Case Number: 2304161/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE P BRITTON (sitting alone)**

BETWEEN:

Claimant **MR D I MIAH**

AND

Respondents **NHS ENGLAND (1)**
MR DAVID DAVIS (2)

ON: **15 and 16 October 2020**

APPEARANCES:

For the Claimant: **In Person plus on day 1 as notetakers Mr Tierney and Mr Connel. On day 2 morning only Mr Tierney**

For the Respondent: **Ms R Azib, barrister at law**

JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. The applications of the Claimant for the dismissal of the response on the basis of fraud and otherwise misconduct is dismissed.

2. The application by the Claimant for interim relief is dismissed.

3. The Respondent's application for strike out of the claim succeeds the claim before the Tribunal having no reasonable prospect of success.

REASONS

Introduction:

This case comes before me following a lengthy procedural history which I shall briefly touch upon at this stage. The claim (ET1) was originally presented to the Tribunal on the 29 July 2016. The Claimant had presented it himself. He ticked the boxes as to what claims he was bringing on page 6 of the ET1. Thus: for unfair dismissal; religious belief discrimination; and also for race discrimination. He otherwise ticked the box marked other payments. Stopping there, there was no particularisation whatsoever.

1. Following a response (ET3) and the observation therein that there was a complete lack of particularisation, the Respondents having filed a defence in so far a they could, there was a further and better particularisation of the claim (ET1), including amendments to the heads of claim now sought to be brought, which is before me in the Claimant's bundle (C Bp) between C Bp 6-30. The Respondents opposed those amendments. The matter came before Employment Judge Morton (C Bp43-50) on the 25 January 2017. The Claimant was represented by Mr F Hoar and the Respondent by Mr J Chegwidden, both of counsel. EJ Morton refused the Claimant's application to amend his claims so as to bring a claim of automatic unfair dismissal by reason of whistle-blowing pursuant to Section 103A of the Employment Rights Act 1996 (ERA). Such a claim does not need two years qualifying service. Of significance in terms of what I shall in due course address is that there was no claim based upon detrimental treatment short of dismissal for whistleblowing as per s47B of the ERA and no claim for interim relief.

2. EJ Morton also ruled that the Tribunal had no jurisdiction to entertain the claim of " ordinary" unfair dismissal pursuant to Section 98 of the ERA in that the Claimant had only been employed by the Respondent between

the 26 October 2015 and the 30 April 2016 and thus lacked the necessary two years qualifying service to bring that claim.

3. Thus, she made plain that the only claim that would therefore proceed was that '*his dismissal was an unlawful act of race and/or religious discrimination … under the Equality Act of 2010. "*

4. She declined as per the application of the Respondents to strike out or make a deposit order on the evidence that was available to her at that time in relation to those claims. She had gathered that the Claimant was bringing a claim in the County Court which could be on the same territory and therefore she stayed matters until confirmation of that was received. Stopping there, it means that was the end of adjudication in the Tribunal for the time-being.

5. What then happened is that the matter went, indeed, before the County Court and there was a lengthy hearing before Judge Hellman over some seven days between the 3 and 10 of December 2018. The Claimant represented himself. Mr Bruce Gardiner of Counsel represented the two defendants who are the same as the two respondents in the case before me. The Judge gave a draft Judgment to the parties on the 2 January 2019 and published his Judgement shortly thereafter. That Judgement runs between C Bp 51-83. It is dated the 11 January 2019 and it runs to some 153 paragraphs.

6. Suffice it to say, that Hellman J was first dealing with a claim relating to Breach of Contract and inter-facing to the fixed term contract that the Claimant was employed under whilst with the first Respondent. Second, was the claim as to whether the Claimant had suffered harassment whilst in the employ of the first Respondent as per the Protection from Harassment Act 1997. In relation to all the matters which the Claimant has set out in that respect in his further and better particulars of claim to the Employment Tribunal there is little difference between it and the amended particulars of claim that he submitted to the County Court and

upon which Hellman J adjudicated. He dismissed the Claimant's claims in their entirety

7. The Claimant appealed. Leave was refused. The Claimant persisted and his application was dismissed by Mr Justice Jacobs on the 19 September 2019, as to which see the Respondent bundle (R Bp.390). He was very clear that there was no merit whatsoever in the Claimant's appeal, and he went so far as to make it plain that the Claimant was not being given permission to go further in the judicial process i.e. to the Court of Appeal. The Claimant persisted, inter alia seeking leave to appeal to the Supreme Court. On 9 January 2020 Mr Justice Peperall made an extended Civil Restraint Order against the Claimant for a period of 3 years and in doing so made plain that the Claimant's attempt to appeal to the SC was " ridiculous" (R Bp (311- 316).

8. That then brings me to the Respondent. On 23 February 2019 it applied to the Employment Tribunal (C Bp 84-91) for strike out of the matters which were still before it and yet be adjudicated upon apropos the Judgement of Employment Judge Morton. Detailed reasons were given: essentially that as per the schedule attached[1], and which set out core points from the very detailed Judgement of Hellman J, that the case therefore should be dismissed as having no reasonable prospect to success given the findings of Hellman J and which meant that the Claimant would not be able to re-litigate such as the harassment and otherwise discrimination issues relating to his employment with the Respondent and the ending of the fixed term contract (FTC) because he had chosen to litigate them in the County Court.

9. The Claimant opposed that application and put in a counter application for strike out of the response (ET3).

10. The matter came before Employment Judge Sage on 18 May 2020 (C Bp 153-6). The Claimant represented himself. The Respondent was represented by Mr Bredenkamp, solicitor. This was a telephone

preliminary hearing (TCMH). EJ Sage listed it for a preliminary hearing today:

(1) " …The hearing is to consider the following:

(i) The respondent's application to strike out the Claimant's claim on the basis that the facts have now been determined by the County Court and the Tribunal will be bound by those facts. They state that the claim should be struck out.

(ii) The claimant applies to strike out the Respondent's defence due to their unreasonable conduct and the misdirection of counsel on the law (referring specifically to section 47B of the Employment Rights Act 1966).

(iii) If the claims proceed the tribunal shall then make any orders and directions for a full hearing on the merits."

She made orders of directions for the hearing before me.[1]

Determination of the Claimant's application for strike out of the response

11. This has become the first application that I dealt with today, the Claimant being insistent that it be determined first. I have heard what he has to say.

12. I have also looked carefully in particular at first his witness statement dated 23 September 2020. Second his skeleton argument; including the schedules. He has endeavoured to persuade me that a Supreme Court authority: **Edwards v Chesterfield Royal Hospital NHS Trust 2011 [UKSC 58]** can come to his aid. But that case has nothing do with the core issue in this case which is can the Employment Tribunal be used as the forum to reopen issues covered by the detailed Judgment of Hellman J? To put it bluntly, if as the Claimant alleges, inter alia the judgement of Hellman J is flawed because as alleged fraudulent evidence was given to him by one or other of the Respondents' witnesses with the collusion of

[1] Updated and attached to the written submissions of Ms Azib before me.

the Respondents' legal team , then is that a matter that means the Claimant can seek to have the Respondents struck out in relation to the litigation which remains before the Employment Tribunal?

13. What this application to strike out is actually about is the Respondents' alleged misconduct in the County Court before Hellman J and where and issue was as to whether in terms of the demise of the Claimant in terms of his employment with the first Respondent engaged was whistle blowing. Stopping there, despite what the Claimant may assert before me, as per her order (1) (ii) EJ Sage was not ruling that the Tribunal had jurisdiction to entertain a s47B ERA claim. There was no application to amend to include such a claim before her. There is not one before me. The Claims going forward up to the adjudication today are as per determined by EJ Morton.

14. There is no finding by Judge Hellman that there was any unreasonable conduct by the Respondents. In fact, that Judge makes absolutely clear, for reasons which are in entirely unhelpful to Mr Miah, that he believed the Respondents witnesses, preferring their evidence to that of the Claimant. Thus:

> *"I did not find him a convincing witness. His evidence involved misunderstanding, exaggeration and in some cases, fabrication, e.g., the allegations of misconduct against Mr Davis and Ms Sinclair which I reject. I am not satisfied that Mr Miah's note of his telephone conversation with Mr Davis on or about the 21 January 2016 was contemporaneous but I am satisfied that it was not accurate. I am not satisfied that, as Ms Sinclair alleged, Mr Miah was, in fact, recording or trying to record his conversation with her on 28 January 2016. That apart, whenever there was a conflict of evidence, I preferred the evidence of NHS witnesses to the evidence of Mr Miah."*

15. That Judge makes no criticisms of the documentary evidence or the conduct of the Respondents including by the legal team . To me this fatally undermines the Claimant's assertion that there was such impropriety; or orchestrated lying; or that Counsel, Bruce Gardner, acted in a way such as to deliberately mislead the court.[2]

16. Furthermore, this is not the forum for adjudication on such issues. There has been no hearing on the merits of this case at all other than the preliminary adjudication by Judge Morton back on the 25 January 2017. Indeed, the proceedings before the tribunal were stayed once it became clear that the Claimant was litigating in the County Court until those proceedings were finished.

17. It follows that the Claimant's remedy in terms of these very serious accusation was to appeal the judgement of Hellman J. I have learnt today via Counsel that the grounds of his appeal included these issues of inter alia professional impropriety and fraud. It thus obviously follows that the High Court has already adjudicated upon the merits of that appeal and by the decision of Mr Justice Jacobs roundly dismissed that appeal as having no merit.

18. It goes further than that because Mr Justice Pepperall sitting in The Royal Courts of Justice on the 9 January 2020 took the exceptional step of making the Civil Restraint Order that I have so far only briefly referred to. The important point in terms of my adjudication today is the extent of that order. Thus:

(1) that the Claimant was 'forbidden for a period of two years from the date of this Order (until 9 January 2022) (whether personally or through any servant or agent) from issuing any new proceedings against NHS England, NHS England (Commissioning Board) or David Geoffrey Davis

[2] In support of his application the Claimant has referred to **Takhar v Gracefields Development ltd (2019) UKSC 13** in which recited are the principles which govern applications to set aside judgments for fraud namely " conscious and deliberate dishonesty" as discovered in relation to a party to the proceedings. But I repeat that Hellman J found no such conduct by the Respondents. Furthermore the Claimant has been refused leave to appeal. Thus it does not assist the Claimant.

(Mr Davis) arising out of his former employment and dismissal by NHS England or any alleged harassment or breach of duty by the three of them (the three Respondents) in the High Court of Justice or any County Court in England and Wales or from issuing any new application or appeal …"

19. The Claimant seeks to say that that does not preclude him from issuing new proceedings in the Tribunal. Well, there are not any. If there were, then I would interpret the Order as meaning they cannot be brought. I would go so far as to interpret it as including any attempt to amend the current proceeding to bring a new head of claim. But it does not matter as there is no such proceeding.

20. In any event for the reasons that I have now given I dismiss the Claimant's application that the Respondents be dismissed from being able to defend the proceedings before the Employment Tribunal on the basis of alleged misconduct in one shape or form in the County Court proceedings adjudicated upon by Hellman J or otherwise.

21. One final point to make is as to the Claimant's submission that if I rule against him, as I now have done on this first issue, that the Employment Tribunal can grant his application to leap-frog his appeal direct to the Supreme Court. His reference in his skeleton argument and also his statement to 37A(4) and (5) of the Employment Tribunals Act 1996 is misguided in that an appeal from this Tribunal lies to the Employment Appeal Tribunal and which has the power if it so wishes to grant a certificate for an appeal direct to the Supreme Court. It is not within the jurisdiction of the Employment Tribunal to so grant.

The Application for Interim Relief:

22. The Claimant seeks by way of his amended statement before me today (C Bp 169, para 36 onwards) to make an application for interim relief pursuant to s128-129 of the Employment Rights Act 1996 (the ERA). First I note that he says *"the true date of termination of his employment would have been around 2017.However, NHS England's employees made*

representations to purported a termination around 30 April 2016 which an act of deceit as well as discriminatory."

23. However in the amended particulars of claim submitted to the Employment tribunal (C Bp 6- 30) , which were drafted by Mr Hoar, of counsel and are dated 14 November 2016, the last date of the employment was stated to be 30.4.2016. This was not in dispute at the hearing before EJ Morton and at which Mr Hoar appeared for the Claimant. As to Hellman J, he dealt extensively with the fixed term contract which the Claimant was employed under and how it came to an end. He also found that the Respondent terminated that contract on 30 April 2016.

24. Thus it follows that I find that the effective date of termination (EDT) was 30 April 2016.

25. On 15 September 2016 the Claimant must have applied for interim relief. I do not have that application before me. But on 10 October 2016 the then solicitors for NHS England, namely the Treasury Solicitor, wrote to the Tribunal inter alia referring to this application and pointing out that " *there needs to be a hearing as soon as possible.*

26. This appears to have not been actioned by the tribunal.

27. However as to the amended particulars of claim as drafted by Mr Hoare there was no reference to any application for interim relief.

28. The same applies to the hearing before EJ Morton. But of course in any event she dismissed the application to amend to bring a claim based upon unfair dismissal based upon whistleblowing pursuant to Section 103A of the Employment Rights Act.

29. Interim relief was also not discussed before EJ Sage on 18 May 2020. The published record of that hearing contains no reference at all. Thus it was not one of the issues that she ordered be adjudicated upon at this Hearing.

30. Finally on 21 September 2020 the Claimant wrote to the Tribunal reiterating that this application was outstanding and thus would need to be determined.

The law engaged

31. Section 128 of the Employment Rights Act 1986:-

"(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and -

(a) that the reason (or more than one the principle reason) for the dismissal is one of those specified in -

(i) … 103A…

May apply to the tribunal for interim relief

(2) the Tribunal shall not entertain an application for interim relief unless it is presented to the Tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date.

(3) the Tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) the Tribunal shall give to the employer not later than seven days before the date of the hearing, a copy of the application together with the date, time and place of the hearing.

(5) The Tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it not doing so.

32. For the avoidance of doubt, as to what is meant by the effective date of termination, see Section 97(1) of the ERA .

"Subject to the following provisions of this section in this Part "the effective date of termination" –

> *(a) in relation to employee whose contract of employment is terminated by notice, whether given by the employer or his employee, means the date on which the notice expires …"*

33. I do not need to explore the other subsections because the Claimant was given notice and the effective date of termination was at the expiration of said notice, namely 30 April 2016.

34. The originating claim (ET1) was presented to the Tribunal on 29 July 2016. That is to say almost three months after the effective date of termination. This was following a period of ACAS Early Conciliation and the issue of the certificate. This is usually a required precursor to bringing a claim to the employment tribunal :see s8A of the Employment Tribunals Act 1996. But there is no requirement to wait upon the ACAS Early Conciliation process for the bringing of an application for interim relief[3]. The reason is obvious: it is an injunctive process which is engaged at s138. Hence the immediacy of the need to make the application because it would stop the dismissal, in effect, continuing to have effect because if a Tribunal was to find that the application for interim relief, in terms of the merits of the actual under-riding claim, namely a dismissal by reason of whistle-blowing, had a pretty 'good chance of success' then it would order the employment to continue until the final determination of the substantive claim.

35. But here was no application for interim relief at all in the originating claim. Furthermore, it was not presented within the seven days following the EDT. There is no power provided at s138 to extend time. It can be contrasted with the Tribunal's ability to extend time for such as an unfair dismissal claim which might be out of time, including one for whistle-blowing, by considering whether or not it was not reasonably practicable to bring the claim within the applicable three months' time limit; but that is not

[3] See Employment tribunals (early conciliation exemption and rules of procedure) regulations 2014 : reg 3 (d).

the case here, there is no such escape clause, so to speak, provided in s138.

36. Accordingly the application for interim relief must be struck out it having been prevented out of time.

Remaining Issue - Respondents application for strike out and/or a deposit Order of the remaining claims based upon race and religious discrimination including harassment.

37. Before proceeding, on the second day of this hearing at 10:10 the Tribunal received an email from the Claimant effectively telling me that he would not be attending today as he was too medically unwell: "*untreated medical condition ... anxiety and migranous headaches'.*

38. He did not, however, require the Tribunal to stop, i.e., he was not seeking a postponement. Indeed at his paragraph 3 he asked that I proceed and 'carefully consider and reconsider the Claimant's witness statement dated 23 September 2020, and skeleton arguments included further below…'

39. Therein he was seeking to go back on my first judgement which I had delivered extempore on the afternoon of the first day. He repeated his core argument as to why the Respondents should be struck out.

40. Thus he wishes me to reconsider my first Judgement on the first issue. He refers me to Rule 70 of the Employment Tribunals Rules of Procedure 2013 which states: 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 interest of justice to do so. On reconsideration of the decision (the original decision) may be confirmed, varied or revoked. If it is revoked, it is to be taken again.*

41. Taken simply, there are no grounds put forward by the Claimant which means that it is in the interests of justice that I revoke my judgement and start again. As he does not agree with my Judgement his recourse is to appeal.

Back to the Respondents application

42. Engaged are again the 2013 Rules of Procedure. Thus:

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

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

(b) that the manner in which the proceedings have been conducted by or on behalf of the Claimant….has been scandalous, unreasonable or vexations…"

44. The Respondent applied for strike out in particular in its letter of the 25 February 2019, (C Bp:84-89).

45. In the alternative it applied for deposit orders. Thus engaged is Rule 39(1):

*" where at a preliminary hearing ... the Tribunal considers that any specific allegation or argument in a claim ... has little reasonable prospect of success, it may make an order requiring a party (*in this case the Claimant*) to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.'*

46. As to strike out in discrimination based cases. I am well aware of the line of authorities that commences with **Anyanwu v The South Bank Students Union (2001) IRLR 305 HL.** Thus as per Lord Steyn and in reviewing the then jurisprudence:

For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim

being examined on the merits or demerits of its particular facts is a matter of high public interest."

47. The Claimant also cites **Balls v Downham Market High School & College (UKEAT/0343/10)** per Lady Smith as to her setting out of how the test should be applied:

> *6. Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects.*
>
> *7. I would add that it seems only proper that the Employment Tribunal should have regard not only to material specifically relied on by parties but to the Employment Tribunal file. There may, as in the present case, be correspondence or other documentation which contains material that is relevant to the issue of whether it can be concluded that the claim has no reasonable prospects of success. There may be material which assists in determining whether it is fair to strike out the claim. It goes without saying that if there is relevant material on file and it is not referred to by parties, the Employment Judge should draw their attention to it so that they have the opportunity to make submissions regarding it but that, of course, is simply part of a Judge's normal duty to act judicially.*

48. But those cited speeches presuppose that the facts have not already been determined. The basis of the application to strike out is that they have been by Helllman J and the appeal therefrom dismissed. The point being obvious. If, in fact, all the allegations in terms of factual complaints before this Tribunal have been tested in the County Court, with witnesses questioned under oath, allegedly responsible for the discrimination individually or collectively; and in turn the Claimant has given his evidence and also been cross-examined; and that Court has had before it the material documentation; and that Court has then made

findings of fact on those matters and been upheld on appeal, then it is self-evident that unless it did not cover the same factual territory as the Tribunal, then otherwise the facts are no longer in issue because they have been determined. Thus, leaving the Tribunal, if it is still left with anything, to determine as a first starter, as to whether the label of the proceeding before it makes or does not make any difference to those findings of facts and requires any further findings, and if not, thence as to whether the case is doomed as bound to fail and should be struck out

49. Before Hellman J was the claim based upon harassment. Strictly speaking a claim based upon s26 of the Equality Act 2010 and which relies upon harassment related to a protected characteristic, in this case first race and second religion, was not before Hellman J. But for reasons I shall come to and as to which see the Respondent's updated schedule, he covered the same factual territory and therefore dismissed the harassment claim including the allegation of the Claimant that engaged in that conduct was his race or religion. Similarly, although not strictly before him as a head of claim, he dealt with the allegations as to race and religious discrimination. He in so doing referred to less favourable treatment on the grounds of race/religion. In the Tribunal that would engage s13 of the EQA[4]. And of course as per his further and better particularisation prepared by Mr Hoar for the EJ Morton hearing, the Claimant was inter alia claiming that as to the termination of the fixed term contract he was being less favourably treated because of his race or religion. Hellman J dismissed those allegations as being in effect part of the breach of contract claim before him and also the scope of the harassment claim.

50. That brings me to the burden of proof. This was the subject of considerable jurisprudence even before the Equality Act 2010 but is

[4] 'A person (in this case read the Respondent) discriminates against another person (in this case read the Claimant) if, because of a protected characteristic the Respondent treats the Claimant less favourably then the Respondent treats or would treat others'.

encapsulated in **Igen Limited v Wong (2005) [IRLR 258 CA**. Thus, inter alia, stated therein,

(1) *…It is for the Claimant who complains of (*in this case race and religious discrimination*) to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful… These are referred to below as "such facts".*

(2) If the Claimant does not prove such facts, he or she will fail.

51.There is then considerable reference to the fact that frequently this exercise will not be clear cut and may extend to consideration of all the evidence before deciding whether the prima facie threshold has been satisfied by the Claimant and if an inference is thereby raised thus reversing the burden of proof.

52. However there is no such difficulty in this case. I am with Counsel for the Respondent that all the factual allegations which would go to establishing a prima facie case of discrimination, have in fact been adjudicated upon by Hellman J including his being cross referenced to the relevant documentation. Thus, it assuredly follows that the Employment Tribunal, and I am back to where I started from, would not be able to revisit those findings of fact.

53.In her written submissions Ms Azib has first dealt with the principles of Res Judicata commencing at the heading C: The Law. And thence issue estoppel; the rule in Henderson v Henderson; and finally abuse of process.54. But as to Res Judicata this is not a case, for the reasons which I have now rehearsed, where the Claimant in now bringing a new cause of action post the determination of Hellman J. Thus it is not engaged.

55. However, it manifestly does engage the principle of issue estoppel. Despite the Claimant's submissions to the contrary, I am satisfied that Hellman J determined all the material factual issues which the Tribunal would have to determine. Furthermore, there is no substance to the contention that he made

material errors or made adverse findings on some matters which thus undermined his judgement. The adverse comments he made seen in context were on issues that did not undermine the Respondent's core case. The Claimant's schedules cherry pick.

56. Strictly speaking Hellman J was not dealing with s13 EQA direct discrimination or s26 race or religion based harassment as the compass of the Protection from Harassment Act is in that respect different. But he made findings as I have said which engage both.

57. Thus as the Claimant's case that he wishes to bring before the Tribunal is based on the same factual scenario, and in a context where he refuses to accept the findings of Hellman J, thus issue estoppel applies and as per the accurate definition thereof in Counsel's submissions commencing at para 13:

> *"13. Accordingly, issue estoppel operates to the effect that even where a cause of action or subject matter is not the same in the later action as it was in the earlier one, an issue which is necessarily common to both and was decided on the earlier occasion is binding on the parties in the later case.*
>
> *14. An issue estoppel arises in relation to any matters which formed the basis of the judgment or were determined as an essential step in the courts reasoning: see Spencer Bower and Gandley: Res Judicata (Fifth Edition) at (8.01)-(8.02).*
>
> *15. The respondent submits that as the factual allegations in the County Court and the ET proceedings are identical, and have been determined against the Claimant, an issue estoppel is created as those factual findings are essential ingredients for the formulation on the Claimant's discrimination claims".*

58. As to the Claimant on this issue in his Skeleton argument and which is principally, as I have said, focused on the fraud allegations , he says at 1. (b) Proceedings being conducted by deceit, fraud and perjury by the respondent, (therefore issue estoppel/ res judcata/ abuse of process does not apply to this

case according to the Supreme Court in **Takhar**[5] if the legal test for fraudulent misrepresentation, deliberate concealment to materially misled judgment, perjury and deceit is established;" What he then does is to rehearse all his contentions as to why this was engaged per the hearing before Hellman J whilst bring silent that his appeal was roundly dismissed.. It follows that Takhar does not assist him at all.

59. There is no need for me to explore the minutia of the Hellman J judgement. I have read closely the entirety of it. The Respondents' schedule of his core findings is an accurate summary. And I am not dealing with issues, despite the Claimant's efforts to introduce the same, relating to damages for manner of dismissal as per the Jonson v Unisys[6] exclusion zone. It does not engage before the Tribunal as there is no longer any claim based upon unfair dismissal. In any event Hellman J dealt comprehensively with that in terms of the breach of contract and harassment claims in his judgement per paragraphs 137- 141. And in particular in terms of its relevance to the remaining claims before the Tribunal at per para 140

> *" Johnson v Unisys concerned a claim for damages for the manner of dismissal brought in an action for wrongful dismissal. However, I accept counsel's submission that, by parity of reasoning, the decision bars a claim for the manner of dismissal from being brought in any cause of action except a tribunal claim for unfair dismissal. Eg a claim for harassment can not be based, wholly or partly, on the manner in which an employee was dismissed".*

58. Finally on this topic, Mr Miah does not seem to understand in terms of his reliance on ***Edwards V Chesterfield Royal Hospital NHS Foundation Trust 2011UKSC58*** the core point namely that it reaffirms ***Dunnachie*** as to which see the footnote below. Damages for the manner of dismissal even in unfair dismissal claims are not recoverable. As to the Claimant's

[5] **Takhar v Gracefield Developments Ltd (2019) UKSC 13**

[6] (2003) I AC 518 HL.. However then see **Dunnachie v Kingston upon Hull City Council 2004 ICR 1052 HL.** Made plain is that the tribunal can only award compensation for economic loss. Thus it cannot award damages for the manner of dismissal.

interpretation of remarks of Hellman J about the extent to which it can award compensation as per unfair dismissal in making an award under the ERA the tribunal is limited first to making a basic award. In this case it would not be able to as the claimant lacks qualifying service. As to compensation, it is limited to loss of earnings.

59. I now turn to the document headed 'update schedule' of the Respondent on ET1 allegations and His Honour Judge Hellman's Judgment which has been prepared for me today. I have cross-referenced that document to the Judgment of His Honour Hellman. I repeat that it is accurate. Also it brings me back to amended particulars of claim in this matter drafted by Mr Hoar of Counsel and before the Employment Tribunal back on 14 November 2016.

60. I have been taken to and cross-referenced that document to the County Court particulars. I have noted that the factual allegations are all exactly the same although the reference therein is, of course, to the Protection from Harassment Act.

61. Therefore, we can see in terms of the Tribunal pleading and the heading 'Harassment of the Claimant' and then the heading 'Particulars of Harassment' that there are some eleven identical paragraphs with some twenty-two sub-paragraphs setting out each and every allegation that the Claimant makes which constitutes harassment plus reliance on a course of conduct.

62. These obviously encapsulate, also, the ending of his employment, i.e., the termination of the fixed term contract. Thence the next heading is 'Direct Discrimination and Detriment during the Claimant's Employment', paragraph 12:-

*'further and alternatively to the above claim and harassment, it is alleged that the Respondent by subjecting the Claimant to the treatment pleaded in paragraph 9 above (*should also include paragraph 10*) engaged in a course of conduct by which he was treated less favourably than other*

employees in similar positions as the Claimant but do not share his protected characteristics or have not made protected disclosures[7] and if which is denied, any part of the above behaviour does not amount to an harassment, it is alleged that it nevertheless amounts to a course of conduct by the Respondent by which the Claimant was subjected to less favourable treatment'.

63. As far as I can see, virtually every one of those allegations was dealt with in the painstaking fashion to which I have referred to by His Honour Judge Hellman. Hence, the schedule prepared by Ms Azib is accurate. I will give just two examples of just how important this is to the case before me and thus, paragraph 83 of Judge Hellman's Judgment:-

'*Mr Miah makes a number of specific allegations against Mr Davis[8], e.g., he alleges that Mr Davis who is white made various inappropriate remarks about his race and religion. At a monthly meeting on 9 December 2015, he allegedly asked Mr Miah and another employee of Asian heritage whether each of them took illegal drugs. When they said they did not, Mr Davis allegedly said "Oh you are Muslim and Bengali, aren't you?".Mr Miah said that at the same meeting, he felt pressurised into announcing that he was going to get married. Towards the end of January 2016, Mr Davis allegedly said to him, in the open-plan office where he worked, "Are you now going to suddenly disappear off and get married in secret?"Mr Miah said that he felt embarrassed when led to reveal details of his private life.*

The Judge then rehearsed … inter alia, that Mr Davis:

" *said that he had 'no precise recollection of the meeting nor whether there was a generalised discussion about the use of illegal drugs, however, he was certain that he did not make the comments attributed to Mr Miah … about his marriage either at the meeting or towards the end of January*

[7] Dismissed as a head of claim by EJ Morton.

2016 and denied that he would have said anything to embarrass Mr Miah or ask him to reveal details of his private life.'

64. That is only one example of the Judge rehearsing fully the issue and the contending evidence. All that needs to be said then is that cross-reference to the Judge's finding of fact, and I have already of course referred to his preferring the Respondent's witnesses ,and what the Judge did having rehearsed all the issues as I have outlined and as per the schedule prepared by Ms Azib, is encapsulated at paragraph 148:-

'in my Judgment, management behaved reasonably towards Mr Miah, e.g., he was not given inappropriate tasks, inadequate training or an excessive work load. As to the workload, I bear in mind that this was a senior administration post and not an entry level. ***I reject his claims of deliberate harassment***[9]*, e.g., that Ms Sinclair was brought in as an enforcer and informant.*

There is no evidence from which I can properly conclude after his fixed term contract ended, he was 'black-listed' by the NHS.

Paragraph 149:-

'In the circumstances, I am satisfied that neither NHS England nor Mr Davis engaged in a course of conduct in relation to the Claimant which amounted to harassment. Mr Miah's claim that he was harassed is therefore dismissed'.

65. Dealing with one last point by the Claimant, and relating to the role of Ms Coghill, and whether or not she knew that he was being racially discriminated against as opposed to her telling him, how it engages otherwise in relation to the issues, and this goes absolutely to perception. First of all the reader is taken to paragraph 23-24 of her evidence as recited by Hellman J:-

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[8] Mr Miah was one of a team of six working for the NHS 111 Team within the Respondent. Also in that team was David Davis clearly senior to the Claimant and who was the National Clinical Lead and Head of Programme for the Integrated Urgent Care (IUC)/NHS 111 WD Team.

[9] My emphasis

"She is director of work of the Work Force Racial Equality Standard, I gather, for NHS England. She held a presentation on 6 January 2016 for sixty to seventy new members of NHS England at which present was the Claimant. 'The presentation addressed discrimination experienced by ethnic minority employee in the NHS. It resonated with him (the Claimant) and led him to understand his unhappy work experience in terms of discrimination on racial and religious grounds – Mr Miah is a Muslim and describes himself as a man of Asian ethnicity'.

'I asked her whether in the light of her experience of reported discrimination within the NHS, and acknowledging the allegations made by Mr Miah, whether there were any aspects of his complaints which would invite the Court to examine with particular care.

She replied very fairly that she was not in a position to say as she had only heard his version of events. She did, however, confirm that when Mr Miah spoke to her, he was genuinely stressed. She stated that one of his concerns was that he felt under-utilised and under-valued in his role and said that he was working below the skill and level of his competence'.

66. Cross- reference again back to the overall findings, and paragraph 142:-

'This is an unfortunate case where Mr Miah joined NHS England full of idealism and enthusiasm for his new job. In his letters to Mr Stevens, he speaks eloquently about how he was motivated to apply for the job after seeing overwhelmed doctors in A and E bursting into tears in a television documentary. But he rapidly became disillusioned. This was due to a mis-match between his expectations and what the role actually required. Ms Coghill's observation that he felt under-valued and under-utilised in this role and that he was working below the levels of his skills and competence was spot on. Mr Miah had expected a stimulating and relatively high-powered role. What he found was something much more mundane. Moreover, although he found his duties somewhat dull and routine, he struggled to cope with it. This led to an increasingly hands-

on intervention by management particularly Ms. Breeze who he greatly resented…

Paragraph 144:-

Mr Miah found Ms Coghill's 9 January 2016 presentation on diversity in the NHS to be a revelation. He took from it a conceptual framework which made sense of his job dissatisfaction namely that he was being discriminated against because of his religion and ethnicity. He used this framework to interpret his past and future experience in the jod. The framework was unfalsifiable e.g., when Mr Miah was cross-examined about a sensibly fair email sent by management such as emails setting deadlines, he would never accept that they were really were fair as he was convinced that management was discriminating against him …

Paragraph 149:-

In the circumstances I am satisfied that neither Mr Davis[10] engaged in a course of conduct in relation to Mr Miah which amounted to harassment. Mr Miah's claim that he was harassed is therefore dismissed."

67. The reader can otherwise cross-reference to the rest of the updated schedule by Ms Azib. Suffice it to say, that I am entirely satisfied that all the factual issues of any substance that were alleged in the Employment Tribunal particulars of claim were in-fact dealt with His Honour Judge Hellman. There is one observation I have got to make but curiously it is not referred to in the Claimant's statement for the purposes of today or his skeletal submissions or indeed the further email that I have recited that came in this morning but at paragraph 11 he pleaded: '***the Claimant relies in support of his allegation that the above course of conduct amounted to a prime-facia case of harassment due to direct discrimination on the paper 'snowy white peaks of the NHS (Roger***

[10] who was second defendant before the county court

Kline, Middlesex University, 2004…)'. He then gave further details of what was said to be the culture, so to speak as in that publication.

68. Cross reference to the proceedings before Hellman J and I note that Mr Kline was not called to give evidence by the Claimant and furthermore I cannot find any reference therein to the Claimant deploying the Kline report.

69. This leads me to another point for the sake of belts and braces, and this of course is that there is absolutely no reason given the length of the hearing before Judge Hellman why the Claimant could not have deployed that evidence had he wanted to. So, if he was seeking to do it now, it comes within the concept of abusive process. Of course, on its own, given all the other findings it would not assist the Claimant in any event, because it is implicit the very least if not explicit from the findings of Hellman J that he did not find that there was actually harassment of the Claimant going on in terms of his employment with the Respondent. Thus, that squares that off lest the Claimant might seek to argue that it is engaged.

Discussion

70. Thus, first the following engages: Reverting to the burden of proof, the Claimant is therefore stuck so to speak with the findings of Hellman J. The Tribunal cannot revisit them because of issue estoppel. Thus, the Claimant will not be able to persuade a Tribunal on those facts that he was harassed. The caveat to that would be of course the difference in definition of harassment as per Section 27 of the Equality Act. There is actually no definition of harassment in the Protection from Harassment Act but that has been dealt with by the jurisprudence. Essentially, it would be aggressive, heavy-handed behaviour, matters of that nature, which objectively speaking would be considered to be reasonably found to be the case with of course consideration of the overall circumstances of what has occurred.

71. Cross reference to Employment Tribunal and how harassment is defined in section 27 of the Equality Act:

'1. A *person (*for which read the Respondent) *harasses another (*for which read the Claimant*) if*

(*a) the Respondent engages in unwanted conduct related to a relevant protected characteristic and*

(b) the conduct has the purpose or effect of (1) violating the Claimants dignity or (2) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant ..

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

(a) the perception of the Claimant

(b) the other circumstances of the case

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

(5) The relevant protected characteristics are age … religion or belief …

72. And as to the importance of the overall context in determining these matters, see the judgment of Mr Justice Underhill, as he then was, in **Richmond Pharmacology Ltd v Dhaliwal 2009 [IRLR3366]**. Although a Claimant may perceive himself to have been subjected to harassment as defined in terms of (1)(b) it does not follow that it is harassment because it depends on the context and whether in fact it would be reasonable for that conduct to be taken to have that effect. In that sense it is an objective test.

73. That has all been determined by Hellman J. For the reasons I have now gone to. The only label, so to speak, that the Protection from Harassment Act does not deal with is the protected characteristic. But Hellman J squared that off in his findings because he was aware that the Claimant was raising issues engaging discrimination against him by reason of his

race or religion and he made specific rulings to the effect that he did not find that the Respondent had behaved in the way as alleged by the Claimant. That is obvious from his conclusions.

74. As to whether or not the Claimant could say, well, the judge did not deal with whether my dismissal was on the grounds of my protected characteristics and thus I was treated less favourably. It is implicit in the finding that he made in relation to the circumstances of the Claimant's dismissal; and I repeat and it is the last observation I make in that sense his reference in his findings of fact at 149:-

In the circumstances, I have satisfied that neither NHS England or Mr Davis engaged in a course of conduct in relation to Mr Miah which amounted to harassment. Mr Miah's claim that he was harassed is therefore dismissed.'

75. In other words, he was looking at the dismissal as part and parcel of the overall harassment conduct as is obvious; and he makes clear in that Judgement that the Respondent acted in good faith. It cannot but include in terms of the dismissal of the Claimant. And I find it inconceivable that Hellman J would not have made plain if he had found that there was an element of race or religious discrimination in the dismissal of the Claimant. In other words, I am with again Ms Azib that is obvious that he determined that no part of the treatment of the Claimant including his dismissal was by reason of his protected characteristics. Hence his reference to the espondent having acted 'in good faith'.

CONCLUSION

76. Given all my findings, as per **Anyanwu** and **Downham Market High School,** I am with the submissions of Miss Azib, that this is an exceptional case in terms of whether or not to strike out. Because the facts have been adjudicated upon and cannot be revisited, it must follow that the Tribunal would inevitably conclude that the Claimant was not discriminated against by the Respondent.

77. Thus, it assuredly follows that the Claimant will not get over the first hurdle in terms of the burden of proof of showing that he was less favourably treated as per s13 of the EQA.. It thus follows that the claim of direct discrimination does not have any reasonable prospect of success. The same applies to the harassment claim as per s26.

78. Accordingly I find that the claims have no reasonable prospect of success and therefore must be dismissed.

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Employment Judge Britton
Date: 13 December 2020

[i]. What I was not made aware of until after my extempore judgement in this case on 16 October and the e-mails the next day from the Claimant, as to which he copied me in, is that he must have appealed the EJ Morton judgement and possibly the EJ Sage orders. I say that because there was an appeal lodged by the Claimant on May 18 2020 under case UKEATPA/0554/ 2020. As at 10 September Hanks J seems to have stayed it pending the outcome of this Hearing. I also note that on the 18 October the Claimant

appealed my judgement. He did not attend the hearing on the 16 October but did not seek a postponement.