EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4104542/2018, 4104543/2018, 4123364/2018, 4123520/2018, 4122619/2018, 4122635/2018, 4123034/2018, 4104544/2018, 4123074/2018, 4122580/2018, 412620/2018, 4123363/2018, 4104541/2018, 4122634/2018, 4123337/2018 and 4122779/2018

Held in Glasgow on 14 November 2019

Employment Judge: L Doherty

Mr Abdolreza Ahari	**Claimant** **In Person**
The University of Glasgow	**First Respondent** **Represented by:** **Mr A Hardman - Counsel** **and Ms H Craik - Solicitor**
NHS Education for Scotland	**Second Respondent** **- see above**
Ayrshire and Arran NHS Trust	**Third Respondent** **- see above**
The British Medical Association	**Fourth Respondent** **- see above**
Golden Jubilee Hospital	**Fifth Respondent** **- see above**
Professor Michael Farthing	**Sixth Respondent** **- see above**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant has failed to comply with the Unless Order issued under Rule 38 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules) on 21 October 2019 and the Tribunal gives written notice in accordance with Rule 38 of the Rules that the claims are dismissed with effect 4th November 2019.

E.T. Z4 (WR)

REASONS

1. This was a Preliminary Hearing (PH) to consider a number of issues identified in a Case Management Note issued by Employment Judge Whitcombe on 21 October 2019. For the avoidance of doubt, Employment Judge Whitcombe's Case Management Note applied to all the cases currently brought by the claimant in Scotland, and this PH was fixed to consider all the cases currently brought by the claimant in Scotland (4104542/2018, 410453/2018, 4123364/2018, 4123520/2018, 4122619/2018, 4122635/2018, 4123034/2018, 4104544/2018, 4123074/2018, 4122580/2018, 412620/2018, 4123363/2018, 410451/2018, 4122634/2018, 4123337/2018, 4122779/2018)

2. The matters to be considered at this PH are specified in paragraph 13 of the Note issued by Employment Judge Whitcombe as follows:-

    a. To take evidence on oath or affirmation from the claimant as to the recordings he made or tribunal proceedings. Findings of fact will then be recorded in the reasons for any resultant judgement or order.

    b. To give the respondents an opportunity to cross examine the claimant on those matters if they wish to do so.

    c. To consider whether the claimant should be permitted to rely on any such recordings as evidence in any of these proceedings.

    d. Whether any of the claims should be struck out under rule 37 of the ET Rules of Procedure on the basis that the making of the recordings amounts to scandalous, unreasonable or vexatious conduct of the proceedings.

    e. In order to resolve those issues, it may be necessary for the Tribunal to consider whether the claimant has made recordings in breach of section 9 of the Contempt of Court Act 1981 (the definition of 'court' in section 19 includes 'tribunals exercising judicial power of the State').

3 The claimant appeared in person, and the respondents were represented by Mr Hardman, counsel.

Preliminary Matters

4 There were three preliminary matters which the Tribunal had to deal with. The first was the claimant's application that this hearing should be conducted before a full Tribunal. The application was made by the claimant on the basis that a full Tribunal was required in order to consider issues of fact.

5 It was clearly in the mind of the Employment Judge fixing this PH that evidence would be heard. The claimant has already made an application for a full Tribunal, which has been refused, and there is nothing said by the claimant in support of his renewed application which would cause this Tribunal to consider that it is necessary for the Hearing to be conducted by a full Tribunal. It is in any event not necessary that a full Tribunal sits in cases where evidence is taken and there is a dispute on facts.

6 The claimant made an application to be permitted to record all Tribunal hearings. It was explained to him that the Tribunal could only make a determination of his application in relation to this hearing.

7 The application was made on two grounds. The first is that the claimant submitted that in the past there have been issues regarding a number of witnesses who gave evidence on oath, and he found that the Employment Tribunal had difficulty in documenting the facts.

8 The claimant also submitted that he had a difficulty in hearing. He referred the Tribunal to medical records dated from 1997,2005, and 2006 sent under cover of an email of 8 November 2019, and which included an audiogram. The claimant submitted that the judgments from the Social Security Tribunal referred to by the respondents were concerned only with his ability to work, rather than a disability. The Tribunal should a have appointed a medical advisor to look at these.

9 The respondents resisted the application on the basis that it was unnecessary for the proceedings to be recorded. Mr Hardman referred to two decisions

from a Social Security Tribunal, provided by the claimant, and included in the bundle at pages 35 and 39. The first judgment dated August 2018 included a statement to the effect that while the claimant has some issues with his hearing this did not impede his ability to function. The second judgment also dated August 2018 included a statement to the effect that the claimant had reduced hearing in his left ear but normal function in his right ear, and he could communicate clearly and understand communication both verbally and non-verbally.

10 The Tribunal was not persuaded that it was consistent with the overriding objective in the Rules to grant the claimant's application that these proceedings be recorded. The claimant's perception that Employment Tribunals have a difficulty in documenting facts is not a basis upon which to grant an application to record proceedings. The medical evidence which the claimant provided undercover of his email in November dates back to 1997, 2005 and 2006. These medical records refer to a number of investigations being carried out, including a referral for an MRI scan in 2006, however there was no updated medical report before the Tribunal and there is no medical report before the Tribunal which supports the conclusion that the claimant will have difficulty in hearing what was said in the course of these proceedings. In contrast to that, judgments issued by the Social Security Tribunal in 2018 both suggested that the claimant was able to communicate and understand verbal and non-verbal communication. The Tribunal accordingly refused the claimant's application to record these proceedings.

11 The Tribunal notes that claimant said that the adjustment he sought was that he sits on the left-hand side of the respondent's agents and that people speak loudly. These seating arrangements were put in place.

12 On the few occasions during the course of the hearing the claimant asked for things said to be repeated, however other than on those occasions, he was able to fully engage in the proceedings, to make submissions and to answer questions put to him.

13 The third preliminary matter related to the intimation of the bundle which the respondents wished to use for the purposes of this PH to the claimant on the morning of the PH. The claimant submitted that the bundle was lodged late, and the respondents had failed to comply with Presidential Guidance for the production of documents, by producing the documents on the morning of the Hearing. He submitted this was relevant, even if he had seen the documents before.

14 Mr Hardman accepted the documents were produced on the morning of the PH, however he submitted that the documents were to be used for the purposes of cross-examination only. Furthermore, all the documents, bar one, were all documents which the claimant had previously seen.

15 Albeit the documents were lodged late, the Tribunal was satisfied that it was consistent with the overriding objective in the Rules to allow the documents to be produced, given the limited purpose of cross-examination for which the documents are to be used, and taking into account the fact that the claimant has previously received or had sight of all but one of all the documents in the bundle. The bundle comprises of correspondence which the claimant has sent, been copied into or received, together with copies of Tribunal Orders, Notes and a Judgment in proceedings to which the claimant was a party. The Tribunal notes that the one document which the claimant had not seen before was not referred to in the course of the hearing.

Background

16 The claimant has presented 18 claims against various NHS bodies, the University of Glasgow, and the British Medical Association, and a number of individuals associated with those bodies. The majority of the claims are brought under the Equality Act 2010 for direct race discrimination (section 13) and or victimisation (section 27). The claimant in some claims also alleges detrimental treatment on the grounds that he made protected disclosures (section 47B of the Employment Rights Act 1996).

17 While it is unnecessary to go into the procedural history of these claims in detail, as a result of an earlier judgment issued by EJ Whitcombe following a

two-day hearing in February 2019 a great many of the allegations brought by the claimant were found to be either *res judicata*, having been the subject of prior ET judgements, or to fall outside the jurisdiction of the Employment Tribunal having regard to the applicable stationery time limits, or both.

18 Following a Hearing on 14 August, in a judgment issued on 21 August 2019, EJ Whitcombe, held that the claimants claims against Dr P Wilson, and all claims brought vicariously against NHS Education for Scotland on the basis of vicariously liability for the acts or omissions of Dr Wilson, were struck out under rule 37 (1) (a) of the Employment Tribunals Rules of Procedure (the Rules) on the basis that they had no reasonable prospects of success

19 The claimant's remaining 17 claims have been listed for a series of Final Hearings, commencing on 25 November over a period until 6 December.

20 An issue has arisen regarding the possibility of the claimant making unauthorised and covert recordings of ET proceedings, both historically, and in the proceedings presided by Judge Whitcombe in August 2018.

21 The claimant wrote to the Tribunal on 26 September 2019, stating that he wished to seek permission from the Tribunal to send 'my evidence' including his tape recordings of hearings at the Employment Tribunals to the Tribunal and to the BMA. The claimant stated that his reasons for recording the hearings included that he had a hearing impairment, the Tribunal was acting in an improper manner, and the respondents and their representatives were acting in an improper manner and he felt that things were progressing 'wrongly'.

22 On 26 September Employment Judge Whitcombe directed the claimant to confirm by return, and by no later than 1 October 2019 whether he had recorded any ET Hearings, and if so, whether the judge or panel at each relevant Hearing, gave permission for the recording to be made. Employment Judge Whitcombe warned the claimant in that communication that no recordings should have been made without the express permission of the Employment Judge or Tribunal panel concerned, and that unauthorised or

covert recordings of Court or Tribunal proceedings raise important issues which would require further thought and submissions.

23 No satisfactory response was received to that communication, and Unless Order was issued under Rule 38 of the Rules by employment Judge Whitcombe on 21 October in the following terms:-

> '*Unless Dr Ahari provides written answers to each of the following questions, and to each responded,* ***by no later than 4 November 2019, the claims will be dismissed without further order in accordance with rule 38 (1) of the ET Rules of Procedure 2013.***
>
> a. *Has Dr Ahari made any recordings of any sort of Employment Tribunal proceedings? If so, please provide the case numbers the presiding judge, the dates for recordings made, the place or places where those recordings and any copies are currently stored and the format of the recording.*
>
> b. *Was permission granted for any recordings made? If so, please state when and by whom.*
>
> c. *If recordings were made, does Dr Ahari admit any breaches of section 9 of the Contempt of Court act 1981?*

24 The claimant responded to that Unless Order on 4 November 2019. He identified three cases in which recordings had been made. Those were;

> Dr A Ahari v University of Glasgow/ the HCI. Case number 102470/2001 -presiding judge Employment Judge Patrick.
>
> Dr A Ahari v The British Medical Association. Case number S/10664/2003 and others-presiding judge Employment Judge Garvie.
>
> Dr A Ahari v Dr Paul Wilson and NHS Education for Scotland; 4104541/2018 and others- Employment Judge Whitcombe.

The Hearing

25 The claimant give evidence, and a Bundle of Documents was produced by the respondent. From the information before at the Tribunal with the following findings in fact.

Findings in Fact

26 The claimant is a litigant in person in a number of claims against various NHS bodies, the University of Glasgow, and the British Medical Association, and a number of individuals associated with those bodies. The majority of the claims are brought under the Equality Act 2010 for direct race discrimination (section 13) and or victimisation (section 27). The claimant in some claims also alleges detrimental treatment on the grounds that he made protected disclosures (section 47B of the Employment Rights Act 1996).

27 The claimant has appeared in a number of Employment Tribunal proceedings in Scotland and in England.

28 On three occasions in Employment Tribunal proceedings in Scotland the claimant has a recorded the proceedings and has done so without the consent of the presiding Judge. The proceedings which the claimant had recorded without consent in Scotland are:-

Dr A Ahari v University of Glasgow/ the HCI . Case number 102470/2001- presiding judge Employment Judge Patrick. The hearing took place in March 2002

Dr A Ahari v The British Medical Association. Case number S/10664/2003and others-presiding judge Employment Judge Garvie. The hearing took place in August 2007.

Dr A Ahari v Dr Paul Wilson and NHS Education for Scotland; 4104541/2018 and others- Employment Judge Whitcombe. The hearing took place in August 2019.

29 The claimant asked Employment Judge Garvie if a recording of the proceedings could be made by the Employment Tribunal Service however no recording was made. The claimant did not ask Employment Judge Garvie if

he could record the proceedings. He did not ask Employment Judge Patrick or Employment Judge Whitcombe if he could record the proceedings.

30 The claimant made these recordings without permission because he thought that things were 'proceeding wrongly'.

31 The President of the Employment Tribunals in Scotland wrote to the claimant on 7 June 2019 informing him that; *'parties to proceedings in the Employment Tribunal (just as in civil courts) are not permitted to record proceedings without consent.'* The President informed the claimant in June 2019 that if the this was done without permission, then '*serious issues arise'.*

32 The claimant wrote to the respondent's solicitor, Ms Craik, on 30 September 2019 (page 67) stating '*Dr Wilson fabricated allegations against me to the G M C when he was an adviser for Prof Corcoran. You, Dr Wilson and Prof MacLennan conspired in relation to judicial proceedings of the HMCTS which was about my civil rights. One may infer that your conduct amounted to criminal conduct. '*

33 Ms Craik responded refuting the allegations as being without foundation and defamatory in nature. The claimant responded to Ms Craik thereafter on the 7 October 2019 (page 66) referring to her to his recording of the Tribunal proceedings, which he then sent her, stating '*Have you not read my evidence and heard your own voice, Dr Wilson and Prof Millen's voice on oath?'*

34 The claimant used his recording of Employment Tribunal proceedings when writing to Prof Muscatelli of the University of Glasgow on 3 October 2019 (page 59) to make a complaint and requesting an investigation into Professor Kenny. The claimant attached copies of his recording of transcripts of Tribunal proceedings with that letter. He stated he could prove a number of conspiracies and criminal conduct by evidence.

35 The claimant requested a reconsideration of a decision issued by Employment Judge Whitcombe's on 9 September 2019 (page 14 to 22). Part of his reconsideration application was made on the basis that the respondents and their solicitors, Dr Wilson, and Professor McClellan were engaged in a

conspiracy. Part of the reconsideration application included the claimant's transcript of proceedings which had been recorded in August 2019 without the consent of the Employment Judge. The claimant stated in that application that Dr Wilson had knowingly and deliberately lied on oath, and that he presented this as part of his 'falsehood'.

36 The application for reconsideration was refused by Employment Judge Whitcombe (page 45), on the basis, among other things, that the Employment Judge had made an assessment of the credibility of the witnesses, and had dealt with that in his reasons; and that he had found no evidence of the criminal offence of perjury, collusion, or lying on oath, as alleged in the claimant's application for reconsideration. The Employment Judge also did not see any evidence of impropriety on the part of the NHS legal Central Legal office, including, Ms Craik during the Hearing, and did not see anything in the application for reconsideration which may substantiate that allegation.

37 The claimant made a judicial complaint against EJ Whitcombe which was rejected by the President of the Employment Tribunals in a letter dated 10th October 2019 (page 72/74). In making this complaint the claimant produced something which purported to be a recording of the transcript of part of the ET hearing which took place before EJ Whitcombe on the 14th of August 2019. Part of the claimant's complaint asserted that EJ Whitcombe was '*dishonest in the conduct of the judicial proceedings.*' This complaint was dismissed by the President on the basis that she found it to be not only without substance but vexatious.

38 The claimant has recorded two sets of Employment Tribunal proceedings in England in which he has been engaged without seeking the permission of the Employment Judge. The fact that the claimant recorded these proceedings in England was not disclosed by him in the answers he produced in response to the Unless Order

Note on Evidence

39 The claimant stated that the reason he made recordings of the Tribunal proceedings were because he had a hearing difficultly, and because he felt that the Tribunal proceedings were 'proceeding wrongly'.

40 The Tribunal on balance concluded that it was this second reason, rather than a hearing difficulty, which was the claimant's reason for covertly recording the Employment Tribunal proceedings.

41 In reaching this conclusion the Tribunal take into account that the medical records from 1997, 2005 and 2006, recount investigations carried out about the claimants hearing, but not provide clear medical evidence to support the conclusion that the claimant would have had difficulty in hearing what was said in the course of Employment Tribunal hearings in 2002, 207 and 2019. Furthermore, it did not appear to the Tribunal to be plausible that in the event the claimant had difficulty in hearing what was said in the course of the hearings, he would not have asked for permission to record the hearings. There would be no reason for him not to make this request.

42 The claimant said he did not make this request because he anticipated it would be refused; this however in the Tribunal's view was not a convincing reason. Had the claimant genuinely had difficulty in hearing as was said in the course of the hearings, then it would have been open to him to produce medical evidence to support that, and to ask the Employment Judge that he be permitted to record the Hearing. The fact that he did not do so, coupled with the use to which the claimant has put his transcripts of the proceedings, (to make allegations of wrongdoing against others involved in the litigations), supported the Tribunal's conclusion that the claimant covertly recorded the Employment Tribunal proceedings because of his perception that the Hearings were, as he put it, 'proceeding wrongly'.

Failure to Comply with Unless Order

Respondents Submissions

43 The purpose for which this PH was fixed was identified in a Case Management Note of 21 October issued to the parties. In the course of giving

evidence however it became apparent that the claimant has recorded two sets of Tribunal proceedings in England, and that he did not disclose the fact that he had done so in response to the Unless Order issued on 21 October 2019 with the compliance date of 4th November 2019.

44 Mr Hardman submitted that notwithstanding the limited parameters of this PH, the Tribunal is required in terms of Rule 38 to dismiss the claim in the event of non-compliance with Unless Order.

45 Mr Hardman submitted that there could be no doubt that the claimant had not complied with the Unless Order and therefore the effect of this is that the claim is dismissed. He referred to the case of *Scottish Ambulance Service v* John *Laing UKEATS/0038/12/B1,* and the judgment of Lady Smith in that case which supported the proposition that an Unless Order is a conditional judgment, and the Tribunal has no discretion other than to confirm dismissal of the claim in the event of non-compliance by the claimant. Mr Hardman referred the Tribunal to paragraph 35/36 of the judgment, which cautions against conflating what would be considerations in a Rule 18 (7) strike out, with the exercise which is required where an Unless Order has been granted. By the time such an order has been granted the Tribunal has already addressed the question of whether strikeout should fall on the party against whom the Order is made and decided that unless a particular direction is complied with, it should. Mr Hardman also referred to the case of *Wentworth -Wood and Others v Maritime transport Ltd UKEAT/0316/15/JOJ* in support of his position.

46 Mr Hardman submitted that relief from the consequences of failure to comply with the Unless Order should not be granted for the same reasons which he advanced in support of his application for strikeout of the claim under rule 37 (1).

Claimants Submissions

47 The claimant submitted that he had complied with the Unless Order. The Scottish Tribunal did not have jurisdiction over the English Tribunal. The issue arose when he identified three Scottish Tribunal cases where he wished to

introduce recordings. He was being asked about proceedings in Scotland and he had responded honestly about the Scottish Tribunal proceedings which he had recorded.

Consideration

48 Rule 38 of the Rules states;

> *(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.*
>
> *(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations*.

The Tribunal was satisfied that it requires to consider the issue of non-compliance with the Unless Order, notwithstanding that this was not identified as one of the issues for this PH. The reason for that is that the Unless Order is in effect a conditional judgment. The relevant law is set out in paragraphs 15 to 26 of Lady Smith's judgment, in *Scottish Ambulance Service*. At paragraph 15 Lady Smith states:

> *(3)* '*In the case of the 'Unless Order', the tribunal has no discretion – notice has been given in the order itself and if the order is not complied with then the claim or response struck out as at the date of non-compliance without any further procedure being required or indeed provided for under the Employment Tribunal Rules. The recipient of an 'Unless Order' should be under no illusion – his claim or response will be struck out without further ado if he does not do as the tribunal directs him. Further, partial compliance will not do:*

see e.g. ***Royal Bank of Scotland v Abraham*** *UKEAT/0305/09/DM. If there is a failure to comply whether wholly or partially, tribunal cannot revisit a decision that failure to comply result in automatic strikeout.*

16. In the case of ***Uyanwa-Odu v Schools Offices Services Ltd*** *UKEAT/0294/05HHJ Peter Clark said:*

'25. In our view, a Rule 13(2) unless order amounts to a conditional judgment. He becomes a final termination of the proceedings if the party fails to comply with the underlying order'.

48 On the basis of the facts found the claimant had recorded two sets of Employment Tribunal proceedings in England, and did not disclose this in his response to the first question in the Unless Order, which asked him had he made any recordings of any sort of any Employment Tribunal proceedings?

49 This question does not distinguish between Employment Tribunal proceedings in Scotland or England, but clearly encompasses *any* Employment Tribunal proceedings. The claimant in failing to disclose that he has recorded two sets of proceedings in England, therefore failed to comply with the Unless Order. The Unless Order applied to all of the claims identified in paragraph 1 above, and the consequence of this failure to comply, is that all of these claims are dismissed.

50 Mr Hardman asked the Tribunal to reject an application for relief from the consequences of the Unless Order on the same basis that it should strikeout the claims under Rule 37 (1) of the Rules. He made submissions as to why the claimant should be struck out under rule 37 (1).

51 The Tribunal however was not satisfied that this was an appropriate course for it to adopt at this stage, given that no application for relief has been made under Rule 38(2), and further, that in terms of Rule 38(2) the claimant may apply to the Tribunal within 14 days of the date on which notice is sent to him requesting that the Order is set aside. That time-limit runs from the date upon

which notice is sent to the claimant, and the claimant was not given notice in the course of the Hearing that his claim was dismissed.

52 The Tribunal however has already taken evidence and heard parties' submissions on the issue of strikeout under rule 37(1)(a) of the Rules identified in the Case Management Note of 21 October 2019, and in the event the Tribunal requires to revisit the question of strike out in the basis identified in that Note, then a further Hearing will not be necessary.

Employment Judge: Laura Doherty
Date of Judgment: 20 November 2019
Entered in register: 20 November 2019
and copied to parties