EMPLOYMENT TRIBUNALS

Claimant: Miss C Poku

Respondent: NHS Croydon Commissioning Group (1)
Ms Alison Grady (2)
Ms Rachel Colley (3)

Heard at: **London South Croydon** **On:** **14 January 2020**

Before: **Employment Judge Sage**

Representation
Claimant: Mr Gloag of Counsel
Respondent: Mr Kennedy of Counsel

JUDGMENT having been sent to the parties on the ***5 February 2020*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided. I wish to apologise for the delay in sending this out to the parties. The reason for the delay was the covid lockdown in the first instance which was then compounded by the fact that the bundle could not be located. The bundle has yet to be located but the reasons have been produced from the notes of the hearing.:

REASONS

Requested by the Claimant.

1. This is the respondent's application to strike out the Claimant's claims under rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. This hearing was converted to a one day preliminary hearing to consider the matter. It was the Respondent's case that the Claimant is not permitted to pursue her claims for disability discrimination, race discrimination, victimisation or perjury and breach of the Public Sector Equality Duty on the basis of res judicata and/or Henderson v Henderson (1843) 67 ER 313, witness immunity from suit and on the basis of her claim being out of time.

The Respondent's submissions

2. It was submitted on behalf of the respondent that in a previous hearing held on the 2-4 April 2019 the Claimant was found to have been dishonest and all her claims were dismissed. The Tribunal in that case awarded the respondent their costs of £20,000 on the 5 November 2019.

3. Subsequent to that case, the Claimant now pursues a claim for perjury in her ET1 which was presented on the 26 July. In this case the Claimant seeks to rely on the contents of an email sent by the Respondent's solicitors to the Claimant dated the 18 March 2019. This case turns on one email, we say this is res judicata. We also say that the case is estopped.

4. The respondent took the Tribunal to the ET1 in this case and the ET1 in the previous case at pages 14 and 63 of the bundle and conducted a comparison. They stated that all the background facts were lifted from the first ET1. On that ground alone the Tribunal does not have jurisdiction.

5. The Respondent stated that the Claimant may say that paragraph 5 of page 18 changes the facts. This email was produced in the course of litigation and the respondent is replying (the Respondent handed up the full email which was marked as R2). The Claimant sought to limit disclosure to prevent a criminal investigation. The word "this" in the email refers to the management of the Claimant and is not an admission that the Respondent discriminated against her. The Respondent stated that this email did not undermine their case of res judicata. The new claim also raised the issue that the Claimant was claiming perjury however the Tribunal does not have power to adjudicate on this head of claim under section 149 of the Equality Act. Given that these are the additional elements, the tribunal can quickly say that they do not have jurisdiction in the case. The respondent said that this email is simply a way to try and lever the door open. The ET1 is a claim that relies on the same facts as before the only difference is a reference to the email from the solicitor where they say that the reason for the fraud investigation was because the claimant lied.

6. In addition, the Tribunal has found that the Claimant had lied, this claim is therefore an abuse of process and the fact that it is an abuse of process to continually litigate. The Claimant says the Respondent struck her and discriminated against her. Given the background it should be dismissed with prejudice and find that the Claimant's actions are abusive.

7. The respondent then dealt with the length of the hearing, he referred to the Claimant's submissions where it has been stated that the case will take one day. However, the Respondent said that she could not pursue an action that will undermine an existing decision. Page 9 paragraph 7 shows the cause of action is extinguished. The Claimant appealed to the EAT and it was rejected.

8. The Respondent stated that there must be finality in litigation and the Claimant has been to the ET and the EAT on eight occasions and has appealed on numerous occasions without success. Employment Judge Balogan has found as a fact that the Claimant lied. We say that this new claim is vexatious. We do not need to go to rule 37 as it is res judicata first.

9. If the tribunal is not with me on that, then you can proceed to rule 37 on the grounds that this was vexatious and the Claimant lied. How could any future ET find facts on the same event to be different? In my submissions, the Claimant has been afforded as much leeway as possible.

10. The respondent is an NHS Trust and there are two individual respondents, there must be a point when the Claimant is no longer able to drag individuals through the mud, they gave evidence and were found to be truthful. This Tribunal cannot go behind that. If the Claimant claims perjury she can pursue that but it is clear who was lying in this case.

11. The Respondent asked the Tribunal to dismiss the claim and to give the Claimant a warning not to proceed with vexatious litigation. The respondent referred to page 13 paragraph 22(1) and stated that it was absolute in relation to all the parties. The tribunal cannot go behind it.

The Claimant's submissions

12. The Claimant wished to proceed to the directions hearing. in her view the case will not take long, only one day and wishes to quickly proceed to a full hearing. on page 14 you will see the new ET1 and the material matters start at page 18 where it talks of the decision. It states that the statements were signed in March 2019 and in May 2019 there was an application for a reconsideration on the basis of the email. The Claimant's evidence was that the email dated the 18 March 2019 sent at 12.19 contained the central admission made by the Respondent. That is what launched the fresh ET1.

13. On page 19 at paragraph 6 of the ET1 the Claimant produced part of the email relied upon which was "These documents directly relate to the motivations and actions of the Respondents during the Claimant's employment, and around the cessation, of the Claimant's employment, it is the Respondent's case that the Claimant lied about her qualifications and experience and as a result was unable to perform her duties as required. It is the Respondent's submission that it was <u>this</u> that resulted in the treatment about which she complained…" . The ET1 went on to state that the email contained an unequivocal admission. What cannot be denied is at page 20 a public body is subject to the Equality Act and I take issue with what my Learned Friend says, it simply states that the respondent is under a public duty.

14. The law is plain, the Virgin Atlantic Airways Limited v Zodiac Seats UK Limited [2014] AC 160 SC case at paragraph 17 sets out the important elements of res judicata. If a party could have raised matters in previous proceedings but here the facts are in the Claimant's favour. The cat is let out of the bag. This could not be an abuse of process as it showed what was going on.

15. One can only strike out under rule 37 if it is scandalous or vexatious. We say the email is a new cause of action and shows that the Claimant has a reasonable prospect of success and this matter should be set down for a hearing.

16. I also say that the power to strike out should only be exercised in rare circumstances. What we have here is a new cause of action and I say they could not be more dissimilar.

17. In the case of Ashmore v Corp of Lloyds 1992 All ER 486 it was held that people have the right to have their case heard to conclusion, that is an essential tenant of justice. The respondent is seeking to close down her genuinely held complaint. This case could result in an abuse of process if the case is struck out as the Claimant has a serious and genuinely held concern.

18. Counsel referred to the case of Bristen v Humphrey 1884 and he stated that two actions may be brought if they relate to two causes of actions. In relation to the abuse point, the email of the 18 March 2019 should be tested at a final hearing, where evidence can be called and challenged.

Decision

19. The Claimant brings this claim relying on essentially the same facts and evidence that was relied upon in her previous claim number 2301411/2018 "the 2018 claim". I am satisfied having been taken to the documents in the bundle by the Respondent and having compared the two claim forms, that the facts relied upon in the 2018 claim and this claim are identical save for the reliance on the contents of the email dated the 18 March 2019 sent from the Respondent's solicitors to the Claimant and tribunal about what documents should be included in the bundle. This document was therefore before the Claimant prior to the start of the hearing.

20. The decision of the Tribunal in the 2018 case dismissed all claims and concluded that the Claimant had lied to the Tribunal and they went on to conclude that all the allegations against the Respondent were untrue. The tribunal having considered all factual allegations and concluded that they had no basis in fact is a decision I cannot and will not go behind. Having found that the factual allegations in the 2018 claim, and therefore the facts relied on in this claim are untrue, the matter has been decided and appealed to the EAT.

21. I accept the respondent's submission that this is a clear case of res judicata and have considered the Virgin Airways case which stated that once a judgment is given, the cause of action is extinguished, and the Claimant's sole right is on the judgment. As it has been concluded that the facts are the same on the two claims it must follow that the matter has been adjudicated and a decision has been given and appealed. The issues raised are the same and the facts relied upon are the same, this is an attempt to relitigate and therefore res judicata applies to prevent the Claimant from pursuing this claim.

22. I also considered the following quote from the Virgin Airways case (referred to above) "*Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger*".

23. Applying the ruling of Henderson v Henderson to the facts before me, I went on to consider the contents of the 2019 email relied upon by the Claimant. This email was described by the Claimant as a 'clear and unequivocal admission of liability by the Respondent'. On reading the whole of this document I do not agree with this analysis. It does not amount to new evidence or to an admission. The email was sent by the Respondent to the Claimant in connection with the disclosure of documents for the full merits hearing in the 2018 case. The email clarified the relevance of certain documents to the issues that were to be dealt with in that hearing. The extract of the email in the ET1 was misleading as it omitted the last words which were "*rather than in her race or grievance as she alleges*". The words did not amount to an unequivocal admission as it included a clear denial of the facts in relation to the causes of action pursued by the Claimant.

24. It was also highly relevant that this email was before the Claimant on the 18 March 2019, before the full merits hearing of the 2018 case which began on the 2 April. It was a matter she could and should have raised as a preliminary issue to admit new evidence in the hearing, but failed to do so.

25. Even if the email contained an admission (which I conclude that it did not) having taken into account the ruling of Henderson v Henderson, I conclude that this was a matter that she could and should have raised in the full merits hearing but failed to do so. She is therefore precluded from relying upon this document to reopen the litigation in a subsequent ET1 relying on the same facts.

26. This is an attempt by the Claimant use the 2019 email to reopen the litigation and to have the matter considered again. This is an abuse of process. The door was firmly shut when the Tribunal delivered its decision and after the costs hearing. There is a public policy principle that there should be finality in litigation, and this should only be undermined where there are facts that suggest that it is in the interests of justice to do so. The Claimant has provided no explanation as to why there are special circumstances as to why the ruling should not be applied in this case and therefore conclude that this was an abuse of process.

27. This case is therefore dismissed.

28. The tribunal has also been asked to give the Claimant a warning about pursuing vexatious litigation. On the facts before the Tribunal it is concluded that such a warning is appropriate. The evidence showed that no new facts were pleaded in the new claim form when compared to the 2018 claim form, the only new evidence was a partial quote from the email which gave a false and misleading impression of the nature of the communication between the parties. The Claimant's insistence that others are lying and committing perjury are serious and damaging allegations, it is of concern that the Claimant has been unable to produce any credible evidence to support these allegations in the hearing in April 2019 or today in this hearing. These allegations are all the more damaging as they are made against individual respondents.

29. I was very grateful for the helpful submissions presented on behalf of the Claimant today, however she has failed to show any grounds on which her claim can be resurrected by the presentation of a new claim form relying on the same facts and issues, or why it would not be an abuse of process to allow her to do so.

30. It is further concluded from the limited facts before me and submissions made by the Respondent that to pursue such a claim would also be vexatious however there was no need to make a ruling on that ground due to the decision reached above.

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Employment Judge Sage

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Date: 2 October 2020