



EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Hemphill

Respondent: Great Western Hospitals NHS Foundation Trust

JUDGMENT

The Respondent's application dated 5 March 2024 for reconsideration of the Judgment sent to the parties on 20 February 2024 is refused. That is because there is no reasonable prospect of the Judgment being varied or revoked.

REASONS

Preamble

1. The Respondent applies for reconsideration in an application dated and submitted on 5 March 2024. The Tribunal's Reasons were issued on 20 February 2024. The application is made in time.
2. The Respondent relies on a procedural mishap meaning that a party, the Respondent, had been denied a fair and proper opportunity to put its case.
3. The Respondent seeks reconsideration of paragraphs 7.74, 7.8, 7.80 and 7.157. The case made is that the Tribunal exceeded its jurisdiction in determining a matter that was not in the agreed list of issues; that is, that the Tribunal expanded the case in relation to the meeting of 21 December 2018 to a bullying allegation which was not pleaded, not identified in the List of Issues, not addressed in evidence or closing submissions. In so doing, the Tribunal acted in a way manifestly unfair and inappropriate.

The complaints as set out in the ET1 and Issue 1.1.5

4. Mr Hemphill says, in his grounds for complaint in the ET1,

“21. On 21st December 2018 I was called to a meeting with KM (Kevin McNamara) and my new line manager Rupert Turk (RT) who was promoted to Director of Estates under KM for taking on the H&S Department from HR. I also recorded this meeting on my phone for my own personal notes but this actually turned out to be an attempt to tarnish my professional reputation by attempting to serve me with a disciplinary performance improvement notification.

22. I believe that this was the significant start of the ongoing bullying campaign against me thereafter and in retaliation for raising my grievance. KM confirmed that it was he who wanted this performance improvement notification issued against a list of made-up and unsubstantiated concerns from several years previously. I had been part of the Estates department for less than four months at this point and had recently had a good appraisal with RT my new line manager only a few weeks earlier.

23. Immediately after this meeting I wrote to the then Chief Exec explaining that I had just been subjected to a blatant attempt to discredit my excellent professional reputation and asked that this attempted performance improvement incident also be added to the forthcoming grievance hearing which was being arranged.”

5. Mr Hemphill went on, in dealing with the dismissal of his grievance, to comment on the failure of the grievance officer to listen to the recordings of the meeting of 21st December 2018 (and another meeting), “which in my opinion clearly show the determination of the bullying and victimisation campaign against me.”
6. The allegation of bullying by Mr Turk and Mr McNamara is referred to again in the final paragraph of the ET1 grounds:

“56. The continuing pattern of bullying and victimisation from RT directly and KM in a more subtle and indirect manner when taken over the last three years also amount to a total breach of trust and confidence and this continuing pattern of behaviour culminated in the last straw when my requests to step away from this persistent management bullying were rejected vindictively preventing me from continuing to serve in the NHS in any H&S capacity”

7. There is a lack of clarity there, in that this refers to the “last three years” but the Claimant had earlier said that the meeting of 21 December 2018 was the start of the ongoing bullying campaign. That meeting was more than three years before the claim was made.
8. Whether or not paragraph 56 was intended to include reference to the meeting of 21 December 2018, the complaint of bullying in the meeting on 21st December 2018 is a complaint made in the grounds for his claim in the ET1.
9. The List of Issues refers to that meeting. What it says is, in relation to a charge of fundamental breach of contract in respect of the express terms of the job description and/or the implied term of trust and confidence is,

“1.1.5 On 21 December 2018, calling the Claimant to a meeting to discuss performance improvement (and other matters discussed at the meeting are also relied on).”

10. Paragraph 1.1.5 of the List of Issues does not expressly refer to bullying in relation to that meeting.
11. The List of Issues was revisited at the Case Management Hearing on 14 November 2023, and several minor revisions were made. Those did not affect paragraph 1.1.5.

Law

12. The Tribunal may 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.
13. Rule 72(1) requires initial consideration of the application. If the Employment Judge considers that there no reasonable prospect of the original decision being varied or revoked, the application shall be refused.
14. The Tribunal shall give effect to the overriding objective in interpreting, or exercising any power given to it by the Tribunal Rules.
15. An application for reconsideration under Rule 70 can only be entertained by a tribunal for the end of varying or revoking a decision. It is not a means to challenge the reasoning where there is no reasonable prospect of the decision being varied or revoked (*AB v Home Officer UKEAT/0363/13*).
16. The List of Issues is a case management tool (*Millin v Capsticks Solicitors LLP [2014] EAT 0093, per Langstaff J* and *Parekh v London Borough of Brent [2012] EWCA Civ 1630 per Mummery LJ*).
17. That the list of issues is the distillation of a party's case from the ET1/ Grounds of Complaint is established in the case of *James Scicluna v Zippy Stitch Ltd and ors, CA [2018] EWCA Civ 1320, 2018 WL 02740463* (“Zippy Stitch”). The Court of Appeal there confirmed that where the list of issues has been agreed, that will, as a general rule, limit the issues at the substantive hearing to those in the list. That applies too where the list has been developed in the course of a case management hearing conducted by an Employment Judge, and not thereafter challenged. It would be exceptional to depart from the precise terms of an agreed list of issues.
18. The EAT considered Zippy Stitch in *Saha v Capita plc [2018] EAT 80*, holding that a tribunal’s core duty is to hear and determine the case in accordance with the law and the evidence; it should depart from an agreed list of issues where a failure to do so would

prevent it from determining the case in accordance with that duty. Similar comments were made by the Court of Appeal in *Mervyn v BW Controls Ltd* [2020] ICR 1364 CA, where the Court of Appeal held that it is good practice for an employment tribunal, at the start of a substantive hearing with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not, the tribunal should consider whether an amendment to the list of issues is necessary in the interests of justice.

19. In *Moustache v Chelsea and Westminster NHS Foundation Trust* [2022] EAT 204, the EAT observed that while a list of issues is a helpful case management tool, it should not be slavishly adhered to, or elevated to a formal and rigid pleading, such as to preclude a fair and just trial of the real issues. It is not a pleading, claim form or response, and its use is subject to the overriding objective of dealing with cases fairly and justly.
20. While there is a general rule that agreed lists of issues, including those set out by an Employment Judge at a preliminary hearing should be followed, there is also an obligation on the Tribunal to establish at the outset of the hearing whether there is a need to address the List of Issues in order to address the case fully and fairly. The point is made in *Yorke v Glaxosmithkline Services Unlimited* (EA-2019-000962-BA (previously UKEAT/0235/20/BA), that, “A list of issues is a tool to assist the tribunal to do its job and it is always worth considering carefully whether it actually works.”

Analysis

21. The List of Issues here encapsulated the 56 paragraphs in the claim form into 15 summary factual allegations of breach of contract, in the course of a telephone hearing. The allegations are multiple, relating to matters arising over a considerable period. The issue that is challenged relates to an asserted breach of the mutual term of trust and confidence. To aid the reader by saving cross referencing, the issue in relation to the meeting of 21st December 2021 was defined in the List of Issues as a breach of the implied term of trust and confidence in,

“1.1.5 On 21 December 2018, calling the Claimant to a meeting to discuss performance improvement (and other matters discussed at the meeting are also relied on).”
22. The wording of the Issue in question is loose and general. With hindsight, it does not encapsulate fully the content of this element of the claim.
23. Consideration of the grounds in the ET1 show that they refer to the issues here as the change at the meeting in its purpose and scope, the proposal of a performance improvement plan, Mr Hemphill’s challenge to the allegations and his reference to it being the start of a “bullying campaign”.

24. The wording of the Issue does not here identify bullying in terms. That contrasts with later issues, where bullying is specifically identified as an element (1.1.9, 1.1.10, 1.1.11, 1.1.12, 1.1.13).
25. The Claimant had complained of the manner in which the meeting was conducted: he raised it as part of his grievance, evidencing bullying and victimisation (para 4.151).
26. In his grounds for the claim he refers to this as the start of a significant bullying campaign.
27. He saw the conduct of the meeting as bullying. The identification of the issue does not reflect that in terms.
28. However, it is not the case that he had abandoned that aspect of his claim in relation to this meeting.
29. The Respondent's contention is that the Issue as defined points only to the calling of the meeting or as to whether the allegations were substantiated or not.
30. Calling the meeting and other matters discussed at the meeting were presented in the List of Issues as being in breach of the implied term.
31. Calling a meeting cannot of itself be such a breach. There must be more to the allegation than that. That is made clear in the additional wording referring to other matters. To understand the issue and the nature of the breach, it is necessary to go back to the wording in the ET1.
32. The Issue as defined does not refer to whether or not the issues were substantiated. The meeting was not called to substantiate the allegations, nor was that the issue before the Tribunal. It was not an investigation, the evidence was not canvassed and no response was permitted.
33. If the issue were whether or not the allegations were substantiated at that meeting, the judgment makes it clear that they were not.
34. I am not satisfied that the Respondent's case as to what the Issue here was is a fair and reasonable reading of the Issue as drawn, even on its strict wording. The proper understanding of Issue 1.1.5 does require reference back to the ET1; that is not unreasonable or difficult.
35. It might have been helpful to look more closely at the issues at the outset of the hearing, in order to clarify exactly what was at issue here. This List had however been considered by two Employment Judges, most recently on 23 November 2023, and there would have had to be very good reasons for reconsidering the issues as drafted. That exercise of course might well have been challenged, in particular if either party considered the issues as reformulated as requiring additional preparation in order for there to be a fair hearing.

It would have been necessary to weigh any lack of clarity against the risk of delay, including any risk of postponement of the hearing. I did not see that that was needed, given that the issue related to a few clear paragraphs in the grounds for the claim. Based on the context, that is, the content of the claim form, I did not identify any lack of clarity or that reformulation was justified.

36. It appears that the Respondent has a different interpretation of the issue, but it is not one that I accept as well-founded.
37. The Respondent expressly applies in respect of the wording of paragraphs 7.74, 7.78, 7.80 and 7.157. The challenge in relation to the first three relates to Mr McNamara's manner of conducting the meeting, the conduct of the meeting or his approach to the meeting. The point on which the Respondent relies in saying there has been a procedural mishap that has denied the Respondent a fair and proper opportunity to present the case is in relation to the opportunity to respond to allegations that the approach or manner in which the meeting was conducted that amounted to bullying.
38. It is said that Mr McNamara was not cross examined on those points and they could not be addressed in closing submissions.
39. The complaint Mr Hemphill made in the ET1 was that performance and conduct were introduced without notice and based on made up and unsubstantiated concerns, leading to a performance improvement plan, at Mr McNamara's instigation. The conduct that was held to be unfair in paragraphs 7.74 and 7.78 of the Judgment was the lack of warning in relation to performance and conduct matters, in a meeting with two senior managers, without context or investigation or the opportunity to respond, leading to a performance improvement plan. It is called in the Judgment misguided, brutal and bullying and calculated to put Mr Hemphill on the defensive.
40. In my judgment, those findings were factual findings that I was entitled to make, based on the wording of the Issue, with reference to the relevant grounds for the claim. It does not go beyond the Issue as defined.
41. Mr McNamara was cross examined over whether the allegations had been raised with Mr Hemphill before the meeting, and whether it had been disclosed to him prior to the meeting that the meeting would be about performance and conduct, with a view to introducing a performance improvement plan. He said he was unaware of whether there had been earlier discussion of Mr Hemphill's performance or conduct, and unaware of the uncritical recent appraisal. He did not suggest that Mr Hemphill had had any warning of the nature of the meeting. It was put to him that he had the major role in the conduct of the meeting, rather than Mr Turk. He had the opportunity to comment on the matters held to be unfair.
42. Those were the matters that were then described in paragraph 7.74 as a bullying approach, and in paragraph 7.78 as a misguided, brutal and bullying approach. Those were my findings.

43. I do not consider that there was a failure to address these points in cross examination or that the Respondent was taken by surprise.
44. Paragraph 7.80 relates to the recording of the meeting, which was not heard by the officer dealing with the grievance. Mr Hemphill complained that that refusal to listen to the recording undermined the grievance outcome given that, he says, the recordings show the determination of the bullying and victimisation campaign against him (para 25, ET1 grounds). The point being made in the Judgment in the reference to the manner in which the issues were presented is that the content of the email of 12 December, the performance improvement plan and the covering letter do not reflect the allegations as put to Mr Hemphill in the course of the meeting. The Respondent has not produced contemporary notes of the meeting. The Tribunal had the benefit of a transcript of Mr Hemphill's recording. From the improvement plan and covering letter, Mr Rooney could not make a full assessment of what had happened at the meeting.
45. Again, I do not consider that the findings in paragraph 7.80 were findings that I was not entitled to make or that the Respondent was taken by surprise.
46. I do not find that there has been a procedural mishap which denied the Respondent a fair and proper opportunity to present the case.
47. In any event, including if I am wrong in that conclusion, the Respondent was not prejudiced, given the judgment made.
48. The finding of constructive dismissal is not challenged. The Respondent challenges elements in the reasoning and in particular in the findings of bullying in 2018. The Respondent does not challenge the Judgment.
49. Paragraph 157 is challenged. In that paragraph, I held that Mr Hemphill could not rely on the conduct of the meeting in 2018 in relation to his constructive dismissal claim.
50. He had resigned on 15 July 2022.
51. The finding of constructive dismissal is based on events in 2022 and is not the subject of this application for reconsideration.
52. Even if the findings in relation to the meeting of December 2018 were wholly changed, the judgment would remain the same.

53. Given that, in my judgment, there is no reasonable prospect of the original decision being varied or revoked.

54. The application is refused.

Employment Judge Street

Date 14 March 2024

JUDGMENT SENT TO THE PARTIES ON

27 March 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE