EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondent**
Mr R V Mighton		London Underground Limited

Heard at: London Central **On**: 14 February 2017

Before: Employment Judge Wade

Representation
For the Claimant: Mr Ogilvie (legal representative)
For the Respondent: Ms J Shepherd (Counsel)

JUDGMENT AT A PRELIMINARY HEARING

1. The claimant's claims are struck out.

REASONS

1. This hearing was listed to decide whether the claims should be struck out. The respondent has various grounds for arguing that they should be and I decided to deal initially with the first three which are:

1.1 That matters which have already been decided should not be the subject of further litigation. This is known as the "*res judicata"* rule.

1.2 That matters which have not been the subject of earlier litigation but which could have been should not be the subject of this litigation. This is known as "the rule in *Henderson v Henderson"* or "abuse of process".

1.3 That the matters complained of are out of time.

2. The respondent reserves its position as to whether the claims should be struck out under rule 37or a deposit ordered and as to whether the claim should have been accepted in the first place due to alleged deficiencies in the early conciliation process.

3. Happily Mr Ogilvie attended to represent the claimant pro bono because these are technical legal issues and he was helpful in advising and putting forward the necessary arguments which Mr Mighton would have found difficult to deal with on his own.

4. The rule in *Henderson* has been considered in subsequent case law and was considered myself at a hearing on 24 March 2016 when I decided not to strike out certain parts of Mr Mighton's previous claim as being abuse of process. I hope that he therefore recognises that having not applied this rule in earlier proceedings the arguments are very different today.

5. Lord Justice Bingham considered the *Henderson* role in 2002 in the famous case of *Johnson v Gore Wood*. He warned that a dogmatic approach is not to be favoured and that in his opinion a broad merits- based judgment which takes account of the public and private interests involved and of all the facts of the case is to be preferred. He said that a court/ tribunal should focus attention on the crucial question of whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. He also said that:

> "I will not accept that it is necessary before abuse may be found to identify any additional elements such as a collateral attack on the previous decision ….but where these elements are present, the later proceedings will be much more obviously abusive and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party."

6. On the subject of harassment the Court of Appeal in *Agbenowossi-Koffi -v- Donvand Ltd* [2014] looked at the issues and Lord Dyson MR said:

> "The very fact that a defendant is faced with two claims where one could and should have sufficed will often of itself constitute oppression. It is not necessary to show that there has been harassment beyond that which is inherent in the fact of having to face further proceedings."

Background facts

7.1 The Claimant was first employed as a Fitter in May 2008. In 2014 he was dismissed on ill-health grounds but then reinstated and when he returned to work in July 2014 he was first allocated cleaning duties, which he did until January 2015.

7.2 He issued his first claim in June 2014 and this was withdrawn in October of that year.

7.3 He issued his second claim in December 2014. This was a victimisation claim. That claim was dismissed in June 2015.

7.4 Mr Mighton was suspended on 21 March 2015 and he did not return to the workplace before he was dismissed the following August. This is therefore the last date on which a reasonable adjustment for a disabled person would have been relevant. As at that date the claimant had not raised any concerns about disability discrimination.

7.5 Between 23 July 2015 and 27 August 2015 the claimant's contractual sick pay was not paid to him.

7.6 On 27 August 2015 the claimant was dismissed from his employment on grounds of gross misconduct. His appeals were unsuccessful.

7.7 On 15 October 2015 the claimant issued his third claim in the employment tribunal. This was for unfair dismissal, breach of contract (sick pay) and race discrimination.

7.8 Although he did not complain at the time, the claimant says that in December 2015/ January 2016 his locker was broken into and evidence vital to his claims disappeared.

7.9 On 24 March 2016 I refused the respondent's application at a preliminary hearing to strike out part of the claim on the basis that it was abuse of process.

7.10 On 4 July 2016 the tribunal dismissed the third claim in its entirety and this was then rejected at the initial sift stage by the employment appeal tribunal on 14 September as being totally without merit.

7.11 On 6 October 2016 the claimant submitted this claim, his fourth. The issues are not entirely clear but they are dealt with below in the conclusions. The claims were accepted in November and this is controversial as the respondent argues that they should never have been accepted because the early conciliation certificates are defective. I have not dealt with this point at the hearing today.

Conclusions

Unfair dismissal

8.1 There is no doubt at all that the claimant may not pursue a claim for unfair dismissal under the Employment Rights Act because his claim was decided and rejected by the third tribunal on 4 July 2016. This matter is therefore *res judicata*.

8.2 If proof other than the tribunal's judgement itself is needed it is only necessary to look at the claimant's ET1 where he says "*I say again* I have been unfairly dismissed". I understand that he believes that he was not given a fair hearing but this has been considered and rejected by the employment appeal tribunal.

8.3 Mr Ogilvie struggled heroically with this point but was not able to make any inroads. He said that the claimant was pleading different facts in the two sets of proceedings but firstly that is not at all clear and secondly the point is that the claim was adjudicated. If there is any doubt at all that the matter is res judicata, it is an abuse of process as I describe more fully below.

8.4 It also goes without saying that the claim is considerably out of time because he was dismissed on 27 August 2015 and his claim was lodged in the tribunal more than a year later. Under section 111 of the Employment Rights Act 1996 a claim which is lodged more than three months after the event is out of time unless it was not reasonably practicable to lodge it sooner. It patently was reasonably practicable because the claimant did lodge such a claim in October 2015. I need say no more.

Disability discrimination

9.1 Mr Mighton brings a claim of disability discrimination although it is not fully pleaded by any means and I could not tell from the narrative what sort of disability discrimination he is pursuing. This is the first time that a disability discrimination claim has been made.

9.2 He says "I have got from LUL work related stress, work-related asthma, cervical spondylosis, back pain and sciatica, severe headaches caused by 7 years without the right mask. On 21 03 15 after asking Nigel Edwards for a proper mask I was suspended. Dr Adrian Draper says I have work-related asthma. Work-related stress diagnosed by Dr Rhiannon Owen….. Phlegm mucus has been coming off my chest and I cannot breathe. That is from the work-related asthma I have caught from working without the right mask 14 07 14 to 21 03 15. In all I was working in these conditions without the right mask for at least 18 years." The claimant brought a bottle of mucus to the tribunal to show me what he had been collecting.

9.3 On the face of it this is a claim for compensation for personal injury and I have seen papers showing that the claimant is pursuing a civil action against LUL for personal injury. He argues that he is entitled to a remedy in a "court of competent jurisdiction" and of course he has the civil court for that purpose precisely. This tribunal does not have jurisdiction over such personal injury claims.

9.4 In terms of any possible tribunal claim, one reference which may relate to his employment is to his being suspended on 21 March 2015 when he asked for a proper mask. The third tribunal hearing took place after the claimant had been suspended and adjudicated the events leading up to his dismissal and the suspension is dealt with by Mr Mighton in his witness statement. However, he did not make a disability discrimination complaint and did not complain that the suspension related to his request for a face mask. The issue of the suspension is res judicata and an attempt to reconfigure it now as a disability discrimination claim is abuse of process.

9.5 It could also be said that Mr Mighton had plenty of opportunity over the 18 years that he says that he worked without the correct mask to claim that the

respondent was failing to make reasonable adjustments and, to give him the full benefit of the doubt, I should consider a reasonable adjustments claim. There is no suggestion in the ET1 that the claimant was dismissed because of his disability.

9.6 Mr Ogilvie argues that this claim should proceed and that the claimant is not obliged to particularise his claims in legal language which is correct. However, the claims do need to be discernible. He says that any problem could be cured by the provision of further and better particulars.

9.7 I have decided, however, that this claim, in so far as it relates to issues over which this tribunal has jurisdiction, should be struck out as an abuse of process. This is because:

a. The third claim was issued in October 2015, months after the claimant had been suspended in March that year and then dismissed in August. Particularly because he had legal advice at that time from Mr Brown, he had every opportunity to argue disability discrimination if that was what he was concerned about at that time. Instead, he argued race discrimination and made allegations of unfairness without any reference to disability.

b. One aggravating feature is that the claimant is seeking to argue a personal injury claim in the wrong forum and to that end is linking it back to his period of employment thus reconfiguring facts which were thoroughly examined at the time. Of course he says that they were not thoroughly examined because he strongly believes that he would not have lost the case had they been; the employment appeal tribunal disagreed.

c. Further, the *Henderson* rule is particularly relevant where there has apparently been finality in proceedings so that it would be harassment to reopen them. This is very much the case where the employment has ended more than a year before and the respondent's witnesses have already had to address three separate tribunal claims.

d. In March 2015 I decided not to strike out the claim that the claimant was being victimised by being made to do cleaning work but that was in the context of an unfair dismissal claim which was going to proceed to a hearing in any event.

e. I also have concern that this is a collateral attack as identified by Lord Bingham because it arose after the third claim was rejected by the tribunal and the appeal refused. Contrast this with the second claim which principally arose after the claimant was dismissed.

9.8 Finally in relation to disability discrimination, the claims are clearly very out of time. I do not think that it would be just and equitable to extend the time limit because:

a. The last date that the claimant was at work was March 2015 and the claims were not made until October 2016. Not only is this a very long time but there is no prospect of the claimant showing that there was a continuing act.

b. Memories will have faded in respect of a matter never raised before and the claimant's own case is that vital evidence was lost when his locker was allegedly broken into.

c. The claimant was not represented at the third tribunal hearing but he did have legal advice from Mr Brown throughout this time and there is evidence that Mr Brown is still involved today in some capacity or other. Having brought four tribunal claims the claimant himself has experience of time limits.

Race discrimination

10.1 According to his ET1 the claimant's race discrimination claim relates to an allegation that his locker was broken into. This issue was not adjudicated by the third tribunal but since the incident allegedly happened in December 2015 or January 2016 the claimant could have applied to amend that claim to include this allegation but did not do so.

10.2 More than that, he referred to his locker in his witness statement of June 2016, some months after the locker was allegedly broken into, but did not make any allegation of race discrimination or, indeed, that the locker had been broken into and vital evidence lost, evidence which he now says was highly relevant to his claims.

10.3 For the reasons given above, this claim is an abuse of process and amounts to harassment. I cannot see how it can have been appropriate to hold back on this concern which arose in January 2016 and then reconfigure and litigate it some 10 months later. The need for finality is obvious and a postscript such as this is not consistent with the need for litigation to be fair and final.

10.4 The claim is also out of time. The claimant argues that since the British Transport Police were still corresponding with him on this issue in November 2016 there was some sort of continuing act. However, their correspondence relates to a complaint he made about the way they had handled the complaint that his locker had been broken into that he made in January 2016. In fact, this is evidence that he was aware of and could have raised the problem at the time but did not do so. Also, an act cannot continue into the post-employment period.

10.5 For the reasons given above it is also not just and equitable to extend time. The claim is considerably out of time and the claimant cannot say that he delayed bringing the claim to await the outcome of the British Transport Police enquiry because the outcome did not arrive until after he had issued the claim.

10.6 Mr Ogilvie wishes to take the race discrimination claim further and to offer further and better particulars. However, nothing other than the locker incident can be discerned from the ET1 and an allegation that the dismissal was an act of race discrimination is clearly res judicata. This applies also to the cleaning duties which the claimant was required to do until January 2015. He says that in March 16 I upheld his claim that the imposition of these duties was race discrimination, but that was not the case. What I did was to say that he could advance that

argument as direct discrimination at the hearing of the third claim even though it had been raised as victimisation in the second. The cleaning arguments were dealt with specifically by the third tribunal in its judgment at paragraph 60.

Sick pay

11.1 This claim is res judicata. The third tribunal decided that the non-payment of sick pay was not unlawful and this would apply to both a wages act and a breach of contract claim. The claim is also considerably out of time, the test being "reasonably practicable" and for the reasons given in the unfair dismissal section above there is nothing that the claimant can say.

11.2 Mr Ogilvie seeks to extend the sick pay argument into a discrimination argument but for the reasons given above that would be an abuse of process.

Concluding points

12. There are a number of small points to make:

12.1 I fully appreciate that it is important to offer a fair hearing to both sides in order to comply with my duties under the Human Rights Act. This entails giving access to justice to a claimant but also being fair to a respondent. The claimant argues that the only way I can provide a fair outcome for him is to offer him a full hearing on the facts. I'm sorry to say that I disagree. A fourth claim by Mr Mighton is not in the interests of justice.

12.2 Mr Mighton has alluded to some problems that he has had with Mr Brown and he appears to have gone to the legal ombudsman about him. He is thereby demonstrating that he has got recourse to remedy if gaps in his earlier pleadings were due to the inadequacy of legal advice.

12.3 I am fully aware that in many situations it is not appropriate to decide that a discrimination claim is out of time and that it is not just and equitable to extend time without hearing the full facts. This case is different because the alleged events took place a very long time ago, there is no prospect of them extending into the "in time" period and, given that there is either res judicata or abuse of process, justice and equity points against allowing an extension of time.

The end of the hearing on 14 February

13.1 I know that Mr Mighton feels that he has not been fairly treated by the legal system and I am sorry that that is the case but at least he does have his civil claim for personal injury and I hope that with Mr Ogilvie's advice he will understand why I have come to my conclusion. He has also alluded to having poor mental health and I hope that he is able to obtain effective help soon.

13.2 I prepared these Reasons and started reading them to the parties but before I had got far Mr Mighton started to become very angry and left the room. I said that I would therefore send my written reasons to the parties.

Employment Judge Wade
16 February 2017