



RESERVED DECISION

EMPLOYMENT TRIBUNALS

Claimant: Dr J Gosalakkal

Respondent: University Hospitals of Leicester NHS Trust

Heard at: Leicester (via CVP)

On: 19 and 20 September 2022
27 October 2022
8 November 2022 (in chambers)

Before: Employment Judge Ahmed (sitting alone)

Representation

Claimant: In person

Respondent: Mr Richard Powell of Counsel

JUDGMENT ON AN APPLICATION FOR A RECONSIDERATION

The Claimant's application dated 20 July 2018 for a reconsideration of the original decision of 19 December 2014 is refused as there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. This was a hearing to determine on a preliminary consideration under Rule 72(1) of the Employment Tribunal Rules of Procedure 2013 (the "2013 Rules") whether the original judgment of 19 December 2014 should be the subject of a reconsideration hearing or whether it should be refused if it has no reasonable prospect of success.
2. This is the third application for a reconsideration. The first was contained in a letter dated 31 July 2018. The application was refused. It was the subject of a successful appeal at the EAT, HH Judge Richardson presiding (UKEAT/0223/18).
3. On its return from the EAT the second reconsideration application was dealt with on 3 January 2020. By a decision sent to the parties on 7 February 2020 the application was again refused. Following an appeal it was dealt with by consent and the appeal was allowed on the terms agreed by a judgment issued on 13 December 2021 (EA-2020-0001-78-BA), HH Judge Tayler presiding.

4. Running alongside these applications has been the question of the order as to costs which has been dealt with by different Tribunals and is no part of the reconsideration application I am asked to decide.

5. This hearing of this application has been somewhat protracted. It is unusual to have oral evidence at preliminary considerations, or for them to last as long as this, but this is an unusual case. As there was a dispute on the evidence as to when Dr Gosalakkal became aware of the new evidence he relies on to justify a reconsideration it was necessary to have oral evidence from him. Dr Gosalakkal lives in the United States and thus this hearing took place via CVP. It has spawned two large bundle of documents and detailed written and oral submissions.

6. The essence of the Claimant's application is that new evidence came to light in April 2018 which would have a significant, if not critical, effect on the original decision. This 'new evidence' is said to be a Serious Untoward Incident Report ("SUI") which the Claimant says was placed in the public domain in or around April 2018. The Respondent says the Report was completed in 2012 and that it was in the public forum before then but there is no direct evidence of when it was available to the public. The SUI report deals with the state of affairs in the Paediatric Department of the Respondent Trust following the tragic death of Jack Adcock and the care provided by Dr Hadiza Gawa-Bawa who was subsequently convicted of manslaughter with the conviction being overturned on appeal.

7. In terms of the relevant chronology of events for present purposes I take the following from Mr Powell's submissions which Dr Gosalakkal has not contested.

8. On 25 January 2018 Dr Gawa-Bawa was struck off by the GMC. There was widespread publicity surrounding the case. The Claimant says he became aware of the SUI Report on 18 April 2018.

9. On 12 May 2018 the Claimant emailed the EAT to appeal against the liability decision. He was informed on 7 June 2018 that the proper course was to seek a reconsideration.

10. On 20 July 2018 the Claimant submitted his reconsideration application which was refused on 7 February 2020 and was the subject of (the second) successful EAT appeal.

11. Dr Gosalakkal's evidence as to how he came to know of the circumstances of the SUI report are to some extent set out in his statement. Although he was given the opportunity to tell the Tribunal of the circumstances as to how he came to learn of it he has largely used the opportunity to deal with a number of matters which are not relevant to the issues to be determined now. The only relevant passages of his witness statement are at paragraphs 102 – 104 and as follows:

"102. 2018 I was checking on something at the UHL website and for the first time I came across the first statement by the UHL trust released on April 18 2018 on their response to the Hadiza Bawa Gerba (sic) case and officially accepted for the first time as far as I know that their investigation had uncovered a number of defects in the children's department and stated no single person could be blamed for Jack Adcock's death.

103. Here something must be clarifiedthe role of the UHL trust and its witnesses became clear only after the public statement of the UHL trust on April 18 2018. Till I got the report Mr Powell himself had rejected newspaper report as "not new evidence".....Technically the first time I got the full report with names on was in June 2022. The first time the trust officially sends the redacted report was before the second consideration. The question then was when the first time

was that I got the evidence which would satisfy the first requirement of *Ladd v Marshall* which is the SI report. This was in April 2018.

104. There has been a lot of speculation that the claimant should have known about the HBG case before, but the claimant neither paid attention or sort out any one of the various personalities involved or discussed this with anyone in the trust.”

12. I should add here that I find it unconvincing that the Claimant did not keep up with what was happening at his former employer or his former colleagues. In August 2015 BBC News reported the conviction of Dr Ferrie who had earlier investigated some of the matters against the Claimant. Dr Gosalakkal was well aware of that story as he took a screenshot of the news report for his EAT appeal. The story was not widely reported. However the whole saga involving Dr Gawa-Bawa was very widely reported from the very beginning. It is likely to have attracted the Claimant’s interest as worked in the same Department as Dr Gawa-Bawa.

13. There are also Facebook entries which show that the Claimant was keeping up with activities at the Trust. I accept that most of these are largely historical and there are no relevant entries around April 2018 but of course it depends on what is disclosed. He was in my judgment keeping up with news of the Respondent. He was evidently doing so in April 2018 to discover the SUI Report so it is difficult to believe he was not doing so earlier.

THE ISSUES

14. The issues for this hearing are as follows:

14.1 When did Dr Gosalakkal become aware of the SUI report?

14.2 Did he make his reconsideration application in time and if not is it appropriate to extend time?

14.3 Does the application satisfy the criteria in **Ladd v Marshall** (1954) 3 All ER 745, so that the reconsideration application has reasonable prospects of success?

THE LAW

15. There is no dispute as to the law in this case. The relevant rules are Rules 70 – 72 (reconsiderations) and Rule 5 (extensions of time).

16. Rule 70 states:

“A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision (“the original decision”) may be confirmed, varied or revoked. If it is revoked it may be taken again.”

17. Rule 71

“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 that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.”

18. Rule 72 so far as is material states:

“(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge’s provisional views on the application.”

19. Rule 5 deals with extension of time and states:

“The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.”

20. The relevant test to be applied is set out in **Ladd v Marshall (CA)** where Lord Justice Denning MR said this:

“The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled:- First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: Thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

CONCLUSIONS

When did Dr Gosalakkal become aware of the SUI Report?

21. I can find no direct evidence of the Claimant discovering the existence of the SUI Report in April 2018 other than his oral evidence on which I have expressed reservations. It does seem somewhat odd that one fine sunny day in April 2018 the Claimant just happened to be looking at something on the UHL website and became aware of the existence of the Report. Had Dr Gosalakkal indicated some event which stirred his memory to look on the site on that day or around that time it may have sounded more convincing. There is simply no context to his ‘discovery’ whatsoever.

22. It seems to me the more likely explanation is that having spent the best part the previous year in arguing against the various costs judgments that arose from the liability decision (including the refusal by the Court of Appeal to entertain his appeal on the costs judgments in February 2017) and then spending time in April on the assessment itself that this ‘new evidence’ was the only roll of the dice left to the Claimant to challenge the costs order. I understand that post June 2017 there were efforts to enforce the costs order against him.

23. I cannot therefore make any determination on when Dr Gosalakkal became aware of the SUI Report with any degree of certainty or confidence. I do not find his evidence reliable and there is no other evidence available to enable me to make a determination.

Is it appropriate to extend time?

24. It appears to be agreed, and if not I am satisfied that it is the case, that if the Claimant only discovered the SUI Report on 18 April 2018 then his time for applying for a reconsideration under Rule 71 expired on 2 May 2018. His reconsideration application of 20 July 2018 is therefore outside the time limit set by Rule 71.

25. Before I deal with the extension issue I must make it clear that I do not understand the second appeal, which was effectively disposed of by consent, to have settled the extension of time issue. That is to say it remains an issue to be determined although the parties did agree that my decision on refusing an extension of time for the reasons I gave previously cannot stand.

26. Having regard to the broad discretion contained in Rule 5 and notwithstanding the absence of a finding on exactly when Dr Gosalakkal came to know of the SUI Report I consider it to be in the interests of justice to extend time to 20 July 2018. There is some delay even on the Claimant's own position after discovering the SUI Report and then making the formal application but the delay is relatively short, it was due to his lack of knowledge of legal procedure which as a litigant in person is understandable and there is little or no prejudice to the Respondent. I therefore extend time to 20 July 2018 for this application to proceed.

Does the application satisfy the **Ladd v Marshall** criteria so that the reconsideration application has reasonable prospects of success?

27. It is accepted that the SUI Report was signed by Dr Rabey and Nurse Killer both of whom gave evidence at the tribunal hearing. However there is no direct connection between the Claimant's alleged protected disclosures and the problems in the Children's Ward of the Respondent Trust. Despite extensive opportunities the Claimant has failed to establish any evidence of a link or connection. In fact the Claimant had identified Nurse Killer as an 'irrelevant witness' earlier in the proceedings. Dr Gosalakkal fails to establish how her evidence is now a reason why the original decision should be set aside based on anything in the SUI Report. There is equally no such connection established with Dr Rabey.

28. The Claimant's case on detriment for protected disclosures was dismissed because it was brought out of time. It is difficult to see what difference knowledge of the SUI Report, or any other report for that matter, would have made in relation to complaints that were dismissed for want of jurisdiction. Dr Gosalakkal's opinions have not changed on reading the report. He held the same views even before the Report.

29. The Claimant's argument in relation to the unfair dismissal part of the claim is that the Respondent was motivated to dismiss him because he had made complaints in 2009/2010 which were similar to the failures identified in the SUI Report. This is effectively an argument that the decision to dismiss was made in bad faith.

30. A key feature of the decision to dismiss the Claimant was that it was *his* conduct that had led to the breakdown in relationships. This had nothing to do with the SUI Report. The origin of the Claimant's disciplinary proceedings was Dr Gosalakkal's complaints and reports about his colleagues that kicked off the

whole process. Far from the Trust looking to keep him quiet it was the Claimant who was initiating complaints to silence his critics.

31. The Claimant alleges that the Respondent's witnesses lied under oath and that this is supported by the SUI Report. In his reconsideration application he says:

"...a judgment obtained under fraud or deception can be overturned. If given a chance the Claimant can show at the least the EJ Ahammed judgment was obtained by the Trust witness by lying."

32. The suggestion that witnesses of the Respondent is in my view unsustainable. Even if the allegation of lying was made at the time – and there is nothing that the Claimant has produced at this hearing to suggest that it was - there is no new (or old) evidence of any witness lying under oath. The Claimant has failed to provide any reference in the SUI Report to demonstrate that any of the witnesses had lied. Moreover, the Claimant has not said what the witnesses are supposed to have lied about, when it is they lied or what the evidence is in support of his contention that they lied. The allegation of lying is merely his unsupported opinion.

33. In summary I do not consider that there is any basis to permit this application for a reconsideration to go beyond the preliminary consideration stage. There is nothing to suggest that matters would have been decided differently if the SUI Report had been available earlier. I accept Mr Powell's submission that the Claimant has not identified how the SUI report might lead the Tribunal to conclude that an employee making unsubstantiated and retaliatory complaints against his colleagues would not amount to gross misconduct. I also accept his submission that the Claimant has failed to identify how the Respondent's witnesses were lying and this this 'new evidence' has no prospect of altering any part of the liability judgment. I reject the Claimant's argument that the decision to dismiss him was made in bad faith and/or that the SUI Report has any bearing on this. The SUI Report would not have had an important influence on the outcome of the case. This application does not therefore meet the **Ladd v Marshall** test.

34. For those reasons the application for a reconsideration is refused.

Employment Judge Ahmed

Date: 5 January 2023

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