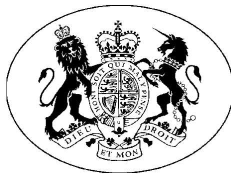

EMPLOYMENT TRIBUNALS

Claimant: **Dr J Gosalakkal**

Respondent: **University Hospitals of Leicester NHS Trust**

Heard at: **Nottingham**

On: **3 January 2020**

Before: **Employment Judge Ahmed (sitting alone)**

JUDGMENT ON AN APPLICATION FOR A RECONSIDERATION

The Claimant's application for a reconsideration of the original judgment of 19 December 2014 (sent to the parties on 8 January 2015) is refused as there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. This was an application for a reconsideration of a decision of the Tribunal signed on 19 December 2014 and sent to the parties on 8 January 2015 (the "original decision"). The decision followed a hearing over 13 days before a full tribunal at the end of which the tribunal dismissed all of the Claimant's complaints of unfair dismissal (both 'ordinary' unfair dismissal and unfair dismissal for whistleblowing), detriment for whistleblowing and breach of contract.

2. The Claimant applied for a reconsideration of the original decision in January 2015. That application was refused on 4 March 2015 in a judgment sent to the parties on 16 March 2015. Following the liability hearing the Respondent applied for costs. That was listed separately and was dealt with by my colleague Employment Judge Heap. This reconsideration application does not deal with any issues relating to the costs decision.

3. Some three years after the original decision on liability and after he had failed in his appeal in relation to the original decision, the Claimant applied for a further reconsideration of that decision. He application was contained in three e-mails dated 14 July, 20 July and 27 July 2018. The e-mails of 14 and 20 July are materially the same. The e-mails of 20 and 27 July are set out below in the form and wording received other a change in the indentation of some of the paragraphs for ease of reading and reference. The emails were as follows:

20 July 2018 email

“Dear Sir,

This is an appeal to reconsider the judgment made by Judge Ahammed in Gosalakkal v UHL 1900030/2012.The appeal was forwarded on the direction of the Registrar of the EAT to Midlands ET. Judge Heap ruled that it would not be appropriate to consider a fresh appeal on matters already settled and directed the claimant if he had further fresh evidence to submit it under section 70 to the original judge EJ Ahammed. Copies of the letters from EAT and ET are enclosed. Further evidence and information can be presented if this reconsideration under section 70 is entertained.

To further clarify this appeal is lodged on the following legal precedents as understood by Litigant (non legal) Though the principle of; legal finality is important there are exceptions provided by the law for condoning time and reversing established verdicts.

Chronology

1 In April/May of 2018 the appellant became aware of a serious incident report commissioned by the UHL trust which contained and since admitted by the trust several failings in their children hospitals. This was not available at the time of the Eady trial. Though the Trust was aware they did not disclose this report commissioned in February 2011. This raises two legal pints

a) Whether this fresh evidence should be examined under the Ladd_Marshal principles since relaxes somewhat. Paraphrasing Lord Denning

a It could not be obtained by reasonable diligence to be used art trial. Since no one knew of this documents existence and since the trust witnesses denied any knowledge of its contends and the fact that it was disclosed to a select few after FOI requests shows it could not have been obtained at the time of the Lady trial

b The evidence must be such that if given it would probably have an important influence on the results of the trial During the trials Trust witnesses Malcolm Lowe Laurie/Harris/Killer/Harris?Bradley denied any such deficiencies which the claimant had reported to the CQC/DH under oath and EJ AHammed gave read his verdict) Great importance to this denial under oath and if this report had been available it would have had an important influence

c It should be credible. Since the Trust itself accepts the report it is credible .It is however important the EAT issue an order to the Trust to give an authentic copy and compare it with the scot schedule provided by the claimant which was ridiculed y the Trust witnesses and EJ Ahammed besides in the Royal Bank of scooted V Highland Magnet the appeals court had stated that a judgment obtained under fraud or deception can be overturned.If given a chance the claimant can show at the least the EJ Ahammed judgment was obtained by the Trust witness by lying. Fraud charges I understand can be brought within 6 years of discovery. I do not know if rule 59(b) applies here. It can also be used by the judges for any other reason

If the registrar rejects this application I wonder if 10 (3) s applicable

The cost order appeal as you know has been allowed to go forward

I hope this clarifies the appeal

Dr Jayaprakash A Gosalakkal MD

Ps I understand it is easier all round if I just gave up

e.g Judge Ahammed to Witness Killiar Has the claimant at any time whistleblown to you Witness never (cited in the verdict).E mails since discovered show witness has been lying under oathThe Trust board was asked by an MP abo

Judge Ahammed to witness Bradley_Have any investigations shown any defeciences in the hildrens hospital Witness Bradley-no The witnesses were then aware of the serious

incident report into the Haidzeh Bawa case (six days after claimant was excluded) which shows witness must have known of this report. There is a lot more evidence since uncovered ti show this verdict was possibly obtained by deception and that judicial finality should not take precedence here."

27 July 2018 email

"Dear sir

Kindly consider this chronology of events in Dec/January unto January 11 th I had made a series of complaints against the University hospitals of Leicester NHS trust

In Late January the Trust Board meets and discusses this grand summit of GMC/CQC/DOH to consider my concerns

On January 30th Kevin Harris the MD tries to railroad me

On Feb 7th 2011 Harris initiates action against me

Judge Ahammed failed to see the connection and it is hoped that this further evidence since uncovered on a digital search on all evidence will lead to the following questions

1) Does the Fresh evidence in the Hadizah barwa case of the UHL investigation so far kept secret qualify by the Ladd-Marshall test to reconsider and set aside Judge Ahammeds decision in UHL V Gosalakkal at Leicester ET

2) Does the newly uncovered documents confirm that trust officials have at the least obtained this judgment by misleading the court and at worse commiting perjury and if so should this verdicat obtained by fraud be set aside as per appeals court judgment in royal bank of Scotland

3) Or does the principle of judicial finality take precedence even in the presence of overwhelming evidence that this finality was obtained by deceit

4. The reconsideration application of July 2018 was dealt with as a preliminary consideration on paper. By a letter dated 31 July 2018 from the Tribunal the application was refused on the grounds that insofar as any appeal was concerned that was a matter for the EAT and as for the rest of the grounds the application was out of time and in any event there was "no real information, only fresh allegations if anything".

5. That reconsideration decision was the subject of an appeal to the EAT. In a judgment handed down on 4 July 2019 the EAT (HH Judge David Richardson sitting alone) the appeal was allowed. The matter was remitted back to the same Employment Judge to consider the application for reconsideration afresh. This decision therefore deals with the reconsideration application again on its journey back from the EAT.

6. Prior to this reconsideration decision being considered there was a Preliminary Hearing before Regional Employment Judge Swann on 4 December 2019 conducted by telephone to give directions. The Claimant as previously represented himself. The Respondents were represented by Ms Badger, a solicitor with the firm that has had conduct of this case from the outset. It was agreed that all of the relevant evidence to be relied upon for the reconsideration application was already in the possession of the Tribunal and, subject to exchanging up to date submissions, the matter would be determined on paper without the parties or their representatives being present. The date for the reconsideration was fixed in the presence of the parties.

7. In accordance with the directions of his HH Judge David Richardson in the EAT judgment referred to above, the Respondent has through Mr Richard Powell of Counsel submitted their reply to the application and also appended a copy of the investigation report (incident report W65737) which is the subject of the reconsideration application.

8. Also in accordance with the Order of HH Judge David Richardson the Claimant was required to lodge his reply to the answer. This he did on 5 September 2019.

9. In coming to my decision therefore I take on board the judgment of the EAT reported as *Gosalakkal v University Hospitals of Leicester NHS Trust* (UKEAT/0223/18/DA), the Respondent's written submissions, the Claimant's original application for reconsideration and the Claimant's two documents e-mailed on 5 September 2019 the first of which is headed "Skeletal arguments" and the second entitled "Claimant's response to Respondent's resistance to reconsideration petition".

10. The application for a reconsideration is based on the emergence of new evidence which was not or could not reasonably be available at the date of the original hearing.

11. The factual background (which does not entirely emerge from the Claimant's application) so far as is relevant for this application was as follows: The Claimant was dismissed from his position as a Consultant Paediatric Neurologist at the Trust for gross misconduct. He was based at the Leicester Royal Infirmary. There had been high hopes of him after difficulties with his predecessors but those hopes were dashed when the Claimant made it a habit of complaining against colleagues who disagreed with his views. The Claimant for his part believed that there was a clique of doctors who effectively 'ganged up' on him and refused to co-operate. Relationships between the Claimant and his colleagues deteriorated significantly. An internal investigation was commissioned. Dr Gosalakkal initially refused to co-operate with the investigation but when he eventually did he began to make further complaints of his colleagues, including a threat to bring defamation proceedings, which he never actually carried out. He also made allegations that in a number of patient cases there had been serious misdiagnoses by those colleagues who (in the main) had criticised his work. When such allegations were investigated they were found to be without substance.

12. The Trust completed its internal investigations in May 2010 and a copy of their Report (the 'Gregory Report') was sent to the Claimant and his BMA representatives. The report was highly critical of the Claimant. It went on to say that Dr Gosalakkal's behaviour should be reviewed by occupational health as it might be caused by excessive overwork and stress. Dr Gosalakkal viewed such comments as implying that his sanity was being questioned.

13. As a result of the Gregory Report the Trust decided to instigate an external review by an independent body. It instructed NICHE, a Health and Social Care Consultancy. The focus at that stage was largely on the Paediatric Neurology service. The NICHE investigation was a very wide-ranging review taking the best part of a year with an interim report released in January 2011 and the final part in

May/June 2011. This report was also highly critical of the Claimant. It found that the percentage of Claimant's complaints about his colleagues (as opposed to those about him) was much higher and that his allegations were not factually correct. In terms of the Claimant's behaviour the report noted that the Claimant either refused to communicate properly with his colleagues or was unable to do so.

14. Dr Gosalakkal did not accept any of the findings in the NICHE. In retaliation he reported three of his colleagues to the GMC making serious allegations about their professional conduct and clinical practice. There is no evidence that any of the allegations were upheld by the GMC.

15. The Claimant was then called to a meeting to discuss matters with Dr Harris, the then Medical Director and Ms Bradley then Head of HR on 7 February 2011. The meeting was arranged to take place at the Trust premises. The purpose was to discuss whether the Claimant should be excluded from the workplace given that he had failed to modify his behaviour. The Claimant agreed a time and place to meet but failed to attend the meeting and could not initially be contacted. It was eventually discovered he was at home. A decision was made shortly after the meeting to suspend the Claimant. A few hours after being suspended he wrote an email to the parents of a patient asking for their support. Unfortunately the Claimant sent the email in error to the Chief Executive instead. At the tribunal hearing the Claimant did not admit or deny sending the email, merely that he did not remember doing so. The tribunal found that the respondent's view that the Claimant had sent the email was a reasonable view and that it was inappropriate to involve patients in personal issues.

16. Following a disciplinary hearing in October 2011 the Claimant was dismissed for gross misconduct. His subsequent appeal against dismissal was not upheld. He then brought proceedings in the tribunal. He alleged making a large number of public interest disclosures for which he claimed he had suffered detriment over a period of approximately 2 years. All of his complaints were dismissed by the tribunal.

17. A week or so after the Claimant was suspended in February 2011 the tragic death of Jack Adcock took place in the Paediatric Department at the Leicester Royal Infirmary. The incident was widely reported in the media then and subsequently. It concerns issues as to the conduct of doctors and nurses on duty on that fateful day. The Trust commissioned an investigation. The updated report of the investigation (in places referred to as a 'serious untoward incident' or 'SUI' report, hereinafter the 'investigation report') was completed in 2012. The report was not referred during the hearing of this case. A copy of that report has been supplied for the purposes of this reconsideration application. It concerns, amongst other matters, the actions of Dr Hadiza Gawa-Bawa and others who were employed in the relevant section of the Leicester Royal Infirmary on that tragic day.

18. The Claimant in his email says that he only became aware of the investigation report in April/May 2018. He says the report was not available "at the time of the "Eady trial" by which I assume he is referring to his appeal on liability in this case which was dealt with by HH Judge Eady (as she then was).

He also alleges that the witnesses denied knowledge of its contents and the fact that it was disclosed to only “a select few”.

THE LAW

19. The relevant rules as to reconsideration of judgments are set out at Rules 70 - 73 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as amended (hereinafter the “Employment Tribunal Rules”). The material parts of those rules are as follows:-

Rule 70

“A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision (“the original decision”) may be confirmed, varied or revoked. If it is revoked it may be taken again.”

Rule 71

“Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.”

Rule 72

“(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge’s provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.”

20. The Tribunal has a broad discretion to extend time for the doing of certain acts. Rule 5 of the 2013 Rules states:

> "The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired."

21. The law relating to applications for reconsideration on the basis of fresh evidence was set out in **Ladd v Marshall** [1954] 3 All ER 745 (CA). In that case Lord Justice Denning MR said:

> "The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled:- First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: Thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

22. In the EAT case of **Outasight BB Limited v Brown** UK EAT/0253/14, the EAT held that notwithstanding the changes in wording from the 2004 Rules to the present rules, the principles laid down in **Ladd v Marshall** applied to cases in the Employment Tribunal. Indeed it went further and at paragraph 50 it said:

> "… The interests of justice might on occasion permit evidence to be adduced where the requirements of *Ladd v Marshall* are not strictly met, but it was ever thus… As to what circumstances might lead an ET to allow an application to admit fresh evidence, that will inevitably be case specific… It might be in the interests of justice to allow fresh evidence to be adduced where there is some additional factor or mitigating circumstance which meant that the evidence in question could not be obtained within reasonable diligence at an earlier stage."

THE ISSUES

23. The broad issue is whether pursuant to and under Rule 71 of the Employment Tribunal Rules, it is in the interests of justice to reconsider the original decision. In addition there are the following related issues: -

23.1 Whether the reconsideration application has been made in time and if not whether time should be extended?

23.2 Whether the reconsideration application has reasonable prospects of success?

CONCLUSIONS

24. I will deal firstly with the question of whether time should be extended. Clearly the application for a reconsideration is made outside the 14-day period provided for in Rule 71.

25. It is not clear when the investigation report came into the public domain. In their submissions the Respondents say that the criticisms of the clinical competence [of the matters dealt with in the investigation report] were "well publicised in 2017". Again, there is no direct evidence of this or when the report was published.

26. The Claimant says that the Trust witnesses denied knowledge of its contents. It is not clear on what basis this allegation is made as there is nothing

in the judgment to this effect. If the witnesses did deny knowledge then clearly it is not "new evidence" unless he means that the witnesses knew of it and deliberately kept quiet about its contents. It is not clear on what basis the Claimant says that it was "disclosed to a select few" or who those select few were.

27. The Claimant departed to the US shortly after the substantive hearing concluded where he still lives. Whilst the circumstances relating to Dr Hadiza Gawa-Bawa were frequently in the news from the time of the events in question in the UK it is possible that it was less of a news item abroad. Against that it has to be said that anyone in the medical profession, particularly one who was employed by the same Trust and in the same department, would have keenly followed the events leading to the death of Jack Adcock or the subsequent trial of Dr Gawa-Bawa who was convicted of manslaughter in or around November 2015. It is not clear as to precisely what it was that brought the report to the attention of the Claimant specifically in April/May 2018.

28. I accept that the report could not have been made available at the hearing because at that point there is no evidence that the report was in the public domain. However, even if the Claimant only discovered the existence of the report at the end of May 2018 that does not explain why he chose to make his application for reconsideration as late as 14 July 2018. The Claimant had a number of his allegations dismissed as being out of time at the substantive hearing. He would have been aware of the need to deal with matters as soon as possible and without delay.

29. The Claimant gives no explanation as to how the report came to his knowledge when it did. He gives no explanation as to why he took no steps to apply for a reconsideration until 14 July.

30. I therefore find whilst there is a broad discretion to extend time it is not appropriate to exercise that discretion in the Claimant's favour as no reason, let alone a good reason, has been put forward for the delay. The reconsideration application is therefore out of time and it is initially refused on that basis.

31. If I am wrong on the time point, I have gone on to consider the question of whether there is a reasonable prospect of the original decision being varied or revoked. I do so under the provisions of Rule 72. In doing so I take into account the principles set out in **Ladd v Marshall** and expanded upon in **Outasight BB Limited v Brown**.

Relevance of the evidence

32. The investigation report largely sets out the reasons as to the failure of the relevant staff and the systems that were in place at the time to provide adequate care for children. None of those who gave evidence at the Tribunal hearing in 2014 were involved in the Jack Adcock case nor does the Claimant identify anyone who was involved in the investigation report as being involved in these proceedings. I accept that there are redactions in relation to some of the names in the investigation report but there is no suggestion that any of the redactions are of those involved in the Claimant's case.

33. The investigation report is a general review of the care provided within the Trust on the day in question. It is not a report in respect of any allegations made by the Claimant. It is not, in particular, a report as to the interpersonal issues

which feature heavily in these proceedings. Had the report been available at the time of the original hearing, it is most likely to have been excluded as irrelevant. In short, the report has nothing whatsoever to do with the circumstances of the Claimant's case.

34. I am satisfied that the investigation report would not have had any influence on the decision or the credibility of the Respondent's witnesses. The Respondent's witnesses acknowledged that they were aware of problems and/or issues raised regarding the quality of care for children in the Ward.

35. I do not accept that the investigation report has the potential for any influence upon the credibility of any of those whom the Respondent called as witnesses. It could have no relevance to the HR Director, Ms Bradley or the former Chief Executive and dismissing officer Mr Malcolm Lowe-Lauri. The same applies to Mr Hindle, the former Chairman of the Trust and the person who dealt with the appeal against the Claimant's dismissal. Dr Rabey was a Consultant Anaesthetist who undertook an investigation leading to the Claimant's disciplinary hearing. The investigation report makes no reference to Dr Rabey nor is he in any way involved. Mrs Hillary Killer (then Head of Nursing) against whom a number of allegations of whistleblowing were made in the proceedings had no connection with the matters set out in the investigation report.

36. As such the Claimant's suggestion that the 'investigation report demonstrates the credibility of the witnesses should be doubted' has no basis whatsoever. The reason for the Claimant's dismissal was because of gross misconduct which led to a breakdown in working relationships and not the state of affairs in the department he worked.

37. The Claimant's reconsideration application suggests that witnesses may have committed perjury yet he fails to give any example as to how the investigation report would lead one to that conclusion. He makes an allegation of deceit yet provides no basis as to how the Trust's witnesses acted deceitfully.

38. For the reasons given the application for a reconsideration is refused.

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Employment Judge Ahmed

Date: 7 February 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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