



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. M Ahsan

**Respondent:** Ministry of Defence

**Heard at:** Midlands West

**On:** 16 and 17 October 2023

**Before:** Employment Judge Faulkner

**Representation:** **Claimant** - Mrs. D Shakoor (lay representative)  
**Respondent** - Mr. E Beever (counsel)

## PUBLIC PRELIMINARY HEARING - JUDGMENT

1. The complaints referred to below are those identified by the corresponding numbers in the List of Allegations prepared by the Respondent on 26 September 2023 and commented upon by the Claimant on 7 October 2023 in preparation for this Hearing.

2. The following complaints in the List of Allegations are dismissed following withdrawal (“the Withdrawn Complaints”), the Claimant having confirmed that there is no reason he wishes to advance as to why they should not be dismissed: 81, 83, 84, 85, 86, 87, 96, 97, 98.1, 98.2, 98.13, 98.21, 98.22, 98.26, 98.28, 98.29, 98.31, 98.46, 98.47, 98.50, 98.57, 98.58, 98.60, 98.61, 98.63, 98.64, 98.67, 98.68, 98.70, 98.71, 103.2, 103.4, 103.6, 103.7, 103.8, 103.9, 103.10, 103.14, 104.1, 104.2, 104.4, 104.5, 104.8, 104.10, 104.11, 104.12, 104.13, 104.14, 104.15, 104.17, 104.18, 104.19, 104.20, 104.21, and all complaints under 105 and 106.

3. The Claimant does not seek to rely on the following alleged protected acts set out in the List of Allegations: 9, 10, 11, 13, 27, 28, 29, 30, 35, 36, 37 and 41.

4. The following complaints in the List of Allegations are struck out on the ground that they are vexatious and/or have no reasonable prospect of success because of cause of action estoppel: 80, 82, 98.38, 98.39, 98.40 and 98.44.

5. The Respondent's application to strike out Allegation 98.37 on the ground that it is vexatious and/or has no reasonable prospect of success because of issue estoppel is refused.

6. This Judgment shall not affect any complaint which has not been withdrawn by the Claimant and which is in whole or in part a duplicate of any of the Withdrawn Complaints.

7. The remaining complaints are also unaffected by this Judgment.

## **REASONS**

1. The background to these Claims and indeed to this Hearing has been rehearsed at length in previous Case Management Summaries, most recently that dated 23 June 2023, and in the Judgment of the Tribunal dated 22 March 2023 in Claim Number 1305012/2020 and part of Claim Number 1303456/2021, sent to the parties on 29 March 2023 ("the Judgment"). I do not repeat any of that background here. Complaint numbers below refer to the corresponding numbers in the List of Allegations prepared by the Respondent on 26 September 2023 and commented upon by the Claimant on 7 October 2023 in preparation for this Hearing ("the LOA").

2. Most of the Withdrawn Complaints were notified to the Tribunal as withdrawn by a letter from the Claimant dated 17 September 2023. Others were withdrawn on both days of this Hearing. Mrs. Shakoor confirmed in each case that the Claimant did not seek to advance any reason as to why they should not be dismissed on withdrawal. I have listed the Withdrawn Complaints above and dismiss them accordingly.

3. Although of course not complaints in and of themselves, I also record that the Claimant confirmed that he no longer sought to rely on certain alleged protected acts for the purposes of complaints of victimization. Those alleged protected acts are also listed above.

4. There were a much smaller number of other complaints which the Respondent argued involved causes of action or issues which had already been determined by the Tribunal in the Judgment, giving rise to cause of action or issue estoppel.

5. Given what is stated below, I do not need to rehearse the law in relation to cause of action estoppel. The relevant law in relation to issue estoppel can be summarized as follows:

5.1. The basic principle is that issue estoppel prevents a party from reopening an issue that has been decided in previous proceedings involving the same parties.

5.2. The House of Lords in **Arnold v National Westminster Bank plc (No. 1) [1991] 2 AC 93, HL** said that issue estoppel may arise where “a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue” [my emphasis]. This means that where a tribunal goes beyond what it was required to determine in a particular cause of action, issue estoppel will not arise.

5.3. The House of Lords went on to say, “there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings”.

5.4. The authorities were more recently explored by the Employment Appeal Tribunal (“EAT”) in **Edey v London Borough of Lambeth and another [2022] EAT 94**. Amongst further case law principles drawn out in that decision is the fact that the burden is on the party alleging that an estoppel arises and that just because something has been rehearsed in witness evidence does not mean that it was a necessary ingredient in a previous decision. The EAT summarized the law on issue estoppel as follows:

“... consideration must extend beyond asking whether a matter was raised and, even, was it a matter dealt with in a judgment. What must be asked, excluding issues of credibility, is whether the matter was raised as a necessary ingredient to establishing or defeating the cause of action or in establishing or defeating any defence to it. In other words, it is a matter over which the body making the first decision has jurisdiction, because it is necessary for it to be resolved in order to decide whether a claim succeeds. To this might be added the question, are there special circumstances which disapply the doctrine?”

6. In a Case Management Summary prepared after a Hearing on 22 June 2023, I indicated at paragraph 16, using the numbering in the LOA, that it seemed to me that certain complaints were the subject of cause of action estoppel, in that they had already been determined at the First Final Hearing (three further Allegations where the Respondent raised cause of action estoppel were withdrawn by the Claimant and dismissed in my judgment of 23 June 2023, namely 98.41, 98.42 and 98.43). The complaints I referred to were as follows, with the Allegations referred to second in each case having been determined in the Judgment:

6.1. Allegation 80 – see Allegation 92, which included the same complaint of victimisation.

6.2. Allegation 82 – see Allegation 93, which included the same complaint of victimisation.

6.3. Allegation 98.38 – see Allegation 94.3, which included the same complaint of victimisation.

6.4. Allegation 98.39 – see Allegation 94.6, which included the same complaint of victimisation.

6.5. Allegation 98.40 – see Allegation 94.7, which included the same complaint of victimisation.

6.6. Allegation 98.44 – see Allegation 94.3, which included the same complaint of victimisation.

7. Mrs. Shakoor said that she accepted that cause of action estoppel arose in respect of those complaints and did not oppose them being dismissed. What she also said, in written submissions handed up at the start of this Hearing and clarified in discussion during the Hearing, was that there may be evidence that emerges in the Final Hearing of these Claims which may persuade the Tribunal to revisit its conclusions set out in the Judgment in respect of the corresponding Allegations, namely 92, 93, 94.3, 94.6, 94.7 and 94.3. Specifically, she referred to the interview conducted by David Field (an external investigator) with Adrian Bettridge in the course of the Tomlin Process (the investigation of the Claimant's complaints about how the Bettridge process – see below – was handled), and to views expressed by another external investigator, Sara Parry, commissioned to review the Claimant's "Poppy Breaks Grievance". In short, Mrs Shakoor says that the Tribunal may have been misled in reaching the conclusions in question.

8. It is a matter for the Claimant (and Mrs. Shakoor) to decide what, if anything, to do in relation to the apparent new evidence. Whilst of course I was (and am) unable and unwilling to provide advice, I mentioned two matters, without objection from Mr. Beever. The first is that there is a reconsideration process available in respect of any judgment, set out at rules 70 to 73 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, which in principle could apply to the Judgment or to the further judgment set out in this document. Secondly, as Mrs. Shakoor herself suggested, there may be a credibility issue in relation to evidence given at the final hearing of these Claims if the Tribunal is persuaded that evidence given at the previous final hearing (and which led to the Judgment) was in some way inaccurate. It is neither necessary nor appropriate for me to say anything further at this stage.

9. What was disputed was whether complaint 98.37 could proceed because of issue estoppel. The complaint is one of victimization and relates to the "Bettridge Process" by which Adrian Bettridge dealt with the Claimant's complaints about his colleagues Jenny Withers and Louise Short. The complaint, clarified by Mrs. Shakoor during this Hearing, is that Mr. Bettridge "failed to have proper regard to the report of the HIO (Harassment Investigation Officer)", Mr. McDermott. Mrs. Shakoor's note handed up at this Hearing clarified that what specifically the Claimant is referring to is the covering letter commending the HIO report to Mr. Bettridge. The note goes on to refer to Mr. Bettridge's evidence to David Field that he had disregarded what had been said to him by the Claimant's witnesses, namely Ms. Hartshorne, Ms. Moore and Ms. Zakers.

10. Mr. Beever referred me to paragraphs 464.2 and 466 of the Judgment. They were in the context of Allegation 94, which was headed, "The Respondent's findings in its internal complaint [i.e., the matters decided by Mr. Bettridge] were unsubstantiated, irrelevant, malicious and retaliatory". After dealing with the seven parts of that Allegation in turn, the Judgment stated at paragraph 464.2, "Mr. Bettridge did not disregard the evidence of the Claimant's witnesses, but without any negative reflection on any of them, we thought they added little to the overall evidence before us, though they did highlight for example concerns about

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Mrs. Short's body language. It is unsurprising therefore that Mr. Bettridge took a similar view". At paragraph 466, the Judgment concluded its treatment of Allegation 94 overall by stating, "In respect of all aspects of allegation 94 therefore, the Claimant did not prove facts from which we could conclude that the Respondent victimised him. Even if he had done so, we were satisfied the Respondent provided explanations for its actions which were in no sense whatsoever influenced by any protected act or any belief about the same".

11. Having carefully considered the Respondent's arguments, I conclude that the Claimant is not issue estopped from pursuing Allegation 98.37. That Allegation is now clarified to be that Mr. Bettridge "failed to have proper regard to" the covering letter commending the HIO report to him. The substantive conclusion in the Judgment in relation to Allegation 94, quoted above, referred to Mr. Bettridge's findings, not to what he took account of. Whilst the text of Allegation 94 included the assertion that the findings were "unsubstantiated", that is not synonymous with or close enough to the question of whether a particular point or comment (whatever the HIO letter says) was or was not considered by Mr. Bettridge in reaching whatever conclusions he reached.

12. It is true that paragraph 464.2 of the Judgment states that Mr. Bettridge did not disregard the evidence of the Claimant's witnesses, but I note two things about that. First, that seems to be a separate point to the question specifically identified by Mrs. Shakoor of whether Mr. Bettridge considered the HIO's covering letter or not. Secondly and in any event, what paragraph 464.2 sets out was not a necessary finding in dismissing the Claimant's complaint that Mr. Bettridge's conclusions were unsubstantiated. The main grounds on which the Tribunal concluded that the complaint to this effect was not made out were set out in paragraphs 457 to 463. Paragraph 464, including sub-paragraph 464.2, set out more general observations in relation to Allegation 94 taken as a whole.

13. I make clear that the question of whether Mr. Bettridge's findings were "unsubstantiated" has been determined in the Judgment, and that it seems to me therefore that a cause of action estoppel would arise if the Claimant sought to revisit that. The only question raised for determination under Allegation 98.37 is whether Mr. Bettridge disregarded the HIO covering letter or some identified part of it and, if he did, whether that was because the Claimant did one or more protected acts or because Mr. Bettridge believed that he would do one or more such acts.

14. I refer the parties to the separate Case Management Orders and Summary in this regard. That document records in full the issues the Tribunal will have to decide at the Final Hearing of all of the outstanding complaints encompassed by these Claims, together with arrangements for and Orders in relation to that Hearing.

Employment Judge Faulkner  
4 December 2023