EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4104542/2018, 4123520/2018, 4123364/2018, 4122619/2018, 4104543/2018, 4122656/2018

Preliminary hearing held in Glasgow on 14 August 2019

Employment Judge M Whitcombe

Dr A Ahari	**Claimant** **In person**
NHS Education for Scotland	**First Respondent** **Represented by:** **Miss H Craik** **(Solicitor)**
Dr P Wilson	**Second Respondent** **Represented by:** **Miss H Craik** **(Solicitor)**

JUDGMENT

The judgment of the Tribunal on the preliminary issues is as follows.

(1) Dr Wilson was not at any relevant time the employee or agent of NHS Education for Scotland for the purposes of sections 109 and 110 of the Equality Act 2010.

(2) Consequently, all remaining claims brought against NHS Education for Scotland on the basis of vicarious liability for the acts or omissions of Dr Wilson are struck out under rule 37(1)(a) of the Employment Tribunals

Rules of Procedure on the basis that they have no reasonable prospect of success.

(3) Consequently, all remaining claims brought against Dr Wilson personally are also struck out under rule 37(1)(a) of the Employment Tribunals Rules of Procedure on the basis that they have no reasonable prospect of success.

(4) Consequently, and by consent, Dr Wilson is removed from the parties to the proceedings under rule 34 of the Employment Tribunals Rules of Procedure.

(5) Dr Ahari is ordered to pay expenses/costs of £2,500 to NHS Education for Scotland (who have also borne Dr Wilson's legal expenses) under rule 76(1)(b) of the Employment Tribunals Rules of Procedure on the basis that none of the claims brought against either (a) Dr Wilson personally or (b) NHS Education for Scotland in respect of the acts or omissions of Dr Wilson had a reasonable prospect of success.

REASONS

Introduction

1. Oral reasons were given in the presence of the parties at the end of the hearing on 14 August 2019. These written reasons have been provided at Dr Ahari's subsequent request. I have taken this opportunity to correct the phrasing of paragraph (1) above under rule 69 of the ET Rules of Procedure. It was incorrectly phrased in the original document sent to the parties as a result of an accidental slip on my part, for which I apologise.

Procedural background

2. Dr Ahari is the claimant in 17 claims currently proceeding in Scotland. The

respondents include various parts of the NHS, the BMA, the University of Glasgow and a number of individual doctors and academics associated with those bodies. Most of those respondents face more than one claim. Most of the claims are brought under the Equality Act 2010 for direct race discrimination (section 13) and/or victimisation (section 27). Some also allege detrimental treatment because Dr Ahari had made protected disclosures (sections 47B of the Employment Rights Act 1996). Additional claims have either been commenced in, or transferred to, England.

Claims already struck out or dismissed

3. It is not necessary to set out the complicated procedural history in full, but it is relevant to refer to my previous judgment following a hearing on 4 and 5 February 2019 (copied to the parties on 15 April 2019). In that reserved judgment I found that a great many of the allegations brought by Dr Ahari were either *res judicata* having been the subject of prior ET judgments, or fell outside the jurisdiction of the ET having regard to the applicable statutory time limits, or both. The claims identified in the two schedules to that judgment were either struck out or dismissed accordingly.

The purpose of this hearing

4. This preliminary hearing was listed to deal with the respondents' application to strike out the claims brought by Dr Ahari against NHS Education for Scotland ("NES") in respect of the acts or omissions of Dr Wilson, and also the claims brought against Dr Wilson personally in respect of those same acts or omissions. All of those claims are brought by Dr Ahari under the Equality Act 2010.

5. Following careful discussions lasting an hour, it was agreed at the start of this hearing that the effect of my previous judgment was that the only remaining allegations in relation to Dr Wilson's conduct were dated 28 March 2018 and 21 October 2018.

6. All of the earlier allegations in relation to his conduct had been found to be time-barred and/or *res judicata* (see paragraphs 69-76, 134-137, Schedule A and Schedule B of my previous judgment, sent to the parties on 15 April 2019).

Respondents' argument

7. The respondents' point can be summarised simply. The respondents argue that it can very easily be demonstrated that Dr Wilson was neither the agent nor the employee of NES at the time of the only remaining allegations in relation to Dr Wilson's conduct in 2018. For that reason, NES cannot be vicariously liable for any acts or omissions of Dr Wilson under section 109 of the Equality Act 2010, and consequently Dr Wilson cannot personally be liable under section 110 of the same Act either. On that basis, the respondents argue that the claims against Dr Wilson personally and against NES in relation to Dr Wilson's conduct have no reasonable prospect of success and should be struck out under rule 37(1)(a) of the ET Rules of Procedure 2013.

8. Those are the arguments pursued by the respondents at the hearing. Certain other arguments set out in the respondent's written submissions were not pursued. I had indicated that those other arguments were not in my view appropriate for summary determination and would have to be left to a full hearing. There is no need to say any more about them here.

Claimant's argument

9. The claimant's argument is that Dr Wilson was the agent, or alternatively the employee, of NES at all relevant times and that therefore it cannot be said that his claims against NES and Dr Wilson have no reasonable prospect of success.

Applicable statutory provisions

10. I will set out the relevant parts of sections 109 and 110 of the Equality Act 2010, since they are of central importance.

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

[the remainder of the section is not relevant]

110 Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

11. It is very clear from those sections that the principles of vicarious liability in section 109 depend upon the actor being *at the time of the relevant act or omission* an employee or an agent of the principal. There is no vicarious liability for the acts or omissions of those who are *former employees*, *or former agents*, at the time of the alleged discrimination.

12. This should not be confused with the effect of section 108, which deals with relationships which have ended. Section 108 provides for situations in which, for example, a former employer discriminates against its former employee. The relevant relationship in such a case is therefore the one between claimant and respondent. However, that has no bearing on the question of vicarious liability, and the type of person for whose acts the former employer might be liable and through whom it might discriminate. Vicarious liability only arises in respect of the *current* employees or agents of the former employer (or other relevant respondent, such as a qualifications body or employment service provider). That is obvious from the statutory wording.

13. In summary, a viable claim for discrimination or victimisation under the Equality Act 2010 can only be based on the actions of those who are themselves, at the relevant date, the employee or agent of the alleged discriminator. That is the fundamental legal principle at the heart of this case. Dr Ahari did not argue otherwise.

14. None of the parties suggested that section 111 of the Equality Act 2010 (instructing, causing or inducing contraventions) or section 112 (aiding contraventions) had any relevance to this hearing or to these claims. Dr Ahari has not put his claims on either of those bases. The hearing was concerned with sections 109 and 110 only.

Legal principles applicable to striking out

15. The vicarious liability issue outlined above is to be determined in the context of an application to strike out under rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 on the basis that the claims have no reasonable prospect of success. Previous versions of the ET Rules have applied the label “misconceived” to claims which have no reasonable prospect of success, and it remains a convenient shorthand, especially since the phrase appears in many of the leading authorities.

An exceptional course in discrimination cases

16. Since giving oral reasons in the present case the decision of the President of the EAT, Choudhury J, in ***Malik v (1) Birmingham City Council (2) Trickett*** (UKEAT/0027/19/BA) has become available on the EAT website. It provides a valuable summary of the principles below. I mention it for the sake of completeness but nothing in it changes the legal principles I have applied and I did not think that fairness required any additional submissions from the parties.

17. It is well established that Tribunals should be very cautious about striking out discrimination claims at a preliminary stage. It should only be done in the clearest of cases. See for example the classic case of ***Anyanwu v South Bank Students' Union*** [2001] UKHL 14, especially paragraph 24 in the speech of Lord Steyn, and also ***Mechkarov v Citibank NA*** [2016] ICR 1121, EAT, for a more recent summary of principles.

Cases which are misconceived on the facts

18. Only in exceptional cases is it appropriate to strike out a claim where the central facts are in dispute and the evidence in relation to them has not yet been heard (***Ezsias v North Glamorgan NHS Trust*** [2007] EWCA Civ 330). One example would be where the facts asserted by one party were clearly and directly contradicted by contemporaneous documentation. If, however, the relevant factual issues can only be resolved by hearing evidence, then it will generally be inappropriate to strike the case out even if there are obvious weaknesses in the claimant's case (see ***A v B and C*** [2010] EWCA Civ 1378).

19. However, there is certainly no absolute bar to striking out discrimination claims and in other cases the courts have held that a Tribunal should not be deterred from striking out a discrimination claim where the factual basis for inferring discrimination was considered to be simply too weak to establish an arguable case (***ABN AMRO Management Services Ltd v Hogben*** (UKEAT/0266/09)). Similarly, in ***Community Law Clinics Solicitors Ltd & Ors v Methuen*** (UKEAT/0024/11) it was said that claims could be struck out

when appropriate and that the resources of ETs ought not be taken up by having to hear evidence in cases that are bound to fail.

20. It is acceptable in some cases to hear evidence on the core disputed facts before reaching a conclusion on the prospects of success. It is not always necessary to assume for the purposes of argument that all of the facts asserted by the claimant in the ET1 are true. For example, in ***Eastman v Tesco Stores Ltd*** [2012] All ER (D) 264 (Nov) the EAT endorsed the approach of the Employment Tribunal which included hearing evidence on the core factual dispute and then resolving that dispute. Having done so, and having resolved that dispute against the claimant, the ET permissibly struck the claim out as having no reasonable prospect of success. HHJ Peter Clark expressly rejected the submission made to the EAT that it was not open to the Employment Judge to resolve a central dispute of fact by hearing evidence on a strike out application. HHJ Peter Clark contrasted the position with that in ***Ezsias*** where central facts remained in dispute at the preliminary hearing.

Cases which are legally misconceived

21. There are also many examples of cases in which claims, including discrimination claims, have been struck out at a preliminary stage without hearing evidence because the claims are found to be legally misconceived (see ***Hawkins v Atex Group Ltd*** [2012] IRLR 807).

22. In summary, there are really two routes to the exceptional step of striking out all or part of a discrimination claim. The first route is where it is quickly and easily established that the essential facts relied on by the claimant have no reasonable prospect of being established at a full trial. The second is where, even taking the claimant's case at its factual highest and assuming that those essential facts are established, the correct application of the law means that there is still no reasonable prospect of success.

23. I have adopted the approach taken in ***Eastman v Tesco Stores Ltd*** (above). I have heard evidence (both oral and documentary) relevant to the following central issue: whether Dr Wilson was on the relevant dates in 2018 the

employee or agent of NES. Having made the necessary findings of fact, I have then applied the law in sections 109 and 110 of the Equality Act 2010 in order to assess whether the claims have a reasonable prospect of success.

24. By taking that course I have not conducted an "impromptu mini trial of oral evidence to resolve core disputed facts", an approach disapproved by Mitting J in ***Mechkarov v Citibank NA*** [2016] ICR 1121, EAT. This hearing has not been limited to oral evidence but has also taken into account all of the documentary evidence which the parties put before me. It has not been a "mini-trial", it is the determination of Dr Wilson's status as an agent or employee of NES as a preliminary point. The merits of the claims have been assessed for the purposes of rule 37(1)(a) in the light of that finding.

Evidence

25. I turn to review the evidence. I heard from the following witnesses, all of whom gave evidence on oath or affirmation and were cross-examined.

Dr Wilson

26. The first witness was Dr Wilson, one of the respondents. He is a retired consultant anaesthetist formerly employed both by Ayrshire and Arran Health Board and by the predecessor of that organisation. He was also the sometime specialty advisor to the relevant Deanery and the organisation which in due course became NES. There is no evidence before me at all to suggest that Dr Wilson was ever *employed* by NES. However, he was subject to a service level agreement with NES. In that capacity, it is accepted that he was certainly once an agent of NES and its predecessor. The question is for how long he remained the agent of NES.

27. Dr Wilson says that he held that position for only 3 years, from 1 January 2002 until 1 January 2005, when he resigned the role because it was incompatible with another role he had accepted with the Royal College of Anaesthetists. Dr Wilson says that he has not held any other position with NES since 1 January 2005.

28. Dr Ahari asserts that this evidence is false, on a basis which I will explore below.

Professor McLellan

29. The next witness was Professor McLellan. He is currently the relevant Postgraduate Dean and has held that role since 2012. He corroborates Dr Wilson's evidence in all relevant respects. He is quite clear that Dr Wilson has not acted as an agent of NES since 2005, and that Dr Wilson was certainly was not acting as agent of NES on the relevant dates in 2018. Once again, Dr Ahari contends that this evidence is false on a basis I will explore below, but he did not suggest in cross-examination or submissions that Professor McLellan had any reason to lie about the matter.

Dr Ahari

30. The third and final witness was Dr Ahari, the claimant, who firmly believes that Dr Wilson continued to act as agent of NES until at least the two relevant dates in 2018 and maybe longer. He also disputes the accuracy of Dr Wilson's claimed retirement date from Ayrshire and Arran Health Board, although that is not the central issue.

Assessment of the evidence

31. As always, my findings of fact were made on the balance of probabilities. As it turned out, the burden of proof had no real part to play because the evidence pointed overwhelmingly to a particular conclusion.

32. Dr Ahari had some difficulty in focusing on the relevant issues, which were discussed, agreed and emphasised before the evidence started. I queried several times during evidence the relevance of the questions Dr Ahari was asking and the relevance of some of the evidence Dr Ahari proposed to give himself. Dr Ahari's questions and evidence were almost all concerned with periods prior to 2018, which is the only relevant period for present purposes. Sometimes Dr Ahari's questions or evidence concerned events in 2002, 16 years prior to 2018. For example, Dr Ahari played a covert recording of a conversation he had with Dr Wilson in 2002, although it remains unclear to

me how anything said in that conversation shed light on the existence of a relationship of agency between Dr Wilson and NES some 16 years later in 2018.

33. I was concerned that Dr Ahari was exploring other matters of interest to him rather than taking on board my clear and repeated reminders of the need to focus on the relevant issues for this preliminary hearing, namely the relationship, if any, between Dr Wilson and NES in 2018. My reminders became increasingly firm but there was no real change in Dr Ahari's approach, or his tendency to revisit topics which had already been dealt with.

34. Eventually, I adopted the following approach to Dr Ahari's cross-examination of witnesses and his own evidence in chief. I asked Dr Ahari how long he wanted to complete his cross examination of a witness, or his own evidence in chief. I established his view of the fair period and I then allowed him all of the time he requested, despite my concerns about relevance and repetition. However, those time limits were then enforced in accordance with rule 45. It was very much then for Dr Ahari to decide how best to use the time he had requested, and which questions he should ask during that period.

35. Dr Ahari complained that he could have brought additional documentary evidence, but the decision not to do so was entirely his. As an experienced litigant he is well aware that courts and Tribunals can only decide cases on the evidence available to them, the evidence brought forward by the parties at the hearing. They cannot decide a case on assurances about the content of other evidence which might have been brought as well, or instead. Dr Ahari took responsibility for preparing his own bundle of documents and he decided what should be included in that bundle. He is an extremely experienced litigant in person and has litigated many Employment Tribunal claims in Scotland and elsewhere since 2001.

Factual conclusion and reasoning

36. As already stated, on behalf for the respondent, there is clear, firm and corroborated oral evidence that Dr Wilson's role as an agent of NES ceased in 2005, more than 13 years before the relevant dates. Dr Ahari asks me to find that Dr Wilson was still the agent of NES in 2018. By implication Dr Ahari is suggesting that that Dr Wilson and Professor McLennan are both lying, since they could hardly be honestly mistaken about 13 additional years of alleged activity on behalf of NES.

37. As a matter of impression, Dr Wilson and Professor McLennan both struck me as careful, thoughtful and honest witnesses. They engaged with the questions asked of them and their patient answers were always supported by cogent and logical reasons. I did not find any significant inconsistency between their oral evidence and the documentary evidence. They did not contradict themselves and their evidence was coherent and plausible.

38. I will deal now with the various points made by Dr Ahari in his own evidence, in cross-examination of the respondents' witnesses and in submissions.

39. First, Dr Ahari refers to Dr Wilson's speciality advisor contract, the first page of which is included in Dr Ahari's own bundle. Dr Ahari points out that the contract was for a fixed but extendable term of five years and that it was possible for the contract to continue for longer than that. I accept that an extension was a *possibility*, but the point in this case is that Dr Wilson is saying it did not happen. Indeed, he says that he resigned before the expiry of the initial fixed term of five years. That is not inconsistent with the terms of the contract. The contract does not preclude earlier termination by resignation or agreement. That is precisely what Dr Wilson claims to have done. I therefore find that there is nothing in the terms of the contract to suggest that Dr Wilson's evidence as to the duration of his role with NES is incorrect.

40. Even if Dr Ahari's point were well-founded, it would only take matters up to 1 January 2007 when the five year fixed term expired. There is no evidence before me of a formal renewal or extension of the contract at that stage, or at any other stage. Given that the real issue is whether Dr Wilson was the agent of NES in 2018, Dr Ahari's point about the fixed term is of no real assistance.

41. Next, Dr Ahari makes a point about a document which appears at page 4 of his bundle. It is a printout of a web download made by Dr Ahari on 22 August 2005, as appears from the information in the footer and as he confirmed in his own oral evidence. The document certainly lists Dr Paul Wilson as a speciality advisor or training programme director in the department of anaesthetics at Crosshouse Hospital as at the date of download. However, I find that this does not help Dr Ahari. First, the existence of this document is entirely explicable by some delay in updating online information to reflect Dr Wilson's resignation and the appointment of a replacement. Second, and even if that were not the case, it would only establish the position in August 2005. Dr Ahari has no similar document any later than August 2005. He does not have a similar printout for 2006, 2007 or any subsequent year up to and including 2018, the year containing the relevant dates for present purposes. Taking it at its highest, the document at page 4 proves nothing of assistance to Dr Ahari in relation to 2018. I am not prepared to draw any inferences about the position in 2018 from a document downloaded 13 years earlier.

42. Dr Ahari highlighted that Dr Wilson held office on the board of the West of Scotland Society for Anaesthetics ("the Society") and also attended its meetings, whether as a board member or in a personal capacity. There is no factual dispute about that, but I find that it is of no relevance at all. Dr Wilson's tenure on the board of the Society or his participation in its activities cast no doubt on the truth and accuracy of his evidence in relation to his involvement *with NES*. Quite simply, the Society is not NES. It is not a subsidiary of NES, it is not run or managed by NES, it is quite separate from NES. NES and the Society both have an interest in providing continuing education for doctors but that overlap in objectives certainly does not mean that they can be equated, or that the officers or members of the Society are, by virtue of that, agents of NES.

43. For similar reasons, I am not attracted to Dr Ahari's argument that the continuation of Dr Wilson's status as an agent of NES beyond 2005 is demonstrated by the fact that, from about 2017, Dr Ahari was excluded from Society meetings. Dr Ahari asserts that the reason for his exclusion was an

instruction given by Dr Wilson. The source of that belief is apparently a comment made to Dr Ahari by a Dr Goudie. However, Dr Goudie was not called to give evidence. I only have Dr Ahari's hearsay account and I am not inclined to accept it given that there is no obvious reason why Dr Goudie could not have been called to give evidence himself, and to face cross-examination.

44. However, even if I had accepted Dr Ahari's hearsay evidence that Dr Wilson did in some way cause him to be excluded from Society meetings, that would be entirely compatible with Dr Wilson's role and involvement *with the Society*. It simply has no bearing on the essential question whether in 2018 Dr Wilson was the agent of NES. Once again, Dr Ahari appears either to equate the Society with NES, or to assume some involvement behind the scenes for which there is no evidence. There is simply no evidential basis for a conclusion that NES controlled attendance at Society meetings, such that Dr Wilson could have been acting on behalf of NES, if indeed he brought about Dr Ahari's exclusion from Society meetings as alleged. There is no evidence at all to contradict the natural presumption that the Society is an autonomous body with its own officers making their own decisions. If any decision to exclude Dr Ahari was made by Dr Wilson as an officer or member of the Society, then I find that he did not do so as an agent of NES.

45. Dr Ahari submitted, without any supporting objective evidence, that Dr Wilson did not really retire in 2011 and that he really retired in 2016. That argument is based on some speculative points about salary, pension, and an assumption on Dr Ahari's part that Dr Wilson would necessarily work for as long as he was contractually able to in order to maximise his NHS pension. In fairness to Dr Wilson, his evidence was that he did locum work after retirement in 2011. Dr Wilson's evidence was simply that he retired from his substantive role in 2011 and there is no evidence to contradict that. Even if there had been, I find that the point does not help Dr Ahari. Even if Dr Ahari were right that Dr Wilson did not retire from his consultant post until 2016, that would demonstrate nothing in relation to the key question whether he

was also acting as an agent of NES at any particular time, still less anything of relevance to the critical dates in 2018.

Conclusion

46. My conclusion on the pertinent issue of fact is therefore that I accept Dr Wilson's evidence regarding his involvement with NES, evidence which is corroborated by Professor McLellan. Dr Ahari's criticisms of their evidence are not well-founded.

47. I find that Dr Wilson was neither the agent nor the employee of NES on the relevant dates in 2018. The evidence in support of that conclusion is clear and is in no way undermined by Dr Ahari's points.

Implications for strike out

48. This is one of those strikeout applications in which it is possible to make findings of fact on a single issue which then leads to the disposal of the claim. Having made the factual finding above, I also find that there is no reasonable prospect that:

    a. NES would be found vicariously liable for the alleged acts or omissions of Dr Wilson in 2018 under section 109 of the Equality Act 2010; or that

    b. Dr Wilson would himself be found personally liable since the test in section 110(1) of the Equality Act 2010 is not satisfied.

49. All of the remaining allegations against NES based on vicarious liability for the acts or omissions of Dr Wilson in 2018 are therefore struck out as having no reasonable prospect of success. Further, the equivalent claims against Dr Wilson personally are also struck out as having no reasonable prospect of success. In both respects, this is one of the very clear cases recognised in ***Anyanwu*** as ones which might properly be struck out. The claims are bound to fail.

50. Having heard further submissions from the parties, it was agreed that in light of those conclusions Dr Wilson should no longer be a respondent in these

proceedings. NES will remain a respondent because Dr Ahari also claims against them on other bases.

Expenses/costs

51. NES (which also bears Dr Wilson's legal costs) has applied for expenses under rule 76(1)(b). A Tribunal *may* make an expenses order and *shall* consider whether to do so where it considers that any claim or response had no reasonable prospect of success. This is such a case.

52. The respondent does not base its application on a submission that Dr Ahari has acted unreasonably or vexatiously in bringing or conducting the claims (rule 76(1)(a)).

53. It is often said that awards of expenses or costs are rare, and it is sometimes said that they are the exception rather than the rule. Certainly costs do not follow the event, and do not follow automatically just because a claim has been struck out.

54. For the avoidance of doubt, the respondent sought an order for expenses not just in relation to the claims struck out today, but also in relation to the claims against or in relation to the acts of Dr Wilson which were dismissed or struck out as a result of my previous judgment on the issues of *res judicata* and jurisdictional time limits.

55. I approach this application in three stages.

    a. First, is the threshold test to trigger my power to award expenses met?

    b. Second, and if so, should I exercise my discretion to award expenses? I am certainly not obliged to award expenses simply because I have the power to do so and there is no presumption one way or the other.

    c. Third, if I decide in principle to make an award, how big should it be?

56. I have taken into account the submissions made by both sides and I have also taken into account what Dr Ahari has told me about his financial means, although I am not necessarily required to do so (see rule 84).

57. Dr Ahari is living in social housing. Housing benefit is paid direct to his landlord. He says that his only income is Job Seeker's Allowance of £190.70 per month (less than the standard rate), that he has no savings, an overdrawn bank account and no valuable assets. He has used a laptop, a wireless speaker and a smart phone during these proceedings but tells me that they are of little value. When I asked him how he had travelled to other cases in England he acknowledged rail fares of £250-300 to Birmingham and about £350 to London. I have some difficulty understanding how Dr Ahari was able to afford such expensive, undiscounted, peak fare rail tickets if the information given about his financial means is accurate, but for present purposes I accept his unchallenged evidence on that.

Threshold

58. On the first question, I am satisfied that I do have jurisdiction to make an award of expenses. My reasons are as follows.

    a. For the reasons already set out above I have found that the claims against Dr Wilson and against NES in relation Dr Wilson's actions or omissions in 2018 never had a reasonable prospect of success, and that is why I have struck them out today. The vicarious liability point was misconceived in so far as it related to any allegation later than 1 January 2005. The relevant allegations were more than 13 years later than that.

    b. It is also necessary to refer to my previous judgment on jurisdictional time limits, since claims dismissed on that occasion are also in issue. The claims against Dr Wilson and against NES in relation to his acts and omissions in the period 2002 until 2016 also lacked reasonable prospects of success, given that they were so very substantially out of time. It should be noted that Dr Ahari did not seek to rely on any just and equitable extensions of time. His sole argument was that all relevant acts amounted to one instance of conduct extending over a period. For the reasons given in paragraph 135 of my last judgment, I

find that Dr Ahari's "continuing act" argument had no reasonable prospect of success.

Whether to make an order

59. When deciding whether, as a matter of discretion, I should make an award I bear in mind the following matters. Although the claims with which I am concerned lacked a reasonable prospect of success, considerable effort and expense will have been necessary on the respondents' parts to defend them, and to secure an order disposing of them without the further costs of a full trial. I also bear in mind that Dr Ahari is an extremely intelligent and highly educated man with considerable experience of litigation in the Employment Tribunal. I have only been concerned with his most recent 17 claims in Scotland, but I am aware of at least 5 prior claims in Scotland since 2003, as well as other litigation in Employment Tribunals south of the border. Dr Ahari also has experience of applications for costs/expenses. He could not remember the number of awards which had been made against him in the past, but he remembered at least one. He did not pay it because he could not afford to do so. There have been several preliminary hearings in this litigation which have discussed and defined the issues. Dr Ahari has been aware of the respondent's position from an early stage, and of the intention of several respondents to apply for costs. I was referred to ***Kovacs v QMW College*** [2002] EWCA Civ 352, [2002] ICR 919, CA and other authorities which remind Tribunals that a lack of means is not of itself a defence to an application for expenses or costs, since otherwise a litigant who lacked means could act with impunity. A lack of means is just one factor to be considered, and does not of itself mean that no order should be made (see e.g. ***Chadburn v Doncaster and Bassetlaw Hospital NHS Foundation Trust*** (2015)(UKEAT/0259/14)). I also bear in mind that Dr Ahari is not certified unfit to work and therefore has the capacity to gain employment to pay off any award made against him. He also continues to pursue many other Employment Tribunal claims in which he claims sums which would dwarf the award of expenses sought by the

respondent in this case. He claims to be entitled to compensation which would make an award of expenses today entirely affordable.

60. On balance, I have concluded that it would be just to make an award of expenses in the respondent's favour. It would be fair for Dr Ahari to bear some of the financial consequences of his decision to bring claims which had no reasonable prospect of success.

Amount

61. Miss Craik claimed expenses in the total sum of £5,720. There is no VAT on that sum. I assessed it summarily in accordance with rule 78(1)(a). Miss Craik responded in detail to my questions about the bill of costs. I was satisfied that all of the costs claimed were reasonably and properly incurred, that the hourly rates were appropriate and that the costs incurred were proportionate to the importance and complexity of the issues. She confirmed that all of the sums claimed were ones which her clients were liable to pay. Indeed, they had already been billed and paid, save for the costs of this hearing.

62. Having regard to Dr Ahari's limited means I have decided that he should be ordered to pay £2,500 of those costs to NES. That is a meaningful proportion of the total claimed, but less than half of what I might have ordered. That reduction is a concession to Dr Ahari's financial circumstances and is intended to achieve justice between the parties on this issue.

Employment Judge: Mark Whitcombe
Date of Judgment: 14 August 2019
Entered in the Register: 15 August 2019
& copied to parties