EMPLOYMENT TRIBUNALS

Claimant: Mr D Estephane

Respondent: Barking, Havering and Redbridge University Hospitals NHS Trust

Heard at: London Central **On:** 30 September 2024

Before: Employment Judge Forde

REPRESENTATION:

Claimant: In person
Respondent: Miss Whiteley (Solicitor Advocate)

PRELIMINARY HEARING IN PUBLIC JUDGMENT

The judgment of the Tribunal is as follows:

Strike out of claim

1. The complaints of **Unfair Dismissal, Race Discrimination, Sex Discrimination, Disability Discrimination** are struck out under Employment Tribunal Rule 37(1)(a) because the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious. For the avoidance of any doubt this means that the entirety of the claimant's claim is struck out.

Costs

2. Upon the respondent's application for costs and upon the tribunal finding that the conduct of the claimant in the claim has been either vexatious, abusive, disruptive or otherwise unreasonable, the tribunal orders the claimant to pay the sum of £9500 to the respondent within 28 days of the date of this order, such sum representing the tribunal's assessment of the claimant's liability to costs.

Reasons

3. The Respondent applied for the claim to be struck out on a number of grounds (see more later). The claimant resists the application.

4. The claimant was employed by the respondent as a biomedical scientist from 17 November 2006 until 12 August 2012. He presented the claim form to the East London Employment Tribunal which it received on 25 November 2012. In that claim he made a number of allegations and was seeking compensation and reinstatement. At that time, he pursued claims of unfair dismissal and discrimination on the basis of sex, disability, sexual orientation, race, and notice pay.

5. His claim was heard by Employment Judge Jones sitting alone on 29 July 2013. Judge Jones ordered that the claimants claims be struck out on the basis that they had no reasonable prospects of success. In relation to the claimants claims of race and sex discrimination, EJ Jones determined that they were out of time saying the following:

"it is therefore this tribunal's judgement that the complaints of race and sex are out of time and the tribunal would not have any jurisdiction to hear them. There was no case made that they were part of any continuing act and the claimant gave no reason upon which the tribunal will be able to rely on in exercising its discretion to extend time to allow those complaints to proceed. In relation to the complaints of discrimination on the grounds of disability by way of association and of sexual orientation the claimant did not submit any allegation of discrimination against him on these grounds. There was no alleged breach of the Equality Act alleged in relation to disability and sexual orientation."

Current claim

6. The claimant completed his claim form indicating that he pursues claims of unfair dismissal, race discrimination, sex discrimination, disability discrimination, and under the heading of another type of claim namely, "*the claimant has said being set up of fraud being committed by a senior manager*".

7. In terms of the detail of his claim, the claimant provides within 8.2 of the claim form a narrative that underpins his claim. That narrative is on cogent and discursive but explains that among other things, the claimant had a concern that emanated from 2011 and describes a factual matrix relevant to that time.

8. The claimant also makes mention of hearings before HCPC his professional regulator and specifically that in those proceedings before that body three of

seven witness says upon whom he was relying as support for him attended the hearings. Orally before me contented that it was the respondent who prevented the other 4 witnesses attending although he produced no evidence to support this contention.

9. The respondent denies the claims. In short, it says that firstly the claims are out of time by virtue of the claimant presenting a claim form on one April 2024 after a conciliation. Starting 27 January 2024 ending 9 March 2024.

10. Secondly that the claimant's reliance and belief that the existence of his name and pictures being made public and online following a posting that Miss Beardsell a witness for the respondent believed had been made by HCPC in 2017 but was said to be available by the claimant the intranet of NHS trusts and in the wider Internet as well as discussion about him taking place within the biomedical science community had placed his life and the lives of his children in danger did not constitute a basis of the claim to be pursued against the respondent nor did it justify the extension of time.

11. Thirdly, but the claimant could have bought the claims sooner or, in other words, the claimant's claims offends the **Res Judicata** principle because he had pursued a claim before the East London tribunal by way of case number 320-3624/ 2012 relying on the same facts. It should be noted that at the case management hearing before Employment Judge Joffe that took place on 15 July 2024 in this claim, the claimant accepted that he was relying on exactly the same facts as he had in the 2012 claim before London East employment tribunal but that he had new evidence (or new evidence was available) that would support his claim and would by turn justify a re-opening of the litigation.

12. Alternatively, the respondent says That's under the rule **in Henderson v Henderson 1843 UKPC 6** the claimant is prevented from pursuing a further claim in new proceedings which could have been raised in separate earlier proceedings but were not may be struck out as an abuse of process because there should be finality in litigation and a defending party should not have to deal with two sets of proceedings where matters could and should have been resolved in one.

Procedural and regulatory background

13. The background post-dismissal of the claim before London East ET is set out in the respondent's skeleton argument which the claimant confirmed as being accurate and correct and upon my review of documents in the bundle it appeared to be correct. Accordingly, it is largely reproduced in the paragraphs below.

14. The Claimant was the subject of a Health Care Professionals Council ('HCPC') hearing on 9-11 September 2013, the outcome was the Claimant's suspension

from practice on the basis that his practice was impaired. The Claimant appealed this outcome to the Administrative Court, the appeal was dismissed.

15. The Claimant applied for reconsideration of this outcome in or around September 2015, which was rejected in or around November 2015.

16. The Claimant subsequently appealed to the Employment Appeal Tribunal on 1 January 2016, under Case Number - UKEATPA/0002/16/DA. His Honour Judge David Richardson concluded that the Claimant's Notice of Appeal disclosed no reasonable grounds for bringing the appeal. This was communicated to the Claimant on 16 May 2016. In 2017, the Claimant applied to the Court of Appeal for permission to appeal the Employment Appeal Tribunal's decision and permission was refused on three grounds on 11 December 2017.

17. In or around April 2017, the Claimant requested his regulatory case be reviewed by the HCPC and following that, the Claimant appealed to the High Court a further time. On 17 August 2017 Mr. Justice Warby (as he was then) dismissed the appeal and imposed a civil restraint order against the Claimant.

18. The Claimant notified ACAS in relation to his second claim on 27 January 2024, the ACAS certificate was provided on 9 March 2024 and he submitted his ET1 form on 1 April 2024 ('Claim 2').

Evidence

19. The tribunal had the benefit of a bundle spanning 269 pages containing the essential tribunal documents, the documents relating to the previous proceedings before the London East tribunal and the Employment Appeal Tribunal, some documents relevant to the evidence presented on behalf of the respondent, as well as some information including a document at page 205 the bundle which contains a picture of the claimant together with some commentary around him. The document is dated 6 April 2017 and is entitled "hospital scientist said he was fed up with working with disabled people". Within the document, the claimant takes issue with a reference to him being accused of failing to declare a conviction for driving whilst disqualified. In fact it is this document that the claimant complains of because he says it is being circulated within the intranets of NHS trusts and on the wider Internet.

20. In addition, I had the benefit of a witness statement from Ms Deborah Beardsell an employee relations manager for the respondent and a position statement from the claimant. Ms Beardsell gave evidence to the tribunal I was cross examined by the claimant. The claimants case was presented by way of submission.

21. In cross examination, Ms Beardsell confirmed that she and the claimant had been in contact because he had indicated that he wanted to raise a grievance

over what I understood to be his recent discovery of the document at page 205 of the bundle. Ms Beardsell explained in response to a question from the claimant that it was not possible for the respondent to entertain his grievance because the document at page 205 referred to above had not emanated from the respondent but had been generated by another entity separate to the respondent. The claimants agreed that this was the state of affairs.

Findings of fact

22. it is my finding the claimant is seeking to relitigate the facts that underpinned the matters relevant to claim one in 2013. While he says that he has new evidence which can show that the court was wrong to have dismissed his claim on the basis that it had no reasonable prospects of success in 2013, the claimant confirmed before me but he had not taken any steps to contact witnesses who he says would support his claim, in other words he not yet acquire the new evidence that he was relying upon to justify this new claim.

23. The respondent indicated that it intended to seek a strike out of his claim in its grounds of response and subsequently in correspondence. The case was listed for an open preliminary hearing by Employment Judge Joffe on 15 July 2024. Throughout this hearing, the claimant insisted that the evidence was available and went as far as identifying the names of some of the witnesses. He sought to rely on the fact that he had not been told to acquire the evidence by EJ Joffe as a ground to justify the non-appearance of the new evidence since the previous preliminary hearing in the claim. I found that argument to be unsustainable given the basis that the client was seeking to relitigate and the respondent's warnings as to costs. Further, I find that the claimant's conduct in this regard to be abusive of the proceedings generally.

Law

24. The claimant says that it would be just and equitable for the tribunal to extend time for him to be allowed to pursue his claim. It is of course the case that the tribunal has two jurisdictions under which it can extend time.

25. In respect to the claimants claim of unfair dismissal, the jurisdiction to extend time is not just and equitable but reasonably practicable and what this means is set out at section 111(2)(a) of the Employment Rights Act 1996. What that means is essentially reasonably achievable. What the tribunal needs to find is that it was not reasonably possible for the claimant to have acquired the evidence that he needs to rely on in the time that has run between the disposal of the last claim to now. The claimant has not provided reasons as to why the jurisdiction should be extended.

26. In respects of the discrimination claims, the Equality Act states at section 123(1) that the claim must be presented within three months less one day of the period

of three months starting with the date of the act to which the complaint relates. In so far as the exercise of the just and equitable jurisdiction is concerned, the jurisdiction is a wide one and the tribunal can take into account a number of factors. One of those is the underlying strength of the claim. The other is whether or not the circumstances of the claim justify the extension. Another is the prejudice to the parties.

27. On the facts presented to the tribunal, I find that the claimant has failed to meet the high bar that he needs to in relation to the tribunal exercising its discretion under the reasonably practicable extension provided within section 111(2)(a) of the Employment Rights Act. The claimant has not provided any evidence as to why he has been unable to pursue his claim any sooner than he has done.

28. In relation to the just an equitable extension and discretion that I have under section 123(1)(a) of the Equality Act, I reached the same view that I reached in respect of the reasonably practicable extension. I also take into account what I consider to be the very considerable prejudice that would be caused to the respondent by extending time in circumstances where the respondent is now unable to acquire the witness evidence it says it will need due to the fact that a number of its employees who were employed at the time of the claimants employment are no longer employed by it. Evidence as to this particular point was provided by Miss Beardsell and was unchallenged by the claimant.

29. When I consider all of the factors in this claim and the totality of the respondent's application I have determined that this is a claim which stands to be struck out under rule (1)(a) tribunal's 2013 rules that provides that a claim maybe strike out if it is scandalous or vexatious or has no reasonable prospect of success.

30. It is well established law but the word 'scandalous' in the context of rule 37(1)(a) means irrelevant and abusive of the other side. It is my finding that the claimant is seeking to relitigate matters which have already been determined against him. He has taken no steps to acquire the evidence that he says will prove his claim and that of itself I consider to be scandalous.

31. Further, I find but the claimant has offended the Res Judicata principle which bars him from relitigating matters that have already been resolved. It is my finding that the present claim contains the entirety of the first claim which the claimant has admitted to me. Given that that claim has already been resolved and dismissed, they cannot be put before the employment tribunal again. I find that by starting the claim in the circumstances that he has the claimant has acted abusively and therefore scandalously.

32. Further, I find that this is a claim which offends the rule in Henderson v Henderson in that the claimant is seeking to raise issues in new proceedings which could have brought In the previous proceedings. Again, I find that the claimant has acted scandalously.

33. Further, it is plain that the claimants claims do not have any reasonable prospects of success. It is noteworthy that EJ Jones found in 2013 that the claimant's claims were out of time then. Leaving aside that, it is also clear that the claimant is seeking to rely on evidence that does not yet exist.

34. Accordingly, it is my finding that the claims should be struck out because they are scandalous and have no reasonable prospect of success.

35. This judgment was provided to the parties. The claimant walked out the hearing before the conclusion of its oral delivery indicating that he would appeal.

Costs

36. Before going any further, it should be noted that the claimant departed the hearing before I had finished delivering judgement in respect of the respond and strike out application.

37. Miss Whitley on behalf of the respondent applied for the respondents costs on the basis of my finding that the claimant had acted scandalously and unreasonably.

38. Before going any further, I considered whether it would be appropriate to continue with the application for costs in the claimant's absence. Exercising my power on the rule 29 of the 2013 rules, I found that the claimant had voluntarily absented himself from the hearing and had done so in circumstances where he was on notice that the respondent was likely to apply for its costs. Accordingly, I ordered that the hearing would continue in the claimant's absence.

39. With regards to notice of the costs application, I noted that the grounds of resistance indicated that a cost application would be forthcoming in the event of the claim was unsuccessful at. Specifically, the respondent wrote to the claimant by way of letter sent by e-mail on 17 May 2024 and 23 July 2024 in which it was made clear to the claimant on both occasions that the respondent would be seeking an applicant seeking its costs by way of an application to the tribunal. Miss Whitley told me that the claimant had told the respondents solicitors Capsticks but he had been unable to open the letters attached to the emails above and on both occasions that he made this observation the passwords had been re sent to him (Miss Whitley told me that the passwords had been sent to him on the same day that the emails with the letters attached had been sent to him). Accordingly it was open to me to reasonably infer that the claimant had received notice of the respondents intention to apply for its costs.

40. Miss Whitley told me but this was a claim that had been brought over 10 years before an acknowledged by the claimant that that was the case. It had been struck out before and had been unsuccessful in both Employment Appeal

Tribunal and the Court of Appeal. In support of his case here the claim it relies on new evidence and the 2017 that can be found at page 205 of the bundle as a justification of the claim.

41. Miss Whiteley gave an example of the claimant's conduct of the proceedings noting that on the Wednesday before this hearing, 25 September 2024, the claimant had sent 2 Capsticks approximately 40 emails as part of the preparation for the preliminary hearing. She made the point but this had provided the respondent and its solicitors with more work and in the event the documents provided were irrelevant for the issues to be determined at the hearing.

42. An employment tribunal has a discretionary power to make a costs order under rule 76(1)(a) of the 2013 rules where it considers that a party has acted vexatiously abusively disruptively or as otherwise unreasonably. That has been my finding in this case. Given my finding, I then must go on to consider whether it would be appropriate to exercise my discretion to make an award of costs and I consider that it would be an appropriate case to exercise this discretion. This is because of the procedural history mentioned earlier in this judgment specifically, the findings of EJ Jones, the Employment Appeal Tribunal and the Court of Appeal. Put simply, the claimant could not have been in any doubt that the merits of his claim had not improved but went ahead nonetheless.

43. I bear in mind that the claimant was not present to hear the application for costs but that was his choice. I consider that the claimant should have been on notice that this claim had little or no basis in law and was abusive of the tribunal's process. It was unreasonable for claim to have been pursued in the absence of the new evidence that the claimant relied upon to support it.

44. Considering all of the above in respect of costs I ordered that the claimant should pay an appropriate level of the respondent's costs.

45. I was provided with a small costs bundle which contained essential correspondence and a basic schedule of costs which ran to a total figure for work done from the start of the claim to the date of the open hearing as £12,919.50. Adjusting that figure to reflect the time spent at the hearing before me it reduced to £12,539.50 which approximates to a reduction of 3 hours calculated at Miss Whiteley's hourly rate as a grade B fee earner of £160 per hour plus VAT.

46. I considered it appropriate to reduce the total figure by 25% to reflect an amount of time which would not be ordinarily recoverable against the opposing party in this case the claimant. Accordingly, I ordered that the claimant shall pay the sum of £9500 sterling to the respondent within 28 days of the date of this order.

Employment Judge Forde
30 September 2024

Judgment sent to the parties on:

11 October 2024
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For the Tribunal:

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