Case Number: 2204797/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr D Matovu		2 Temple Gardens Chambers & 19 Others

Heard at: London Central Employment Tribunal

On: 14 September 2020

Before: Employment Judge Adkin

Representations

For the Claimant : Mr Matovu in person
For the Respondent: Mr R Leiper QC, Counsel

JUDGMENT

(1) The Claimant's application to prevent Farrar & Co. LLP acting for the Respondents is dismissed.

(2) The Claimant's application to strike out paragraph 48 of the Grounds of Resistance is dismissed.

(3) The Respondents' application to strike out on the basis that the Claimant is estopped from pursuing his claim as articulated in paragraph 2.1 of the list of issues (relating to the investigation of Mr Tyler's grievance and alleged failure to investigate the Claimant's grievance) is granted.

(4) The Claimant's application to stay proceedings pending the outcome of all of his appeals is refused. A postponement however is granted. The hearing listed to commence on 3 November 2020 is postponed as per the order below.

REASONS

1. By a claim presented on 7 November 2019 the Claimant presented a claim of victimisation and harassment relating to race falling under the Equality Act 2010. I have referred to this below as the "present claim".

2. There have been earlier claims brought by the Claimant against the same Respondents, namely 2200700/2019 and 2202130/2019. These were determined by Employment Judge Snelson sitting with members ("the Snelson Tribunal") in a decision promulgated on 11 February 2020 following a hearing in November 2019. The Claimant's appeals arising out of those earlier claims are ongoing.

3. I drew up a list of issues following the case management hearing by telephone on 13 March 2020. This list was substantially based on the Claimant's own list, which I somewhat modified following the discussion at that hearing.

Submissions

4. I received three separate skeleton arguments from the Claimant:

   4.1. Regarding conflict of interest;

   4.2. Regarding his application to strike out part of the Grounds of Resistance;

   4.3. In support of the Claimant's application for a stay;

5. There was no separate skeleton argument in relation to the Respondent's estoppel argument.

6. From Mr Leiper I received a single skeleton argument covering estoppel, strike out, application to stay/postpone and conflict of interest.

7. This matter was originally listed to take place by video link (CVP). I invited the parties to consider changing to an in-person hearing in correspondence last week. The parties agreed that this was appropriate and accordingly attended the Tribunal in person.

8. I heard oral submissions in support from both the Claimant and Mr Leiper which took up all of the day that had been allotted to this open Preliminary Hearing.

Conflict of interest

The application

9. The Claimant argued that there is a conflict because he has been represented and is currently represented by Farrar & Co LLP ("Farrars") solicitors as a trustee of family trusts of the Lytton Cobbold family. In the present proceedings the Respondents are represented by Farrars. He says that that leads to a conflict and his principal submission to me today, which he has amplified by reference to a skeleton argument and also by a number of legal authorities and is that I ought to be able to and should interfere with a party's right to representation where this is disqualified by law. His argument is that the conflict outlined above amounts to such a disqualification, and he invites me to make an order barring Farrars representing the Respondents.

Summary of decision on conflict

10. My determination having heard submissions from both parties is while there might conceivably be a conflict, I am not going to make a determination on that point. I find that I do not have jurisdiction to make an order preventing the Respondents from relying on Farrars as a solicitor. Given that absence of jurisdiction, for the reasons below the Claimant's application is dismissed.

History of conflict argument

11. The procedural history of this matter is that the question of a conflict was originally raised in a case management hearing relating to an earlier claim between the same parties on 11 July 2019. At that stage, the then Acting Regional Employment Judge Wade noted that this question of conflict had been raised. According to the Respondents on that occasion the Claimant accepted that he did not have jurisdiction. I do not need to enter into an analysis of exactly what was said on that occasion, other than to note that the question of jurisdiction was raised at that stage.

12. The matter was raised and argued more fully in front of Employment Judge Hodgson. He dealt with this matter and gave written reasons following a hearing on 24 and 25 October 2019. In his reserved reasons dated 15 November 2019 at paragraphs 67 and 68 he dealt with the Claimant's application relying on the case of *Bolkiah v KPMG* [1999] 2 AC 222 HL. His conclusion was that what the Claimant at needed was injunctive relief. He said this at paragraph 68:

> 68. In the tribunal, the general principle is that the party may instruct whoever it chooses. A tribunal should be extremely reluctant to interfere in a party's choice of representative. If the solicitor is acting inappropriately there are remedies. They may be reported to the Solicitors' Regulation Authority. Indeed, I understand that has happened. There may be the possibility of an injunction. I have no power to grant an injunction. Rule 29

> cannot stretch that far. Any such claim must be brought in the High Court. I reject this application, as it is misconceived.

13. The issue before me is the same, albeit it involves a subsequent claim involving the same parties. I consider that that the reasoning of Employment Judge Hodgson assists me, although it does not bind me.

14. A third judge, Employment Judge Snelson declined to rule on the alleged conflict of interest during the course of the substantive hearing which took place in November 2019. The Claimant in fact, appealed that decision (paragraph 7.6, part of Ground 2 contained within a notice of appeal dated 24 March 2020). This point has been the subject of a rule 3(7) "sift" under the Employment Appeal Tribunal Rules 1993 by His Honour Judge Auerbach, who dismissed the appeal against this point on 28 August 2020, saying:

> Whilst Tribunal could have ruled on the conflict issue relating to the Respondent's solicitors, paragraph 7.6 raises no argument for saying that the Tribunal was wrong to decline to do so; and I cannot see why it was.

15. The Claimant has the right, however, to pursue this point to an oral hearing under rule 3(10) of the EAT rules.

16. It seems therefore that I am the fifth judge to be invited to consider this conflict of interest point. The Claimant says that the Solicitors' Regulation Authority has declined to become involved pending a determination of a court.

17. I have been provided with some correspondence relating to the question of conflict. The position of Farrars based on correspondence dated 8 July 2019 is that the firm acknowledges that the Claimant is a "current client" in his capacity as a trustee, but concluded that there is no actual or potential risk of conflict between him and the other clients they act for. According to Mr Jeremy Gordon, a partner, this view has been confirmed following a discussion with the SRA's Ethics Team. In an email dated 10 July 2019 he detailed measures to ensure that there is no crossover between files held on the two different matters in which the Claimant is involved. For clarity I am not making any determination, but simply noting this.

Law

18. While, I have some doubts about the merits of reviewing the authorities, given that other judges have already done the same, nevertheless I heard submissions based on the authorities and for this reason have set out very briefly my findings.

19. The *Bolkiah* case referred to is about injunctive relief sought against KPMG the advisor. This underlines my conclusion that the appropriate forum for such application is at the High Court with an application brought with Farrars as a party rather than the present proceedings.

20. In *Bache v Essex County Council* [2000] ICR 313 reaffirmed that the Tribunal that does not have the power to take away the party's right to a representative representing him.

21. There was a discussion about that that authority in a later decision of the EAT in *Dispatch Management Services (UK) Ltd v Douglas*, [2002] IRLR 389. Both counsel have referred to this authority in their closing submission. Wall J held:

> 38 We were shown the origins of s.6 of the Employment Tribunals Act 1996 in Hansard (HL, 8 June 1971, Cols 48 and 49) in which the Minister, Baroness Tweedsmuir of Belhelvie accepted an amendment in the terms of s.6 moved by Lord Beaumont of Whitley, commenting: 'it has always been the intention of the Secretary of State, in drafting new rules for industrial tribunals, to provide for an unrestricted right of representation in their proceedings'.
>
> 45 Having considered the matter, we agree with Mr Oudkerk's submission on this part of the case. It is, we think, significant that Peter Gibson LJ discusses the tribunal's powers to deal with improper or inappropriate behaviour in a passage in paragraph 20 of his judgment immediately following his statement that s.6(1) confers an unqualified statutory right. Although we have already set out the passage in question, we repeat it here:
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> 'To my mind, Mr Roe is right to say that s.6(1) confers an unqualified statutory right. If a party chose to be represented by a solicitor or counsel the tribunal may be able to ensure compliance with its directions by a threat to report the representative to his professional body, but it would not, in my judgment, be possible for the tribunal to direct that the party had to represent himself.'
>
> 49 Bache is, in our judgment, a powerful authority establishing a very important point of principle, as the extract from Hansard demonstrated. It is, of course, binding on us. We must, we think, remember at all times that we are dealing with employment tribunals. In our view, the existence of any power to interfere with representation before the employment tribunal would require clear statutory authority, and, for the reasons we have given, we do not think this is provided by either the Human Rights Act or the introduction of the overriding objective.

Conclusion on conflict application

22. In conclusion, the Tribunal does not have jurisdiction to do what the Claimant is asking. I consider that he must pursue this matter differently if he wishes to pursue it either by seeking injunctive relief in the courts or to argue the principle through the existing appeal in the Employment Appeal Tribunal.

Claimant's application to strike out part of Response

23. The Claimant's application was based on his contention that paragraph 48 of the Grounds of Resistance was so far away from being a *Chagger v Abbey National* [2009] EWCA Civ 1202; [2010] ICR 397 sort of situation that it was unarguable.

24. The Respondents' primary case is that the Claimant was lawfully expelled on 29 October 2019 following a vote of the members at 2 Temple Gardens Chambers for dishonestly and in bad faith raising and pursuing a complaint of race discrimination against the Senior Clerk Mr Tyler, dishonestly repeated the same allegation and then failed to cooperate into an investigation.

25. If, contrary to this primary case, this action is found to be unlawful, the Respondents' rely upon matters set out in paragraph 48 of the Grounds of Resistance, namely that the Claimant would have been at this date (or shortly thereafter) lawfully expelled in any event due to a refusal to participate in an investigation and further his contributions to Chambers on his earnings, resulting in arrears of over £26,000.

26. The Claimant argues that in his assessment the Respondents do not have an evidential basis to establish a *Chagger* type case given that (i) his expulsion from Chambers was not a redundancy situation and (ii) unlike *Chagger* where lawful redundancy was a possibility irrespective of the unlawful dismissal, there was not a lawful reason why he might have been expelled on the same day.

27. A Tribunal may strike out part of a response under rule 37(a) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 on the grounds that it is "scandalous or vexatious or has no reasonable prospect of success".

28. In my analysis, if the Claimant managed to establish that his expulsion from Chambers was unlawful discrimination, but the Respondents could establish that his expulsion was in any event likely to have occurred on the same date or shortly thereafter even for unrelated reasons, that must be something that the Tribunal at a substantive hearing could take account of as part of its assessment of the just level of damages.

29. I do not conclude at this stage that there is no reasonable prospect of this argument succeeding.

30. I entirely accept the submission put forward by Mr Leiper that arguments under *Polkey/Chagger* are a matter for evidence and submissions. The Claimant can of course argue in submissions at the final hearing that the circumstances of his expulsion are not covered by the Chagger principle.

Respondent's application for strike out (issue estoppel)

Law

31. In *Watt (formerly Carter) v Ahsan* [2008] 1 AC 396 Lord Hoffman said as follows:

> 31 Issue estoppel arises when a court of competent jurisdiction has determined some question of fact or law, either in the course of the same litigation (for example, as a preliminary point) or in other litigation which raises the same point between the same parties: see *Thoday v Thoday* [1964] P 181, 198. The question is therefore whether the appeal tribunal was a court of competent jurisdiction to determine whether the Labour Party was a qualifying body within the meaning of section 12.
>
> 32 The jurisdiction of an employment tribunal depends upon whether the facts fall within certain statutory concepts which the Act defines with varying degrees of precision. These include concepts such as a "contract of employment" (section 230 of the Employment Rights Act 1996), "redundancy" (section 139 of the 1996 Act) and, in the present case, "body which can confer an authorisation or qualification". The decision as to whether the facts found by the tribunal answer to the statutory description is sometimes treated as a question of fact (from which there is no appeal to the appeal tribunal) and sometimes as a question of law (from which there is). In either case, however, the tribunal has jurisdiction to decide the question. I can see no basis for distinguishing between questions which "go to its jurisdiction" and those which do not. A decision that a contract falls outside the jurisdiction of the tribunal because it is for services, or for service overseas, seems to me just as much a question which goes to the jurisdiction as the question of whether the Labour Party is within the jurisdiction because it is a qualifying body. Both are decisions of fact or law, which are (subject to appeal on questions of law) within the competence of the tribunal.
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> 33 In my opinion, therefore, the decision that the Labour Party was a qualifying body for the purposes of section 12 was made by a competent court and is therefore binding upon the parties. It does not matter that a later decision, now approved by this House, has shown that it was erroneous in law: see In re Waring; Westminster Bank v Burton-Butler [1948] Ch 221. The whole point of an issue estoppel on a question of law is that the parties remain bound by an erroneous decision.
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> 34 As Rimer J pointed out [2005] ICR 1817, para 74, the issue estoppel is in principle binding between the parties in subsequent litigation raising the same issue, as in the second and third applications by Mr Ahsan. I cannot therefore see any basis for the distinction drawn by the Employment Appeal Tribunal between the application of res judicata in relation to the

> first application and in relation to the second and third. It is true that the severity of this rule is tempered by a discretion to allow the issue to be reopened in subsequent proceedings when there are special circumstances in which it would cause injustice not to do so: see Arnold v National Westminster Bank plc [1991] 2 AC 93. As Lord Keith of Kinkel said, at p 109, the purpose of the estoppel is to work justice between the parties. In the present case, however, I think it would be unjust if the issue estoppel did not apply to the second and third applications. Although the Labour Party knew that it had given notice of appeal in *Ali v McDonagh* [2002] ICR 1026, it made no attempt to obtain an extension of its time for appealing in this case. Instead, it involved Mr Ahsan in a lengthy and expensive hearing over the summer of 2001, during which the merits of all three applications were examined. It would be quite unfair for Mr Ahsan now to be told that he must start again in the county court.
>
> 35 In my opinion, therefore, the Labour Party is estopped from challenging the ruling that it was a qualifying body and was not entitled to discriminate on racial grounds in its choice of candidates for the council election. The tribunal found that it had done so. This finding was held by the Employment Appeal Tribunal (presided over by Silber J) to involve no error of law. But the majority of the Court of Appeal expressed the opinion that if the tribunal had had jurisdiction to consider the complaints at all, their findings of fact would not have supported a conclusion that there had been discrimination. I must therefore consider the facts in greater detail.

Respondents' argument

32. The Respondents' argument is that the Claimant is estopped from pursuing his claim as articulated in paragraph 2.1 of the list of issues in the present claim (relating to the investigation of Mr Tyler's grievance and alleged failure to investigate the Claimant's grievance. Paragraph 2.1 reads as follows:

> 2. Did the Respondents subject the Claimant to a detriment in the following respects?
>
> 2.1 By proceeding to investigate only the grievances raised by Mr Tyler against him, whilst declining to investigate the grievances raised by the Claimant, in particular those relating to alleged victimisation and/or harassment of him

33. The Respondents' submit that this is identical to issue 18.8 in the earlier claims (2200700/2019 & 2202130/2019), which have already been determined:

> 18.8 By the First Respondent and Management Board, by letter dated 1 May 2019, seeking to instigate a formal grievance

> procedure against the Claimant based on comments which the latter had made in a feedback form that was completed on or about 5 April 2019 just repeating long-standing complaints, whilst disregarding the Claimant's complaints and not seeking to investigate those, within section 47(5)(e) of the Equality Act 2010.

34. The Respondents point to factual findings at paragraphs 96 – 102 of the Snelson Tribunal written reasons. Of particular relevance are paragraph 100 the first and last paragraphs of this section given the Claimant's position outlined below:

> "96. On 5 April 2019 Mr Matovu completed the Chambers annual staff appraisal form, in which he complained that Mr Tyler was continuing to victimise him by not serving him and the Board was "happy to condone this unlawful and appalling discriminatory conduct".
>
> …
>
> 100. Having taken legal advice the Board decided that it was necessary to appoint an independent investigator to examine Mr Tyler's complaint. Rachel Crasnow QC, a well-known employment law practitioner, was selected. She had no connection with Chambers
>
> …
>
> 102. Ms Crasnow produced her report in June 2019. <u>She found no substance in Mr Matovu's allegations against Mr Tyler</u>." [emphasis added]

35. The conclusion at paragraph 123:

> 123. Again, issue 18.8 discloses no arguable detriment. Mr Tyler had raised a grievance and the only problem course open to the Board was to proceed to investigate it. To do anything else would put Chambers in breach of its obligations to Mr Tyler.

36. The Respondents argue that if this is not an estoppel/res judicata situation it is certainly an abuse of process, given that the Claimant has already pursued this claim to a Tribunal, evidence has been heard and a determination given.

37. The Respondents' argument is that the remedy for the Claimant's dissatisfaction with the findings of the Snelson Tribunal in this respect is to appeal (which he is in the process of doing, albeit that this claim has been turned down on the "sift" at rule 3(7) of the EAT rules), rather than bring a further claim arguing the same point and inviting a different Tribunal to determine the same point on the evidence.

Claimant's arguments

38. During the course of his oral submissions, the Claimant accepted that this issue as framed based on the present claim is the same as issue 18.8 in the earlier claim.

39. The Claimant's arguments are:

39.1. The Snelson Tribunal failed to deal with the entirety of his argument. The judgment considers the treatment of Mr Tyler, but not the point of comparison with the Claimant's own treatment;

39.2. He has a very strong ground of appeal (notwithstanding that this has already been declined on the Sift) that this point has not been dealt with;

39.3. It is not appropriate to find that a party is estopped from pursuing an allegation when that allegation is still subject to appeal.

40. The Respondents deny that the Snelson Tribunal failed to deal with the allegation given the extracts above and additionally a confidential annex to the Tribunal reasons demonstrated that the matter had been dealt with. The Respondents' position is that the Claimant's own "grievance" was dealt with in a without prejudice mediation rather than being investigated formally. The Claimant's strongly disputes this.

41. The Claimant was initially reluctant for me to consider the "Confidential Annex", I indicated that I thought it would be helpful for me to see it. He did not continue to pursue an argument that I should not read it. The annex is expressed to be "Reasons for the decision on issues 11.1, 18.5, 18.6 and 18.7". It is clear from the first paragraph of the annex that it has been produced as a separate confidential document because the evidence adduced to support the findings is inadmissible on account of "without prejudice privilege".

42. Reading the confidential annex, did not in the end assist me a great deal. There is no reference to Issue 18.8, which I might have expected had this been a document which demonstrated that the Snelson Tribunal had in fact dealt with issue 18.8 in part based on evidence of matters that were without prejudice.

Conclusion on issue estoppel/strike out

43. Issue 2.1 is the same factual issue as 18.8 in the earlier proceedings as the Claimant admits. Issue 18.8 was determined by the Snelson Tribunal. It arises between the same parties. I find therefore that the Claimant is estopped from pursuing allegation 2.1 in the present case.

44. If I am wrong about estoppel, if the Claimant is right and the Snelson Tribunal has failed to deal with part of the 18.8, his remedy is the appeal that is currently ongoing. It must be an abuse of process to simultaneously appeal the finding of a Tribunal (even if this is said to be an omission or failure to deal) and also to litigate the same point with a fresh Tribunal before the

appeal is concluded. I entirely accept the submission put forward by Mr Leiper that this risks leading to "procedural chaos".

45. If the Claimant is successful to any extent in his appeal there are, broadly speaking, three possible outcomes. First the point will be remitted to the Snelson Tribunal. Second it will be remitted to different Tribunal. Third, in the event that the EAT considers that the point can have only one permissible conclusion based on the evidence, the Appeal Tribunal may substitute its own conclusion. In any event the Claimant would be given the opportunity he seeks to have this point determined again. In that situation it would certainly be an abuse of process for him to have the same point also determined in the present claim.

46. This allegation is therefore struck out.

Claimant's application for stay/postponement

Law

47. Rule 2 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 provides:

> 2. The overriding objective of these Rules is to enable Employment Tribunal's to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –...
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues;
>
> (e) saving expense.

48. The Equality Act 2010 contains an exclusion from the definition of a protected act for the purpose of a victimisation claim:

> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Claimant's application

49. The Claimant's application is that the Tribunal should a stay the present claim pending the conclusion of appeals in both the Employment Appeal Tribunal and the Court of Appeal arising from his earlier claims. Any stay would be for an indeterminate period. The Claimant accepts that it would be "ages" before the appeals are all fully determined.

50. The Claimant highlights that the Respondent is seeking to rely upon the Snelson Tribunal's determination that the Claimant's complaint of race discrimination against Mr Tyler was false in the present case, such that the complaint falls within section 27(3) EqA and does not amount to a protected

act. The Snelson Tribunal declined to deal with whether this complaint was in bad faith, so any tribunal hearing the present claim may approach this element of section 27(3) unhindered by earlier findings.

51. The Claimant argues, based on *Johns v Solent SD Ltd* [2008] EWCA Civ 790; [2008] IRLR 820 that it would be wrong in principle for me to take a view as to his likely prospects of success in these appeals. In that case Smith LJ upheld the decision of the EAT that the Tribunal Chairman had erred in striking out the claim as a result of an assumption about the likely outcome of the *Heyday* litigation relating to enforced retirement. She said:

> 20. It seems to me that Nelson J was right when he said that it was not appropriate for him or the chairman – and I would add, or indeed for this court – to form any view about the likely outcome of the justification issue in the Heyday case. It does, however, seem to me that Nelson J was entirely justified in reaching the conclusion that, on the basis of what is known about the Heyday case, it may succeed. Ms Russell accepts that if the claimant succeeds in Heyday and reg. 30 is struck down as unjustifiable and incompatible with the Directive, Mrs Johns' claim will have real prospects of success; indeed, so far as I understand it, she accepts that the employers will have no defence to her claim. It follows that because Heyday might succeed, Mrs Johns' case has reasonable prospects of success. It cannot be struck out.

52. Notwithstanding this submission that I ought not to speculate as to the likely outcome of an appeal, the Claimant has set out detailed arguments in his skeleton argument in support of his contention that his various grounds of appeal are strong and likely to succeed.

53. The Claimant contents that he has a very strong appeal to the Court of Appeal from the original decision of Employment Judge Wade, which was turned down by Lewis J as being “totally without merit” in his consideration dated 15 April 2020. His contention is that if successful this will mean that the entire decision of the Snelson Tribunal will be overturned. The implication of the Claimant’s argument is that if the Tribunal in the present claim relied on the Snelson Tribunal’s finding that the allegation of discrimination was false, any judgment in the present claim would have to be overturned as well following a successful appeal against the Snelson decision.

54. The other appeal, from the Snelson Tribunal, has been granted permission to proceed to a preliminary hearing (at which the Claimant/appellant only would need to attend) in relation to issues 18.1 and 18.4. These relate, respectively, to alleged victimisation detriments in relation to agreed tape recording equipment being dispensed with in November 2016 and the withdrawal of the clerking services of the Senior Clerk Mr Tyler from October 2017 onward.

Respondent's arguments

55. The Respondent understandably argues that this matter should not be left hanging over them and that the existing trial date should be kept.

56. The Respondents distinguish the *Johns* case on the basis that that case was an extreme situation. Mrs John's claim could not succeed under the then state of the UK domestic legislation relating to retirement. If the claim was not stayed it would be "snuffed out". The Heyday case would potentially overturn that legislation with the result that she would have a claim, most likely a winning claim. In other words the decision whether or not to strike out or allow a stay was highly likely in itself to be entirely determinative of the outcome.

57. By contrast the present situation is not one in which I am considering the possibility of a strike out, which would end the claim, but simply a case management question about when the hearing presently listed in November should take place.

Degree of overlap between the present and earlier claims

58. I have considered the content of the present claim (now that I have determined the point about 2.1) based on the list of issues. The factual scope of this claim, which is a claim of victimisation & harassment relating to race, relates to the following allegations:

> 1. Were the following protected acts?
>
> 1.1 Claimant's letter to Mr Moody QC dated 12 July 2017 raising an express allegation that Mr Tyler had contravened the Equality Act 2010 as was repeated also in staff appraisal feedback form completed by Claimant on or about 5 April 2019. The Respondent contends that a Tribunal has found that this was a false allegation and further contends that it was made in bad faith.
>
> 1.2 Claimant's act in bringing proceedings under Case Number 2200700/2019. The Respondent accepts that this was a protected act, save insofar as it repeated false allegations against Mr Tyler.
>
> 1.3 Claimant's act in bringing proceedings under Case Number 2202130/2019. The Respondent contends that a Tribunal has found that this was a false allegation and further contends that it was made in bad faith.
>
> [emphasis added]
>
> [the following issues are paraphrased]
>
> 2.2 & 2.3 the investigation of Mr Tyler's grievance dated 17 April 2019, specifically that this should have been investigated and

> determined fairly/impartially by an independent panel who were not all white and the process would not be biased or unfair;
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> 2.4 the timing of an Extraordinary General Meeting close to the commencement of a trial on 29 October 2019;
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> 2.5 the Claimant's expulsion from Chambers with immediate effect on 29 October 2019;
>
> 2.6 the continued instruction of Farah & Co, notwithstanding a known conflict of interest.

59. Issues 1.1, 1.2 & 1.3 all contain references to an allegation of race discrimination made by the Claimant which the Respondent contends has been already found to be false by the Snelson Tribunal. I have read the Snelson Tribunal's findings at paragraphs 78 and 96-103, 110, 117, 133-135. At paragraph 133 of the reasons the Tribunal held:

> 133 Our findings above determine the complaints of direct racial discrimination and harassment: there was no actionable detriment and no treatment capable of amounting to harassment. In any event, we are satisfied that there was no discriminatory treatment. We have found that, for the most part, Mr Matovu fails to establish any good reason for feeling aggrieved, but even if that view is mistaken, the Respondents have given cogent and plausible explanations for their actions which, in our judgment, exclude discrimination.
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> …
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> 135 It would not be proportionate to subject the full canon of complaints to further individual examination. The reasoning in the preceding paragraph applies equally to issues 11.2 (tape recording), 11.4 (accepting Ms Azib's report), 11.5 (temporary clerking arrangements), 11.7 (requiring contributions after 4 October 2017) and 11.8 (handling of the interruption at the AGM). In relation to all, the Respondents behaved in an entirely rational and unremarkable manner. Mr Matovu fails to identify any act or omission suggestive to any extent of a race-based or race-related motivation.
>
> [emphasis added]

60. It plainly will be a matter for a later tribunal to determine the Respondents' argument that the Snelson Tribunal has found a 'false allegation' for the purposes of the exclusion to protected acts set out at section 27(3) of the Equality Act. Bad faith has been left alone entirely. The Claimant at paragraph 6 of his skeleton argument characterises the Snelson decision as having 'partly' dealt with the 'false' issue. That seems a fair statement. Even if the question of 'false' has not been entirely determined,

any later tribunal is likely to consider that they are not approaching this particular element of section 27(3) with a blank sheet.

61. Issues 2.2 & 2.3 would seem to me to somewhat overlap with findings about the investigation of grievance have already been made by the Tribunal. The specific allegations about fairness and the racial composition of the panel have not been litigated or determined. These are new allegations.

62. Issue 2.4 & 2.5 have not been dealt with by the Tribunal at all.

63. Issue 2.6 the alleged conflict-of-interest has been raised by the Claimant in the context of his multiple applications essentially as a procedural argument that Farrars should not be allowed to represent the Respondents. There has been no determination that this state of affairs amounts to detriment or harassment.

<u>The appeals</u>

64. The present situation is sufficiently factually different to the *Johns* case to mean I consider it can be distinguished. In that case the decision as to whether to grant a stay or not would determine the whole claim. The Employment Judge erred by striking out the entirely claim basis on an assumption about the *Heyday* litigation.

65. By contrast the present situation is a choice between on the one hand a substantial and indeterminate delay if I grant a stay in the terms suggested by the Claimant and on the other the risk that the decision of a tribunal following a hearing in November might have to be overturned as a knock on effect of the Snelson decision being overturned. In short the trade off is between delay on the one hand and possible expense and waste of the parties and tribunal's time on the other.

66. In that context of this balancing exercise, it seems to me that it is appropriate for me to make some sort of an assessment of the risk identified. It would not be appropriate to stay proceedings for an indeterminate period because of a theoretical risk that I judged to be highly unlikely to materialise.

67. *EAT* - in respect of the appeal to the EAT PA/0355/20/LA, the grounds that have been allowed to proceed to a Preliminary Hearing (i.e. 18.1 & 18.4), should not even if successful cause a difficulty with the present claim, given the absence of overlap. It would only be if the Claimant successfully cleared the both the hurdle of a rule 3(10) oral hearing and then a full hearing of the appeal in respect of some other matters that the risk might arise. In practical terms these would have to be an attack on either the issue 18.8 ground or the the findings relating to a 'false' discrimination claim or less likely a ground causing the whole decision to be overturned. The Claimant is on the back foot given the decisions of HHJ Auerbach on 28 August 2020. Nevertheless this is not an unsurmountable challenge.

68. *Court of Appeal* - the appeal to the Court of Appeal filed on 9 August 2020 I regard rather differently. This is an appeal from Lewis J at the EAT

who found by his order dated 15 April 2020 (sealed on 18 July 2020) that the appeal from the ET to the EAT was totally without merit and accordingly there was no right to an oral hearing.

69. That appeal was from a case management decision of the Acting Regional Employment Judge on 11 November 2019 who reaffirmed an earlier decision by Employment Judge Hodgson dated 25 October 2019 not to consolidate two proceedings on the basis that there had been no material change of circumstances. Judge Hodgson had been aware that the Claimant's expulsion from Chambers and a further claim were in the offing.

70. The Claimant's contention is that there is a good ground of appeal and that if he wins it the Court of Appeal would be likely to overturn the whole Snelson Tribunal decision. There are multiple hurdles for the Claimant. This is an appeal from a case management decision. He would need to obtain permission to appeal, then win the appeal and then persuade the Court of Appeal that the whole hearing and decision of the Snelson Tribunal should be thrown away as result of an earlier case management decision by an earlier judge. I cannot discount the possibility, but I consider it highly unlikely that the Claimant will achieve this result through this appeal.

Conclusion on stay/postponement

71. There is a tension between 'delay' and 'proper consideration of the issues' and additionally 'expense' under rule 2(e).

72. I do not consider that it is in the interests of justice for this matter to have an indefinite stay, which taking a realistic view might go into 2022. Memories fade. The longer time that elapses between material events and witnesses being asked questions about those events, the more difficult it is for them to give accurate or clear recollections of events.

73. If the Court of Appeal appeal were the only appeal that the Claimant was relying upon I would consider that the balance would swing in favour of allowing the November hearing to go ahead.

74. Given however that the EAT appeal PA/0355/20/LA has two grounds proceeding (albeit tentatively to the PH stage), that there is some prospect of the Claimant successfully adding further grounds at a rule 3(10) hearing and given that a tribunal sitting in November would be constrained by the Snelson Tribunal decision and there is some risk of the material parts being overturned, I consider that the interests of justice are served, not by an indefinite stay, but by a **postponement of the hearing**.

75. Given the dates to avoid requested by the EAT, it ought to be clear the basis on which any ground of appeal is proceeding and the date of the appeal hearing by February 2021.

76. I also consider that preparation of the case should continue. This claim has been beset with a series of delays, some within the control of the parties and some without. If the case is ready for trial by the time of a case

management hearing in February 2021 this will give the maximum possible flexibility for relisting.

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Employment Judge - Adkin

Date: 23/09/2020

WRITTEN REASONS SENT TO THE PARTIES ON

.24/09/2020

FOR THE TRIBUNAL OFFICE

Notes

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