



EMPLOYMENT TRIBUNALS

Claimant: Mr. C. Day

Respondent: Lewisham and Greenwich NHS Trust (1)
Health Education England (2)

RECORD OF A PRELIMINARY HEARING

Heard at: in private and in person at London South Croydon
On: 1 October 2019

Before: Employment Judge Sage (sitting alone)

Appearances

For the Claimant:

Mr Allen of Counsel

For the First Respondent:

Mr Cooper QC

For the second Respondent

Mr Moon QC

CASE MANAGEMENT SUMMARY

Listing for the Final hearing

- (1) All issues in the case, limited to liability only will be determined at a final hearing before an Employment Judge sitting with Members at the Employment Tribunals, Montague Court, 101 London Road, Croydon Surrey CR0 2RF, on **1 March 2021**, starting at 10 am or as soon as possible afterwards. The time estimate for the hearing is **15 days**.
- (2) The claimant and the respondents **must** inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

Submissions on listing the case

- (3) In consideration of how long the case should be listed the representations of all parties were weighed up. The First Respondent indicated that the case should be listed for 10-12 days, due to the large number of witnesses, they submitted that the Claimant's evidence is likely to be lengthy and the original disclosures before the Tribunal hearing the 2014/5 cases must be considered, the Tribunal must understand what the case is about and it may be necessary to see what

the Claimant says about the disclosures and about the WP discussions (it was stated that in the previous hearing consideration of the disclosures took about one and a half days). Time will have to be given submissions and deliberations.

- (4) The Second Respondent's view on the listing of this case was that, there should be a preliminary hearing listed to consider the time points and the issue of vicarious liability of Dr Frankel. In their view if this was hived off for a separate preliminary hearing, it would reduce the number of witnesses in the full merits hearing and would significantly reduce the length of hearing, if they were successful. It was estimated that the preliminary hearing would need to be listed for 2 days.
- (5) The Claimant did not agree with the Second Respondent's submissions, they felt that five days would be enough to dispose of the case and doubted whether the time required would be shortened by listing the preliminary matters identified by the Second Respondent. They referred to the points made in their position statement at paragraph 3 that identified the concern about increasing the costs of the parties and a preliminary hearing on these points would be unlikely to reduce the scope of the hearing. They made the point that the estimated days needed to consider the issue of vicarious liability is likely to take two days whereas this is only likely to save two days from the full merits hearing. A tribunal is unlikely to be able to rule on the issue of time limits without hearing all the relevant evidence. They also raised a concern that hiving off these issues are likely to result in satellite litigation which may result in appeals to the EAT and perhaps the Court of Appeal thus resulting in further delays and costs to the parties.
- (6) Having weighed up all the arguments, it was concluded that little if any time would be saved by listing this matter for a preliminary hearing to consider the issues raised by the Second Respondent of both time limits and vicarious liability. This approach carried with it the potential for satellite litigation, increased costs and perhaps delay in hearing the case on its merits. The benefit of listing all matters to be considered at the full merits hearing achieves finality on all issues and minimises the possibility of delays. It was considered that 15 days was appropriate to deal with all the issues in the case, including giving the tribunal reading time, time to consider all the evidence and to hear closing submissions. It was felt better to list generously rather than to risk going part heard.

The claim

- (7) The claimant was employed by the First Respondent, as an Anaesthetic and Intensive Care Doctor, from August 2013 until September 2014. By a claim form presented on 6 March 2019, following a period of early conciliation on the 13 January 2019, the claimant brought complaints of detriment on the grounds that he had made protected disclosures. The Claimant had previously pursued claims 2302023/2014 and 2301446/2015 against the First and Second respondent, these claims were settled. There is presently an appeal pending at the EAT under rule 3(10) pursued on the grounds that the settlement was procured on the basis of a misrepresentation and should therefore be set aside.

HHJ Auerbach has ordered that claims for wasted costs be stayed pending the full hearing. Both Respondents defended the claims and the Second Respondent raised time points and an issue of vicarious liability.

The issues

- (8) The issues have been largely agreed between the parties save for one point made by Mr Allen in his position statement in respect of a core factual issue (relating to alleged statements made by the First and Second Respondent in without prejudice discussions).
- (9) A final agreed list of issues should be sent to the Tribunal 14 days prior to the commencement of the full merits hearing.

Consideration of the Wasted Costs Application and listing for this hearing.

- (10) The Claimant has made an application for wasted costs against the Second Respondent. The EAT has issued an order staying the application for wasted costs until the 30 November 2019 or until determination of the rule 3(10) hearing. As this matter could not be progressed, the parties are ordered to apply in writing for a one-hour telephone hearing providing an agreed agenda to the Tribunal 7 days before the telephone preliminary hearing setting out:
 - (i) The length of hearing if it is likely to be more than one day;
 - (ii) An agreed agenda;
 - (iii) Dates for exchange of statements;
 - (iv) Responsibility for the disclosure of any documents;
 - (v) Responsibility for the production of bundles and
 - (vi) Dates to avoid for a 3-month time period.

Orders to be made for the Full Merits Hearing

- (11) It was considered to be too early to make orders for the full merits hearing. However, it was confirmed that the following orders must be agreed by the parties and orders will be made after the outcome of the appeal of case numbers 2302023/14 and 2301446/15 are delivered. At that stage (and after any subsequent appeals), the parties **shall** write to the Tribunal asking for the matter to be listed for a telephone preliminary hearing for one hour the purposes of:
 - (i) Giving directions for the First Respondent to file an amended ET3;
 - (ii) Making orders for the disclosure and inspection of documents;
 - (iii) Making orders for the preparation of the bundle (the First Respondent has agreed to prepare this);
 - (iv) Providing a date for the exchange of witness statements;
 - (v) To consider mediation if appropriate and
 - (vi) To prepare a chronology, cast list and reading list.

The parties are encouraged to agree an agenda and to send this to the Tribunal 7 days before the telephone preliminary hearing

Other matters

- (12) 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/
- (13) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise)...*". **If, when writing to the tribunal, the parties don't comply with this rule, the tribunal may decide not to consider what they have written.**
- (14) 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.
- (15) 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.
- (16) 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.
- (17) Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- (18) The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.
- Public access to employment tribunal decisions**
- (19) 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.
- (20) **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.**
- (21) **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 Sage

3 October 2019

Sent to the parties on: 9 October 2019



Mrs C Gangadeen
For the Tribunal Office