Case Numbers: 2302397/2020
2302411/2020
2305076/2021

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON (by CVP)**

BETWEEN:

Miss U Prasad **Claimant**

AND

Epsom & St Helier University Hospitals NHS Trust (1) **Respondents**
Jacqueline Totterdell (2)

ON: **15 April 2024**

Appearances:
For the Claimant: **Dr P Howard**
For the Respondent: **Ms R Azib KC, Counsel**

JUDGMENT

1. Except insofar as they relate to the Claimant's dismissal on 9 June 2020:
    a. the Claimant's claims against the First Respondent of harassment on the grounds of sex and victimisation in case number 2302397/2020;
    b. the Claimant's claims against the First Respondent of race discrimination and victimisation in case number 2302411/2020; and
    c. all and any other claims and issues referred to in the particulars of claim attached to case numbers 2302397/2020 and 2302411/2020;
    are res judicata and are struck out;

2. The claims against the Second Respondent of race and sex discrimination, harassment, victimisation, whistleblowing detriment and automatic and unfair dismissal set out in case number 2305076/2021 have no reasonable prospect of success and are struck out.

3. The Claimant's claim of unfair dismissal and any application by the First Respondent in respect of that claim shall be stayed pending the outcome of the

Claimant's appeal to the EAT in case numbers 2303151/2018 and 2305631/2019.

REASONS

Introduction

1. This is my judgment and reasons following a preliminary hearing conducted in public by CVP on 15 April 2024. The purpose of the hearing, which had been postponed from a date in October 2023, was to consider applications by the Respondents for strike out and deposit orders in respect of the claims made by the Claimant, Miss Prasad in case numbers 2302397/2020, 2302411/2020 and 2305076/2021. The essence of their applications was that the new claims raise issues that are res judicata, are an abuse of process or have no reasonable prospect of success. The applications were resisted by the Claimant.

2. At the hearing I heard from Dr Howard on behalf of the Claimant, from Ms Azib on behalf of both Respondents and from the Claimant herself. There were a number of observers joining the remote hearing. I was provided with skeleton arguments and written submissions by the Claimant and Ms Azib, a bundle of authorities from Ms Azib and a bundle of documents prepared by the First Respondent. To the extent that I was not able to read these before and during the hearing I read them afterwards whilst preparing these reasons. I refer to the parties' submissions only in so far as is necessary to deal with the issues arising in the applications. Not all of the submissions made by the Claimant were relevant to those issues.

3. References to page numbers below are references to page numbers in the Claimant's submissions where I use the prefix "CS" and to page numbers in the First Respondent's bundle where I use the prefix "RB". For the avoidance of doubt, I referred only to the documents that were provided to me before and during the hearing. The Claimant made references to some documents with which I was not provided and I was therefore unable to refer to them.

The law and legal materials

4. The law applicable to the applications I was dealing with is set out in the authorities and materials to which I was referred by Ms Azib. These were:

    a. *Virgin Airways Limited v Zodiac Seats UK Limited (formerly known as Contour Aerospace Limited) [2013] UKSC 46* which in turn refers to and considers a range of leading authorities on the doctrine of res judicata. The doctrine is described by Lord Sumption in the judgment as a "portmanteau term" covering cause of action estoppel, the doctrine of merger, issue estoppel and abuse of process and including the rule in Henderson v Henderson [1843] 3 Hare 100;

b. An extract from Spencer Bower and Handley: Res Judicata (Fifth Edition); and
c. An extract from Harvey on Industrial Relations on Cause of Action and Issue Estoppel.

5. I have also made reference where necessary in these reasons to the authorities the Claimant relied on in her own skeleton argument.

6. I also considered the provisions of Rules 37 and 39 of the Employment Tribunal Rules, dealing with strike out and deposit order respectively:

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a)that it is scandalous or vexatious or has no reasonable prospect of success;

(b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c)for non-compliance with any of these Rules or with an order of the Tribunal;

(d)that it has not been actively pursued;

(e)that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

History

7. The Claimant has filed a total of six claims arising out of matters arising during her employment and, on 9 June 2020, her dismissal.

8. The claims in Claim 1 (2302369/2016) were brought against the First Respondent. The allegations were of sex discrimination, bullying, harassment, victimisation and detriment due to protected disclosures and were dismissed by Judge Andrews sitting with members by a judgment dated November 2017. One matter was remitted after an appeal, but failed on remittal.

9. The claims in Claims 2 and 3 (2303151/2018 and 2305631/2019), were brought against the First Respondent and were consolidated. The claims in Claim 2 were of workplace harassment, bullying, discrimination, victimisation and gender pay gap. The claims in Claim 3 were of race and sex discrimination, detriments on the grounds of making protected disclosures, harassment on the grounds of sex, discrimination and harassment on the grounds of illness caused by the First Respondent. Other than an equal pay claim, which was withdrawn by the Claimant, all the claims were dismissed by a unanimous judgment of Judge Hyams-Parish sitting with members on 7 February 2022 (the "Hyams-Parish judgment").

10. The Claimant submitted Claim 4 (2302397/2020) on 15 June 2020. The claims were for interim relief, automatic and unfair dismissal, harassment on the grounds of sex and victimisation.

11. She submitted Claim 5 (2302411/2020) on 16 June 2020 and the claims were for interim relief, automatic and unfair dismissal, race discrimination and victimisation.

12. The interim relief application was not successful.

13. The Claimant submitted Claim 6 (2305076/2021) against Jacqueline Totterdell, CEO of Epsom & St Helier University Hospitals NHS Trust (the "CEO") on 6 October 2021, 16 months after her dismissal. The claim form alleged race and sex discrimination, harassment, victimisation, whistleblowing detriments, automatic and unfair dismissal. The claim form contained no particulars. Particulars of the claim were not provided until 23 April 2023.

14. On 17 December 2021 the First Respondent made an application [RB212] for Claim 6 to be struck out on the papers on the grounds that the claim had contained no particulars and could not be sensibly responded to, it had not explained what the discrimination, whistleblowing or victimisation claims were about or why they had been brought against the CEO and that neither the ordinary nor automatic unfair dismissal claims could be brought against the CEO, who was not the employer. Accordingly, the First Respondent submitted that Claim 6:

    a. has no reasonable prospect of success (rule 37(1)(a);
    b. cannot sensibly be responded to (rule 12(1) (b);
    c. has not been actively pursued (rule 37(1) (d); and/or
    d. is outside of the Tribunal's jurisdiction.

15. On 24 May 2022 the First Respondent made an application in relation to Claims 4 and 5 [RB286], reciting the procedural history and submitting that many of the factual matters pleaded in the Claims 1-3 are identical to and overlap with the issues in Claims 4 and 5. It submitted that:

    a. factual and legal matters that have been decided are res judicata;
    b. asking for allegations to be considered again is an abuse of process;
    c. the tribunal does not therefore have jurisdiction to deal with such matters;
    d. alternatively the claims are bound to fail given compelling earlier findings of fact, or are misconceived.

16. The First Respondent sought a strike out of the claims or, in the alternative, deposits, citing the statutory tests in the Employment Tribunal Rules set out above. It also sought a consolidation of Claims 4-6 and preliminary hearing to deal with its applications.

17. On 1 December 2022 Employment Judge Balogun made an order for consolidation of Claims 4-6, with Claim 4 as the lead file. She declined to strike out Claim 6 on the papers.

18. The application was eventually listed for hearing in October 2023 and that hearing was then postponed to 15 April 2024. I apologise to the parties for the delay in providing this decision, which has been due to the pressure of other work.

What is the Claimant claiming in Claims 4-6?

Claims 4 and 5

19. The First Respondent's bundle [RB149-160] contained the particulars of the claim in Claims 4 and 5. I have read those particulars carefully.

20. Ms Azib on behalf of the Respondents made detailed submissions noting that the matters raised in Claims 4 and 5 were identical to the matters raised in Claims 2 and 3. Ms Azib made a careful comparison of the Hyams-Parish judgment and took me through the relevant paragraphs, by reference to the matters seemingly raised in Claims 4 and 5.

21. In the particulars to Claims 4 and 5 the Claimant begins with a description of events in 2012. It sets out a narrative that on my reading fully repeat the very facts and events that are dealt with in the Hyams-Parish judgment. This document was submitted on 15 and 16 June 2020 at which point the Hyams-Parish hearing had not yet taken place and the Hyams Parish judgment had not been delivered. It is therefore to some extent unsurprising that the Claimant decided to set out again at that point, the matters some of which were still to be considered and determined by the employment tribunal in

Claims 2 and 3. But looking at matters as they stand now, in my judgment everything relied on concerns matters that have already been adjudicated in Claims 1-3, with the exception of the Claimant's dismissal which I deal with separately below.

22. The Claimant made submissions in her skeleton argument as to why I should not determine that the matters adjudicated in Claims 1-3 are now res judicata or should not otherwise decide that the Tribunal does not have jurisdiction to hear them. Leaving aside her submissions on dismissal, which I broadly accept, she makes several submissions that I reject:

    a. She relies on the fact that that there is an outstanding appeal in relation to Claims 2 and 3. But if it is the Claimant's case that there were errors of law in the Hyams-Parish judgment, in my judgment the proper channel for dealing with that is her appeal to the EAT which I understand has now been heard. It would be an abuse of process to attempt to circumvent the appeal process by pursuing claims and issues in parallel proceedings (Claims 4 and 5) that are the subject of appeals in cases that have already been dealt with (Claims 1-3), if indeed that is what the Claimant is trying to do.

    b. She refers at page 3 of her skeleton argument to an unresolved application for reconsideration of an aspect of the judgment in Claim 1. Again, the proper channel for dealing with that is the reconsideration process applicable to Claim 1. It is an abuse of process to try to circumvent or supplement that process by bringing parallel proceedings, if that is what the Claimant is trying to do.

    c. She refers to what she describes as the exceptionally serious nature of the public interest disclosures she relies on in the proceedings she has brought. She relies on this to argue firstly that the doctrines of res judicata and issue estoppel should not apply at all when the issue in question is of particular gravity. I do not accept that argument, or that it is supported by the authority she relies on (Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982] 2 Lloyd's Rep 132) whose facts are clearly distinguishable from those of the Claimant in this case (and which concerned proceedings where the parties to the overlapping proceedings were not one and the same). But she also suggests that given the strong public interest in protecting whistleblowers and the seriousness of her disclosures, it would be "contrary to justice" to apply these doctrines inflexibly to preclude her claims. I do not accept the premise of that argument, which taken to its logical conclusion would leave it open to any whistleblower who had raised serious concerns to seek to have issues litigated multiple times, in pursuit of a more favourable outcome. If the Claimant is dissatisfied with the original decision of the Tribunal and a matter of law arises, she can appeal, as she has done. But otherwise, there is no general principle that justice requires whistleblowing claims to be treated as an

exception to the principles of res judicata and issue estoppel.

23. I considered the Claimant's submissions carefully, but I do not accept them. With the exception of the matter of her dismissal, all matters referred to in Claims 4 and 5 are in my judgment matters that have already been the subject of decisions of earlier Tribunals by way of findings of fact and decisions on the legal issues that arise. Cause of action estoppel, issue estoppel and the doctrine of merger all apply. These matters are therefore res judicata and the Tribunal has no jurisdiction to hear further claims on those issues. It is accordingly an abuse of process to pursue them further. For completeness, if and to the extent that the Claimant wishes to rely on matters that were not explicitly decided upon in Claims 1-3, but could have been put forward during the course of those proceedings, the doctrine in *Henderson v Henderson* prevents her from putting these matters forward now.

24. All of the content of the particulars of claim in Claims 4 and 5 that are set out at [CS149-160] are therefore struck out with the exception of the reference to the Claimant's dismissal on [CS149] where she asserts that the dismissal was a direct result of making protected disclosures about patient safety issues and for raising concerns about internal bullying, harassment and sex discrimination. I return to the question of the Claimant's dismissal below.

25. For the avoidance of doubt, I have considered whether it was the Claimant's case that the particulars belatedly filed in April 2023 related to Claims 4 and 5. I find that that was not the case. On the contrary, on 3 and 4 April 2023 the Claimant sent two emails to the First Respondent, cited on page 2 of the Claimant's skeleton argument, the second of which confirmed that the particulars she had sent the previous day related to Claim 6. She wrote:

> **"Following my email below, I note that the following attachments were not sent and I attach them now;**
> **1. Particulars of the claim for 2305076-2021**
> **2. GMC Expert report."**

26. It is therefore clear that the particulars in question related only to Claim 6. That leaves an issue about the referral of the Claimant to the GMC, which I return to in paragraph 43 of these reasons.

Claim 6

27. The Claimant says in her skeleton argument (page 1) that the CEO "is included as the Second Respondent". In fact, the Claimant has brought Claim 6 only against the CEO and the CEO is therefore the first respondent to that claim.

28. The Respondents are correct in stating that no particulars of Claim 6 were filed until April 2023. The Claimant herself acknowledges this on page 2 of her skeleton argument where she says:

Particulars of the claim 6 - the Respondent states "The claims remain unparticularised" - page 5 of Respondents skeleton arguments. This is clearly not true as "particulars of the claim" was provided in email on 4 April 2023; Email was sent to ET and Respondents representative, Ms Janotta".

29. The Respondents submit that those particulars are therefore very substantially out of time and that they should not be accepted without a formal amendment application, which the Claimant did not make. Before considering that argument I will set out what it seems to me that Claim 6 is about. I have taken the following details from pages 14 - 17 of the Claimant's skeleton argument and comment as follows as to whether or not the claim raises matters that have in my judgment already been adjudicated, using the Claimant's own numbering.

    (i) Sets out a claim for automatically unfair dismissal for whistleblowing. This has not been adjudicated.

    ii-v) Refer to matters that have been adjudicated or are still being dealt with within Claims 1-3;

    vi)-vii) Contain a further reference to dismissal – this has not been adjudicated;

    viii) refers to the decision to refer the Claimant to the GMC and raises concerns about the manner in which that referral was dealt with. This has not been adjudicated.

    ix) Complains that the appeal against dismissal was not upheld despite the fact that the Claimant had been exonerated by the GMC in the interim. This has not been adjudicated.

30. There is then a passage [CS15-17] without numbering, that refers to internal MHPS investigations. These are matters that have already been adjudicated in Claims 2 and 3.

31. The remainder of the Claimant's skeleton argument is difficult to follow and is not set out chronologically or systematically. However, the Claimant next sets out a complaint of post termination victimisation concerning the treatment of her belongings and the handling of a grievance after her dismissal. This has not yet been adjudicated.

32. There are a number of references [CS7, 37, 41] to the Claimant's requests, made to the CEO either by the Claimant directly or via other members of the medical profession on her behalf for the Claimant to be reinstated in her role. The Claimant's premise appears to be that the CEO has "overall responsibility" for the processes at issue in the case [CS30] and that it is within her gift to reinstate the Claimant. I have reflected on the nature of this claim. The Claimant accepts [CS30] that the CEO was not involved in the "internal appeal process" (I take this to mean the Claimant's appeal against

her dismissal). Nowhere in her skeleton does the Claimant suggest that the CEO has refrained from reinstating the Claimant because she has made protected disclosures or did protected acts in the sense that that was part of the CEO's motivation. In other words, I do not see anything resembling a whistleblowing detriment claim in the Claimant's skeleton argument. I therefore interpret this as a claim of "failure to reinstate".

33. The nature of the claim against the CEO in respect of matters that have not already been adjudicated is therefore, in summary:

    a. A claim of unfair dismissal for making protected disclosure. It is axiomatic that the claims of ordinary and automatic unfair dismissal cannot be brought against the CEO who is not and never has been the Claimant's employer. Accordingly that claim has no reasonable prospect of success.

    b. A compliant about the referral of the Claimant to the GMC and the manner in which that referral was managed. The decision to make the referral was taken some 13 months before the CEO joined the Respondent (July 2021) and the Claimant's appeal against her dismissal was concluded in November 2020.The CEO cannot therefore have had any part in the referral to the GMC or the handling of the appeal and that claim therefore has no reasonable prospect of success.

    c. A complaint about the treatment of the Claimant's belongings following termination of her employment. That too occurred some 13 months before the CEO joined the Respondent. The CEO cannot therefore have had any part in the decisions about the Claimant's belongings and that claim therefore has no reasonable prospect of success.

    d. A complaint about the handling of her grievance post termination of her employment. The grievance process was conducted before the CEO joined the Respondent. The CEO cannot therefore have had any part in the process and that claim therefore has no reasonable prospect of success.

    e. A complaint that the CEO has not reinstated her despite requests from a number of sources. I interpret this claim as one of two things. One possibility is that it is a claim for an order that the CEO reinstate the Claimant. If that is so, then the claim is premature. An order for reinstatement can be made as a remedy for a dismissal that the Tribunal has found to be unfair. But the dismissal claim has not yet been decided, so by seeking reinstatement the Claimant is seeking a remedy before a finding on liability. If that is the claim she is bringing the claim is therefore misconceived. The second possibility is that the Claimant is seeking to make the CEO personally responsible for the Claimant's dismissal. If that is the case the attempt is in my judgment

misconceived on both legal grounds (see above) and on the facts of the matter, as the CEO was appointed some 13 months after the Claimant was dismissed.

34. Therefore, none of the Claimant's claims against the CEO as explained in her skeleton argument have any reasonable prospect of succeeding and they should be struck out pursuant to Rule 37(1)(a) of the Tribunal Rules. This deals with the question of strike out without me needing to consider whether or not the Claimant has made an amendment application. For completeness, if one had been made it would not have succeeded on the basis of the laakc of merit in the claims encompassed in the application.

35. For all these reasons the claims in Claim 6 are struck out.

The Claimant's dismissal

36. The Claimant was dismissed in June 2020. The reasons put forward by the First Respondent were related to capability and an irretrievable breakdown in relations with her colleagues. The fairness or otherwise of the dismissal has not been adjudicated by any employment tribunal. The Hyams-Parish tribunal was careful to say that it was not deciding matters that had occurred subsequent to the events covered by the list of issues in the case. That did not include the Claimant’s dismissal.

37. It is the First Respondent's case that a claim for unfair dismissal is bound to fail or has little reasonable prospect of success because of the matters that have been dealt with in the Hyams-Parish's judgment. It was accepted in Claims 2 and 3 that the Claimant had made protected disclosures, but none of the conduct of First Respondent of which the Claimant complained was found to be detrimental because of any of the unlawful reasons. The First Respondent elaborated on this argument in Ms Aziz’s helpful written submissions, which contained a detailed analysis of the Hyams-Parish judgment and its findings and conclusions on matters that could potentially be relevant to a finding of unfair dismissal (whether under s98 or s103A Employment Rights Act 1996 ("ERA")).

38. The Claimant submits that the dismissal was the culmination of the unlawful treatment to which she had been subjected because she had made protected disclosures and done protected acts (in the Hyams-Parish judgment these were collectively referred to as "the unlawful reasons"). In the particulars of Claims 4 and 5 [RB149] her words are: "It is the Claimant's case that the dismissal was a direct result of making protected disclosures about patient safety issues and for raising concerns about internal bullying harassment, sex discrimination. The Claimant seeks a Re-instatement to her previous role as a Consultant Cardiologist and Lead Clinician for Heart Failure."

39. The Claimant also says that she brings a claim for ordinary unfair dismissal under s98 ERA. Her particulars are entitled "Particulars of claim for Interim

Relief for Automatic and Unfair Dismissal". The claim form for Claim 4 [RB131] states: "The dismissal is not only automatic unfair dismissal because of the disclosures and therefore I have been subjected to detriments and victimisation) but also unfair dismissal". The claim form for Claim 5 [RB143] states "I am claiming for automatic and unfair dismissal on the grounds that the case built against me and the sanction applied were unfair. The case was brought against me because I am a BAME female who had made disclosures in the public interest, had complained of bullying, harassment and discrimination by some of my male colleagues within and leading the service and dismissal was wholly unreasonable in all the circumstances of my case." However, no further details of an ordinary unfair dismissal claim are given in the particulars of claim accompanying Claims 4 and 5 [RB149-160] and it is not clear what the nature of the Claimant's assertion of unfairness is other than her assertion that the dismissal was for an unlawful reason (whistleblowing or discrimination).

40. I should emphasise at this point that in my judgment any Tribunal assessing whether the dismissal was fair or unfair whether on ordinary principles or because of any of the unlawful reasons relied on by the Claimant, would be bound by the findings of fact and conclusions on the issues set out in the Hyams-Parish judgment (and if relevant the judgment in Claim 1) to the extent that these related to the dismissal itself. The Respondent correctly submits that it would be an abuse of process for the Claimant to be using Claims 4 and 5 to relitigate matters that have already been determined in previous proceedings and I have already decided that the particulars in Claims 4 and 5 that repeat what has already been decided in Claims 1-3 must be struck out. This would mean a balancing exercise for the Tribunal involved which would need to read and understand the previous decisions but be astute not to make them again, whilst making decisions about the dismissal itself. A list of issues will be helpful to this process, if it takes place.

41. I am not however prepared at this stage to strike out, or make a deposit order in respect of the claims relating to the dismissal. My principal reason for taking this view is the Claimant has appealed the decision of the Hyams-Parish tribunal and that appeal remains outstanding at the time of writing. I understand that the appeal was heard in June 2024. If any ground of appeal is successful, it may reopen some of the issues regarding the whistleblowing detriment and other unlawful reasons that had been determined in the Respondent's favour and may therefore have an impact on how the Claimant's dismissal and the reasons for it should be approached. It would not be fair to the Claimant to prevent her from having the fairness of her dismissal considered in a full hearing where there is an appeal outstanding that might affect the issues to be decided. For that reason, I consider that it would be premature to strike out the Claimant's claim regarding her dismissal or to make a deposit order in respect of it. The claim of unfair dismissal made in Claims 4 and 5 and the application for strike out/a deposit order should instead be stayed until the outcome of the appeal to the EAT is known.

42. There is one further matter related to the Claimant's dismissal which, because of the manner in which she chose to present Claims 4-6, has not been properly included in any of the claims and falls away with the dismissal of Claim 6. That is the question of the Claimant's referral to the GMC and her exoneration by the GMC. She refers to this in the belatedly supplied particulars of Claim 6 and it was a matter that was alluded to at the hearing of Claims 2 and 3. The Hyams-Parish judgment said the following at paragraph 169:

> **Mr Jackson also suggested that the Tribunal was not restricted to looking at those matters which pre-dated the second claim when determining those claims which had arisen and which formed part of the second and third claims. The Tribunal agreed with that in principle. Of course, the Tribunal was careful not to stray into areas that would be the subject of any subsequent claims but where it had a bearing on those matters before this Tribunal, then of course the Tribunal agreed that it should be considered. One such matter that the Tribunal was invited to consider was the outcome of the claimant's hearing before the GMC. The GMC began an investigation into the claimant which concluded in March 2021 with no further action to be taken. The claimant continued to state throughout this hearing that she had been exonerated by the GMC, suggesting that their conclusion must cast doubt on the actions and motivations of the respondent. However, the Tribunal found it difficult to draw any such conclusions from the GMC outcome. The Tribunal was not shown the content of the GMC referral or the case examiner's report. Whilst the GMC and the respondent were looking at the same cases, their remits were likely to be quite different. In any event, the Tribunal was not shown sufficient evidence to decide either way.**

43. That passage clearly does not amount to a determination about the significance of the GMC referral or its outcome. On the contrary, the Tribunal was at pains to say that it did not want to "stray into areas that would be the subject of any subsequent claims" and declining to make a finding that the GMC report cast doubt on the Respondent's motivations. It is clear however from the written and oral submissions the Claimant made that she considers that the referral to the GMC was done for an unlawful reason and that the Respondent failed to have sufficient regard to the implications of her having been exonerated when it dealt with her appeal against dismissal. She has not however formally included these complaints in Claims 4 and 5 or explained how these concerns would relate to a claim of unfair dismissal. If she wishes to do so she must therefore make a formal application to amend her claim to which the Respondent should have the opportunity to respond.

44. Once the outcome of the appeal to the EAT is known there will therefore need to be a further preliminary hearing at which the implications of the appeal decision are considered. This may include:

    a. identification of the issues that arise in relation to the dismissal complaint (taking into account the need to exclude any issues that have been determined in Claims 1-3);
    b. consideration of any application for amendment the Claimant decides to make; and

c. if appropriate, further consideration of the Respondent's applications for strike out and/or a deposit order.

45. I consider that this would require a full day's hearing. The parties are asked to suggest dates for that hearing based on what is understood to be the likely date of the outcome of the appeal.

46. There are two other matters I will address briefly. The first relates to the Claimant's suggestion that the Respondent has attempted to mislead the Tribunal by excluding certain materials from the bundle for the hearing. Given the chronology and the fact that the bundle was prepared for a hearing originally scheduled for October 2023, I find no evidence that that was the case. I make this point explicitly in light of the seriousness of an allegation that professional representatives have engaged in deliberately misleading conduct.

47. The second concerns the Claimant's assertion that pursuing her for costs was an act of victimisation that ought to be further adjudicated by the Tribunal. I do not accept that suggestion and accept the Respondent's submission that any issue as to the propriety of pursuing a costs application, including the question of whether pursuit of them represented an act of victimisation could and should have been dealt with within the costs proceedings and any appeal related to them. The remedy, if a costs order has been wrongly pursued is that the costs award is not made and if it is wrongly made the remedy is that it is set aside on appeal. It would in my judgment be an abuse of process to attempt to challenge the application for costs in further, parallel proceedings.

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Employment Judge Morton
Date: 5 July 2024

Sent to the parties on
Date: 8 July 2024