5. Applications

5.1 For reasons as set out above, the claimant's application to amend his claims set out in his fourth claim to the Employment Tribunals is refused.

5.2 For reasons set out above, R2's application for a preliminary hearing relating to the status of Dr Frankel was agreed and the hearing is listed above.

6. Complaints and issues

6.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

7. Further information

- 7.1 The claimant will by **9 April 2021** confirm to the parties and the Tribunal whether or not he wishes to continue with his application to join Dr Frankel as a party and, if so, on what basis. If the claimant does not wish to join Dr Frankel, he must apply to the Tribunal to vacate the hearing with the parties listed for 10 May 2021 and must remind the Tribunal that the outstanding issues will be dealt with on paper by EJ Kelly in chambers.
- 7.2 The claimant will by **9 April 2021** disclose to the other parties any complaint made by him (relevant to the issues) concerning Chris Milsom of counsel including but not limited to any complaint to the Bar Standards Board, head of chambers, inns of court or the information commissioner and any other relevant claims to any court concerning Mr Milsom including but not limited to pre-action letters and responses to claims or complaints (excepting that if the claimant says that any such document is subject to litigation privilege, he shall not be required to produce it but will explain why it considers the document is subject to such privilege to the other parties.)
- 7.3 By **16 April 2021**, R1 will produce to the claimant documents arranging a telephone board discussion on 14 October 2018 which are relevant to the issues in dispute.

7. Final hearing bundle

- 7.1 R1 will ensure that any amendments to the hearing bundle/its index are circulated to the parties by **24 December 2021**.
- 7.2 If the claimant wishes to produce further documents which the respondents say are irrelevant, he shall out them into a paginated and indexed bundle and circulate this to the parties by **24 December 2021**.

8. Witness statements for final hearing

- 8.1 The claimant and the respondents shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **26 April 2022**. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle(s); contain only evidence relevant to issues in the case.

9. Final hearing preparation

- 9.1 By no less than 7 days before the start of the hearing, the parties must:
 - 9.1.1 Exchange copies of any legal authorities on which they intend to rely;
 - 9.1.2 Agree a neutral chronology and cast list (or in the absence of agreement, exchange their respective final versions);
 - 9.1.3 Agree a reading list for the Tribunal;

- 9.1.4 Agree a timetable for the hearing to be concluded (including Tribunal decision making and promulgation of decision).
- 9.2 **If the hearing takes place at the tribunal hearing centre:** By 9.30am on **20 June 2022**, the following parties must lodge the following with the Tribunal:
- 9.2.1 four copies of the bundle(s), by R1;
 - 9.2.2 four copies of the claimant's bundle referred to at order 7,2 above by the claimant;
 - 9.2.3 four hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in accordance with rule 44), by whichever party is relying on the witness statement in question;
 - 9.2.4 three hard copies of the following, agreed if possible, by R1, a neutral chronology, a 'cast list', a reading list, a hearing timetable;
 - 9.2.5 three hard copies of any legal authorities and skeleton arguments by the party relying on them.

Note: In the event that virus precautions are still necessary, either appropriate gloves must be provided for the witnesses to use when handling the bundle or sufficient copies of the bundle must be provided so that each witness has their own bundle.

9.3 **If the hearing is by video conference:**

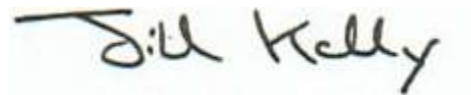
- 9.3.1 By no less than 2 working days before the start of the hearing, the parties must send electronic versions to the Tribunal of the witness statements, hearing bundle, skeleton arguments and any authorities to be relied on, in compliance with the Presidential Guidance on remote hearings accessible here: <https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PG-Remote-and-In-Person-Hearings-1.pdf>. Please note in particular para 24 of the Guidance.

10. Other matters

- 10.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.
- 10.2 Anyone affected by any of these orders may apply under rule 29 for it to be varied, suspended or set aside. Any further applications should be made at the next preliminary hearing unless they concern orders to be complied with prior to that date, in which case, they should be made within 14 days.
- 10.3 **Public access to employment tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case. The tribunal has no

power to refuse to place a judgment or reasons on the online register or remove one which is already there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the tribunal for an order to that effect under rule 50 of the ETs Rules of Procedure. Such an application must be copied to all other parties for comment and it would be carefully scrutinised by the tribunal before deciding whether and to what extent it should be granted.

- 10.4 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 10.5 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**



Employment Judge Kelly

Signed on: 19 March 2021

Sent to the parties on:

7th May 2021



Djodjo Amponsah
For the Tribunal Office