



EMPLOYMENT TRIBUNALS

Claimant: Mr O Oyesanya

Respondent: The Pennine Acute Hospitals NHS Trust

HELD AT: Manchester

ON: 1, 2, 7, 8, 9 and 13
March 2017

BEFORE: Employment Judge Horne

Members: *Ms C S Jammeh*
Mr A J Gill

REPRESENTATION:

Claimant: In person

Respondent: Mr P Allen, solicitor

This is the unanimous judgment and order of the tribunal.

In this document:

- a. "ERA" means the Employment Rights Act 1996;
- b. "EqA" means the Equality Act 2010;
- c. "the bundle" means the bundle prepared for the final hearing starting on 1 March 2017;
- d. "the Further and Better Particulars" or "FBPs" means the document appearing at pages 161 to 460 of the bundle;
- e. "the September 2014 CMO" means the case management order made by Employment Judge Slater on 24 September 2014; and
- f. "the List of Issues" means the list of issues prepared by the respondent dated December 2016.

JUDGMENT

1. The following parts of the claim are dismissed following withdrawal by the claimant:
 - a. the allegations headed, “Insignificant issues highlighted” at pages 326, 369, 410 and 440 of the bundle;
 - b. the allegations headed, “Refusal to reconsider [etc]” at pages 332, 373 and 443 of the bundle;
 - c. the allegations headed, “Unnecessary incident forms/’low threshold’ for filling incident forms” at pages 344, 381 and 447 of the bundle.
2. It is recorded that the claimant withdrew those allegations on the basis that they merely duplicate allegations appearing elsewhere in his claim.
3. The allegation headed, “Insignificant issues about conduct being highlighted and/or escalated” appearing 326, 368, 409 and 440 of the bundle is struck out on the ground that it has no reasonable prospect of success.

CASE MANAGEMENT ORDER

1. The tribunal will determine the claim as it is set out in Schedule A.
2. The claimant is not required to amend his claim in order to rely on the protected disclosures set out in Schedule A or to pursue the complaints of protected disclosure detriment, race discrimination and age discrimination as set out in Schedule A.
3. The claimant is not permitted to include any allegation in his claim unless it appears in Schedule A.
4. The claimant has permission to amend his claim by including a complaint of harassment related to age and harassment related to race.
5. The claimant has permission to amend his claim to include a complaint of victimisation, but only to the extent that it appears in Schedule A.
6. The claimant does not have permission to amend his claim so as to allege that he was treated less favourably than Rita Bhalla was treated. If the existing evidence refers to the way Rita Bhalla was treated, and it is relevant to an allegation in Schedule A ~~or Schedule B~~, the claimant may rely on such evidence for the purposes of the complaints of direct race discrimination and direct age discrimination to show how a hypothetical comparator would have been treated.
7. The claimant does not have permission to amend his claim so as to include, under his allegation headed “generating unnecessary complaints” at page 321 of the bundle, any allegation based on the complaint of Patient L (referred to at page 700 of the bundle). Permission is likewise refused for the corresponding allegations under the same heading appearing elsewhere in the Further and Better Particulars.

8. The claimant does not have permission to amend his claim so as to include, under his allegation headed “generating unnecessary complaints” at page 321 of the bundle, any allegation based on the incident referred to at page 684 of the bundle. Permission is likewise refused for the corresponding allegations under the same heading appearing elsewhere in the Further and Better Particulars.
9. The claimant does not have permission to amend his claim so as to include under his allegation headed, “The (wrong) way that complaints [etc] were handled” at page 340 of the bundle, any allegation based on the incident referred to at page 779 of the bundle. Permission is likewise refused for the corresponding allegations under the same heading appearing elsewhere in the Further and Better Particulars.
10. The claimant does not have permission to amend his claim so as to include under his allegation headed, “Undermining” at page 341 of the bundle, any allegation based on the incident referred to at page 779 of the bundle. Permission is likewise refused for the corresponding allegations under the same heading appearing elsewhere in the Further and Better Particulars.
11. The claimant does not have permission to amend his claim so as to include a claim for damages for breach of contract on the basis (as alleged at page 342 of the bundle) that the respondent unilaterally required him to work sessions or programmed activities at particular times.
12. The tribunal will determine the issues that are set out in the List of Issues, with the amendments referred to in Schedule D.
13. By 4pm on 27 March 2017 the respondent must deliver to the claimant and the tribunal a new list of issues incorporating the amendments in Schedule D.
14. The claimant’s application for permission to give evidence in chief about the matters referred to in Schedules B and C is refused.
15. The claimant’s application for permission to ask questions in chief of witnesses about the matters referred to in Schedules B and C is refused.
16. The claimant’s renewed application for permission to rely on a supplemental witness statement is refused.
17. The claimant will be permitted to ask questions in cross-examination of witnesses called by the respondent, but will not be permitted to put any assertion to them unless there is an evidential basis for doing so.
18. The claimant will be permitted to re-examine his witnesses and give evidence in re-examination in accordance with normal principles.
19. The claimant’s application for specific disclosure of patient notes is refused.
20. The claimant’s application for specific disclosure of further rotas is refused.
21. The tribunal grants the claimant’s request for a witness order for Mr Amu.

22. In the event that Mr Amu attends, the claimant will be allowed a maximum of 30 minutes to examine Mr Amu in chief and the respondent will be allowed a maximum of 30 minutes to cross-examine him.
23. The respondent and/or Mr Amu may apply to set aside the witness order on the ground, amongst others, that Mr Amu is not in Great Britain. Such application must provide evidence of where Mr Amu is.
24. The tribunal refuses the claimant's application for a witness order for:
 - 24.1. Dr Maniaz
 - 24.2. Edna Smith
 - 24.3. Cathy Trinick
 - 24.4. Dr Thirwell
25. If the claimant confirms the truth of his witness statement under oath, he will be treated as having confirmed his assertion at paragraph 130 that he made the disclosures in the way that is set out in the Further and Better Particulars.
26. The objections to the Further and Better Particulars (set out in Schedule B) do not render paragraph 130 inadmissible, but will be taken into account in deciding what (if any) weight to give to that evidence.
27. If the tribunal finds that any allegation in Schedule B or C is not well founded for the reasons set out in that Schedule, the tribunal will have regard to the reasonableness or otherwise of the claimant's continued pursuit of that allegation when considering any application for costs.
28. The hearing will be relisted with a time allocation of 15 days on dates to be notified separately to the parties.

SCHEDULE A

Complaints to be considered by the tribunal

1. The tribunal will consider:
 - 1.1. the complaints listed in paragraph 8 of the September 2014 CMO;
 - 1.2. the complaints of harassment related to age and harassment related to race, contrary to sections 26 and 40 of EqA; and
 - 1.3. the complaint of victimisation contrary to sections 27 and 39 of EqA.
2. For the purposes of the complaint of automatically unfair dismissal (section 103A of ERA) and detriment (section 47B of ERA), the claimant relies on:
 - 2.1. all of the protected disclosures 1 to 16 as set out in his Further and Better Particulars pages 180 to 297 and
 - 2.2. his letter to Mr Amu dated 26 July 2013.

3. The numbered allegations listed below form the complete list of:
- 3.1. the less favourable treatment said to be because of race and/or age;
 - 3.2. the unwanted conduct said to be harassment related to race and/or age;
 - 3.3. the less favourable treatment said to be on the ground that the claimant was a fixed-term employee;
 - 3.4. the alleged acts or deliberate failures to act done on the ground that the claimant made protected disclosures; and
 - 3.5. the alleged acts or deliberate failures to act done on the ground that the claimant sought to exercise his right to be accompanied.
4. The list of allegations is as follows:

Allegation number	Number given in FBPs	Alleged perpetrators	Date	Description
1	1	Dr Preston and Dr Jain	June 2012	Overloading the claimant with work by putting the claimant on the rota to work all day followed by the "twilight" shift to cover Dr Russell
2	11	Ms Moore, Mr Amu, Mr Adegbite, Dr Preston, Mrs Trinick	June 2012 onwards	Failure to ensure that whoever was named on the rota actually attended to carry out the shift
3	2	Dr Preston and Dr Jain	July to September 2012	Further overloading the claimant with work in the same manner
4	3	Dr Preston and Dr Jain	October 2012 to July 2013	Further overloading the claimant with work in the same manner, despite assuring the claimant that it would be a "one-off"
5	4	Dr Preston and Dr Jain	October 2012 to July 2013	Persistently overloading the claimant with additional risky tasks or high risk cases, in particular: <ul style="list-style-type: none"> - a patient with a stable ectopic pregnancy in about April 2013 - the 11 July 2013 incident involving Sister Barrett (p833)
6	14	Mrs Trinick	October	Encouraging Mrs Preston to make a

			2012	complaint about the matters referred to at page 673
7	5(i)	Dr Preston	October/November 2012	Holding a "kangaroo" meeting to blame the claimant when he raised concerns about the inappropriate behaviour of another consultant
8	12	Dr Preston	October/November 2012	Failing to allow the claimant to be accompanied at a meeting to discuss "the issues around the inappropriate behaviour of a consultant colleague"
9	18	Dr Preston	October/November 2012	Causing a one-sided letter to be inserted into the claimant's personnel file without inserting a similar letter into the file of the other consultant involved in the dispute.
10	19	Dr Preston	October/November 2012	Lying or distorting facts in relation to the same dispute in order to discredit the claimant
11	8	Staff nurse (unnamed)	October/November 2012	Making an "open threat": "If you don't get out and allow me to use the consulting room, I will complain to the New Site Lead [Dr Preston]"
12	8	Gynaecological Ward Sister	October/November 2012	Saying that the claimant "cannot admit the patient", when admission was clinically necessary and beds were available
13	6	Dr Preston	October 2012 to July 2013	Giving the claimant more onerous or mundane tasks including making him pick up cases abandoned by others
14	8	Dr Preston	February 2013	Stating on the telephone in an open office space, "It is the nature of the job."
15	8	Dr Jothilakshmi	February 2013	Blurting out, "If you don't like it, you should talk to Dr Jain when she gets back." (p708)
16	19	Mrs Preston, Dr Jain, Dr Jothilakshmi	February 2013	Lying or distorting facts to discredit the claimant in relation to placing the claimant's name on the rota
17	5(ii)	Dr Preston Dr Jain, Mrs Trinick, Dr Jothilakshmi	February 2013	Blaming the claimant when Dr Jothilakshmi "mistakenly" put the claimant's name on the rota
18	11	Ms Moore, Mr Amu, Mr Adegbite, Dr Preston, Mrs Trinick	February 2013	Failure to pair staff together as suggested by the claimant's e-mail of 22 February 2013 (p705)
19	5(iii)	Unclear	March 2013	Blaming the claimant for seeking to prevent an unnecessary Caesarean

				section
20	5(iv)	Dr Preston, Mrs Trinick	April 2013	Blaming the claimant for the incident concerning the patient with stable ectopic pregnancy
21	26	Mr Amu	April (possibly July) 2013	Following a complaint by Edna Smith, failing to tell her to postpone Caesarean section procedures
22	8	Midwifery Sister, Antenatal Clinic	April 2013	Saying, "Mr Oyesanya could not remove the partition insert, but the porters could."
23	11	Ms Moore, Mr Amu, Mr Adegbite, Dr Preston, Mrs Trinick	April 2013	Failure to ensure that the 4-step protocol (described at page 331) was followed in the event of staff shortages
24	12	Mr Amu	15 April 2013	Failing to allow the claimant to be accompanied at the meeting to discuss the non-renewal of his contract.
25	18	Mr Amu	April 2013	Inserting a one-sided letter into the claimant's personnel file without opportunity for comment.
26	13	Mrs Trinick	April 2013	Failing to consider the claimant's "appeal/grievance" made "initially verbally" to Mr Amu, repeated in letters from the British Medical Association and from the claimant himself.
27	21	Ms Moore, Mr Amu	April 2013	Refusing to consider the alleged expected and promised security and/or continuity of tenure or renewal of contract.
28	22	Ms Moore, Mr Amu	April 2013	Providing spurious reasons for their refusal as above.
29	26	Dr Preston	24 April 2013	In breach of the protocol for trainees, inviting Dr Cassim to put her complaint about the claimant in writing (page 754).
30	27	Dr Preston	25 April 2013	Failing to challenge Dr Cassim by asking her why she was speaking to the claimant in the manner set out in p754
31	26	Dr Preston	April 2013	Failing to question the reliability of the complaint made by Dr F about the claimant at page 761 as an "adjustment" for Dr F's "mental health issues"
32	27	Dr Preston	April 2013	Failing to ask Dr F why she needed to go to the MAU
33	7	Ms Moore, Mr Amu, Dr	June 2012 to July	Breaching the claimant's contract by adding shifts (see D1) and also

		Preston, Dr Jain and Dr Jothilakshmi	2013	by giving inadequate notice
34	14	Mrs Trinick	April until June 2013	Encouraging the three complaints referred to at page 814.
35	14	Mrs Trinick	April until June 2013	Encouraging the complaint referred to in Mrs Trinick's letter of 9 August 2013 (document C1)
36	9	"Management"	June 2012 to July 2013	Failing to pay sums due to the claimant for extra programmed activities, on call duties, annual leave, study leave or special leave.
37	10	Dr Jain, Dr Preston, Mr Amu and Ms Moore	February 2012 to July 2013	Denying the claimant the opportunity to take leave or to attend training (including needing to cancel arranged leave/training several times including a conference in Liverpool in June 2013 and the respondent's mandatory training in July 2013)
38	11	Ms Moore, Mr Amu, Mr Adegbite, Dr Preston, Mrs Trinick	Various	Failing to carry out an investigation into the alleged protected disclosures 1, 9, 11, 12, 14 and 16
39	11	Ms Moore, Mr Amu, Mr Adegbite, Dr Preston, Mrs Trinick	Various	Failing to carry out an investigation into the alleged protected disclosures 2-8, 10, 13 and 15 (as referred to in Schedule B)
40	11	Ms Moore, Mr Amu, Mr Adegbite, Dr Preston, Mrs Trinick	July 2013	Failing to establish a robust protocol for elective Caesarean sections
41	11	Ms Moore, Mr Amu, Mr Adegbite, Dr Preston, Mrs Trinick	Unclear	Failing to ensure that a newly-recruited agency doctor was "made to focus on the problem" of ensuring that that whoever was named on the rota actually attended to carry out the shift.
42	12	Mrs Trinick	June 2013	Failing to allow the claimant to be accompanied at a meeting following concerns about an unnecessary Caesarean section.
43	14	Mrs Trinick	Unclear	Encouraging a complaint about Patient Z (post-Caesarean infection) referred to at page 322
44	27	Dr Preston	11 July 2013	"Unleashing" Sister Barrett by placing her in a "high-risk situation" with the claimant

45	27	Dr Preston	11 July 2013	Failing to keep Sister Barrett out of high-risk situations with the claimant as an “adjustment” for Sister Barrett’s personal circumstances
46	8	Mrs Trinick	July 2013	Saying, “Mr Oyesanya said it was not necessary to wash your hands.”
47	18	Mrs Trinick	July 2013	Inserting a one-sided letter into the claimant’s file.
48	15	Mr Amu, Ms Moore and “the Directorate Manager”	July 2013	Giving the claimant inadequate notice of termination by allegedly terminating the contract in a backdated letter received on 8 July 2013.
49	20	“Management”	July 2013	Refusing to pay a contractual redundancy payment.
50	21			Dismissing the claimant
51	32	Ms Moore, Mr Amu, the “Directorate Manager”	July 2013	Failing to provide written reasons for the claimant’s dismissal

5. For the purposes of the complaint of breach of section 12 of the Employment Relations Act 1999, it is recorded that the claimant does not rely on the matters in bold type at pages 425 and 449 of the bundle as separate detrimental acts or failures to act. These matters are relevant purely to remedy if the claimant’s complaint under section 11 of that Act is well founded.
6. For the purposes of the victimisation complaint:
 - 6.1. the claimant may rely on one protected act only, namely his letter dated 26 July 2013 appearing at page 866 of the bundle; and
 - 6.2. the only allegations of detriment that the claimant may pursue are Allegations 48, 49, 50 and 51.
7. For the purposes of complaint under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, the claimant compares his treatment to that of Mandy Jones.
8. The complaint of indirect discrimination is put on the following basis:
 - 8.1. The claimant’s primary case is that the respondent is not being truthful about its reason for dismissing him. The indirect discrimination complaint is advanced as an alternative, in the event that the tribunal accepts the respondent’s reason.
 - 8.2. The respondent had a practice of not employing non-resident consultants and employing resident consultants instead.
 - 8.3. This practice put consultants of the claimant’s age at a particular disadvantage compared to younger consultants, in that resident consultants are generally younger than the claimant.

- 8.4. The practice also put consultants “from overseas” at a particular disadvantage compared to other consultants, because they tend to be older than consultants who began their careers in the United Kingdom and, hence, are more likely to be non-resident consultants.
- 8.5. The claimant was put at these disadvantages because he was non-resident. He does not suggest that he would have had any difficulty in taking up a resident post had he been invited to do so.
9. The complaints of wrongful dismissal, breach of contract (annual leave and redundancy payment), denial of the right to be accompanied and breach of contract/unlawful deductions relating to programmed activities are pursued on the basis set out in the Further and Better Particulars and List of Issues.

SCHEDULE B

In respect of all the alleged protected disclosures appearing below, the claimant has confirmed that:

1. Except for paragraph 130, there is nothing in the claimant’s witness statement to say that he made the disclosure;
2. Whilst paragraph 130 states that he made the disclosures as set out in the Further and Better Particulars, those Further and Better Particulars give no detail about how the claimant made the disclosures, except to state that, in every case, the disclosure was made during a telephone conversation followed by a face-to-face conversation;
3. Except where made clear in relation to the specific allegation, there is no evidence in any of the other witness statements that the claimant made the disclosure;
4. There is no evidence in the bundle of the claimant’s having made the disclosure;
5. The evidence on which he wishes to rely in support of the allegation that he made the disclosure consists of:
 - 5.1 His own supplemental witness statement (which has been refused)
 - 5.2 His own evidence in chief (which has been refused)
 - 5.3 Supplemental witness statements of other witnesses (which has been refused)
 - 5.4 questions in chief of witnesses (which have been refused)
 - 5.5 re-examination of witnesses (which will be governed by ordinary principles)

5.6 the answers that he expects that the respondent's witnesses will give under cross-examination (which will be governed by ordinary principles)

5.7 questions in chief of witnesses attending by way of witness order (which has been refused).

The alleged protected disclosures to which this schedule refers are:

1. Disclosures 2 and 3 (In addition, the claimant relies on pages 627 and 628 and paragraph 95 of his own witness statement: these might help to determine whether the information was *true*, but are silent as to whether the information was *disclosed*.)
2. Disclosure 4 (In addition, the claimant relies on pages 637 and 638 – these do not refer to any disclosure made by the claimant.)
3. Disclosures 5 and 6 (The claimant relies additionally on the letter at page 673 of the bundle – this does not refer to any disclosure made by the claimant.)
4. Disclosure 7 (The claimant also relies on paragraph 57 of Mr Amu's witness statement, but that paragraph denies that the claimant disclosed the information.)
5. Disclosure 8.
6. Disclosure 10. (In addition, the claimant relies on the chain of e-mails at page 826 to 832 and paragraph 59 of Mr Amu's statement. These do not state that the claimant disclosed the information which would make the disclosure qualify for protection.)
7. Disclosure 13 (In addition, the claimant relies on page 757, but this does not refer to any disclosure made by the claimant.)
8. Disclosure 15 (The claimant also relies on pages 751 to 753, but they do not refer to any disclosure made by the claimant. He wishes to rely on paragraphs 35, 36, 48, 52-53 and 54 of Mr Adegbite's witness statement, but they do not refer to any disclosure made in April 2013.

SCHEDULE C

In respect of all the allegations appearing below, the claimant has confirmed that:

1. There is nothing in the claimant's witness statement to say that the claimant was treated in the way that he alleges.
2. There is no evidence in any of the other witness statements that the claimant was treated in the way that he alleges.
3. Except as specifically referred to below, there is no evidence in the bundle of the claimant's having been treated in the way he alleges.

4. The evidence on which he wishes to rely in support of the allegation consists of:
 - 4.1. Inferences from the documents in the bundle identified next to the particular allegation
 - 4.2. His own supplemental witness statement (which has been refused)
 - 4.3. His own evidence in chief (which has been refused)
 - 4.4. Supplemental witness statements of other witnesses (which has been refused)
 - 4.5. questions in chief of witnesses (which have been refused)
 - 4.6. re-examination of witnesses (which will be governed by ordinary principles)
 - 4.7. the answers that he expects that the respondent's witnesses will give under cross-examination (which will be governed by ordinary principles) and
 - 4.8. questions in chief of witnesses attending by way of witness order (which has been refused)

The allegations are:

1. Allegation 6 (see below)
2. Allegation 11 (the only additional evidence being a letter from Kate McCarthy which the claimant could not find)
3. Allegation 12
4. Allegation 14
5. Allegation 22
6. Allegation 23
7. Allegation 31 (the factual issue currently unsupported by evidence is whether Dr F had mental health issues casting doubt over the reliability of her account)
8. Allegations 6, 34, 35 and 43 (there currently being no evidence that Mrs Trinick encouraged the complaints - the claimant seeks to draw an inference from the fact that he was invited for an "informal chat" which, he says, was in reality a formal meeting);
9. Allegation 39
10. Allegation 40 (the only apparent connection to the claim being the allegation that the claimant made a protected disclosure, namely Disclosure 10)
11. Allegation 41
12. Allegations 43 to 46.

SCHEDULE D

Amendments to the List of Issues

1. Issues 16.2, 18.2, 19, 22, 32, 35, 50 and 62 are to be deleted.
2. The Appendix is to be deleted.
3. References in the List of Issues to “the Appendix” are to be changed to references to the table of allegations in Schedule A.
4. Issues 3 to 14 inclusive are to be replaced by a list setting out the same issues, but in relation to each of Disclosures 1 to 15 and in relation to each person to whom the disclosure was allegedly made.
5. To Issue 15, add:
 - “15.3 Did the claimant believe that his disclosure was made in the public interest?”
 - 15.4 Was it reasonable for him to hold that belief?”
6. Issue 17 is to be correspondingly amended.
7. After Issue 23 add three further issues:
 - “Was the alleged act or failure to act part of a series of similar acts ending with an act for which the claim was presented within the statutory time limit?
 - If not, was it reasonably practicable for the claim to have been presented within the time limit?
 - If not, did the claimant present his claim within such further period as the tribunal considers reasonable?”
8. After Issue 35, add two further issues:
 - “Was the alleged treatment part of an act extending over a period ending on a date for which the claim was presented within the statutory time limit?
 - If not, it is just and equitable to extend the time limit in respect of the allegation?”
9. In substitution for Issue 36, the following is to be added:
 - “Did the respondent have a practice of not employing non-resident consultants and employing resident consultants instead?”
10. The respondent is required to add such further issues as it considers necessary to enable the tribunal to determine the complaint of harassment, both in relation to jurisdiction and the merits of the complaint.
11. After Issue 46, add two further issues:
 - “Was the alleged treatment part of an act extending over a period ending on a date for which the claim was presented within the statutory time limit?
 - If not, it is just and equitable to extend the time limit in respect of the allegation?”
12. In Issue 49, the word “predominantly” is to be deleted.

13. After Issue 49, add three further issues:

“Was the alleged act or failure to act part of a series of similar acts ending with an act for which the claim was presented within the statutory time limit?

If not, was it reasonably practicable for the claim to have been presented within the time limit?

If not, did the claimant present his claim within such further period as the tribunal considers reasonable?”

14. From Issue 52, delete “or alternatively has claimed £20,107.75”.

15. To Issue 55, add “The claimant claims £22,342.50”).

16. In Issue 59, for the words in parentheses, substitute “the claimant claims £15,713.41”.

Originally signed 13 March 2017
Amended version signed 26 April 2017

Employment Judge Horne

SENT TO THE PARTIES ON

4 May 2017

FOR THE TRIBUNAL OFFICE