Case Number: 3400451/2017

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr A Tayel	v	(1) Ormiston Academies Trust
		(2) Ormiston Endeavour Academy
		(3) Carmel Brown
		(4) Christine Woods

PRELIMINARY HEARING

Heard at: Bury St Edmunds **On:** 4 & 5 December 2017

Before: Employment Judge Laidler

Appearances:

For the Claimant: In person.

For the Respondent: Mr S Crawford, Counsel.

JUDGMENT

1. The claimant is estopped from relying upon the protected disclosure about Mrs Lee's appointment in these proceedings.

2. The disclosures relied on in the earlier proceedings:

   2.1 That Mrs Kidby stored highly flammable chemicals inappropriately and

   2.2 The three emails on 23, 24 and 29 April 2015 complaining about Mrs Anderson (4 and 5 in the list of disclosures in the Sigsworth judgment)

   should be added to the list of issues and are disclosures that the claimant can continue to rely upon in these proceedings.

3. The claimant's disclosure to the information Commissioner January 2016 was never pleaded and leave to amend to rely on that disclosure is refused.

4. The inclusion of an English aptitude test in the interview schedule January 2017 as an allegation of direct race discrimination has 'little reasonable prospect of success' within the meaning of Rule 39 of the Employment Tribunal Rules 2013 such as to entitle the tribunal to order the payment of a deposit as a condition of continuing to advance this allegation.

5. That the English aptitude test was a 'provision, criterion or practice' that put ethnic minority groups whose first language is not English at a disadvantage and put the claimant at such a disadvantage is an issue that can only be determined at a hearing upon consideration of all relevant evidence.

6. The allegation that the requirement to undergo the English aptitude test was also harassment on the grounds of race, as it was done to deter the claimant from applying and to create a hostile and threatening environment has no reasonable prospects of success and is dismissed.

7. The allegation that the English aptitude test was also an act of victimisation has little reasonable prospects of success within the meaning of Rule 39 of the Employment Tribunal Rules 2013 such as to entitle the tribunal to order the payment of a deposit as a condition of continuing to advance this allegation.

8. With regard to the allegation that on 10 January 2017 when the respondent informed the claimant it was re-advertising the position as one of the three candidates had withdrawn that was an act of detriment because the claimant had made a protected act and protected disclosure:

8.1 The claimant is estopped from relying on the protected disclosure concerning Ms Lee's employment in view of paragraph 1 of this judgment above.

8.2 The claimant may rely on the other disclosures as identified at paragraph 2 above.

9. The allegation that the failure to provide a reference to East Bergholt School was an act of victimisation is out of time and is dismissed.

10. The allegation of failure to provide training and shadowing in the last week of claimant's employment – as the claimant will seek to argue a continuing act of less favourable treatment the tribunal has concluded that issue can only be determined upon a hearing of all of the evidence.

11. The alleged comments by Mrs Le Marrec and Miss Anderson as a further act of less favourable treatment and victimisation should have

been brought in the earlier proceedings and are out of time and it is not just and equitable to extend time. This particular allegation is dismissed.

12. Leave to amend requested in the application of 16 October 2017 is refused.

REASONS

1. This matter was last before this Employment Judge on 13 July 2017 when an attempt was made to clarify the issues. A summary was sent to the parties following that hearing on 9 August 2017. That recorded that it had been agreed that the Judge would deal with the application to amend on paper, the claimant having been given time to file further authorities he relied upon. That application was determined by the Judge and the reasons sent to the parties on 15 October 2017. Counsel then appearing for the respondent did not make objections to some matters raised in the application to amend and the Judge only needed to determine the remaining matters. For the sake of completeness, the issues as identified at the hearing in July and the amendments which were not objected to and therefore allowed are now set out below. Leave to amend in all other respects was refused.

> "The Claims
>
> 5. The Claimant brings claims of: -
>
> a. Direct race discrimination
> b. Victimisation
> c. Harassment
> d. Detriment on the grounds of having made a protected disclosure
>
> Protected Act
>
> 6. There is no dispute that the Claimant issued proceedings against the first Respondent and another under Case No 3401781/2015 ("the first claim") and that that amounted to a protected act for the purposes of Section 27 of the Equality Act 2010.
>
> Acts relied upon
>
> 7. *The failure of Mrs Brown to provide a reference when the Claimant applied for the position of Science Department Technician in December 2016.*
>
> This is said to be an act of victimisation.
>
> 8. *The inclusion of an English aptitude test in the interview schedule January 2017.*

8.1 The Claimant alleges this was a form of direct race discrimination as the Respondent knew that English was not his first language, and this was designed to discriminate against him.

8.2 The Claimant also asserts this was indirect race discrimination in that the English aptitude test was a "provision, criterion or practice" that put ethnic minority groups whose first language is not English at a disadvantage and put the Claimant at such a disadvantage.

8.3 This was also harassment on the grounds of race as it was done to deter the Claimant from applying and to create a hostile and threatening environment.

8.4 The Claimant asserts that this was also an act of victimisation.

9. *10th January 2017 when the Respondent informed the Claimant the Respondent was to re-advertise the position as one of the three candidates had withdrawn.*

9.1 The Claimant believes the Respondent withdrew the advert because he was the strongest candidate and due to his protected act and protected disclosures.

9.2 This was an act of victimisation.

9.3 The Claimant also states this was an act of detriment for having made a protected disclosure.

Protected disclosure

10. The disclosure relied upon is that made in the previous proceedings brought by the Claimant. This was that a Mrs Lee obtained a job at the school because a friend of hers was a science teacher. The Claimant says he reported this to Jo Tankard in or about March 2015, and in May 2015 to the Principal Mrs Dixon. The breach was of a legal obligation namely the principles of the Equality Act 2010.

11. The detriment to the Claimant is that he did not then participate in the recruitment process as the Respondent failed to re-assure the Claimant that he would not be subjected to less favourable treatment and detriment.

Failure to provide a reference

12. The Claimant relies on two schools that he applied to, namely East Bergholt High School (paragraphs 25 and 26) of the claim form and a GP Surgery (paragraphs 28 to 31 of the claim form). The Claimant alleges that the failure to provide references to these two entities amounted to a further act of victimisation and race discrimination.

13. The Claimant further alleges that there were more than 80 jobs he applied for where he performed well at interview but was not offered the post. The Claimant believes that these were as a result of detrimental references by the Respondent. The Judge suggested to the Claimant that it would not be proportionate to expect the Respondent to deal with 80 job applications that the Claimant had made, and the Claimant agreed to confine himself to 6 applications he had made. An order has been made set out below for him to identify those relied upon.

14. The Claimant also asserts that Mrs Wood the Principal of the Respondent failed to provide training and shadowing to him. It transpired that this was something that the Claimant says should have been provided in the last week of his employment. He accepts that such a claim would now be out of time, but asserts that it is now within time as part of a continuing act of discrimination. The issue did not come to his attention until a few weeks before the full merits hearing in the earlier matter and upon the exchange of witness statements.

15. This is one of the matters that the Respondent asserts could have been brought in the previous proceedings. It asserts that under the principles in *Henderson v Henderson* the Claimant could have brought the claim in those earlier proceedings and should not be permitted to now bring it in these proceedings.

16. That in December 2015 following the Claimant's dismissal, the Claimant found out that two employees namely Mrs Le Marrec and Miss Anderson had made the following comment: -

> *"They had a concern about a member of staff going in a car with the Claimant unaccompanied."*

The Claimant asserts this was an act of further discrimination and victimisation because of his race. They knew that the Claimant had done a protected act. The Claimant explained he had made a complaint and the other employee counter complained. The details of these comments were only released to the Claimant in December 2015. The Claimant asserts that the complaint had been redacted.

17. The Respondent argues that these are also matters that could have been brought in the earlier proceedings. It relies upon *Henderson v Henderson*. The Claimant relies upon two authorities, *Foster v Bon Groundwork Limited [2011] IRLR 645* and *Arnold v National Westminster Bank [1991]*.

<u>Comments made that were relied upon in the previous proceedings</u>

18. The Claimant refers to matters in 2015 when Mrs Kidby stated she could not see herself working with the foreign lady because of her accent and that UKIP should be running the country. The Claimant relies upon these as background matters in this claim."

2. In addition, by way of amendment the following matters were added (paragraph numbers are from the Application to Amend of the 12 July 2017 for ease of reference)

"1. In June 2017 the Respondents (Stoke High School- Ormiston Academy) advertised for two positions in their Website namely: Exam invigilators (Casual), and Deputy College Leader. Experience for both positions was not required, as training will be provided.

The website provided:

"We currently have the following vacancies".

Deputy College Leader - Closing date 8am Monday 26th June 2017

Invigilators (Casual).

Indirect Race Discrimination- institutional Racism

Exam Invigilator

Requirement

Person specification provides inter alia;

"***Must have high standard of spoken English*".**

The Claimant considers this requirement as "**No foreigners please"**

2. The Claimant is of Egyptian origin (ethnic minority). The Claimant found the advert to be discriminatory as it puts the ethnic minorities at disadvantage in comparison to white English candidates.

…

Direct Race discrimination and Detriment

5. On the 30 June 2017, the Respondents removed the advert from their Website and informed the Claimant that there is no job available.

The Claimant's position is that the Respondents removed the advert, as they do not want the Claimant (the foreign candidate) to apply for the position.

Hypothetical Comparator

6. Had a prospective white candidate raised the same concern with the Respondents, the Respondents would not have removed the advert.

…

Refusing the Claimant the opportunity to participate in a recruitment exercise

15. The Claimant submitted a completed application for the post of Deputy College Leader. The Claimant met the essential and desirable requirement for the post.

16. The Respondents refused to invite the Claimant to interview.

17. The Respondents refused to provide the Claimant with formal feedback despite the Claimant repeated requests.

Direct Race Discrimination

Not fitting in

The only feedback received by the Respondents

18. On the 6 July 2017 the Respondents stated the following:

> "*In your email you seem to dispute the fact that we measured candidates against the personal specification, in particular around experience of working directly with young people. Please refer to the copy of the person specification we sent you under the essential criteria. You can see that it makes specific reference of this as follows:- Demonstrate by example* ***excellent interpersonal skills and communications with students, families/carers, external stakeholders and all Academy members'***.
>
> The Claimant position is this:
>
> The Claimant provided example of interpersonal skills, and was more than willing to provide further examples and details had the claimant been invited to interview.
>
> The Respondent seems to suggest that the claimant would not fit in. The Respondent is referring to the previous relationship between the Claimant and other members of staffnamely; Ms Anderson; Mrs Le Marrec, and Mrs Kidby.
>
> **Ms Anderson**
>
> *Ms Anderson made the following comments:*
>
> *"You Fxxxxxx pxxxxxx me off"*

"Ms Anderson had Concerns about Mrs Kidby going to the car with a foreign man on her own". (Mrs Le Marrec shares this view).

Mrs Kidby

"The UKIP should be running the country"

Mrs Kidby cannot see herself working with foreigners because of their accent".

Last act of victimisation

19. The Claimant applied for a position at the Ministry of Justice.

On the 8 July 2017 the Claimant was made aware that the Job, which the Claimant applied for is at risk, because there is a problem with the reference provided by the Respondents."

Respondent's application for this hearing

3. By letter of the 26 July 2017 the respondents applied for a further preliminary hearing to deal with the following issues: -

   3.1 The identity of the correct respondent and striking out the claims against the 2nd, 3rd and 4th respondent;

   3.2 Striking out any parts of the claimant's claim that the tribunal does not have jurisdiction to hear either due to limitation issues or that the matters should have formed part of the previous litigation; and

   3.3 Making a deposit order for any allegations which may be allowed to continue.

4. The hearing to deal with these matters was listed and notice of it sent to the parties by letter of the 19 October 2017.

The claimant's further application to amend

5. The judge's reasons for refusing further leave to amend following the July hearing were sent to the parties on 15 October 2017. By letter of the 16 October 2017 the claimant submitted a further application to amend. It was agreed that matter would also be determined at this hearing.

6. In view of all the matters that there were to be dealt with it was not possible for the decision to be given and this was therefore reserved.

Submissions on behalf of the respondents

7. Counsel for the respondent used the hearing summary sent to the parties on the 9 August 2017 as the basis for his submissions. Reference will be made to the numbered paragraphs in that summary.

Paragraph 10 – protected disclosure.

"The disclosure relied upon is that made in the previous proceedings brought by the claimant. This was that a Mrs Lee obtained a job at the school because a friend of hers was a science teacher. The claimant says he reported this to Jo Tankard in or about March 2015 and in May 2015 to the principal Mrs Dixon. The breach was of a legal obligation, namely the principles of the Equality Act 2010."

8. Counsel then referred to the reserved judgment with reasons given by the earlier tribunal presided over by Employment Judge Sigsworth in September 2016 ('the Sigsworth judgment'). This was a case of proceedings brought by the claimant against Stoke High School and Ormiston Academy Trust case number 3401781/2015. On page 2 of the reasons the tribunal set out the five alleged protected disclosures relied upon by the claimant in those proceedings. The third of those was as follows: -

> "Reporting that Mrs Lee's resignation was a constructive unfair dismissal (section 43B (1)(c) of the Act) in an oral conversation with Mrs Tankard in March 2015 and in the claimant's grievance of 21st May 2015."

9. In its findings of fact on page 9 that tribunal dealt with this alleged protected disclosure (at paragraph 9). It found: -

> "The claimant says that he told Mrs Tankard that Mrs Kidby had told him that she did not like Mrs Lee because she had been given the position of senior technician without interview and ahead of Mrs Kidby because she was a personal friend of Mrs Tankard... Mrs Tankard agreed that the claimant had spoken to her about the allegation that Mrs Lee had not had to interview for her position, because she was a friend of Mrs Tankard. However Mrs Tankard denied that this was the case..."

10. In its conclusions the tribunal on page 20 at (3) found as follows:-

> "That disclosure has simply not been made out, as there was no miscarriage of justice and no court and no evidence were involved. If the claimant, in the alternative, is saying that it was a breach of legal obligation (possibly a breach of the implied term of mutual trust and confidence) then he did not have the necessary facts to form a reasonable belief about that, on the basis of the evidence we have heard and read. He cannot have known exactly why Mrs Lee resigned (as he did not speak to her) and simply made assumptions on the basis of the poor relationship between Mrs Lee and Mrs Kidby and what Mrs Kidby said. That protected disclosure has not been made out. Even if we are wrong about that and the claimant's belief was reasonable and thus the disclosure protected, he would still need to get over the causation hurdle – see below."

11. It was submitted on behalf of the respondent that issues of estoppel arose.

12. The first was issue estoppel, namely whether the issue of whether there had been a protected disclosure had already been decided. In the respondent's submissions, there had been evidence and consideration of whether there had been a disclosure in the terms advanced in that earlier case. That has now been decided and the claimant is estopped from in effect seeking to re-litigate that.

13. The other estoppel is cause of action estoppel which prevents the claimant pursuing a cause of action which was dealt with in earlier proceedings involving the same parties. The issue will be whether the claimant relies on the same cause of action or whether the protected disclosure now relied upon is sufficiently different so that that estoppel does not apply.

14. At the July 2017 preliminary hearing it was recorded that the alleged breach of a legal obligation was a breach of the Equality Act. Looking at page 20 of the reasons given in the Sigsworth judgment it considered the evidence and whether in fact the claimant had the necessary facts to form a reasonable belief about what was the cause of termination of Mrs Lee's employment. It decided the claimant could not have known why Mrs Lee resigned and that he had made a number of assumptions. He does not now assert it was a constructive dismissal but a breach of the Equality Act. The earlier tribunal had already decided that the claimant did not have requisite knowledge to form a reasonable belief. The protected disclosure was not made out. It was submitted that the cause of action is the same or sufficiently similar, so as to estop the claimant advancing that case in these proceedings.

15. Alternatively, applying the decision of *Henderson v Henderson* 1843 3 Hare 100 PC, to pursue this argument again is an abuse of the process of the tribunal. Counsel relied on the dicta of Lord Bingham in the case of *Johnson v Gore Wood and Co* 2002 2 AC 1, HL when he said as follows:-

> "That is to adopt too dogmatic an approach to what should in my opinion be a broad merit based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question 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."

16. It was submitted that the claimant must have known that he believed Mrs Lee was obtaining the job because she was a friend of a science teacher. That is one of the decided facts set out in the earlier reasons. It is an abuse not to have advanced that case at that time. In effect, the claimant is re-parcelling something about which he had knowledge at the time but is now seeking to raise it in subsequent litigation. That is unjust to the respondent.

17. In effect, the claimant had the same knowledge back then, as now, but he is putting different labels on the allegation, so as now to re-litigate it. He is now saying to the tribunal that the facts showed not that there was a constructive dismissal but a breach of the Equality Act 2010 which is something he should have advanced at the previous hearing.

Acts relied upon.

Paragraph 8. The inclusion of an English aptitude test in the interview schedule January 2017

8.1 The claimant alleges this was a form of direct race discrimination as the respondent knew that English was not his first language and this was designed to discriminate against him.

18. It was submitted this claim has no reasonable prospects of success. The inclusion of the English aptitude test would have been made without the knowledge of who was applying for the role. The concerns of the claimant are that the respondent has included such with the design of discriminating against him. He cannot have any evidence on which the employment tribunal could reasonably infer that it was so included. On that analysis this claim has no reasonable prospects of success.

19. In the alternative the respondent will argue that this claim has 'little reasonable prospects of success' such as to give the tribunal the power to consider whether the claimant should be ordered to pay a deposit as a condition of continuing to advance that allegation (Rule 39 Employment Tribunal Rules 2013).

8.2 The claimant also asserts this was indirect race discrimination in that the English aptitude test was a "provision criterion or practice" that put ethnic minority groups whose first language is not English at a disadvantage and put the claimant at such a disadvantage.

20. It was submitted that the claimant must satisfy the employment tribunal, that there was a group which shared such a characteristic, and the claimant it is argued fails to show he was part of such a group. If the tribunal were against the respondent in that submission it argues that the reason for such a PCP is clearly the pursuing of a legitimate aim and is proportionate. The requirement was in relation to examine invigilation and it was imperative that students would fully understand what the directions from the invigilator were.

21. In the alternative the respondent would make the same arguments as made above, that there should be a payment of a deposit.

8.3 This was also harassment on the grounds of race, as it was done to deter the claimant from applying and to create a hostile and threatening environment (within the meaning of section 26 of the Equality Act 2010).

22. The claimant alleges the imposition of the English aptitude tests was to deter the claimant and create a hostile environment. The tribunal will have to ask itself whether it was reasonable for the claimant to believe that and find that such a criterion created a hostile/threatening environment based on his race. It was submitted that no reasonable tribunal could make such a finding. The aptitude test in interview was a reasonable criteria for selection and it is difficult if not impossible to imagine how its application reasonably created a hostile

environment. Further, the wording of section 26 requires the conduct to be “unwanted" and it is not clear how such a test could come within the meaning of unwanted conduct.

8.4 The claimant asserts that this was also an act of victimisation.

23. Whilst the respondent accepted at the earlier preliminary hearing that the claimant committed a protected act by virtue of the issue of the earlier proceedings there is a causation issue. The claimant will need to establish that inclusion of the aptitude test was done because he had brought the earlier claim. The respondent says there is and will be no evidence from which a reasonable inference of that can be drawn.

Paragraph 9 - 10 January 2017 when the respondent informed the claimant the respondent was to re-advertise the position as one of the three candidates had withdrawn.

24. The respondent only made submissions in so far as it is alleged that this was done because of the making of a protected disclosure. It makes the same submissions as were made above in relation to the fact that the earlier tribunal found the claimant did not reasonably believe the matters complained of about Mrs Lee.

Paragraph 12 and failure to provide a reference. The claimant relies on two schools that he applied to, namely East Bergholt High School (paragraphs 25 and 26) of the claim for and a GP surgery (paragraphs 28 to 31 of the claim form). The claimant alleges that the failure to provide references to these two entities amounted to a further act of victimisation and race discrimination.

25. The respondent submits that these allegations are significantly out of time. It is not clear when the applications were made. The claimant made it clear that this is set out at paragraph 24 of his claim form and the application to East Bergholt High School was in about July 2016.

26. The ET1 was submitted on the 8 May 2017 and the early conciliation certificate from 24 January to 24 February 2017. The claimant is significantly out of time and there are no reasons which make it equitable to extend time. The employment tribunal does not therefore have jurisdiction.

27. The respondent does not make any submissions in relation to the application to the GP surgery as it is clear that that was maid in March 2017 and therefore the claim is in time.

Paragraph 13. The claimant further alleges that there were more than 80 jobs he applied for, where he performed well at interview but was not offered the post. The claimant believes that these were as a result of detrimental references by the respondent. The judge suggested to the claimant that it would not be proportionate to expect the respondent to deal with 80 job applications that the claimant had made and the claimant agreed to confine himself to 6 applications that he had made. An order has been made as set out below for him to identify those relied upon.

28. The respondent submitted that it had never received those details from the claimant.

29. The judge then realised in rereading the summary that order had never been. The claimant's position in relation to these details will be set out below when dealing with his submissions.

Paragraph 14 training and shadowing.

30. The claimant accepted at the last hearing this was something that he alleges should have been provided in the last week of employment and accepted that such a claim would now be out of time but asserts that it is now within time as part of a continuing act of discrimination. On behalf of the respondent it was argued that it is difficult to see how it was part of a continuing act. If it was it was questioned what the last act relied upon is. If it is the failure to provide references which is the most recent there is no link between the two given that they were different persons asked to provide the reference. The claimant may say, the effect is continuous but that is not enough to show a continuing act of discrimination.

31. If the tribunal is against the respondents on that point, then under the principle in *Henderson v Henderson* this requires the claimant to have brought these matters in his earlier proceedings. It is something that arose out of the facts of that hearing. It came to his attention a few weeks before the full merits hearing and the claimant has demonstrated his ability to make applications to amend when he feels the need to do so.

Paragraph 16 - that in December 2015 following the claimant's dismissal the claimant found out that two employees, namely Mrs Le Marrec and Ms Anderson had made the following comment. "They had a concern about a member of staff going in a car with the claimant unaccompanied". The claimant states that the details of this allegation were only released to him in December 2015. He asserts it was a further act of discrimination and victimisation because of his race.

32. The respondent submits this is significantly out of time. The claimant found out about this allegation of December 2015 and it is not just and equitable to extend time.

33. This was in the claimant's knowledge when he brought the last claim, could have been included and deals with the same factual background.

34. Further, counsel was not clear what the protected act relied upon what was and whether it was the bringing of the first proceedings or not. There is no evidence that there was a protected act.

Submissions on behalf of the claimant

The aptitude test for the position of science technician.

35. The claimant submitted that the respondent deliberately put the requirement to pass a psychometric test onto this role in order to discriminate against him. In December 2016 they advertised for three different positions and the other two did not require the passing of an aptitude test. The claimant questions why the test was applied to the role of science technician but not the other roles. The respondent wanted to put the claimant at a disadvantage and discriminate against him.

Indirect discrimination

36. The test is likely to put minority ethnic groups at a disadvantage the claimant argued and he is a member of that group. The respondents were deterring the claimant from applying. The claimant applied but he never got an interview.

37. In answer to a question about how the "group" is to be constructed the claimant said that would be a hypothetical group of ethnic minorities in very broad terms. He submitted that any foreign group would be disadvantaged in comparison to white candidates.

38. The claimant submitted that a similar argument was put forward in the Equality Bill and in *Essop v the Home Office* 2017 UKSC 27. The next day the claimant produced for the judge a copy of the extract from the legislation that he was referring to. It was in fact the explanatory notes to s.19 of the Equality Act 2010 which gave an example of:-

> "an observant Jewish engineer who is seeking an advanced diploma decides (even though he is sufficiently qualified to do so) not to apply to a specialist training company because it invariably undertakes the selection exercises for the relevant course on some Saturdays. The company will have indirectly discriminated against the engineer, unless the practice can be justified."

39. The claimant argues that he was selected for interview but did not go to it because of the aptitude test. He had sought clarification as to why the respondent had applied that test and had not applied it to the other interviews but received no response.

40. In relation to the exam invigilator role the Claimant argues that any minority ethnic group would have no chance of passing the test. The exam invigilator does not speak however inside the exam room as students are provided with written instructions. The requirement of a high standard of English still put the claimant at a disadvantage. The claimant submits that they withdrew the advert as soon as he applied for it.

41. The reference to the exam invigilator is reference to the matters set out at paragraph 19 of the previous summary. Counsel for the respondent clarified that he had made no submissions in relation to that for the purposes of this hearing.

Victimisation

42. The claimant argues that when he submitted his application for the science technician role the respondent gave him and three other candidates an interview date of the 12 January. On the 10th however, they withdrew the interview and decided that as they did not have sufficient candidates they had to postpone it. This the claimant says is an act of victimisation as the respondent knew he was the strongest candidate and wanted to get someone who could compete with him. There was absolutely no other reason for the interview to be cancelled. In support of this contention, the claimant will rely upon the fact that he believes that in 2015 the respondent only interviewed two people for a science technician post. Interviewing two or three candidates for a role is not uncommon. He has evidence that other schools have interviewed such a number.

References

43. The claimant asserts that he has applied for several positions, but that the respondents refused to supply him with a reference. Before he issued his first employment tribunal claim however, they had supplied him with a reference. It is therefore only because he issued that first claim that the respondent now refuses to supply him with a reference.

44. Dealing with the point made by the respondents relying on *Henderson v Henderson* the claimant states he requested information regarding the reference from East Bergholt school but it was refused. It was not reasonable for him to make application to amend the earlier claim with no knowledge of what the reference says. The only evidence he has now after communication with East Bergholt after the earlier judgment is that East Bergholt say they did not receive a reference from the respondent. The claimant did not have any knowledge before and if he had he would have made an application to the tribunal to amend. East Bergholt and the respondent refused to supply a copy of the reference. The claimant accepted that nothing has changed in that he still has not seen the reference. However, he asserts that he can now bring the claim as the East Bergholt School has confirmed it did not receive the reference. Initially he did not know if they had received a reference. Now he knows that they did not. He found out from East Bergholt that they could not provide the information weeks before he issued this claim. When asked by the judge why it was therefore not included in this claim when it was issued the claimant stated that it was not the only issue about failing to give a reference. He has applied for a number of jobs including the Ministry of justice and the respondent has provided a very negative reference. All that the MOJ said to him, however, was to ask why he had failed his probationary period at the respondent.

45. With regard to a position at a GP practice the fact was that the offer they made to him was withdrawn. He had been asked to give his consent for them to approach the respondent. It was weeks later that they said they could not offer the job to him when they had offered it to him at interview.

46. The claimant has never been provided with the recruitment policy of the respondent but they referred him to a document from the Department of Education. It states quite clearly that references will be sought prior to

interview. When Ormiston Academy invited the claimant for an interview, he requested to have sight of the reference as he had listed Ormiston Academy as a referee but they refused to give him sight of it. These are the facts the claimant relies upon in relation to the claim of victimisation concerning references.

Protected disclosure

47. The judge pointed out to the claimant that in the earlier summary that she had prepared following the hearing on 13 July only one protected disclosure had identified at paragraph 10 and this was that the claimant reported to Jo Tankard and the principal Mrs Dixon that Mrs Lee had obtained a job at the school because a friend of hers was a science teacher.

48. The claimant submitted this was not the only protected disclosure he had made and now relies upon. In the earlier decision the employment tribunal had found he had made disclosures to the respondents, and in particular that he had been sworn at. He had stated that that was an act of harassment and/or breach of a legal obligation.

49. Consideration was given again to the reserved judgment of the hearing presided over by Employment Judge Sigsworth and it could be seen that at paragraph 5, the tribunal concluded as follows:-

> "We also conclude that the emails of 24th April and 29th (Disclosure 1.5) concerning the alleged behaviour of Mrs Anderson and complaints to Mr Locke could be protected disclosures, even if the claimant has not identified with precision the legal obligation being breached by Mrs Anderson. However, see further below in the context of causation of the claimant's dismissal and alleged detriment to him."

50. In its findings of fact, the tribunal had accepted that Mrs Anderson swore at the claimant and slammed the door. On 29 April 2015 in an email to Mr Pettit, the claimant made a number of allegations against Mrs Anderson.

Post termination disclosure to the information Commissioner

51. The claimant then raised the fact that he also relies upon a post termination disclosure to the Information Commissioner. The judge asked where this had been set out in the previous summary or in his original ET1 received on the 8 May 2017. It was suggested on behalf of the respondent that it was only contained in the application to amend which was before the tribunal on the last occasion and was one of the areas in relation to which leave to amend was not given. The claimant who did not have any documents with him save for those on a tablet stated he would provide the information the next day. On the next day, the claimant relied upon the list of issues for 13 July hearing and the agendas. He indicated to the tribunal that the allegation that he had made a disclosure to the information Commissioner was contained in his list of issues.

52. After detailed discussion on the second day of this hearing the claimant stated that he was not relying on the first two disclosures from the list of five at the earlier hearing. He was relying upon the disclosures of:-

    iii) reporting Mrs Lee's resignation.

    iv) reporting that Mrs Kidby stored highly flammable chemicals inappropriately.

    v) the three emails in April 2015 repeating the allegations about Mrs Anderson.

    and his disclosure to the Information Commissioner

53. In relation to the Information Commissioner the claimant produced a letter from the Commissioner's office dated the 20 January 2016 acknowledging correspondence from the claimant of the '19 January 2016 in relation to your concerns about Stoke High School – Ormiston Academy' This concerned the claimant having requested a Mrs Dersley's home address from the Academy. They wrote to Mrs Dersley to obtain her permission which she refused. The Academy informed the claimant of this and produced copies of their correspondence with Mrs Dersley from which her home address had not been properly redacted. The Commissioner's office was now in correspondence with the Academy about this.

54. In the claimant's list of issues for the previous preliminary hearing this matter was listed as follows:-

> "Breach of legal obligations
> Disclosing the full address of Mrs Nikki Dersley (Lee) without her consent"

55. In January 2016 the claimant reported that Stoke High disclosed personal information of its employee without their consent. The information was reported to the Information commissioner office. The breach was:-

> Failure of meeting the requirement of the DPA by failing to put in place adequate security and organisational measures to guard against the accidental disclosure of employees' personal information without consent'

    (That wording is taken from the Information Commissioner's letter of the 20 January 2016 referred to above)

56. The respondent was prepared to make submissions on these additional disclosures that the claimant wished to rely upon in the interests of transparency and having board of the matters dealt with at this hearing.

57. Reference was made to the ET1 which only referred to "breach of legal obligations and health and safety". At the preliminary hearing before this employment judge, submissions were made about the protected disclosures and what they were. The claimant's application to amend included in the page 2 paragraph 3

> "on 28 June 2017 the claimant formally informed the respondents about the claimant's wish to apply for the position. Concerns (discriminatory advert – as minorities disadvantage) to the respondents as other employers do not require that discriminatory requirement for the same job or other jobs."

58. The judge had to point out that the claimant had withdrawn that allegation at the hearing on 13 July.

59. At the hearing in July there was a schedule of issues. The claimant clearly had the opportunity to clarify what this position was and also seek to amend where appropriate. On behalf of the respondent it was submitted that the claimant had more than enough time to state what his case was and what the amendments were he wished to make. There had been a decision on amendments. The decision has been formulated and written reasons produced. If there was an issue taken about those decisions than the claimant's right was to apply for a review or an appeal. That had not been done. That would therefore make what is being applied for another application to amend on matters which have already been decided. The respondent's primary submission therefore was that the claimant is unable to do that in the circumstances.

60. If the tribunal were against the respondent and treats this as an application to amend then consideration must be given to the guidance in *Selkent*.

61. The nature of the amendment – this is not a clerical error and not a re-labelling, but is advancing a new factual allegation. The claimant has an uphill struggle to try to advance new allegations given the fact that he has understood what was required of him to advance the case on which he relies. He was aware of the subject matter which might substantiate his claim.

62. Time limits – these allegations are significantly out of time and in considering that, although it is not determinative, the tribunal has to consider whether it was reasonably practicable to bring the claim in time and/or just and equitable to extend time. When considering the circumstances of this application to amend it falls foul of both of those considerations.

63. The timing and manner of the application – counsel recorded in the case of *Ladbroke Racing*, that guidance was given to employment tribunals about taking account of the timely manner of the application, why the application is made at the stage it is and why it was not made earlier. It seems that when the claimant nailed his colours to the mast and finds that he is not given leave he seeks to amend again to nail his colours to another mast.

64. If leave to amend were allowed it would lead to further delay as the hearing would be lengthened if new issues were allowed to be raised. There will need to be reconsideration of disclosure, relevance of documents, witnesses and no doubt this will lengthen the hearing.

65. Lastly there is the issue of delay which may have put the respondent in a position where evidence is rendered of lesser quality. Witnesses may have to be asked about incidents that happened some time ago.

66. If this is an application to amend then there is a balancing exercise with regard to hardship and the respondent submits it should not be exercised in favour of the claimant.

67. In response, the claimant said that his list of issues produced on the last occasion was in response to the respondent's list of issues. He believed he had a document which referred to the protected act and disclosure and what he is relying on was before the preliminary hearing on the last occasion. The reason he produced a schedule of issues was to make clear the protected acts relied upon and the disclosures, including those to the information Commissioner. The claimant stated he should be able to provide this document after a break. He is not making an application to amend as his position is that the claim was already there. The respondent was seeking further clarification of the protected disclosure and protected acts relied upon.

68. The claimant then sought to suggest that when only one of the protected disclosures was listed in the summary from the last occasion he believed that the tribunal was then going to go through every single item in his list of issues. He was asked why he did not then state that the judge's summary was inaccurate when it was received by him. The claimant's response was that he knew the respondent was seeking a further preliminary hearing and this matter was therefore going to come to light. The claimant however agreed that he would go to the public library over lunch adjournment and print out the documents upon which he relied.

69. On resuming after the lunch break the claimant stated that he relied upon the respondent's agenda and list of issues. He also provided his response to the preliminary hearing summary by letter of 10 August 2017. The claimant drew attention to the fact that in his list of issues for the 3 July hearing he referred to:

'Protected Disclosures as found by the ET

Breach of legal obligations,

8. Ms Anderson swore at the claimant.

Health and safety

9. On the 21 May 2015 the claimant reported that:-

"Mrs Kidby stores highly flammable chemicals inappropriately."

Breach of legal obligations

Disclosing the full address of Mrs Nikki Dersley (Lee) without her consent.

11. In January 2016 the claimant reported that Stoke High disclose personal information of its employees without their consent. The information was reported to the information Commissioner office.

70. The claimant submitted that sometimes claimants have to produce further and better particulars when matters are not clarified and this was the case here. The respondent knew he had made a protected disclosure, including that to the information Commissioner as they were contacted by that office.

71. The claimant also referred to paragraph 34 of his ET1 when he stated that Mrs Wood subjected him to detriment “as a result of the protected act and protected disclosures that the claimant made". The claimant placed emphasis on the fact that he said protected disclosures in the plural and therefore it would be known that he relied upon more than one.

72. The claimant was adamant, however, that he was not seeking leave to amend as he believes that his disclosures had been stated. He acknowledged there may be a part failure on his part but he was relying on the respondent seeking a further preliminary hearing where all the disclosures were going to be discussed at. The reason he drafted the schedule of issues was to clarify the matters he was complaining about.

73. The claimant acknowledged that he did write to the tribunal after the last hearing in a letter dated 10 August 2017. That was in response to the tribunal’s emails of 9 August 2017. It is noted that the summary of the last hearing was sent to the claimant on that date. The purpose of this letter was primarily to deal with authorities. There was, however, reference to the claimant’s schedule of issues on the very last page. The claimant refers to the withdrawal of the interview schedule of 12 January 2017 and the removal of the exam invigilators advert 30 June 2017 and stated he ‘made it clear he wished to pursue those issues as victimisation claims and race discrimination claims.’

Documents produced by the claimant at this hearing

74. Science technician interviews – the claimant wished to draw to the tribunal’s attention the issue of justification. The respondent wanted to apply for a strike out so the claimant wanted to draw attention to the differences and that other schools do not apply the English aptitude test which shows this was a deliberate act of victimisation and race discrimination.

75. Documents 10 and 11 are the interview schedule for the same school for two positions run at the same time as that of science technician and they did not have an English aptitude test. One of them was 99% the same job as that of science technician and deals with more children.

Remaining matters

76. The judge determined that the matter would be reserved and raised other issues that it had been directed would be considered at this hearing.

The correct respondent

77. The respondent pointed out that it is made it clear that it is not relying on the statutory defence and will pick up any compensation flowing from any

discriminatory acts found to have been committed by the named individuals. If there is no good reason for including them and it transpires that the claim fails that may have some influence over whether to pursue a costs application.

78. The claimant stated that he has a valid claim and that he is entitled to pursue this against named respondents.

Application to amend dated 16 October 2017

79. The claimant clarified this was a claim of victimisation on the grounds of race for not giving him a reference. The claimant is however not sure if they have provided a reference. The claim is therefore for providing a negative reference or for not giving a reference at all. The claimant has got the recruitment policy of Chantry High School and it states references are sought prior to interview and must be in writing. The claimant attended an interview in 2015 so Ormiston Academy must have supplied Chantry High School with a reference then. The claimant did not get a job when he applied in July 2017 having submitted the same application but one that was much better and which gave clearer clarification of his experience and qualifications for the role. The fact he did not get an interview, despite being qualified and meeting the desired and essential criteria for the post must be because he was not given a reference or was given a bad reference by Ormiston Academy.

80. It was put to the claimant that he does not know if a bad reference or no reference was given. He stated he applied to Chantry High School to ask for the reference and they said he must apply to Ormiston Academy. He believes it is Mrs Brown, who is the one who is victimising him, as she is in control of references.

The protected act relied upon

81. The protected act relied upon is the complaint the claimant initially made on the 21 May 2015 which is also the protected act relied upon in the earlier proceedings. The claimant also relies upon these proceedings issued on the 8 May 2017. He then withdrew that suggestion and confirmed that it was only his complaint of the 21 May 2015 against Mrs Kidby and not these or the earlier proceedings.

82. The claimant had requested that the respondent who says it has an open reference policy disclose the references and to date they have refused. The claimant has made an application for specific disclosure but they continue to refuse to provide him with the references.

83. The judge raised that at the last hearing, the claimant had referred to 80 jobs he had applied for and he had been directed and indeed agreed to indicate the 6 that he was going to confine himself to.

84. The claimant states that these were provided in his request for specific disclosure of 2 October.

85. An order was made that the claimant advise the tribunal and the respondent within seven days the 6 jobs on which he is going to base the claim of failure to provide a reference.

86. Since the hearing the claimant has forwarded a copy of his request for specific disclosure sent to the respondent on 2 October 2017. This required the respondent to provide various documents, including its recruitment policy, principles Handbook, Chantry High School recruitment policy and the job references prepared for the claimant. These have been requested for roles applied for going back to June 2015.

87. The respondent stated in relation to this application to amend that it has been brought on receipt of the tribunal decision not to allow him leave to amend. There is no reason why this application could not have been made at the same time. It seems to be with the claimant a sequential process so that if one application is refused he makes another.

Deposit order

88. The judge reminded the claimant that the respondent in the alternative if claims are not struck out seeks a deposit order. The judge reminded the claimant that the rules state that the tribunal must have regard to the paying parties means. The claimant was reluctant to provide any information. He stated his position was under probation at the moment. He would be able to provide information electronically in due course. The judge said that was not appropriate and that it should be provided now so that questions could be put to the claimant by the respondent's counsel. The claimant did not wish to do so. The judge therefore had to warn the claimant that if the tribunal were minded to order a deposit and there had to be a further hearing dealing solely with the claimant's means, that could have been given at this hearing there may be costs consequences of having to come back for another hearing.

Relevant law

89. Rules 37 and 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 state:-

> "**Striking out**
> 37.—
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

and

"Deposit orders
39.—

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

90. The respondent is arguing that the claimant is estopped from relying on some of the matters that he now seeks to rely upon as they have already been dealt with in the previous proceedings brought by him against these respondents. It further argues that under the principles in Henderson, the Henderson the claimant failed to raise issues in the previous proceedings which he could or should have raised then he is estopped from raising them in the future as to do so would be an abuse of process.

91. No relevant case law has been referred to during these submissions.

92. With regard to estoppel, there is: -

96.1 Cause of action estoppel which prevents a party pursuing a cause of action that has been dealt with in earlier proceedings involving the same parties.

96.2 Issue estoppel which prevents a party decided in earlier proceedings involving the same parties.

96.3 The rule in *Henderson v Henderson*.

Cause of action estoppel.

93. This prevents a party pursuing a cause of action that has been dealt with in earlier proceedings involving the same parties. Where two sets of proceedings are brought in relation to similar circumstances the issue will be whether they both rely on the same cause of action or whether they are sufficiently different such that cause of action estoppel does not apply.

94. One example of where this might arise is where a claimant fails in his or her claim on the basis of one legal approach and then seeks to relitigate the matter on the basis of another.

Issue estoppel

95. This prevents a party reopening an issue that has been decided in earlier proceedings involving the same parties. What needs to be considered is whether a tribunal has made findings of fact the existence of which are a condition necessary to the cause of action which this tribunal is considering. The parties will be estopped from calling that finding of fact into question in subsequent proceedings. Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties

seeks to reopen that issue (*Arnold v National Westminster Bank plc* 1991 to AC 93 HL.)

The rule in *Henderson v Henderson* 1843 3 Hare 100 PC

96. This provides that if a party fails to raise any issue in the proceedings that he or she could and should have raised, he or she may be prevented from raising that issue in the future if to do so would amount to an abuse of process. The modern understanding of this rule was set out in Johnson v Gore Wood and Co 2002 2 AC 1, HL. Lord Bingham stated: -

> "Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same; that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all… It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question 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."

Amendments

97. Consideration must be given to the guidance in *Selkent Bus Co Ltd v Moore* 1996 ICR 836 EAT, given by the then President Mr Justice Mummery when he stated that the relevant factors would include:

97.1 The nature of the amendment
97.2 The applicability of time limits
97.3 The timing and manner of the application.

98. Dealing with the nature of the amendment the guidance made it clear that this could range from the correction of minor errors to the making of new factual allegations which change the basis of the existing claim. In *Abercrombie and others v Aga Rangemaster Ltd* 2013 IRLR 953 CA it was made clear that when considering applications to amend that arguably raise new causes of action, the focus should be:

> 'not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old; the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted'.

99. The tribunal must always balance the injustice and hardship in allowing the amendment against the injustice and hardship of refusing it.

100. The applicability of time limits is particularly relevant where a new complaint is sought to be added by way of amendment. The tribunal must consider whether that complaint is out of time and if so whether the time limit should be extended under the applicable statutory provisions. This is however merely one of the factors that the tribunal must take into account in deciding whether or not to exercise its discretion.

101. The fact that the new claim has arisen since the presentation of the ET1 form does not mean that the claim form cannot be amended to include such a claim. (*Prakash v Wolverhampton City Council* EAT 0140/06)

102. The timing and manner of the application is another factor to be considered. An application can however be made at any time although the party applying will ned to show why it was not made earlier.

Conclusions

Protected disclosures

Mrs Lee

103. There was a detailed clarification of the issues at the preliminary hearing on the 13 July 2017. The only protected disclosure identified at paragraph 10 was that Mrs Lee obtained a job at the school because a friend of hers was a science teacher. The claimant said he reported that Jo Tankard in or about March 2015 and in May 2015 to the principal Mrs Dixon. The breach was said to be of a legal obligation, namely the principles of the Equality Act 2010.

104. In the Sigsworth judgment, one of the listed protected disclosures was "reporting that Mrs Lee's resignation was a constructive unfair dismissal in an oral conversation with Mrs Tankard in March 2015 and in the claimant's grievance of 21 May 2015." The tribunal concluded that the disclosure "has simply not been made out as there was no miscarriage of justice and no court and no evidence were involved". The tribunal however also went on to consider in the alternative if the claimant was saying there had been a breach of a legal obligation possibly of the implied term of mutual trust and confidence, "then he did not have the necessary facts to form a reasonable belief about that on the basis of the evidence we have heard and read. He cannot have known exactly why Mrs Lee resigned (as he did not speak to her) and simply made assumptions on the basis of the poor relationship between Mrs Lee and Mrs Kidby and what Mrs Kidby said. That protected disclosure has not been made out."

105. This tribunal accepts the submissions made on behalf of the respondent that the claimant to all intents and purposes attempting to re-litigate that matter. He now seeks to rely upon reporting of the same matter but seeks to allege that

there was a breach of the principles of the Equality Act 2010. What that breach was has not been identified and neither has the protected characteristic relied upon been.

106. The tribunal is satisfied that it would be an abuse of process if the claimant were allowed to re-litigate this matter when a tribunal has already found that that protected disclosure was not made out. The tribunal is satisfied that that would be prohibited under cause of action estoppel, where the cause of action has already been dealt with in earlier proceedings involving the same parties. That the claimant complained about Mrs Lee's appointment has already been litigated on and findings made and a conclusion reached. The claimant is estopped from pursuing that matter again in these proceedings.

107. The tribunal would also find that the claimant is estopped under issue estoppel from reopening an issue that has been decided in earlier proceedings involving the same parties. Findings of fact have been made already. They are "necessary ingredients" of the matter which the claimant now seeks to advance, namely that he made a protected disclosure and was then subjected to a detriment. Findings of fact have already been made by the earlier tribunal that the protected disclosure was not made out.

108. The claimant is therefore estopped from relying upon the protected disclosure about Mrs Lee's appointment in these proceedings.

Other disclosures relied upon

109. The Claimant now seeks to rely upon other disclosures, namely that he reported that Mrs Kidby stored highly flammable chemicals inappropriately and the three emails on 23, 24 and 29 April 2015 complaining about Mrs Anderson (4 and 5 in the list of disclosures in the Sigsworth judgment).

110. Whilst the tribunal's position is that the claimant only identified one disclosure that he sought to rely upon at the preliminary hearing in July it accepts that as a litigant in person, he may have thought that it was clear that he was also relying on the disclosures the first of which was upheld as a disclosure and the second stated to possibly be a disclosure. The tribunal has concluded that these should be added to the list of issues and are disclosures that the claimant can continue to rely upon in these proceedings.

The claimant's disclosure to the information Commissioner January 2016

111. This matter has never been pleaded in the ET1 form. The first mention of it is in the claimant list of issues for the July preliminary hearing in which the claimant stated:

> 'In January 2016 the Claimant reported that Stoke High disclosed personal information of its employees without their consent. The information was reported to the information commissioners office. The breach was:

> Failure to meet the requirements of the DPA by failing to put in place adequate security and organisational measures to guard against the accidental disclosure of employees personal information without consent.
>
> Disclosing the full address of Mrs Kidby without her consent.
>
> Despite the fact that the ICO confirmation of contacting Stoke High School on the 16 January 2016 regarding paragraph 9 above (Mrs Kidby storing highly flammable chemicals inappropriately);
>
> 12. In October 2016 the Stoke High School – Ormiston Academy released the full address of Mrs Kidby to the Claimant. The breach was reported the Mrs Brown and Mr Hurd.

112. That is not a pleading. It was not contained in the application to amend which was determined after that hearing and not brought up in the claimant's letter of 10 August sent after the summary was sent to the parties. The claimant has said at this hearing that he is not seeking leave to amend as this had already been part of his case. The tribunal does not agree with that interpretation. If the matter is not in the claim form then leave to amend is required to rely on it.

113. Applying then the guidance in ***Selkent*** to this amendment the tribunal is satisfied that leave to amend should be and is refused.

114. This is a completely new allegation not arising out of any facts that are already pleaded. The claim form in this matter was received on the 8 May 2017. The claimant must therefore have been well aware that he considered he had made a protected disclosure to the Information Commissioner by his letter of 19 January 2016 and that he believed he had been treated detrimentally as a result. Despite that he did not include this allegation in the claim form.

115. This appears to be a claim of post termination detriment, although what the alleged detriment is to the claimant is not stated. It appears that if any detriment arose it was to those whose home address was disclosed. They are not claimants in these proceedings. The tribunal must also take into account the fact that there does not appear to be a detriment alleged against the claimant in relation to this matter and therefore no cause of action

116. The matter is now significantly out of time. No evidence has been heard as to why there should be any extension of time given. The claim would need to have been brought within three months of the date of the act complained of unless the tribunal determined that it was not reasonably practicable to do so in which case the tribunal must consider whether it was brought within a reasonable time thereafter. Nothing has been heard to explain the delay and why the claim could not have been brought in time. The latest act seems to be disclosing Mrs Kidby's address to the claimant in October 2016. Even if some detriment to the claimant could be established the claim was received on 8 May 2017 and this complaint is out of time.

117. It is also noticeable that this was never contained in the original application to amend that was dealt with at and following the July preliminary hearing. The claimant made a further application to amend adding further act of victimisation in 16 October document and again this was not included.

118. The tribunal is satisfied that this would put the respondent to further cost and expense defending a claim which is now significantly out of time relating to events nearly two years previously. The claim would also still need to be further clarified as it is not even clear if there is a cause of action open to the claimant against his former employer.

119. Leave to amend is refused and there is therefore no claim before this tribunal about a protected disclosure to the information Commissioner made in January 2016.

The inclusion of an English aptitude test in the interview schedule January 2017.

8.1 The claimant alleges this was a form of direct race discrimination as the respondent knew that English was not his first language and this was direct designed to discriminate against him.

120. The respondent argues this claim has no reasonable prospects of success. The inclusion of the test would have been made without the knowledge of who was applying. The claimant has no evidence on which the tribunal could reasonably infer that the test was included with the design to discriminate against the claimant.

121. The tribunal cannot determine without hearing the evidence that this claim has no reasonable prospects of success. The tribunal is however satisfied it has "little reasonable prospects" such as to give the tribunal a discretion to award a deposit as a condition of continuing to pursue this claim. The claimant will need to establish that those who put together the recruitment exercise included the English language requirement 'because of' the claimant's race within the meaning of section 13 of the Equality Act 2010 and that by so doing the claimant was treated 'less favourably than [the Respondent] treats or would treat others'. As the test was applied to all it is difficult to see how that can be established.

122. The claimant was given the opportunity of providing details of his means, but refused to do so at this hearing. He is now ordered to provide evidence of his income and outgoings within 14 days of the date on which this decision is sent to the parties when consideration will then be given to the amount of the deposit.

8.2 That the English aptitude test was a provision, criterion or practice that put ethnic minority groups whose first language is not English at a disadvantage and put the claimant at such a disadvantage.

123. The respondent states that the claimant fails to show that he was part of such a group. Even if the claimant could the respondent had a legitimate aim and such a test was proportionate.

124. The tribunal has concluded that it cannot determine at this preliminary stage whether such a claim has no or little reasonable prospects of success. The question of the identification of 'the pool', the disadvantage and if necessary the question of objective justification need to be determined having heard all of the evidence.

8.3 This was also harassment on the grounds of race, as it was done to deter the claimant from applying and to create a hostile and threatening environment

125. S.26 of the Equality Act 2010 provides that: -

> "(1) a person (A) harasses another (B) if –
>
> (a) a engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose of effect of –
> (I) violating B's dignity, or
>
> (II) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

126. The tribunal accepts the respondent's submissions that the provision of an English aptitude test cannot come within the meaning of "unwanted conduct".

127. The tribunal accepts that this claim has no reasonable prospects of success and is dismissed.

8.4 The claimant asserts that the English aptitude test was also an act of victimisation

128. The respondent submits the claimant will need to establish that inclusion of the test was done because he had brought the earlier claim. The respondent says there is and will be no evidence from which a reasonable inference of that can be drawn.

129. Until the evidence is heard the tribunal cannot conclude that this claim has no reasonable prospects of success. However, it does accept that there are issues of causation that the claimant will need to overcome and has concluded that it this allegation has "little reasonable prospects" so as to enable it to award a deposit to be paid as a condition of continuing with this claim.

Paragraph 9 - 10 January 2017 when the respondent informed the claimant the respondent was re-advertising the position as one of the three candidates had withdrawn.

9.1 This is alleged to be an act of detriment because the claimant had made a protected act and protected disclosure.

130. The respondent makes the same submissions as it did earlier, namely that the protected disclosure about Mrs Lee has already been litigated upon and the tribunal comes to the same conclusions as it has above in relation to that. The claimant is estopped from relying upon that disclosure, which was not made out in the earlier proceedings.

131. The claimant now says he also relies upon the other disclosures and the two that have been allowed can continue but not the disclosure to the Information Commissioner.

132. The Respondent makes no submissions about this matter as an act of victimisation.

Failure to provide a reference.

Paragraph 12 East Bergholt school

133. The claimant relies on paragraph 24 of the ET1 in which he asserts that in July 2016 the respondent refused to provide this reference. Any claim in relation to that should therefore have been brought by October 2017. ACAS Early Conciliation was not entered into until 24 January 2017 way past that primary limitation period. The conciliation period of one month does not therefore lengthen the 3 month limitation period.

134. The claimant has submitted at this hearing that he could not have brought this claim sooner as he did not have knowledge of whether a reference had been provided. That is inconsistent with his pleaded case in which he states that the respondent 'refused to provide a prospective employer… a reference for the claimant. East Bergholt High School formally confirmed that they sought a reference before the interview but no reference was given…' The claimant was therefore aware of that position. He had provided no satisfactory explanation as to the delay in issuing and why it would be just and equitable to extend time. The tribunal accepts this particular complaint is out of time and is dismissed.

Paragraph 14 – failure to provide training and shadowing in the last week of claimant's employment

135. The claimant will seek to argue a continuing act of less favourable treatment and the tribunal has concluded that issue can only be determined upon a hearing of all of the evidence.

Paragraph 16 – comments by Mrs Le Marrec and Miss Anderson

136. The claimant found out about these comments in December 2015. His first claim was heard in September 2016. These matters could and should have

been raised in those proceedings. The claimant chose not to do so even though it has been shown he is well versed in how to apply for an amendment to his claim. Under the rule in *Henderson v Henderson* he should not be permitted to bring those allegations in these proceedings.

137. In addition the claims are now substantially out of time and no justifiable reason has been advanced as to why it would be just and equitable to extend time.

138. This particular allegation is dismissed.

Application to amend dated 16 October 2017.

139. This application relates to a role applied for in July 2017 to Chantry High School. It is based on an assumption that the reason the Claimant was not invited to interview was because he had issued previous proceedings and is brought as a complaint of victimisation. The criticism seems to be of Chantry High School and not this Respondent as the Claimant alleges in his application to amend 'Chantry High School refused to offer the Claimant an interview because the Claimant issued proceedings against his previous employers'.

140. The claimant does not know whether a reference was requested or provided. Any claim should have been brought by October 2017. The claim is therefore now out of time. There seems some credibility in the respondent's submission that this was made after receiving the tribunal's decision on 15 October 2017 refusing a previous application for leave to amend. The claimant has given no convincing evidence as to why the claim could not have been brought in time.

141. This is not relabelling but the addition of a new claim. Although not determinative the claim was out of time at the date of the application to amend. The claim is based on assumptions even on the claimant's own case. To allow the amendment would add to the length of proceedings as additional evidence would be required with regard to this interview process. The Claimant also seeks to rely on how he was treated at interview in 2015 which is now over two years past. There needs to be finality to the number of issues in these proceedings. The claimant already has a number of allegations and causes of action that are proceeding. To allow the amendment would result in greater hardship to the respondent in having to also defend this than it would give to the claimant in refusing it.

142. In all the circumstances leave to amend is refused.

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Employment Judge Laidler

Date: 12 Mar. 18

Sent to the parties on:

For the Tribunal:

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