Case No: 1801047/2020 (A)

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Keenan**

Respondent: **Workers Educational Association (WEA)**

Heard: Remote Hearing by Telephone **On:** **17 July 2020**
13 August 2020

Before:
Employment Judge JM Wade

Representation
Claimant: In person
Respondent: Mr J Jenkins (counsel)

This has been a remote hearing conducted by telephone because it was not possible to conduct a hearing in person, and the claimant was unable to take part in a video hearing.

JUDGMENT

1 The claimant's complaint of unfair dismissal is struck out, a founding and preliminary issue in the case having been subject to a strike out Judgment sent to the parties on 10 June 2019.
2 The claimant's application that the respondent's response be struck out is refused.
3 The claimant's constructive wrongful dismissal and other payments claim continue to hearing unless otherwise disposed.
4 Own motion (not discussed with the parties): the respondent's costs application will stand dismissed unless by 4pm on **27 August 2020** the respondent requests further to be heard orally on the matter.

REASONS

Introduction

1. This is the second set of proceedings between these parties. The respondent is a charity providing adult education employing a few hundred staff and the claimant was a support centre assistant between 15 February 2018 and his resignation on 9 December 2019.

2. The complaints in this second case were constructive unfair dismissal (section 103 A – protected disclosure dismissal); breach of contract (constructive wrongful dismissal); disability discrimination (failure to make reasonable adjustments); and a claim of "I am owed other payments", which is to be clarified.

3. Today's hearing was adjourned from 17 July 2020, when a public preliminary hearing by telephone to address the following preliminary issues took place:

3.1. The respondent's application of 27 March 2020 that the claim should be struck out because it has no reasonable prospect of success or because it is scandalous, vexatious or because the claimant in bringing the claim has acted vexatiously, abusively or disruptively.

3.2. To consider whether the claimant is prohibited from seeking to relitigate any relevant issues which may have been determined in the first claim and generally whether and to what extent the doctrine of res judicata (including issue estoppel) applies. This too could lead to all or part of the claim being struck out ("the res judicata issue").

3.3. Whether the claim or any parts of it have little or reasonable prospect of success and if so whether a deposit should be ordered as a condition of the claimant proceeding with the claim or any part of it.

3.4. If it remains in dispute, whether or not at the material time the claimant was a person with a disability as defined by the Equality Act 2010 section 6 ("the disability issue").

3.5. To consider and determine the claimant's application of 1 April 2020.

4. On 17 July I heard oral evidence from Mr Keenan in relation to the disability issue and I heard oral submissions from both him and Mr Jenkins on disability and res judicata. I also had a file of one hundred and forty pages or so and written submissions from Mr Keenan, together with written applications from both him and the respondent.

5. There was time to give an extempore judgement on the disability issue and that judgment was sent to the parties shortly after the hearing. Mr Keenan subsequently requested written reasons and those reasons are to be provided shortly.

6. It was convenient today to give the oral judgments above on the res judicata issue and other live matters, with the exception of costs.

<u>The facts giving rise to the res judicata issue</u>

7. The claimant presented his first claim (1801006/19) on 12 March 2019 in which he complained that eight weeks' suspension since January 2019 (and various matters related to it) were detriments on the grounds of protected disclosure.

8. The respondent's response denied that the claimant's raising of an issue about its heating, earlier in January 2019, was a protected disclosure; and denied the allegations of linked detrimental treatment.

9. At a case management hearing in early May 2019, a deposit order was made and a judgment striking out the claim for non payment of deposit was sent to the parties on or around 10 June 2019. There were various applications by the claimant in respect of the deposit order and judgment but they are not material to this judgment. The 2019 protected disclosure detriment claim was at an end as of 10 June 2019 or thereabouts.

10. Meanwhile, the claimant's employment was continuing, albeit he was absent for reasons of ill-health. On 9 December 2019 he resigned his employment summarily, alleging constructive dismissal. He presented this claim on 12 February 2020. The respondent presented its response and on 27 March 2020

applied for the this claim to be struck out, including because these proceedings are an abuse of process - an attempt to resurrect the previous claim. The respondent also sought a costs order alleging vexatious conduct concerning the claimant's oppressive conduct in raising grievances and this second claim. The claimant's opposition to that application included his own application of 1 April that the respondent's response be struck out ("dismissal") for reasons of its alleged misleading of the tribunal in its response, and general conduct, including in failing to address his allegations in detail in its response.

11. The Employment Judge at the hearing on 3 April 2020 clarified the issues and applications to be determined above, including identifying the particular "res judicata" issues which might prove problematic for the claimant.

The Submissions

12. The gist of the claimant's submissions on this issue is that the respondent's grievance determination in October 2019 provided new evidence going to the respondent's wrongdoing, that he could not reasonably, with due diligence, have discovered. Even if estoppel applied, his constructive unfair dismissal complaint, founded on the same protected disclosure as his first claim, should, applying the exceptional and special circumstances principle, be permitted to proceed.

13. Mr Jenkins' submissions included directing me to Ms P. Patel v The Governing body of Lister Community School [UKEAT/0289/16 JOJ]. He considered that this was an overwhelming case of a litigant seeking a second go at the same claim and public policy was firmly against it.

14. He developed that in relation to the claimant's wrongful constructive dismissal claim, saying that it, too, was founded on the March 2019 allegations of protected disclosure detriment, and must also be struck out.

The law

15. As to the law I can do no better than directing myself to the summary of Mrs Justice Simler (as she then was) as follows at paragraphs 36 to 38:

"The rule in **Henderson v Henderson** is that where a matter is the subject of litigation in a court or tribunal of competent jurisdiction, parties to that litigation cannot relitigate it and will not, save exceptionally where there are special circumstances, be permitted to reopen the same claims or matters that could have been pursued as part of the earlier litigation. The issues will be *res judicata* in their strict sense, where they are decided by a court, but the rule also applies on the basis of abuse of process to other issues that properly belong to the subject matter of that litigation which the parties, exercising reasonable diligence, might have brought forward at the time but did not. Those issues may not be raised in subsequent proceedings on the basis of the public interest in finality of litigation and preventing multiplicity of actions.

The principle of *res judicata* allows for no exception for special circumstances, even where there has been no hearing on the merits. There is an absolute bar on reopening a cause of action that has already been adjudicated on. The second aspect of the rule founded on abuse of process, does allow for an exception if there are special circumstances. Special circumstances in this context were considered in **Arnold v National Westminster Bank plc** [1991] 2 AC 93 where the House of Lords held that the disputed issue could be reopened where it would, in effect, be an abuse of process if permission to reopen was refused.

It is also well established that the doctrine of issue estoppel applies to Employment Tribunal proceedings (in addition to the rule in **Henderson v Henderson**) where proceedings are formally dismissed on withdrawal. The fact that a tribunal hears no evidence or argument on the issues of fact and law does not prevent such a decision operating by way of *res judicata* (see for example **Barber v Staffordshire County Council** [1996] 2 AE 748 at 756D-F). The doctrine does not turn on the reason why the court's decision to dismiss the claim was consented to by the party making the claim, nor on the reason why a court made the order dismissing the claim; it depends on the simple fact that the order was made. It is for that reason that, in the case of issue estoppel, the court will not re-open or entertain questions about the merits or the justice of preventing the litigant from re-opening the issues, whereas the court may do that in the wider jurisdiction under **Henderson v Henderson**, which turns on abuse of process."

Conclusions on res judicata

16. In this 2020 claim alleging constructive unfair dismissal the claimant cannot rely on the right not to be unfairly dismissed, unless the Tribunal determines that the principal reason for his dismissal was the making of a protected disclosure.
17. A foundation stone and preliminary issue in this second case is whether he did, or did not, make a protected disclosure in raising concern about heating in January 2019. The identical preliminary issue or foundation stone arose in the first case.
18. At the case management stage the Employment Judge did not determine that issue on its merits, but proceeded to identify difficulties in the claimant's causation case. Those difficulties gave rise to the deposit order, and subsequently the claimant abandoning the claim in choosing not to pay the deposit.
19. It seems to me that applying the law as summarised above, it is not necessary to go to the rule in Henderson v Henderson. The claimant's case contains a very obvious and clear point of issue estoppel, in respect of which, for all the public policy reasons above, the special circumstances exception does not apply. The claimant's unfair dismissal complaint is simply prohibited from continuing because there has been a final judgment, albeit in a different cause of action (protected disclosure detriment), but which necessarily includes determination of whether he made the same alleged protected disclosure as that asserted in this case. That being an essential component of this unfair dismissal claim, and already subject to a final judgment against him, this claim must be struck out. That is my judgment notwithstanding there has been no determination on the merits on the estopped issue, but simply, that it has been finally determined as a result of abandonment.

Strike out of the other claim(s)

20. I am against Mr Jenkins in relation to the claimant's constructive wrongful dismissal claim. His case describes a chain of alleged "wrongdoing" by the respondent, albeit starting with events following his suspension in January 2019, and ending with its failure, as late as December 2019, to refer him to occupational health. The overarching theme of the matters referred to in his claim form includes failures to comply with the ACAS code in relation to grievances, or to offer him an appropriate remedy, the respondent itself having identified failings.
21. This claim does not involve determination of whether or not he made a protected disclosure; it requires only that the Tribunal ask whether the alleged conduct amounts to conduct without reasonable and proper cause, calculated or

likely to destroy or seriously damage trust and confidence, and if so, whether he resigned at least in part in response to it, and in particular his alleged last straw – the failure to refer to occupational health. Were these matters the effective cause of the resignation?
22. The remedy for constructive wrongful dismissal is of course damages, typically limited to the sums the respondent would have had to expend to terminate the contract lawfully (in this case I am told that is four weeks' notice). That may come to by uplifted in respect of an unreasonable failure to comply with the ACAS code by up to 25%.
23. However, the claimant may put a further and different breach of contract case: that discreet breaches of the implied term have given rise to financial losses on his part. In particular, the claimant alleges that his prompt written explanation of the allegation of harassment against him in January 2019 was never put to, or discussed with, the complainant. That is not in dispute and is without a pleaded explanation. Had that been done promptly, he says, he would not have remained on suspension because it was self evident there was nothing in the complaint; and further he would not have then become ill as a result of the stress of prolonged suspension with consequent lost earnings.
24. There is no rule of law that breach of the implied term cannot give rise to financial losses actionable as a breach of contract claim in this Tribunal; but it is an unusual claim and has at least one causation issue: was it reasonably foreseeable that prolonged suspension would lead to mental ill health, then resulting in financial loss?
25. I have separately ordered the claimant to set out how he puts the, "I am owed other payments", claim and this may give rise to him clarifying it as a breach of contract claim as above. Both this and the wrongful dismissal claims are not res judicata; nor do they fall fowl of the rule in Henderson v Henderson. The claimant could not, with reasonable diligence, have brought forward a breach of contract claim in the March proceedings because a) the losses had not arisen (he was only half way through what we now know was the ultimate period of suspension); and secondly a claim of breach of contract cannot be brought in the Tribunal unless the employment is at an end. His constructive wrongful dismissal claim and the associated money therefore remain to be determined if not resolved by the parties.

The respondent's costs application

26. The written application was put on the basis of oppressive and vexatious conduct, relying on the claimants' lengthy and persistent raising of grievances whilst employed by the respondent. It was accompanied by a chronology of those grievances. There was not time to explore the application in detail but Mr Jenkins had said on the last occasion that he relied on the respondent's written application. I have not determined this application finally, nor announced that to the parties.
27. However, the current position is this. The claimant's unfair dismissal is struck out; his disability complaint has been dismissed on my determination that he was not a disabled person. His remaining complaints proceed.
28. The claimant feels a wrong has been done him, which he is determined to put right. He acts as a litigant in person. The three estoppel points (cause of action, issue, and Henderson v Henderson) are difficult territory for practitioners let alone those without lawyers, as the judgment above demonstrates. He has not acted unreasonably or vexatiously in the pursuit or conduct of the claims thus far; and it seems to me that what he may (and he denies this) have said in the heat of the moment, to the respondent's HR director is not, even if it were true ("I'll sue

the pants off you"), sufficient basis to find vexatious or abusive or unreasonable conduct of proceedings. Certainly in these two hearings there has been no such conduct. Nor can conduct in the repeated lodging of grievances be considered "conduct of the proceedings".

29. Unless the respondent requests to be heard again on the issue, I will give judgment dismissing that application after two weeks from the sending of these reasons.

The claimant's 1 April application

30. The claimant says the response must be struck out because the respondent previously denied maltreatment on grounds of protected disclosure, and misled the Tribunal at and before the May 19 case management hearing, by its response to those claims.

31. He says this because a grievance determination in October 2019 found there was no explanation for the failure to provide his account of the January incident to the complainant in a timely way (or words to that effect).

32. Misleading the Tribunal is a serious allegation: it involves telling the Tribunal something you know to be wrong. That is not a fair characterisation of the chronology. The respondent denied in April 2019 that there was any link between a prior complaint about heating and subsequent suspension for an allegation of harassment. That is not misleading; that was the respondent's position and its case. The fact that on later investigation (after the conclusion of the proceedings), an independent third party found (amongst a wealth of other findings which were not adverse to the respondent) that there was no explanation for a failure to provide the claimant's prompt written account to the complainant for her comment, adds little. It does not lead to a conclusion that the respondent knew in April and May of 2019 that the relevant action had not been done by the relevant investigator or manager; and even if it did, that would not suggest its position, that there was no link between heating complaint and treatment, was misleading.

33. For these reasons the claimant's application is also dismissed.

Employment Judge JM Wade

Date 13 August 2020