**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107299/2014**

**Held in Edinburgh on 27 September 2019**

**Employment Judge: Rory McPherson**

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| **Mr G Imrie** | **Claimant**<br>**Represented by:**<br>**S Healey–**<br>**Solicitor** |
| **Right Track Scotland Ltd** | **Respondent**<br>**Represented by:**<br>**W Lane –**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that;

1. a) those aspects of the claimant's claim of Constructive Unfair Dismissal asserting breach of s 94 of Employment Rights Act 1996 (ERA 1996) seeking

   i) a Basic Award in terms of ss118 (1) (a), 119, 120 (1), s121 and 122 of the ERA 1996; and

   ii) a Compensatory Award in terms of s 123 of the ERA 1996 restricted to loss of statutory rights; and

   are claims within the jurisdiction of the Tribunal; and

   b) the remaining aspects of the claimant's claim of Constructive Unfair Dismissal asserting breach of s94 of the ERA 1996 are out with the jurisdiction of the Tribunal, in terms decree of absolvitor in the Court of Session dated 27 October 2017, in respect that those matters are res judicata and is dismissed; and

2. the claimant's claim of Disability Discrimination in terms of the ss 20 and 21 of the Equality Act 2010 (EA 2010) failure to make reasonable adjustments is out with the jurisdiction of the Tribunal, in terms of decree of absolvitor in the Court of Session dated 27 October 2017, in respect that those claims are res judicata, and is dismissed; and

3. the claimant's claims in terms of s15 of the EA 2010 (discrimination arising from a disability) are out with the jurisdiction of the Tribunal, in terms of decree of absolvitor in the Court of Session dated 27 October 2017, in respect those claims are res judicata and are dismissed; and

4. the claimant's claim of Disability Discrimination s19 (indirect discrimination) is out with the jurisdiction of the Tribunal, in terms of decree of absolvitor in the Court of Session dated 27 October 2017, in respect that those claims are res judicata and is dismissed; and

5. a) those aspects of the claimant's claim for Detriment due to Protected Disclosures in term of 47B of the Employment Rights Act 1996 (ERA 1996) seeking a Declaration in terms of s49(1)(a) of the ERA 1996 and expenses reasonably incurred by the claimant in consequence of the acts complained of in terms of s49(3) (a) of ERA 1996 are not out with the jurisdiction of the Tribunal by reason of res judicata; and

b) the remaining aspects of the claimant's claim for Detriment due to Protected Disclosures in term of 47B of the Employment Rights Act 1996 (ERA 1996) are out with the jurisdiction of the Tribunal, in terms of decree of absolvitor in the Court of Session dated 27 October 2017, in respect those matters are res judicata, and are dismissed; and

6. a) those aspects of the claimant's claim of Detriment due to Automatic Unfair Dismissal in term of 103A of ERA 1996 (protected disclosure/whistleblowing) seeking Basic Award in terms of ss118 (1) (a) , 119, 120 (1), s121 and 122 of the ERA 1996 and Compensatory Award in terms of s 123 of the ERA 1996 restricted to loss of statutory rights are within the jurisdiction of the Tribunal; and

b) the remaining aspects of the claimant's claim of Detriment due to Automatic Unfair Dismissal in term of 103A of ERA 1996 (protected disclosure/whistleblowing) are out with the jurisdiction of the Tribunal, in terms of decree of absolvitor in the Court of Session dated 27 October 2017, in respect those matters are res judicata, and are dismissed.

Further the Tribunal Orders that:

1. Those aspects of the claimant's claims of Constructive Unfair Dismissal, seeking; a Basic Award in terms of ss120 (1), s121 and 122 of ERA 1996, declaration of breach of s94 ERA 1996 and Compensatory Award in terms of s 123 of the ERA 1996 restricted to loss of statutory rights, should now proceed to a Final Hearing; and

2. The claimants claims in terms of 47B of the Employment Rights Act 1996 (ERA 1996) seeking a Declaration in terms of s49(1)(a) of the ERA 1996 and expenses reasonably incurred by the claimant in consequence of the acts complained of, in terms of s49(3) (a) of the ERA 1996, should now proceed to a Final Hearing, subject to the reserved jurisdictional issue of time bar set out in Tribunal Judgment of 12 July 2019, sent to the parties 12 July 2019; and

3. The claimant's claim of Detriment due to Automatic Unfair Dismissal in term of 103A of ERA 1996 (protected disclosure/whistleblowing) seeking Basic Award in terms of ss118 (1) (a) , 119, 120 (1), s121 and 122 of the ERA 1996 and Compensatory Award in terms of s 123 of the ERA 1996 restricted to loss of statutory rights should now proceed to a Final Hearing.

4. Parties are directed that a Final Hearing Date listing stencil accompanies this Judgment and parties are required to complete the Date Listing Stencil in full and return it to the Tribunal as may be directed.

## REASONS

### Introduction

### Preliminary Procedure

1. The present preliminary hearing was appointed following Preliminary Hearing on 12 June 2019 2019, at which Right Track had raised as a preliminary matter in relation to further procedure that that " *the whole or part of these proceedings may be res judicata"* and that Right Track had instructed that an application for strike out the claim under Rule 37(1)(e) of the 2013 Employment Tribunal Rules of Procedure (the 2013 Rules) be made.

2. At the outset of this preliminary hearing Right Track's representatives intimated that they were no looking seeking strike out and were solely relying on their arguments relating to the application of res judicata.

3. While Right Track no longer insist upon Strike Out, Rule 37(1) of the 2013 Rules provides that Strike Out is a matter which a Tribunal may consider on its own initiative. In light of the history of this case, including the previous application for Strike Out, I consider it is useful to make observations below regarding the use of Strike Out.

### Issues for the Tribunal

### Evidence

4. While no witness evidence was led, a number of factual findings are considered appropriate from the set of documents provided for this hearing including a Court of Session Record in respect of which no material issue was taken as to the accuracy of same, together with the Tribunal's own records.

5. No substantive findings of fact on the merits of the claim are made beyond the procedural history which is recorded in the following Findings of Facts.

**Findings in fact**

6. Mr Imrie commenced employment with Right Track (Scotland) Ltd (Right Track) on 17 June 2009 as a Life Skills trainer.

7. Mr Imrie asserts that he was certified as unfit to work from 3 April 2012 and was absent thereafter. During this absence, it is asserted that there were a number of interactions between Mr Imrie and Right Track including grievance procedure.

8. Mr Imrie's employment with Right Track Scotland Ltd came to an end on 30 April 2014.

9. Mr Imrie presented his claim to the Tribunal on 8 September 2014 asserting claims for constructive unfair dismissal in terms of s103 of the Employment Rights Act 1996 (ERA 1996) seeking compensation and not reinstatement or re-engagement. He further asserted claims for disability discrimination in terms of sections 13, 15, 20 and 27 the Equality Act 2010 (EA 2010), further that he was subjected to a detriment for having made a protected disclosure contrary to s43A and s 47B of the ERA 1996 and for holiday pay (and although not specified this is understood to be in terms of reg 30 of the Working Time Regulations 1988 or under s13 of ERA 1996 if contractual in nature). Mr Imrie's claim identified his former representatives as acting on his behalf.

10. Right Track (Scotland) Ltd (Right Track) presented their ET3 timeously on 16 October 2014. Right Track were identified as represented by their current representatives.

11. On 28 November 2014 at a case management preliminary hearing the Tribunal issued a number of Case Management Orders and provisionally fixed a Final Hearing for 5 days commencing 16 March 2015. It was noted that Right Track may revert to the Tribunal within the following 28 days to request a preliminary hearing on time bar however and in the absence of such a request the hearing dates would become fixed. At that preliminary hearing it was intimated that the discriminatory acts or detriments for the

purpose of s47B of ERA 1996 were Right Tracks acts in informing Mr Imrie that he had been selected for redundancy and the acts immediately said to have led to his resignation and thus, it would be argued, time bar did not apply. It was intimated that the Mr Imrie's then representative would consider whether a duty to make reasonable adjustment was triggered with reference to (**McHugh v NCH Scotland** UKEATS/0010/16 (**McHugh**) and **Collins v Home Office** [2005] EWCA Civ 598 (**Collins**)]. It was further intimated for Mr Imrie that the alleged detriments for whistleblowing were the same acts complained of above and that clarification would be provided to the Tribunal whether these issues were each being argued as primary claims or one was an esto case.

12. On 19 December 2014 Right Track through their representatives intimated that the Tribunal should consider issuing order for strike out of Mr Imrie's case on the basis that the case had no prospect of success failing which a deposit order be issued.

13. On 25 March 2015 the Tribunal wrote to the parties advising that it had been directed that there should be a telephone case management preliminary hearing on 7 April 2015 to discuss matters including the nature of the claim being made.

14. At the telephone case management hearing on 7 April 2015 it was noted that there was a high hurdle to be overcome in relation to striking out a discrimination case **Balls v Downham Market High Street and College** 2011 IRLR 217, Lady Smith (**Balls**)) and certain procedural steps were indicated to be taken in relation to pleadings and it was intimated that attempts to instruct a joint medical expert was on hold until a preliminary hearing on strike out took place.

15. On 8 April 2015 the Tribunal intimated that a preliminary hearing was appointed for 20 April 2015 to consider whether the claim should be struck out, it being asserted by Right Track that the claim had no prospect of success and to further consider making a deposit order.

16. On 15 April 2015 Right Track's representatives withdrew their client's application for strike out and/or deposit order and invited the Tribunal to vacate the preliminary hearing scheduled for 20 April 2015.

17. The preliminary hearing scheduled for 20 April was cancelled on Right Track's representatives request.

18. On 1 June 2015 the Tribunal intimated that it was proposed that the Tribunal list the case for a Final Hearing and parties were invited to confirm their availability.

19. On 8 June Mr Imrie' former agents intimated that the parties had agreed to jointly instruct a consultant psychiatric in relation to disability status and in light of the date scheduled for examination and anticipated production of the report a new date Final Hearing date listing stencil was requested to cover September, October or November 2015.

20. On 17 June 2015 Final Hearing date listing stencil was issued for the September, October and November 2015.

21. By Tribunal letter dated 14 July 2015 the parties were notified of a 5 day Final Hearing to take place Monday 23 November to Friday 27 November 2015.

22. On 6 November 2015 Mr Imrie's former agents intimated to the Tribunal and Right's Agents by e-mail stating with regard to the:

*"…above claim in which a Hearing is assigned on 23, 24, 25, 26 and 27 November 2015.*
*A claim for personal injury has now been initiated by the claimant in the Court of Session. A copy of the Summons... is attached. The Summon was served by post on 5 October 2015 is attached. Defences were received today….*
*There will be significant overlap between the evidence that will be adduced in the court and tribunal proceedings. For instance, it is claimed in the tribunal proceeds that the respondent breached the implied term of mutual trust and confidence by its failure to adequately deal with grievances… The*

*asserted failure to adequately deal with the claimant's grievances is articulated ..., in articles 5, 8, 9 and 10 of the Summons.*
*A further example is in respect of the claim that the respondent failed in its duty to make reasonable adjustments, particularly those adjustments mooted in the occupational health report of 17 December 2012 (as set out in paragraph 4 of the statement of claim). This issue is address …in articles 7 and 8 of the Summons.*
*Furthermore, there will be considerable overlap in relation to wage and pension loss following the date of resignation.*
*In these circumstances, it is requested that the Hearing assigned on 23 to 27 November is postponed and that the Tribunal is thereafter sisted to allow the proceedings in the Court of Session to continue. Having regard to the principles identified in* ***Mindimaxnox v Glover & anor*** *EAT 0225/10 as being relevant to the question of which proceedings should take priority, the following factors are relevant: (i) there is a substantial factual dispute in this case supported by voluminous number of documents; (ii) there is a significant overlap in respect of the factual material as described, and (iii) the value of the Court of Session proceedings is likely to be greater than the tribunal proceedings."*

23. On 30 November 2015 the Tribunal confirmed that the Tribunal claim should be sisted pending the outcome of the personal injury action.

24. Mr Imrie's former representatives who acted in his Employment Tribunal claim had prepared personal injury proceedings in the Court of Session against Right Track and the summons was signeted 1 October 2015 and served 5 October 2015 (the Court action).

25. Defence to the court action were issued for Right Track by separate representatives (Right Track's court representatives).

26. The Court action, by the time of the Closed Record, at para 4 of Statement of Claim sets out that Mr Imrie was employed by Right Track and provides a factual matrix concerning the work environment. I do not set out the whole of the narrative, beyond noting that it is alleged that Mr Imrie felt bullied by his

manager and he alleged that he was subjected to harassment for which Right Track were said to be vicariously liable.

27. The Court action asserted at para 6 of the Statement of Claim that Right Track's *"acts and omissions which were causative of"* Mr Imrie's "*physiological injury and continued to exacerbate it did cease until in or about April 2014 when*" Mr Imrie "*resigned from his employment*".

28. The Court action at para 12 of the Statement of Claim asserted common law claims to effect that "*injury to Mr Imrie's mental health was caused or materially contributed to by the fault of"* right Track "*It was their duty to take reasonable care for the safety of their employees… to avoid exposing them unnecessarily to the risk of injury".* While I do not repeat the whole narrative of the asserted claims none, at para 12 are asserted as arising from statute.

29. The Court action at para 13 of the Statement of Claim asserted that as a result of Right Track's fault, Mr Imrie *"sustained loss, injury and damage"* and he asserted claims for *"(i) solatium (ii) past loss of earnings and future loss of earning; (iii) loss of employability; and (iv) pension loss"* and that he *"meets the definition of a person with a disability, as provided for in section 6(1) of the Equality Act 2010".* Certain factual assertions are made by Right Track in response by Answer 13, which may have been relevant to consideration of the application of the definition Right Track by the Court of Session however they make the general denial "*Quoad ultra denied".*

30. The Court action at para 15 of the Statement of Claim asserted that his claim was based upon fault at common law et seperatim breach of section 8 of the Protection from Harassment Act 1997.

31. Right Track issued defences and a Closed Record was created incorporating both parties' written case with the period for adjustment by the parties to their pleadings being extended to 24 March 2016 and thereafter to 7 November 2016 with the date for lodging of the Closed Record (the Closed Record) being extended from 26 February 2016 to 21 November 2016.

32. The Closed Record which identified Mr Imrie's former representatives and Right Track's court representatives as acting throughout, identifies that Mr Imrie had been required to lodge his Statement of Valuation of Claim by 12 February 2016, which was extended to 24 March 2016 and thereafter to 7 November 2016. Further the Closed Record identified that Right Track had required to lodge its Statement of Valuation of Claim by 14 April 2016 which was extended to 19 December 2019.

33. A provisional diet of proof was appointed for the Court action for 31 May 2016 and the three following days, which diet was subsequently varied to 13 February 2018 and the 5 ensuing days.

34. Prior to the proof the Court action was settled extra judicially by a Joint Minute signed for both parties which stated that the parties "*concurred and hereby concur in stating to the Court that the action has settled extra-judicially and they craved and hereby crave the Court: -*

1. *To grant decree of absolvitor in favour of the Defenders; and*
2. *To award no expenses due to or by either party."*

35. A final interlocutor in the Court of Session action was pronounced dated 24 October 2017 which stated "*The Lord Ordinary, on the unopposed motion of the pursuer, and in terms and in respect of the joint minute for parties no. 11 of process, finds no expenses due to or by either party quoad ultra assoilzes the defenders from the conclusions of the summons and decerns."*

36. On 26 March 2018 the Tribunal intimated to Mr Imrie's former representatives and to Right Track's current representatives that it was proposed to list the case for a (one) day preliminary hearing in the period May June 2018 to conduct preliminary consideration of the claim with the parties and make case management orders including orders relating to the conduct of the final hearing. It was intimated that parties should confirm their availability in the period May to June 2018 by 2 April 2018.

37. On 2 April 2018 Mr Imrie's former representatives intimated "*that the Court of Session proceedings have been resolved by way of Joint Minute.*

*Accordingly, there is no longer an impediment to further procedure being assigned in this claim. Given the complexity of the claim*" it was suggested that a case management preliminary hearing be appointed. Mr Imrie's former representatives also confirmed their availability in the period May to June 2018.

38. By letter issued 11 April 2018 the Tribunal notified that a preliminary hearing was appointed for 8 June 2018.

39. On 30 May 2018 Mr Imrie's former representatives advised that they no longer acted.

40. On 5 June 2018 Mr Imrie sought postponement of Preliminary Hearing scheduled for 8 June 2018 as he was unrepresented.

41. The preliminary hearing scheduled for 8 June 2018 was postponed on request of Mr Imrie. On 3 September 2018 the Tribunal intimated that the preliminary hearing would now take place on 1 November 2018 with matters to be discussed being case management, further that parties should attend with details of availability of witnesses for the case being listed for a hearing in the period November 2018 to January 2019.

42. On 30 October 2018 Mr Imrie's present representatives intimated that they were now instructed and required to take certain steps including regarding legal aid and accordingly sought postponement of the case management preliminary hearing scheduled for 1 November 2018.

43. On 31 October 2018 it was confirmed that the preliminary hearing was postponed.

44. By letter dated 3 November 2018 both parties' representatives were requested to confirm availability to attend a 1hour case management preliminary hearing in the period November to December 2018 by 10 November 2018.

45. By letter dated 14 November 2018 parties were notified of the preliminary hearing scheduled for 4 December 2018. It was indicated that matters to be

discussed included; the nature of the claim which was being made, the statutory provisions upon which the claimant relied and the essential matters which must be capable of being proved at the final hearing if the claim is to have reasonable prospect of success, and whether their were any preliminary issues arising which it would be appropriate to determine at a further preliminary hearing.

46. At Preliminary Hearing on 4 December Mr Imrie's present representatives were directed to advise the Tribunal and Right Track's representative within 21 days which complaints were still being pursued and to express views on further procedure. The Tribunal similarly directed Right Track's representatives to advise on further procedure. As a Final Hearing was a possible next step a date listing stencil was provided for the period February to April 2019.

47. On 7 December 2018 the Tribunal issued the Tribunal's Note with date listing stencil for a Final Hearing in the period February to April 2019.

48. On 19 December 2018 Right Track's representatives responded to the date listing stencil noting that they understood that the factual background to the case ran from the period June 2009 to April 2014 and that Right Track, which they stated was a charitable organisation, had significantly contracted and *"depending on the complaints the claimant wishes to pursue"* the relevant witnesses may no longer be employed and may have been out of contact with Right Track for *"a number of years".*

49. On 7 January 2019 Mr Imrie's present representatives requested an extension of time by 7 days.

50. By letter dated 15 January 2019 Right Track applied for strike out in terms of rule 37(1)(d) of the 2013 Rules as the claim "*has not been actively pursued"* and in the alternative an unless order in terms of rule 38(1) seeking an order that Mr Imrie be required to confirm which complaints were still being pursued and further that he would be required to express his views on further procedure.

51. On 18 January 2019 Mr Imrie's present representatives confirmed that he insisted upon his claims for;

1. Constructive Unfair Dismissal in breach of the s 94 of the ERA 1996 (the right not to be unfair dismissed); and
2. Disability Discrimination –ss 20 and 21 of the EA 2010 (failure to make reasonable adjustments); and
3. Disability Discrimination – s15 of the EA 2010 (discrimination arising from disability); and
4. Detriment due to Protected Disclosures- s47B of the ERA 1996 (having been subject to detriment due to having made a Protected Disclosure); and
5. Automatic Unfair Dismissal- s103A of the ERA 1996 (being dismissed for the sole or principal reason of having made a protected disclosure).

They confirmed that Mr Imrie did not insist upon claims for Direct Discrimination (s13 of EA 2010), Holiday Pay and any claim under heads 1-5 previously pled on a different factual basis being any formulation of such claims other than those expressly set out in a document headed Adjusted Statement of Claim.

52. That Adjusted Statement of Claim document (the Adjusted Statement of Claim) broadly provided specification of certain factual allegations together with statutory claims of:

a. constructive unfair dismissal based upon repudiatory acts by Right Track all in terms of s94 of the ERA 1996; and
b. disability discrimination failure to make reasonable adjustment in breach of section 15 of the EA 2010; and
c. protected disclosures detriment contrary to section 47B of ERA 1996; and
d. automatic unfair dismissal in terms of s103A of ERA 1996 in respect it is said that the dismissal arose, in whole or to a material part, from the making of a protected disclosure;

while withdrawing other previously pled claims including holiday pay (whether in terms of reg 30 of the Working Time Regulations 1988 or contractually under s13 of ERA 1996).

53. Mr Imrie's statement of claim in the Employment Tribunal was amended by judgment dated 12 June 2019 sent to the parties 2 July 2019 to include an additional compliant of detriment arising from the alleged making of an protected disclosure contrary to s43A and 43B of the ERA 1996 and a claim for indirect discrimination within terms of section 19 of the EA 2010, while reserving the question of time bar in in relation to those amendments (in terms of sections 123(1) (a) and (b) of the EA 2010).

54. As above the present preliminary hearing was appointed to determine whether Mr Imrie's (whole) claim, or any part of it is out with the jurisdiction of the Tribunal on the basis that it is res judicata, and whether Right Track's application to strike out the claim under Rule 37(1)(e) should be granted.

**Submissions for Right Track**

55. A relatively concise written submission, supplemented by oral submissions, was provided on behalf of Right Track. Where relevant below I have identified authorities referred to for either party.

56. For Right Track, it was argued that that modern Scottish authority for the plea of re judicata is found in the decision of the Extra Division of the Inner House **Smith v Sabre Insurance** [2013] CSIH 28 (**Sabre**) and reference was made to paragraphs 28 to 20 with what is said to be possible translations of medium concludendi at paragraph 21.

57. Further reliance was placed upon the decision of extra division of the Inner House in **British Airways v Boyce** 2001 SC 510 (**Boyce**) at para 8 at which the Inner House states "*we can see no reason why the principle underlying res judicata … should not in some way be applied to proceedings before administrative tribunals such as those involved in the Employment Tribunal"* and "*we would… go further and say that in the Tribunal system the media concludendi should in general be taken as covering everything in the legislation, both in its legal and factual aspects, which is pertinent to the act or acts of the employer made the subject of complaint."*

58. Right Track further asserted that the claimants complaints of disability, indirect discrimination and failure to make reasonable adjustments (under s15, 19 and 21 of the EA 2010) were properly characterised as statutory delicts, relying upon s 119(3) of the EA 2010 which states that "*the sheriff has power to make any order which could be made by the Court of Session (a) in proceedings for reparation (b) on a petition for judicial review"* and s124(6) of the EA 2010 *"The amount of compensation which may be awarded under subsection 2(b) corresponds to the amount that could be awarded by .. the sheriff under s119*".

59. Right Track argued that those claims should be characterised as statutory delicts by reference to the Supreme Court in **Taiwo v Olagibo and another, Anu v Akwiwu and another** [2016] UK SC 31 (**Taiwo**) "*..proceedings for the statutory tort of race discrimination can be brought in an employment tribunal, at the same time as proceedings for unpaid wages and other breaches of contact of employment and for unfair dismissal."*

60. In summary, Right Track argue that there had been a prior determination by competent court, the decree had been pronounced in foro contensio, the subject matter of the two actions were the same and both actions have the same medium concludendi.

61. Right Track's primary position was that on this approach, the whole of the present claim before the Employment Tribunal is subject to res judicata. As a secondary position, if the Tribunal considered that too broad a medium concludendi was being insisted upon, at least all the disability discrimination complaints are subject to res judicata, reserving the other complaints for unfair dismissal, constructive unfair dismissal, protective disclosure and automatic unfair dismissal and holiday pay.

62. Right Track further relied upon the comments in **Sabre** in what is described as the one action rule at para 24 "*is a rule to the effect that all heads of damage, actual and apprehended, consequential upon one delictual act, must be sued for in one action and if that is not done any omitted head of damage is held to ne irrevocably departed from"* and, at para 44 *"we consider*

*it to be a sound principle that where a legal or natural person suffers damage as a result of a single negligent act, that gives rise to a single right to obtain reparation which must be pursued in one action.*"

63. Thus, and as the parties to the 2 separate proceedings were the same, res judicata applied. It was argued that all of the Tribunals claims for Mr Imrie should be struck out in their entirety, or at least all those claims which can be characterised as statutory delicts should be struck out.

64. Finally, it was submitted that consideration should be had to the conclusion of the Court of Session action (the Court action) as being decree of absolvitor in accordance with a Joint Minute. Where a party wishes to simply abandon and re-raise in a different format (or forum) the appropriate disposal would be one of dismissal (of the particular action) which, subject to time bar, preserves the right to re-raise.

**Submissions for Mr Imrie**

65. For Mr Imrie it was submitted again by reference to concise written submissions supplemented by oral submissions briefly that the Court action was one of personal injury based on common law and the Protection from Harassment Act 1997 (**PfH Act 1997**). For Mr Imrie, it was argued that the Court had being invited to decide whether Right Track acted in a way that caused injury, and if it had, what remedy should be awarded, it being contended that financial loss arose as Mr Imrie would say he could no longer return to work. That, it is said is different from the Tribunal claim that Right Track's breach of contract amounted to constructive dismissal.

66. For Mr Imrie, it is said that the Employment Tribunal (at this stage) has 3 claims; constructive dismissal, disability discrimination and detriment for making protected disclosure. None of those claims appeared in the Court action. Further the unfair dismissal and detriment were statutory claims (ERA 1996) and could only be raised in the Tribunal. On this basis the application should be refused. Further notwithstanding the limited Sheriff Court jurisdiction in such matters (s114 of EA 2010) the present disability discrimination claim could only have been raised in the Tribunal.

67. In summary and for Mr Imrie it was argued that none of the matters now before the Employment Tribunal could have been raised in the Court action, they thus cannot form part of the media concludendi. They had not been raised in the Court action. It was argued that the EA 2010 claims were specific to the interpretation of the redundancy exercise and the disciplinary process as what are, within the meaning of s19 of EA 2010 (indirect discrimination), a provision, criteria or practice which, it is understood Mr Imrie will argue placed him at a disadvantage at the relevant time as compared with others (subject to Mr Imrie setting out who was the comparator and how it was that he was placed at a disadvantage and for Right Track to consider whether it argue that any provision, criteria or practice which may be held to exist was a proportionate means of achieving a legitimate aim).

68. Further for Mr Imrie, it was argued that he was seeking a declarator that he was unfairly dismissed and discriminated against, and so whilst compensation is being sought in both, the Court action and the Tribunal claims are not identical**.** Further for Mr Imrie, it was argued that within the Closed Record (with specific reference to para 13 of the Statement of Claim) of the Court action there is no mention of a claim for Injury to Feelings.

69. For Mr Imrie reliance was placed on excerpt from **Macphail Sheriff Court Procedure** (3rd edition 2006) (**Macphail**) at 2.108 which states "*An unsuccessful pursuer has a right to raise a further action against the same defenders relating to the same subject matter, provided the second action is based on different grounds."*

70. By reference to **Stuart v Stuart (No.2)** 2004 SLT (Sh Ct) 44 (**Stuart**) it was submitted the proper exercise is to look at the essence of the matter and decide what was litigated and what was decided. On that basis, it was argued, it cannot be said that what was litigated in the Court action and thus what was decided upon were the matters before this Tribunal.

71. With regard to, what has been referred to as, the one action rule that is, it was submitted for Mr Imrie, correctly applied where there is a personal injury

action or equivalent where one forum can adjudicate all the matters. That was not the case here.

72. On strike out (which was no longer insisted upon) written submissions for Mr Imrie referred to **Balls** in which Lady Smith commented that striking out was draconian.

**Supplementary comments**

73. Subsequent to submission the Tribunal sought comments from both parties on what the possible relevance of **Eastwood v Magnox Electric plc; McCabe v Cornwall County Council** [2004] IRLR 733 (**McCabe HoL**) and **Sheriff v Klyne Tugs (Lowestoft) Ltd** [1999] IRLR 481 (**Sheriff**), CA and/or **O'Laoire v Jackel International Ltd (No 2)** [1991] ICR 718 (**O'Laoire).**

**Supplementary submissions for Right Track**

74. It was observed that **McCabe HoL** centers on the "*Johnson exclusion area"* which does not derive from the principle of res judicata rather the *"interrelation between the common law and statute" (*Lord Birkenhead at para 27 and 33). It is said thus to be readily distinguishable.

75. **Sheriff** was said to support **Right Track's** position although it was based on English tort of negligence, it was a civil court action which followed a race discrimination claim which had been dismissed. While not central to its decision the Court of Appeal expressed the view that res judicata could apply (para 24).

76. **O'Laoire** is said not to be of assistance as it centers of the English principle of issue estoppel, which is not recognised by Scots Law and thus is distinguishable.

**Supplementary comments for Mr Imrie**

77. For Mr Imrie it was noted that **McCabe HoL** centers on the "*Johnson exclusion area"* which broadly prevents a party pursuing a breach of employment contract claim in the civil courts based on an implied term of

trust and confidence, and, in effect, the manner in which an employee is dismissed. It was considered that as Parliament had placed a limit on compensation for unfair dismissal it would be wrong to develop a parallel remedy. It was submitted for Mr Imrie that this issue was not relevant to the present case as the claimant is not making a claim for damages. He is, it was submitted, making a claim for unfair dismissal, discrimination and detriment.

78. On **Sheriff** for Mr Imrie it is said that supports his position noting the Court of Appeal comments "*(3) That, further, it was a principle of public policy that claims had or could have been litigated in earlier proceedings between the same parties in a tribunal or competent jurisdiction should not, save in exceptional circumstances, be allowed to be litigated."*. Mr Imrie could not have raised his employment tribunal claims in the Court of Session. While the Court of Appeal strike out that claim noting the existence of a Compromise Agreement meeting the relevant then statutory provision (what would now be classed a settlement agreement) and *"… the court requires parties... to bring forward their whole case, and will not (except in special circumstances) permit the same parties to open the same subject in respect of which might have been brought forward as part of the subject in contest but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The pleas of res judicata applies ... to every point which properly belonged the subject of litigation.*"

79. It was submitted for Mr Imrie that it would perverse that an individual could only have one shot to raise claims in a court that does not have jurisdiction to adjudicate other claims. While the Court of Appeal make reference, in **Sheriff** to finality, in the present case Right Track knew of their potential liability in relation to what might be said to be one event and they knew when decree was granted in the Court of Session action there was an outstanding Tribunal claim. It is submitted that there was no evidence that it was in Right Track's contemplation that the settling of the Court of Session would affect the Tribunal claim when the decree was granted and thus while **Sheriff** relies

on **Talbot v Berkshire County Court the** comments on Talbot do not apply here.

80. **O'Laoire** was said not to be of assistance for the current matter.

**The Law**

**Employment Tribunal Rules**

81. Rule 2 of the Schedule 1 to Employment Tribunals (Constitution & Rules and Procedures) Regulations 2013 (the 2013 Rules) sets out that:

*"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

*(a) ensuring that the parties are on an equal footing;*

*(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*

*(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*

*(d) avoiding delay, so far as compatible with proper consideration of the issues; and*

*(e) saving expense.*

*A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

82. Rule 37(1) (e) of the 2013 Rules provides

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."*

83. Rule 41 of the 2013 Rules provides

"*41. The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.".*

**Res Judicata**

**Relevant Law**

84. It is considered useful to make a number of comments regarding cases to which parties have been referred.

85. The factual matrix of **Sabre** is as follow; Mr Smith had raised an action in the Sheriff court in respect of his personal injuries arising out of an accident caused by a Mr Holmes in March 2009 when Mr Smith sustained injury and his car was damaged and required to be written off. Decree was taken with expenses.

86. Subsequently Mr Smith issued separate proceedings in the Court of Session against Sabre, Mr Holmes's insurers, seeking compensation for what are described as "*loss of use claim"* relating to hire charges consequential on the loss of the use of Mr Smith's own car.

87. Lady Paton starting at para 44 states

*"In our opinion, notwithstanding the particular contexts of the relevant dicta and the absence of a statement in totally unambiguous terms, the matter we have to consider is settled by what was said by Lord President Inglis in* ***Stevenson v Pontifex and Wood*** *and by Lord Keith in* ***Dunlop v McGowans****. Even were that not so, we consider it to be a sound principle that where a natural or legal person suffers damage as a result of a single negligent act,* ***that gives rise to a single right to obtain reparation which must be pursued in one action****. While it is true that when discussing a one action rule in relation to claims for personal injury in* ***Aitchison v Glasgow City Council****, the Lord President described it as a rule of practice (*supra *at para 32), we see it as consistent with the underlying legal analysis and with policy. A right of action for damages emerges as soon as there is concurrence of damnum and iniuria, that is as soon as loss or injury is sustained as a result of the wrong in question. The opinion of the majority of the Court of Appeal in* ***Brunsden*** *depends on a distinction between different kinds of damage: damage to the person and damage to property each of which gives rise to a "cause of action". We do not see that as being consistent with the law of Scotland.* ***Brunsden*** *has never been approved in Scotland, as far as we are aware. As far as policy is concerned, without something of the nature of a one action rule a defender cannot know if a particular claim does or does not represent the full extent of his potential liability. We recognise, as did the Lord President in* ***Aitchison*****,** *that the effect*

*of a one action rule can appear to be harsh (as is illustrated by the facts in that case and the earlier case of* ***Carnegie*** v ***Lord Advocate*** *2001 SC 802 which was overruled in* Aitchison*) but the remedy for that must lie with the legislature.*

*[45] Thus, in determining whether the plea of* res judicata *should be sustained in the present action the critical questions come to be, looking to the substance of the matter, what was litigated and what was decided in the Stirling action and what it was proposed to litigate and decide in the present action. If the answer is that they were the same then the plea has to be upheld and decree of absolvitor granted (as held by Sheriff Macphail in* ***McPhee*** **v** ***Heatherwick*** *and not challenged as the appropriate form of disposal by Mr Hofford in the event that a plea of* res judicata *is upheld). These were the questions that the Lord Ordinary asked himself. He was correct to do so. He answered them by concluding that the subject matter of the Stirling action was the right of the pursuer to obtain reparation from the defenders and the medium concludendi or ground of action was the negligence of the defenders. The subject matter of and the medium* concludendi *in the present action were, in the Lord Ordinary's estimation the same. We agree*."

88. The factual matrix of **Boyce** can be summarised as follows. Mr Boyce had made a complaint in August 1996 to the, then, Industrial Tribunal, in terms of what was the Race Relations Act 1976 (RRA 1976) asserting that he had been discriminated on "*grounds of his race".* Both the Tribunal and the Employment Appeal Tribunal application seeking a declaration that British Airways had discriminated against him on "*grounds of his race*". An appeal to the Inner House was abandoned. Subsequently in July 1998 Mr Boyce made a further application which was identical in terms, with the single exception that this application was on "*national origins"* aspect of the definition of the RRA 1976. Section 3(1) of the RRA 1976 at the time provided that discrimination on what were described as racial grounds was defined as meaning "*any of the following grounds, namely, colour, race, nationality or*

*ethnic or national origins".* A plea of res judicata was taken and the matter ultimately proceeded to the Inner House.

89. At paragraph 7 Lord Marnoch commented *"It was argued for the respondent- and it is undoubtedly correct- that the definition of res judicata in Scotland does not go so far as the 'rule in Henderson' in England. For instance, … res judicate, as so far as understood in Scotland, will often require a decree of absolvitor"* while noting that such procedure does not exist in Tribunals.

90. At para 8 Lord Marnoch additionally states with approval "*borrowing from Lord President Cooper in Grahame v Secretary of State for Scotland at 387 we consider that the proper approach is encapsulated by the question" what was litigated and what was decided. As to the first part of that questions, we have already expressed the view, regarding this particular case, that all that lay between the two applications was an altered legal perception on the part of*" Mr Boyce's legal adviser. Lord Marnoch continues '*We would… go further and say that in the Tribunal system the media concludendi should in general be taken as covering everything in the legislation, both in its legal and factual aspects, which is pertinent to the act or acts of the employer made the subject of complaint- here the act of the employer in refusing the respondent's job application on allegedly racial grounds."* Lord Marnoch commented that what had been "*said does, however, admit of exceptions for special circumstances of a wholly unforeseen nature or for a situation (quite unlike the present) in which the Tribunal has made it clear that no final decision was intended".*

91. In the circumstances it is considered useful to set out a fuller excerpt from **Macphail** which usefully sets out in a description of the application of res judicata at 2.104:

> "*The exercise of jurisdiction is excluded where the court sustains a plea of res judicata. The rule may be stated thus: when a matter has been the subject of judicial determination pronounced in foro contentioso by a competent tribunal, that determination excludes any subsequent action in regard to the same matter between the same*

*parties or their authors, and on the same grounds. "The plea is common to most legal systems, and is based upon considerations of public policy, equity and common sense, which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis." It is the interest of the state that there should be an end to litigation, and it is a hardship that a man should be vexed twice for the same cause. The plea is usually stated in the short form "res judicata", although in some circumstances a more detailed plea may be appropriate, and it must be founded on relevant averments in the answers to the condescendence. The plea is not a preliminary plea but a plea on the merits, since it professes to show that the pursuer is not entitled, at any time or in any form or in any court, to the object of his suit. If the plea is established quoad the whole cause, the defender is accordingly entitled to decree of absolvitor. For the plea to succeed, the five conditions referred to in the following paragraphs must be satisfied…*

*(1) The prior determination must have been made by a competent tribunal, which may be … a statutory tribunal. …*

*(2) The prior determination must have been pronounced in foro contentioso, without fraud or collusion. It is not, however, necessary that the action should have been fully litigated to make the decree pronounced a decree in foro contentioso. In the sheriff court it is sufficient that defences should have been lodged in an ordinary cause or, it is thought, that a defence should have been noted in a summary cause. A decree of absolvitor and a decree by default will support the plea. It is not material that the prior determination should have proceeded upon a compromise, consent or joint minute"* authority for which is provided by the Inner House decision **James Forrest v Alexander Dunlop** (1875) 3 R. 15 **(Forrest)**

*(3) The subject-matter of the two actions must be the same.*

*(4) The media concludendi or points in controversy between the parties, in the two actions must be the same. The media concludendi are not the same unless the specific point raised in the second action has been directly raised and decided in the first. An unsuccessful pursuer has a right to raise a further action against the same defenders relating to the same subject-matter, provided that the second action is based on different grounds. Whether the media concludendi are the same will appear from a study of the pleadings and decision in the previous action: the court looks at the essence and reality of the matter rather than the technical form and considers the question, what was litigated and what was decided. A new medium concludendi will elide the plea of res judicata unless it is irrelevant or is obnoxious to the plea of "competent and omitted". In an action of reparation based on the alleged fault or negligence of the defenders, common law negligence and breach of statutory duty are not different media concludendi for the purposes of res judicata.*

*(5) Except where the earlier decree is a decree in rem, the parties to the second action must be identical with, or representative of, the parties to the first action, or have the same interest. When considering who are the parties to the second action, the court has regard to the reality and the substance of that action. Where the first judgment is a judgment in rem, which includes for this purpose a judgment affecting status, a plea of res judicata will be upheld not only against the original parties but against any other person who desires to litigate with regard to the same matter."*

92. **Macphail** sets out that an action of reparation based on the alleged fault or negligence of the defenders, common law negligence and breach of statutory duty are not different media concludendi for the purposes of res judicata, reflecting the comments from Maclaren Court of Session Practice 1916 at p 401 "*Though the delict or breach of contract be of such a nature that it will necessarily be followed by injurious consequences in the future, and though it may for this reason be impossible to ascertain with precise*

*accuracy at the date of the action or of the verdict the amount of loss which will result, yet the whole damage must be recovered in one action, because there is but one cause of action.*" Maclaren however preceded the creation of the Employment Tribunal system (and modern labour rights).

93. More recently **Thomas v Council of the Law Society of Scotland** [2005] CSIH 81(**Thomas**) is cited by **Macphail** above as guidance for the approach described in identifying different media concludendi. In that case it was held that a sheriff's decision (a court of first instance) could not bar disciplinary proceedings before a domestic tribunal arising out of the same circumstances and the outcome of a straightforward prosecution brought by the Lord Advocate could not found a plea of res judicata in civil proceedings relating to the same facts. It was concluded that the subject matter in the two sets of proceedings was not the same and the media concludendi were different.

94. Further and again cited by **Macphail** is approach of the Inner House in **Crudens v Tayside Health Board** 1979 SC 142 (**Crudens**). In this case the Inner House rejected a plea of res judicata in a contractual civil court claim where there had been a prior arbitration on the basis (1) that the proper approach in deciding whether an action is barred by prior arbitration proceedings is to examine the questions raised in the arbitration and to see whether the same questions are raised in the action; (2) that only if the questions in the action had been properly and competently before the arbiter and properly resolved by him could they be excluded from being the subject matter of the subsequent action; (3) that in this case the questions raised had not been referred to the arbiter and he could not competently have dealt with them.

95. Further cited by **Macphail** is **Forrest v Hendry** 2000 SC 110 (**Forrest**). Forrest was a case arising from the dissolution of a partnership following an earlier court action brought by Hendry in which Forrest had been ordered to pay Hendry a sum in respect of Hendry's share of the firm. That order was made following the terms of a minute of tender and acceptance. A further

action was raised with the plea of res judicata being rejected and proof before answer was allowed. It was clear that the pleadings in the first action had not addressed the issue of goodwill.

96. **Macphail** suggests that it is important to look at the essence and reality of the matter rather than the technical form. It indicates that the question to be applied is, what was litigated and what was decided, and notes with approval the approach taken in **Stuart**. In that case as part of an action of divorce there had been an order for the transfer of the former home from the former wife to the husband. Thereafter the former husband raised an action seeking payment his former wife, for one half of some of mortgage payments paid by him in respect of their former matrimonial home. An argument of Res Judicata was dismissed on the basis that while the divorce action contained averments relating to the mortgage payments, that was not enough to succeed in a plea of res judicata, the former wife had failed to demonstrate that the subject matter of both actions was the same and that the issue of the mortgage payments had been specifically decided upon in the divorce action.

97. I have reminded myself of the recent decision delivered by Lord Carloway in the Inner House in **Glasgow City Council v SA** [2019] CSIH 45 (**SA**), issued 27 August 2019 which on a different factual matrix stated at para 27 that

*"The principle of res judicata can be applied in either a negative or a positive way. In the former, it acts as a plea of bar to prevent a litigation which mirrors an earlier one whose merits have already been determined. In the latter it operates to allow facts, which have been established in earlier litigation, to be founded upon conclusively to support a 14 subsequent action based upon those facts. As was said in* ***Grahame*** *v* ***Secretary of State for Scotland*** *1951 SC 368 (LP (Cooper) at 387: "The plea is common to most legal systems, and is based upon considerations of public policy, equity and common sense, which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis". The reference to the "same parties" should not be construed too strictly. It is*

*sufficient if the interest of the parties in the first and second action is the same…Equally, in relation to the media concludendi, excessive concentration on the precise nature of the remedies sought in each action should be avoided in favour of a simple inquiry into "What was litigated and what was decided?" (Grahame v Secretary of State for Scotland (supra) at 387).*"

98. In **Grahame v Secretary of State for Scotland** it was stressed that the court should not concentrate on the specific terms of the conclusions or the pleas in law, but look to "*the essence and reality of the matter*" and simply inquire – *"What was litigated and what was decided?"*. The court is not concerned with whether the first decision was right or wrong. In **Grahame** the plea failed because the two actions dealt with "*essentially separate and distinct subjects of assessment"* – Lord Russell at 392.

99. It may be said that the public policy behind the doctrine is a concern for finality in litigation between the same parties, the need to avoid a multiplicity of identical proceedings and a desire to prevent abuse of the legal processes which guarantee access to justice. The Latin phrase "*res judicata"* simply means "*a matter [already] judged".* That public policy does however require to take into account the decision of Parliament to set out that while some rights can be enforced in the civil courts other rights, which may be breached by the same events, may only be adjudicated in the Employment Tribunal.

**Disposal of the Court of Session Action**

**Discussion**

100. While for Mr Imrie it is argued that there is no evidence that Right Track had in their contemplation that the Employment Tribunal claim would come to an end as a result of the disposal of the Court of Session, that is not a full answer. As was pointed out for Right Track both parties agreed to dispose of the Court action by decree of absolvitor and not decree of dismissal. In those circumstances it is not necessary to speculate why someone seeking to defend a court action may agree to absolvitor, prohibiting the re-raising of

that specific court action, rather than dismissal. There is no requirement in the Court of Session rules requiring parties to accept either form of disposal.

101. In this case is that there was no identified attempt by either party to formally address the issue of the existing and current Tribunal claim as part of disposing of the Court action. The only direction the Tribunal is given is the existence of the decree of absolvitor of the Court action.

**One Action Principle**

**Discussion**

102. In the present case, Mr Imrie argues that his position is distinguishable from from **Sabre**, he suffers injury giving in breach of a series of separate rights, and while one is broadly asserted as a common law and can entirely appropriately be raised in the civil courts, the remainder of those rights could not have been pursued in the civil court as the Tribunal has exclusive jurisdiction.

103. Thus, Mr Imrie argues does not have a single right to obtain reparation which must be pursued in one action. Indeed, his multiple rights, which he says are infringed, cannot be pursued in the one court action and he is required to assert those, as he does in his present Employment Tribunal claim.

**Overview of the Tribunal issues**

104. It is considered useful to set out what issues would be considered by the Tribunal in the present claim, prior to considering the application of Res Judicata, in the present Tribunal claim.

**Issues in this Tribunal claim**

**Ordinary Unfair Dismissal**

**The Law**

105. Where a Tribunal has found a dismissal to be unfair, in breach of s94 of ERA the remedies set out at s112 to s126 of ERA 1996 are reinstatement, re-engagement and compensation.

106. Where a claimant does not seek reinstatement or re-engagement the remaining remedy for Unfair Dismissal is compensation as provided for in terms of s128 to s126 of ERA 1996 which consists of;

(1) The basic award which is unique to Tribunal and is calculated on the basis of (capped) gross weekly pay and the number of years' service. In order to make such an award the Tribunal would require to conclude that a claimant was unfair dismissed; and

(2) The compensatory award, subject to statutory cap and possible adjustment, is designed to reflect some of the financial loss arising from the dismissal based on actual net pay and would include other economic losses such as pension loss. It does not include non-economic loss such as injury for feelings (**Dunnachie v Kingston upon Hull City Council** [2005] 1 AC 226 (**Dunnachie**)). The compensatory award may include an discrete award, unique to the Tribunal, for what is classed as the loss of statutory rights, as a an employee will require to accrue 2 years' continuous service before they will have acquired before they will have acquired the right to claim statutory redundancy or unfair dismissal (Daley v AE Dorsett (Almar Dolls) Ltd [1981] IRLR 385 (**Daley**), Arthur Guinness Son & Son (GB) Ltd v Green [1989] IRLR 288 (**Green**) and Puglia v C James and Sons [1996] IRLR 70 (**Puglia**)). As an element of the compensatory award that may be subject to adjustment by reference to **Polkey v AE Dayton Service Ltd** [1987] IRLR 50 (**Polkey**) and s 207A the Trade Union and Labour Relations (Consolidation) ACT 1992 (TULR(C)A 1992) and s123(6) of ERA 1996. In the present case there is no pled case that there was a failure to provide written statement of employment, as such adjustment in terms of s38 the Employment Act 2002 does not arise.

107. While there is no statutory right in for a declaration (unlike the position under the EA 2010) that a dismissal was unfair, I have reminded myself that in the EAT **Telephone Information Services Ltd v Wilkinson** [1991] IRLR 148, Tucker J said at para 293 *"In our judgment, the respondent has a right under*

[s 94 of the ERA 1996] *to have his claim decided by the [employment] tribunal. His claim is not simply for a monetary award; it is a claim that he was unfairly dismissed. He is entitled to have a finding on that matter, and to maintain his claim to the tribunal for that purpose."* which passage was expressly approved by the Court of Appeal **in Gibb v Maidstone and Tunbridge Wells NHS Trust** [2010] IRLR 786 at paras 19, 62.

**Issues in this Tribunal claim**

**Disability Discrimination**

**The Law**

108. Where a Tribunal finds that an employer has discriminated against an employee s 124 of EA 2010 provides for three types of remedy, in that the Tribunal may;

(1) make a make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(2) order the respondent to pay compensation to the complainant

(3) make an appropriate recommendation.

109. In relation to compensation, the Tribunal is said to have the central aim of putting the claimant in the position, so far as may be reasonable, as they would have been had the act of discrimination not occurred. The constituent elements of the compensation are, for the present purposes, broadly same as it would be before an ordinary court and beyond immediate economic loss attributable to the act (or acts) of discrimination such as wage and pension loss the Tribunal can award a sum for injury to feelings.

110. I have reminded myself that in **Armitage, Marsden and Prison Service v Johnson** [1997] IRLR 162 (**Armitage**) Smith J Ladyship said, in relation to injury for feelings page 165:

*'We summarise the principles which we draw from these authorities:*

*a. Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without*

*punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.*

b. *Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use Lord Bingham's phrase, be seen as the way to untaxed riches.*

c. *Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.*

d. *In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.*

e. *Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made.'*

111. **Armitage** was approved by what is now the leading case of **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] IRLR 102 (**Vento**) from which guidance on the level of award of injury to feelings is now taken from. **Vento** itself is supplemented by **Da'Bell v NSPCC** [2010] IRLR 19 and, in Scotland via Presidential Guidance by further uplift in **Simmons v Castle** [2012] ECA 1288 (Simmons). In **Simmons** the Court of Appeal had announced an 10% increase in what in England are referred to as General Damages (being non-economic losses such as physical pain and suffering arising from an injury and emotional distress) in the civil courts in England which broadly equates to the Solatium in the Scottish civil courts.

112. I have reminded myself that the civil court in England and Scotland have regard to the Judicial Studies Guidelines from which the Vento bands are derived and indeed the increases to the Vento bands reflect changes to the Judicial Studies Guidelines.

113. **Taiwo,** was a 2016 Supreme Court decision concerning what remedies were available to migrant domestic workers who were allegedly mistreated by employers exploiting their employees' vulnerable situation. Lady Hale at para 2 described that "*proceedings for the statutory tort of race discrimination can be brought in an employment tribunal, at the same time as proceedings for unpaid wages and other breaches of the contract of employment and for unfair dismissal".* The issue for the Supreme Court was whether the conduct complained of amounted to discrimination on grounds of race under the EA 2010, the Supreme Court ultimately concluded that the legislative framework of the EA 2010 did not provide for recompense "*not because these appellants do not deserve a remedy for all the grievous harms they have suffered. It is because the present law, although it can redress some of those harms, cannot redress them all."*

**Issues in this Tribunal claim**

**Protected Disclosure**

**The Law**

114. A worker has the right not to be subjected to detriment because they made a protected disclosure (s47B). Where a claim is upheld the Tribunal is required to make a declaration and may make an award of such an amount as it considers just and equitable having regard to the infringement to which the complaint relates and any loss which is attributable to the act which infringed the claimant's right in terms of s49(2) and s149(2) of ERA 1996 and paragraph 159(2) to Schedule 1 of **Trade Union and Labour Relations (Consolidation) Act 1992** (**TULR(C)A 1992**). The losses include expenses reasonably incurred by the claimant in consequence of the act and loss of any benefit which the claimant might reasonably be expected to have had but for the act, in terms of s49(3) and 149(3) of ERA 1996 and paragraph 159(3) to Schedule A1 of **TULR(C)A 1992**. The award may include compensation for injury to feelings.

115. s49 of ERA 1996 provides

*"Remedies*

*(1) Where an employment tribunal finds a complaint under section 48 (1A)] well-founded, the tribunal;*

*(a) shall make a declaration to that effect, and*

*(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.*

*(2) Subject to subsections (5A) and (6) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to*

*(a) the infringement to which the complaint relates, and*

*(b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.*

*(3) The loss shall be taken to include—*

*(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and*

*(b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.*

*(4) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.*

*(5) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding*.

**Issues in this Tribunal claim**

**Ordinary Unfair Dismissal**

**Discussion and Decision**

116. Mr Imrie asserts that he has been unfairly dismissed in breach of s94 of ERA 1996. The ET1 identifies that the remedy sought is compensation. The issues, absent decree of absolvitor of the Court of Session dated 27 October 2017, if Mr Imrie succeeded in this claim would include both a basic and

compensatory award. Appling the test of *"What was litigated and what was decided?"* the compensatory award, with the exception of the loss of statutory rights award, however constituted reflects the economic loss claim asserted in the Closed Record and in respect of which decree of absolvitor has been granted. The compensatory award is thus subject correctly to the plea of res judicata, with the exception of any award in respect of loss of statutory rights.

117. Mr Imrie entitled to pursue his claim for a basic award. In doing so Mr Imrie is entitled to invite the Tribunal to determine whether Mr Imrie was unfairly dismissed. He is also entitled to seek the loss of statutory rights element of his compensatory award with any relevant adjustment which may arise in that regard.

**Issues in this Tribunal claim**

**Disability Discrimination**

**Discussion and Decision**

118. Mr Imrie asserts that he has been discriminated against by Right Track. Mr Imrie explicitly asserted at para 13 of Statement the Closed Record that Statement that he met the definition of a person with a disability in terms of the Equality Act 2010. That was an issue in dispute, as set out above. The issue of Mr Imrie's qualification as a disabled person has been resolved by decree of Absolvitor. It would be essential for Mr Imrie's various claims in respect of the EA 2010 (ss 15, 19, 20 and 21) for determination to be made that Mr Imrie met the relevant definition of a person with a disability. Applying the test of *"What was litigated and what was decided?"* Mr Imrie's status cannot be re-adjudicated by this Tribunal. Further statement of claim 4, 5, 6, 7, 8, 9, 10, 11, 12 and 15 of the Closed Record set out the factual matrix which was litigated before the Court. What was decided was that decree of absolvitor was granted in respect of all of those matters. They are all properly subject to pleas of res judicata.

119. In any event the constituent elements of any award which might have otherwise have been available reflect both the non-economic and economic loss claim asserted in the Closed Record and in respect of which decree of absolvitor has been granted.

120. While noting the arguments for Mr Imrie that the phrase*" injury to feelings"* as one would find in a compensatory award in Employment Tribunal does not appear in the Court action, that does not conclude the question. The term used in the Court of action is "*solatium*", that term which encompasses aspects of physical pain and suffering together with emotional pain and suffering or otherwise injury to feelings. In any event it, is not a wholly discrete head of claim. It is a matter which has already been

121. For the reasons set out above approach in relation to Injury to Feelings and Solatium sharing the same roots in so far as Injury Feelings awards share a broad concept of of non-economic loss. Appling the test of *"What was litigated and what was decided?"* what was litigated were all the matters as set out in statement of claim 11 and 13. What was decided was that decree of absolvitor was granted.

**Issues in this Tribunal claim**

**Protected Disclosure**

**Discussion and Decision**

122. Mr Imrie in the Amended Statement of Claim under the heading Protected Disclosures asserts that grievances of 11 April 2012, 14 March 2013 and 22 August contained what are said to be protected disclosures.

123. Mr Imrie is entitled to pursue a claim seeking a declaration to the effect that he made a protected disclosure.

124. For the reasons set out above in relation to the approach to Injury to Feelings and Solatium sharing the same roots in so far as Injury Feelings awards share a broad concept of non-economic loss. Appling the test of *"What was*

*litigated and what was decided?"* what was litigated were all the matters as set out in statement of claim 11 and 13. What was decided was that decree of absolvitor was granted.

125. However, the Court action did not encompass any "*any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates"* and to that extent Mr Imrie economic claim, excluding what would otherwise be classed as injury for feelings, past loss of earnings, future loss of earnings, loss of employability and pension loss for the alleged protected disclosure is not res judicata.

**Issues in this Tribunal claim**
**Automatic Unfair Dismissal**
**Discussion and Decision**

126. The position in relation to Automatic Unfair Dismissal is as above in respect that the sole issue, under this heading, which has not already been adjudicated upon is Mr Imrie's asserted position that his dismissal was a protected reason namely the making of a protected disclosure in terms of s103A of ERA 1996 with the remaining possible remedy being a Basic Award.

**Court of Session Procedure**

**Discussion and Decision**

127. Applying the test set out in **Grahame** *of what was litigated and what was decided?"* most recently reinforced by the Inner House in **SA**, I am satisfied that what was litigated in the Court of Session covers most, though not all, aspects of the the present proceedings.

128. I consider that the approach set out above is consistent with the approach in **SA, Sabre, Boyce, Aitchison** and indeed **Forrest** and the guidance set out in Macphail. Further and in so far as they are relevant it is consistent with the

approach in **Stuart** and **Crudens, McCabe HoL** and **Sheriff.** It is consistent with the further cases otherwise referred to above.

129. It is accepted that certain rights litigated in the Employment Tribunal are distinct legal remedies set out by Parliament which can only be appropriately be adjudicated in the Employment Tribunal.

130. It is correct to state that Right Track seek to argue, in their primary position, Mr Imrie cannot now seek to assert rights which he could not have sought in the Court of Session and could not have been disposed of by either dismissal or indeed decree of absolvitor.

131. However, the decree of absolvitor is what was decided, that cannot be ignored. What was litigated is set out in the Closed Record.

132. From review of the cases above, however, I do not consider that the application of Res Judicata in Scotland operates to restrict Mr Imrie, as Right Track argue, from pursuing the whole of his claim presently before the Tribunal.

133. Indeed, Right Track offer as a secondary argument that Res Judicata would only apply for the "*discrimination claims"* and that the claims, broadly expressed, in relation to Protected Disclosure and Statutory Unfair Dismissal which are unique to the Tribunal may continue.

134. The primary approach proposed by Right Track is incorrect. However, I do not consider that the secondary approach proposed by Right Track is the correct approach.

135. I do agree with the position of Right Track in relation to the question of the discrimination claims. Determination of disability discrimination complaint may include a declaration (s124(2)(4) and s124(5) of EA 2010) or recommendation (s 124(2)(c) of EA 2010 and indeed the Tribunal is directed, s124(2) of EA 2010 that it must consider making either a declaration or recommendation. However, in order to do so the Tribunal would require to consider Mr Imrie's status. Mr Imrie explicitly asserted at para 13 of the Statement of Claim that he met the definition of a person with a disability in

terms of the EA 2010. The issue of Mr Imrie's qualification as a disabled person has been resolved by decree of Absolvitor. The economic and non-economic remedies which potentially arise from disability discrimination have been resolved. These matters cannot be re-adjudicated by this Tribunal.

136. A Tribunal cannot look behind a Decree of Absolvitor. Appropriately neither party has invited that the Tribunal do so. The matters disposed of cannot be re-raised. Indeed, this was not a disposal by informal agreement where matters of waiver of privilege may arise, as seen in **Brennan v Sunderland City Council** [2009] ICR 479 (**Brennan**). Those matters which were the subject of the Court action have been resolved by the decree of absolvitor. That includes the aspects of loss injury and damage before the Court including the non-economic loss of solatium arising, as is stated in the Court action at para 13 from Mr Imrie meeting *"the definition of a person with a disability, as provided for in section 6(1)"* of the EA 2010 and all other matters asserted including past wages loss, pension loss and asserted limitation of *"employment options".*

137. It is recognised that this approach leaves Mr Imrie with limited economic remedies in this Tribunal. That is, however, the consequence of the decree of absolvitor having been granted in accordance with the Joint Minute referred to above.

**Strike Out**

**Relevant Law**

138. I have already set out the terms of Rule 37 of the 2013 Rules.

139. As noted above at case management hearing on 7 April 2015 it had been noted at that stage, that there was a high hurdle to be overcome in relation to striking out a discrimination case by reference to **Balls**

140. For Mr Imrie, in his drafted written submissions prepared for this hearing, made to the high test referred to in **Balls**.

141. As the matter of strike out was previously canvassed in 2015 and again in 2019 is is considered helpful to set out a summary of the background to the

EAT decision in that case. In **Balls,** the claims were struck out (under similarly worded former rule 18(7) of the 2004 ET Rules) on the basis that Mr Balls had not actively pursued same and that his claim had no reasonable prospects of success. Mr Balls, a groundsman, had been summarily dismissed from his employment at the same at his wife who was the bursar at the school it appears thefts of money has occurred connected to the bursar office. Both Mr Balls and his wife had submitted claims. The separate Tribunal claims were conjoined by the Tribunal. Mrs. Balls who was prosecuted for the thefts pled guilty and sentenced to 18 months imprisonment. Mr Balls had never been charged with any offence. The school, had it appears sought to infer some element of responsibility arising from certain actings of Mr Balls which appeared unrelated to the thefts. Mr Balls had not agreed to the conjoining of the actions. He had actively sought to pursue his claim, he did not want his claim sisted but had had to accept same. Mr Balls had responded to correspondence from the Tribunal. Due to ill health Mr Balls was unable to attend a hearing at which consideration was giving to his claim being struck out. In Mr Ball's absence his claim was struck out. The EAT overturned that decision commenting that they had "*no difficulty in upholding the appeal".*

142. Lady Smith at para 6 of **Balls** states *"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."*

143. The test for strike out as correctly observed in this case in 2015 is a high one. The parties have been aware of and directly and actively engaged in the litigation since 2014. I have reminded myself that the overriding objective set out above is to deal with cases fairly and justly and includes so far as practicable dealing with cases which are proportionate to the complexity and importance of the issue, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, so far as compatible with proper consideration of the issues and saving expenses. While the duration of this case, to date, has been lengthy, it is perhaps not exceptionally so, for such complex matters and the delay to date has been excusable. I am not been not minded to strike out the whole or any part of the claim in terms of Rule 37 of the 2013 Rules.

**Supplemental matters**

144. If there are further submissions which either party considers it is necessary, in the interests of justice, to address supplemental to their respective existing submissions, they should set out their position in a request for reconsideration in accordance with Rule 71 of the 2013 Rules.

145. It is matter of regret that the issue of this judgment took longer than the anticipated 4 week period I had suggested. While the parties had promptly responded to the further cases I had referred to them by 10 October 2019, thereafter and for personal reasons out with the control of either the parties and the Tribunal, I was delayed in issuing the judgment and for that I apologise.

**Further Procedure**

146. The Tribunal in its Judgment of 12 July 2019, sent to the parties 12 July 2019 sets out those matters which remain subject to the reserved jurisdictional issue of time bar and at para 33 states *"that is a matter for the full hearing, in my judgment".*

147. There has been active litigation, with all the implications that arise from same, between the parties since 2014 and having regard to the overriding

objective, those matters in dispute which are not res judicata should now proceed to a Final Hearing as set out above. Jurisdictional matters of time bar, as set out in the Tribunal's Judgment of 12 July 2019 are reserved for that full hearing.

148. I have directed that a Final Hearing Date listing stencil accompanies this Judgment and parties are required to complete the form in full and return it to the Tribunal as directed.

**Conclusion**

149. The judgment of the Employment Tribunal is that;

150. a) those aspects of the claimant's claim of Constructive Unfair Dismissal asserting breach of s 94 of Employment Rights Act 1996 (ERA 1996) seeking

i) a Basic Award in terms of ss118 (1) (a), 119, 120 (1), s121 and 122 of the ERA 1996; and

ii) a Compensatory Award in terms of s 123 of the ERA 1996 restricted to loss of statutory rights; and

are claims within the jurisdiction of the Tribunal; and

b) the remaining aspects of the claimant's claim of Constructive Unfair Dismissal asserting breach of s94 of the ERA 1996 are out with the jurisdiction of the Tribunal, in terms decree of absolvitor in the Court of Session dated 27 October 2017, in respect that those matters are res judicata and is dismissed; and

151. the claimant's claim of Disability Discrimination in terms of the ss 20 and 21 of the Equality Act 2010 (EA 2010) failure to make reasonable adjustments is out with the jurisdiction of the Tribunal, in terms of decree of absolvitor in the Court of Session dated 27 October 2017, in respect that those claims are res judicata, and is dismissed; and

152. the claimant's claims in terms of s15 of the EA 2010 (discrimination arising from a disability) are out with the jurisdiction of the Tribunal, in terms of

decree of absolvitor in the Court of Session dated 27 October 2017, in respect those claims are res judicata and are dismissed; and

153. the claimant's claim of Disability Discrimination s19 (indirect discrimination) is out with the jurisdiction of the Tribunal, in terms of decree of absolvitor in the Court of Session dated 27 October 2017, in respect that those claims are res judicata and is dismissed; and

154. a) those aspects of the claimant's claim for Detriment due to Protected Disclosures in term of 47B of the Employment Rights Act 1996 (ERA 1996) seeking a Declaration in terms of s49(1)(a) of the ERA 1996 and expenses reasonably incurred by the claimant in consequence of the acts complained of in terms of s49(3) (a) of ERA 1996 are not out with the jurisdiction of the Tribunal by reason of res judicata; and

b) the remaining aspects of the claimant's claim for Detriment due to Protected Disclosures in term of 47B of the Employment Rights Act 1996 (ERA 1996) are out with the jurisdiction of the Tribunal, in terms of decree of absolvitor in the Court of Session dated 27 October 2017, in respect those matters are res judicata, and are dismissed; and

155. a) those aspects of the claimant's claim of Detriment due to Automatic Unfair Dismissal in term of 103A of ERA 1996 (protected disclosure/whistleblowing) seeking Basic Award in terms of ss118 (1) (a) , 119, 120 (1), s121 and 122 of the ERA 1996 and Compensatory Award in terms of s 123 of the ERA 1996 restricted to loss of statutory rights are within the jurisdiction of the Tribunal; and

b) the remaining aspects of the claimant's claim of Detriment due to Automatic Unfair Dismissal in term of 103A of ERA 1996 (protected disclosure/whistleblowing) are out with the jurisdiction of the Tribunal, in terms of decree of absolvitor in the Court of Session dated 27 October 2017, in respect those matters are res judicata, and are dismissed.

156. Further the Tribunal Orders that:

157. Those aspects of the claimant's claims of Constructive Unfair Dismissal, seeking; a Basic Award in terms of ss120 (1), s121 and 122 of ERA 1996, declaration of breach of s94 ERA 1996 and Compensatory Award in terms of s 123 of the ERA 1996 restricted to loss of statutory rights, should now proceed to a Final Hearing; and

158. The claimants claims in terms of 47B of the Employment Rights Act 1996 (ERA 1996) seeking a Declaration in terms of s49(1)(a) of the ERA 1996 and expenses reasonably incurred by the claimant in consequence of the acts complained of, in terms of s49(3) (a) of the ERA 1996, should now proceed to a Final Hearing, subject to the reserved jurisdictional issue of time bar set out in Tribunal Judgment of 12 July 2019, sent to the parties 12 July 2019; and

159. The claimant's claim of Detriment due to Automatic Unfair Dismissal in term of 103A of ERA 1996 (protected disclosure/whistleblowing) seeking Basic Award in terms of ss118 (1) (a) , 119, 120 (1), s121 and 122 of the ERA 1996 and Compensatory Award in terms of s 123 of the ERA 1996 restricted to loss of statutory rights should now proceed to a Final Hearing.

160. Parties are directed that a Final Hearing Date listing stencil accompanies this Judgment and parties are required to complete the Date Listing Stencil in full and return it to the Tribunal as may be directed.

**Date of Judgment: 10 December 2019**
**Employment Judge: Rory McPherson**
**Entered Into the Register: 12 December 2019**
**And Copied to Parties**