



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Rittoo

**Respondents:** 1. Wirral University Teaching Hospital NHS Foundation Trust  
2. Andrew Gibson  
3. Nicola Stevenson  
4. Jacqui Grice

**Heard at:** Manchester (remotely, by CVP)

**On:** 24 May 2022

**Before:** Employment Judge KM Ross

## REPRESENTATION:

**Claimant:** In person

**Respondents:** Mr J Boyd (Counsel)

# STRIKE OUT JUDGMENT

1. The Employment Judge considers that the claimant's allegations that he was victimised by the respondents pursuant to s27 Equality Act 2010 for bringing proceedings in case number 2411559/2019 and suffered detriments as set out at paragraphs 1, 2, 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17(a)-(f), 18, 19, 20, 21, 22, 23(a)-(f), 24, 25, 26, 27, 28 and 29 of the attachment to the claim form, (p21-4 Bundle of Documents) have no reasonable prospect of success and pursuant to rule 37 Employment Tribunals (Rules of Procedure) Regulations 2013, these allegations are struck out.

2. For the avoidance of doubt, the claimant's allegations at paragraphs 4,5,6 and 7 that he was victimised by the respondents pursuant to s27 Equality Act 2010 for bringing proceedings in case (p22 of the Bundle) are unaffected by this strike out Judgment although the claimant is subject to a deposit order if he proceeds with these allegations. (See separate Order).

3. In relation to the claimant's claim that the respondent subjected the claimant to direct discrimination within the meaning of section 13 Equality Act 2010, the claimant's allegation at paragraph 1 is struck out, and the claimant's claim at paragraph 2 is struck out in part where it relates to Mr Gibson. (See below).

4. For the avoidance of doubt, the claimant's allegations of direct discrimination in the remainder of paragraph 2 (see below), paragraph 3, paragraph 4, paragraph 5, paragraph 6, paragraph 7, paragraph 8, paragraph 9, paragraph 10 and paragraph 11 are unaffected by this strike out judgment but all the allegations are subject to a deposit order (see separate Order).

5. The claimant's claims for detriment within the meaning of section 47B Employment Rights Act 1996 for making protected disclosures are struck out because they relate to paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29, for the same reasons as set out in the victimisation claim.

6. For the avoidance of doubt, the claimant's claims for detriment within the meaning of s47B Employment Rights Act 1996 at paragraphs 5, 6 and 7 are not struck out but are subject to a deposit order. (See separate Order.)

## REASONS

### Background

1. The background to this case is that the claimant was a Consultant Cardiologist with the first respondent. Following a complaint from another doctor the claimant was excluded from the workplace. Disciplinary proceedings were brought against him and he was dismissed for alleged reasons of misconduct on 7 May 2019. He appealed and his appeal was rejected by letter dated 25 August 2020.

2. The claimant brought proceedings against Wirral University Teaching Hospital NHS Foundation Trust in case number 2411559/2019. The claimant brought claims for "ordinary" unfair dismissal (sections 94 and 95 Employment Rights Act 1996), direct sex, race and marital discrimination (section 13 Equality Act 2010), harassment on the grounds of sex and race (section 26 Equality Act 2010), victimisation (section 27 Equality Act 2010), detriment because of a protected disclosure (section 47B Employment Rights Act 1996) and breach of contract. The claimant provided very detailed further particulars of his claims (see pages 43-86). The case has been listed for a ten day final hearing commencing 14 August 2023.

3. The claimant was permitted to amend that claim to include allegations in relation to his appeal by the Order of Employment Judge Ainscough on 12 October 2020.

4. The claimant has presented this claim, case number 2408482/2021, where in addition to naming the first respondent, Wirral University Teaching Hospital NHS Trust, he also names Andrew Gibson, a solicitor for the respondent, Nicola Stevenson, the dismissing officer and Jacqui Grace, the Trust Executive Director of Workforce.

5. This case was originally case managed by Employment Judge Feeney on 24 November 2021. Employment Judge Feeney clarified that the claimant's further claims related to the conduct of his appeal.

6. The case came before me (Employment Judge Ross) on 28 February 2022. The hearing in relation to strike out/deposit did not take place on that occasion because the claimant, a litigant in person, felt disadvantaged by the late disclosure of the respondent's skeleton argument and bundle and indicated that he would take legal advice on the respondent's application.

7. Today I had the benefit of a bundle of documents and a skeleton argument from the respondents' counsel, Mr Boyd and he spoke to it. I also had the benefit of a submission from the claimant, and he too spoke to it. (The claimant's submission was disclosed late but Mr Boyd did not object to proceeding.)

### **Victimisation**

8. I turn to consider first the claim for victimisation.

9. In this claim the claimant clarified that the protected act is his original claim 2411559/2019. The detriments are listed at paragraphs 1-29 of the attachment to his claim form (pages 20-23).

10. The majority of these paragraphs relate to the conduct of the legal proceedings by Mr Andrew Gibson, the named solicitor representative of the Trust in the first claim. They include complaints about his communication to the Tribunal (paragraphs 1, 9 and 22). They also include the communications between the claimant and Mr Gibson about the disclosure of documents in the case (paragraphs 11, 13, 14, 16, 17(a)-(f), 18, 19, 20, 21, 23(a)-(e), 24, 25, 26, 27, 28 and 29).

11. Other allegations relate to communication between the claimant and Mr Gibson in the course of proceedings. The claimant sought further information from the respondent (paragraphs 11, 12, 15, 20, 24, 25).

12. The claimant's allegations also contain criticism of how Mr Gibson conducted the pleadings and the timeliness of the pleadings (paragraphs 1, 2, 3) and criticism of Mr Gibson's role advising the Trust (paragraph 7 – a time prior to the appeal being concluded but after the claimant had already lodged the first set of proceedings in September 2019).

13. The respondent submitted that the claim against Mr Gibson would have little or no reasonable prospect of success. I find that the claim against Mr Gibson would have no reasonable prospect of success because of the principle of immunity from suit.

14. A long-established principle of common law provides that in certain situations there is absolute immunity from suit in respect of things said or done in the course of judicial proceedings. The rationale for this rule is the need to protect those involved in litigation from the fear of liability for things said or done in the course of that litigation and the need to protect the integrity of the judicial process.

15. I drew the parties' attention to **South London v Maudsley NHS Trust v Dathi [2008] IRLR 350** and provided a copy of it. In that case Judge McMullen had regard to Devlin LJ's categorisation of the absolute immunity rule in **Lincoln v Daniels [1962] 1 QB 237** at 258. Lord Devlin stated:

*“The absolute privilege which covers proceedings in or before a Court of Justice can be divided into three categories.*

*The first category covers all matters that are done before a court. This extends to everything that is said in the course of proceedings by Judges, parties, counsel and witnesses and includes the contents of documents put in as evidence.*

*The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings.*

*The third category is the most difficult of the three to define. It is based on the authority of **Watson v McEwan [1905] AC 480** in which the House of Lords held that privilege attaching to evidence which a witness gives (before a court) extended to the...proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In **Beresford v White [1914] 58 SOL JO 670** the privilege was held to attach to what was said in the course of an interview by a solicitor with the person who might or might not be in the position of a witness on behalf of his client in contemplated proceedings.”*

16. In this case the claimant is seeking to draw into litigation matters which clearly relate either to the pleadings themselves or Mr Gibson’s communication with the Employment Tribunal, or his communication with the claimant in the process of discovery of documents, or his communication with the claimant in relation to information the claimant is seeking as part of his legal claim.

17. There are other ways, as Mr Boyd pointed out, for the claimant to achieve a remedy about the matters of which he complains. The claimant is a litigant in person and may be unaware that there is a procedure to make an application for specific disclosure of documents, within the Employment Tribunal rules.

18. I find the principle of immunity from suit applies here. There is judicial immunity for things said or done in the course of judicial proceedings. I am satisfied that the allegations set out at paragraphs 1, 2, 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17(a)-(f), 18, 19, 20, 21, 22, 23(a)-(f), 24, 25, 26, 27, 28 and 29 under the victimisation claim are all matters which were said or done in the course of these Tribunal proceedings.

19. An exception is allegation 7 which is in the context of Mr Gibson’s role advising the Trust throughout the appeal process. Allegation 7 relates to Mr Gibson taking instructions from Mr Byrne in the context of the claimant’s appeal against dismissal between November 2019 to August 2020. Accordingly, having regard to the characterisation of the absolute immunity rule, it cannot be said to be covered by either the first category which extends to everything that is said in the course of the proceedings by Judges, parties, counsel and witnesses and includes the contents of documents put in evidence. It cannot be said to be covered by the second category, which is everything done from the inception of proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of proceedings starting with the writ or other document which institutes proceedings.

That is because the appeal documentation, although in existence after the commencement of the first proceedings, came into existence as a part of the appeal process rather than as a result of the judicial process.

20. The third category, which is the most difficult to define, is in relation to privilege attaching to evidence which a witness gives before a court. I am not satisfied that letters relating to the appeal process can fall within this category. Accordingly, allegation 7 is not struck out but it is subject to a deposit (see separate Order).

21. In the alternative to the claimant's victimisation claim he also brought a public interest disclosure detriment claim and he relied on the same detriments, in particular paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29.

22. I find that, for the same reasons as I have described above in his in his victimisation claim, the allegations at paragraphs 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 are struck out because of judicial immunity from suit.

23. So far as the detriment relied on at paragraph 5 is concerned in relation to the victimisation claim is concerned, the position is complicated. This allegation relates to the cancellation of the claimant's email address by Mr Byrne on or around 24 August 2020. Judicial immunity from suit is not relevant.

24. However there is an element of duplication in this allegation. The claimant relies on this allegation i.e. the cancellation of his email, in his first claim. In his first claim he brings it as an allegation of direct discrimination (page 51), allegation ccc, and an allegation of harassment (page 61). He also brings it as an allegation of victimisation (see allegation II at page 67). Therefore it appears that there is duplication. On closer analysis the protected acts relied upon for victimisation (section 27 Equality Act 2010) are the protected acts occurring between 16 February 2017 and 17 July 2020 (four protected acts) at page 63. The claimant confirmed that the protected act he relies upon in his second claim is the presentation of the Employment Tribunal claim in the first claim, which was presented on 18 September 2019.

25. The position is complicated. Employment Judge Ainscough permitted the claimant at the case management hearing on 12 October 2020 to amend his claim to include matters which related to his appeal which post-dated the first claim form, taking place between December 2019 and August 2020. It is surprising that when the claimant made the very detailed particulars of claim which he was ordered to provide by 23 November 2020 (see pages 45-88) that the claimant did not include the presentation of the claim form as a protected act. Tempting as it is to strike out the victimisation claim as identified in paragraph 5 on the principle in **Henderson v Henderson**, on the basis that if the claimant had wanted to rely on the presentation of the claim form as a protected act, he should have done so when giving his detailed particulars. However I have also taken account the fact that the claimant is a litigant in person and so on balance, so have not struck out the allegation on the basis of Henderson. Accordingly the allegation at paragraph 5 of the victimisation claim survives.

26. The same facts are relied upon in the allegation at paragraph 5 in connection with the whistleblowing claim. Judicial immunity from suit does not apply. The claimant says this is detriment-cancellation of his email account-occurs in relation to protected disclosures 1, 2 and 3 in the second claim. In the first claim he relies on the cancellation of the email account on page 82 (allegation ccc), one of approximately 67 detriments connected to four different protected acts. Once again I considered **Henderson v Henderson** and was tempted to strike the claim out on that basis. Again, given the claimant is a litigant in person I have not done so.

27. Accordingly the allegation at paragraph 5 of the whistleblowing claim survives.

28. The same duplication problem appears to exist in relation to the allegation at paragraph 6:

“The appeal panel (Mr John Oakley, Mr Anthony Middleton, Dr Umesh Prabhu), advised by Mr Byrne, dismissed the claimant’s appeal by making false statements in the outcome letter dated 25 August 2020.”

29. This appears as a claim of victimisation in connection with the claimant bringing the first proceedings (in the second claim) and also as an alleged detriment for whistleblowing in relation to protected disclosure 3 in the second claim.

30. In the first claim the claimant relied on this allegation as direct discrimination (page 55vvv) and victimisation (page 73eee). Once again there appears to be a complete overlap in terms of the victimisation claim, although on closer scrutiny the claimant is relying on different protected acts. In the second claim he relies on the presentation of the first proceedings, whereas on the first claim he relies on four different protected acts. Once again it is frustrating that in his very detailed further and better particulars of claim that the claimant did not include the first claim as a protected act.

31. In the first claim the claimant relied on this allegation as a whistleblowing detriment (see page 86vvv). It is the last of approximately 67 detriments in relation to nine protected disclosures. However, the protected disclosure relied on in the second claim ie at p20-21 appear to be different to those identified in the first claim at 7 (a)-h, p71-78.

32. There is no clear explanation as to why the claimant had not clarified the matter when given the opportunity to provide detailed particulars. Once again it is tempting to strike out under **Henderson v Henderson** but given that the claimant was a litigant in person I have not done so.

### Conclusion

33. Therefore in conclusion, the allegations which remain for the purposes of victimisation detriment are the allegations set out at paragraphs 4, 5, 6 and 7 (p20-21). The allegations which remain for the purposes of whistleblowing detriment are the allegations as set out at paragraphs 5, 6 and 7 (the claimant did not rely on paragraph 4 for his whistleblowing claim).

## Direct Discrimination

34. The Tribunal now turns to the claimant's claims of direct discrimination in his second claim.

35. Allegation 1 is struck out and allegation 2 is struck out in relation to Mr Gibson. The other allegations remain but are subject to a deposit order.

### Allegation 1

36. Allegation 1 is struck out for judicial immunity from suit. This allegation relates to discussions in relation to disclosure of documents in the context of Tribunal proceedings and I am satisfied, for the reasons I have already given, that this is protected by judicial immunity from suit.

### Allegation 2

37. I turn to allegation 2. This is an allegation of direct race discrimination against Mr Gibson, Mr Nicola Stevenson and Ms Jacqui Grice. Where the claimant complains about Mr Andrew Gibson, he complains about what Mr Gibson told the Tribunal on 21 December 2020 and on two other occasions. These are communications in the course of proceedings and protected by judicial immunity from suit and must be struck out.

38. The allegation about Dr Nicola Stevenson appears to be duplication of the original claim as the claimant has already brought a claim for race discrimination against Dr Stevenson, the dismissing officer, in relation to his dismissal. The claimant makes a further micro allegation that she did not put allegations to the claimant at the disciplinary hearing that he may "bring the reputation of the Trust into disrepute" and that he "breached the Trust's trust and confidence in you" in his original claim form or in his amended claim. On the face of it, there is no reason why he should not have placed this in the original claim form or in the further particulars document and it is tempting to strike out on **Henderson v Henderson** basis. However, the claimant is a litigant in person so I have not done so.

39. The rest of the allegation relates to failure of the respondent to take action against Mr Byrne or misleading information given about Mr Byrne. It is wholly unclear how such an allegation could amount to less favourable treatment of the claimant. The claim has not been struck out, but a separate deposit order is made (see separate Order).

### Allegation 3

40. Allegation 3 is an allegation of direct race discrimination which refers to Mr Byrne but does not identify how this means, for the purposes of section 13 Equality Act 2010, that the claimant was subjected to less favourable treatment. It appears that the claimant, who is a litigant in person, is suggesting Mr Byrne as a comparator. However, as section 23(1) Equality Act 2010 states, for the purposes of establishing direct discrimination there must be "no material difference between the circumstances relating to each case". It therefore seems unlikely that Mr Byrne, an HR professional, is an appropriate comparator for the claimant, a cardiologist, facing

a disciplinary process due to allegations made against him. This allegation is subject to a deposit order (see separate Order) but is not struck out.

#### Allegation 4

41. Allegation 4 is another allegation where the claimant complains about Dr Nicola Stevenson treating him less favourably because of his race. It reiterates that the claimant was dismissed by Dr Stevenson for “misconduct”. That allegation is captured in the first claim and is therefore duplicated here. The allegation appears to rely on Dr Lipton as a comparator to the claimant. It is therefore subject to a deposit order (see separate Order) but it is not struck out.

#### Allegation 5

42. Allegation 5 is not a clear allegation of less favourable treatment on the grounds of race and sex, as is stated at the outset of the allegation. The claimant has already included allegations which relate to Dr Sharma in his original claim. He appears to be relying on Dr Sharma as a hypothetical comparator to the claimant, complaining that no disciplinary action has been taken against Dr Sharma whereas it has against the claimant. This allegation is not struck out, as I am mindful of the guidance in the long line of cases reminding the Tribunal it is dangerous to strike out in discrimination cases, but it is subject to a deposit order (see separate Order).

#### Allegation 6

43. Allegation 6 is an allegation which again refers to direct less favourable treatment on the grounds of race or sex and reiterates allegation 4 and what is in the original claim form. Although the claimant has already brought a claim that he was dismissed and alleges that the dismissal amounts to an act of direct sex or race discrimination, it is unclear whether the minutiae of this specific allegation is included in the original claim or in the further and better particulars. Having regard to the guidance of the dangers of striking out discrimination claims, I have not struck the allegation out. However, in relation to the allegation that complains that Dr Stevenson has treated Dr Sharma differently to the claimant, this is the subject of a deposit order (see separate Order).

#### Allegation 7

44. Allegation 7 is a complaint that the claimant was treated less favourably because of his race than another white doctor. Again it appears to be an attempt to use another individual as a comparator. I have not struck out the claim, but I have made it subject to a deposit order (see separate Order).

#### Allegation 8

45. Allegation 8 is a further allegation of the claimant being treated less favourably than Dr John Oakley and Mr Anthony Middleton. Once again neither of them appears to be appropriate comparators and this is subject to a separate deposit order (see separate Order).



Allegation 9

46. Allegation 9 is another allegation where Dr Stevenson is alleged to have treated the claimant less favourably than another doctor because of race. Again I am mindful of the guidance of not striking out claims of discrimination in a pluralistic society, and I have not struck out this claim but I have made it subject to a deposit order (see separate Order).

Allegation 10

47. Allegation 10 appears to be duplication of allegations 5 and 6 in the second claim. It also appears to be an allegation that was covered in the first claim, namely an allegation of direct race and sex discrimination against Dr Stevenson in relation to the claimant's dismissal.

48. The second part of the allegation appears to rely on using Dr Sharma as a comparator. I have not struck out the claim mindful of the guidance of the higher courts in discrimination cases, but I have made it subject it to a deposit order (see separate Order).

Allegation 11

49. Finally, allegation 11 is another complaint against Dr Stevenson and Ms Grice in relation to how they treated the claimant compared to another doctor on the grounds of race. It makes the same point in relation to an unsuitable comparator. I have not struck out the claim, but I have made it subject to a deposit order (see separate Order).

Conclusion

50. In conclusion, for the direct discrimination claim allegation 1 is struck out and allegation 2 is struck out in relation to Mr Gibson.

51. The other allegations remain but are subject to a deposit order.

Employment Judge KM Ross

Date: 14 June 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 June 2022

FOR THE TRIBUNAL OFFICE

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