EMPLOYMENT TRIBUNALS

Claimant: Mr Abdel Bari

Respondent: Epsom and St Helier University Hospitals NHS Trust

Heard at: London South **On: 16 July 2021 (and in Chambers on 3 March 2022)**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: in person
For the respondent: Mr Pacey, Counsel

RESERVED JUDGMENT FOLLOWING A HEARING TO DETERMINE APPLICATIONS UNDER RULE 37

Decision

The respondent's applications to strike out the claims under Rule 37 (1) (a), (b) and (e) are not well founded and fail

Reasons

The applications, appearances and documents

1. This was the respondent's application to strike out the claimant's direct race discrimination claim as it has no reasonable prospects of success, alternatively because it was out of time, alternatively because the claimant's conduct has been scandalous, unreasonable or vexatious or it was no longer possible to have a fair trial (Rule 37 (1) (a), (b) and (e). There was also an application in relation to Costs relating to the postponed Hearing on 18 December 2020.

2. Alternatively, the respondent sought a Deposit Order under rule 39 on the basis the claim had little reasonable prospects of success.

3. The claimant appeared in person, the respondent by Mr Pacey Counsel.

4. The respondent had prepared an E-Bundle of 225 pages.

5. The respondent's applications were dated 3 April 2020 and 30 December 2020, the latter adding further applications under Rule 37 (1) (b) and (e).

6. The claimant also provided 2 supplementary E-Bundles.

Findings of Fact

7. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of documents the Tribunal was directed to and the submissions of both parties.

8. Only findings of fact relevant to the applications before the Tribunal, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every other fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was a document the Tribunal was taken to.

9. The claimant was engaged by the respondent as a Locum Doctor, in the Obstetrics and Gynaecology department.

10. The respondent asserted he had been engaged with the respondent's 'bank' since January 2019.

11. The claimant's bundle contained documents dated 21 September 2012, 28 January 2013 and 2 November 2015, which appeared to show agency engagements of the claimant with the respondent. In his claim form, the claimant claimed a working history with the respondent 'on and off' for 21 years.

12. The claimant worked assignments as a 'bank' worker for the respondent as and when offered, subject to his right to decline/refuse the assignment.

13. The Tribunal did not consider it necessary to make any findings in relation to the claimant's status or continuity or dates of 'employment' engagement for the purpose of the applications before the Tribunal. It was not a live issue before the Tribunal and nothing herein binds a future Tribunal determining such issues.

14. The events leading to the dispute in these proceedings are relatively discrete.

15. On 16 October 2019, a band 7 midwife expressed concerns in relation to the claimant's involvement in the delivery of a baby.

16. This was in relation to the claimant's suggestion/recommendation for a baby to delivered by a Caesarean section. A more Senior Consultant, Dr Psychoulis, reassessed the patient and recommended a vaginal delivery, as he found the head of the baby to be low enough. The claimant accepts he mentioned a Casearean section would be better to Dr Psychoulis, but that the context was that it was for Dr Psychoulis to make that decision. He disputes he mention it before.

17. The claimant delivered the baby by forceps delivery in respect of which Dr Pscychoulis had concerns, as only part of the head was delivered before the forceps were removed. It appeared to the Tribunal that the claimant was uncomfortable to undertake this procedure. The claimant disputes however there was anything unsafe with his delivery method.

18. Dr Psychoulis also understood that the claimant would not carry out ventouse deliveries. This is disputed by the claimant.

19. The midwife had also expressed concerns about the claimant's recommendation to increase (in respect of the level of) syntocinon (to increase the frequency of contractions).

20. The matter had been escalated by the midwife on 17 October (to the labour lead and Clinical Director) and the Tribunal understood the bank/agency were informed on 17 October 2019 that pending a review into these concerns, the claimant was not to return to undertake any booked shifts and he was not to be booked for future shifts.

21. The claimant attended for a shift on 21 October 2019. The claimant had not been informed of the cancellation of his shift(s). The respondent accepted

the claimant had not been informed and had assumed the bank had informed him.

22. The claimant was instructed to leave on this day.

23. The claimant emailed the bank on 21 and 23 October seeking to know what had happened in relation to his cancellations.

24. Dr Pscychoulis emailed the claimant on 25 October 2019 to set out the clinical concerns he had, broadly outlining what is set out above (a feedback and escalation of concern form had been completed on 23 October 2019).

25. Thereafter, the claimant sent a number of letters including on 7 November, 10 November, 6 December, 7 December, 16 December and 20 December 2019.

26. A meeting was arranged for 20 December 2019, but which did not go ahead. The respondent did offer to meet the claimant again (page 118).

27. The Tribunal did however have before it an investigation conducted in the claimant's absence which concluded that there had been no discrimination. This investigation included a statement from the claimant dated 7 November 2019 and additional emails from him, statements from Dr Pscychoulis and Ms Cox, Midwife Coordinator, whose statement corroborated that of Dr Psychoulis and stated her own concerns too regarding syntocinon and the manner of forceps delivery (pages194-225).

28. During the course of oral submissions, in relation to the respondent's application to strike out the claim because it had no reasonable prospects of success, the claimant made numerous references to Dr Pscychoulis being dangerous (more than once), careless, negligent, incompetent (multiple) and defamatory and who had breached the Data Protection Act. There was a singular express reference to discrimination.

29. There was no evidence before the Tribunal of any other racial allegation or issue in relation to Dr Psychoulis or other clinicians or the midwives in the Trust at large, or any other incident, or any cultural concern. On the claimant's case he had worked with respondent, intermittently, over a period of 21 years.

30. At the Hearing, it had emerged that the claimant was Bankrupt. There was a Bankruptcy Order made on 15 February 2021. The claimant's bundle also

included financial documentation setting out the claimant's outstanding debts and a notice seeking possession. This had caused a subsequent delay in relation to the claimant's standing to bring the claim (as opposed to his trustee in bankruptcy) until he ultimately limited his claim to injury to feelings, permitting him to continue with his claim.

31. The claimant had issued proceedings on 28 February 2020, having approached ACAS on 7 January 2020. An ACAS certificate was issued on 17 January 2020.

32. The claimant had engaged in substantial correspondence with the respondent's representative and the Tribunal some of which was unprofessional, inappropriate and repetitive. The claimant has also emailed the respondent client directly despite having Solicitors instructed. This required Tribunal intervention to get the claimant to stop.

33. Notably, the claimant had attended the Tribunal for a Preliminary Hearing on 18 December 2020 with forceps, a pair of scissors and a knife. He explained the forceps and scissors were to be used to demonstrate procedure (in the Hearing) but the knife was unexplained. The police were called leading to the claimant's arrest. He was subsequently released without charge and the Hearing was postponed.

Applicable Law

34. Striking out

Rule 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

(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

35. *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.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise, the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

Conclusions

36. The Tribunal did not think it was in a position to strike out the claimant's case for being out of time. Whilst prima facie, the claim was out of time based on a one-off act on 16 October 2019, the Tribunal could not be satisfied that was the extent of his claim whether on the basis of a course of conduct or separate subsequent allegations of discrimination. His claim form referred to an incident as late as 13 December 2019.

37. Alternatively, if the Tribunal was to exercise its just and equitable discretion to extend time, the delay was minimal and there was little or no prejudice to the respondent and none had been asserted by the delay of 11 days. There would be no impact on the cogency of evidence and the Tribunal noted the claimant was a litigant in person.

38. As indicated however, the Tribunal stops short of extending time on the basis of an alleged one-off act as the issues remain to be identified. This is this held over to the final Hearing or a separate future Preliminary Hearing.

39. In relation to the claimant's conduct, the Tribunal noted that in the lead up to the Preliminary Hearing, the claimant had engaged in inappropriate correspondence with the respondent's representative, illustratively set out in the respondent's correspondence of 30 December 2020.

40. The Tribunal did not consider that the nature, content and volume was such it was so scandalous, unreasonable or vexatious for which it was proportionate to strike out the claim or of such a degree that a fair trial was no longer possible.

41. The Tribunal considered that the claimant could be curtailed in the nature, tone and volume of correspondence with both the respondent and the Tribunal and further robust case management could occur with forewarnings about the expectations of conduct, process and procedure.

42. In relation to the strike out application because the claim had *no* reasonable prospects of success, the Tribunal recognised that there was little evidence before the Tribunal of a prima facie case of discrimination such that the burden of proof would shift to the respondent. This appeared to be a case about a clinical difference of opinion, which the Tribunal considered would be commonplace in a Hospital Trust. It did not, without more, provide a platform for a discrimination claim especially in the absence of sufficient other facts from which the Tribunal could conclude an act of discrimination.

43. That said however, there was a delay in the claimant being informed of his 'release', there was in fact no subsequent meeting, the claimant had worked, it appeared, over a number of years without concern. In fact, the 2 November 2015 A&E Agency document referred to the claimant having very good clinical skill and knowledge. Some of the facts around the method/manner of delivery and the claimant's comments are in dispute.

44. The sanction of strike out is draconian. The Tribunal considered that in the absence of considering all the documentary evidence and oral testimony, from the claimant and the relevant individuals for the respondent and perhaps evidence of other occurrences/examples of clinical difference of opinions, it was going too far to strike out the claim.

45. The Tribunal had regard to ***Anyanwu v South Bank Student Union 2001 ICR 391*** in which the House of lords referred to the fact-sensitivity of discrimination cases which are best resolved after hearing the evidence and in ***Eszias v North Glamorgan NHS Trust 2007 ICR 1126*** in which the Court of Appeal expressed caution about striking out discrimination claims where the central facts are in dispute. In this case whilst all of the central facts are not in dispute, some of them are.

46. However, the Tribunal did feel able to make a Deposit Order as, based on the evidence thus far, there was little reasonable prospect of success. The threshold is lower. Essentially, whilst the reasons given above for not striking out the claim which required proportionate enquiries, they were not significant enough to elevate the claimant's reasonable prospects of success, which remained little. This was mainly because the Tribunal saw this as a professional/clinical difference of opinion leading to a more senior consultant overruling the claimant on the method/manner of delivering a baby, in the best interests of the mother and child and which concerns were corroborated by the midwife in charge. There were very limited other facts from which discrimination could be inferred.

47. In reaching this conclusion on the making of a Deposit Order, the Tribunal also had regard to the investigation report which did appear to provide a complete non-discriminatory answer to the incident. This was conducted by a Consultant Obstetrician, Gynaecologist, Fetal medicine Obstetric lead which, in the Tribunal's view, provided a technical/clinical view from a person not involved. It involved written input from the claimant, Dr Psychoulis and Ms Cox. If this remains the broad outcome following the Full Merits Hearing, the claimant will be at risk of having acted unreasonably in pursuing the argument that the clinical dispute was in fact rooted in discrimination.

48. The content and effect of the Deposit Order is set out in a separate private case management Order.

49. The issue of Costs of the Hearing which did not go ahead on 18 December 2020 is postponed for future deliberation as the Tribunal considers that for the sum claimed (£992), having regard to the claimant's limited means (currently known), the Tribunal may wish to have regard to an up-to-date position on the claimant's means.

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Employment Judge Khalil

7 March 2022