# EMPLOYMENT TRIBUNALS

**Claimant:** **Louis Tshimuanga**

**Respondent:** **East London NHS Foundation Trust**

**Heard at:** **East London Hearing Centre (by telephone)**

**On:** **23 November 2021**

**Before:** **Employment Judge Housego**

**Representation**

Claimant: Dr Ronald Ibakakombo

Respondent: Adam Ross, of Counsel

# JUDGMENT

**The claims are dismissed.**

# REASONS

1. This hearing was convened as a telephone case management hearing, in private. As matters progressed it became clear to me that the overriding objective required that under Rule 56 the hearing be converted to a public hearing. Dr Ibakakombo agreed to this. I noted that Rule 46 permits all hearings to be conducted by electronic means, including by telephone.

2. The Claimant was a Band 5 mental health nurse. He assaulted a patient. He was convicted of that assault, in the Magistrates Court. He appealed to the Crown Court unsuccessfully. On 18 February 2021 the Nursing and Midwifery Council struck him off at a meeting, he not asking for a hearing.

3. The Claimant asserts that he was not guilty of that assault and that the witnesses all colluded in the making of their statements, in order to get him dismissed. He says they did this because he is Congolese. He says that the

person who dismissed him (who is of Nigerian heritage) did so for the same reason. He says that the person who heard his appeal (a woman who I presume to be white) did the same. He says that he was suspended for too long, and that his grievance took too long. He says that his grievance appeal was dismissed for the same reason, that is that he is Congolese, and it was unfair to do so because the witnesses against him all colluded in the making of their statements.

4. EJ Ross struck out all the claims in the first claim brought save the ones set out below, which he thought had little reasonable prospect of success. He invited the Claimant to withdraw those claims too (paragraph 63 of EJ Ross's order, page 77 of bundle of documents). The remaining claims are set out in the EAT decision (page 98 of the bundle of documents):

    4.1. The Claimant being continuously suspended with no supporting reasons from 27 March 2018 to 28 January 2019 when Edwin Ndlovu invited the claimant to attend a disciplinary hearing (issue 3c); and

    4.2. The disciplinary hearing being delayed in breach of the Respondent's disciplinary policy with no supporting reasons (issue 3h and issue 7c).

5. The Claimant then recycled his complaints in the later claims (two of them are identical). He refers to the appeal against dismissal as being unfair because of a failure to investigate his claim that all the witnesses colluded against him.

6. I observe that there is no prospect of him being able to advance that claim, let alone succeed in it. As Tayler J observed in his EAT judgment in this case in the appeal brought against the judgment of EJ Ross (01 May 2021, page 94 of the bundle of documents), at paragraph 5 *"There is no reasonable prospect of the claimant establishing that the witnesses conspired against him"*.

7. Dr Ibakakombo said that he did not know the outcome of the fitness to practise decision of the Nursing and Midwifery Council. Mr Ross did, and informed me that the Claimant was struck off on 18 February 2021. I asked Dr Ibakakombo if he had any objection to me looking at it (these decisions are all published and accessible on the internet). He had no objection, and I found it without difficulty. It sets out some helpful background to their decision.

    *"At the material time Mr Tshimuanga was employed as a Band 5 registered nurse on Leadenhall Ward (the Ward) in the Tower Hamlets Centre for Mental Health. The Centre is part of Mile End Hospital and comes under the control of East London NHS Foundation Trust (the Trust). The Ward is a 19 bedded inpatient ward for older adults with functional mental illness.*

    *On 26 April 2019 the NMC received a referral from a colleague of Mr Tshimuanga to explain that on 27 March 2018 she had responded to an incident whilst working as Duty Senior Nurse on the Ward, where Mr*

*Tshimuanga was hitting a patient across the face. The referrer explained that Mr Tshimuanga had been found guilty of a criminal offence, which he had subsequently unsuccessfully appealed.*

*The Police disclosed their Case File Summary which describes the incident in more detail. A verbal argument between Mr Tshimuanga and the patient was witnessed by other staff. The patient picked up a chair, at which point another member of staff activated the emergency alarm, and the patient put the chair down. The patient and Mr Tshimuanga are described as reaching for each other and another staff member got between them but the patient fell to the floor. Mr Tshimuanga then slapped the patient around the head several times while the patient continued to lash out at him.*

*The Trust investigated the incident and produced three reports, dated 16 July 2018, 15 January 2019 and 3 April 2019. The Trust completed the first addendum report on 15 January 2019 in light of a criminal conviction. The second addendum report was produced as a result of Mr Tshimuanga's appeal against conviction and sentence.*

*There is information in the Trust's documents to suggest that the patient had targeted Mr Tshimuanga with aggressive behaviour and racist comments prior to the assault.*

*A memorandum of conviction from East London Magistrates Court confirms Mr Tshimuanga pleaded not guilty but was found guilty on 28 September 2018 of assault by beating contrary to section 39 of the Criminal Justice Act 1988. Mr Tshimuanga was sentenced to a community order comprising 120 hours' unpaid work within 12 months; pay £100.00 compensation; £85 victim surcharge; £620 costs.*

*Mr Tshimuanga appealed against his conviction and sentence. On 14 February 2019 Snaresbrook Crown Court partially allowed the appeal against sentence and varied the sentence. The Court cancelled the compensation element of the sentence but required Mr Tshimuanga to pay costs of the appeal in the sum of £415.00. The transcript of the appeal confirms that the compensation element was removed due to the mild injuries caused and also questioned if it was the appropriate forum to award compensation. Otherwise, the appeal was dismissed."*

8. There is no prospect of the Claimant mounting any attack on the fairness of the dismissal or of the outcome of the appeal when he was convicted of the assault which was the reason for the dismissal, and when he was struck off for it.

9. There is no prospect of the Claimant being able to show that any deficiency in the process (if there was any deficiency) and any connection with his race or nationality. He asserts no reason why there might be a racial or nationality bias against him other than saying that he was the only Congolese. He does not say whether it is ethnicity or nationality that he asserts is the basis of asserted bias, or why the fact of his heritage has any connection with his dismissal or the process which resulted in it.

10. The Claimant describes himself as being "Black African of Congolese origin" (page 47 of the bundle of documents, letter from representative to Tribunal of 11 July 2019). He offers no reason why another person of black African heritage should discriminate against him by dismissing him.

11. I observe that suspension from work in such a case is inevitable in order to protect the public, until the criminal matter was concluded (which was 14 February 2019)). He was on full pay throughout. He was called to a disciplinary hearing by letter of 28 January 2019, and it took place on 20 August 2018 (Claimant's application to amend, page 54 of the bundle of documents). There was no financial detriment to him in being suspended, and given that he admitted the facts (and was convicted of the assault), the delay until the disciplinary hearing was an advantage to him. In any event there is nothing to link this to race or nationality. The two remaining claims have no reasonable prospect of success.

12. The new claims recycle the dismissed claims under new headings. The Claimant says his appeal should have found the dismissal unfair. This must fail for the same reasons that the claim that the dismissal was race discrimination was struck out.

13. These claims all have no reasonable prospect of success.

14. In addition, these claims are vexatious. Originally the Claimant claimed his dismissal was direct age discrimination, with no reason for doing so. That was struck out. He now brings new claims on the same assertions as were founding the claims already struck out. He refuses to accept that he was guilty of assaulting the patient, despite a failed appeal against his conviction, and continues to assert that the witnesses colluded against him. As Judge Tayler pointed out in the EAT judgment there is no prospect of that claim being made out. The claims fall within Rule 37(1)9a) for this reason also.

15. The Claimant asserts that the Respondent should have investigated the racist comments he had to endure from the patient: this is not to the point. Patients in mental health hospitals are often abusive, because of the very reason they are patients. Nurses are not permitted to strike them, and that they endured this abuse is no mitigation if they do.

16. The NMC's opinion was:

> *"The NMC submitted that the offence in this case relates to an incident where Mr Tshimuanga hit a vulnerable patient. Whilst acknowledging the mild injuries suffered by the patient, not only has Mr Tshimuanga put the patient at an unwarranted risk of harm, but also has caused actual harm to a patient. When the attitudinal nature of the offences and Mr Tshimuanga's limited insight are considered, there is a high risk that his actions will be repeated."*

They considered that the Claimant showed no insight and no remorse.

17. While not basing my decision on anything the NMC decided, it is abundantly clear from the pleadings, the undisputed facts, and the statements of the Claimant and his representative that there are no primary facts upon which any Tribunal could find that any action of the Respondent had any connection with race or nationality.

18. While it is rare to strike out discrimination claims[1], this is a case where it would be very unfair to the Respondent (and the people accused of racist actions) to have to endure these meritless claims proceeding further.

19. For these reasons I struck out the new claims. I also strike out the claims which were not struck out by EJ Ross. The further light cast on these claims by subsequent events, and the content of the EAT decision persuade me that these also have no reasonable chance of success.

20. This judgment is intentionally short. The fundamentals are absolutely clear and there is no point in setting out a long narrative history of events. Nor is there merit in setting out the claims made by, or on behalf of, the Claimant in great detail. They are all elaborations of the fundamental and baseless assertion that his colleagues colluded against him because he is Congolese to make false allegations, and that he did not assault the patient. The actions of the Respondent in this situation were inevitable. The matters he complains about were not to his disadvantage. Delaying disciplinary action and leaving him on paid suspension pending a criminal trial (at which he was found guilty) for assaulting a patient is not disadvantageous when the inevitable outcome (absent remorse and contrition and evidence of remediation) was dismissal followed by strike off.

**Employment Judge Housego**
**Date: 23 November 2021**

[1] The case law is set out fully in Malik v Birmingham City Council & Anor (Striking-out : dismissal) [2019] UKEAT 0027, and I have considered and applied the guidance in that case.