Neutral Citation Number: [2023] EAT 23

Case Nos: EA-2021-000908-VP

EA-2021-001470-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 March 2023

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

DR STEPHEN JOHN WATKINS	**Appellant**
- and -	
BRITISH MEDICAL ASSOCIATION	**Respondent**

- -
- -

DR STEPHEN WATKINS the **Appellant** in person
LORD HENDY KC and BETSAN CRIDDLE KC
instructed by the British Medical Association for the **Respondent**

Hearing date: 31 January 2023

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JUDGMENT

SUMMARY

CERTIFICATION OFFICER

The Certification Officer did not err in law in refusing to allow Dr Watkins to amend complaints that had already been determined (and unsuccessfully appealed), in refusing to determine those complaints again, or in dismissing a complaint remitted by the EAT.

HIS HONOUR JUDGE JAMES TAYLER:

Introduction

1. These appeals are against decisions of the Certification Officer, determining complaints about matters that occurred in 2017 and 2018. The dispute has run and run, becoming somewhat convoluted.

2. I shall refer to the appellant as "Dr Watkins" and the respondent, the British Medical Association, as "the BMA".

3. The BMA is the trade union for doctors. It is governed by Articles of Association. Article 13 sets out behaviours that may result in disciplinary action. Article 14 sets out, in broad terms, the disciplinary process; including investigation, hearing, appeal and sanctions. Article 14 permits the Council of the BMA to determine detailed procedures. In May 2017, the BMA Council adopted a policy for, amongst other things, dealing with complaints, called living our values ("LoV").

4. LoV sets out principles, including Principle 17:

> The process should not be used to stifle constructive debate or deter members from seeking election.

5. In the summer of 2017, the BMA Council held elections for its Deputy Chair. On 10 August 2017 Dr Watkins placed a posting on "listserver" that was addressed personally to the successful candidate, Dr Sara Hedderick, and was automatically copied to all Council members ("the posting"). Dr Watkins asserted that Dr Hedderick had been elected because of the support of members who did not want another candidate, Dr David Wrigley, to succeed. Dr Watkins asserted that those members chose Dr Hedderick to deprive Dr Wrigley of support and because they thought she was the candidate who was "the least determined and least experienced". Dr Watkins added that he hoped that Dr Hedderick might be able to prove her detractors wrong.

6. On 17 August 2017, Dr Andrew Dearden, Treasurer of the BMA, complained about the posting under the LoV procedure ("the Dearden complaint"). Dr Watkins was suspended pending determination of the Dearden complaint ("the early suspension"). The Dearden complaint was heard by a LoV panel on 12 October 2017. The decision was given on 24 October 2017, upholding the

complaint. Dr Watkins was suspended from all BMA committees and other elected roles and his access to listserver was removed for 12 months. On 12 Nov 2017, Dr Watkins appealed against the upholding of the Dearden complaint.

7. Elections for the BMA Council took place in early 2018. On 9 January 2018, Dr Watkins circulated a document entitled Manifesto for a Better BMA ("the manifesto") written by himself and others. That day Sir Sam Everington submitted a LoV complaint, asserting that it was inappropriate for Dr Watkins to circulate the manifesto while suspended and that it was intimidating ("the Everington complaint").

8. Dr Watkins was informed of the Everington complaint on 12 January 2018. On 15 January 2018, Dr Watkins sent an email stating that he had shared the Everington complaint with his co-authors. Dr Watkins asserted that "the BMA could well expose itself to a risk of being seen to interfere with the election campaign contrary to s47 and s48 of the Trade Union and Labour Relations Act 1992". There was then an exchange of correspondence about the potential effect of the Everington complaint on the circulation of the manifesto. On 22 January 2018, Dr Watkins wrote to the BMA and suggested that members might be changing their behaviour because the complaint remained open. On 30 January 2018 Dr Watkins was informed that the BMA would not be taking any action on the Everington complaint.

9. On 29 January 2018, the appeal against the Dearden complaint was dismissed, in large part.

10. On 26 July 2018, Dr Watkins submitted a complaint to the Certification Officer raising issues about the handing of the Dearden and Everington complaints. There was an exchange of correspondence during which the precise nature of the complaints was clarified, as is the normal practice of the Certification Officer. On 10 January 2019, a letter was sent setting out the 7 complaints identified during the exchange of correspondence. On 22 January 2019, Dr Watkins confirmed that the complaints had been correctly identified. The seventh complaint was struck out on 29 July 2019. The remaining complaints were considered at a hearing before the Certification Officer on 25 and 26

September 2019. The BMA conceded the first complaints.

11. The complaints that are relevant to this appeal were:

11.1. Complaint 1 – a complaint about Dr Watkins being suspended before the Dearden complaint was determined ("the early suspension complaint")

11.2. Complaint 2 - a complaint about the way in which the Everington complaint had been dealt with, asserting that Principle 17 had been infringed ("the Principle 17 complaint").

11.3. Complaint 4 - which concerned the decision to uphold the Dearden complaint ("the Dearden CO complaint")

12. By a Decision, dated 14 October 2019, the Certification Officer dismissed the complaints that remained live ("the CO decision").

13. By a notice of appeal received by the Employment Appeal Tribunal ("EAT") on 19 November 2019, and sealed on 4 August 2020, when it was set down for a full hearing by Linden J, Dr Watkins appealed against the CO decision ("the first appeal against the CO decision"). The full appeal was heard by Bourne J on 23 March 2021. Judgment was reserved and handed down on 6 April 2021 ("the Bourne J judgment"). Bourne J rejected the appeal in respect of all complaints save for the Principle 17 complaint which was remitted to the Certification Officer to determine whether the Everington complaint should not have proceeded because it had an actual or potential stifling effect on constructive debate and/or deterred members from seeking election, so that it engaged Principle 17 and, if so, whether dismissal of the complaint after a three week period was sufficient to achieve compliance with Principle 17.

14. On 21 June 2021, Dr Watkins applied to the Certification Officer to amend Complaint 1, the early suspension complaint, and Complaint 4, the Dearden CO complaint. Most importantly for the purpose of this appeal, Dr Watkins contends that it was only on reading the Bourne J judgment that he realised that the wording of Complaint 4 meant that while the appeal in respect of it had correctly

been dismissed, it would have succeeded before the Certification Officer had it been worded differently.

15. On 24 June 2021, the Certification Officer refused Dr Watkins application on the basis that he had agreed the wording of Complaints 1 and 4 and she did not have power to consider any part of the original complaint save for the Principle 17 complaint remitted as a result of the Bourne J judgment:

> It is not possible to amend the terms of your complaint to the CO. Following correspondence with me, you agreed the terms of your complaint which was considered by the CO at a Hearing on 25 and 26 September 2019. You appealed that decision and the EAT remitted part of that complaint back to the CO. That complaint is now concluded.
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> The CO has no power to consider, or reconsider, any part of the original complaint unless it is remitted back to her by a Higher Court. If you are dissatisfied with any other part of the EAT judgment, then you could consider a further appeal to the Court of Appeal.

16. By a Notice of Appeal received by the EAT on 2 August 2021, and amended on 15 October 2021, Dr Watkins brought two appeals. First, Dr Watkins appeals against the refusal to amend Complaints 1 and 4 ("the amendment appeal"). Secondly, Dr Watkins sought to appeal for a second time against the CO decision ("the second appeal against the CO decision"). By an order sealed on 25 March 2022, Griffiths J permitted the appeal to proceed. In its response the BMA asserted that the second appeal against the CO decision, in addition to being an abuse of process because complaints 1 and 4 had already been determined, and the appeal in respect of them determined by Bourne J, was submitted out of time. In an email dated 1 June 2022 Dr Watkins accepted that he required permission to pursue the second appeal against the CO decision out of time. On 9 June 2022, Griffiths J directed that the "issue of whether an extension of time is required and if so whether it should be granted will be dealt with by the judge at the full hearing".

17. By a decision dated 3 November 2021, the Certification Officer dismissed the remitted Principle 17 complaint. The Certification Officer considered the correspondence between Dr Watkins and the BMA and concluded that Principle 17 was not engaged through there being a risk to stifling

constructive debate or deterring members from seeking election until 22 January 2018 and that the BMA had achieved compliance with Principle 17 by dismissing the Everington complaint on 30 January 2018.

18. On 3 November 2021, Dr Watkins appealed ("the Principle 17 appeal"). By order sealed on 7 December 2022, the Principle 17 appeal was permitted to proceed, apparently without being sifted. The BMA submitted what it described as a cross-appeal challenging the decision of the Certification Officer that Principle 17 had been engaged in principle.

Appeals to the EAT from the Certification Officer

19. At the relevant time, section 108C TULR(C)A provided:

> An appeal lies to the Employment Appeal Tribunal on **any question of law** arising in proceedings before or arising from any decision of the Certification Officer under this Chapter. [emphasis added]

20. For any decision of the Certification Officer made on or after 1 April 2022, the section has been amended to replace the words "any question of law" with "any question": Section 21 **Trade Union Act 2016** and Reg 16 **Trade Union Act 2016 (Commencement No 4 and Transitional) Regulations** 2021 (SI 2021/1373). That change does not affect this appeal.

The amendment appeal

21. It was common ground that the doctrine of res judicata applies to proceedings before the Certification Officer: **McFadden v Unite the Union** UKEAT/0147/19:

> the first disciplinary proceedings did not conclude with the decision of the disciplinary panel or the decision of the appeal panel, but with the decision of the Assistant Certification Officer. His declaration and enforcement order may be relied on or enforced as if it was a declaration made by, or an order of, the court. Mr Potter accepted that the doctrine of res judicata does apply to such decisions

22. **McFadden** was appealed to the Court of Appeal, but not in relation to the conclusion that res judicata applies to determinations of the Certification Officer: **Unite the Union v McFadden**, [2021] EWCA Civ 199, [2021] IRLR 354. The Court of Appeal decided that res judicata does not apply in

relation to internal disciplinary hearings of trade unions, but that is not relevant to this appeal. Although, the application of res judicata to the Certification Officer was conceded in the EAT, so is not strictly binding on me, Dr Watkins did not seek to argue that I should hold otherwise.

23. Furthermore, the doctrine of res judicata applies to the Bourne J judgment.

24. Lord Sumption JSC considered the principles of res judicata in **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd** [2013] UKSC 46, [2014] AC 160:

> Res judicata: general principles
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> 17. Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section 34 of the Civil Jurisdiction and Judgments Act 1982. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 State Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197–198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive

> proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.
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> 18. It is only in relatively recent times that the courts have endeavoured to impose some coherent scheme on these disparate areas of law. The starting point is the statement of principle of Wigram V-C in *Henderson v Henderson* 3 Hare 100, 115. This was an action by the former business partner of a deceased for an account of sums due to him by the estate. There had previously been similar proceedings between the same parties in Newfoundland in which an account had been ordered and taken, and judgment given for sums found due to the estate. The personal representative and the next of kin applied for an injunction to restrain the proceedings, raising what would now be called cause of action estoppel. The issue was whether the partner could reopen the matter in England by proving transactions not before the Newfoundland court when it took its own account. Wigram V-C said, at pp 114–116:
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>> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time … Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."

25. The office of the Certification Officer is statutory, and she has no power of review other to correct accidental errors: **R (B) v Nursing and Midwifery Council** [2012] EWHC 1264 (Admin) [36].

26. Dr Watkins applied to amend Complaint 1, the early suspension complaint, and Complaint 4, the Dearden CO complaint. The early suspension complaint had been conceded by the BMA and determined in Dr Watkins' favour by the Certification Officer. The Dearden CO complaint had been determined against Dr Watkins by the Certification Officer and his appeal was dismissed by Bourne J. Both complaints had been finally determined and there was nothing left to be amended.

27. Even, if that were not the case, the amendments do not appear to raise significantly different grounds, and, even if they did, those grounds could and should have been raised in Dr Watkins' original complaint to the Certification Officer. I do not accept Dr Watkins' argument that there are special circumstances that would require a departure from the application of **Henderson v Henderson**. Dr Watkins agreed the terms of Complaint 1 and Complaint 4 after extensive correspondence with the office of the Certification Officer. There is no proper basis for reopening the terms of the complaints now. The fact that, having read the Bourne J judgment, Dr Watkins wishes that he had agreed to slightly different wording does not come close to amounting to special circumstances. If claims could be reopened because a party on receipt of a judgment wished they had pleaded the claim rather differently, the revolving doors of the courts would never stop spinning and there would be no finality in litigation.

28. Furthermore, I do not consider that the Certification Officer has the power to reconsider the determination of the wording of Complaints 1 and 4, or the decisions made on them. There is no statutory power for her to do so.

29. The amendment appeal fails.

The second appeal against the CO decision

30. The second appeal against the CO decision was submitted long out of time. There is no basis whatsoever for granting an extension of time as there is no good excuse for the delay or anything close to amounting to circumstances that would justify the EAT taking the exceptional step of granting an extension as is required by **United Arab Emirates v Abdelghafar** [1995] IRLR 243. Dr

Watkins could and should have brought all his challenges in the original appeal against the CO decision which was submitted in time.

31. Furthermore, the appeal is obviously an abuse of process as the complaints have been finally determined in the Bourne J judgment, so even if time was extended the appeal would be bound to fail.

32. The second appeal against the CO decision is dismissed

The Principle 17 appeal

33. The determinations that Principle 17 was not engaged because of a risk to stifling constructive debate or deterring members from seeking election until 22 January 2018 and that the BMA had achieved compliance with Principle 17 by dismissing the Everington complaint on 30 January 2018 were findings of fact. The simple answer to this appeal is that these were factual determinations that were open to the Certification Officer. Her decision can only be challenged in the EAT on the basis that it involved an error of law. Dr Watkins has not identified any error of law or come close to passing the very high threshold for establishing perversity.

34. The Certification Officer was entitled to conclude that initially only Dr Watkins was aware of the Everington complaint and that Principle 17 was not engaged until Dr Watkins told the BMA that members may be changing their behaviour because the complaint remained open in the letter he sent on 22 January 2018. The Certification Officer was entitled to conclude that although Principle 17 was engaged compliance was achieved when the complaint was brought to an end on 30 January 2018. The Certification Officer was entitled to reject the application to introduce evidence from Professor Pollock about other matters and the alleged effect of LoV complaints in stifling debate. The matter that was before the Certification Officer was the alleged breach of Principle 17 said to arise from the Everington complaint.

35. The “cross appeal” is not an appeal against a determination of the Certification Officer but alternative grounds for upholding her decision. Having dismissed the challenge to her decision I do

not need to consider it.

36. The Principle 17 appeal is dismissed.