EMPLOYMENT TRIBUNALS
PUBLIC PRELIMINARY HEARING

Claimant: Dr J Ilangaratne

Respondent: Humber Teaching NHS Foundation Trust

HELD AT: **Hull** **ON: 1 July 2025**

BEFORE: **Employment Judge JM Wade**

APPEARANCES:
Claimant: **in person**
Respondent: **Mr D Bayne, counsel**

RESERVED JUDGMENT

1 The claimant's unlawful deduction from wages complaint is dismissed on its withdrawal.

2 The claimant's breach of contract complaint has no reasonable prospects of success and is dismissed for the reasons set out below.

3 The claimant's application to amend his claim is refused.

4 The case management hearing of 4 August 2025 is vacated.

REASONS

Introduction and previous orders

1. This hearing was directed in Orders sent to the parties on 10 March 2025 as follows:

2. *"The preliminary issues for determination are, does the claim have no reasonable prospect of success because:*

2.1. A complaint of unathorised deduction from wages does not (under sections 27 (1) and 27 (2) (d) of the Employments Rights Act 1996) apply to any payment referable to a worker's redundancy;

2.2. A complaint of unathorised deduction from wages does not (under section 27 (1) of the Employments Rights Act 1996) apply to alleged non-payment of employers' pension contributions because this is not a sum payable to the worker.;

2.3. The complaint(s) of breach of contract under section 16.24 of the NHS Terms and Conditions Handbook – if applicable- is/are not a claim which arose or was outstanding on the termination of employment (3rd May 2023) but only after the award of the retrospective pay increase from 1st April 2023 (September or October 2023) – under article 4 (c) of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994;

2.4. The complaints whether or unauthorised deductions or of breach of contract were not brought within 3 months of the relevant date, when it was reasonably practicable to have done so, or were not brought within a reasonable time thereafter: section 23 (2) of the 1996 Act and article 7 of the 1994 Order.

3. *Only if the claim(s) proceed will the Tribunal on the next occasion give further directions as to how any issues are to be determined arising from the allegation of misrepresentation in respect of the COT3 agreement and/or whether or not section 16.24 of the Terms and Conditions applies to a "voluntary" redundancy payment agreed under such a settlement.*

4. *Any application for privacy under rule 49 of the Employment Tribunal Rules 2024 will be dealt with at the next hearing.*

5. *The application to amend to add a complaint of post-employment victimisation in respect of paragraph 7 of the ET1, is also adjourned to the next hearing.*

6. *Further case management directions (including if applicable the ordering of an amended ET3) will then be addressed at the conclusion of the preliminary hearing."*

7. The claim, to which the directions above apply, is a money claim for a sum of around £5000 plus interest/consequential loss.

<u>This hearing</u>

8. Both sides had prepared skeleton arguments and I had a hearing file as directed. There had been no order for witness statements. The claimant had withdrawn his unlawful deductions from wages complaint and the only complaint before the Tribunal was one of damages for breach of contract pursuant to the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 ("the Order"). Questions 2.1 and 2.2 above had fallen away.

9. It was apparent that justice did not require oral evidence for the determination of 2.3 and witness statements had not been ordered. The claimant's primary

position was that this point could not be determined without hearing all the evidence and a final hearing was more appropriate – that submission had not born fruit on the last occasion and I did not consider there was any material change such that I would depart from the previous direction. I was content to address 2.3 on the basis of limited agreed facts and submissions only.

10. Mr Bayne encouraged both jurisdiction and time limits to be addressed together (rather than sequentially) and I agreed that would be the most efficient use of our time and in the interests of justice in the circumstances. If I were to address the question of "a further reasonable time period to present the claim" I would need to make findings of fact, and I canvassed the swearing in of the claimant to formally adopt and confirm the contents of his particulars on time limits, and to answer questions arising in connection with time limits, with which he was content.

11. I heard that oral evidence and then I heard further oral submissions from the parties, and I reserved my decisions to be given in writing.

12. We discussed the claimant's application for privacy under rule 49 at the start of this hearing and I indicated I was sympathetic to the claimant's wish to protect the privacy of his medical information. He had put it in the agenda for the previous private preliminary hearing as follows: "As requested under ET1/PoC, which parts of C's private medical information should be anonymised/heard in private and how it could be achieved per Rule 50, Tribunal rules."

13. We noted that there were no observers in this hearing. We discussed the various ways in which privacy may be achieved. Firstly, there may be no written reasons requested of any decision; secondly any reasons can be circumspect about the level of detail given – only that which is necessary to determine the issues; thirdly, if anonymisation is required, it is often necessary to anonymise a respondent in order to prevent patchwork or other identification of the claimant; one option is a key such as "health condition 1"; whatever approach is taken must balance the principle of open justice with the claimant's convention rights; it must also be mindful of the Tribunal's resources (the practical implementation of anonymisation orders requiring greater resources than open judgments).

14. Mr Bayne was without instructions on a privacy order and could not obtain them due to the absence of his instructing solicitor. The claimant opposed any anonymisation of the respondent in these proceedings, and when we discussed matters, he was content with the use of "a very serious illness" in any description of his relevant circumstances.

15. In the round and in all the circumstances of this case, having decided to reserve my decision, and written reasons becoming necessary, the right balance to be struck between convention rights and open justice in this case is the practical arrangements we discussed to describe the claimant's circumstances, rather than anonymity or redaction of any particular findings.

16. As to the claimant's amendment application, this was within the agenda for the last hearing, and in summary he sought to allege:

    16.1. By reference to paragraphs 5) and 6) of his particulars of claim, "alleged redundancy was not genuine or a sham in breach of s 139 Employment Rights Act 1996";
    16.2. By reference to para 7) Unfair Dismissal, Wrongful dismissal and or Dismissal because of protected acts, thus victimisation per s 27 Equality Act 2010;
    16.3. See para 15; despite an established custom and practice, refusing C permission to attend weekly remote SCP sessions because of the protected acts thus victimisation s27 Equality Act 2010 (also see para 7).

17. His skeleton for today referred to that agenda and said "*this is a case of relabelling those pleaded facts. Amendments would have an effect on financial remedy…I am unable to identify any real prejudice or injustice to R if the proposed amendments are granted. There would be greater disadvantage and injustice to me (Claimant) if the proposed amendments base on pleaded facts within POC/ET1 are not granted*".

18. His position addressed orally in this hearing repeated that the complaints were within his original particulars – the facts were there – and his amendment application was to identify the legal cause of action in the nature of a relabelling.

19. Mr Bayne's position was that the applications were premature – if I decided the jurisdictional or time points against the claimant, and the claims were struck out, there were no proceedings to amend. He referred me to Cocking as authority for that proposition.

20. I indicated that I wanted to take matters in the order set out by the previous Judge, and wished to reach my decision on the extant claim first before considering amendment. I directed a case management hearing to take place on 4 August 2025 at 10 am, should that be required, but as indicated above, I reserved my decisions.

21. The hearing took its course at a pace that was consistent with the claimant's illness – he had highlighted that he might need more time than would otherwise have been the case.

Findings of Fact

22. From 2011 to 2023 the claimant worked for the respondent as a Speciality Doctor for 30 hours per week. He was in receipt of an NHS pension following earlier medical retirement. He also holds judicial office as a medical member of the Tribunals.

23. In 2022 the claimant presented two Tribunal claims alleging Equality Act contraventions. On 3 May 2023 his employment came to an end by agreement within the terms of an ACAS COT3. He received sums through that agreement,

in respect of which he seeks a 6% uplift because on 7 August 2023 a 6% pay increase was announced for the NHS in respect of salaries from 1 April 2023.

24. The claimant began to suspect he was unwell in 2023; in September 2023 he was diagnosed with a very serious illness. A rapid treatment regime was put in place from October 2023 to March 2024, when it was paused. In October and November 2023 the claimant corresponded with the respondent's solicitors in connection with his belief that COT3 payments should be uplifted to reflect the pay award. He relied on 16.27 of the NHS Terms and Conditions of Service Handbook (which was before me today).

25. Section 16 deals with "Redundancy pay (England)". It provides:
"16.1 This Sections sets out the arrangements for redundancy pay for employees dismissed by reason of redundancy who, at the date of termination of their contract, have at least 2 years of continuous full-time or part-time service. These take effect from 1 April 2015. It also sets out the arrangements for early retirement....NHS contractual redundancy is an enhancement to an employee's statutory redundancy entitlement, the statutory payment being offset against any contractual payment.

.....
Retrospective pay awards
16.27 If a retrospective pay award is notified after the date of termination of employment, then the redundancy payment and/or pension will be recalculated, and any arrears due paid."

26. The claimant received a negative response to his correspondence, and he commenced ACAS conciliation on 27 November 2023 with a certificate being issued on 15 December 2023. The claimant heard from ACAS on 4 January 2024 that "they don't want to talk any more", which he understood meant there would be no conciliated settlement.

27. The claim felt too unwell to set out particulars of claim to the standard he wished, nor to undertake the research he wished to undertake, until the pause in his treatment had enable some respite in March 2024. He had previous knowledge of discrimination and victimisation law, but not redundancy or this sort of money claim. He began work on the claim in late March, and may also have undertaken some fee-paid remote sitting in the period March to May 2024, presenting his claim on 17 May 2024.

28. The claimant's offspring are grown up and live their own lives. His household comprises his wife and himself, and the health events above presented a profound challenge of a kind the claimant had not experienced before. The claimant did not have legal advice on this claim, whether informally from friends or family, or from lawyers, nor was he a member of the BMA – he regards himself able to manage most aspects of a Tribunal claim provided he can conduct research, and he understood the relevant time limits at the material times.

The Law

29. The relevant provisions of the Order are:

3.....Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or claim for a sum due, in respect of personal injuries) if....
...
...
(c)The claim arises or is outstanding on the termination of the employee's employment"

7.....an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented.....(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim,,,,,or (b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented....within such further period as the tribunal considers reasonable".

30. Article 8B replicates the ACAS extension provisions in other Tribunal claims – the "stop the clock" or "one month after Day B" provisions extend the ordinary three month period.

Submissions and conclusions on 2.3 and 2.4

31. These are very unusual facts and neither of the parties could help me with previous cases where the same, or a sufficiently similar matter, had been decided. That may or may not be surprising. The NHS is a very large employer. The sums in this case are relatively small - the claimant does not seek relief in relation to his NHS final salary pension, which is in payment, but his claim is confined to payments including the value of employer contributions to the "Nest" defined contribution scheme.

32. Argument focussed on Miller Bros & FP Butler Ltd v Johnston [2002] ICR 744, which reminded me, at paragraph 23 per Recorder Langstaff (as he then was) that the Order was intended to avoid duality of proceedings: employees and employers could have all matters (other than exempted disputes) arising from a contract of employment decided in the same forum – unfair and wrongful dismissals being the paradigm. Miller concerned a separate agreement to pay a sum to a director concluded some 11 days after employment ended.

33. The claimant's case on this point, developed orally, is that his termination agreement was concluded on the day that his employment ended – in that sense his claim satisfies the Miller temporal limitation – it is the combination of the termination within the termination agreement and 16.27 which gives rise to the cause of action.

34. He also says 16.27 "arises" on termination for redundancy, and it would be wholly wrong and unintended if the "temporal" interpretation, decided in Miller,

and contended for by Mr Bayne, prevented NHS employees of complaining to the Tribunal of a failure to make back payments of pension or redundancy pay, simply because 16.27 is an obligation which envisages fruition on the announcement of the pay award – likely to be some time after employment has ended.

35. Mr Bayne further advanced Peninsular Business Services Limited v Mr J Sweeney EAT/1096/02/SM, paragraphs 49 to 51 as supportive of his position. The claimant relied on, "In our view, a claim will only be "outstanding" at such date if it is in the nature of a claim which, as at that date, was immediately enforceable but remained unsatisfied". He says the obligation was unsatisfied at the date of termination.

36. I do not consider the claim can reasonably fall within "outstanding on" - that tortures the plain English of the Order. In common with Sweeney the claimant could not sue for an uplift to pension contributions and redundancy pay on the date of termination, as he could not on the day before, or the day after. He could only sue on the term (putting aside any substantive or other arguments to be advanced by the respondent) after the pay award had been made in August 2023. It is conceivable, as in some public sector pay bargaining, that considerably more time elapses before such awards are announced, and it is not inconceivable that no award is announced. Those decisions are in the hands of others.

37. Similarly the claim is not "arising on" the termination, in the temporal sense, notwithstanding the termination agreement was the same day – the cause of action only arises on the decision of the relevant bodies to make a pay award.

38. For these reasons, the claim, assuming as the previous Employment Judge did, that it is arguable as a common law damages claim, is outwith the jurisdiction of the Tribunal as prescribed in the Order. It has no reasonable prospects of success and the respondent's application to strike out for that reason succeeds.

39. If I am wrong on the jurisdiction point, and I bear in mind the proportionality of these proceedings for sums which, in the ordinary course would be decided at a two hour final hearing, I would analyse the limitation issue in this way. It was not reasonably practicable (that is reasonably doable) for the claimant to present his claim before 7 August 2023, because the cause of action did not arise until that moment. That is already more than three months from the termination of his employment on 3 May 2023. Such further period as I consider reasonable requires me to assess, as a matter of fact, a reasonable period thereafter, taking into account all the relevant facts in this case – it is highly fact sensitive.

40. The period from the cause of action arising, and the claimant being alerted to its possibility or promise, and late September and early October when his payslip arrived with back pay, is the first phase of the chronology – it seems to me that given his attention to detail and the ubiquity of late pay awards and back pay in the public sector, it is at least feasible for the question to have been asked – does this affect my severance payments – sooner – albeit I accept the

claimant was already concerned for his health at that time and had those concerns on his mind.

41. The second phase is a period during which correspondence was entered into and reliance on the term identified and conciliation commenced. Again, given that those communications were taking place during treatment, the claimant's wish to seek to resolve matters are understandable and reasonable. I weigh in that factual matrix that treatment effects were cumulative and not necessarily linear, and this was a very difficult time indeed with fluctuating functioning. A longer period of correspondence and conciliation, albeit reasonable, does then extend the overarching period. I consider those who take longer in conciliation to fully explore the possibility of agreement then need to be willing to act with speed if conciliation does not come to fruition – the claimant knew he wished to pursue this matter from the start and he knew that a Tribunal claim would follow unless the respondent settled.

42. The time taken to produce the claim was then the whole of April and more than two weeks of May. That was in circumstances when the time limit was known, and the claimant had chosen throughout not to use advisers preferring to address matters himself. The seven page particulars involve a narrative about the termination, the NHS contractual term, circumstances since, and a short schedule of calculations, setting out the 6% uplift, and a section on delay. This was a considered piece of work, but at a time when the claimant may also have undertaken sitting assignments, not least because it was important to him in that pause in treatment to return to normality to the extent possible.

43. In the round, there can be no criticism of the priorities and decisions made by an individual in the circumstances faced by the claimant, and nothing in this decision should be read as such. Similarly the diligence with which he approaches commencing litigation, and the need to have full particulars. Nevertheless, I do consider that it was reasonable for this claim, if it was to be presented, to have been presented by the end of April 2024, rather than the later date on which it was presented, 17 May 2024, notwithstanding the claimant's very serious illness in all the circumstances above. That is my conclusion as to the further period which I consider reasonable. It follows that if I am wrong on the jurisdictional challenge, I would also dismiss the claim on limitation grounds.

44. As for the amendment application, given my conclusions above, if the principle advanced by Mr Bayne is right, there is no claim to amend and the application must fail. If I would be led into error by that approach, I address the application on merit in the alternative, the claimant in his submissions properly identified the governing principle – balance of prejudice.

45. The wider principles are also well-established: see in particular *Selkent Bus Company Ltd v More* [1996] ICR 836 and *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650. The discretion to amend must be exercised judicially and taking into account all the relevant circumstances. The Tribunal should consider the nature of the amendment: does it simply add detail to existing allegations, does it apply a new label to facts already pleaded, or does it make entirely new factual

allegations that change the basis of the existing claim? If the amendment seeks to add a new complaint or cause of action, the Tribunal should have regard to any applicable time limit for bringing such a claim. However, that is just one factor in deciding whether to allow the amendment; it is not by itself determinative. The Tribunal must also consider the timing and manner of the application, including the length of and reasons for any delay in making the application.

46. Having considered all the relevant facts and circumstances, as the claimant identified, fundamentally the Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The apparent prospects of success may be relevant to that balancing exercise.

47. The application was made by email on 29 October 2024, intended for an earlier case management hearing which I understand was postponed. The causes of action – wrongful and unfair dismissal (relying on a sham redundancy) and victimisation (both the termination of employment and the refusal of CPD attendance) are not, in my judgment, discernible, **reading the claim as a whole,** albeit the facts are there. The causes of action are not indicated by the boxes ticked; they are not indicated by the careful structuring of the claim form into "background and events leading to", and then the identification of particular legal claims, which are very clearly expressed on the basis of the research the claimant conducted.

48. This is not a litigant in person who did not understand what was required to assert a claim of victimisation - he identified protesting victimisation by CPD refusal in correspondence in his background section, and he had the previous experience of the 2022 proceedings, and get he did not assert it in the claims or remedy section. Similarly the unfair/wrongful dismissal allegations.

49. The claimant did not suggest error on his part, or omission, but he made a decision in October 2024, which he had not made in May 2024, namely to seek to advance further claims relying on the background facts he asserts. He does so 12 and 18 months after the index events (May 2023 termination of employment and August to October refusal of CPD).

50. I can infer a reason for the delay in presented the new causes of action from the claimant's evidence concerning delay: generally there is considerable strain involved in Equality Act litigation and in May he may not have considered he had the required resilience, but he overcame this by October.

51. He advances that the only prejudice to him is in relation to the financial remedy the Tribunal can award if permission is not granted – in short greater sums may be awarded than in the damages claim. He sees no prejudice for the respondent.

52. I do see prejudice for the respondent in these circumstances: the inherent loss of a limitation defence, unknowable costs of defence, both in direct financial outlay but also in the diversion of resources, and strain on individuals alleged

to be contraveners of the Equality Act/dismissing officers. I see there will not be forensic prejudice in terms of evidence, because matters are all documented.

53. It is clear that the prejudice for the claimant – accessing further financial remedy – is contingent on his allegations succeeding. There is greater prejudice, the greater the likelihood of the claims succeeding. In this case, both in the damages claim had it survived, but also in the unfair/wrongful dismissal allegations, the claimant must overcome the fact that he agreed to the termination of his employment through an ACAS COT 3 (and accepted considerable sums as a result) - he seeks to void that agreement on the basis of duress/unconscionability. That is a considerable hurdle. Waiver by COT3, albeit of a future claim, would no doubt also be argued in respect of the CPD victimisation allegation.

54. The potential financial remedy is also a measure of prejudice for the claimant. The claimant would, it seems to me, have to give credit if he were successful in voiding the COT 3, for the sums already received which are considerable. The contained additional remedy achievable would be wholly disproportionate to the time and costs for the parties.

55. These proceedings, as with the 2022 proceedings, are wholly at the cost of the public purse. It is surprising that the claimant sees no prejudice to the respondent by his amendment application, in light of his considerable knowledge and understanding of the Tribunal process. It may well be that the claimant is fully prepared to invest considerable time and energy, during a difficult time for him, in prolonging this litigation, but that is not a reason to permit the application. My consideration of all the factors leads me to conclude that the balance of prejudice lies with the respondent. If I am wrong on the first basis submitted by Mr Bayne, and I addressed this application at the outset before deciding the damages claim questions, I would also dismiss it.

Employment Judge JM Wade
2 July 2025