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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr A Adams

Respondent

1 Kettering General Hospital
NHS Trust

and

2 Northern Lincolnshire and
Goole Hospitals NHS
Foundation Trust
3 Lincoln County Hospital

JUDGMENT FOLLOWING AN OPEN PRELIMINARY HEARING

Held at Bury St Edmunds on 16, 17 and, in Chambers,
22 January, 9 and 10 April 2020

Representation

Claimant:

Ms E Banton, Counsel

Respondents:

1 & 2 Mr J Gidney, Counsel

3 Ms Y Genn, Counsel

Employment Judge Kurrein

JUDGMENT

- 1 The Claimant's claims are struck out because:-
 - 1.1 they have no reasonable prospect of success; or
 - 1.2 the Tribunal has no jurisdiction to hear them because they are out of time and, in all the circumstances, it would not be just and equitable to extend time.

REASONS

- 1 On 10 October 2018 the Claimant presented a claim to the tribunal alleging post-termination victimisation against the above three Respondents.
- 2 The Claimant is a highly qualified and experienced consultant in emergency medicine. In summary, it is his case that, despite a well-known shortage of people with his expertise and qualifications, he has been unable to secure a substantive post since 2012.
- 3 He alleges that each of the Respondents has subjected him to detriments contrary to section 27 Equality act 2010 because he brought a claim alleging race discrimination against the First Respondent ("R1") on 1 March 2012. That is the protected act he relies on. It is not in dispute.
- 4 Each of the Respondents presented responses in which they denied they had subjected the Claimant to any detriment because of that protected act.
- 5 The protected act claim was compromised by a COT3 on 11 March 2013 as part of which R1 agreed that it would provide a reference in a specified form:

giving only the dates and nature of his employment and stating that he performed his clinical duties to R1's required standards.

- 6 A preliminary hearing took place in the present claim on 11 April 2019, at which directions were given that the Claimant should give detailed particulars of his claim in both narrative and tabular form. The narrative form has never been produced or served on the tribunal or any parties. The tabular form is referred to in the course of these reasons and a copy of it is appended to them.
- 7 The directions included further orders for amended responses, for the Claimant to provide a witness statement in response to the time points taken by the Respondents, and listed the matter for an Open Preliminary Hearing at which the Respondents intended applications for the Claimants claims:-
- 7.1 to be struck out because they had no reasonable prospect of success;
- 7.2 that the Claimant be ordered to pay a deposit in respect of them because they had little reasonable prospect of success;
- 7.3 that they be struck out because they were out of time and it would not be just and reasonable equitable in all the circumstances to extend time.
- 8 Those matters have come before me today. I have heard the evidence of the Claimant on his own behalf. I have read the written submissions on behalf of each of the parties, And heard the oral submissions. I have considered the documents to which I was referred and had regard to the authorities cited to me.
- 9 I accept that on a hearing this nature I must take the Claimants case at its highest. I also accept that it is not open for me to make findings of fact on matters that are in dispute.
- 10 The final version of the Claimants tabular form of his claims appeared at page 88 of the bundle. The columns had the following headings, number, Respondent, named individual, act/omission, date of act/omission, detriment to Claimant, and claim form paragraph number.
- 11 In discussion with the parties prior to hearing submissions or evidence I sought to clarify the basis on which the Claimant advanced each of the 14 matters he relied on.
- 12 In the course of doing so I reminded myself that the relevant provision of the Equality Act 2010 is in the following terms: –
- “27(1) A person (A) victimises another person (B) if A subjects B to a detriment because-
- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.”
- 13 I was concerned that the Claimant appeared to be relying on more than one act or omission as a detriment because the acts he relied were not, of themselves, alleged to be the detriments. I refer to Claim 1 as an example.
- 14 It is alleged that Mr Ashaolu, an employee of R2, wrote a negative reference for the Medical Director of R2 dated 3 October 2012 (the alleged act) which resulted in the Claimant's application for a post where he says he was the sole applicant, being rejected (the alleged detriment). Thus both the negative reference and the failure to be appointed are relied on.

- 15 It appeared to me that there was a substantial difficulty with such an approach. It is clear from the provisions of section 27 that the person who subjects the Claimant to a detriment must do so because of the protected act.
- 15.1 If that person is said to be Mr Ashaolu he must be aware of the protected act, because he has to be motivated by it.
- 15.2 If that person is the panel who did not appoint the Claimant, or, in this case, R2, It must be aware of the protected act because it will have to be motivated by it.
- 16 This raised the question of whether an analysis similar to that in the decision of the Supreme Court in Royal Mail Group v. Jhuti [2019] UKSC 55 could be relied on so as, in Claim 1, to import the knowledge and motivation of Mr Ashaolu (if he had the knowledge and was so motivated) to the panel or R2.
- 17 The Claimant did not make it clear what his position was on these issues in the course of this hearing. I thought it most likely that the detriment was the allegedly inappropriate reference, and the failure to be appointed to be the consequence, which might sound in damages if appropriate findings were made.
- 18 I now turn to deal with each of the claims in turn.

Claim 1

Merits

- 19 As noted above, this claim concerns the Claimant's failure to be appointed to a substantive Consultant role with R2 in October 2012. It identifies R2, R3, Mr Ashaolu and Dr Levy (Medical Director).
- 20 Dr Ashaolu was the Clinical Director of and a Consultant in the Accident and Emergency department at R2. A Dr Scott was the Medical Director of R2.
- 21 The Claimant had been working at R2 as an Locum Consultant on a series of contracts from 23 April 2012 until the anticipated expiry of the then current contract on 24 October 2012.
- 22 The Claimant's application form for that post gave Mr Ashaolu as one of five referees he provided.
- 23 The role of Mr Levy, who is also named (and described as a Medical Director) was wholly unexplained. He was not R2's Medical Director and was not named as a referee by the Claimant in his application.
- 24 The connection of R3 to this claim was unexplained. That part of the claim appears to be misconceived.
- 25 The only events concerning the Claimant that Mr Ashaolu refers to in his reference, appear to be confined to his knowledge of the Claimant, as a colleague and the Clinical Director, during his engagement as a Locum.
- 26 I accept that the reference might be described as negative..
- 27 There was no evidence before me, oral or documentary, to suggest that Mr Ashaolu had any knowledge of the Claimant's protected act, far less that he had been motivated by it. It was suggested that a Tribunal could infer such knowledge.

28 I have grave doubts whether that would or could be an appropriate inference. There was no suggestion of any evidence from which such an inference might be drawn.

Time

29 The events relied on took place in 2012. The Claimant knew of his rejection at the time.

Claim 2

Merits

30 This relates to an application for a position with R3 in early 2014. It names all three Respondents and names Dr Andrew Chilton (Medical Director at R1), Mr Ashaolu (Clinical Director at R2) and Mr David Flynn. The Claimant was the sole candidate and was unsuccessful.

31 In his application for this post the Claimant volunteered Dr Chilton, Mr Ashaolu and Dr Flynn as his referees.

32 The particulars of the act/omission are,

“Provided “mere dates of employment” by way of a two line reference. R3 has not provided a response to C’s SAR response [sic] but the content of Dr Flynn’s reference is assumed to be adverse”

33 The First allegation is entirely erroneous. The document referred to was not a reference from Dr Chilton, but an email or memo from a member of HR at R1 which gave the dates of the Claimant’s employment with R1 to Dr Chilton. There was no evidence before me of what, if anything, Dr Chilton said in any reference.

34 The second part of this claim alleges that “Dr Flynn’s reference is assumed to be adverse”.

35 The basis on which it is said that Dr Flynn can be assumed to have given a negative references in not set out.

36 There was no evidence that either Mr Ashalou or Dr Flynn were aware of the protected act, far less that they were motivated by it.

37 It appears to me that this claim is based on nothing more than conjecture.

Time

38 The events relied on took place in 2014. The Claimant knew of his rejection at the time.

Claim 3

Merits

39 This claim is based on the failure of the Claimant to be appointed to a position at Northwick Park Hospital in 2015. He names all three Respondent and Drs Flynn, Loryman and Chilton.

40 He alleges Drs Chilton and Loryman provided references, but makes no allegation against Dr Flynn. He does not alleges any references that were given were adverse.

- 41 He alleges Dr Amir Shweik, who worked for R2, was on the interview panel, but was not listed as being so. He make no allegation of impropriety concerning Dr Shweik or R2.
- 42 Despite my best endeavours I was quite unable to discern the basis on which this claim was advanced against these Respondents.

Time

- 43 The Claimant knew he had not been successful in 2015. He has not suggested that he has made a SAR, or that it has not been complied with.

Claims 4, 5 and 6

Merits

- 44 These claims arise from the Claimant's failure to be appointed to a substantive post at York.
- 45 The claims are against R3, R2 and R1 in that order, and name Dr Loryman, Mr Ashaolu and R1's. Director of HR, Mr G Etule.
- 46 Much of the evidence for this claim comes from a note made by Mr M Williams, Clinical Director in EM at York, where the Claimant had worked some shifts prior to his application.
- 47 It is clear from that note that Mr Williams was hopeful of appointing the Claimant to the post prior to interview, but that the Claimant's performance at interview was, "very disappointing" with the panel thinking his answers were "weak".
- 48 Dr Loryman's reference was "generally supportive" but gave details of the difficulties in the Claimant's relationship at R1, including his dismissal and re-engagemnt. Mr Williams spoke to Dr Loryman, who was "guarded" about the issues at R1. He also spoke to Mr Ashaolu, who was,"scathing about [his] disruptive influence within the department and his poor communication / liaison skills. Mr Ashaolu regarded the Claimant as a friend, but was unequivocal in advising he not be appointed.
- 49 The Panel were unanimous in deciding not to appoint in light of the interview performance and written reference from Dr Loryman.
- 50 Once again, I was unable to understand the basis on which the Claimant was alleging that R3 could be liable for victimisation arising from the reference provided by Dr Loryman in his capacity as a former colleague of the Claimant. There was nothing to suggest that Dr Loryman was acting for R3 in providing the reference, far less that it was aware he was doing so. There was no evidence that his reference was improperly motivated or, even if he was, that his then employer was aware of it.
- 51 The situation with what Mr Ashaolu is reported to have said is at least as difficult for the Claimant. There is no suggestion he knew of, mentioned or even might have been motivated by the Claimant's difficulties with R1. It is simply supposition.
- 52 I am at a complete loss to understand the basis of the claim involving Mr Etule. The Claimant was dismissed by the First Respondent, in circumstances in which it was required to report the dismissal to the GMC. R1 did so in 2012.

- 53 What the Claimant alleges is that the GMC then passed that information on to R2. Whether it did so or not, no claim can lie against R1 for the acts of the GMC.

Time

- 54 The Claimant know of his rejection for this post in November 2015. He has not explained when he knew of the contents of Mr Williams' note or the other matters he relies on.

Claims 7 to 13

- 55 These are all concerned with North West Anglia NHS Foundation Trust ("NWA") from which it appears the Claimant has been given substantial documentation under a SAR. NWA was formed by a merger of Hinchingsbrooke with Peterborough and Stamford NHS Trusts from 1 April 2017.

Claim 7

Merits

- 56 This claim is not an accurate record of what was said or its circumstances. It is against R3 and its employee, Dr R Andrews.
- 57 On 14 July 2016 a clinician at Peterborough sent an email concerning the Claimant's upcoming interview at NWA in which he said the Claimant had been, "extremely frank and honest about previous history with some of the consultants here [at Peterborough]" and asked whether it was appropriate for him to be on the panel.
- 58 It appears Dr Andrews provided a reference at the request of the Claimant which said, in part, "Mr Adams is viewed by colleagues in management as awkward to deal with and at times is considered unduly reluctant to return to the department when he is on call ..". He also referred to the Claimant's failure to be appointed in Lincoln, but expressed the view that he had matured as a consultant.
- 59 Once again, this claim is based on a series of assumptions concerning Dr Andrews:-
- 59.1 He was acting for R3 in providing this reference;
- 59.2 He knew of the Claimant's protected act;
- 59.3 He was motivated by that knowledge to give the reference he did, rather than by his own knowledge and of what his staff had reported to him.
- 60 In my view, in the lack of compelling evidence in his favour, the Claimant faces formidable difficulties in this aspect of his claim.

Time

- 61 The Claimant was aware of the outcome of this interview shortly after it took place in July 2016.
- 62 Once again, he has been rather coy as to when he received the SAR documents.

Claim 8

Merits

- 63 This claim is made against R3 and Dr Andrews. It relates to an application to NWA in May 2017. There is no relevant documentation specific to that application.
- 64 It appears to be based on the document referred to at paragraph 57 (above) dated 14 July 2016.
- 65 However, that email, though heavily redacted, gives the clinical and executive work addresses of the author as Peterborough City Hospital. Dr Andrews worked for R3, not in Peterborough.
- 66 This claim is unsustainable.

Claim 9

Merits

- 67 This is based on an allegation that in late 2017 NWA placed the Claimant on a "restricted list" that limited his opportunities for employment in that Trust.
- 68 It names all three Respondents and Dr Andrews.
- 69 The basis for this claim is vague in the extreme. It alleges that:-
- 69.1 Medical Directors in the region meet regularly "to discuss issues or problems".
- 69.2 All Respondents would be involved in those discussions.
- 69.3 R1 and R3 are linked through the Trent Regional Healthcare Training Networks.
- 69.4 Dr Andrews (an Associate Medical Director) and Dr Shaukat (the Claimant's case being that his complaint about Dr Shaukat led to his dismissal from R1) are both cardiologists.
- 69.5 R2 and R3 are also linked through Trent Regional Healthcare Training Networks.
- 70 None of these matters, in my view, assist the Claimant to establish even the beginnings of a case that NWA placed him on a restricted list because someone was motivated by his protected act. It is simply speculation and assertion, without an iota of evidence.

Claims 10 to 13

- 71 These all related to the Claimant's failure to be shortlisted for an appointment with NWA in early 2018.

Claim 10

Merits

- 72 This claim is made against R1 and/or R3 and an "Unknown Individual". It concerns the Claimant's failure to be engaged by NWA in about March 2018 to work at Hinchingsbrooke. He had worked there in about 2005.
- 73 It seeks to suggest that NWA relied on a 2016 reference from Dr Andrews, possibly that at paragraph 58 (above), but the author of the email relied on by the Claimant and dated 9 March 2018 is clearly internal to NWA.

74 The content of the email appears to be based wholly on the writer's knowledge of the Claimant, acquired in the course of a previous interview process in which the Claimant had clearly not impressed.

75 This claim is, again, based on wholesale speculation as to who did what, when and why. In particular, the claim relies on mere assertion that an unknown individual knew of and was motivated by the protected act, and was in a position to influence the outcome of the selection exercise.

Claim 11

76 This claim is made against R1 and an unknown individual and arises from the same selection exercise as Claim 10.

77 It is based on a redacted email internal to NWA. The author clearly had considerable knowledge of the Claimant, going back to 2006, and was on the interview panel in 2016.

78 The only complaint appears to be the fact that the author mentions the referral to the GMC. That was made by R1 in about 2012.

79 In my view this claim is simply misconceived. There is no basis on which the necessary causation could be established.

Claim 12

80 This claim is made against R1 and/or R3 and names Dr Andrews "via Hinchingsbrooke".

81 It is based on redacted emails dated 14 April and 5 June 2018. Only the later email is before me and the author is not identified, although the Claimant appears to attribute it to a Dr Gardener, who he asserts relied on Dr Andrews' (2016?) reference. It is internal within NWA.

82 This claim, like so many of those before it, appears to me to be based on nothing more than mere assertion. There is no evidence of any causative link between the protected act and the failure of the Claimant to be shortlisted.

Claim 13

Merits

83 This claim is based on the feedback given by Dr Gardener on 11 September 2018 to the Claimant following his failure to be appointed by NWA in March 2018.

84 The Claimant made notes about what was said. I have to assume that they are accurate.

85 Dr Gardener told the Claimant that he wanted to give him some information face to face in addition to that which had already been provided by the Claimant's SARs. He expressed his concern that the Claimant had not reflected or learned from what had happened in the past and believed that there were "numerous people" in the department who still had negative feelings about the Claimant. He thought that a number of people who were independent of each other, from different Trusts, shared that view, so thought there to be some truth in it. References from a number of sources had raised the same issues, such as not being visible when "on call", and being unwilling to make decisions. Both he and the former CEO of

Hinchingbrooke had fought to give the Claimant a chance, but too many Trusts and people were saying the same thing: the Claimant shirked responsibility when on call and displayed his temper.

- 86 Nowhere in these notes is there any reference to the protected act. It is wholly concerned with Dr Gardener's perception and understanding of his and other people's view of the Claimant in his professional capacity as a EM Consultant.
- 87 I am quite unable to understand the reference in the Schedule to "victimising reasons" being given. None were.
- 88 Similarly, there is no mention in the documentation of any reference from Dr Andrew for the post in question. I can only assume that that the Claimant is again relying on the 2016 reference.
- 89 I have concluded that there is no evidence at all of the necessary causation in respect of this aspect of the claim.

Claim 14

- 90 This claim is against all three Respondents and Dr Loryman. It concerns the Claimant's application for a position as a locum consultant for 12 months at Buckingham Healthcare Trust. His complaint is that he was only appointed for a three month period because of his "difficult background".
- 91 However, the only references given by Dr Loryman appear to have been to Northwick Park, Claim 3; and York, Claim 4, in 2015. His connection with this claim is not identified.
- 92 It is suggested, in common with Claim 13, that the Claimant's failure to succeed was based on "Hearsay/gossip". I cannot comment on that: however, that is a very far cry from being evidence from which all the necessary inferences that might found a claim for victimisation can be made.

Generally

- 93 It is clear from all my above findings that the Claimant chose to identify individual doctors as his referees for these applications. They were a mix of current and former colleagues. It is apparent that they find him affable and do not comment adversely on his clinical ability. Some consider him a friend. However, they are unanimous in raising concerns regarding his work ethic and character. These were discussed with him from at least as early as October 2012.
- 94 The Claimant makes allegations against seven identified people, and four unknown individuals.
- 95 In order to succeed in any part of this claim the Claimant will have to, at the very least, adduce sufficient evidence to persuade a Tribunal that they might have been motivated to give the reference they did, at least in part, by the protected act, and not by their honest opinion.
- 96 Despite my receipt of a bundle containing over 550 pages of documents and hearing the applications over two full days, as well as the Claimant's evidence, I concluded that there was no evidence before me from which such an inference might be drawn.

Strike Out Law

97 I accept the principles set out in Anyanwu v South Bank Students' Union [2001] IRLR 305, HL, in which Lord Steyn said,

"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

98 That principle is qualified by the following passages from Lord Hope of Craighead,

" .. the time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail"

and

" ... discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

99 In my view, for all the above reasons, the Claimant's claims numbered 1 (in ewspwxr od R3), 2, 3, 6 and 8 to 14, inclusive, are bound to fail, and should be struck out. They have no reasonable prospect of success.

Time Issues

Calculations

100 The Claimant started early conciliation on 18, 21 and 22 August 2018. The cut off dates for claims to be in time are therefore 19, 22 and 23 May 2018.

101 On that basis only Claims 12 (in part), 13 and 14 were potentially presented in time.

102 The Claimant relies on Hendricks v. Commissioner of Police for the Metropolis [2003] IRLR 96 and asserts that there is an overarching state of affairs such that all the claims are in time. It is also asserted that the claims arise from a continuing act and/or are a series of similar acts the last of which is in time.

103 However, the last of the remaining claims, claim 7, is dated 18 July 2016 and is therefore almost two years out of time. Those principles cannot assist the Claimant in these circumstances.

Claimant's Knowledge

- 104 The Claimant's witness statement on this issue was only of very limited assistance. Only a few paragraphs were relevant. In cross-examination, however, the following emerged:-
- 104.1 The Claimant accepted that his case would:-
- 104.1.1 Impose a substantial obligation on the Respondents to seek third party disclosure.
- 104.1.2 Require many witnesses who were not employed by the Respondents, as well as many who were, to recall events from as much as 8 or more years ago.
- 104.2 The Claimant was aware:-
- 104.2.1 From his protected act in 2012, of the relevant time limits.
- 104.2.2 In 2014 that Dr Flynn's reference might not have been favourable, and spoke to Dr Hepburn about this in August 2016.
- 104.2.3 In 2016 that Dr Andrew's reference, given that year, might not have been as favourable as he would have wished.
- 104.2.4 Was aware of his right to take action in 2016, but did not do so because he feared investigations, complaints and dismissal. He didn't want to be seen as a serial litigant.
- 104.3 The Claimant sought advice from the solicitors who had advised him in relation to the protected act claim, and sought informal resolution.
- 104.4 In 2017 he sought and obtained advice from the BMA about being placed on a "restricted list" (Claim 9) and was informed it was lawful unless there was discriminatory treatment.
- 104.5 In 2017 he was receiving comments from locum agencies about difficulties in finding him placements, but did not seek advice on it because, "it's not what doctors do."

Prejudice

- 105 There will clearly be very substantial prejudice to the Respondent if these claims proceed against it. The claims relate to events many years ago, and in most cases concern decisions made by health Trusts other than themselves. The process of obtaining disclosure and witness evidence will be huge, and expensive.
- 106 I accept that the Claimant, too, will be prejudiced if these claims do not proceed. However, he had the knowledge and means to proceed with them contemporaneously and chose not to do so.
- 107 In my view the prejudice to the Respondents clearly outweighs that to the Claimant.

Discretion

- 108 In light of all my above findings I have concluded that the Claimant has failed to discharge the burden on him of establishing, on the balance of probabilities, that it would in all the circumstances be just and equitable to extend time in his favour.
- 109 The Tribunal therefore has no jurisdiction to hear claims 1 (against R2), 4, 5 and 7 and they must be struck out.

Deposit Orders

- 110 The Claimant's statement failed to give particulars of his means. I heard some evidence of them
- 111 Had I not made the above findings I would have found that the entirety of his claim had little reasonable prospect of success. On the basis of my knowledge of his means I would have imposed deposits on each claim totalling as much as £5,000.00.

Delay

- 112 I apologise to the parties for the extent of the delay there has been in promulgating this Judgment.

Employment Judge Kurrein

10 April 2020

Sent to the parties and
Entered in the Register on

14 : 04 :2020

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For the Tribunal