EMPLOYMENT TRIBUNALS

Claimant: **Professor T Ahmed**

Respondent: **United Lincolnshire Hospitals NHS Trust**

Heard at: **Via Cloud Video Platform**

On: **25th January 2021**

Before: **Employment Judge Heap (Sitting alone)**

Representation
Claimant: **Mr. D Matovu - Counsel**
Respondent: **Mr. C Breen – Counsel**

COVID-19 Statement

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V – fully remote. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

JUDGMENT

1. The complaints of victimisation, whistleblowing detriment and discrimination relying on the protected characteristic of religion or belief are dismissed on withdrawal by the Claimant.

2. The Claimant's application for an extension of time to Reconsider the Judgment sent to the parties on 15th February 2020 is refused.

3. Even if that application had been granted, the Reconsideration application would have been refused on the basis that there was no reasonable prospect of the Judgment being revoked.

4. It follows that the following complaints are struck out on the basis that the Claimant is estopped under Rule 52 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 from pursuing them:

(a) Restricting the number of witnesses that the Claimant was permitted to call during the disciplinary process relating to requests made of the Respondent in February and March 2019.

(b) Failing to carry out a balanced investigation by gathering evidence which might potentially be viewed as exculpatory or consistent with the Claimant's explanations equally as conscientiously as gathering evidence pointing to culpability.

(c) Failing to investigate properly exculpatory evidence or information, including where appropriate questioning witnesses who might provide independent corroborative evidence, such as others who were present at the time of certain disputed events or other team members whom the Claimant line managed to obtain a balanced view when those matters were raised in February and March 2019.

(d) The focus of the investigation as conducted by the investigating officer was to gather evidence to support the allegations against the Claimant including questioning witnesses who had left the Respondent or the Claimant's department more than 4 years previously, even more than 10 years ago in one case.

(e) The ignoring or overlooking clear documentary evidence that contradicted or severely undermined the uncorroborated oral testimony of witnesses called to give evidence against the Claimant other than where that relates to the disciplinary hearing which resulted in his dismissal.

(f) The manipulation of the whole process by senior management collectively and systematically so as to out the Claimant at a significant disadvantage other than where that relates to the disciplinary hearing which resulted in his dismissal and the disciplinary hearing outcome.

(g) Subjecting the Claimant to a disciplinary procedure culminating in his dismissal other than where that relates to subjecting the Claimant to a disciplinary hearing.

5. The complaints that the Claimant is permitted to advance in these proceedings are set out in Annex One attached.

6. Case Management Orders are attached.

REASONS

1. This hearing is primarily concerned with the Claimant's application for Reconsideration of a Judgment ("The Judgment") dismissing proceedings that he had brought under case number 2602646/2019 ("The First Claim"). That followed on from a withdrawal of the First Claim by solicitors then acting for the Claimant on 13th January 2020.

   Extending time for the Reconsideration application to be determined

2. Before that point, however, Mr. Matovu accepts that the Claimant needs to apply for an extension of time for the substantive application itself to be heard.

3. The provisions of Rule 5 of the Regulations deal with extensions of time and say this:

   > ***"Extending or shortening time***
   >
   > ***5.*** *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."*

4. Mr. Matovu submits in short terms that the Claimant should be afforded an extension of time because around the time that the Judgment was issued he parted ways with his now former solicitors and, thereafter as a litigant in person, would not have appreciated the significance of the Judgment on his ability to bring the further claims that he now seeks to advance in claim number 2600767/2020 ("The Second Claim").

5. Mr. Breen submits that there is no good reason to extend time. He submits that any failure to do so lay in the hands of the Claimant's former representative and that the Claimant is an intelligent man who was able to take steps to access further legal advice.

6. The Judgment was sent to the parties on 15th February 2020. It was not until 29th May 2020 in or around the time that Mr. Matovu was instructed for the purposes of a Preliminary hearing on that date that the application for Reconsideration was made. The Second Claim was issued on 1st March 2020. On 31st March 2020 the Respondent issued their ET3 Response. That was sent to the Claimant on 2nd April 2020. Part of that Response set out that the Claimant was estopped from bringing any part of the Second Claim that encompassed complaints raised in the First Claim.

7. I am satisfied that there is no good reason to grant such a significant extension of time – around three months – in these circumstances. The Claimant was still legally represented by a consultant within a firm of solicitors at the time that the Judgment was issued. That consultant had specifically referred to Rule 52 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations") in their letter withdrawing the First Claim. The consultant concerned cannot therefore have failed to note that the Judgment did dismiss the claim and, as a CILEx Litigator Advocate representing Claimants in Tribunal proceedings, also cannot have failed to know that that Judgment would prevent the Claimant from commencing the same or substantially the same proceedings in the Second Claim once he issued it. I do not know of course what advice may or may not have been given to the Claimant, but all Judgments are accompanied by details of how and when applications for

Reconsideration should be made. The Claimant's representative would have been aware of that and the ramifications of the dismissal Judgment. There is no good reason why a prompt application for Reconsideration could not have been made in time.

8. Moreover, there is nothing to suggest that the Claimant would not have been able to seek alternative advice promptly. Particularly, by early April 2020 the Claimant would have known from the ET3 Response that the Respondent was taking a point on estopple. As an intelligent man – indeed he is a professor – the Claimant had the wherewithal to act much more promptly.

9. There is therefore no good reason to afford such a substantial extension of time under Rule 5 of the Regulations.

The substantive Reconsideration application

10. However, I have gone on to consider what the position would have been if I had granted an extension of time to the Claimant. Had that been the case, then I would in all events have refused the application for Reconsideration as having no reasonable prospect of seeing the Judgment revoked.

11. The procedure and basis for applications for Reconsideration is provided for by Rules 70 to 73 of The Regulations. Under the provisions of Rule 70, a Judgment will only be reconsidered where it is 'necessary in the interests of justice to do so' and a Tribunal dealing with the question of Reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly'. A Tribunal should also be guided by the common law principles of natural justice and fairness when dealing with applications of this kind.

12. The wording 'necessary in the interests of justice' in Rule 70 allows Employment Tribunals a broad discretion to determine whether Reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised having regard not only to the interests of the party seeking the review or Reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.

13. Also relevant to the Reconsideration application are the provisions of Rule 52 of the Regulations which say as follows:

> ***"52.*** *Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—*
>
> *(a)the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or*
>
> *(b)the Tribunal believes that to issue such a judgment would not be in the interests of justice."*

14. The Claimant relies upon the terms of the withdrawal letter which was sent by his then solicitors on 13th January 2020 which said this:

> *"We write to notify the Tribunal that it is the decision of the Claimant to withdraw his claim under case number 2602646/2019. Pursuant to rule 52 the Claimant wishes to reserve the right to bring such a further claim which may raise the same, or substantially the same complaint arising from his recent dismissal from the Respondent's employment which occurred post the lodging of case number 2602646/2019."*

15. I took the content of that letter into account before issuing the Judgment dismissing the claim on withdrawal.

16. Whilst the Claimant may well have reserved his right to bring the claim again, that is not the end of the matter. My view then – and now – remains that there was no legitimate reason for the Claimant to withdraw the First Claim only to then issue the Second Claim in almost identical form with the addition of complaints relating to dismissal. If it was open to Claimants to withdraw claims only to later be entitled to revive them by way of a further complaint once something else happened, that would create an unnecessary burden on the Tribunal system and on Respondents who are entitled to assume that once something has been abandoned they will not need to revisit it once again.

17. The only sensible and legitimate course was either to apply to amend the First Claim or to issue fresh proceedings dealing with the dismissal only and to then have those proceedings consolidated.

18. The Claimant's withdrawal email did not make plain that he would definitely be issuing a fresh claim or that that would not largely centre on the issue of dismissal. The Claimant was professionally represented by a firm of solicitors at the time of the withdrawal and I agree with Mr. Breen that there can only be at best speculation of the reasons why his then representative took the course that she did.

19. This is not a case where the Claimant has realised that he has litigated in the wrong forum or that some cap on compensation means that it would be more appropriate to look to a different jurisdiction. The Claimant has actively elected to withdraw his claim to then replace it with an almost identical one around six weeks later. No legitimate reason can possibly be advanced for doing so and the withdrawal email certainly did not hint at one. It simply assumed that having withdrawn, the Claimant had the right to raise those matters again.

20. I also do not accept that it is in the interests of justice to revoke the dismissal Judgment. Again, there is no good reason for the Claimant to have taken the course that he did. Interests of justice need to be considered not only from the Claimant's perspective but also from that of the Respondent. They are entitled to a finality of litigation from a claim that has been withdrawn not to have it hanging over them only to be vexed with a near identical complaint at a later unspecified point in time.

21. There is also not a public interest in encouraging Claimant's to abandon litigation only to then raise the same matters in the exact same forum without exceptional reason. There is no such exceptional reason here.

22. Whilst Mr. Matovu identifies of course that there will be prejudice to the Claimant if his application is not acceded to, that is tempered by the fact that if his former solicitors were at fault for the present state of affairs then he has potential redress against them in negligence. He also has other substantial complaints which he remains able to advance and that includes many of the harassment complaints which relate to points in the disciplinary process which took place after the presentation of the First Claim. There is not, therefore, a great deal that he now advances as matters of importance that he will not be able to pursue in the Second Claim. Moreover, he is not prevented from relying on the issues in the First Claim as background to his unfair dismissal complaint. That does not mean, however, that additional Tribunal time needs to be taken up considering those issues as discrete complaints of harassment in addition.

23. I am therefore satisfied that even had I extended time, it would not have been in the interests of justice to revoke the Judgment.

Strike out

24. It follows that the dismissal Judgment sent to the parties on 15th February 2020 stands and the Claimant is prevented, under the provisions of Rule 52 of the Regulations from raising the same or substantially the same complaint within the Second Claim.

25. I am satisfied that the complaints set out at paragraph 4(a) to (g) of the Judgment set out above were all complaints that were advanced in the First Claim under the ambit of harassment with regard to the Respondent allegedly conducting a selective investigation (see paragraph 11b of the Claim Form at page 15 of the Preliminary hearing bundle and paragraph 33 at page 20).

26. I make it plain that nothing in this Judgment prevents the Claimant from ventilating issues relating to alleged deficiencies in the investigation process as part of his claim for unfair dismissal.

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Employment Judge Heap

Date: 9th February 2021

JUDGMENT SENT TO THE PARTIES ON

11 February 2021

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FOR THE TRIBUNAL OFFICE

Notes:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Annex One

1. Restricting the number of witnesses that the Claimant was permitted to call during the disciplinary process relating to requests made of the Respondent in October and November 2019.

2. Refusing to permit the Claimant to have legal representation at his disciplinary hearing.

3. Ignoring or overlooking clear documentary evidence at the disciplinary hearing that contradicted or severely undermined the corroborated oral testimony of witnesses called to give evidence against the Claimant.

4. Failing to investigate properly exculpatory evidence or information, including where appropriate questioning witnesses who might provide independent corroborative evidence, such as others who were present at the time of certain disputed events or other team members whom the Claimant line managed to obtain a balanced view when those matters were raised in October and November 2019.

5. Treating witnesses giving evidence against the Claimant more favourably than those giving evidence to support him by giving a witness interview questions in advance of the disciplinary hearing against the Claimant and helping the same witness to answer questions during the disciplinary hearing itself.

6. The ignoring or overlooking at the disciplinary hearing of clear documentary evidence that contradicted or severely undermined the uncorroborated oral testimony of witnesses called to give evidence against the Claimant.

7. The manipulation of the disciplinary hearing and disciplinary hearing outcome by senior management collectively and systematically so as to put the Claimant at a significant disadvantage.

8. Subjecting the Claimant to a disciplinary hearing.

9. Dismissing the Claimant.

Complaints 1 to 8 are advanced as complaints of harassment related to race.
Complaint 9 is advanced as complaints of harassment and direct discrimination[1].

[1] Although the Claimant's Response document dated 4th June 2020 also referenced complaints 1-9 as being acts of victimisation in the alternative, that claim has been withdrawn on 29th May and 4th June and is now dismissed on withdrawal.