THE EMPLOYMENT TRIBUNALS

Claimant: **Mr S Daly**

Respondent: **Newcastle upon Tyne NHS Foundation Trust**

Heard at: **Newcastle Hearing Centre On: Wednesday 24th February 2021**

Before: **Employment Judge Johnson**

Representation:

Claimant: **In Person**
Respondent: **Mr R Gibson (Solicitor)**

JUDGMENT

1. The claimant's complaint of unlawful disability discrimination, referred to as Allegation X in the judgment of the Employment Appeal tribunal dated 10th June 2019, is not well-founded and is dismissed.

2. The claimant's complaint of unlawful disability discrimination, referred to as Allegation Y in the judgment of the Employment Appeal tribunal dated 10th June 2019, is not well-founded and is dismissed.

3. The claimant is ordered to pay to the respondent the sum of £3,000 towards its costs of the original employment tribunal proceedings judgment, which was promulgated on 30th May 2017.

4. The claimant's application for a reconsideration of the entirety of the judgment of the employment tribunal promulgated on 30th May 2017 is refused. It is not in the interests of justice for there to be a reconsideration.

REASONS

1. This matter came before me by way of a public preliminary hearing which was conducted by CVP with the agreement of both parties. The claimant attended in person and the respondent was represented by Mr R Gibson, Solicitor.

2. On 30th May 2017, the Employment Tribunal promulgated its judgment, with reasons, in respect of the claimant's complaints of unlawful disability discrimination. That judgment followed a 5-day hearing in March 2017, which was followed by deliberations on 12th May 2017. The case was heard before Employment Judge Hunter and members Mrs M Clayton and Miss E Jennings. All the claimant's complaints of unlawful disability discrimination were dismissed.

3. Following a subsequent hearing on 5th September 2017, the same Employment Tribunal panel gave judgment on the respondent's application for costs, ordering the claimant to pay £3,000 towards the respondent's costs in a judgment promulgated on 13th October 2017.

4. The claimant appealed against the judgment dismissing his claims and against the judgment ordering him to pay costs to the respondent. That appeal came before her Honour Judge Eady QC sitting in the Employment Appeal Tribunal on 22nd March 2019. In a judgment promulgated on 10th June 2019, the Employment Appeal Tribunal upheld the claimant's appeal on liability in two respects (herein after referred to allegations "X" and "Y"), on the basis that inadequate reasons had been given by the Employment Tribunal. The Employment Appeal Tribunal also upheld the claimant's appeal on the judgment on costs, again because the Employment Tribunal had failed to provide adequate reasons for its decision.

5. The Employment Appeal Tribunal found that it was appropriate for those 3 matters to be returned to the same Employment Tribunal for reconsideration.

6. In the period of time since the original judgments on both liability and costs, Employment Judge Hunter has retired, as has the employer-side member, Miss E Jennings. Regional Employment Judge Robertson has appointed Employment Judge Johnson in place of Employment Judge Hunter. The claimant and the respondent's representative agreed to Employment Judge Johnson and trade union-side member Mrs Clayton dealing with those issues referred back by the Employment Appeal Tribunal, as a two-person panel.

7. At a private preliminary hearing by telephone on Thursday 29th August 2019, I raised with the parties 3 possible alternatives for them to consider, as to how this matter should proceed:-

   (i) the Employment Judge and members should meet to review the original notes of evidence, submissions, judgment and the judgment of the Employment Appeal Tribunal and then provide the parties with their judgment on those matters which were remitted, without further hearing;

   (ii) that a full hearing be convened, at which the Tribunal would hear submissions from the parties on those points which had been remitted by the Employment Appeal Tribunal;

   (iii) that a full hearing should be convened, at which the parties may call witness evidence and then make submissions on the three matters which have been remitted.

8. The claimant indicated that he would prefer a hearing in person and further indicated that he may wish to call additional evidence about what he described as "further allegations" against the respondent. I explained to the claimant that the Tribunal could not and would not consider any further allegations brought by the claimant against the respondent. This Tribunal will only consider those 3 specific points which had been remitted by the Employment Appeal Tribunal. The Tribunal has already heard the evidence from both the claimant and the respondent on those points and has heard the original submissions from both parties on those points. Any further evidence must be limited to those points.

9. Mr Gibson, solicitor for the respondent, suggested that the tribunal panel should meet to review the original statements, documents and submissions. Thereafter, the parties should be informed as to which parts of the statements, oral evidence and documents appear to the Tribunal to be relevant to the 3 remitted points. If the parties so required, there could then be a further hearing, at which both parties could make any further submissions. I explained this to Mr Daly and was satisfied that he understood what was proposed. Mr Daly confirmed that he was in agreement with that proposal.

10. On 3rd December 2019 I met with Mrs Clayton (Lay Member) and reviewed the evidence with regard to allegations X and Y and the submissions made by both sides in respect of those allegations.

Allegation X

11. The claimant alleges that on 14th May 2015 in Ward 27, Mr Cowie admitted to him that he had been under surveillance, as she had reports from Hayley Cusack and other health care assistants that he was avoiding his duties. The claimant alleges that "These reports were false". The Tribunal has examined the following statements and documents from the original Hearing bundle:-

    The claimant's further particulars - paragraphs s) and t) on page 68

    The respondent's response - paragraphs s) and t) on page 74

    paragraph number 7 on page 293

    paragraph 1 on page 348

    paragraphs 43-46 on page 358-359

    paragraph 199-200 on page 731-732

    paragraphs 203-204 on page 732

    paragraph 210 on page 733

    paragraph 30 of the claimant's witness statement

paragraph 32 of the claimant's witness statement

paragraph 32 of Rose Kerridge's witness statement

paragraph 14 of Sharon Cowey's witness statement

paragraphs 15 and 16 of Sharon Cowey's witness statement

paragraph 15 of Hayley Cusack's witness statement

paragraph 14 of Hilary Sexton's witness statement

paragraph 6 of Fiona Hindhaugh's witness statement

paragraph 20 of Fiona Hindhaugh's witness statement

paragraph 35 of Fiona Hindhaugh's witness statement

paragraph 21 of Laura Grant's witness statement

12. Those documents and statements indicate that a number of the claimant's colleagues were concerned and had expressed their concern, about the claimant's occasional absences from Ward 27. Those absences had been specifically noticed by a number of the claimant's colleagues. Those concerns had been reported by those colleagues to the ward sister. The claimant alleges that those reports were false and had been made either because he is disabled or because his disability made it difficult for him to work as quickly as his colleagues. The claimant further alleged that he had been told by Mrs Cowey that he had been "under surveillance". The claimant alleged that he was under surveillance because he is disabled or because his disability made it difficult for him to work as quickly as his colleagues.

13. The respondent's witness evidence was that all nursing staff are required to inform their colleagues if they leave the ward, particularly male employees who require to use the toilet, as the male toilet was not on Ward 27. The tribunal accepted the evidence of the respondent's witnesses, namely that they had specifically noticed the number and length of the claimant's absences whilst carrying out their duties and not because they were watching the claimant in particular. The tribunal found that the reports of the other nurses on Ward 27 were not false, but were made as a result of genuine concerns about the number and length of the claimant's absences.

14. Sister Cowie in her witness statement denied ever telling the claimant that he was under surveillance and described that allegation as "totally false". The claimant has not referred to any other persons who were present when that comment was allegedly made. At today's hearing, the claimant made reference to entries in his personal diary, copies of which appear at pages 1113 – 1123 in the bundle. Those diary entries were admitted into the trial bundle shortly before the final hearing began. The claimant made no reference whatsoever to those diary entries at the grievance hearing, in his pleaded case or in his witness statement.

The claimant did not specifically refer to the entry about "under surveillance" at the final hearing when giving his evidence or being cross-examined. The claimant also referred me today to minutes of the meeting on 14th May 2015 which were taken by his trade union representative, Mr Steve Allerdyce. There is no mention in those minutes of Ms Cowie making any mention of the claimant being under surveillance. Bearing in mind the serious nature of the allegation, the tribunal found it likely that Mr Allerdyce would have recorded that comment, had it been made. The tribunal found that no such comment was made. Even if it had been made, it was not a fact from which the employment could conclude; the comment was made because the claimant is disabled or because his disability made it more difficult for him to work as quickly as his colleagues. The claimant's absences from Ward 27 were denied by the claimant and could not therefore have been something which arose in consequence of his disability.

Allegation Y

15. The claimant states:-

> "On the 29th September 2015 the claimant made a formal grievance which amounted to a protected disclosure regarding the manner in which he had been treated since the start of his employment. During the investigation process the claimant faced false allegations made against him such as hiding in the toilets, deliberately avoiding duties, being intimidating towards colleagues and harming a patient's skin when shaving him. The respondent refused his requests for any relevant statements and evidence to support these allegations.

The Tribunal has examined the following documents and statements:-

paragraph 42 of the particulars of claim on page 29

paragraphs s) and t) of the claimant's further particulars at page 68

paragraph s) and t) of the respondent's response at page 75

paragraph number 3 at page 293

paragraph 46 of the claimant's grievance at page 358-359

paragraph 21 of Rose Kerridge's witness statement

paragraph 34 of Rose Kerridge's witness statement

paragraph 14 of Sharon Cowie's witness statement

paragraph 15 and 16 of Sharon Cowie's witness statement

paragraph 35 of Fiona Hindhaugh's witness statement

16. The respondent concedes that it did not disclose to the claimant any statements taken from his colleagues on Ward 27. The reason for this as given by the respondent's witnesses, was that it was not necessary as part of the investigation into the claimant's grievance, for those colleagues to be named. The respondent considered it important to protect the confidentiality of those individuals. The claimant has not established how his grievance would have been advanced if those persons had been named and had their statements been disclosed. The claimant was certainly aware of the nature of the allegations made against him, which could only have come from a very small pool of colleagues. The claimant had not proved facts from which the tribunal could conclude in the absence of an explanation from the respondent that the reason why the statements were not disclosed, or the names of the persons not given to the claimant, was either because he is disabled or because his disability made it more difficult for him to work as quickly as his colleagues.

17. For those reasons, the two allegations of unlawful disability discrimination (referred to by the employment tribunal as Allegations X and Y) and not well-founded and are dismissed.

Costs

18. Following the original judgment in the employment tribunal, dismissing all the claimant's complaints of unlawful disability discrimination, the respondent made an application that the claimant pays its costs of those proceedings, or contribute towards those costs. The respondent's application was on the basis that the claimant had brought allegations of disability-related discrimination, harassment, failure to make reasonable adjustments and detriment as a result of making a protected disclosure and that those claims had no reasonable prospect of success. The respondent asserted that it had asked the claimant to look reasonably at his claims, in order to limit the preparation of the respondent's case and the number of witnesses which would be required, but the claimant had refused to do so. The claimant had required all the respondent's witnesses to give evidence and he also asked for documents to be added to the bundle which were not referred to in evidence. In an effort to settle the claim, the respondent had made an offer of settlement to the claimant in the sum of £7,000, but the claimant refused to accept anything less than £12,000. The respondent maintained that this all amounted to unreasonable behaviour in the conduct of the proceedings. The respondent claimed costs of £36,996 plus VAT.

19. The original employment tribunal concluded that the public interest disclosure claim had no reasonable prospect of success and similarly allegations relating to the way in which the redeployment exercise had been organised had no reasonable prospect of success, because there was no evidence to connect any proceedural inadequacy to the claimant's disability. The tribunal further noted that offers to settle the claim had been made and described the claimant's decision to turn down the offer of £7,000 as "imprudent". However, the tribunal found that the claim was potentially worth more than £7,000 and that the claimant could not be regarded as unreasonable in taking the decision to pursue his claims to trial.

20. However, the tribunal concluded that the evidence of Ms Carole and Ms Grant was unnecessary, as was the evidence in respect of the grievance and redeployment process and also that relating to the public interest disclosure claim, all of which had no reasonable prospect of success. The tribunal concluded that the respondent's solicitors had been put to at least 22 hours of additional and unnecessary work which, at a charging rate of £130.00 per hour, amounted to £2,860.00 plus VAT. That was described as "a very conservative estimate" and the tribunal ordered the claimant to contribute £3,000 towards the respondent's costs. The claimant appealed to the employment appeal tribunal against that finding. Her Honour Judge Eady considered the appeal and stated as follows:-

> "Finally, I turn to the costs appeal and on this I am satisfied that the claimant's appeal must be allowed. Apart from the reference to **Barnsley Metropolitan Borough Council v Yerakalva**, there is simply no indication that the employment tribunal considered whether it should exercise its discretion to award costs in this case. I have considered whether the reference to **Yerakalva** might be sufficient for me to infer that the employment tribunal did embark upon an exercise of its judicial discretion in that regard, but it is one thing to state the relevant approach laid down in the case law, it is another to apply it. I can see no evidence that the employment tribunal did so in this case; its reasoning suggests, on the contrary, that it moved straight from the first to the third stages of the exercise it had to undertake, failing to demonstrate any appreciation of the discretionary nature of a cost award."

21. The issue for the Tribunal to consider is therefore, having found that the respondent has established that the claimant had acted unreasonably in the way the proceedings were conducted and that the public interest disclosure claim had no reasonable prospect of success and further that the allegations relating to the redeployment exercise had no reasonable prospect of success, the Tribunal had then to consider whether, and if so why, it should exercise its discretion to award costs to the respondent pursuant to Rule 76.

22. It is important that, when considering whether to exercise its discretion to award costs, the tribunal's thought process should not be tainted by irrelevant factors (**Smolarek v Tewin Buryfarm Hotel Limited [UKEAT/0031/17/DM]).** As was said by the employment tribunal in **Ayoola v Saint Christopher's Fellowship [UKEAT/0508/13]**, simply because the Tribunal's cost jurisdiction is engaged, costs will not automatically follow the event. The Tribunal must still be satisfied that it is appropriate to make such an order. Any costs order should not breach the indemnity principal and must compensate the respondent and not penalise the claimant. It was said by the Employment Appeal Tribunal in **AQ Limited v Holden [2012 IRLR648**], that the Tribunal should not judge a litigant in person by the same standards as a professional representative. Lay people may lack the objectivity of law and practice brought to bear by a professional advisor, and this is a relevant factor which should be considered by the Tribunal, even if the threshold of unreasonable conduct or pursuing a claim which has no reasonable prospect of success has been crossed, when deciding in the light of all the circumstances, whether to make a costs order and if so in what amount.

23. In **Yerakalva v Barnsley MBC,** it was reiterated that what is required, is for the Tribunal to look at the whole picture of what happened in the case and to identify the conduct, what was unreasonable about the conduct and its gravity, and what effects the unreasonable conduct had on the proceedings. In the present case, the unreasonable conduct in pursuance of claims which had no reasonable prospect of success, meant time was wasted in preparing and copying bundles of documents, preparing witness statements and requiring the attendance of witnesses, in circumstances where all of those could and should have been avoided. The claimant had been given an opportunity to avoid those costs, but refused to do so. Correspondence from the respondent shows how the respondent was thinking in respect of these matters and it was made clear to the claimant that there may be consequences if he insisted upon pursuing those matters.

24. In the present case, the employment tribunal addressed those principles. In particular, having satisfied itself that the first stage of the three-stage process had been established (namely that the claimant had acted unreasonably in pursuing a claim that had no reasonable prospect of success), the tribunal was satisfied that it was appropriate for the reasons given that it should exercise its discretion and make an order that the claimant should contribute towards the respondent's costs. Whilst it does not follow that an order must be made once the first hurdle is overcome, this was one of those cases where it was appropriate for an order for costs to be made.

Reconsideration

25. By letter dated 29th July 2019 the claimant made a formal application for a reconsideration of the entirety of the employment tribunal judgment promulgated on 30th May 2019 and also the costs judgment promulgated on 13th October 2017. The claimant states in that letter that his application is made "under Rule 34 of the Tribunal Rules of Procedure". That is clearly an error. The rules which now govern an application for a reconsideration are contained in Rule 70 – 73 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Nevertheless the grounds of the claimant's application are stated to be as follows:-

    (i) new evidence has become available since the hearing which is not available to the claimant and could not have been foreseen at the time of the hearing; and

    (ii) the interests of justice require a review.

26. The new evidence referred to by the claimant is said to be the "minutes of a grievance appeal hearing on 14th June 2019 and subsequent outcome appeal letter dated 26th June 2019". The claimant maintains that these amount to "new information which has become available which goes to the heart of the claim and in particular casts doubt on the whole respondent case and conduct." The claimant suggests that "in light of this new information there are grounds for concern that the tribunal may have been misled or vital information withheld preventing a fair adjudication".

27. It became clear during today's hearing that the "new information" to which the claimant refers, is the existence on his personnel or HR file with the respondent of a copy of an earlier judgment in employment tribunal proceedings brought by the claimant against a previous employer, NTW. The claimant alleges that having a copy of this judgment on his HR file amounts to a breach of his right to a private and family life and a breach of confidentiality.

28. The claimant further maintains that the contents of that judgment, and in particular because he had been successful in those proceedings against his previous employer, had adversely affected the behaviour of his work colleagues on Ward 27 of the respondent's hospital.

29. The ground relied upon by the claimant was one of the 4 grounds for reconsideration which existed under the 2004 employment tribunal rules. Nevertheless, it is recognised that those old grounds may still have relevance under the new rules. As Mr Daly pointed out today, the tribunal is primarily governed by the Overriding Objective, to dealt with cases justly which includes:-

    (i) ensuring that the parties are on an equal footing;
    (ii) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
    (iii) avoiding unnecessary formality and seeking flexibility in the proceedings;
    (iv) avoiding delay so far as compatible with proper consideration of the issues;
    (v) saving expense.

    It is accepted that the tribunal should also be guided by common law principles of natural justice and fairness in respect of such applications.

30. Rule 71 states as follows:-

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

31. It is clear beyond conjecture that the claimant's application for reconsideration is considerably out of time. The original judgment was promulgated 30th May 2017. The judgment on costs was promulgated on 13th October 2017. The application for reconsideration was made on 29th July 2019. The claimant today submitted that the new evidence to which he refers came into his possession on 20th July 2019, following a grievance hearing on 14th June 2019.

32. It is clear from the evidence given by the claimant at the original hearing, that he had made the respondent aware of his previous successful employment tribunal claim against NTW. Reference is made to that in the notes made by Mr Allerdyce at the meeting on 14th May 2015. The respondent's witnesses also make reference in their statements to the claimant having discussed openly those

earlier proceedings against NTW. I am satisfied that the claimant had informed the respondent prior to his engagement that he had brought employment tribunal proceedings against his previous employer, which proceedings had been successful.

33. I am not satisfied that this information was not available to the claimant at the first employment tribunal hearing. It is clearly referred to in the witness statements. What the claimant now seems to be saying is that the respondent held on his HR file, a copy of that judgment. The respondent does not deny that. Francis Blackburn has confirmed by letter dated 6th June 2019 that he was informed of the tribunal's judgment proceedings brought by Mr Daly against NTW, but he had no recollection of reading the full judgment in any detail, nor did he retain a copy. He was aware of the existence of the judgment when he heard Mr Daly's grievance appeal on 15th and 16th February 2016.

34. Mr Daly has not today provided any evidence whatsoever to show that the behaviour towards him by his colleagues was in any way whatsoever influenced by those earlier proceedings against NTW. Mr Daly has not produced any evidence to show that the existence of that earlier judgment in any way whatsoever influenced the grievance procedure in respect of his complaints about the way he was treated. Mr Daly has not shown how the presence of that document on his personnel/HR file has any relevance to the claims he brought before the original employment tribunal.

35. Furthermore, Mr Daly has not explained why his application for reconsideration is brought two years and two months after promulgation of the original judgment. Furthermore, he has not explained why he waited until 29th July 2019 to complain about matters which were raised at the grievance on 14th June 2019.

36. I am not satisfied that the application for reconsideration relates to information which was not already in the possession of the claimant at the time of the original proceedings. The respondent was, from the time the claimant was employed, aware of the previous judgment against NTW. The claimant knew that the respondent was aware of that, because he was the one who disclosed it to them on a number of occasions. Furthermore, I do not see how the respondent's knowledge of that earlier judgment had any relevance to the earlier employment tribunal proceedings against this respondent.

37. For those reasons I am not satisfied that it is in the interests of justice for there to be a reconsideration of the original employment tribunal judgment and the claimant's application for a reconsideration is refused.

Authorised by EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 11 March 2021

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.