EMPLOYMENT TRIBUNALS

Claimant: **Mr K Crossland**

Respondents: **(1) Chamberlains Security (Cardiff) Ltd**
(2) Mr R Trevivian
(3) Mrs L Trevivian

Heard at: **Cardiff (via CVP)** **On: 5 July 2021**

Before: **Employment Judge S Jenkins (sitting alone)**

Representation:
Claimant: In person
Respondents: Ms B Darwin (Solicitor)

JUDGMENT

The Claimant's claim is struck out, pursuant to Rule 37(1)(a) of the Employment Tribunal Rules of Procedure, on the basis that it has no reasonable prospect of success.

REASONS

Background

1. This case has taken up a significant amount of judicial time over the last seven years, and the background to it has already been summarised in several judgments. I therefore only briefly summarise the background relevant to this hearing.

2. The Claimant brought claims against the First Respondent, his former employer, in February 2015, of: discrimination arising from disability, pursuant to Section 15 of the Equality Act 2010; failure to make reasonable

adjustments, pursuant to Sections 20 and 21 of that Act; and victimisation, pursuant to Section 27 of the Act.

3. Relevantly to his current claim, the Claimant also contended that any compensation awarded to him, if his claims were successful, should be increased, pursuant to Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, on the basis that his claim concerned matters to which a relevant Code of Practice applied, and the First Respondent had unreasonably failed to comply with that Code.

4. The Code of Practice for the purposes of the 1992 Act means a Code of Practice issued by ACAS under the scope of Chapter III of Part IV of that Act. Essentially, for the purposes of this claim, that involved the ACAS Code of Practice on Disciplinary and Grievance Procedures ("ACAS Code").

5. The brief factual background to the claims was that the Claimant was engaged by the Respondent, on a "zero hours" basis, as a security guard, and was assigned, as a lone worker, to Llandegfedd Reservoir in Pontypool, to provide security services at the site, owned by Dŵr Cymru Welsh Water ("DWCC"), whilst it was being developed into a water sports centre. Whilst at the site on 10 October 2014, the Claimant, who suffers from Type 1 Diabetes, had a glycaemic episode, which led to a call to the emergency services and the attendance of a paramedic.

6. Subsequently, the First Respondent took the view, which appears, from an internal report form in the bundle produced for the hearing, to have been shared by its client, DWCC, that it would not be appropriate, from a health and safety perspective, for the Claimant to work at the site. As the First Respondent did not have alternative work to which the Claimant could be allocated, that effectively left him without work and income. He brought the section 15 and sections 20/21 claims as a result of that. His section 27 claim arose from the First Respondent's subsequent indication that it would not employ the Claimant following the discovery that the Claimant had pursued claims against previous employers, in addition to indicating that he would pursue claims against the First Respondent, which was the protected act for the purposes of his section 27 claim.

7. The Claimant's claims were dismissed in July 2015 by an Employment Tribunal sitting in Cardiff chaired by Employment Judge Beard ("Beard Tribunal"), but, having been remitted to a fresh Tribunal on appeal, were upheld in May 2017 by an Employment Tribunal sitting in Bristol chaired by Employment Judge Pirani ("Pirani Tribunal").

8. Notably, whilst the Pirani Tribunal did not uphold every strand of each of the Claimant's claims, for example, it did not agree that all of the adjustments contended by the Claimant as reasonable were of that character, all of the

three claims brought by the Claimant; Section 15, Sections 20/21 and Section 27, were upheld.

9. Before the Pirani Tribunal an issue arose as to whether or not the Claimant had been dismissed, that having relevance for part of his Section 15 claim and also for the question of whether the First Respondent had unreasonably failed to comply with the ACAS Code. As the Pirani Tribunal noted, whether the Claimant was dismissed was a "complex legal and factual issue". Ultimately, the Pirani Tribunal decided, on balance, that the Claimant had resigned by requesting his P45, and therefore had not been dismissed.

10. The Tribunal went on however to note that, even if it was wrong about that, it would not have concluded that the Respondent's failure to comply with the ACAS Code was unreasonable, or that it would be just and equitable to increase any award due to any failure to comply. In essence, the Tribunal concluded that the termination of the Claimant's employment involved a capability issue rather than a disciplinary issue, and therefore the ACAS Code had no application. Whilst the Judgment did not refer to it, the Employment Appeal Tribunal has confirmed, in *Holmes -v- Qinetiq Limited* [2016] ICR 1016, that if the reason for dismissal does not involve a disciplinary offence then the Code has no relevance, and it follows that there can be no basis for awarding an uplift for failure to comply with it.

11. The Pirani Tribunal also concluded that, even if there had been a failure to follow the ACAS Code, they did not consider that the First Respondent had acted unreasonably, because the First Respondent believed that it had not dismissed the Claimant such that any failure was inadvertent rather than deliberate.

12. The Claimant sought to appeal the Pirani Judgment to the Employment Appeal Tribunal. Although the grounds of appeal were not before me, part of the Judgment of HHJ Stacey, as she then was, issued in January 2018, in which she rejected the appeal following a hearing under Rule 3(10) of the Employment Appeal Tribunal Rules of Procedure, indicated that the Claimant had complained about the Pirani Tribunal's conclusion that he had resigned and had not been dismissed. A further application to the Court of Appeal for permission to appeal was refused, by Bean LJ in August 2018, who noted that arguments on appeal that the Employment Tribunal should have found the Respondent to be dishonest were "hopeless".

13. In August 2019 the Claimant submitted a fresh Tribunal claim in the Wales Tribunal to set aside the Pirani Tribunal Judgment, due to allegations of fraud on the part of the Respondent. However, in September 2019, the Claimant withdrew that claim, having issued an application in Cardiff County Court in the same terms.

14. That application was struck out by District Judge James, in October 2019, on the basis that the County Court had no jurisdiction to set aside an Order of an Employment Tribunal. The Claimant lodged an application to appeal District Judge James' decision, but permission to do so was refused by HHJ Harrison in January 2020.

15. A remedy hearing took place in November 2020 before the Pirani Tribunal, differently constituted due to the retirement of the two non-legal members, and Judgment on Remedy was issued on 26 November 2020. In the remedy hearing the Tribunal noted that the Claimant continued to argue that the Judgment in his favour should be set aside due to fraud, but that, on being asked whether he wished the Tribunal to set aside the earlier Liability Judgment, he had confirmed that he did not.

The application

16. On 23 February 2021, the Claimant issued a further claim in the Wales Tribunal against the First Respondent, and also the Second and Third Respondents, the directors and owners of the First Respondent. In that claim, whilst ticking the boxes to refer to claims of unfair dismissal, disability discrimination and holiday pay, the Claimant also ticked the box to say that he was making another type of claim which the Employment Tribunal can deal with. He went on to explain that his claim was an independent cause of action to that begun in 2015, and was to have the Pirani Tribunal Judgment set aside because of fraud. He cited the Supreme Court Judgment in *Takhar -v- Gracefield Developments Limited* [2019] UKSC 13 in aid.

17. The Respondents resisted the claim, and applied for it to be struck out as an abuse of process, or on the ground that the Tribunal had no jurisdiction to consider it.

Applicable law and the parties' submissions

18. The principal element of the Claimant's contentions, relating to what he asserted to have been fraud on the part of the Respondent, related to notes of a grievance meeting in December 2014 between the Claimant and the Second Respondent, the notes having been taken by the Third Respondent. Unbeknown to the Respondents at the time, the Claimant covertly recorded the meeting. He contended that the First Respondent's notes of the grievance meeting were falsified to change their meaning. He referred in his submissions to me to a "wholesale rejigging" of them.

19. The Claimant also advanced two further allegations of fraud. One related to risk assessments prepared by the Second Respondent following the incident on 10 October 2014. The Claimant contended that they were

contradictory regarding the view that driving at the site was a requirement; a general one indicated that it was not, whereas a specific one relating to the Claimant indicated that it was.

20. The other related to what the Claimant described as a "false witness". That related to a reference in the Second Respondent's witness statement to his speaking to a contractor at the site on 10 October 2014, whose name he could not remember, in which the contractor had told the Second Respondent that he had observed the Claimant's behaviour at the time and that an ambulance had attended at the site.

21. The focus of the Claimant's oral submissions before me was, however, very much on the grievance meeting notes.

22. The Claimant contended that the alleged frauds affected the Pirani Tribunal's Judgment on both liability and remedy.

23. The essence of the Respondents' application was that the Claimant was attempting, having tried various avenues of appeal, to overturn the Judgment of the Pirani Tribunal and to relitigate the case. They contended that I did not have the statutory power to set aside the Judgment of the Pirani Tribunal on the basis of fraud, as the Employment Tribunal's jurisdiction is statutory, and an Employment Tribunal Judge only has the ability to hear claims that statute has given them power to hear.

24. In the alternative, the Respondents contended that any application to set aside the Judgment of the Pirani Tribunal must be to that Tribunal.

25. In the further alternative, the Respondents relied on res judicata and abuse of process to say that the Claimant was estopped from pursuing his claim further, as the claims, and the matters giving rise to them, had already been litigated.

26. Without going into any of the detail of the case law in that area, the essential position is that, where claims, and the factual matters underpinning them, have been addressed and considered by a Court or Tribunal, or could, with reasonable diligence, have been addressed and considered by a Court or Tribunal, then the parties are prevented from pursuing them further. That has variously been described as; cause of action estoppel, issue estoppel, the Rule in *Henderson -v- Henderson*, and abuse of process, but, the precise categorisation is not relevant.

27. The Respondents contended that concerns over the grievance meeting notes were raised by the Claimant at the initial hearing, and were therefore addressed by the Pirani Tribunal such that the Claimant was estopped from pursuing them further.

28. The Claimant contended that the Supreme Court Judgment in *Takhar* applies an important gloss to that principle, which is that where it is alleged that a judgment was obtained by fraud, and where no allegation of fraud had been raised at the trial which led to that judgment, there is no requirement that the Claimant must not, with reasonable diligence, have been able to identify the alleged fraud at that hearing.

29. The Supreme Court in *Takhar* did however endorse the principles which govern applications to set aside judgments for fraud summarised by Aikens LJ in *Royal Bank of Scotland PLC -v- Highland Financial Partners lp* [2013] 1 CLC 596. Those are: (i) That there has to be a "conscious and deliberate dishonesty" in relation to the relevant evidence; (ii) The relevant evidence must be "material", i.e. must have been an operative cause of the court's decision to give judgment in the way it did; and (iii) That the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were retried.

30. With regard to strike out applications, the approach to be taken by Employment Tribunals has been the subject of guidance from the appellate courts on many occasions, although principally in relation to the assessment of reasonable prospects of claims from a qualitative perspective. Most recently, guidance was provided by HHJ Tayler in *Cox -v- Adecco and others* (UKEAT/0339/19). In his judgment in that case he outlined a number of general propositions which emerged from earlier cases, which include that a claimant's case must ordinarily be taken at its highest.

31. I therefore approached the Respondents' application on the basis that the Claimant will be able to establish that the Respondents did act fraudulently in the drawing up of the notes of the grievance meeting, in the preparation of the risk assessments, and in relation to the evidence regarding the "false witness".

32. For the avoidance of any doubt, I have adopted that approach purely for the purposes of this hearing, and my doing so must not be taken to be any conclusion, or even indication, that the Respondents acted fraudulently. Indeed, my observations were that, whilst there were some discrepancies in the evidence put forward on the part of the Respondents, that did not necessarily imply dishonesty on their part, let alone that fraud had taken place.

33. By way of example, in his submissions to me the Claimant asserted that the "false witness" had said to the Second Respondent that an ambulance had attended the site when, in fact, a paramedic in a rapid response car had

attended. However, the internal DCWW report form, referred to at paragraph 6 above, referred to an ambulance having been called, and it is not difficult to see how an observer would describe a rapid response car, driven by a paramedic, with, it is presumed, health service livery, as an ambulance. In my view therefore, it would be extremely unlikely that incorrectly reporting that an ambulance had attended, when, in fact, a rapid response vehicle had, would be viewed as fraudulent, but, as I have said, I have proceeded on the basis that fraud would be able to be established.

Conclusions

34. I first considered whether I had jurisdiction to consider an application to set aside the Judgment of another Employment Tribunal. I noted that the Claimant called in aid Rule 3.1 of the Civil Procedure Rules, sub-paragraph 7 of which notes that a Court's general power of case management includes a power to revoke an Order. However, the Court of Appeal, in *Neary -v- The Governing Body of St Albans Girls School* [2010] ICR 473, noted that Parliament had deliberately not incorporated CPR Rule 3.9 into the Employment Tribunals Rules of Procedure when it chose to incorporate the overriding objective. I concluded that the same would have to be said of Rule 3.1, and that, as an Employment Tribunal Judge, it gave me no power to do what the Claimant was asking me to do.

35. I then looked to the Employment Tribunal Rules of Procedure to see if any power to set aside a Judgment of another Tribunal arose there; indeed the Claimant himself contended that Rule 70 allowed the setting aside of a Judgment.

36. Rule 70 does cater for an application by a party for a Judgment to be reconsidered, where it is necessary in the interests of justice to do so. However, Rule 72(3) notes that any such application shall be considered, where practicable, both with regard to the initial assessment of prospects and any substantive assessment, by, in the case of an initial assessment, the Employment Judge who chaired the full Tribunal which made the decision, or, in the case of a substantive one, by the full Tribunal which made it.

37. I could not conclude therefore that I had any power under Rule 70 to consider an application to reconsider the Judgment of another Tribunal. Any such application would need to be considered first by Regional Employment Judge Pirani as to whether there was a reasonable prospect of a decision being revoked, and then, if so, by the full Tribunal.

38. I observed that Rule 71 contains a specific time limit within which applications for reconsideration must be made, which has long since

passed in this case, but Rule 5 does give the Tribunal general power to extend the time limit whether or not it has expired.

39. In his written submissions the Claimant additionally sought to persuade me that I would have power to set aside the Judgment of the Pirani Tribunal through correcting a lacuna in the law, or through the requirement, set out in Section 3(1) of the Human Rights Act 1998, that legislation must, so far as possible, be read and given effect in a way which is compatible with Convention rights. However, I saw no lacuna in the legislation which required correction, and nor did I see that any of the Claimant's Convention rights, including his right to a fair hearing under Article 6, had in any way been infringed.

40. In my view therefore, the only method available to the Claimant to set aside the Pirani Tribunal Judgment is to make an application to that Tribunal, under Rule 70, for its Judgment to be reconsidered. That is obviously subject to the terms of Rules 70, 71 and 72, and any application the Claimant may make for the time in which to make such an application to be extended. I also observed, as I noted above, that the Pirani Tribunal did ask the Claimant if he wished it to set aside the Liability Judgment, to which he replied that he did not.

41. My decision on jurisdiction was sufficient for me to conclude that the Claimant's application to the Tribunal under the above case number has no reasonable prospects, and that it should therefore be struck out. However, in case it may be of assistance to the Claimant from a practical and pragmatic perspective, I considered that I would, if I had felt that I had power to entertain the Claimant's application, have concluded nevertheless that it had no reasonable prospects and should be struck out.

42. I would have reached that conclusion by reference to the principles set out by Aikens LJ in *The Royal Bank of Scotland* case regarding materiality. Even taking two aspects of the Claimant's case at their highest, that is that the Respondents had acted fraudulently, and that that had not been something that had been raised at the original hearing, I still would not have considered that Aiken LJ's principles were satisfied.

43. As I have noted, the Claimant's claims succeeded before the Pirani Tribunal, although not in their absolute entirety. As I have also noted, the principal element of the Claimant's allegations of fraudulent conduct related to the compilation of the notes of the grievance meeting in December 2014. However, whilst the grievance meeting is referred to in the Pirani Tribunal's findings of fact, those findings are not drawn upon in that Tribunal's conclusions on the Claimant's claims to any material extent.

44. The conclusions reached on the Claimant's reasonable adjustments and victimisation claims did not involve anything arising from the grievance meeting, and therefore any concern over the compilation of the grievance meeting notes had no bearing on those matters.

45. The Section 15 claim also succeeded on the basis of the decision that the Claimant should not continue to work at the site at which he had been engaged, the Tribunal's view being that that unfavourable treatment was not justified due to the ability of the First Respondent to relocate the Claimant to another site or to swap his job with that of another of its employees. Again, that was not a matter on which the notes of the grievance meeting had any bearing.

46. The Claimant also contended that his Section 15 claim encompassed the dismissal, however I did not see what the Claimant could have additionally gained had such a claim been accepted, bearing in mind that a Section 15 claim had already succeeded. Notwithstanding that, I did not consider that the notes of the grievance meeting had any material bearing on the Pirani Tribunal's conclusion on that aspect of the case in any event.

47. The nub of that aspect of the case revolved around the provision of the P45, the Respondent contending that the Claimant had requested it and therefore that he had resigned, and the Claimant saying that it had been offered by the Respondent and therefore that he had been dismissed. The Tribunal having weighed the evidence concluded, on balance, that the Claimant had requested the P45 and therefore had not been dismissed.

48. The Claimant contended in his submissions before me that that balance would have tilted in his favour had the Tribunal been conscious of what he contended was fraudulent behaviour by the Respondents. However, although there was reference to the covert recording in that section of the Judgment, I again did not consider that any asserted fraud had any material impact on this aspect of the Tribunal's decision. The Tribunal considered the parties' evidence on the specific point, i.e. how the P45 came into existence, and referred to specific reasons as to why it concluded, on balance, that the Claimant had requested it. They drew those conclusions, it seemed to me, from the transcript and the general point that there had been no need for the Respondents to send the Claimant his P45 if not requested. I did not therefore see how this aspect of the Judgment could have been "infected" by any fraud.

49. Similarly, I did not see that any such "infection" could have had a material impact on the Tribunal's conclusion on the ACAS uplift. Despite concluding that the Claimant had not been dismissed, the Tribunal went on to conclude that they would in any event have not ordered any uplift. That was because the reason for the Claimant's dismissal did not involve allegations of

misconduct and therefore the ACAS Code had not been engaged, and, in any event, that the Respondent had not acted unreasonably due to its belief that it had not dismissed the Claimant.

50. I took a similar view with regard to the materiality of the alleged "risk assessment" and "false witness" frauds. Very little reference to those matters was made within the Pirani Tribunal's Judgment, whether in its factual findings or its conclusions.

51. With regard to the risk assessment issue, the majority of the Claimant's written submissions on the point referred to conclusions reached by the Beard Tribunal, which I indicated to him were not matters I would be considering, as that Tribunal's Judgment had been overturned on appeal.

52. The Claimant's submissions relating to the Pirani Tribunal's Judgment record it saying, "*There was no need for the claimant to use a car on site*", and he then contended that no judge had addressed the possibility of fraud arising from the Second Respondent's assertion, in the specific risk assessment relating to him, that he was required to use a car on site. However, the Claimant's submissions omitted the previous two sentences from the Judgment which were, "*The second adjustment contended for is that the respondent should have recognised that security officers did not need to use their car as part of their job when at the reservoir. <u>This was conceded by Mr Trevivian</u>"* (my emphasis added).

53. That seemed to me to read as an acceptance by the Tribunal, and indeed an acceptance by the Respondents, that the Claimant did not need to use a car on site, and therefore the Pirani Tribunal's Judgment could not have been "infected" by an alleged fraud regarding the risk assessments.

54. Similarly with regard to the "false witness", some differences existed between the parties as to what precisely happened on 10 October 2014, but there seemed broad agreement that the Claimant suffered a glycaemic episode and his behaviour was impacted by that. Indeed, the Claimant in his written submissions referred, in relation to a different point, to Laing J's Judgment on the Claimant's Rule 3(10) application in relation to his appeal against the Judgment of the Beard Tribunal. In that, I noted that she stated, "*I have considered the material and the Claimant's skeleton argument and it appears to me that there was not a significant dispute about what had happened*". Again therefore, I did not see how the particular paragraph from the Second Respondent's statement, referred to and criticised in the Claimant's written submissions, could have had any material adverse influence on the Pirani Tribunal's Judgment.

55. Finally, the Claimant contended that the alleged fraud infected the Pirani Tribunal's Liability Judgment, but the Tribunal concluded, purely by

reference to the fact that the Claimant had been earning at or close to minimum wage with the First Respondent, that it would not have been difficult for him to have mitigated his losses by looking for such work elsewhere and that he would have been successful had he done so within six months. The Claimant contended that the Respondent's fraud and the Tribunal's Judgment meant that he pursued retraining and self-employment rather than paid employment, but I saw no basis for concluding that the Tribunal would have reached a different conclusion even if the Respondent had committed fraud, particularly as that Tribunal was aware of the Claimant's broad contentions at the Remedy Hearing.

56. Overall therefore, even if I had considered that I had jurisdiction to consider the Claimant's claim, I would still have considered it appropriate to strike it out, as I saw no reasonable prospect of the original Judgment being set aside, even assuming that he would be able to establish that there had been fraud, due to the fact that it would not have been causative or the Judgment being made in the way that it was, in relation to both liability and remedy.

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Employment Judge S Jenkins
Dated: 12 July 2021

JUDGMENT SENT TO THE PARTIES ON 13 July 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche