Appeal No. UKEAT/0059/17/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 19 October 2017

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR A BHAM — APPELLANT

2GETHER NHS FOUNDATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS VICTORIA BROWN (of Counsel) Bar Pro Bono Scheme
For the Respondent	MS LAURA ROBINSON (of Counsel) Instructed by: Bevan Brittan LLP Kings Orchard Queen Street Bristol BS2 0HQ

SUMMARY

PRACTICE AND PROCEDURE - Estoppel or abuse of process

PRACTICE AND PROCEDURE - Review

PRACTICE AND PROCEDURE - Restriction of proceedings order/vexatious litigant

The Claimant appealed against a Decision of the Employment Tribunal ("the ET") refusing his application, out of time, for a reconsideration, pursuant to Rules 71 to 72, of a Decision made in 2011, on the basis of "fresh evidence". The Employment Appeal Tribunal held that the appeal was an abuse of process, because the "fresh evidence" was the same "fresh evidence" as the Clamant had relied on in unsuccessful applications in 2014, for reconsideration of the 2011 Decision, and for permission to appeal to the Employment Appeal Tribunal. The Employment Appeal Tribunal also held that the ET had not erred in (1) refusing to extend time for the making of that application, (2) the procedure it adopted for deciding that application, or (3) its approach to the merits of that application. The Employment Appeal Tribunal asked for written submissions from the parties on the question whether the appeal was totally without merit.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

1. I mentioned to the parties in the course of the haring today that I had given Judgment in August 2015 in a substantive appeal involving the same parties. On that occasion the Appellant before me was the same as the Appellant today. There were three appeals before me. I allowed one of the appeals. I dismissed the other two appeals. When I raised this at the hearing this morning there was no objection to my dealing with this appeal from either party.

2. This is an appeal from the Employment Tribunal ("the ET") sitting at Bristol. In a Decision sent to the parties on 19 May 2016, Regional Employment Judge Parkin ("the REJ") decided that the Claimant's application for reconsideration had been made outside the time limit provided for in Rule 71 of the **Employment Tribunal Rules of Procedure 2013** and could not be considered; and that, in the alternative, the application was refused because there was no reasonable prospect of the original Decision being varied or revoked. As I shall explain, that original Decision was made in 2011. As became clear in the course of the hearing today, the basis of the application for reconsideration which was dismissed by the REJ was what was said to be fresh evidence. The fresh evidence was said to consist of timesheets signed by Mr Davies. He was a manager who dealt with the Claimant's case. It was accepted by the Claimant that, at the time of the 2011 hearing, he had had in his possession three unsigned timesheets for the relevant period (which is January to March 2010). His case was that two timesheets signed by Mr Davies for the months of July and October 2011 were disclosed to him in 2012 but that the timesheets signed by Mr Davies covering the relevant period had not been disclosed to him until they were disclosed to him on 20 February 2016 in a bundle which the Respondent sent to him for the purposes of a Costs Hearing in relation to a different but linked claim which he brought against the Respondent in 2011.

3. On the appeal the Claimant was represented by Miss Brown and the Respondent by Ms Robinson. I am grateful to both counsel for their excellent written and oral submissions. It would be invidious to single out one or other of them but I must pay particular tribute to Miss Brown, who appeared pro bono, for the composed way in which she dealt with a series of questions from me which I asked because I did not understand the precise factual basis of the appeal, in circumstances where she was having to take instructions, as it were on the hoof, from the Appellant. I will refer in the rest of this Judgment to the parties as they were below.

4. Singh J (as he then was) ordered this appeal to proceed to a Full Hearing after a hearing under Rule 3(10) of the **Employment Appeal Tribunal Procedure Rules**. The Claimant was represented at that hearing by Ms Patel of counsel acting under the auspices of the ELAAS scheme.

The Facts

5. The Claimant has brought several ET claims and several appeals to the Employment Appeal Tribunal ("the EAT"). I will mention in this summary only what seemed to me to be the most relevant of those. The Claimant was employed by the Respondent as a community development worker. In April 2010 he issued a claim against the Respondent ("claim one"). It is claim one that was the subject of the application for reconsideration which, in turn, is the subject of this appeal. He claimed that the Respondent had discriminated directly against him and harassed and victimised him on the grounds of the protected characteristics of race and sex. The focus of the claim was a training meeting on 4 November 2009 and its consequences, an investigation launched by the Respondent, grievances brought by the Claimant, and the placing of the Claimant on restricted duties. In brief, the ET which dealt with those claims ("the first

ET") dismissed those claims. The Claimant appealed unsuccessfully to the EAT and his application for permission to appeal to the Court of Appeal was dismissed on the papers.

6. I should say a little bit about the way in which that claim was framed. In the ET1 the Claimant refers to a meeting that had taken place on 4 November 2009. He raised concerns about the way in which a Ms Hall has dealt with him at that meeting. In paragraph 6 of the grounds of claim he said that on 11 November 2009 he had been notified of a complaint against him of verbal aggression towards a colleague and told that limitations would be placed on his role pending an investigation. The Claimant was given, he says, a support role that he believed was "of lower status than his usual role". He went on to say that on 11 January 2010 he had made a formal written grievance and complaints of racial discrimination and victimisation. Those complaints included a complaint about "the ongoing restrictions to his job role and restrictions placed on his contact with colleagues". In paragraph 12 of the ET1 the Claimant said, "To date, neither the disciplinary investigation nor the claimant's grievances have been concluded. … The ongoing situation is causing the claimant considerable stress and frustration …". In paragraph 13 he said that the manner of his treatment, namely the ongoing restrictions placed on his role, amounted to a continuing act of unlawful direct discrimination and/or to victimisation. He relied in support of that contention on two points set out at subparagraphs (a) and (b), and at subparagraph (b) he said this:

> **"That he has been and continues to be treated less favourably as compared with Denise Hall, who is white, in that: he continues to be subjected to the detriment of having limitations placed on his job role on an ongoing basis (restrictions which it is contended are both unnecessary and disproportionate) …"**

At subparagraph (f) he contended that "the decision to place restrictions on his job role and on his contact with colleagues amounts to an ongoing act of victimisation …". The ET1 was submitted during the course of 2010 and it was that ET1 that was the subject of the adjudication

by the first ET in 2011. In his witness statement prepared for the first ET, which is neither signed nor dated, he described in paragraph 58 restrictions that had been put on his regular functions because of the allegations and those included giving up any training activities and suspending all community projects. Further material in relation to the restrictions that had been placed on his duties was set out at paragraphs 61, 62, 64, 65, 67 and 73 of that witness statement. At paragraph 77 he referred to events on 11 January 2010. He said that on that date, in the belief that the procedures instigated against him were different from those used in relation to his white colleague, Denise Hall, who was continuing to deliver training, he made a formal written grievance and complaints of discrimination and victimisation. He said that the complaint was about the ongoing restrictions on his job role and contact with his colleagues, restrictions to which he had not agreed and which, he had discovered, had not been applied to Denise Hall. It is significant, in my judgment, in the light of the subsequent weight that has been attached in the arguments before me to events which occurred on 11 January 2010 that there is no reference in this paragraph of the witness statement or indeed anywhere else in the witness statement to a meeting, which I think it is common ground, occurred between the Claimant and Mr Davies on that date. In particular it is not alleged by the Claimant that he was told that he was being suspended or that he had been de facto suspended as from 11 January 2010. In paragraph 94 of the witness statement he said this:

> **"I was also asked to produce Time sheets retrospectively for Jan/Feb/March - although I was paid and I could only log Special Leave as was instructed previously. I felt that this was a huge U-turn to the decisions of 17th Nov, 4th Dec, 4th Jan and subsequent chase to get me to take alternative roles. I was being offered limited Equality & Diversity task still based at home. The situation was still quite stressful and demoralising."**

7. Miss Brown told me on instructions that the unsigned timesheets had in fact been prepared in the first instance by the Claimant in relation to these periods and submitted to Mr Davies for Mr Davies to sign and approve so what the Claimant was saying there was that he had been told when preparing his timesheets to log the time as special leave and he was also

saying that at that time he was being offered limited equality and diversity tasks still based at home. What he was not saying was that he had been suspended or de facto suspended and that he had been given nothing to do. In paragraph 96 he said:

> **"I believe the victimisation limb of my claim to be ongoing as I am still on the various restrictions in my role and effectively put on special leave since 11th January 2010 which effectively was suspension and not being allowed to work with colleagues or having access to work facilities."**

There is there an allegation that what had happened since 11 January 2010 amounted, in effect, to a suspension, but that has to be read in the context of paragraph 94 where the Claimant is clearly accepting that he had been offered limited work to do based at home.

8. I should then say something about the Decision of the first ET. The hearing took place between 28 and 31 March 2011 and the Decision, which was a Reserved Decision, was sent to the parties on 18 May 2011. The Decision starts with a recitation of the issues which the first ET had to decide. Paragraph 1.1 says, "The issues were clarified in detail at the start of the hearing and agreed. The claimant's first claim is of direct race discrimination in respect of the following matters", and I need not read them all but the significant one is at paragraph 1.1.5, "The claimant being placed on and remaining on restricted duties". The first ET then set out the issues that arose under the victimisation claim. It set out what the protected acts were said to be, and one of the detriments which was claimed by the Claimant at paragraph 1.2.1.2, "Restrictions and limitations placed on the claimant". Further protected acts were set out at paragraph 1.2.2. Those were complaints made on 21 December 2009, on 11 January 2010, on 15 February 2010, and the detriment that was complained of in relation to those protected acts, some of which had occurred on or after 11 January 2010, is said to be at paragraph 1.2.3, "The detriment complained of comprises ongoing restrictions on his role". The first ET then referred to the complaints of direct discrimination and/or harassment on the ground of religion or belief.

A The detriments complained of included, at paragraph 1.3.1, "Restrictions on his role". It was very clear both from the ET1 and from the Claimant's witness statement that the substance of his complaint, both in relation to direct discrimination and victimisation, was the continuing restrictions on his role, restrictions which were said, by him, to have continued after 11 January 2010.

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9. In short, the first ET considered the claims, in particular at paragraphs 4.17, 4.19, 4.22 and 4.29. At paragraph 4.29 the ET made a finding about what had happened on 11 January 2010:

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> **"On 11 January the claimant met Mr Davies. Mr Davies explained that the claimant would work from home pending the outcome of the investigation and fact-finding review. The claimant presented a formal grievance and a racial complaint in respect of the events of 4 November and what had followed."**

D

10. In section 7 of its Decision the first ET set out its conclusions. In relation to the complaint of race discrimination at paragraph 7.1 the first ET said that the first matter of complaint was Ms Hall's conduct towards the Claimant on 4 November. As can be seen from the first ET's findings of fact, the first ET did not accept the Claimant's recollection about Ms Hall's conduct. The first ET concluded that:

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> **"… Ms Hall's conduct was not inappropriate as alleged by the claimant. It certainly did not amount to discrimination on the ground of race since all she was seeking to do was to make her presentation and the claimant interrupted her aggressively. This complaint fails and is dismissed."**

G It is clear from that paragraph that the first ET were rejecting the Claimant's account of what had happened on 4 November and accepting the other evidence that Ms Hall's conduct had not in any way been inappropriate.

H

11. In paragraph 7.4 the first ET alluded to a complaint about "the complaint being made about him on 11 November". The first ET then said this:

> **"… On the basis of the evidence before the Tribunal, the Tribunal was satisfied that the allegations against the claimant regarding his conduct on 4 November were true. Accordingly, making that complaint was clearly permissible and there was no evidence to suggest that if a person of a different racial origin had behaved in a similar way, a complaint would not also have been made about that person. Accordingly, the complaint fails."**

At paragraph 7.5 the first ET addressed the complaint that while the Claimant's activities were changed, Ms Hall remained involved in training activities. The first ET said this:

> **"… However, by the time the claimant complained about Ms Hall, the fact finding had already garnered statements from witnesses to the events of 4 November to the effect that it was the claimant who had misbehaved, not Ms Hall. In those circumstances the Tribunal is satisfied that the claimant's circumstances were not the same and were materially different from those of Ms Hall. The complaint therefore fails."**

In paragraph 7.6 the first ET dealt expressly with the Claimant's complaint that he had been placed on, and remained on, restricted duties. The first ET said this:

> **"… The Tribunal noted that the respondent did not favour suspending the claimant so decided to transfer him because the respondent wanted to remove him from the area where the complaint had been made. Although this was contrary to the disciplinary procedure, there was no evidence to suggest that a person of a different race would have been treated differently. In those circumstances this complaint fails."**

At paragraph 7.11 the Tribunal dealt with the detriment that was complained of in relation to the victimisation claim. The first ET said this:

> **"The detriment complained of is the on going restrictions of the claimant's role. By this time he had been restricted from doing training and it was also proposed, although it had not happened, that he should move temporarily to a different post. Decisions were taken to remove the claimant from the area where the complaint had been made. The Tribunal has accepted that explanation and that it was because the respondent did not want to suspend the claimant. There was no evidence before the Tribunal that someone of a different racial background would have been treated any differently. Accordingly this complaint fails."**

In paragraph 7.12 in relation to the claim of discrimination and/or harassment on the grounds of religion or belief, the first ET again dealt with the complaint about restrictions on his role. The first ET said that it had accepted the reasons given by Mr Trewin for those restrictions. The first ET said there was nothing to suggest that the Decision had been taken on the grounds of

A the Claimant's religion. The Tribunal then referred to an unfortunate comment made by one of the Claimant's work colleagues in 2008. The first ET said this about that incident:

> **"… However, that matter was dealt with almost instantly in September 2008, not only by the perpetrator herself by apologising to her colleagues but also by Mrs Andrews who arranged for the perpetrator to apologise to the claimant as well. There was nothing at all in the evidence to suggest that imposition of restrictions on the claimant's role was in any way on the ground of the claimant's religion for reasons similar to those set out in paragraphs 7.6 and 7.11 above and accordingly, this complaint fails."**

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Paragraph 7.17, the first ET dealt with the claim of direct discrimination on grounds of sex.

C The first ET said that:

> **"… the circumstances were materially different between the claimant and Ms Hall. When the complaint was made against the claimant it was proper to start an investigation and, in the course of the investigation, to remove him from his duties for the reasons found by the Tribunal above, namely to remove him from the area of the complaint in preference to suspending him. When the claimant complained about Ms Hall, the respondent already had witness statements relating to the incident of 4 November from which it was clear that those witnesses did not believe Ms Hall has misbehaved in any way whereas they had reported that the claimant had acted aggressively towards Ms Hall. Accordingly, Ms Hall is not a satisfactory comparator for the purpose of section 3(5)."**

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The first ET then considered a further alleged difference in treatment in paragraph 7.18 and

E rejected that complaint.

12. The Claimant applied for reconsideration of that Decision on several occasions. He did

F so first by means of two letters in 2011. That application was refused. He appealed to the EAT and that appeal was dismissed by Mr Recorder Luba QC. He applied for a review again and His Honour Judge Richardson dismissed that appeal on 4 September 2013. As I have already indicated, an application for permission to appeal to the Court of Appeal against this and other

G Decisions of the EAT was refused by Rimer LJ on 4 February 2014. The Claimant applied for reconsideration again in 2013. That application was refused by Employment Judge Carstairs on 18 October 2013. He said that that application had been a repetition of the Claimant's second

H application in November 2011. The Claimant again appealed to the ET in November 2013.

13. In September 2011 the Claimant brought a further ET claim against the Respondent ("claim two"). He claimed that the Respondent had directly discriminated against him on the grounds of his race and religion or belief. Employment Judge Mulvaney listed the issues to be decided by the second ET in an Order dated 3 May 2012. That Order is attached to the Decision of the second ET ("Decision 2"). Disclosure in that claim was ordered on 29 October 2012. That Order provided for all the timesheets authorised for the Claimant between November 2009 and May 2012 and all the timesheets as received by HR Payroll as above to be disclosed; see paragraph 1 of the CMC Order of that date which is at page 145 of the bundle, and paragraph 2 subparagraphs (a) and (b) on pages 148 to 149 of the bundle, which is the Claimant's application for disclosure. According to the Respondent, all those timesheets had been disclosed to the Claimant on 11 October 2011, see paragraph 2(iv) of a witness statement made on 20 November 2012 by Ms Harrison for the Respondent. The hearing of claim two was delayed by the Claimant's appeal against various procedural Decisions of the ET. That appeal was eventually dismissed. In 2012 the Claimant brought three further claims in the ET arising from his dismissal, and his appeal against that dismissal. Those had originally been listed to be heard with claim two but that Order was derailed by the Claimant's appeal against a case management Order made on 26 June 2013.

14. Claim two was eventually heard over several days in February and March 2014. The Claimant's complaints in claim two overlapped to some extent with the complaints in claim one as the ET ("ET2") explained in paragraph 4.3. Issue one was, "Sending the Claimant home on 11 January 2010". ET2 said that the first ET had covered "the factual ground around that issue (paragraphs 1.1.5, 1.2.1.2, 1.2.3, 1.3.1 and 4.29 … and, possibly 7.6, 7.11 and 7.12 [of their Decision]". ET2 had to decide whether the issue had "effectively been determined within those proceedings as part of the general allegation concerning the restrictions that were placed upon

his duties". If that were so it would not have been appropriate for ET2 to reopen those issues. ET2 said that on 11 November 2009 the Claimant had been placed on restricted duties and sent to the Montpellier ward. He was off sick between 30 November 2009 and 4 January 2010. He had not done the training necessary to work on the Montpellier ward and on his return to work on 11 January 2010 Mr Davies had told him to work at home pending an investigation into his behaviour. ET2 dealt with issue one in EJ Mulvaney's list of issues at paragraph 8.6 and following. ET2 held that that issue was covered in chronological terms by the first ET. In paragraph 8.7 ET2 recited the Claimant's argument that the first ET had only dealt with restricted duties and not with the "more fundamental complaint" that he had been sent home on 11 January 2010. ET2 said it was clear that he was not sent home to do no work. The conclusion in paragraph 7.11 of the first ET's Decision dealt with that issue and if not, ET2 would have dismissed his complaint, especially in the light of the comments in paragraphs 9 and 10 of Mr Davies' witness statement. Mr Davies produced witness statements for both hearings and paragraphs 9 and 10 of both witness statements, although not identical, are broadly similar. They essentially say that the Claimant had bits and pieces of work to do at home, he had access to emails and there was no alternative to his working on the Montpellier ward (as he had agreed). The Claimant appealed against the Decision of ET2 and that appeal was also dismissed.

15. The next significant event in the sequence is an application to the ET which the Claimant made on 9 September 2014, out of time. In a letter of that date the Claimant said:

> **"Further to the letter from the Tribunal of 29 August 2014 allowing for an out of time application for cost against respondent. Claimant wishes to add the following information coming to light as recent as February 2014 at hearing by this time the matter of cost was previously stayed by REJ while the matter was being Appealed."**

A It is clear that the Claimant was at that stage saying that information had come to light as recently as February 2014. The letter goes on to refer to the evidence of Mufti Patel and Imam Gangat. At subparagraph 2 it says this: "More documents and evidence came to light at the hearing of February 2014 …" I pause there to say that that is the hearing of claim two, "which are complete contradiction of previous evidence from various witnesses for the respondent at hearing of March 2011", i.e. the hearing of claim two. I pick up the letter again at subparagraph 6, "Falsified existence of duplicate Time sheets - after victimising claimant came to light after the hearing of March 2011". On the next page, the letter says this:

> **"Rehearing - In light of the fresh evidence which was not available before the original tribunal and the serious nature of contradictory evidence including the lying by witness this is a serious request and application to reconsider a full proper hearing of the matters which were heard in March 2011. The Tribunal are reminded of the serious claim for cost made by the respondent. In the circumstances it would [be] just and equitable that an unrepresented claimant is given the opportunity to present his case fully."**

On 12 September 2014 that application was refused by REJ Parkin. Subparagraph 3 of the Decision said that insofar as the Claimant sought a reconsideration of the Judgment in claim one, REJ Parkin had considered that as an application for reconsideration under Rules 70 to 73 of the **Employment Tribunals Rules of Procedure 2013**. In the absence from the office of EJ Carstairs, the letter said:

> **"… the REJ has considered but rejects this application under Rule 72(1). This is substantially the same application as has previously being made and refused by EJ Carstairs, who has rejected three applications by you for review or reconsideration on substantially the same grounds. Moreover, the Tribunal's judgment has been subject to extensive appeal proceedings which have not disturbed the judgment. There is no reasonable prospect that the Tribunal's reserved judgment will be varied or revoked."**

16. The Claimant sought to appeal against that Decision. It is necessary to set out at some length what he said in that application for permission to appeal. In the second paragraph of the application the Claimant said that the application for reconsideration was:

> **"… based on fresh evidence which was not before the original Tribunal cited the availability of documentation after he came across further evidence from respondent who had failed to release the relevant documents at the original hearing."**

In paragraph 3, the application said:

> **"The document and the evidence to be considered is incontrovertible and very relevant to the issue of victimisation. At the ET hearing in March 2011 respondent witness Mr Stephen Davies gave evidence to the Tribunal which completely contradicts his signed information now being sought to be adduced by the claimant. The evidence is central to the [claimant's] claim for victimisation after he raised a Grievance in January 2010 which was his specific complaints that he suffered Race Discrimination. Mr S Davies sent him home immediately on special leave. In absence of any documentary evidence at the hearing Mr S Davies maintained that he had asked claimant to work from home. In subsequent disclosure after the hearing several … time sheets appeared which showed Mr S Davies signed the special leave - the knowledge of these signed time sheets were not known to the claimant - these were for [respondent's] internal use for salary purposes. This evidence completely flies in the face of Mr S [Davies'] contention and only goes to support [claimant's] claim that he was victimised by being sent home after raising a grievance. This fact is significant as claimant was never allowed back to work despite his many attempts and was eventually dismissed from his job in March 2012. Mr Davies as claimant's Senior Manager was instrumental in arranging meetings in June 2011 to prevent him from returning to his role."**

The fourth paragraph referred to serious credibility issues which Mr Davies was said to have had. In paragraph 5 the application said:

> **"The new documents with his signature would only further show that Mr S Davies did not only lie to the tribunal more than once but again seriously falsified the nature of claimant's victimisation. The information is both incontrovertible and very relevant."**

I need not read from paragraph 6. In paragraph 7 the Claimant said this:

> **"REJ's decision of 12 September 2014 and his reasons to refuse [claimant's] application to introduce fresh evidence have no bearing with his previous applications. Some of [claimant's] previous Appeal applications were about discriminatory and bigoted conduct related to Ms C Andrews and had nothing to [do] with the new documents being adduced and evidence which had become available as a result of his second ET action which was heard in March 2014."**

17. Pausing there for a moment, it was suggested by Miss Brown on her client's behalf that the Claimant in this application was referring to timesheets signed by Mr Davies relating to July and October 2011. Two points can be made about that contention. The first point is that there is no way of substantiating that contention, firstly because it is accepted that the Claimant attached no documents to his application dated 9 September 2014, and secondly because it is not known whether he attached any documents to the grounds of appeal. Secondly, and more significantly, in my judgment, as Ms Robinson pointed out in her submissions, the timesheets to which the Claimant is referring in this application for permission to appeal cannot possibly be

timesheets dating from July and October 2011 as those had not been brought into existence at the time of the hearing which is referred to in the grounds of appeal, namely March 2011. It must follow, in my judgment, that the signed timesheets to which the Claimant was referring in his application for reconsideration in September 2014 and in his application for permission to appeal to the EAT were signed timesheets which were brought into existence before March 2011 and it is also clear both from the application for reconsideration and from the grounds of appeal that the Claimant had those signed timesheets and appreciated their significance on his case as recently as February 2014, see the first paragraph of his letter of 9 September 2014. I will return to those matters in due course.

18. The Costs Hearing in claim one did not take place until June 2015. The ET awarded costs against the Claimant on the grounds that he had conducted the proceedings unreasonably. On 29 February 2016 the Claimant wrote a further letter to the Tribunal, I think misdated "29 February 2015" I think it must have been intended to be dated "29 February 2016". He made an urgent application to be considered by the Tribunal before a hearing which was listed for 2 March 2016. He wished to bring to the attention of the Tribunal "a very serious matter in the above case. Claimant received a cost bundle from the respondent on 20 February 2016 …". The Claimant went on to suggest that the Respondent had substituted documents despite the Claimant sending the original within the costs bundle related to a CMD Order made by REJ Parkin on 29 October 2012. He then referred to the affidavit signed by Ms Harrison which I have already mentioned. He went on to say that on closer inspection of the disclosure bundle "which respondent substituted in the cost bundle for 2 March 2016 it appears respondent have failed to make the necessary documents available as they have not been included in the original bundle for February 2014 hearing". He went on to say that he had established from NHS Payroll that they would not entertain any post-dated timesheets. In short, he seemed to be

saying that he could not have got these documents from NHS Payroll, although that is not entirely clear. He then said that he had enclosed the documents which had been disclosed by the Respondent pages 392-"295", I think that must be a typo for "395". He submitted that "this recent action of respondent is extremely serious and brings into question the following matter for the reasons - 1) falsified statement of Truth by Ms K Harrison, 2) it involves a Mr S Davies who has previously [been] caught lying under oath" and so on. The Claimant wished to draw the attention of the Tribunal to various aspects of the Respondent's conduct during the course of the litigation. The letter ended with a request for a postponement of 2 March hearing and a request that this application be considered urgently.

19. The application for postponement was refused on the papers and the Costs Hearing went ahead. The Decision on the Costs Hearing was contained in a Judgment sent to the parties on 18 March 2016. This, I should make clear, is a Judgment relating to a costs application in claim two. At paragraph 1.1, the ET referred to the long and rather convoluted history of the claim. In section 5 the ET referred to the Claimant's application. He had applied for costs some two years after the hearing. That was the costs application. At paragraph 2.2 the ET addressed the Claimant's application for a postponement and the contents of the letter of 29 February. The ET said that the basis of the application was not entirely clear but it was asserted that the Respondent's bundle did not in some way comply with the October 2012 disclosure Order. It was not clear, the ET said, for what purpose the Claimant was seeking a postponement. It had become clear in the course of the hearing that what the Claimant wanted was a postponement in order to apply for a complete rehearing. He maintained, it was said, that the Respondent had disclosed some timesheets recently which showed that when he had been sent home on 11 January 2010 he had been treated as being on special leave or special pay as signified by the code "SP". The ET then said this:

> **"The *fact* that the Claimant had been sent home by Mr Davies in January 2010 had been the focus of one of his complaints before the Tribunal (Issue 1, which was dealt with between paragraphs 8.6 and 8.8 of our Reasons [40]). Although it was not clear whether that issue had, in fact, been one which had been previously determined by an earlier Tribunal (see paragraph 6.4.4 [23]), the *status* of the Claimant's work from home from 11 January onwards had never been a relevant consideration, either by us or that earlier Tribunal. We could not therefore see how these alleged new time sheets impacted upon our decision in any way."**

The ET then referred to an assertion that the new evidence threw significant doubt on the credibility of Mr Davies' original witness statement, in particular paragraph 9. The ET said this:

> **"… Having reconsidered the contents of that paragraph, we could see no apparent inconsistency. He further alleged that doubt was cast over an affidavit which Miss Harrison had prepared, but we were similarly unimpressed by that argument. We also noted that the 'new' time sheets had been provided to the Claimant much earlier (e.g. [286]), albeit that those copies had not been signed by Mr Davies. Whether or not the time sheets had been signed did not appear to affect the point that the Claimant was seeking to make about the Respondent's treatment of his absence from January 2010 onwards."**

The ET went on to say that in any event they had no power to order a complete rehearing of the claim.

20. What emerges in any event from the letter sent to the Tribunal on 29 February 2016 was that the Claimant was saying that he had received fresh evidence on 20 February 2016. What happened next was that on 16 March 2016, that is about 25 days after this "fresh evidence" had been received by the Claimant (on his case), he wrote again to the ET, in this case, about claim one. He said that he was applying for a reconsideration pursuant to Rules 70 to 73 of the **Employment Tribunals Rules of Procedure**. He said it would be in the interests of justice to consider this application and that he was adducing "fresh evidence" in accordance with the **Ladd v Marshall** principle. He said that the information was not available to the original Tribunal as the fresh information is quite compelling. He said it would have had an important bearing on the outcome of the Judgment of May 2011 and subsequent Judgments:

> **"… Clearly fresh evidence flies in the face of the facts as accepted by the Tribunal and its eventual findings. Claimant as part of his application relies on the *Ladd* principle …"**

A He also referred to another authority. He then said:

> **"The fresh evidence comes as a result of:**
>
> **A recent Bundle prepared by respondent for cost hearing dated 2 March 2016 for ET remedy hearing - new matter relates to fresh evidence a number of signed Timesheets by a respondent witness Mr Steve Davies, which was never before any Tribunal and it is further contended that failure of respondent to follow a CMD Order of 29 October 2012 to release documents by way of Disclosure. …"**

B

He then referred to Ms Harrison's affidavit and he continued, "The respondents had been deliberately misleading both the claimant and the Tribunal". He asserted that it was a very serious case of bad faith on the part of the Respondent. He then said this:

C

> **"… This evidence is clearly very crucial and is incontrovertible and totally relevant to the issues pleaded. In a nutshell the documents are evidence to the contrary where respondent have stated that Claimant was put on restricted duties and the evidence shows that he was sent home on "Special Leave" which flies in the face of the issues pleaded in the above claim at (a) 1.1.5 (b) 1.2.2 and the detriments suffered by claimant and complained of as a result at (c) 1.2.3 and (d) 1.3.1 and the relevant findings at (e) 7.6 (f) 7.11 and (g) 7.12 of May 2011 Judgement by Judge Carstairs."**

D

He finished the letter by saying that it was just and equitable for the claim to be reconsidered.

E

21. There is a letter dated 11 April 2016 from the Respondent to the ET from which it is clear that the Respondent had been asked to comment on the application. The Respondent made the point that this was the latest of a series of applications for reconsideration following a

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Judgment that had been handed down nearly five years ago. The long litigation history was summarised in the rest of that paragraph. The Respondent contended that the application was completely without merit and that the material relied on by the Claimant "adds nothing

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whatsoever to the claim. Whether the Claimant was sent home on special leave or restricted duties makes no difference at all to this claim of discrimination and victimisation". There is then a reference to the Claimant's assertion that he had obtained timesheets from NHS Shared Services. That was a separate organisation from the Respondent and it could not possibly show

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bad faith or breach of a Tribunal Order if documents had been obtained that were not in the Respondent's possession or control.

22. In a Judgment sent to the parties on 19 May 2016 the REJ refused the application for reconsideration. It is clear from paragraph 1 of that Judgment that the REJ had taken into account not only the Claimant's letter dated 16 March 2016 but also his letter dated 13 April 2016, which I infer was a response to the contentions made by the Respondent in its letter of 11 April. The REJ stated that EJ Carstairs, who chaired the proceedings, had now retired and it was not practicable for him to deal with the application. In those circumstances the REJ had appointed himself to deal with it. The REJ started by stating correctly that, by Rule 71, an application for reconsideration must be made within 14 days of the date on which the Decision or if later the Written Reasons were sent to the parties. He said, rightly, that the application was received nearly five years outside the relevant time limit. The REJ correctly referred to Rule 5 which gave the ET power to extend time even in the case where the time limit had expired. The REJ then said this:

> **"… The circumstances here, whereby the claimant contends that he only discovered recently (on about 20 February 2016) in the course of preparation for a costs hearing in separate proceedings of the existence of documents which would undermine the respondent's original defence and credibility do not afford any basis for extending time in relation to proceedings which were concluded several years ago. The claimant did not even apply for reconsideration within 14 days of seeing those documents in that costs bundle. Accordingly, the application cannot be considered."**

In case he was wrong about that, the REJ went on to consider whether or not there was a reasonable prospect of the Decision being varied or revoked pursuant to Rule 72(1). He recited that the application was based on an application to adduce fresh evidence in accordance with the **Ladd v Marshall** principle and the Claimant's argument that the new documents showed that the Respondent's officers have acted in bad faith in defending the original claim so as to undermine the Judgment. He then summarised what the Respondent had said in its letter of 11

April 2016. In paragraph 8, the REJ said he had considered the content of the original claim form presented by the Claimant on 30 March 2010 and the Reasons accompanying the Judgment. He said this:

> **"… The Reasons carefully set out the tribunal's primary fact-finding and conclusions upon the claims of direct race discrimination, victimisation and direct sex discrimination which centred around the approach taken by the claimant's line manager Mrs Andrews and actions by his colleague Ms Hall; those claims were dismissed. There have indeed been various applications by the claimant since then for reconsideration, seeking to rely on fresh evidence but these have been rejected."**

In paragraph 9 the REJ, importantly, said "The claimant seeks now to challenge not only the Tribunal's conclusions but even the formulation of the issues before it, which simply cannot be a legitimate challenge so long after the hearing". In paragraph 10 the REJ summarised the **Ladd v Marshall** principles in a way with which Miss Brown rightly does not take issue. He directed himself correctly about those principles. The REJ said that having considered the claim form and the Judgment he concluded that even taking the Claimant's case at its highest, that is, that the documents should have been disclosed originally within these proceedings by the Respondent, this documentary evidence was not in any way central to the claims that were before the first ET and were dismissed. At paragraphs 7.6, 7.11 and 7.12 the first ET made:

> **"… firm findings upon the issues it did have to determine; its conclusions were that there was no evidence that a comparator of a different race would have been treated differently from the claimant and there was nothing to suggest that the treatment was in any way on the ground of the claimant's religion i.e. race. In context, these findings were wholly consistent with the other conclusions reached by the Tribunal on the issues before it and it is certainly not shown that the documents would probably have had an important influence on the hearing."**

In paragraph 11 the REJ referred to the public interest in finality in litigation. He said, "the interests of justice apply to both sides". He went on to say that this was a new application on a different basis from previous applications for reconsideration but it was still a further attempt by the Claimant to go behind the Judgment, which had not been overturned on appeal, and to have a second bite at the cherry, and on that basis it was refused. I pause there to say that the REJ in stating that this was a new application on a different basis from previous applications

must have been ignorant of the application that had been made in September 2014, but since his attention does not appear to have been drawn to it by either party, he cannot be criticised on that account.

Discussion

23. There are two grounds of appeal in the amended grounds of appeal. The first is that the REJ erred in law in imposing a 14-day time limit on the making of the application and acted unfairly in relying on documents from another case file without asking the Claimant about them. The second ground of appeal is that the REJ erred in law in his application of the **Ladd v Marshall** principles. It is said that the new timesheets show that rather than being on restricted duties, the Claimant was de facto suspended after the events of January 2010, that he was not working, and that Mr Davies must have known this because he authorised the payments to the Claimant.

24. Before I deal with the grounds of appeal, I need to deal with a more fundamental point. That is the significance of the application for reconsideration in 2014, and its fate. It is clear, in my judgment, from the text both of the application for reconsideration in 2014 and from the text of the application for permission to appeal, that the signed timesheets which formed the basis of those applications in 2014 were exactly the same signed timesheets as form the basis of the application that was dismissed by the REJ and which is the subject of the appeal before me. In those circumstances, in my judgment, it was an abuse of process for the Claimant firstly to make a further application for reconsideration in 2016 that was based on exactly the same material as the application in 2014 and further to appeal to this Tribunal based on that same material. I appreciate that the Claimant was given permission to appeal by this Tribunal after a hearing pursuant to Rule 3(10) of the **Employment Appeal Tribunal Procedure Rules**, but

unless I am told otherwise it is my assumption that the documents relating to the application for reconsideration and the appeal from the refusal of that application in 2014 were not before this Tribunal at that hearing. I am sure that had those documents been before this Tribunal at that hearing, permission to appeal would not have been granted. Therefore, it seems to me, I could stop there. The 2016 application and this appeal being an abuse of process, there is nothing more to be said about them.

25. In case that is wrong I will deal with the merits of the application. I consider that Ms Robinson is right to submit that in paragraph 10 of his Decision the REJ was prepared to give the Claimant the benefit of the doubt in relation to the first **Ladd v Marshall** principle and that he concentrated his reasoning on the second **Ladd v Marshall** principle, in other words, whether the fresh evidence was relevant and would probably have had an important influence on the hearing. The third principle is not relevant. I remind myself that the REJ in considering this application was careful to consider the claims which had been before the first ET. It is clear from the Decision that he had specifically considered the ET1 on which those claims were based and no doubt, having read the Decision of the first ET, he also noted the issues that the first ET had, with the agreement of the parties, set out at the beginning of its Decision. I have recited those materials at some length and it is clear to me that the issue which, it is now sought to suggest, was an important issue, in other words, whether the Claimant was suspended on 10 January, was never an issue that was before the first ET. If that is right then evidence which suggests that the Claimant had been, if it does indeed suggest that, in fact suspended rather than being put on special duties or sent home to do work, seems to me to be neither here nor there. But even if that is wrong, in my judgment, nothing turns on the label which is given to the treatment that was accorded to the Claimant, whether it be restricted duties, special leave, or suspension. The underlying point that the Claimant was making in claim one was that he had

been treated differently from Ms Hall. That was his underlying grievance. The clear factual findings of the first ET were that the Respondent had discharged any burden of proof because the Claimant and Ms Hall were not in the same position. It is clear from the findings of the first ET that it had found that Ms Hall had not misbehaved at the contentious meeting whereas the Claimant had, and it was from that difference in their situations, that the differences in treatment or detriments that were relied on by the Claimant all flowed. The label which is attached to those, whether it be "sent home to do work", "special leave" or "suspension" is in my judgment absolutely neither here nor there. So even if the signed timesheets were capable of showing that the Claimant had in fact been suspended, or in effect suspended, and that Mr Davies knew that, they could not in any way have undermined the Decision of the first ET. In my judgment, the reasoning of the REJ on that point is sufficient. He makes it clear that he is relying on the firm factual findings made by the first ET about the Claimant's complaints and in my judgment there is no error in his approach to that issue.

26. That being so, it is not necessary for me to deal with either of the two procedural points that were taken by Miss Brown in the course of her oral submissions supplementing the grounds of appeal, but I will do so shortly nonetheless. The first question is whether or not the REJ erred in his approach to an extension of time. It is submitted in particular that there is no express reference by the REJ to the balance of prejudice and that that in and of itself is an error of law by the REJ. It is also submitted that he appears to have directed himself that he had no discretion to extend time beyond 14 days. I reject those submissions. It seems to me on a fair reading of the REJ's Decision that he was very alive to the balance of prejudice. Effectively what he was saying in paragraph 4 is that the proceedings were concluded several years ago, in other words, substantial prejudice would be incurred by the Respondent if it was all reopened many years after the event. By contrast the Claimant, who should have applied for

reconsideration within 14 days of the original Decision, did not even apply within 14 days of getting the supposed fresh evidence. It seems to me that there is no error in placing a burden on a Claimant who seeks reconsideration many years out of time to get his application in within the primary time limit running from the date when he obtains the new evidence. In fact, the Claimant did not apply for reconsideration until 25 days after receiving the supposedly new evidence and he did not in any way seek to explain that delay. Miss Brown sought to suggest in her submissions that the Claimant had in fact taken swift action by applying for reconsideration of the 2011 Decision but I accept Ms Robinson's submission on that that is a two-edged sword. If he was able to apply for reconsideration of the 2011 Decision within a very short period of getting the supposed fresh evidence then there is absolutely no explanation for why he could not have applied within a similarly short period for a reconsideration of claim one. It therefore seems to me that the REJ dealt with the time point in a way that discloses no error of law. It was a perfectly permissible exercise of his discretion on the facts of this case.

27. I turn then to the procedural argument that was advanced by Miss Brown. Her submission, based on the structure of Rule 72, was, in summary, that the REJ having asked for the Respondent's observations on the Claimant's application, was then obliged by Rule 72 to have a hearing. I reject that submission. It seems to me the REJ was entitled, having received representations from both sides, including a second set of representations from the Claimant, after the Respondent's representations, to take stock and to see whether or not Rule 72(1) was engaged, in other words, he was entitled to see whether there was any reasonable prospect of the original Decision being varied or revoked. He was perfectly able, and perfectly able fairly, to reach the conclusion, which I have held was in no way erroneous, which was that there was no reasonable prospect of the application succeeding. I do not consider that he was required by Rule 72 on the facts of this case to hold a hearing.

28. For those reasons I dismiss this appeal, and I invite the parties to make submissions on the question whether this appeal was totally without merit.