EMPLOYMENT TRIBUNALS

claimant: Mrs B Schaefer

respondent: UK Government

PRELIMINARY HEARING

Heard at: Nottingham (in public) **On:** 19 March 2019

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: In person
For the respondent: Ms E Hodgetts, counsel

JUDGMENT

(1) None of the complaints the claimant wishes to pursue has any reasonable prospects of success.

(2) To the extent the claimant would need permission to amend in order to be able to pursue any of those complaints, permission is refused.

(3) The entire claim is struck out pursuant to rule 37(1)(a) on the grounds that it has no reasonable prospects of success.

REASONS

1. This is a preliminary hearing to deal with preliminary issues. First and foremost, the issue I am dealing with is whether the claimant's claim should be struck out under rule 37 as having no reasonable prospects of success.

2. In terms of the relevant law, I take into account, in particular, paragraph 24, part of Lord Steyn's speech, of the House of Lords' decision in Anynanwu v Southbank Student Union [2001] ICR 391 and paragraphs 29 to 32 of the Court of Appeal's decision in North Glamorgan NHS Trust v Ezcias [2007] EWCA Civ 330. When assessing whether a claim has "*no reasonable prospects of success*", the test to be applied is whether there is no significant chance of the trial tribunal, properly directing itself in law, deciding the claim in the claimant's

favour. Subject to one proviso, in applying this test I must assume that the facts are as alleged by the claimant. The one proviso or qualification is that I do not make that assumption in relation to any allegation of fact made by the claimant so implausible that I think there is no significant chance of any tribunal, properly directing itself, accepting the allegation as true.

3. I note that striking out a tribunal claim, particularly one such as this one involving complaints of breaches of important employment rights and disputed allegations of fact, is an exceptional thing to do and that before I will do so the respondent has to cross a very high threshold indeed. Equally, however, the overriding objective is not served by permitting claims that are bound to fail to continue. Doing so benefits no one, least of all the claimant.

4. Finally, in relation to the relevant law, I note that I am not obliged to strike out a claim or part of a claim that I decide has no reasonable prospects of success; I have a discretion as to whether or not to do so come what may. However, I think I would have to have some very particular reason for permitting a complaint I thought was bound to fail to continue. My decision in the present case is that it is appropriate for me to exercise my discretion to strike out in relation to every part of the claim that has no reasonable prospects of success. This is because there is no discernible special or particular reason to do otherwise.

5. There are other issues that I might have had to have dealt with had my decision on rule 37 been different. In particular, there is an issue as to what complaints are before the tribunal and whether the claimant should be given permission to amend if she needs it. In most cases, it would be logical to deal with that issue first in the tribunal's decision.

6. Technically, the claim that is before me is the claim set out in the claim form. Although the claimant seems to think otherwise, she has never been given permission to amend. However, towards the start of the hearing, both the claimant and respondent's counsel accepted my proposal that I deal first with whether or not all the complaints the claimant wishes to pursue have any reasonable prospects of success. If I decided that issue against the claimant, then that would be the end of the matter because, if and to the extent the claimant needs permission to amend to pursue some of those complaints, I would not give permission to amend to enable her to bring complaints with no reasonable prospects of success. What would be the point in giving her permission to amend with one hand only to strike out under rule 37 with the other? Only if I had decided that some part of her proposed claim was not liable to be struck out under rule 37 would I have needed to concern myself with anything else.

7. Having debated the claimant's case with her at length, it is clear to me that all and any complaints she wishes to pursue, whether she needs permission to amend in order to pursue them or not, have no reasonable prospects of success. I have therefore made my decision as if the claimant had been given such permission to amend as she needs, even though she hasn't. My decision is, though, technically in three paragraphs, as set out in the Judgment above.

8. I shall come in a moment to precisely what the claimant's complaints, or proposed complaints, are.

9. These proceedings were presented on 17 September 2018 following early conciliation beginning and ending on the same date. There is one respondent and one respondent only – the United Kingdom Government. The claim form had named two other respondents, the Leicester Partnership NHS Trust (which I shall refer to as the "Trust") and the British Association of Social Workers (which I shall refer to as the "BASW"). However, she had not been through early conciliation against either of them and so her claim against them was rejected under rule 10. She did not apply for reconsideration of that rejection under rule 13.

10. The types of claim the claimant wished to pursue was not at all clear from the claim form, although age discrimination and whistleblowing – that is detriment for making protected disclosures – were mentioned, the former simply by a tick in the relevant box in section 8 of the ET1 claim form.

11. The claimant explained to me during this hearing that she was hoping to be able to pursue a claim against the BASW notwithstanding the rejection of the claim against them and notwithstanding her failure to make an application for reconsideration under rule 13. (She did not express a similar hope in relation to the proposed claim against the Trust). She told me the proposed claim against the BASW was a breach of contract claim. I explained to her that as the BASW had never – even on her own case – been her employer, she would not be able to make that claim in the employment tribunal even if she had gone through early conciliation with the BASW, which she still hasn't. She appeared to accept this, but whether she accepts it or not, there is no claim before the tribunal other than the one against the UK Government or some part of the UK Government.

12. We also discussed the possible age discrimination claim. The claimant explained that what she had had in mind was a claim to the effect that a Judge in previous tribunal proceedings (which I am going to discuss below) had decided the case against her because of ageist prejudice in favour of the respondent's legal representative. There are numerous reasons why such a claim could never hope to succeed, but there is no need for me to go into them because the claimant confirmed that she is not pursuing any age discrimination claim.

13. I shall now explain something of the factual background.

14. The claimant was engaged through an agency to work for the Trust from November 2010 to the end of January 2011 as a locum senior social worker. After that relationship came to an end, the agency asked the Trust for a reference on the claimant and one was provided in or around February/March 2011. The reference was not to the claimant's liking and by a claim form presented to the Leicester tribunal on 20 August 2011 she complained that the provision of the reference was a detriment to which she had been subjected for making one or more protected disclosures during a safeguarding meeting on 24 January 2011.

15. The Trust maintained that she was not a whistleblower; that the reference provided was an appropriate and fair one; and that even if she was a whistleblower, the reference provided on her had nothing to do with any whistleblowing.

16. As best I can tell, there has never been a judicial decision on whether the claimant ever made a protected disclosure – i.e. whether she was actually a whistleblower – nor, more generally, as to the underlying merits of her 2011 tribunal claim. That is subject to comments I shall make later about her subsequent County Court claim.

17. In relation to the 2011 tribunal claim, there was a pre-hearing review to deal with time limits on 15 December 2011. Employment Judge Calladine decided that the claim was out of time and struck it out on that basis. The claimant appealed to the Employment Appeal Tribunal and on 25 June 2012, His Honour Judge Jeffrey Burke QC refused the appeal under rule 3(7), deciding that the notice of appeal disclosed no reasonable grounds for bringing it. The claimant did not seek a rule 3(10) hearing.

18. Nothing more happened in those proceedings until 2018, when the claimant applied to the Supreme Court. I have not seen a copy of her application, but in a written decision of Lord Lloyd-Jones of 18 October 2018 rejecting the application (on the basis that "*No appeal lies to the Supreme Court in these circumstances*"), the application is described as the claimant seeking permission to appeal against the decisions of the employment tribunal of 2011 and the Employment Appeal Tribunal of 2012.

19. However, prior to the claimant applying to the Supreme Court, sometime in 2016 or 2017, she applied for judicial review. I do not know any more about the application than appears from the notification of the Judge's decision refusing permission, a decision of Mr Justice Garnham of 29 June 2017. He stated: "*The claimant challenges a decision of the employment tribunal dated December 2011. If there was any ground for challenge, it should have been pursued by way of an appeal. To seek judicial review of the ET's decision is entirely misconceived. In any event, any such challenge is hugely out of time and there are no conceivable grounds for extending time. There is no properly arguable claim here and permission is refused.*"

20. In or around early 2014, the claimant brought a County Court claim against the Trust. I do not have the Claim Form or Particulars of Claim or the County Court's ultimate decision. However, from what I can deduce from other documents submitted by the claimant, in particular the defendant's Amended Defence of 25 September 2014, and from what the claimant has told me herself today, it was a claim based on the same subject matter as the tribunal proceedings but was to the effect that the reference contained negligent misstatements.

21. The claimant appears to have wanted to make a whistleblowing claim in the County Court as well. But even if such a claim had not already been rejected by the employment tribunal, the County Court would not have had jurisdiction to deal with it.

22. The County Court trial took place in or around June 2016. As just mentioned, I do not have a copy of the County Court's decision because the claimant has not provided it. She told me this morning that the Judge was Mr Recorder Maxwell QC. Looking at other documents that have been provided, in particular a decision of the Court of Appeal refusing permission to appeal, it seems that the claim failed and that the Judge decided that the reference did not involve any misstatement and was non-negligent.

23. Pausing there, I suggested earlier that there has never been a trial on the merits of the previous tribunal claim. That is correct. However, if the claimant were somehow able to reopen the 2011 tribunal proceedings against the Trust, the findings made by the County Court about the reference being non-negligent and not containing misstatements would be binding and potentially highly relevant.

24. The Court of Appeal decision refusing permission to appeal against the decision of the County Court was of Lord Justice Sales and was dated 10 January 2017. He decided the appeal was totally without merit.

25. It is not entirely clear, but the claimant seems to have applied for judicial review of the County Court's decision at or around the same time as applying for judicial review of the employment tribunal's and Employment Appeal Tribunal's decisions. That application was dismissed on or around 18 January 2017 as being totally without merit. I do not have a copy of the decision itself, but I do have the covering letter sent by the Administrative Court Office at Birmingham.

26. By way of further background information, the claimant has also applied, without any apparent success, to the European Court of Human Rights and the European Commission. In addition, she has been in contact with various Members of Parliament and with Sir Robert Francis QC, or at least his office.

27. I turn to the claim the claimant is bringing now and ask myself the question I asked of the claimant during this hearing: out of the types of claim the tribunal has the power to deal with, what type of claim is this? The claimant was unable to answer that question.

28. In summary, I do not think the claimant could realistically hope to succeed in any of the claims she wants to pursue in any court or tribunal. Even if I am wrong about this, she certainly cannot bring them in the employment tribunal because the employment tribunal has no power to deal with them.

29. I shall now consider what the claimant's claim is, going through the relevant parts of various documents she has submitted to the tribunal as well as what she told me about her claim today.

30. In a document headed "*Addendum for to claimant's witness statement for the PHR on Mar 19, 2019*", the claimant suggested, "*this is a claim against the Government under strict liability for permitting breaches of PIDA* [that is, the Public Interest Disclosure Act 1998] and Art 6.1 HRA [that is, the Human Rights Act 1998] *(related to the breaches of PIDA and subsequent breach of Art 1 Prot*

1 HRA)". That is a reference to Article 1 of the First Protocol of the Human Rights Act 1998, which is concerned with personal property rights.

31. Similarly, in an application to amend the ET1 dated 12 February 2019, the claimant stated: "*My claim is one of holding the Government accountable for failing to protect me from breaches of PIDA and Art 6.1 HRA …. My claim is one of holding the Government accountable for failing to protect me from breaches of PIDA and Art 6.1 HRA. This is brought because of the very serious financial consequences that failure has had on my life's mission, its SORI* [I don't know what she means by this] *and my wellbeing.*"

32. I am not aware of any piece of legislation that gives the employment tribunal power to deal with a claim of that kind and the claimant was not able to identify one. When asked to identify one, she referred only to the Public Interest Disclosure Act 1998. I went through section 47B of the Employment Rights Act 1996 ("ERA") with her, in particular subsection (1), which at the time of the events she is complaining about was the potentially relevant provision. She confirmed she was not suggesting that she had ever, at any relevant time, been employed by the UK Government or any part of it.

33. Insofar as I can identify a cause of action, the claim the claimant wants to pursue is one under sections 6 and 7 of the Human Rights Act 1998. Suffice it to say that the employment tribunal has no jurisdiction.

34. Also in the application to amend, the claimant states: "*The present claim has been submitted in time after fresh evidence was presented by Jeremy Hunt in his public statement and the QA session following it in Parliament on June 20th*. *This is the latest and most aggravating incident of victimisation.*"

35. In the statement of case document that accompanied her claim form, the claimant wrote: "*This is a new claim after new evidence was provided by Jeremy Hunt in his public statement before Parliament on June 20, 2018.*"

36. I think the public statement referred to was one made to Parliament in response to a report on the Gosport Memorial Hospital scandal, a report that is in the hearing bundle at the claimant's request. The scandal concerned inappropriate use of opioid analgesics. It had nothing to do with the claimant or the Trust and, looked at objectively, has nothing discernibly to do with the claimant's case.

37. Be that as it may and although I do not think that this is what the claimant meant in her application to amend, if she is wanting to bring a claim under sections 47(B) and 48 of the ERA relying on something said in Parliament by Jeremy Hunt (the then Health Secretary), relying on the statement as a detriment, that would be a hopeless case for numerous reasons including: that statements in Parliament are protected by Parliamentary privilege; that the Department of Health (that is, more properly, the Department of Health and Social Care) was not the claimant's employer at any relevant time; and that Mr Hunt did not make the statement on behalf of the Trust – which, as above, was not involved in the scandal – but in his capacity as Secretary of State. Also, even assuming the claimant did indeed make protected disclosures in 2011, the idea that Mr Hunt

made his statement in 2018 to 'get at' the claimant for making them would be absurd.

38. This is a convenient point to discuss who the respondent is. That is a question tied up with the question of what the claimant is claiming: what she is complaining about and what her cause of action is.

39. As already mentioned, the only named respondent still in the proceedings is the UK Government. Even if the claim against the Trust had not been rejected for lack of an early conciliation certificate, there is no discernible claim against the Trust different from the one which was struck out in 2011. It would be an abuse of process for the claimant to relaunch the same claim now.

40. The proposed claim against the BASW, similarly rejected for lack of an early conciliation certificate, I have already dealt with.

41. The ACAS early conciliation certificate that was provided named the UK Government as the prospective respondent but gave the Department of Health in London as the UK Government's address. Particularly given that the UK Government is not a valid respondent to a tribunal claim, the claimant's claim should potentially be seen as being against the Department of Health and Social Care, i.e. with the Secretary of State as the true respondent.

42. In the claim form, the first line of the UK Government's address is given as the Department of Health and the Department of Justice. This accords with the idea that at least one of the correct respondents is the Secretary of State for Health and Social Care.

43. In the claimant's application to amend, she states: "*The ET1 was initially only sent to the address of the DoH while being intended for an address to both the DoH and MoJ as part of the UK Government*". The claimant confirmed to me that she was intending to make a claim against the Department of Health and the Ministry of Justice.

44. Had the Department of Health / Secretary of State been named as the respondent, I expect the claim would not have been rejected for lack of an early conciliation certificate. This is because the Department of Health appears on the early conciliation certificate, albeit not as the respondent. I am therefore proceeding on the basis that the Secretary of State for Health and Social Care is a respondent to these proceedings.

45. What of the "*Department of Justice*" though? Had the Justice Secretary or the Ministry of Justice been named as a respondent, the claim against them would very likely have been rejected, and in my view rightly so. The claimant did not go through early conciliation against either or both of them. There is, I think, no claim before the employment tribunal against the Ministry of Justice / Justice Secretary.

46. However, in accordance with what I said earlier, I shall for present purposes assume in the claimant's favour that it is appropriate to allow her to amend her

claim to add the Ministry of Justice or the Justice Secretary as a respondent and deal with the strike out application as if I had given her permission to amend.

47. From this point onwards where I refer to the "Secretary of State", I am referring to the Secretary of State for Health and Social Care and when I refer to the "Ministry", I am referring to the Ministry of Justice.

48. What, then, is the claim against the claim against the Secretary of State? In the claim form statement of case, there is a reference to Mr Hunt conceding that there was "*endemic*" unfair treatment of whistleblowers in the NHS and to this being "*new evidence*" for such an "*endemic*" or "*systematic*" practice. It is also stated that the "*barrister for the NHS had to admit in civil proceedings in 2016 that he did not have a defence*".

49. I note, in passing as it were, that: by the "*barrister for the NHS*", the claimant means the barrister representing the Trust in the County Court proceedings and that the Trust is not the same thing as the Department of Health or the Secretary of State; regardless of what the claimant believes was admitted in court in 2016, the fact remains that the claimant lost both her claims against the Trust and I have no power to reopen either of them.

50. The proposed claim against the Secretary of State is developed in the application to amend. The claimant states in that application, "*Even if NHS Trusts are seen as arms-length service providers, the Government obviously intended to advise them very specifically about the application of the PIDA from the point when Sir Robert Francis QC was instructed late in 2012 or early 2013 to develop a report and recommendations how to implement fully the PIDA. Jeremy Hunt on June 20th, 2018 admitted the failure of this to date while deflecting from the breaches of law involved. The Government, through the DoH and the MoJ, are being held responsible for their failure to protect me from breaches of PIDA and Article 6.1 HRA at all levels of the previous processes as detailed in my complaint to the EC* [that is, the European Commission] *from May 2018*".

51. In a document dated 26 November 2018 headed "*claimant's application for Directions*", the claimant wrote: "*The claim stands; the UK Government has failed to protect the claimant from victimisation after whistleblowing through implementation of the law and ethical professional practice at all levels …*"

52. The claimant's statement of 11 March 2019 includes the following: *"The claimant argues this is a fresh claim. A claim against the UK Government for having failed to protect her, as presumably other NHS whistleblowers, from breaches of the law as referred*".

53. In a document headed "*claimant's postscript for her witness statement*", provided to the employment tribunal on 18 March 2019, the claimant stated: "*Insofar as it may no longer be possible in law to speak of strict liability not even in the case of a public authority overseeing the employer, the claimant argues for liability due to negligence, possibly gross negligence on account of failing to get public service provider NHS Trust LPT* [the Trust] *to adhere to PIDA*. *This liability issue*

in the claimant's view might even be seen as abuse of process insofar as the legal team for the defendant would have known or could have known what their barrister 5 years into the process admitted, namely that he did not have a defence. Regrettably working in conjunction with HH Hampton's refusal of a transcript."

54. To explain these last comments: the claimant believes a concession was made by counsel for the Trust at the County Court trial, which was ignored by the trial judge; she told me that she subsequently requested a transcript of the part of the hearing where the concession was made and that her request was refused, on paper, by Her Honour Judge Hampton.

55. The claimant has not told me anything today that materially alters my understanding of her case gleaned from what she has written to the tribunal. We carefully and thoroughly went over what the claim against the Secretary of State was and ultimately, the claimant pinned her colours to the mast in the following way:

    55.1 her primary case comes down to the Department of Health / Secretary of State, from before 2011 and continuing to the present day, failing to ensure there was and is adequate protection for whistleblowers in the NHS and for her in particular;

    55.2 her secondary case (and I am, as best I can, quoting directly from her oral submissions here) is: "*I am inclined to argue that extensive use of legal process to continue with the discrediting of whistleblowers is almost an act in itself*". She holds the Secretary of State responsible for this.

56. In relation to her primary case against the Secretary of State, I am not sure whether any claim along those lines could be made in any other court or tribunal. I rather doubt it, but I lay no claim to particular expertise in public law. What I <u>am</u> certain about is that no such claim can be made in the employment tribunal.

57. As I have attempted to explain to the claimant, the employment tribunal is a creature of statute. What I mean by this is that I, as an Employment Judge, only have the power to decide a particular type of case if there is a piece of legislation somewhere which gives Employment Judges that power. There is no piece of legislation giving Employment Judges the power to deal with the type of public law claim against the Secretary of State for Health and Social Care that the claimant wishes to pursue.

58. Turning to the secondary case, insurmountable problems with a claim along those lines include:

    58.1 in the absence of any coherent allegation of direct interference by the Secretary of State or by Department of Health employees, he is not responsible for the way in which litigation is conducted by individual NHS Trusts;

58.2 no claim could be made about alleged victimisation that takes place as part of legal proceedings because of so-called judicial proceedings immunity – see, for example, South London & Maudsley NHS Trust v Dathi [2008] IRLR 350, EAT;

58.3 once again, the employment tribunal has no power to deal with such a claim.

59. I played devil's advocate with myself and tried to come up with some form of claim against the Secretary of State, consistent with what the claimant is alleging, that the tribunal might conceivably have jurisdiction to deal with. It should be emphasised that this is something I have come up with for myself and is not how the claimant puts the case herself. For what it is worth, the best case I can come up with is a claim to the effect that the Department of Health aided and abetted the alleged persecution of the claimant as a whistleblower by not putting adequate protections for whistleblowers in place within the NHS.

60. There are numerous reasons why such a claim would inevitably fail given the particular facts of this case including: time limits; the fact that if a claim was made in respect of someone's failure to act, that failure to act must be deliberate and the notion that successive Secretaries of State up to 2011 deliberately failed to put adequate protections for NHS whistleblowers in place on the ground that the claimant made a protected disclosure in January 2011 would be far-fetched, to say the least; perhaps more fundamentally, the subsections of ERA section 47B that permit claims to be made against third parties who persecute whistleblowers as agents for the employer did not come into force until 25 June 2013.

61. The proposed claim against the Ministry of Justice is similarly misconceived; more so, if that is possible.

62. The main part of the claim form statement of case which constitutes the proposed claim against the Ministry of Justice is this: "*In my case, the barrister for the NHS had to admit in civil proceedings in 2016 that he did not have a defence which the part-time Judge, a barrister at retirement age, ignored just as he did ignore vital evidence such as NHS policies and duties of an employer of a social worker while simply preferring their evidence and showing very little skill in judicial reasoning*. *Appeals were not heard. This leaves the impression that various senior lawyers in public service are correct when saying that the high number of vacancies for Judges is already affecting justice being not done. This may also account for the scenario in the PHR/ET in December 2011 where the Judge seemed unable to follow a recent closely relevant precedent (late ET1 due to stress and wrong legal advice) and struck out the case for that while the ET seemed to have de facto colluded with the defendant's refusal to disclose vital evidence for whistleblowing (when one member of staff had written to the claimant that in cases of whistleblowing the 3 month time limit could be extended).*"

63. Insofar as there is a claim against the Ministry in the claim form statement of case, and insofar as it is possible to understand the basis of that claim, it is

along these lines: the Judges in the employment tribunal in 2011 and in the County Court in 2016 got their decisions wrong and their decisions should have been, but where not, overturned on appeal; the claimant was denied a fair trial due to the fact that she was unrepresented and she was unrepresented due to cuts to legal aid; the Secretary of State's statement of 20 June 2018 (already referred to), and, in particular, what the claimant refers to as his "*concessions*", constitutes new evidence.

64. Dealing with that piece by piece:

64.1 even if I thought that Employment Judge Calladine and Mr Recorder Maxwell QC had got their decisions wrong and/or that the claimant had been denied a fair trial, I have no power to overturn their decisions nor, directly or indirectly, to go against them;

64.2 as already mentioned, the employment tribunal has no power to hear claims under the Human Rights Act 1998, nor to deal with public law claims;

64.3 in certain rare circumstances, new evidence provides grounds for reopening an old case and overturning the decision that had been made, usually by way of appeal. It does not, however, provide a basis for a court or tribunal in a different case to ignore a relevant decision in an old case that has not been overturned;

64.4 it is inconceivable that the contents of a speech or statement to Parliament given in 2018 could be relevant to the time limits issue in the 2011 tribunal proceedings. Because I do not have a copy of the County Court's decision, I cannot with complete confidence say the same about its relevance to the issues decided by the County Court, but can say it seems vanishingly unlikely that it would be relevant to those issues either.

65. There is nothing in the application to amend, the addendum, the claimant's statement of 11 March 2019, the postscript, or anything else the claimant has written to the tribunal, or anything the claimant told me today, that changes my understanding of the claim she wishes to make against the Ministry of Justice.

66. In her statement of 11 March 2019, she says, amongst other things: "*The barrister for LPT confirmed in 2016 in his oral statement that he had no defence of substance. The barrister for the NHS had twice been caught misleading a Judge, once in 2015 and once in 2016. The Judge in County Court who ignored the barrister's acknowledgement also ignored that the recipient of one piece of the claimant's work in progress had replied expressing contentment with that work in progress. The same Judge also ignored the NHS policies put before him. The original ET in 2011 had de facto colluded with LPT in their refusal to disclose evidence for the claimant's protected disclosures thus facilitating the strike out of the PHR the claimant's original claim against the unfair reference. The Judge in the original PHR ignored a close precedent from earlier in 2011 for allowing an extension of time for stress and wrong legal advice evidence unfortunately lost with a folder at a legal aid solicitor's office. EAT did not provide*

any evidence for judicial reasoning neither did Court of Appeal or Administrative Court."

67. She goes on in that document to refer to several "*unfair trials with unfair outcomes*", to the judicial system being "*in crisis*", and she makes the following statement: "*Where the question of appointing Judges and monitoring their skills or any other aspect of systematic issues exemplified in the present case falls outside the Ministry of Justice or Department of Health responsibilities, it remains in the claimant's view in intention a case against the Government brought by an unrepresented claimant*".

68. Essentially, her case is that she lost her tribunal and County Court claims because of the incompetence of Judges and that the Government is responsible for this.

69. I fear that what I am about to say will be seen by the claimant as patronising, but it is not meant patronisingly or unkindly. Almost all claimants, in my experience, think they are going to win, or at least that they deserve to win. It is very common for people who have lost a court or tribunal claim to think that the reason they have lost was not because their case was weaker than they believed it to be but was, instead, because the Judge was incompetent or biased or at least got it wrong. The system for dealing with judicial errors is the appeal process. If an appeal fails, rightly or wrongly, that is the end of the road.

70. The postscript seeks to add a claim of negligence. I have already mentioned this claim in connection with the claim against the Department of Health. As against the Ministry of Justice, it is a claim for, "*not providing legal aid to an acceptable quality / judiciary with sufficient adequate skill*". No such claim could possibly succeed in any court or tribunal and certainly not in the employment tribunal, which does not even have the power to deal with negligence claims against employers, let alone against non-employer Departments of State.

71. In oral submissions, the claimant confirmed that the claim was about, in her eyes, not getting justice, including not having legal representation and including – in her perception – the quality of and lack of judicial reasoning. She referred to "*systemic*" issues and failures. In answer to a question from me, she identified the 'systemic' problem as, "*not providing justice*".

72. I am afraid that none of that takes the case any further. Her claim boils down to an attempt to re-open her 2011 employment tribunal claim and 2014 County Court claim. That cannot be done.

73. If she could make this claim, then anyone dissatisfied with the outcome of litigation who had appealed unsuccessfully could potentially sue the Ministry of Justice for failing to provide them with justice as they perceive it to be.

74. The fundamentals are these:

    74.1 putting to one side a very small number of very particular areas of jurisdiction that are not relevant to the claimant's situation, the employment

tribunal is concerned with private employment rights as between employer and employee or worker;

74.2 the claimant's only relevant private employment rights claim before the employment tribunal was against the Trust and that claim ended in the tribunal in 2012 when her appeal was rejected by the EAT;

74.3 I do not think there is any basis for anyone to reopen the previous tribunal claim, but even if I thought there was, *I* have no power to do so;

74.4 nobody sitting in the employment tribunal has power to interfere with County Court proceedings and decisions of the County Court, particularly not decisions that have been upheld by the Court of Appeal;

74.5 this claim is not a private law claim against the Trust but a public law claim against the Ministry of Justice, which the employment tribunal cannot deal with;

74.6 the claimant cannot win her proposed claim against the Ministry of Justice without effectively overturning the employment tribunal's 2011 decision and/or the County Court's 2016 decision. The only possible ways to overturn judicial decisions are by successfully appealing or, if this is provided for within the court's or tribunal's own rules, successfully applying for reconsideration or similar, or successfully applying for judicial review where an appeal is not available. The claimant has not made any such successful application;

74.7 the 2011 and 2016 decisions therefore stand and are binding on me and on any other Employment Judge or employment tribunal dealing with the claimant's 2018 claim.

75. I have never previously been in a position where I felt comfortable saying that a claim was 100 percent bound to fail, but I say that here.

76. The claimant sees herself as a persecuted NHS whistleblower. She may be; she may not be. I feel bound to point out that not everyone who calls themselves a whistleblower and thinks they are a whistleblower actually is one; and that the only Judge who has ever looked into the merits of the claimant's claims against the Trust to any extent has rejected them. But even if she was persecuted as a whistleblower, she has had the day – in fact days – in court the law allows her in accordance with her Article 6 rights. The argument that it breaches Article 6 for someone's claim to be struck out at a preliminary hearing on a preliminary point is not a new one. It has been argued and decided before and it is settled law that the argument is invalid; that it does not breach Article 6 or any other part of the European Convention for a claimant to be denied the full trial on every issue that they want.[1]

[1] Counsel referred in her written submissions to various cases on this point.

77. I appreciate the claimant feels she has not had justice, but she has already gone to, or tried to go to, the employment tribunal, the County Court, the Employment Appeal Tribunal, the Administrative Court, the Court of Appeal, the Supreme Court and the European Court of Human Rights. I am afraid that the public interest in the finality of litigation overrides the claimant's desire to have yet another bite at the cherry.

78. The claimant's claim has no reasonable prospect of success and it is appropriate, in accordance with the overriding objective, to strike it out on that ground, pursuant to rule 37.

Employment Judge Camp

04 April 2019

Sent to the parties on:

For the Tribunal: