EMPLOYMENT TRIBUNALS

Claimant: Mr AB

Respondent: The Pennine Acute Hospitals NHS Trust

Heard at: Liverpool **On:** 15 December 2020

Before: Employment Judge Horne

Representatives
For the claimant: In person
For the respondent: Mr M Hatfield, solicitor

RESERVED JUDGMENT

The judgment sent to the parties on 4 October 2019 is confirmed. The claim remains struck out.

REASONS

Preliminary

1. This heading to this judgment is marked with the hearing code "A". The code indicates that the hearing took place over the telephone. Both parties consented to the format of the hearing.
2. I have made a separate order anonymising the claimant's name. The order is time-limited. In the absence of a further order, a further copy of this judgment will appear on the Register of Judgments, bearing the claimant's name.

The claim

3. By a claim form presented on 20 October 2013, the claimant made a large number of complaints including multiple allegations of race and age discrimination and detriment on various prohibited grounds. Amongst those grounds was the making of numerous alleged protected disclosures. The complaints arose out of a period of approximately 17 months' employment with the respondent which ended on 31 July 2013.

The Judgment

4. Following a preliminary hearing on 9 July 2019, I decided that the claim should be struck out. I reached that decision, essentially, for three reasons. First, the claimant had failed to comply with case management orders. Second, a fair hearing was no longer possible because there was no reasonable prospect of the claimant being well enough to participate. Third, the length of past delays also meant that there could no longer be a fair hearing.
5. My decision was recorded in a reserved judgment ("the Judgment") with written reasons ("Reasons") which were sent to the parties on 4 October 2019.

The reconsideration application

6. The claimant applied for reconsideration of the Judgment. His application, dated 17 October 2019, was received by the tribunal on 22 October 2019.
7. The application itself ran to 17 pages. It was accompanied by:
   7.1. a report from Dr C T Pughe, typed with a date of 23 August 2019, but date-stamped 26 September 2019;
   7.2. 47 pages of written submissions; and
   7.3. A three-page retrospective application for an extension of time.
8. It would be disproportionate to reproduce every point that the claimant made in these documents. His essential grounds for reconsideration were:
   1) It was not the claimant's fault that Dr Pughe's report had not been provided by to the tribunal by the time that the tribunal made its strike-out decision;
   2) The claimant was fit to attend a final hearing, as evidenced by Dr Pughe's report.
   3) The respondent had misled the tribunal into striking out the claim by incorrectly stating that the claimant had "failed to comply with an 'Unless Order'.
   4) His failure to comply with case management orders was not deliberate.
   5) "The delay has largely been due to the Respondent's repeated and persistent Applications for unnecessary and largely avoidable Preliminary Hearings; Case Management Orders; Unless Orders and Application to Strike out rather than exhibiting empathy or sympathy or flexibility or co-operation in accordance with the overriding objectives and Civil Reforms in the Higher Courts."
   6) The respondent had not appealed against four previous postponement decisions was "estopped" from arguing that delay had made a fair hearing impossible.
   7) The claimant's willingness to pursue his claim actively was evidenced in a case management order from Employment Judge Ryan. In that order, Employment Judge Ryan noted, "…the claimant urged me not to postpone the hearing…".
   8) The respondent had misled the tribunal into thinking that a witness (Mr Amu) whom it "wishes to call" had moved to the United Arab Emirates (UAE).
   9) The tribunal was wrong to conclude that the reliability of evidence would be affected either by fading memories or by the fact that witnesses had retired or moved to other Trusts.

10) The claimant was entitled to see his Personal File, which would act as an *aide-memoire* and reduce the impact of delay on the reliability of his evidence.

11) The respondent should "allow ex-employees from both sides to have access to the Respondent's E-Mail System before the Hearing", which would help witnesses to remember their evidence.

Procedural history of the reconsideration application

9. The reconsideration application was initially listed for a hearing in person on 24 and 25 March 2020. Unfortunately, that hearing could not take place. Tuesday 24 March 2020 was the second day of what has come to be known as the "first lockdown". Virtually no hearings took place in the region that week.

10. On 27 March 2020, the tribunal wrote to the parties, proposing to list the case for a telephone hearing. The letter instructed the respondent to provide brief written submissions, adding:

> "There appears to be a dispute as to the extent to which the respondent's witnesses have retired or gone to work for other Trusts. The respondent's written submissions must address that dispute in respect of each of the witnesses who were due to give evidence at the final hearing in 2017. The respondent must identify, to the best of its knowledge, whether or not they have retired, where they work, and what Trust employs them."

11. By letter dated 7 August 2020, the parties were informed that the reconsideration hearing would take place on 18 November 2020. That hearing was adjourned, partly because the claimant said he had not received the respondent's bundle, and partly because the respondent had not complied with the instruction in the tribunal's letter of 27 March 2020. The hearing was re-listed to take place on 15 December 2020. The parties were informed of the new date at the 18 November hearing.

Documents

12. I took into account all the documents received from the claimant on 22 October 2019.

13. The respondent relied on documents in a 124-page bundle which it had sent to the tribunal in advance of an earlier hearing on 18 November 2020. On 27 November 2020, the respondent sent further written submissions to the tribunal and to the claimant. At the hearing on 15 December 2020 the claimant confirmed that he had received all these documents and I decided to consider them.

14. During the course of the hearing, the claimant mentioned that he had a copy of an updated medical report from Dr Pughe and asked me to take it into account. He confirmed that he would be able to fax the report after the hearing. I indicated that, if it was faxed to the respondent by 5pm that day, the respondent should forward it to me and I would take it into account. He also stated that he wished to fax a number of judgments in previously-decided cases. I informed the claimant that if he told me the name of each case, I would read the judgment without him having to fax it. The claimant did not mention any new witness evidence in support of his reconsideration application.

15. Between 4.58pm and 8.28pm the same evening, the claimant sent 15 faxes to the respondent, together comprising a "Supplementary Bundle" of 79 pages. The bundle included Dr Pughe's updated report, several witness statements and further documents. The respondent objected to my considering anything in the Supplementary Bundle beside Dr Pughe's updated report and one other document.

16. I read the Supplementary Bundle in its entirety, with a view, first to determining which parts of it I should admit into evidence and, second, to deciding what weight I should give to those parts of the bundle which I was prepared to consider.

Relevant law

17. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so".

18. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

19. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. By rule 2, dealing with cases fairly and justly includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.

20. The current 2013 Rules replaced the old procedure for reviewing judgments. Under their statutory predecessor, the 2004 Rules, review applications could only be granted on one of a specified list of grounds. One of those grounds was that "new evidence [had become] available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time." This proviso reflected the well-known principle in civil litigation deriving from *Ladd v. Marshall* [1954] 3 All ER 745, CA.

21. The current 2013 Employment Tribunal Rules of Procedure replaced the old list of grounds with a single test: a judgment will be reconsidered where it is "necessary in the interests of justice to do so". There is no specific provision for fresh evidence. Nor is there any express prohibition a party relying on evidence about which he knew or ought to have known before the judgment was given. Nevertheless, the "interests of justice" test must, in my view, incorporate a strong public interest in the finality of litigation, even if it is not as inflexible as the proviso in the 2004 Rules. Where a party could reasonably have been expected to rely on the evidence first time around, it would take a particularly good reason to give that party a fresh opportunity to rely on it.

22. I reminded myself of the *De Keyser* guidance relating to expert evidence. This is set out more fully in paragraph 48 of the Reasons.

23. Guidance as to the duty of experts was given in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer")* [1993] 2 Lloyd's Rep:

> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation (Whitehouse v Jordan [1981] 1 W.L.R. 246, HL, at 256, per Lord Wilberforce).
>
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise (see Polliviitte Ltd v Commercial Union Assurance Company Plc [1987] 1 Lloyd's Rep. 379 at 386, per Garland J, and Re J [1991] F.C.R. 193, per Cazalet J. An expert witness in the High Court should never assume the role of an advocate.
>
> 3. An expert witness should state the facts or assumption on which their opinion is based. They should not omit to consider material facts which could detract from their concluded opinion (Re J, above).
>
> 4. An expert witness should make it clear when a particular question or issue falls outside their expertise. If an expert's opinion is not properly researched because they consider that insufficient data are available then this must be stated with an indication that the opinion is no more than a provisional one (Re J, above).
>
> 5. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification that qualification should be stated in the report (Derby & Co Ltd v Weldon (No.9), The Times, 9 November 1990, CA, per Staughton LJ.
>
> …"

24. Where an expert oversteps the mark, and trespasses into areas that are for a judge to decide, the proper course is not to disallow the expert's evidence altogether, but to consider only those parts of the expert's evidence that are properly within the expert's area of expertise: *Sharpe v. The Bishop of Worcester* [2015] EWCA Civ 399.

25. The claimant has referred to a number of decided cases. I read the judgments and distilled the following propositions:

    25.1. Complaints of discrimination and whistleblowing detriment are fact-sensitive and, except in the plainest cases, should not be struck out on the grounds of their prospects of success. This is especially so where there is a central core of disputed fact: *Anyanwu & another v South Bank Students Union* [2001] ICR 391.

    25.2. A tribunal may be required to conduct a hearing differently for a party with a disability, such as Autistic Spectrum Disorder. The required adjustments should be identified at a case management hearing sometimes referred to as a "ground rules hearing". The requirement to adapt procedures does not depend on the disabled party raising the issue. In deciding what adjustments to make, the tribunal should have regard to the *Equal Treatment Bench Book.* If no

adjustments are made, the hearing risks causing procedural unfairness. Authority for all these propositions can be found in *Galo v. Bombardier Aerospace UK* [2016] NICA 25.

25.3. Judgment against a party may be reconsidered on the ground that the tribunal was misled by the unsuccessful party's representative: *Council of the City of Newcastle upon Tyne v. Marsden* UKEAT 0393/09.

Social context

26. The *Equal Treatment Bench Book* (ETBB) provides useful guidance to judges in dealing with litigants in person and parties with mental disabilities. I provided the claimant with a link to the ETBB in my case management order following the hearing on 3 December 2018.

27. The following passages of the ETBB are relevant amongst others:

> "
>
> [page 106]
>
> 75.A witness with a mental disability may have difficulty reconstructing events in chronological order. Difficulty in remembering things is also associated with depression. Further, memory can be affected by some types of medication.
>
> 76.Memory problems may just affect the level of detail or precision, not the reliability or credibility of the testimony as a whole.
>
> …
>
> 78.To meet the needs of a disabled party, a judge may facilitate representation in a form which might not otherwise have been permitted.
>
> …
>
> 80. In some cases, people might not tell the court or tribunal that they have a mental health issue or that they are having any difficulties. This might be because of the stigma attached to mental health, not knowing the court is willing to make adjustments or fear they will be taken less seriously. They may not themselves recognise that they have a difficulty. Unrepresented parties may be particularly unlikely to raise the matter."

Previous medical evidence

28. The claimant has previously submitted medical evidence for earlier hearings. Here is a summary:

28.1. His letter dated December 2018 stated that he suffered from a number of medical conditions, including "severe depression". He enclosed a report from his then general practitioner, Dr Earnshaw, dated 8 October 2018. The report mentioned that his medication included Sertraline, although it did not actually state that the claimant had depression. The claimant's GP fit notes for the period July to October 2018 stated that the cause of the claimant's unfitness for work at that time was "low back pain".

28.2. On 9 July 2019, the day of the preliminary hearing, the tribunal received written submissions from the claimant and a pack of medical evidence. The

submissions stated that the claimant had "severe depression" and was taking SSRI medication. It included a further medical report from Dr Earnshaw, this time dated 10 January 2019, which confirmed that one of the claimant's medical conditions was depression. According to Dr Earnshaw, the medical conditions – or possibly the side-effects of medication – would impact on the claimant's ability to participate in a hearing. Further GP fit notes were enclosed for the period January 2019 to July 2019. The medical condition stated there was "low back pain".

Dr Pughe's evidence

Overview of first report

29. I read Dr Pughe's report of 23 August 2019. It appeared to have been prepared following a consultation on that date.

30. The broad scheme of Dr Pughe's report was to address the three questions identified in the case management order sent to the parties on 15 December 2018. That order stated:

> "
>
> 4. The letter or report must state the medical practitioner's opinion as to:
>
> 4.1 when the claimant is likely to be medically fit to participate in a 15-day hearing;
>
> 4.2 whether the claimant's fitness to participate in such a hearing is affected by stress and, in particular, the stress of these proceedings; and
>
> 4.3 what if any adjustments the tribunal could make to enable the claimant to participate in the hearing."

First report – fitness for a hearing

31. Addressing the first question, Dr Pughe set out the claimant's medical conditions and noted an improvement in the symptoms of each. Having done so, Dr Pughe expressed the following "reasoned prognosis":

> "In my professional opinion, the clinical trajectory; my current assessment of improved symptomatology; the nature, duration and extent of his treatment; and compliance indicate that he is likely to be medically fit to attend, participate and give evidence during the 15 day tribunal hearing booked for January/February 2020."

32. In coming to this view, Dr Pughe noted that the claimant had "reduced suicidal ideation".

33. Dr Pughe answered the second question by first noting Dr Earnshaw's opinion, 6 months previously, that "involvement in a trial at this time would generate sufficient stress and anxiety that there would be a negative impact on some or all of his medical conditions". Having done so, Dr Pughe continued:

> "My assessment today and impression of his clinical trajectory and prognosis suggest to me that things have improved since his assessment. | therefore still believe that he Is likely to be medically fit to attend, participate and give evidence during the 15-day tribunal hearing booked for January/February, 2020."

First report - adjustments

34. Dr Pughe addressed the question of what adjustments the tribunal would need to make in order to enable the claimant to participate in a hearing. Relevantly, Dr Pughe stated:

> "In my Professional Opinion, to enable [the claimant] to effectively attend, participate and give evidence in the hearing booked for January/February 2020 certain general adjustments will be necessary; as well as specific adjustments for his Physical and Mental Disability.
>
> General
>
> - Later Start each morning
> - Frequent Breaks
> - Avoid Distress, Overload or Tiredness
>
> …
>
> - Time allowance for tasks
> - Staff Assistance (if available)
>
> …
>
> In my Professional Opinion, the reliability or credibility of the eventual testimony is not affected. Therefore the court can be reassured that with continuing treatment and the following reasonable adjustments, he will be in a position to participate in the 15-day trial listed for 2020 and will be able to provide reliable and credible evidence.
>
> - Supplementary Witness Statement
> - Supplementary Questions
> - Allow more time in the Timetabling for the Claimant to question the Respondent's Witnesses Sending the Respondent's Questions to the Claimant in advance
> - Help with Legal Representation (as he is currently relying on his own cognitive abilities which can be limited due to his depression)
> - Facilitating Representation

35. Dr Pughe did not explain how his skill and experience as a general practitioner would enable him to give an expert opinion as to the reliability or credibility of any witness's evidence. Neither did Dr Pughe explain why a "supplementary witness statement" or "supplementary questions" would enable the claimant to give "reliable and credible evidence".

36. These statements of opinion gave the impression of Dr Pughe acting as the claimant's advocate on the question of whether the claim should be struck out, rather than assisting the tribunal with his expertise.

Updated report - adjustments

37. Dr Pughe's updated report confirmed his previous opinion that the claimant was fit to attend and participate in a 15-day hearing. He revisited the topic of tribunal adjustments. In addition to "the reasonable adjustments which I outlined before", Dr Pughe made this suggestion:

> "I anticipate that, similar to the situation with the Health Service, there will be backlogs in the judicial system after the Covid-19 Lockown.
>
> Therefore, having a future hearing in blocks of 2 to 3 to 5 days; or any other available blocks may be mutually beneficial for his circumstances as well as that of a judicial system facing a backlog. He will benefit from the break and rest in between the blocks; and the judicial system will benefit from clearing the backlog earlier.
>
> I say this because it is quicker to book day cases or cases involving shorter hospital stays in the NHS with the envisaged backlog. Therefore the same principle may apply to the judicial system.
>
> This approach could present a logistical advantage in getting earlier hearing dates."

38. Dr Pughe was well placed to assess the beneficial effect of a fragmented hearing on the claimant's ability to participate. It would be well within Dr Pughe's expertise to gauge how much rest the claimant would need between different stages of the hearing. His opinion in this regard was nothing new: his earlier report had already expressed the view that the claimant would benefit from one day's rest between different stages of the hearing. But, in his supplementary report, Dr Pughe appeared to be making the same point for a different purpose. Instead of addressing the question of adjustments, Dr Pughe was giving his opinion that a hearing could be listed quickly if the claim were reinstated. This opinion was outside Dr Pughe's area of expertise. He was not qualified to say was whether or not a fragmented hearing would result in an earlier listing. By making the point at all, Dr Pughe appeared to be arguing the claimant's case, rather than giving his opinion as an expert.

Updated report – explanation for delay in initial report

39. Dr Pughe's supplementary report also contained a helpful factual account of the circumstances in which his original report was delayed. He explained Dr Earnshaw's absence from the surgery, and the inability of the practice to keep the claimant informed as to the reason for, or duration, of Dr Earnshaw's absence. He also explained that there had been delays caused by the practice moving to a different location.

40. I accepted that, because of the problems Dr Pughe explained, the claimant was unable to obtain Dr Pughe's original report before the date of my strike-out decision.

41. Dr Pughe then expressed the following opinion:

> "For the above reasons, in my professional opinion, it would be unfair to blame him for any delay or that he should suffer any consequential prejudice."

42. It was not clear how Dr Pughe's professional expertise would enable him to reach that opinion.

Updated report - anonymity

43. Dr Pughe's supplemental report "strongly supported" the claimant's application for anonymity, stating that the claimant was "concerned about stigma damage to his children and family; as well as his Convention Rights and theirs". I valued Dr Pughe's expertise in identifying concerns that might impact on the claimant's mental health, and making suggestions for how those concerns might be addressed. What I found harder to understand was why Dr Pughe thought it relevant to mention anybody's Convention Rights. They are not within his field of expertise. Drawing the tribunal's attention to Convention Rights is generally something that an advocate would do.

Updated report – attributing past non-compliance to depression

44. The updated report dealt with past delays in complying with case management orders. Dr Pughe observed:

> "I further understand that it has been suggested that he has not been actively pursuing his case, or has been slow to comply with case management orders.
>
> These observations, if true, may not be his fault or within his control, given his serious depression which he has suffered for some time but may have kept confidential.
>
> In my professional opinion and experience, it is not unusual for patients, particular professionals[,] to keep conditions like depression and psoriasis confidential because of the fear of stigmatization.
>
> The possible suggestion of things being done at or near the deadline, if correct, will also be consistent with the spectrum of mood disorders from severe depression to severe anxiety, and vice versa.

45. I had to decide what to make of Dr Pughe's opinion about the causes of the claimant's previous non-compliance and late compliance with orders. I bore in mind, of course, the possibility that the claimant may have had mental health difficulties for a long time and been afraid to talk about them for fear of the stigma that it would cause. What I was not prepared to accept from Dr Pughe was any opinion that the claimant was blameless for the delays that had occurred since 2013. I reach this conclusion for the following reasons:

    45.1. Dr Pughe did not set out the evidential basis for his opinion, other than his knowledge of how depression may affect people generally. It is true that there was evidence available to Dr Earnshaw, and presumably also to Dr Pughe, that the claimant had been taking anti-depressant medication in October 2018, and that Dr Earnshaw mentioned depression in January 2019. Dr Pughe also noted that the claimant had "reduced suicidal ideation", implying that the claimant had had suicidal thoughts at some time in the past. But it seemed a big step from there to conclude that undisclosed depression may be the reason for the claimant's pattern of late compliance going back to 2013. Dr

Pughe, and Dr Earnshaw before him, did not set out any evidence of depression or anxiety prior to October 2018. Depression and anxiety did not feature in any of the claimant's fit notes from July 2018 onwards. Those conditions were not recorded in any of the claimant's GP consultations from January to August 2019, as set out in Dr Pughe's first report.

45.2. Dr Pughe did not appear to have been told the full procedural history. In particular, he did not appear to be aware that the claimant had previously given explanations which the tribunal had rejected.

45.3. Dr Pughe's opinion was that, by December 2020, the claimant's health had considerably improved. Yet on 15 December 2020, the claimant was still late in providing documents and kept overrunning his time allocation. That tended to suggest that the pattern of late compliance could not be explained by the claimant's mental health alone.

45.4. I have mentioned several instances of Dr Pughe acting as the claimant's advocate, rather than the tribunal's expert. It seemed to me that this was another example. Dr Pughe's opinion about the claimant's late compliance appeared to be influenced by an understandable wish to help his patient get the outcome he wanted, rather by an assessment of the evidence in front of him.

Admissibility of Dr Pughe's evidence

46. I decided to admit Dr Pughe's evidence, so far as it related to matters within his expertise. I accepted that the claimant could not reasonably have obtained Dr Pughe's reports before the Judgment was sent to the parties. The *Ladd v. Marshall* criteria are satisfied.

47. Where Dr Pughe appeared to be acting as an advocate for the claimant, or straying outside his area of expertise, my approach was to consider Dr Pughe's evidence as admissible, but to give it minimal weight.

Information about further adjustments

48. The claimant's written submissions set out further adjustments that the claimant asks the tribunal to make in order to give the claimant a fair opportunity to participate in the hearing. In addition to those adjustments mentioned by Dr Pughe, the claimant identified the following:

> "46… Allow one-day break between each key stage of the hearing: (i) Claimant's Evidence; (ii) Submissions; (iii) Respondent's Evidence; (iv) Submissions, et cetera."

49. These are appropriate adjustments during a long hearing where a party has fatigue or impaired concentration.

50. The written submissions continued,

> "The Claimant is entitled to see his Personal File. Therefore as an additional *aides memoire*, the Tribunal is respectfully invited to order the Respondent to disclose the file. Access to the contemporaneous evidence in the file will be an extremely useful adjustment for the Claimant's disability and also further ensure a fair trial."

51. The purpose of tribunals making adjustments is to reduce disadvantages which the usual hearing process would cause to a person with a disability. The claimant did not explain how the personal file would help the claimant to overcome any such disadvantage. This looked, instead, like a request for disclosure of documents to uncover evidence that might assist the claimant's case. Such a request could have been made any time in the last 8 years.

Witness evidence - summary

52. The claimant's supplemental bundle contained witness statements from five witnesses. The statements were dated between 11 and 13 December 2020. At least four of the witnesses are consultants in obstetrics and gynaecology. Here is a summary of what each witness had to say:

    52.1. Miss Hervinder Kaur stated that her memory had not faded, despite having moved to Australia. She asserted that the claimant had been "ill for some time despite not saying so". She described in general terms a shortage of staff at the time the claimant was dismissed. She repeated passages of her earlier witness statement, containing highly-generalised assertions about the way in which the claimant had been treated.

    52.2. Ms Kadie Conteh described herself as a "concerned member of the public". She vividly described the claimant's medical intervention in a relative's childbirth, which possibly saved the mother's and baby's lives. She addressed the respondent's assertion that memories had faded, describing it as "a baseless excuse to further pervert the course of justice." She stated that, at the time of the hearing in 2017, "witnesses did not claim to have faded memories," and added the rhetorical question, "so why now?" Her statement did not explain how she came to know what was and was not being asserted by witnesses in 2017. She supported the claimant's application to be allowed to provide a supplementary witness statement, saying, "Now that his health is improving, I believe he will be in a better position to provide a fuller statement."

    52.3. Mr Donald MacFoy repeated the contents of his original witness statement. After setting out paragraphs 15-21 (describing in quite general terms events that had taken place between July 2013 and April 2014), Mr MacFoy added, "I stand by all the documents relating to these incidents and concerns including the escalation mentioned above. My recollection of the above further serves to prove that my memories of these event[s] have not faded." He made a number of legal arguments as to the fact-sensitive nature of discrimination and whistleblowing cases.

    52.4. Mr A L Adegbite's supplemental statement ran to 210 paragraphs. It repeated his earlier witness statement and went into considerably more detail. In particular, Mr Adegbite described what he was thinking at the time the claimant made his 16 alleged protected disclosures. He described why he believed the respondent's actions to be detrimental and based on the claimant's disclosures. He acknowledged that these details were not included in his original statement, explaining that the claimant had not had legal advice or support and had his health and other issues to contend with.

    52.5. Mr E A D Manning did not work in the same Trust as the claimant. He observed that, in his experience, doctors would keep their illnesses confidential

in order to avoid "stigma". He listed various documents which he had previously receive in the case. These totalled 1,856 pages. He observed that, having read the documents in the bundle, his memory of events had not faded. This point appeared to be aimed at the memories of other witnesses, since most of the documents that Mr Manning listed would not have been relevant to the evidence in Mr Manning's original statement. Mr Manning supported the claimant's request for a supplemental witness statement and for disclosure of electronic documents.

Witness evidence - admissibility

53. Having considered what the witness statements had to say, I decided that the evidence was not admissible. This is because there is no evidence to suggest that the claimant could not have obtained these witness statements earlier.

54. The claimant had been told well in advance of my strike-out decision that one of the points I would be considering was the effect of past delays on the ability of witnesses to remember what had happened. In fact, the claimant was expressly invited to address this point. My case management order, sent to the parties on 17 July 2019, said this:

> **"Effect of delay**
>
> 14. At today's hearing, Mr Hatfield made clear the respondent's position that, even if the claimant were fit to attend the hearing in January 2020, the claim should still be struck out.
>
> 15. One of his submissions is that a fair hearing would be impossible, even if the hearing went ahead in January 2020. This is because of the effect of the delay up to now. The claimant's employment ended on 31 July 2013, nearly 6 years ago. Of the 7 witnesses that the respondent wishes to call, one has moved to the United Arab Emirates, two have retired and three have gone to work for other NHS trusts. Even if these witnesses can all be found and brought to the tribunal, they would have to try and cast their minds back many years because of the length of time it has taken to get the case to a hearing.
>
> 16. The claimant's written submissions do not engage with this point. In my view the claimant ought to have an opportunity to answer it. If he wishes, he can make further written submissions explaining how these obstacles to a fair hearing might be overcome."

55. If the claimant had wished to provide statements from witnesses to assert that they could remember clearly, he could have done so between 17 July 2019 and 4 October 2019. Likewise he could have obtained evidence that the respondent's witnesses had not moved and had not retired. The only explanation for the claimant's failure to provide evidence was specific to the difficulties in getting Dr Pughe's report from the surgery. There is nothing to suggest that he could not have approached the witnesses at that time.

56. The *Ladd v. Marshall* criteria for the admissibility of fresh evidence are not satisfied. The principle of finality of litigation must be respected. I accordingly refuse to admit the statements into evidence.

57. I have an additional reason for refusing to admit the statements. They were not provided until after the reconsideration hearing. The respondent has not had an opportunity to comment on them or test the evidence that they contain. I considered whether or not to relist the case for a further reconsideration hearing, in order for that exercise to be carried out. Taking that step would result in even more delay and would not help to achieve the overriding objective.

Witness evidence - weight

58. In case my conclusion on admissibility is wrong, I have nevertheless formed an assessment of what weight I would give to the witness statements if they were to be admissible.

59. All five witnesses asserted that their memories had not faded. I would only have given limited weight to those assertions. This was for a number of reasons:

    59.1. The respondent did not have the opportunity to comment on those assertions at the hearing, owing to the fact that the witness statements had been provided so late.

    59.2. All witnesses appeared to be arguing the claimant's case for him as well as describing what they had observed.

    59.3. It is hard for a witness to be able to assess accurately and objectively how much their own memory has faded.

    59.4. I was not convinced by the witnesses' specific grounds for thinking that their memories were still fresh. Mr MacFoy appeared to think that their ability to remember what had happened was proved by the fact that he stood by his previous witness statement. Ms Kaur gave little more than a bare assertion. Ms Konteh used emotive language and appeared to have been influenced by facts that would have been hard for her to discover except from what the claimant had told her. Mr Manning's reference to documents that would assist in recollection, but they bore little relation to the evidence he had to give.

60. When it came to the witnesses' evidence about what had happened to the respondent's witnesses, I would also have found it difficult to place much reliance on what the witnesses had to say. This was because the statements had been provided too late for them to be effectively challenged.

Further information about the respondent's witnesses

61. The claimant's reconsideration application listed six of the respondent's witnesses asserted that none of them had moved or retired, and stated the organisation for which they worked. The reconsideration application did not provide any information about Mr Amu's whereabouts.

62. It will be remembered that the tribunal's letter of 27 March 2020 required the respondent to provide information about its witnesses. The relevant witnesses were those whose statements were exchanged prior to the hearing in March 2017. That information was provided in the respondent's further written submissions dated 27 November 2020.

63. I did not treat either party's submission as evidence. It did not satisfy the *Ladd v. Marshall* criteria. Either party could have provided information about where the witnesses were before I made the decision to strike out the claim.

64. The purpose of requiring the additional information from the respondent was to establish what areas of agreement and disagreement existed as between the parties. I also wanted to establish whether or not the general assertions made by Mr Hatfield at the hearing on 9 July 2019 were supported by the detail of what had happened to each witness.

65. I can summarise the positions of the parties, starting with the common ground:

    65.1. Both parties agree that three of the respondent's witnesses still do some work for the respondent. These are Miss Preston, Ms Jain and Miss Barrett.

    65.2. The parties are also agreed that, from October 2019 at the latest, Ms Moore has not been employed by the respondent. Her employer since that time has been Lancashire Mental Health NHS Foundation Trust.

    65.3. It is agreed that Mr Wafer is no longer employed by the respondent. It is the respondent's position that his new employer is Manchester University Hospitals NHS Foundation Trust. The claimant has named two different NHS Trusts (one of which merged into Manchester University Hospitals NHS Foundation Trust), which are outside the respondent's organisation.

66. The parties are in dispute about what has happened to Miss Brophy. The claimant says that she is still employed by the respondent. That is denied by the respondent, whose position is that Miss Brophy retired in July 2019 and is now in an HR consultant in independent practice.

67. The main dispute relates to Mr Amu. Before I set out the parties' positions, I need to revisit some of the procedural history.

68. This is not the first time that Mr Amu's evidence has had to be considered. At the final hearing in March 2017, the tribunal made an order that Mr Amu attend to give evidence. The written reasons for that decision may help the reader of this judgment to understand the significance of Mr Amu's whereabouts and the importance of his evidence. Relevantly, the reasons stated:

> "…
>
> 24.10 According to the [claimant's Further and Better Particulars], Mr Amu, the respondent's clinical director, was a recipient of most of the claimant's protected disclosures and the alleged perpetrator of many of the detriments.
>
> …
>
> 30. Witness statements were in due course exchanged. Among the respondent's witnesses was Mr Amu. In his witness statement Mr Amu confirmed that the claimant had raised concerns with him about Caesarean sections, although gave a different context to that set out in the [Further and Better Particulars]. He explained many of the incidents of which the claimant now complains.
>
> …
>
> 115. We now turn to Mr Amu. The application is made late, but that is not the claimant's fault. The first time the claimant could have known that Mr Amu would not be giving evidence was on the second day of the

> hearing. Until then he expected to be able to cross-examine Mr Amu and make use of the evidence already in his witness statement.
>
> 116. Mr Amu's witness statement appears to be relevant. He has referred to some conversations he had with the claimant in which issues were raised which appear at least similar to the protected disclosures upon which the claimant relies. It is not inconceivable that the claimant could ask open questions of Mr Amu that might elicit detail that would support his case. The overriding objective would normally point towards the witness order being granted.
>
> 117. The respondent raises a point of jurisdiction. If Mr Amu is outside Great Britain, the tribunal has no power to make an order. We do not think this objection should stand in our way. The respondent has not provided any address for Mr Amu, or even told us what country he lives in. There is nothing as yet to substantiate the respondent's belief that he is outside Great Britain. As the claimant points out, however, the respondent is in a far better position than he is to know where Mr Amu is actually living. In our view, the better course is to grant the order, subject to the right of Mr Amu or the respondent to apply to discharge it with evidence of his being overseas.

69. One of the points made by the respondent at the preliminary hearing on 9 July 2019 was that the delay had done incurable damage to the quality of the evidence. One example given orally by Mr Hatfield was that a witness (who must have been Amu) was working in the UAE.

70. The claimant's reconsideration application asserted, repeatedly, that none of the respondent's witnesses had gone to the UAE. Mr Amu did not appear in the claimant's list of the respondent's witnesses. It is the claimant's position that Mr Amu is not one of the respondent's witnesses, because the respondent indicated at the hearing in 2017 that it was not going to call Mr Amu.

71. The respondent's latest written submissions set out the position in relation to Mr Amu is as follows:

> "Mr Amu was a critical witness for the Respondent in relation to those matters which are alleged by the Claimant. Unfortunately, it has not been possible to obtain a witness statement from him as Mr Amu left the employment of the Respondent many years ago, but after the events about which the Claimant complains. He is now practising and living in the United Arab Emirates so far as the Respondent is aware."

72. During the hearing on 15 December 2015, the claimant informed me that Mr Amu was not in the UAE. I asked the claimant what his basis was for thinking that he was not in that country. The claimant replied that he had spoken to Mr MacFoy (one of the witnesses he proposed to call) and had been told that Mr Amu was not in the UAE. I asked the claimant where Mr Amu was in fact living. The claimant replied that he would need Mr Amu's permission to tell the tribunal where Mr Amu was. Without Mr Amu's permission, the claimant told me, he could not even say which country Mr Amu was in. The claimant told me that Mr Amu was coming to give evidence. His belief was based on a conversation that he had had with Mr Amu between exchange of witness statements and the 2017 final hearing.

73. I found it hard to accept what the claimant told me about Mr Amu. It would only be in an extreme case that a witness would think of their country of residence as a confidential secret, or that anyone could reasonably believe that that was what the witness thought. I also thought it unrealistic of the claimant to believe, based on a conversation sometime before March 2017, that a witness would voluntarily be giving evidence for the claimant at a hearing sometime after January 2021. At the hearing in March 2017, the claimant had clearly formed the belief that Mr Amu would not be attending voluntarily, whatever he might have been told prior to that date. If the claimant thought that Mr Amu would attend voluntarily, he would not have applied for a witness order.

Discussion of claimant's reconsideration grounds

74. Having examined the new material, I now consider the claimant's grounds for reconsideration:

(1) Delay in providing Dr Pughe's report

75. I accepted that it was not the claimant's fault that he had not obtained Dr Pughe's report before October 2019. Hence my decision to admit the report into evidence.

(2) Fitness to attend a final hearing

76. I accept Dr Pughe's opinion that the claimant is currently fit to attend a final hearing. If I were to re-list the final hearing, there is a reasonable prospect that the claimant would attend. If I thought that that hearing could take place fairly, I would revoke the Judgment.

(3) Respondent misleading the tribunal about failure to comply with an Unless order

77. Paragraph 15 of the respondent's written submissions on 9 July 2019 stated, "This is not a case where the claimant failed to comply with an Unless Order on this occasion." If I understand the claimant's point correctly, he is arguing that, in this paragraph, the respondent was implying that the claimant had failed to comply with Unless orders on previous occasions. I did not think that that was what the respondent was trying to imply. The respondent's submissions were accompanied by a timeline of events, which listed three Unless orders, but did not assert that any of them had been breached.

78. As it is, Employment Judge Ryan's case management order, sent to the parties on 13 December 2016, stated that the claimant had "had to seek relief from sanctions on two occasions having had unless orders made against him." This seems to suggest that, at some point in the past, the claimant did fail to comply with those unless orders, but succeeded in having them set aside. I am unsure whether that is actually what happened, or whether the claimant actually complied with the Unless orders by the original deadline.

79. In any case, the Judgment was not influenced by any belief on my part that the claimant had failed to comply with an Unless order. If I thought that that was what had happened, I would have recorded that fact in the Reasons.

(4) Failure to comply with case management orders not deliberate

80. This argument engages with paragraph 49 of the Reasons. I found that the claimant's breaches of orders had been deliberate and in full knowledge of the

potential consequences. The claimant argues that this case lacks the "hallmark of contumacy", the missing hallmark being any failure to comply with Unless orders. His contention is that, by unsuccessfully resisting the respondent's applications for Unless orders, and then complying with them, the claimant was demonstrating that his initial failure to comply had been unintentional. I disagree. The pattern was one of persistent late compliance with explanations that were either non-existent or rejected by the tribunal. I see no reason to alter my conclusion that the claimant intentionally failed to comply with orders, knowing what the consequences would be.

81. I have considered at this stage whether or not there was a medical explanation for the claimant's failure to comply. For the reasons I have given, Dr Pughe's evidence does not persuade me that the whole pattern was caused by the claimant's depression. Even if it were, there was very little the tribunal could have done about it, because the claimant did not inform the tribunal of his depression until December 2018.

82. Even if the claimant's non-compliance had been entirely unintentional, I would still need to look at the effect of the delay on the tribunal's ability to hold a fair hearing.

(5) Respondent to blame for past delays

83. The claimant puts the argument this way: "The delay has largely been due to the Respondent's repeated and persistent Applications for unnecessary and largely avoidable Preliminary Hearings; Case Management Orders; Unless Orders and Application to Strike out rather than exhibiting empathy or sympathy or flexibility or co-operation in accordance with the overriding objectives and Civil Reforms in the Higher Courts."

84. I have examined that assertion against what I know of the history of this claim. I took account of the claimant's submissions. I also took into account the procedural history set out in the Reasons, the tribunal's written reasons sent on 6 June 2017, the order of Employment Judge Slater following the 4 September 2014 hearing. As a check, I looked at the way in which the procedural history had been described by the Employment Appeal Tribunal in an appeal against an earlier order of Employment Judge Ryan (see UKEAT 0126/17). I am satisfied that it was not the respondent's fault that there were so many delays. The claimant repeatedly failed to provide the information that he was ordered to provide. His explanations were rejected. The respondent was justified in applying for Unless orders.

(6) Estoppel

85. There is no estoppel here. The fact that the respondent did not appeal against previous postponement decisions just means that the respondent was bound by those decisions and could not later question the decision to postpone. (This is somewhat theoretical: as a matter of practical reality, once a tribunal has decided that it will not go ahead with a hearing, there is very little that either party can do about it.) But that would not stop the respondent from being able to complain about the delay to which that postponement has contributed.

86. I understood that the claimant might be making a wider point, beyond the narrow principle of estoppel. Tribunals should be hesitant to allow a party to complain that a delay has made a fair hearing impossible if that party has itself contributed

substantially to the delay. That would provide an incentive to parties – especially respondents – to drag proceedings out for as long as they could. But the respondent has not been dragging out this case. By applying for unless orders, and resisting the introduction of further witness evidence, the respondent was attempting to progress the litigation, not slow it down.

(7) Claimant urging EJ Ryan not to postpone

87. I accept that, at a hearing before Employment Judge Ryan, the claimant urged the tribunal not to postpone the forthcoming hearing. The claimant's request at that time has to be seen in its context. Employment Judge Ryan, in his written reasons sent on 13 December 2016, summarised the history of the claimant failing to comply with orders for exchange of witness statements. The postponement of the earlier hearing was because the claimant had not complied with tribunal orders.

(8) Misleading the tribunal about a witness in UAE

88. The respondent did not mislead me about Mr Amu being a witness. I was already aware that the respondent would not call Mr Amu at the final hearing. In the Reasons (paragraph 31.3) I included Mr Amu as one of the witnesses whom the respondent "wishes to call". This was not because I thought that the respondent would call him, but because I thought that the respondent wanted to call him but could not, because he was out of their reach. Mr Amu was always going to be an important witness, for the reasons I have already set out. If the respondent had not wanted to call him, it would not have sent Mr Amu's witness statement to the claimant in advance of the March 2017 hearing.

89. There is no reliable evidence that the respondent has misled me about Mr Amu's whereabouts. On the one hand I have the respondent's assertion that he was believed to be in UAE. On the other, I have the claimant's assertion that Mr Amu is not in UAE, but he will not tell me where Mr Amu actually is. For the reasons I have given, I cannot rely on what the claimant says about Mr Amu's country of residence to support a finding that the respondent has misled me.

(9) Conclusion about fading memories

90. Despite the claimant's arguments I still take the view that the delay must have caused memories to fade.

91. I have already explained why I did not admit the evidence of the claimant's witnesses that their memories are still fresh, and why I would not have given such evidence significant weight in any event.

92. I have looked again at the effect of the delay on the respondent's witnesses. I need to decide whether there is anything in the new material that would cause me to change my view about whether or not their recollection has diminished. My conclusions are as follows:

92.1. The respondent wished to call Mr Amu but is now unable to do so, for the reasons I have explained. The respondent has consistently maintained since 2017 that Mr Amu was working abroad. The claimant has not put forward any reliable evidence to the contrary.

92.2. It is common ground that Ms Moore and Mr Wafer now work for other Trusts.

92.3. There is a dispute about whether or not Mrs Brophy is still employed by the respondent. Having refused to admit evidence on that question, I have not tried to resolve it. Even if I were to conclude this point in the claimant's favour, it would still leave three witnesses who have undoubtedly moved on from their employment with the respondent.

93. I remain of the view (Reasons paragraph 63) that it is generally likely to be harder for a witness to remember events in the workplace if they have retired and moved to a new employer in the meantime.

94. In any case, that was only one factor that I took into account. I also took into account the sheer length of the delay (Reasons paragraph 61) and the nature of the disputes about which oral evidence would have to be given (Reasons paragraph 62).

95. The claimant seeks to compare this case with cases of clinical negligence resulting in injuries to babies, where the court may have to consider a claim issued nearly 21 years after the baby was born. The two cases are not comparable. Children are given until they reach the age of 18 before limitation periods start to run, because they do not have capacity to bring a claim their own until they reach adulthood. There is no suggestion that the claimant did not have capacity to pursue his claim. Moreover, clinical decisions and procedures are usually heavily documented. This claim is about conversations that took place, in which disclosures were allegedly made and the claimant was allegedly detrimentally treated. Notes would not usually be kept of such conversations. A third reason is that discrimination and whistleblowing complaints focus on the conscious or subconscious motivation of decision-makers. It is much easier for a decision-maker to explain what was going through his or her mind if they give evidence about it shortly after the event. Parliament has recognised the desirability of keeping delays in tribunal cases to a minimum. That is why the ordinary time limit for bringing a claim is three months and not three years as in personal injury cases.

96. As part of my reconsideration, I did consider whether it would be possible to re-instate the claim purely in relation to those disclosures and detriments where the level of documentation was sufficient to protect against fading memories. I concluded that it would not be possible to disentangle the allegations in that way. One major obstacle stems from the way in which the claimant seeks to give evidence about his alleged protected disclosures. His witness statement, in one paragraph, referred wholesale to 71 pages of further and better particulars, in which he set out alleged disclosures without seeking to distinguish between face-to-face conversations and those that took place over the telephone.

(10) Personal file

97. The claimant has had since 2013 to make a request for disclosure of his personal file. I do not know what it contains, but it is purely speculative to imagine whether the contents would assist anyone in their recollection.

(11) Access to e-mails

98. I do not know whether e-mails from 2012-2013 are still retrievable. Even if they were, it would be pure speculation to try to imagine what e-mails might be disclosed and still more speculative to try and predict what beneficial effect those

e-mails might have on witnesses' memories. The exercise of searching for relevant e-mails should have been completed years ago. Anything relevant ought to have been disclosed at that time.

Further considerations

Further delays since the Judgment

99. One consequence of the Judgment was that the final hearing did not proceed in January 2020. By the time the claimant applied to have the Judgment reconsidered, that hearing had been cancelled. It would not have been appropriate to re-list the final hearing for January 2020 on receipt of the reconsideration application. This was for two reasons. First, the cancellation of the 2020 final hearing resulted in other claims being listed for hearing to fill the available capacity. Those hearings would have needed to be postponed. Second, there needed to be reconsideration hearing before the final hearing could take place. Even if the reconsideration hearing could have been listed for late 2019 (which in turn would have put pressure on other cases), there was little prospect of the parties being ready for a final hearing in January 2020 in the event of the claim being reinstated. As at the date of the reconsideration application, the parties were not ready for a final hearing. The claimant's reconsideration application included requests for adjustments such as supplemental witness statements, advance lists of cross-examination questions, access to the respondent's e-mail accounts and disclosure of the claimant's personal file.

100. There has been additional delay caused by the COVID-19 pandemic. Needless to say, that delay was not either party's fault.

When could a hearing be re-listed?

101. The ability of the tribunal to re-list a case quickly depends on its time allocation. The longer a hearing is expected to take, the further into the future it has to be listed in order to avoid postponing other cases.

102. My starting point is that the 2017 final hearing was listed for 15 days (although it was later reduced to 12 days to accommodate difficulties with judicial availability). Having spent 6 days reading the witness statements, dealing with the claimant's numerous applications, and clarifying the issues, the tribunal adjourned the hearing part-heard for a further 15 days. The allocation of 15 further days was based on the assumption that the existing tribunal, already being very familiar with the case, would not need as much reading time as a freshly-constituted tribunal would need.

103. It is no longer practicable for a final hearing to be resumed part-heard. It is nearly four years since the tribunal read the documents. One of the non-legal members of the panel has, for all practical purposes, fully retired. A fresh panel and a fresh start would be needed.

104. It would not be appropriate to take short cuts with tribunal reading time. As the claimant himself observed about the 2017 final hearing in his written submissions:

> "Further, the time allowed for the Tribunal to read the Bundles was grossly underestimated."

105. I anticipate that at least two days of reading time would be needed in addition to the 15 part-heard days allocated in 2017.

106. The additional 15 days listed in 2017 were allocated on the assumption that the tribunal would take its usual breaks and would start at 10.00am. That assumption would need to be revisited. The claimant would need an 11.00am start and additional breaks. If the hearing were to be re-listed now, it would need to include additional days to reflect the reduced length of each day. At least three further days would be needed for that adjustment. There would also need to be at least three additional one-day breaks between the different stages of the hearing.

107. I have no reason to think that the claimant could conduct a final hearing any more quickly in future than he did in 2017. There has been little or no improvement in the claimant's ability to keep to a hearing timetable. During the reconsideration hearing on 15 December 2020 the claimant overran the time allocated for his oral arguments. I twice allowed him further time, and he overran both those extended time limits. This is a repeat of what happened during the final hearing in 2017. (The tribunal's description of what happened at that hearing is set out in paragraphs 46 and 47 of the written reasons for the judgment sent to the parties on 28 March 2017.)

108. Another tendency that does not appear to have improved is the claimant submitting documents after the deadline for doing so. The claimant has had since October 2019 to assemble witness statements in support of his reconsideration application. A previous reconsideration hearing was adjourned on 18 November 2020. Yet the claimant did not start faxing the witness statements to the respondent until 4.58pm after the reconsideration hearing had concluded.

109. These tendencies would have to be taken into account when trying to predict how long a future final hearing might take.

110. The making of adjustments would be unlikely to stop the claimant from conducting the proceedings in this manner. The reconsideration hearing incorporated many of the adjustments that the claimant is seeking for the final hearing. In particular, the hearing started at 11.30am and included a 30-minute break before it finished at 2.20pm. Yet the claimant still repeatedly overran his time allocation and submitted documents late.

111. By my calculation, a final hearing would now need to be listed for a minimum of twenty days, spread over five weeks.

112. The earliest available continuous five-week slot is in September 2022. If I were to try to list the case earlier than that, it would create an unacceptable risk of having to postpone long hearings in other cases. The claimant suggests that a final hearing could be listed sooner by listing it in separate blocks of 3-4 days each. I have looked into that possibility. In my view, it would not significantly improve the prospect of an early listing. For example, if I were to list the case to begin in October 2021, it would involve having to float a number of allocated 3-4 day hearings. Those hearings are in claims that were presented in 2018, 2019 and early 2020. Parties who have already waited over a year to have their claims heard would have to be told that their hearings, nine months from now, might not necessarily be able to go ahead.

113. I therefore approach my reconsideration decision on the basis that, if the claim were to be reinstated, the final hearing would not take place until mid-2022 at the earliest. By that time, it will be 9 years since the claimant's employment with the

respondent ended and 11 years since he started making alleged protected disclosures. It is not fair to expect either party's witnesses to cast their minds so far back.

Conclusion

114. I remain of the view that a fair hearing is no longer possible, despite the improved prospects of the claimant being able to attend.

115. In those circumstances it is not in the interests of justice to revoke the Judgment. The claim therefore remains struck out.

Employment Judge Horne

10 February 2021

SENT TO THE PARTIES ON
18 February 2021

FOR THE TRIBUNAL OFFICE