# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| Mr Ahmed Tayel | **v** | (1) Ipswich Hospital NHS Trust<br>(2) Public Health England |

**Heard at:** Bury St Edmunds **On:** 26 November 2018

**Before:** Employment Judge Laidler

**Appearances**

**For the Claimant:** In person

**For the First Respondent:** Ms R Tuck, Counsel

**For the Second Respondent:** Ms G Hirsch, Counsel

## RESERVED JUDGMENT

**1. The allegations of harassment and victimisation contained at paragraphs 14 and 15 of the Particulars of Claim dated 11 April 2018 are dismissed on withdrawal by the claimant.**

**Public Health England ('PHE')**

**2. The claims against Public Health England are struck out as an abuse of process the claims already having been brought in case number 3325693/2017 and struck out.**

**3. Further and/or in the alternative the claims have been submitted out of time, the tribunal has no jurisdiction and the claims are struck out**

**4. Further and/or in the alternative the claimant is not an employee or applicant under the Equality Act 2010 to bring a claim against Public Health England in relation to his request for information of the 5 May**

**2017 and subsequently on the 25 February and 9 March 2018 and that claim is struck out.**

**5. This tribunal has no jurisdiction in relation to a Subject Access Request and that claim is struck out.**

**Ipswich Hospital NHS Trust ('Ipswich Hospital')**

**6. The claims against Ipswich Hospital are struck because they disclose no potential cause of action against that Respondent.**

# RESERVED REASONS

1. This open preliminary hearing was listed by Employment Judge Finlay at a hearing on 4 July 2018 to determine:

> 'The applications of both respondents for the claim to be struck out as set out in their respective grounds of resistance.'

2. As identified at that hearing, this 2018 claim comprises complaints of:

   2.1 Direct race discrimination;
   2.2 Harassment;
   2.3 Victimisation.

3. The claim was presented on 11 April 2018 following a period of Early Conciliation between 9 and 13 March 2018.

4. There is an issue whether that Early Conciliation covered any complaint against the second respondent.

5. Leave to amend the claim form was given by Employment Judge Finlay to amend the date of an interview the claimant attended with Mr Dundas and Mr Parker to the 20 **June** 2016 rather than the 20 **January** 2016 as pleaded.

6. Also, at the hearing on 4 July 2018 in relation to claim: 3325693/2017 ('the first claim'), Public Health England ('PHE') were dismissed from that claim the tribunal determining it had no jurisdiction to hear it as it had been presented out of time and it was not just and equitable to extend time.

## The Relevant Chronology

## A The interview June 2016

## The first claim – case number 3325693/2017

*Paragraphs 49 – 53 of the first claim*

7. The allegation was of victimisation and stated as follows:

> '(49) In June 2016 the claimant applied for the position of Medical Laboratory Assistant. The advert stated that the employer is Public Health England. The location of the job is Ipswich Hospital.
>
> Victimisation – racial bias
>
> (50) The claimant was interviewed by Mr Steve Parker, and others.
>
> (51) Mr Parker was the claimant's Training Officer (2009 – 2010). The claimant made a protected Act to Mr Parker (March 2010). Mr Parker was / is fully aware of the legal proceedings, which the claimant issued against Mr Parker's employer (Ipswich Hospital).
>
> (52) Public Health England refused to offer the claimant the job because of the protected Act, which the claimant made against Ipswich Hospital.
>
> (53) Mr Parker knows the claimant well. He knows about the claimant's thorough understanding of scientific knowledge (theoretical and practical). For instance, in 2010 during the claimant's placement at Ipswich Hospital, Mr Parker awarded the claimant 88% for his microbiology work. This was the highest in that year group. Mr Parker, and Ipswich Hospital know that the claimant is fully competent in working in three different disciplines (Microbiology – Haematology – Biochemistry)'

8. In its Response to the first claim PHE submitted that the claim about the failure to offer the role in June 2016 was out of time but in any event denied that there had been any victimisation as alleged or at all. They pleaded that Mr Parker had been one of a panel of three and that:

> '(13) During the interview the claimant and the other candidates were asked the same 10 questions which were each scored out of a maximum of 5 marks. There were, therefore a total of 150 marks available across the panel. The claimant scored a total of 78 marks. The claimant asserts that Mr Parker treated him unfavourably but his highest score on the panel came from Mr Parker.
>
> (14) The claimant had the lowest score of the 4 candidates and did not meet the necessary standard. The candidate with the highest score (118 marks) was offered the role.'

9. Employment Judge Michell dealt with this allegation at a Preliminary Hearing on 21 February 2018 when he recorded at paragraph (4) (viii)

para bb that the matters set out at paragraph 7 above were an allegation of victimisation by just the fifth respondent, Public Health England.

10. At the Preliminary Hearing before EJ Finlay on 4 July the Judge clarified the claims that were brought solely against the fifth respondent Public Health England and this included the refusal to offer the role in June 2016.

11. That allegation was struck out along with all claims against PHE:

> "because the tribunal does not have jurisdiction to hear it, the claim having been presented outside of the applicable time limits and it not being just and equitable to extend time."

**The second claim – case number 3305873/2018**

12. This is a claim issued only against Ipswich Hospital and PHE which this tribunal has before it. The first allegations relate to the same June 2016 interview. In these proceedings the claimant made allegations against Mr Dundas and Mr Parker. He stated in the ET1 that:

> "(6) Mr Parker refused / failed to provide the claimant that the claimant was unsuccessful and refused / failed to provide the claimant with outcome of interview. Mr Parker refused / failed to provide the claimant with feedback on interview."

13. In its Response to the second claim PHE asserted (at a time before the first claim was struck out), that the claimant was seeking to amend the original claim by making further allegations about the interview and the decision not to offer him a role in June 2016. He was, it was submitted, seeking to amend a claim which was itself submitted out of time. It was asserted that the claims in this ET1 against PHE should be struck out.

14. In the Response of Ipswich Hospital to this second claim, it was pleaded that PHE is 'legally independent from the 1st Respondent' and that the 'First Respondent is not in partnership with or an agent of the 2nd Respondent as the claimant appears to imply at paragraph 13 of his particulars of claim'. It was further submitted that the claims set out in paragraphs 2 – 10 (the interview in June 2016 and that in February 2017 and its aftermath) were out of time. Further the claimant had already commenced proceedings against both respondents in the First Claim and could have and should have included the majority of this claim with the previous one.

15. Dealing specifically with the June 2016 interview, it was pleaded by Ipswich Hospital that it does not employ those who interviewed the claimant and they were all employed by PHE at the relevant time. In relation to the interview in February 2017 and its aftermath, these were claims against PHE only. Ipswich Hospital sought to be dismissed as a Respondent to these claims.

## Interview February 2017

## First Claim

16. In the First Claim at paragraphs 43 and 54 – 56 the claimant made the following allegations:

> '(43) On 5 May 2017, the claimant made a Subject Access Request to **Colchester Hospital**. The request was refused and has been refused to date [emphasis added]
>
> …
>
> (54) In February 2017 the claimant applied for the position of Medical Laboratory Assistant. The advert stated that the employer is Public Health England. The location of the job is at Ipswich Hospital.
>
> (55) The claimant was interviewed by Mr Hitchcock and two members of staff from (Colchester Hospital namely, David West – and from Ipswich Hospital, Emma). All the three members of the interview panel knew the claimant and were aware of the legal proceedings against Ipswich 2010. They also taught the claimant Microbiology at the University of Essex.
>
> (56) In February 2017 Mr Hitchcock stated that the claimant was unsuccessful in his interview because the claimant would not fit in.

17. Employment Judge Michell at the Preliminary Hearing on 21 February 2018, clarified that those paragraphs were allegations solely against PHE. As regards the failure to obtain the job, 'this is said to be an allegation of victimisation by (just)' PHE. All claims against PHE were struck out by Employment Judge Finlay on the 4 July 2018.

18. Employment Judge Michell also noted that the comment by Mr Hitchcock that the claimant 'would not fit in' was said to be an act of direct race discrimination. It was recorded that the claimant had confirmed that the comment was taken from an answer to question 3 of a series of questions posed by the claimant when seeking feedback. It is set out in an email dated 15 February 2017 @ 11:11 am from Mr Hitchcock to the claimant. Employment Judge Michell further noted:

> "I observed that the relevant passage from the email did not, on its face, obviously 'read' as a race related comment, but the claimant said he was '100% sure' it was".

19. Employment Judge Michell also recorded at paragraph (4) viii) w:

> "Para 43: This is said to be an allegation of victimisation by (just) R2 and R5 [Colchester Hospital and PHE]. The claimant's request is said to have been made by way of a 5.5.17 email, sent to both Mr Hitchcock and Jennifer Cannon (Ms Hirsch asked me to record R5's contention that para 43 does not contain any allegation against R5, and that any attempt to add R5 would require an amendment. I duly record that contention, which can be the subject of further debate… if necessary)."

## Second Claim

## Race Discrimination and Victimisation – paragraphs 8 – 11 ET1

20. Paragraph 8 of this ET1 refers to the complaint the claimant made to PHE in February 2017 of race discrimination and victimisation. Employment Judge Finlay clarified this at paragraph 9.5 of his summary as follows:

> "The complaint which the respondents allegedly covered up and failed to investigate was a complaint made by the claimant against Mr Hitchcock, that Mr Hitchcock has stated that the claimant 'would not fit in' at the second respondent."

21. There then followed at paragraphs 9 – 11 allegations concerning the claimant's Subject Access Request to PHE. The claimant pleaded:

> '9 In February 2017 the Claimant made a Subject Access request under Data Protection Act. Public Health England refused/failed to inform the Claimant that they did not investigate the Claimant's complaint (apparently)
>
> 10. In May 2017 the Claimant requested information on his complaint (race discrimination and victimisation). Public Health England refused/failed to provide the information.
>
> 11. On 25 February 2018 the Claimant made further application regarding information on the investigation regarding the Claimant's complaint of race discrimination and victimisation. Public Health England responded as follows:
>
> 5 March 2018
>
> 'Whilst PHE take a complaint of unfair treatment during an interview process very seriously it is not a matter that we can investigate in the same manner as a grievance raised by an existing employee'

22. These issues were clarified at the Preliminary Hearing before Employment Judge Finlay on 4 July 2018 as follows:

> "9.7 paragraph 9 – this is a complaint of victimisation only. It is an allegation against both respondents. The allegations is that they failed to disclose all relevant documentation in relation to a subject access request made by the claimant. The claimant will be relying upon the allegation that conflict of interest forms were not disclosed. The complaint referred to is the same complaint against Mr Hitchcock as referred to in paragraph 8. The claimant confirmed that his subject

access request was made approximately 1 week after his complaint about Mr Hitchcock.

9.8 paragraph 10 – this is a complaint of victimisation only, again the complaint referred to is the claimant's complaint against Mr Hitchcock. The claimant confirmed that his request was made by email to the second respondent and the deputy director of the first respondent on 5 May 2017.

9.9 paragraph 11 – this is a complaint of victimisation only, again, the complaint referred to is the claimant's complaint against Mr Hitchcock. The claimant relies on the response sent by the second respondent dated 5 March 2018 which is cited at paragraph 11.

9.10 paragraph 12 – this is included as background and further support for the previous allegations. It does not in itself constitute a specific allegation.

9.11 paragraph 13 – this is an allegation of victimisation. The second part of paragraph 13 clarifies the claimant's reasons for including the first respondent as a respondent to the 2018 claim. The claimant relies on two reasons – firstly, that the first respondent was the real employer; and secondly, that the second respondent is an agent of the first respondent and a sub-contractor of the first respondent."

23. Paragraph 13 of the Particulars of Claim refers to a complaint the claimant made on 9 March **2018.** He pleaded that he made this:

"to his former employer, Ipswich Hospital and Public Health England regarding the above. Ipswich Hospital and Public Health England refused / failed to investigate all the above".

He alleged that PHE "is Ipswich Hospital agent."

24. From the bundle for this hearing, the following chronology can be discerned:

| | |
|---|---|
| 10 February 2017 | Interview of claimant by Peter Hitchcock, David Smith and Emma Whittaker, (interview notes provided); |
| 13 February 2017 | The claimant emailed Andrew Bendall asking whether a decision had been made. |
| 14 February 2017 | @ 17:34 hours<br>Andrew Bendall emailed the claimant explaining that Peter Hitchcock was the interview manager and that his enquiries should be addressed to him. |
| 14 February 2017 | @ 18:33 hours<br>The claimant emailed Mr Bendall and Mr Hitchcock 're interview outcomes' clarifying why he had emailed Mr Bendall earlier. |

15 February 2017 Peter Hitchcock wrote to the claimant advising that he had not been successful at the interview. It is relevant to quote some of the feedback he gave. Whilst stating that the panel had no doubt that the claimant was hardworking:

> "during the interview, you gave a number of answers which the panel felt were weak and below the standard of the successful candidate which you may be able to reflect on."

These answers included:

> "Question 3, which asked about team working? Your answer did not include any mention of actually fitting in with others and understanding, empathising and working with the strengths and weakness of other members of the team."

It is of note that Mr Hitchcock did not state, as pleaded by the claimant in the First Claim, that the claimant 'would not fit in'.

15 February 2017 @ 12:53 hours
The claimant emailed Peter Hitchcock and others at PHE stating he was 'fully competent' to work in three different disciplines and that:

> "Please look into this matter. I firmly believe Mr Hitchcock breached the code of conduct of Biomedical Scientists and he unlawfully subjected me to the prohibited act of victimisation (at least)."

17 February 2017 Lauren Toure (Interim Head of Operations, Human Resources Directorate) replied to the claimant thanking him for raising his concerns and that 'we take complaints of this nature seriously and have spent some time reviewing what happened at the interview, who was appointed and why'. She explained that three panel members independently gave the candidates' answers scores from one to five and a merit list was prepared based on these scores. The claimant's answers at interview:

> "were not of a sufficiently high calibre to be appointed on the day. On this basis, there is no evidence of you having been personally victimised in the selection process."

She sent to him the notes of his interview but refused to release those of the successful candidate on the ground of confidentiality.

20 February 2017 The claimant made a Subject Access Request and Lauren Toure advised him the same day of the appropriate email address at PHE.

20 – 21 Feb 2017 Emails between the claimant and PHE with regard to the request.

7 March 2017 Leigh Hopkins, Freedom of Information Officer at PHE responded to the claimant. She forwarded to the claimant two sets of interview notes for the 20 June 2016 and 10 February 2017 and email correspondence. She had redacted a small amount of third-party information. She also provided the claimant with the following information:

"Please note:

The Pathology Partnership is a consortium of 6 Trusts with the East of England region.

PHE is not a partner within the Pathology Partnership; it is sub-contracted by the Pathology Partnership to provide the Microbiology element of the pathology service for the consortium partners.

PHE manages the Microbiology services and associated Microbiology staff only.

PHE took the service and staff over from 1 May 2014.

Prior to 1 May 2014 all service and staff management sat within individual trusts.

Of the staff listed in your request only 5 out of the 11 are PHE staff members.

PHE does not hold any correspondence with the University of Essex in relation to yourself."

The claimant was advised to address any further queries to her and that he had the right to go to the Information Commissioner's Office if a complaint could not be dealt with through the PHE complaints procedure.

5 May 2017 The claimant emailed Peter Hitchcock and Jennifer Canham at Colchester Hospital NHS Foundation Trust only (p309 of the bundle stating):

"On 20 February 2017 I made a request under Data Protection Act. The request was sent to Mr Hitchcock. The request is attached.

Colchester Hospital failed to comply with its legal obligations.

Could you please look into this matter and provide me with my request (SAR)

The request is for:

Any documentation in whatever form including notes, and emails that relate to Mr Tayel whether by name or otherwise. This is a broad request and not limited."

5 May 2017 Leigh Hopkins replied to the claimant reminding him that they had responded to his request on 7 March 2017.

25 February **2018** The claimant emailed Peter Hitchcock and Lauren Toure 'SAR – Missing Document'. He asked that they supply

"…all (if any investigation has been conducted) documentations in relation to complaints of:

a) Victimisation;
b) Race discrimination.

There is a complete absence of any investigation being conducted by PHE, in the documents you supplied on 7 March 2017."

26 February 2018 Leigh Hopkins, PHE sought further information from the claimant.

1 March 2018 The claimant replied:

"On 17 February 2017 Public Health England stated:

We take complaints of this nature seriously.

The statement was made in response to my complaint.

On 7 March 2017 you supplied few emails. No documents in relation to any investigation (victimisation and race discrimination).

On 5 May 2017 I made further request (SAR) in order to be provided with the document in relation to:

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1. Complaints raised by Mr Tayel against Mr Wallis and Mr Hitchcock;

> 2. Communications between Jenifer Canham (Deputy Director of Human Resources Ipswich and Colchester Hospital) and Peter Hitchcock.
>
> You must have conducted an investigation. You failed to provide the documents. I have got rights to be provided with all documentation you hold about me (by name or otherwise).
>
> **If you fail this time to provide the documents, I will consider this to be a failure to investigate a complaint of victimisation and racial discrimination."**

## Harassment and Victimisation – 21 February 2018

25. The other allegations against PHE in the Second Claim related to the hearing on 21 February 2018 and the fact that on 3 April 2018 the claimant was written to by PHE by omitting 'Mr' in the form of address. These allegations were withdrawn by the claimant at this hearing, so no more need be said about them.

## Relationship between the Respondents

26. In its response to the First claim PHE (and repeated in the Second Claim) made it clear that it is an Executive Agency of the Department of Health and its employees are civil servants in Crown employment. Those employees are not, as alleged also employees of Ipswich Hospital or any of the other respondents named. PHE is legally independent of all the other respondents.

27. Ipswich Hospital makes the same point in its response to this claim namely that PHE are legally independent from Ipswich Hospital. PHE employs staff, such as Medical Laboratory Assistants in Microbiology, who are based at Ipswich Hospital premises. That hospital does not however pay, employ, share or manage those staff and does not take part in their recruitment. Ipswich Hospital, it pleaded, is not in partnership with or an agent of PHE.

## Employment Judge Finlay's strike out judgment

28. All of the allegations against PHE were struck out by Employment Judge Finlay as out of time. He set out at paragraphs 3 – 8 of his Reasons the allegations and in paragraphs 9 – 16 the facts and chronology which he stated '*does not appear to be in dispute between the parties'*. From these it is clear that he was considering the refusal of the role following the interview in June 2016, the further application for a role in February 2017 and the subject access request on 20 February and the response of PHE to it of 7 March 2017. That included the allegation against Mr Hitchcock that the claimant was unsuccessful as he *'would not fit in'*. The reference in paragraph 43 of the claim form to 5 May 2017, the claimant making a

Subject Access Request to Colchester Hospital was found not to be an allegation against PHE and was 'discounted' as an allegation against PHE.

## Relevant Rules

## Employment Tribunal Rules 2013

29. Striking out

**37.** (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

30. Deposit Orders

**39.** (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

## Equality Act 2010

### 31. Section 123

#### Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

## 32. Section 39

### Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…

33. Section 40

Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

(b) who has applied to A for employment.

34. Section 27

Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

35. Section 26

Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

## The Rule in Henderson v Henderson

36. The submissions made in this matter include argument by the Respondents that the Rule in Henderson v Henderson (1843) 3 Hare 100 should be applied. This was stated as follows in that original case:

> "… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. A plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

37. Although originally treated as part of the doctrine of *res judicata* it is now recognised as a separate form of estoppel based on abuse of process.

38. The doctrine was summarised by Lord Bingham in Johnson v Gore Wood [2002] 2 AC 31 as follows:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to

adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. … While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

39. It is now well established that the doctrine applies to claims in employment tribunals. They have however been urged to apply a 'broad merits based' approach by the EAT in Parker v Northumberland Water [2011] IRLR 652. It was made clear that:

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Estoppel and abuse of process are each important doctrines with great relevance to case management. In terms of individual litigants, once an issue has been settled in litigation, in broad terms, it is unjust to allow it to be raised again. In terms of the court/tribunal system, there must be an end to litigation, otherwise the system could be clogged by the repetition of claims. So preventing reiteration is important. But there is a danger of matters becoming tangled in arguments as to what is repetition and what is not and what constitutes an abuse and what does not. The instant appeal is an example of the difficulty.

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… Each case is likely to be unique in terms of potential abuse or oppression. From now on I think employment tribunals would be well advised to consider the issue of *Henderson* abuse of process from the perspective identified by Lord Bingham in the House of Lords in *Johnson v Gore Wood* and not from that of the *Divine-Bortey* case.

40. Although effectively a form of estoppel it is distinct. This was made clear by Lord Sumption JSC in Virgin Atlantic Airways Ltd v Zodiak Seats UK Ltd [2013] UKSC 46. He drew attention to the distinction between res judicata and abuse of process as follows:

'25. …Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank plc [1991] 2 AC 93, 110G*, "estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process".

26. It may be said that if this is the principle it should apply equally to the one area hitherto regarded as absolute, namely cases of cause of action estoppel where it is sought

to reargue a point which was raised and rejected on the earlier occasion. But the point was addressed in *Arnold*, and to my mind the distinction made by Lord Keith remains a compelling one. Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."

41. For the doctrine of cause of action estoppel to apply there must have been a judicial decision, order or judgment made in the earlier proceedings. The rule in Henderson v Henderson applies however not only where a decision has been made having heard the facts but to the formal dismissal on withdrawal by the claimant. The reasoning behind that is that the claimant had the opportunity to proceed if he/she had been willing to do so but for whatever reason, on withdrawing put an end to that opportunity. This is distinct to a claim dismissed as out of time where the doctrine of cause of action or issue estoppel will not apply as the claimant had not had the opportunity to have his claim considered at all.

42. In the case of Mr Tayel however this tribunal is dealing with the rule in Henderson v Henderson and/or whether there is an abuse of process in the bringing of the Second Claim.

## Submissions

43. Both Counsel handed up written submissions and spoke to them orally. It was necessary to seek further clarification from Ms Hirsch on behalf of PHE. Some of the paragraphs in her submissions were confusing and did not take account of the leave to amend already given by Employment Judge Finlay regarding the date of the interview in June 2016 (paragraph 8 of his Case Management Summary of 4 July 2018) and his clarification of the issues set out at paragraph 9 of that Summary. Further, written submissions were received on the second day of this hearing from Ms Hirsch. It is not proposed to repeat the written submissions here, but the oral submissions will be summarised.

## First Respondent – Ipswich Hospital

44. Ipswich Hospital asks to be dismissed from these proceedings.

45. The allegations at paragraphs 2 – 6 of the ET1 are about the interview on 20 June 2016 which was conducted by the Second Respondent. It is not an allegation against the First Respondent, Ipswich Hospital. Even on the claimant's own case, the only involvement of Ipswich Hospital is his assertion that Public Health England is Ipswich Hospital's agent. That it was submitted is incorrect as a matter of fact.

46. With regard to the allegation against Mr Hitchcock that the claimant, "wouldn't fit in" again, that is not a claim against Ipswich Hospital. It is misconceived in so far as it is alleged to be so. In the First Claim, the claimant identified that he was employed by Colchester Hospital.

47. In so far as the claimant brings a complaint of victimisation in relation to documents he says were not disclosed, it is submitted that that claim ought to have been brought within the first ET1 and therefore it is against the rule in Henderson v Henderson, there is no explanation why it was not pursued earlier, and it is out of time.

48. Paragraph 10 of the ET1 refers to the claimant's request on 5 May 2017, for information on his complaint and was clarified as a complaint of victimisation. Again, it was raised in the first ET1. Ipswich Hospital is not aware of receiving similar communications on the particular matter.

49. Paragraph 11 of the ET1 refers to the further application for information on 25 February 2018 and refers to Public Health England. It was submitted it was not a claim against Ipswich Hospital.

50. It was acknowledged that the only time Ipswich Hospital is mentioned is in paragraph 13 when the claimant made a complaint on 9 March 2018, "to his former employer Ipswich Hospital and Public Health England". This it is submitted was misconceived and based on the claimant's view that there was some contract relationship between Ipswich Hospital and Public Health England which the respondents have repeatedly said is not the case.

51. The entirety of the claim should be struck out as against Ipswich Hospital.

**Second Respondent – Public Health England (PHE)**

52. Counsel first made submissions on allegations 14 and 15 in the Second claim which do not now need to be dealt with as they were withdrawn by the claimant.

53. Paragraph 2 of the Second Claim relates to the interview on 20 June 2016 which was the subject of the First Claim. Paragraphs 3 – 6 were all things said to have been done during or immediately after that interview and before the First Claim was submitted on 1 August 2017. It is the PHE's submission that they are:

    1. Out of time for the same reasons the First Claim was struck out as being out of time; and

    2. The claimant is not entitled to bring a new (the Second) claim in relation to them as they arose from the same set of facts as already litigated in the First Claim and / or were already litigated in that claim.

54. PHE repeated in its ET3 the grounds it had already submitted in the First Claim as to why the claim with regard to the interview in June 2016 was out of time. When the First Claim was submitted it was 14 months out of time and is now further out of time in relation to the Second Claim submitted on 11 April 2018.

55. It was further argued that the claim is an abuse of process it having already been struck out in the First Claim.

**Claimant**

56. The claimant commenced by arguing that paragraph 10 of his Particulars of Claim, the allegation that on 5 May 2017 he requested information on his complaint and Public Health England refused, was not struck out and was not part of the earlier claim. He then said that the 20 June interview was not either. That was not understood as it was clearly set out as being covered by Employment Judge Finlay in his reserved judgment details of which are set out above.

57. The Judge read out part of the Reserved Judgment to the claimant in which it was clear that all of the claims against PHE had been struck out but the claimant maintained his position that that was not the case.

58. The claimant maintained that the June 2016 interview was not part of the first ET1 and asked the Judge to direct him to where it was. The rule in Henderson v Henderson would not apply in any event he submitted as the claim was not litigated. The only claim that was struck out was the refusal of the offer of the job in 2016 and not the claim against Mr Parker, Mr Dundas and Mrs Chell.

59. The claimant maintained that Ipswich Hospital is in the control of Colchester Hospital and Colchester is under the direction and control of Ipswich. He had made it clear in his email of 22 February 2018 that the Chief Executive of Ipswich Hospital is also the Chief Executive of Colchester Hospital, so they are under the direction and control of Ipswich. Public Health England have formally confirmed they are sub-contractors. Public Health England use the facilities of Ipswich Hospital and even the email addresses are Ipswich Hospital. Members of staff at Ipswich are those of Public Health England. The claims are not misconceived at all.

60. The claimant referred to page 335 of the bundle which was a list of personnel where the 'footer' stated it was Ipswich Hospital Pathology. The claimant's submitted that Mr Dundas who interviewed him is an employee of Ipswich and Mr Bendal who is PHE is also a member of staff at Ipswich. They were, *"wearing two hats"*.

61. The claimant said he had made an application for the contracts between Ipswich and PHE, but they were refusing to disclose the contracts.

62. The invitation to the interview on 20 June 2016 is not in the bundle.

63. The claimant then referred to a staff handbook in the bundle at page 338 with the logo of Public Health England and referring to the Clinical Microbiology Laboratory, Public Health Laboratory, Ipswich. He stated that the logo was that of Ipswich Hospital. He further referred to page 375 being the Equality and Diversity statements where it stated, "this document complies with the Equality and Diversity statements of:

    Public Health England;
    Ipswich Hospital NHS Trust."

64. The claimant stated that the documentation at paragraph 63 above proved that Ipswich Hospital is the real employer. The staff are under the direction and control of Ipswich. They draft procedures, do training and appraisals. Public Health England just have an admin office and are sub-contractors at Ipswich Hospital.

65. The claimant further submitted that Public Health England deal only as an organisation with academics, that their role at Ipswich Hospital is basically to do with what Ipswich normally does. They carry out the normal tests that hospitals do. He stated the role of Public Health England is not clear. The contract between the parties will show the relationship between the two.

66. Mr Steve Parker who interviewed the claimant and Andrew Bendal, were fully aware of the claims which he had issued against Ipswich Hospital and the email against Ipswich Human Resources and Steve Parker and Andrew Bendal shows that they actually were going to seek some HR support in relation to offering the claimant a placement in 2011. They had some concerns. That arises from the fact that as stated in the email between the Chemistry department and HR that they had met with Mr Bendal and Mr Parker and there was no need for the claimant to go to the final chemistry.

67. The Judge asked during the hearing whether this was a matter that was in the claim and Counsel for the Respondents took the Judge to page 102, being the section in the claim form of alleged racial bias of full knowledge of the claims already brought against Ipswich Hospital. The claimant there refers to a section of the Constitutional Reform and Governance Act 2010 which requires a selection of people for appointment as Civil Servants to be on merit on the basis of fair and open competition which means there must be no bias in the assessment of candidates. It went on to state that panel members must declare any conflict of interest. The claimant's argument is that those interviewing him had full knowledge of matters about him and that a conflict of interest did exist. This is the subject of a

further separate claim which was issued in the London South Tribunal and forms no part of this hearing.

68. The claimant referred to a letter he sent to the Employment Tribunal on 28 February 2018 following the preliminary hearing before Employment Judge Michell. That refers to his paragraph 43 being the Subject Access Request on 5 May 2017 to Colchester Hospital. The claimant's concern is that no documents were provided to him contrary to his initial application of 20 February and despite the statement by Public Health England that, *"we take complaints of this nature seriously."*

69. He concluded in that letter that he had no doubt that Public Health England investigated the claims of victimisation and race discrimination but is refusing to provide the claimant with Mr Hitchcock's response to the allegations, *"because the allegations are true and Public Health England are covering up".*

70. The claimant submitted that the failure to disclose documents is a claim in its own right.

71. The claimant further argued that in relation to the request on 5 May 2017, Employment Judge Finlay had asked whether he wanted to make an amendment to include that as part of the victimisation claim and the claimant stated that his claim was a continuous act given the fact there was another claim. The last act the claimant says, is 9 March 2018 when they failed to investigate his complaint and that is why the complaint is in time.

## Conclusions

### Public Health England

#### *The interview on 20 June 2016*

72. It is more than clear from Employment Judge Finlay's reserved judgment that all claims brought in the First Claim against Public Health England were struck out as being out of time. This included the failure to offer the claimant a role in June 2016 (amended from January 2016 as originally pleaded), and the further application for a role in February 2017. That allegation also included the allegation against Mr Hitchcock that he had said the claimant would not fit in and the claimant's Subject Access Request of 20 February 2017.

73. Having been struck out is an abuse of the process to bring the same claim again in these proceedings and it is struck out. There must be finality in

litigation. The claimant cannot continue to issue proceedings about the same matter. That is an abuse of process.

74. If the tribunal were wrong in that conclusion then the same time points arise as they did previously, although by the time of this the Second claim, the claim is even further out of time. All the claimant said about the issue of time is as set out at paragraph 71 above. The claim which E J Finlay struck out was issued on the 1 August 2017, the claim before this tribunal on the 11 April 2018. The ACAS Early Conciliation certificate is from the 9 – 13 March 2018. The first allegation relates to the interview in June 2016 approximately 22 months before the issue of the claim. The next act is the complaint in February 2017 to PHE of race discrimination and victimisation, 10 months after the first act. The final act the claimant relies upon (as recorded at paragraph 71 above) is that he complained in March 2018 to Ipswich Hospital and Public Health England and they failed to investigate. These are discreet acts and not a continuing course of conduct by the same individuals. The claimant by issuing this claim has been attempting to relitigate matters that have been struck out, he has given no convincing explanation for the delay in issuing these proceedings and it would not be just and equitable to extend time.

75. In so far as it could be argued that the allegation at paragraph 10 of this claim that the claimant requested information on 5 May 2017 and that he made a further application for information on 25 February 2018 and again on 9 March 2018 were not matters that were in the first ET1 and therefore were not struck out the tribunal would conclude as follows:

    75.1 It accepts the arguments made by Miss Hirsch on behalf of Public Health England that the claimant cannot bring such claims in his capacity as an employee or an applicant and the tribunal does not have jurisdiction under the Equality Act 2010 sections 39 and 40. Section 39(3) is clear that a person must not be subject to victimisation in the arrangement made who to offer employment to, terms of the offer of employment or by not offering employment. The claimant's subject access request does not come within the scope of that sub section. Whilst acknowledging he had been an applicant for employment, if (which is not accepted) there was any victimisation in not providing documents requested that is not an act that falls within section 39(3). It is not to do with arrangements for interview, the offer or the terms of any offer.

    75.2 The tribunal does not have jurisdiction over a Subject Access Request.

    75.3 The claimant believes he has not been given the information he seeks (which in any event Public Health England states does not exist), and if that is his view he is entitled to take the matter to the Information Commissioner.

**Ipswich Hospital**

76. The tribunal grants the application of Ipswich Hospital to be dismissed from these proceedings.

77. In relation to the interview on 20 June 2016 (paragraphs 2 – 6 of this ET1) that was carried out by representatives of Public Health England. It was clarified at the Preliminary Hearing before Employment Judge Michell that it was a claim of victimisation but 'just' PHE. This was again made clear by Employment Judge Finlay at his hearing on the 4 July 2018. No claim of victimisation has been brought against Ipswich Hospital in relation to the interview in June 2016.

78. The claimant is misconceived in his view that Public Health England is Ipswich Hospital's agent. None of the documentation he has referred to at this hearing supports this contention. The argument has no reasonable prospects of success.

79. Paragraph 8 of the ET1 – the complaint that PHE covered up and failed to investigate the claimant's complaint of February 2017 is a complaint brought against PHE and not Ipswich Hospital. It is specifically recorded in Employment Judge Finlay's Preliminary Hearing summary at paragraph 9.6 that the allegation is against PHE only and that the claimant asserted he would not and did not need to apply to amend to include it as a claim against Ipswich Hospital as well. Insofar as it said now to be a claim against Ipswich Hospital it is dismissed as having no reasonable prospects of success and/or misconceived having not been brought against that entity.

80. Paragraph 9 of the ET1 – that the claimant's Subject Access request of February 2017 was not responded to. Employment Judge Finlay clarified this as a claim of victimisation against both respondents. This complaint is struck out as an abuse of process as contrary to the rule in Henderson v Henderson. The original claim was issued on 1 August 2017 and covered this period of time. At paragraph 43 that original claim even dealt with a Subject Access request of the 5 May 2017 made to Colchester Hospital. That request is a repetition of the request made on the 20 February 2017. It was made clear in Gore Wood that it is misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before. It is an abuse to now raise the February 2017 request in this claim.

81. Further, it is not clear why such a claim is brought against Ipswich Hospital in any event. The original Subject Access request of 20 February 2017

was in the bundle for this hearing. It was addressed to Lauren Toure (Human Resources Directorate PHE) and Peter Hitchcock at a Colchester Hospital email address. It requested information held by the Pathology Partnership. In listing the Trusts that the claimant believed that request covered he did not include Ipswich Hospital. The only reference to Ipswich Hospital was 'please include any investigation carried out by Ipswich Hospital in relation to the protected disclosure… made by [the claimant] December 2013…' To suggest, if the claimant does, that Ipswich Hospital committed an act of victimisation by not replying to a request it was not sent is misconceived and is also struck out on that ground.

82. In relation to the Subject Access Request on 5 May 2017 the tribunal accepts the submissions on behalf of Ipswich Hospital that the request was addressed to Colchester Hospital and not Ipswich Hospital and it does not appear there is therefore a cause of action against Ipswich Hospital. It is addressed to Peter Hancock and Jennifer Canham, both at Colchester Hospital and the request is not addressed to any addressee at Ipswich Hospital. The tribunal finds that this claim is misconceived as against the Ipswich Hospital and is dismissed.

83. Further in relation to the request of the 5 May 2017 the same conclusions as at paragraph 80 must be reached applying the rule in Henderson v Henderson as set out above in relation to the original February request and the claim is struck out against Ipswich Hospital as an abuse of process on that ground also.

84. Further, the claims relating to February and May 2017 are significantly out of time, this claim form having been received on the 11 April **2018** and the claimant has advanced no convincing case as to why it would be just and equitable to extend time (as concluded at paragraph 74 above)

85. Paragraph 11 ET1 – that on 25 February 2018 the claimant made a further application regarding information on the investigation regarding the claimant's complaint of race discrimination and victimisation and he recites the reply of PHE of the 5 March 2018. The tribunal accepts the submissions on behalf of Ipswich Hospital that an analysis of the paragraph does not disclose any claim pleaded against Ipswich Hospital.

86. Paragraph 13 ET1 – 9 March 2018 the claimant made a complaint to Ipswich Hospital and PHE and they failed to investigate. This email was seen in the bundle. It is addressed to Colchester Hospital and not to Ipswich. The substance of the complaint is the interview in 2016 and one in 2017. Those interviews were the subject of the First claim, are matters that relate to PHE not Ipswich Hospital and have been struck out. It is an abuse to attempt to litigate them again under the rule in Henderson v Henderson.

87. The claimant appears to be of the view that he establishes a 'continuing act' by continuing to make complaints and Subject Access Requests about the same matters. In any event there cannot be a continuing act where there is a gap between 5 May 2017 and the 9 March 2018 of 10 months. In addition there is the issue of the status required in accordance with the provisions of the Equality Act 2010, to bring the complaint of victimisation. As has been set out above at paragraph 32, such a claim can be brought by 'a person', not an employee, but only in relation to the specific matters listed in section 39(3) of the Equality Act 2010. Continual and repetitive Subject Access Requests do not fall within the three matters listed of arrangements for deciding to whom to offer employment, the terms of an offer and the failure to offer employment. It is clear from the authorities (Derbyshire and others v St Helens Metropolitan Borough Council and others [2007] ICR 841 HL and Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 HL that the tribunal must apply a three stage test. Firstly, did the alleged victimisation arise in any of the prohibited circumstances set out in s39(3), if so did the employer subject the claimant to a detriment and if so was that because he had done a protected act. The claimant in making his Subject Access requests fails at the first stage.

88. For all the reasons set out in the conclusions above all claims brought in this Second claim are struck out.

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Employment Judge Laidler

Date: …1 March 2019……..

Sent to the parties on: 4 March 2019.

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For the Tribunal Office