EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr. J. Shah	v	(1) GMB (Matthew Mills Anna Woodcock Karen Lok) (2) London Borough of Enfield (Julie Mimnagh Alison Smith Victoria Tozer)

Heard at: Watford **On**: 29 June 2020
Before: Employment Judge Heal

Appearances
For the Claimant: in person
For the First Respondents: Mr D. Patel, counsel
For the Second Respondents: Ms L. Iyavoo, solicitor, by telephone.

RESERVED JUDGMENT

1. The complaints of race and disability discrimination against both respondents are dismissed insofar as they relate to any events on or before 9 January 2019.
2. The complaint of breach of contract against the first respondent is struck out because the employment tribunal has no jurisdiction to hear a breach of contract claim not made against an employer.
3. All complaints of defamation are struck out.
4. The complaints of breach of contract against the second respondent and of race and disability discrimination against both respondents related to matters arising between 10 January 2019 and the date of termination of the contract of employment are not struck out.
4. The remaining applications to strike out and for costs will be heard on 21 August 2020.

REASONS

1. By a claim form presented on 9 January 2019 the claimant made complaints of race, disability and sex discrimination against his union - the GMB - and also his employer, the London Borough of Enfield. This is case number 3300388/2019.

2. Those proceedings were dismissed on 13 August 2019 following a withdrawal of the claim by the claimant.

3. By a further claim form presented on 9 January 2020 the claimant made complaints against the respondents listed above of race and disability discrimination, breach of contract and constructive unfair dismissal. There is no complaint of sex discrimination in this claim form. This is case number 3300186/2020.

4. This hearing was listed before me today to determine, so far as possible:

4.1 The first respondent's (i.e. the GMB's) application for costs against the claimant for the dismissal of the first claim;

4.2 Both respondents' application to strike out the second claim.

The course of the hearing.

5. The claimant and the first respondent attended the hearing in person. The second respondent attended by telephone.

6. I had an electronic copy of the bundle, running to 377 pages. The claimant had the bundle in electronic form on a tablet.

7. At the outset of the hearing the claimant applied for the hearing to be postponed. He did so at first on the ground that he had not had the opportunity to read the second respondent's documents (their legal submissions and authorities) sent at 18:25 on Friday 26 June 2020.

8. He said that this was a breach of the tribunal's own direction. I could not find the direction he was referring to in the tribunal file. He therefore read out to me the following:

'*documents and statements*

Witness statements and bundles <u>must</u> be sent to the hearing venue identified in the notice of hearing so as to arrive at least two days before the hearing'.

9. This appeared to me not to apply to the document sent by the first respondent because that document was a set of legal submissions.

10. The claimant said that he had not read the legal submissions over the weekend because he thought that they had been sent to him late. I therefore offered him, and he took, one hour to read the submissions.

11. When the hearing resumed, at 12.33, the claimant renewed his application to postpone the hearing.

12. He said that he had read the legal submissions in outline, but it would take longer to read them in full and to take appropriate notes and form arguments. He was not convinced as to why the document had been served, 'at the eleventh hour'. He did not see why he should be 'put on the back foot before they submit authorities they wanted to rely upon'.

13. The claimant also wanted a postponement because Mr Anderson Smith had not 'come back' to him. Mr Smith is or was, it appears, a GMB representative whose support the claimant had been seeking. The claimant said that Mr Tony War of the GMB had been less than forthcoming about Mr Smith's continued employment with the GMB.

14. The claimant also requested a 'mixed race panel' to hear his case. I explained that this hearing was one to be heard by a judge sitting alone so it was not a case for a panel.

15. The claimant further wished the hearing to be heard by Employment Judge Henry who heard the first hearing. The claimant wished to have a judge who is black. He felt that EJ Henry was a fair judge. He thought that there had been every indication that EJ Henry would hear this case. He said that he had a number of concerns about bias by judges in the employment tribunal itself. These included the use of the word estoppel by a judge at a point where that issue had not been raised. He said that bias rendered any further judgment 'unsafe and must be dismissed'.

16. The claimant added that he had been trying to get legal representation for his claim. He considered that he would receive a fairer hearing in London Central Employment Tribunal because there would be a 'more fair cross section of judges'. (He added that he meant no disrespect in this.)

17. I did not grant the application for a postponement. I considered that the claimant had had sufficient time (from the date of presentation of the claim form on 9 January 2020) to find legal representation. The issues for this hearing have been known to the parties since receipt of the tribunal's letter of 26 May 2020. The claimant had had time to read the legal submissions delivered by the first respondent on Friday evening. He was not correct about the time of delivery being contrary to a tribunal direction. The tribunal lists a hearing before an available judge, without consideration of personal characteristics. I was confident that the claimant would have as fair a hearing in Watford as he would have in London Central: there was no reason to postpone so that the Regional Employment Judge could consider a transfer. I did not consider that the use of the word 'estoppel' by a judge meant that the tribunal was biased: it is the duty of the tribunal to be alert to matters that go to the jurisdiction of the tribunal. The claimant had not put forward any matter that made me consider that there was any

actual bias in the Watford Employment Tribunal and nor did I consider that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased (*Porter v Magill* [2002] 2 AC 357).

18. I suggested to the parties that we start with the strike out application slowly so that the claimant could follow it. If need be, we would only deal with that matter and then re-list any remaining applications. I suggested that it would be easier if Mr Patel, who was present in the hearing, opened the application to strike out and then Ms Iyavoo, on the telephone, could follow on. The respondents agreed with this. When I asked the claimant whether he agreed, he responded with a concern that the second respondent's submissions talked about the named employees being merely employees of the London Borough of Enfield. I explained that the second respondent was making a distinction between the named individuals and the council, as legal persons.

19. It then appeared that I had not been sent the second respondent's submissions. While I was arranging for these to be emailed to me, the claimant raised a further concern about the presence of Mr War and Mr Burley sitting at the back of the tribunal room. I explained that it was a public hearing. One of them had spoken in the hearing out of a desire to assist with my calling a clerk. I did not consider that he had spoken improperly.

20. The claimant also raised a concern about Mr Anderson Smith. He said that Mr Smith was his representative but the GMB would not tell him where he was. He wanted to ask the GMB about Mr Smith. I did not regard that as a matter for the tribunal at this stage and told the claimant that we were going to proceed with the hearing.

21. The claimant said that he had not received the first respondent's submissions. The first respondent said that they had been sent at 17.41 on 8 June 2020. The claimant said that he was not familiar with the contents of the submissions. I therefore asked Mr Patel to take his submissions slowly, with clear signposting, so that the claimant could follow. I told the claimant that if he disagreed with what Mr Patel was saying, he should make a note of it and keep it for when he had a turn to speak. Otherwise, if he did not understand he could interrupt and say so. I wanted him to understand the submissions. The claimant did take up this offer during the submissions.

The Facts

22. This summary of the facts does not purport to be a full account of the history of these claims but sets out the facts relevant to the strike out application.

ACAS early conciliation certificates

23. On 27 November 2018, the claimant notified ACAS of a matter in relation to the GMB union and the London Borough of Enfield. Two Early Conciliation certificates were issued on 27 December 2018, one naming the GMB and the other naming the London Borough of Enfield as prospective respondents.

The first claim

24. The claimant presented the first claim (3300388/2019) on 9 January 2019. The first respondent in that claim is the GMB; the second is the London Borough of Enfield. At that time, the claimant was still employed and had been since 6 June 2018, according to his form, as a Housing Options and Advice Officer. In the particulars of claim he said that his employer had colluded with his union to dismiss him on the pretext of an untrue allegation. He said that on 10 October 2018 he was due to have a meeting with his employer about an allegation of gross misconduct. He sought help from his union and was due to meet Anna Woodcock of the union so that she could accompany him to the hearing. Ms Woodcock was late, and Mr Mills and Ms Lok of the union were at the union office. The claimant says that Mr Mills and Ms Lok communicated with his employer: Ms Alison Smith and Vicky Tozer. The claimant alleges that, without his consent, Mr Mills told the employer that he and Ms Woodcock would stand down and take no action. The claimant says that this was collusion with his employer and was unfavourable treatment because of his race.

25. By email dated 15 February 2019 the claimant wrote to the tribunal, with a copy to the second respondent union solicitors only, as follows:

'*Owing to my current state of ill health, as a result of matters over the last few months I have reluctantly decided to withdraw both claims forthwith as the stress is making my condition worse*.'

26. On 21 February 2019 the claimant sent an email to the tribunal without copying in either respondent. In it he said that he had withdrawn his claim in haste after the second respondent threatened him with a costs order. He said that he was not making sound judgments and regretted withdrawing his claim. He asked for his claim to be re-listed and attached a medical note as evidence of his depression. He said that he was vulnerable and had been taken advantage of by his union. He had raised a grievance at work and was likely to remain an employee.

27. The second respondent forwarded the email of 15 February to the first respondent who on 22 February 2019 wrote to the tribunal applying for the claim to be dismissed and for an extension of time for the filing of a response, given that a dismissal judgment was expected.

28. By letter dated 26 February 2019 EJ Alliott directed that the parties be told that the claim had come to an end, having been withdrawn. A tribunal had no jurisdiction to set aside a notice of withdrawal of a claim. A judgment dismissing the claim would be issued (upon application by the respondents) unless the tribunal believed that to issue such a judgment would not be in the interest of justice. Accordingly, the claimant was directed to inform the respondents and the tribunal before 12pm on 12 March 2019 whether he objected to a judgment dismissing the claim and if so on what grounds. In default a dismissal judgment would be issued.

29. By email dated 11 March 2019 the claimant objected to his claim being dismissed. He said that due to depression and anxiety he was put under pressure to submit particulars of claim by the respondents. This was not necessary, and he did not have legal representation. He said that he had been advised by a member of the

tribunal staff that his case would not be dismissed. He had submitted a medical note to prove that he had been unwell.

30. He said that it was in the interests of justice for his case to be heard. He had been unable to get legal representation and continued to pursue this.

31. By email dated 15 March 2019 the first respondent pursued the dismissal of the claim and made an application for costs.

32. By email dated 26 March 2019 the second respondent told the tribunal that it wished to pursue dismissal of the claim and made an application for costs.

33. A hearing was listed to decide whether the claim should be dismissed and also the application for costs on 16 September 2019.

34. By email dated 16 July 2019 the claimant informed the tribunal that he wished to withdraw his claim in full against the London Borough of Enfield and that the London Borough of Enfield had confirmed that it would not pursue an application for costs.

35. By email dated 31 July 2019 the claimant wrote to the tribunal withdrawing his outstanding claim against the GMB. However, he wished to reserve his right to take action in the civil courts.

36. By judgment sent to the parties on 22 August 2019 Employment Judge Lewis dismissed the claims upon withdrawal by the claimant.

37. The costs application remained listed for 16 September 2019.

38. The claimant did not appear at that hearing and EJ Henry declined to make an order for costs in his absence.

The second claim

39. The claimant presented his second claim form (3300186/2020) on 9 January 2020. In this claim he named as first respondent 'Mr Matthew Mills of GMB Union, Ms Anna Woodcock and Ms Karen Lok of GMB Union. He gave 'GMB' as part of their address. The claimant named as second respondent three individuals: Julie Mimnagh, Alison Smith and Victoria Tozer. He gave 'Enfield Council' as their address.

40. The claimant gave in the second claim form the same early conciliation certificate numbers for the two certificates issued on 27 December 2018 whose numbers had been given in the first claim form.

41. The claimant gave his dates of employment as from 11 June 2018 to 22 February 2019. He ticked boxes showing that he brought claims of unfair dismissal, race discrimination, disability discrimination (but not sex discrimination) and 'other payments'. In boxes 4 and 12 he also identified a complaint of breach of contract. I leave on one side the complaint of defamation because it is outside the tribunal's jurisdiction.

42. At box 9.2 the claimant said that he would provide further particulars in due course.

43. The claimant's further particulars (in my bundle at pages 235 to 240) say that the claim relates to events following a baseless and unsubstantiated allegation of gross misconduct made on 20 September 2018. He said, 'I have only now had the courage to bring this claim again.' Also, 'I am happy to bring a new claim' and 'If I need to bring a new case please treat this as a new claim.' It is clear from the text that the claimant sees the new claim as a means of making again the original complaint. He sets out again, but in more detail, the events on 10 October 2018.

44. The claimant then adds a reference to events *after* 10 October 2018: of events that he said led to him bringing a number of grievances and having no alternative but to leave his employment.

45. The complaint of unfair dismissal made in the second claim form was rejected because the claimant did not have two years' service.

Issue

46. The issue at this stage is whether the second claim is an abuse of process and/or the tribunal has no jurisdiction to hear it because of cause of action estoppel. Both respondents have applied for the second claim to be struck out on this basis.

The law

47. Rule 51 of schedule 1 to the Employment Tribunals (Constitution and Rules of procedure) Regulations 2013 provides:

'Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.'

48. Rule 52 provides:

'Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

> *(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or*
>
> *(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.'*

49. Once a claimant has withdrawn his claim, he cannot change his mind and re-start it. A formal judgment dismissing a claim acts as a bar to further proceedings.

50. The tribunal rules are clear therefore about what happens to a withdrawn claim. It comes to an end. It is at an end even if not dismissed in a judgment and there is no discretion about this. There is a discretion about whether it will be dismissed: that is to be exercised if the claimant has reserved the right to bring a claim elsewhere (say in the High Court or County Court) or it is not in the interests of justice for it to be dismissed.

51. Mr Patel says that the rules are explicit that a new claim may not be brought in the tribunal raising the same or substantially the same complaint. I consider – although it has not been argued before me – that the passage in brackets in rule 52(a) is mere parenthesis. That is, it is an explanation to a passage which is grammatically (and legally) complete without it. The words, 'which means that…' appear to be by way of explanation or interpretation. So the drafter inserted those words to explain the effect of cause of action estoppel, not to enact it and to define its scope. There may be a difference if the common law cause of action estoppel is less absolute than the 'explanation' in rule 52(1)(a).

52. However, that may be, either the drafter expected cause of action estoppel to apply and so inserted the explanation, or the drafter intended to give effect to cause of action estoppel. Since *Barber* expressly applied cause of action estoppel to the tribunals, I am bound to apply it.

53. Mr Patel has referred me to the key principles set out in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160.

54. Cause of action estoppel places an absolute bar on raising in new proceedings points which had to be or were decided in order to establish the existence or non-existence of a cause of action. Once a cause of action has been held to exist or not to exist, then that outcome may not be challenged by either party in subsequent proceedings. The bar extends to points which could with reasonable diligence have been raised in the former proceedings.

55. Abuse of process is a different but related concept which informs the exercise of procedural powers. Here qualification appears: the bar is not absolute.

56. The principle of cause of action estoppel applies to the employment tribunals. Where an employment tribunal dismisses a claim following withdrawal, cause of action estoppel applies and the claimant will be barred from bringing the same claim again as a new claim. (*Barber v Staffordshire County Council* [1996] ICR 379.)

Analysis

57. There has been a formal judgment dismissing the first claim. That discretion has been exercised by EJ Lewis on 22 August 2019. I cannot go behind it.

58. I have set out a summary of the particulars of the two claims above. Having read the two claim forms, I consider that the second claim is a further claim raising the same or substantially the same complaint as the first claim: up to the point where the particulars of the second claim state, *'thus begin the process of humiliating me, discrediting me and creating a false impression of me as 'aggressive, abusive and obnoxious*.'

59. The first claim deals only with the events of 10 October 2018. The second claim deals with those events, but in more detail, up to the point I have identified. That is the same claim of race and disability discrimination.

60. [I leave aside defamation because the tribunal has no jurisdiction to hear such a claim in any event. I also leave aside sex discrimination which was not raised in the second claim and therefore is irrelevant.]

61. Up to that point therefore the second claim is absolutely barred against both respondents, and the tribunal has no jurisdiction to hear it.

62. The claimant could not bring a complaint of unfair dismissal or breach of contract against his employer, the second respondent, in the first claim because his contract was continuing when he presented his claim form. The tribunal would have had no jurisdiction at that point to hear those claims.

63. However, the claim for unfair dismissal in the second claim form has been rejected because the claimant did not have two years' service, so the issue of whether that claim is estopped does not arise. The claimant cannot of course claim unfair dismissal against his union because the union did not employ him. He cannot claim compensation for breach of contract either against the union because the union was not his employer (*Oni v Unison Trade Union* UKEAT/0092/17/LA). The complaint of breach of contract and any discrimination claims remaining in the second claim form may well be out of time, given the dates, but I am not dealing with that issue in this judgment.

64. The claimant resigned with effect from 22 February 2019, according to his claim form. (The second respondent gives the date of termination of the contract as 3 February 2019. That conflict about dates has not been resolved before me and I do not have the resignation letter in the bundle.)

65. I find that the claimant could have – with reasonable diligence – included in his first claim any complaints about events between 10 October 2018 and 9 January 2019, the date of presentation of the first claim. He was able to present the complaint about the events on 10 October 2018 without legal advice and help. He knew what may have happened to him and was able to formulate such things into a claim. Any such claims are therefore also barred by cause of action estoppel.

66. However, it would not have been possible for the claimant to include events from 10 January 2019 to the date of dismissal on 3 or 22 February 2019 - whichever was the correct date - because such events had not happened at the date of presentation of the first form.

67. The claimant cannot make those complaints as an unfair dismissal claim. He does however say that there was a pattern of racially motivated behaviour by both union and employer 'to dismiss me constructively'.

68. It appears to me that any claims of race discrimination against both the respondents arising between 10 January 2019 and the date of dismissal are not barred because they could not have been raised in the first claim. These claims continue, at least to the determination of the issue whether they were presented out of time. The complaint of breach of contract against the second respondent is also not barred.

69. There arises then the difficulty raised by Ms Iyavoo: that the ACAS certificates do not relate to the second claim. The claimant has relied upon the same certificate for both claims. I do not consider it fair to determine this issue now because the notice of the hearing did not forewarn the claimant that this point would be raised. It will be dealt with at the hearing on 21 August 2020.

70. Therefore, the claims continue in limited form as set out above. The hearing listed for 21 August 2020 will determine the remaining issues of whether the remaining claims were presented out of time, whether the tribunal should have rejected the second claims because the ACAS certificates did not relate to the second claim or the respondents now named and also the outstanding application for costs.

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Employment Judge Heal

Date: 4/8/2020

Sent to the parties on: 4 August 2020

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For the Tribunal Office