EMPLOYMENT TRIBUNALS

Claimant: Dr E Sarkar

Respondent: University Hospitals Plymouth NHS Trust (1)
Royal College of Physicians (2)

RECORD OF A PRELIMINARY HEARING

Heard at: Exeter (Hybrid) **On:** 9 March 2023

Before: Employment Judge Smail

Appearances
For the Claimant: In person
For the Respondent: Mr S. Keen, counsel

RESERVED JUDGMENT

1. For the claims that remain as identified below there will be a Telephone Case Management Preliminary Hearing intended to be reserved to Employment Judge Smail on 28 June 2023 at 4pm. The parties should dial **0333 300 1440** at the appropriate time and enter the code **9459130#** when prompted to do so. The hearing will determine the precise issues of the claims that go forward, make case management orders and list the full merits hearing. The parties are to provide the Tribunal with draft agreed issues and case management orders 7 days before the Hearing.

2. Any claim made by the Claimant in the 2022 claim in respect of events on or prior to 3 December 2018 (the date of the Schedule of Chosen Detriments in the 2018 claim) is covered by issue estoppel, cause of action estoppel or the rule in Henderson v Henderson and is struck out as a claim as an abuse of process in the 2022 claim.

3. For the avoidance of doubt, paragraph 42 of the 'Claim' section in the 2022 claim is struck out for the above reason.

4. Matters pre-3 December 2018 may be referred to by the parties for context only.

5. The following events identifiable in the 2022 claim are the subject of complaints of disability and/or race discrimination arising after 3 December 2018 and may proceed to be determined as liability allegations in the 2022 claim:

    A. In essence, a decision has been taken to investigate the Claimant in respect of her role in the episode of anaphylaxis suffered by patient JH on 10 August 2017, in particular for not proving the safety of the hydrocortisone injection triggering the attack, whereas a decision taken to investigate the role of Dr Whyte in the same matter was withdrawn. The Claimant relies on the following alleged facts in particular

    A.1 An investigation was agreed by Health Education England, the Body charged with awarding medical qualifications. This was in recognition that otherwise the Claimant had failed the Annual Review of Competency and Progression to qualification as a Doctor.

    A.2 On 18 September 2019 an internal clinical investigation into Dr Whyte's alleged negligence in respect of the administration of JH's drugs on 10 August 2017 was agreed to be commissioned by the First Respondent's CEO. The terms of reference were agreed on 14 January 2020. Dr David Adams, a Consultant Anaesthetist and Medicine Care Group Director was appointed to conduct the investigation. On 1 October 2020 at a meeting the Claimant was informed that the internal investigation had not progressed and would be replaced by an external investigation, with the same terms of reference.

    A.3 The Claimant alleges the First Respondent did not commission the external investigation. In May 2021 she learned that the Royal College of Physicians, the Second Respondent, would be asked to perform an Invited Service Review into the August 2017 event. The terms of reference dated 19 August 2021 stated that it was the Claimant's actions that should be investigated in the 'near-miss' incident. So it was her not Dr Whyte that would be investigated. A second terms of reference dated 29 November 2021 dropped the 'near-miss' phrase but otherwise remained the same. The Invited Service Review was due to start in January 2022 but did not do so. On 10 February 2022, despite being asked to do so by the Claimant, the First Respondent declined to change the terms of reference.

    A.4 Dr Whyte is the comparator for the Claimant's intended claims. He is white and able-bodied.

    B. The investigation has not proceeded effectively. The Claimant has not been allowed to send a statement to the external investigation and defend her decision about the safety of the hydrocortisone. Important facts about the investigation such as the investigator, the date of commencement of the investigation, what evidence will be used in the investigation have not been given to the Claimant.

6. Any time limits matters relating to the allegations that proceed will be dealt with at the final hearing.

7. The application to strike out the claim against the Second Respondent is refused. The Second Respondent may be sued as the agent of the First Respondent within the meaning of ss 109 and 110 of the Equality Act 2010.

REASONS

1. The Claimant has been employed by the First Respondent from 6 June 2017 as a Specialist Registrar Trainee in Immunology. She remains on the First Respondent's books but performs, as I understand it, limited or no clinical roles. The Claimant has presented this claim no. 1401134/2022 on 25 May 2022 (the 2022 claim). It follows the claim she presented under case no. 1401895/2018 on 30 May 2018 (the 2018 claim). That claim was against the present First Respondent only. There are 2 issues for this Preliminary Hearing:

    (a) Insofar as the 2022 claim overlaps with the 2018 claim, is it an abuse of process?

    (b) Is there a cause of action against the Second Respondent?

<u>The 2018 claim (1401895/2018)</u>

2. This was heard over 6 days in November 2020, with an additional deliberation day in Chambers. It was heard by E.J. Roper, Ms Hewitt-Gray and Mr I. Ley. Reserved Judgment was promulgated on 24 November 2020. The Claimant's claims were dismissed. The claim concerned 26 alleged detriments said to have been suffered by the Claimant on the ground that she had made a protected disclosure. The Tribunal accepted, as had the First Respondent, that she had made a protected disclosure concerning an episode of anaphylaxis suffered by patient JH on 10 August 2017. She had reported the matter under the Respondent's 'Datix' system on 14 August 2017. The patient had a bad reaction to the administration of a drug.

3. In order to make the case manageable it was agreed to litigate 7 detriments; 5 were possibly in time, if there was discriminatory conduct extending over a period, and 2 were definitely in time. The remainder were stayed pending the outcome of the November 2020 hearing. All the detriments relied upon were set out in a 'Schedule of Chosen Detriments', the final version of which was filed and served on 3 December 2018, and permission for any amendment was given by E.J. David Harris on 18 January 2019. That a limited number of detriments would be litigated at the full merits hearing was agreed at a Preliminary Hearing with E.J. Roper on 12 July 2019.

4. The detriments alleged covered the period 14 August 2017 to 3 April 2018. The detriments include challenges to the Claimant's clinical practice and behaviour. The principal protagonists were Dr Andrew Whyte (Consultant Immunologist), Dr Claire Bethune (Consultant Immunologist and clinical lead for immunology and allergy) and Mrs Christine Symons (Nurse Consultant in Immunology).

5. The Tribunal rejected each of the number of detriments agreed to be litigated. It introduced the detailed findings with the following:

> '115. However, before we examine each of these in detail, we make the following general points. We find it inherently unlikely and highly improbable that any of the respondent's personnel from whom we have heard would commit any act, or deliberately fail to act, on the ground of the claimant's Datix disclosure. In the first place the claimant was actively encouraged to submit the Datix report. Dr Bethune thought she should be encouraged to do so, and Dr Whyte and Dr Leeman thought so too. There were two good reasons for this: first, it was normal procedure and the appropriate thing to do for reasons of patient safety and potential improvement of procedures; secondly, it provided a very good training opportunity for the claimant to prove examples of clinical expertise, team working and her involvement in the development and improvement of the respondent's procedures. The second point relates to the breakdown of relationships and the negative reports about the claimant which led to the ARCP Outcome 4 and her removal from the training programme. It is not the case that the claimant's deficiencies suddenly became apparent after the date of the Datix report. On the contrary, the claimant had demonstrated for a number of years in a number of different hospitals the same identified performance issues which were below or well below normal expectations in her training. These included from time to time a lack of clinical expertise, failure to take responsibility for her own Reflections and filing of training information; and a worrying tendency to react to any perceived criticism with a defensive and hostile nature, leading to a severe disruption of the team dynamic. All of these professional deficiencies already existed before the claimant joined the respondent's team, and again became readily apparent in the short time that the claimant was with the respondent. They simply cannot be said to be new or imaginary deficiencies which had arisen merely because she submitted a Datix report when encouraged to do so. Against this background we find as follows…'

6. On 9 May 2022 E.J. Roper subjected the 19 remaining detriments to a deposit order of £200 each. These were not paid and so the remaining allegations were struck out.

7. Appeals were made to the EAT but I am not told that they have got anywhere. The Claimant told me she takes great exception to much of the extract above. For the moment, though, the passage is undisturbed by any appeal ruling.

8. On 8 August 2022 E.J. Roper ordered that the Claimant pay the Respondent's costs incurred between 6 March 2020 and 21 December 2020 (covering therefore the November hearing) and that these be subject to a detailed assessment.

<u>The 2022 claim (1401134/2022)</u>

9. This is a claim of race and disability discrimination. It is brought on a claim form dated 25 March 2022. The Claimant is disabled with Cerebral Palsy. She was at all material times for the first claim, also. She is of Asian (Indian) ethnicity. The Particulars of Claim are in 3 sections: 'Background', 'Facts' and 'Claim'.

10. She introduces the background to the claim being the same subject matter as the protected disclosure but without using that phrase. The background facts relating to the August 2017 incident are set out as though a clinical negligence claim. She claims she was victimised in or around November 2017. She says a workplace adjustment for her impaired mobility was not supported by the team and race-based allegations were made against her because she had pointed out that a white laboratory manager was misnaming her. At paragraph 25 still under background she writes –

> 'In 2018 I made a whistleblowing claim…against the UHP in the Employment Tribunal and the litigation is ongoing. The Tribunal has heard 7 of the 26 allegations and has not heard the allegations about not supporting adjustment for mobility and making race-based accusations against me.'

11. Under 'Facts' she describes being 'made to fail' at the Annual Review of Competency and Progression by the University on 21 December 2017. The Claimant wished to appeal this. In order to do that effectively it was her position that the incidents around the 10 August 2017 needed to be investigated. An investigation was agreed by Health Education England, the Body charged with awarding medical qualifications.

12. On 18 September 2019 an internal clinical investigation into Dr Whyte's alleged negligence in respect of the administration of JH's drugs on 10 August 2017 was agreed to be commissioned by the First Respondent's CEO. The terms of reference were agreed on 14 January 2020. Dr David Adams, a Consultant Anaesthetist and Medicine Care Group Director was appointed to conduct the investigation. On 1 October 2020 at a meeting the Claimant was informed that the internal investigation had not progressed and would be replaced by an external investigation, with the same terms of reference.

13. The Claimant alleges the First Respondent did not commission the external investigation. In May 2021 she learned that the Royal College of Physicians, the Second Respondent, would be asked to perform an Invited Service Review into the August 2017 event. The terms of reference dated 19 August 2021 stated that it was the Claimant's actions that should be investigated in the 'near-miss' incident. So it was her not Dr Whyte that would be investigated. A second terms of reference dated 29 November 2021 dropped the 'near-miss' phrase but otherwise remained the same. The Invited Service Review was due to start in January 2022 but did not do so. On 10 February 2022, despite being asked to do so by the Claimant, the First Respondent declined to change the terms of reference.

14. The 'Claim' section makes the following allegations. She alleges that Dr Whyte, a non-disabled white doctor, was responsible for 250 incorrect blood test results being reported by the laboratory in 2016 as a locum Consultant. She blames Dr Whyte for the anaphylaxis of JH on 10 August 2017. She claims he is 'an ongoing risk to patient safety.' She claims that the First Respondent refuses to investigate alleged clinical negligence against Dr Whyte.

15. She alleges that in 2017 the First Respondent did not support a reasonable workplace adjustment for her impaired mobility. She alleges race-based allegations were made against her because she had corrected a white laboratory manager who had misnamed her.

16. She alleges in respect of the 10 August 2017 incident, she alleges that she had resuscitated the patient form the anaphylaxis, and yet she is the subject of an investigation against her practice rather than Dr Whyte being the subject of scrutiny.

The Respondents' concession

17. At the earlier Preliminary Hearing before me on 11 December 2022, the Respondent accepted that the following issues in the claim form are in time and are not affected by res judicata/issue estoppel/cause of action estoppel/time limits: -

> "46. The UHP has subjected me, the disabled doctor from the ethnic minority background to a high-level external investigation for not proving the safety of the hydrocortisone but there is no investigation against Dr Whyte or any other able-bodied White doctor or clinical staff for not proving the safety to the hydrocortisone by a challenge procedure.
>
> 47. I have not been allowed to send a statement to the external investigation and defend my decision about the safety of the hydrocortisone. Important facts about the investigation such as the investigator, the date of commencement of the investigation, what evidence will be used in the investigation have not been given to me. The First Respondent subjected the Claimant (as a disabled doctor from an ethnic minority background) to a high-level external investigation for not proving the safety of the hydrocortisone but there is no investigation against Dr Whyte or any other able-bodied White doctor or clinical staff for not proving the safety to the hydrocortisone by a challenge procedure."

18. It seems, to me, however, that this is the essence of the present claim. It relates to the handling of a proposed investigation into the 10 August 2017 matter, with the relevant events complained about starting at earliest in October 2020 when the Claimant was told the internal investigation would not progress and . Those matters were not in the 2018 claim and there is no reasonable basis for saying they should have been.

The law on estoppel and the rule in Henderson v Henderson

19. Where a matter has already been determined, it may not be re-opened (Issue Estoppel), see for example Thoday v Thoday [1964] P 181. A party may not bring a second claim in respect of the same subject matter against the same party using an identical cause of action to a previous claim (Cause of Action Estoppel).

20. In Henderson v Henderson (1843) 3 Hare 100, Sir James Wigram stated at pp. 114-115:

> '… I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under

special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the litigation.'

21. The question of whether or not to strike out a claim for abuse of process on the grounds that the claim should have been brought in previous litigation is not an exercise of discretion. It is a decision involving the assessment of a large number of factors to which there can only be one correct answer (per Lord Dyson in Agbenowossi-Koffi v Donvand Ltd (t/a Gullivers Travel Associates) [2014] EWCA Civ 855). The question is whether the claim should have been raised in earlier proceedings, if it was to be raised at all. The Tribunal should adopt a broad, merits-based judgment, considering the public and private interests involved and all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it issues which could have been raised before.

22. In Agbenowossi-Koffi v Donvand Ltd (t/a Gullivers Travel Associates) [2014] EWCA Civ 855, the claimant raised two new matters in a second race discrimination claim following the dismissal of her first claim as being out of time. The ET struck out the second claim under the rule in Henderson because:

    a) both matters pre-dated the drafting of the first claim form, and the claimant was aware of them;

    b) the claim form was drafted by solicitors who were aware of the time limit problems;

    c) if the claimant genuinely believed that the two new matters were acts of race discrimination, they would have been included in the first claim;

    d) the fact that they were not included indicated that she did not consider them to be acts of race discrimination, and the only reason they were being raised in the second claim was to attempt to resurrect the claim that had already been dismissed.

23. The Court of Appeal upheld the Tribunal's decision. In his judgment, Lord Dyson MR held that whilst it was true that there was no evidence that the claimant issued the second claim in order to harass or oppress the respondent, it did not follow that the second claim was not contrary to the rule in Henderson and an abuse of process in the particular circumstances of the case. He stated (at para 23):

    'The very fact that a defendant is faced with two claims where one could and should have sufficed will often of itself constitute oppression. It is not necessary to show that there has been harassment beyond that which is inherent in the fact of having to face further proceedings.'

24. When considering whether a claim could and should have been brought in earlier

proceedings, it has been held that it is not just claims that accrued before the presentation of the earlier claim that are liable to be dismissed as being an abuse of process but also those that accrued up to the date of the full merits hearing of the claim. According to Judge Eady QC in London Borough of Haringey v O'Brien UKEAT/0004/16/LA 22 December 2016, where further claims accrue between presentation and the merits hearing, they should be added to the existing proceedings by way of amendment; otherwise, it may be an abuse of process to bring them in separate proceedings at a later stage. The cut-off date is the full merits hearing *'or, at least sufficiently prior to have allowed for an amendment of the claim'* (see Eady J at para 60).

25. A claim can be dismissed for being an abuse of process under Rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. That provides that a claim or part of it can be struck out on the grounds that it is scandalous or vexatious or has no reasonable prospects of success.

Conclusions on strike out on the basis of overlap with the 2018 claim.

26. Much of the Claimant's reference to the matters covered by the 2018 claim are by way of background or context only. A proper analysis of the essence of the 2022 claim is that it relates to decisions concerning the investigation of the index 2017 event taken at earliest in October 2020. Those matters could not be the subject of the 2018 claim. In practical terms, the latest any matter could fairly be put before the final hearing of the 2018 claim would be in the the final version of the Schedule of Chosen Detriments which was filed and served on 3 December 2018, and permission for any amendment in which was given by E.J. David Harris on 18 January 2019. The Claimant was bringing a substantial claim before the Employment Tribunal. If she had other substantial claims to bring, it was only reasonable for her to include them all in that pleading document. It would not be and was not reasonable to hold back any other substantial claims.

17. There are 2 new complaints in the 2022 claim which do relate back to the pre-3 December 2018 period. She alleges that in 2017 the First Respondent did not support a reasonable workplace adjustment for her impaired mobility. She further alleges race-based allegations were made against her because she had corrected a white laboratory manager who had misnamed her. Those matters should have been put in the 2018 claim. It is an abuse of process to wait 4 years or more to raise them when they ought to have been raised in the 2018 claim. I do strike those claims out under the rule in Henderson v Henderson. Further, insofar as there are any liability claims relating to events that took place on or prior to 3 December 2018 they are struck out on the same basis.

The claim against the Second Respondent, the Royal College of Physicians

27. The Royal College of Physicians is not the Claimant's employer. It is not the relevant Qualification Body for the Claimant's training. So how does the Claimant bring a claim against it?

28. The Royal College of Physicians was invited to conduct the investigation into the 2017 index event. The College's website tells us this about Invited Review:

The Invited Reviews service was formed in 1998 and offers consultancy services to healthcare organisations on which they may require independent and external advice. Reviews provide an opportunity to healthcare organisations to deal with issues and concerns at an early stage. The main reasons why reviews are requested are due to the following:

Clinical practices and the delivery of care
Patient safety concerns
Increased mortality rates/'red flags' in national data
Concerns around adherence to national guidelines
Workload and capacity issues
Individual behaviours/team working
Governance
Provision of medicine in merging Trust's/Health Board's or in small/isolated medical units.

29. It is arguable that the College is the First Respondent's agent or the purposes of conducting the relevant investigation. By s. 109(2) of the Equality Act 2010, anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal. By section 110 (1) of the 2010 act an agent is individually liable for anything it does which leads to vicarious liability of the principal in respect of a contravention of the 2010 Act.

30. Accordingly, the Second Respondent can be liable as the First Respondent's agent. It is not appropriate at this stage to strike out the Claimant's claim against the College.

Employment Judge Smail
Dated 01 June 2023

Sent to the parties on: 02 June 2023

For the Tribunal Office: