EMPLOYMENT TRIBUNALS

Claimant: Mrs Lokhi Roy

Respondents:
1. Paul Bullivant
2. Dave Syms
3. UNISON

Heard on 2 June 2020

This has been a remote hearing, by telephone (A): A hearing in person was not practicable because of the present restrictions due to Covid-19.

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: In person, supported by Mr Rall, Friend
Respondents: Ms A Palmer, Counsel

JUDGMENT

1. The complaints of disability discrimination and for a redundancy payment are dismissed upon withdrawal.

2. The complaint of victimisation against the first and third respondents at paragraph 51 of the consolidated particulars of claim is struck out as it is vexatious, under the principle of *rej judicata*, having been determined in previous litigation between the same parties. This is the first complaint in these proceedings and is identified at paragraph 39.1 of the reasons.

3. The complaint of race discrimination against the first and third respondents at paragraphs 32, 33 and 39 of the consolidated particulars of claim is struck out on the ground it is vexatious under the principle in *Henderson v Henderson.* That is the second complaint in these proceedings and is identified at paragraph 39.2 of the reasons.

REASONS

1. On 17 January 2020 the Tribunal directed there would be a Preliminary Hearing to consider the following issues: -

   1.1 What legal claims were pursued and what issues arose for determination at any final hearing;

   1.2 Whether any of the claims were out of time and therefore should be dismissed on the ground the Tribunal had no jurisdiction to consider them;

   1.3 Whether any claims should be struck out on the grounds they had already been determined by the Tribunal, the principle of *res judicata*, or on the ground the claimant could have pursued those claims in the previous proceedings, the principle in the case of *Henderson -v- Henderson*;

   1.4 Whether any claim should be struck out on the ground it has no reasonable prospect of success;

   1.5 Whether the claimant should be ordered to pay a deposit as a condition of being permitted to pursue any claim or allegation on the ground it had little reasonable prospect of success; and

   1.6 The length and time of any hearing.

2. That hearing commenced on 7 February 2020, the Tribunal was informed that a claim had been issued against the third respondent in the Central London Employment Tribunal which concerned the same complaints. The cases were combined, but on that day the Tribunal did not have the papers in that case.

3. The claimant was asked to identify what specific detriments she was alleging in the victimisation complaint against the first and second respondents. This was not apparent from the claim form. Although the claimant took some time attempting to provide that information no real progress was made on 7 February 2020. In the circumstances the case was adjourned with further directions for the claimant to identify each detriment which was alleged against any respondent and the protected act to which he said it was related.

4. At the resumed hearing the claimant had produced, pursuant to that order, three documents, entitled ‘Mr Syms and UNISON clarified detriments’ (13 pages), ‘Mr Bullivant clarified detriments’ (14 pages) and, ‘2019 Grounds ‘Take 3’ (3 pages, one for each respondent). The order of the hearing on 7 February 2020 had required the claimant to set out any further allegations in respect of which she sought permission to amend. The claimant said these documents contained further information which she would seek to add to her claim forms, insofar as they raised additional legal complaints, by way of amendment.

Preliminary matters to address at the Preliminary Hearing

5. The claimant had submitted a skeleton argument and a digital recording of a conversation between herself and Mr Bullivant on 9 August 2017. The relevance of the telephone conversation was that Mr Bullivant informed the claimant that she had been suspended on ill health grounds by her employer, the Leeds and York Partnership NHS Foundation Trust (LYPFT). The claimant said that was an important link to the bullying and harassment policy of the LYPFT. She invited the Tribunal to listen to the tape recording which lasted 45 minutes. As the only relevance of this conversation was the remark in respect of medical suspension, it was not necessary for the Tribunal to spend that time listening to the tape. (This was the tape recording referred to at paragraph 15 of the reasons in the judgment which was sent to the parties on 20 December 2018).

6. At the commencement of the resumed hearing the claimant said she had never received the order of 17 February 2020 in which the Tribunal had identified the six issues to be addressed at the Preliminary Hearing. She had, however, received the skeleton argument of Counsel for the respondent which had included the six issues, on 7 February 2020. She did not suggest that she had not been aware of the issues which were to be determined at the resumed hearing on 2 June 2020. Indeed, she had addressed these matters in her skeleton argument sent to the Tribunal on the 27 May 2020. However, after the luncheon break on 2 June 2020, the claimant applied for a postponement on the grounds that she had not received the order of 17 January 2020 and she wished to have more time to consider her representations. The Tribunal refused the application on the basis that the claimant had had significant notice of the issues to be determined, at the very latest from 7 February 2020, and there had already been delay in the progress of this case. To put this case back further would not be in the interests of justice. The claimant had also said that she only received the updated bundle from the respondent the previous day. The bundle had not found its way to the Employment Judge prior to the hearing, so Ms Palmer sent an electronic copy on the day. The updated index ran to 780 pages. It was not possible to open it. However, the original bundle for 7 February 2020 was available to all and the additional documents were those provided by the claimant, so she was fully familiar with them. Both parties were able to take the Tribunal to any relevant document in the original bundle or by reference to any additional evidence by email.

7. The Tribunal informed the parties that because of the substantial volume of evidence submitted and the time available to explain the relevant issues and hear submissions, with the additional complication of dealing with matters over the telephone, it would not be possible to consider all six issues identified in the order of 17 January 2020. The Tribunal therefore indicated that it would consider in the first instance what legal claims had been presented in the claim form and whether any should be struck out on the basis of the issues of estoppel, *res judiciata* or the rule in *Henderson -v- Henderson.* The Tribunal would then consider the material relating to any application to amend, but the remainder of the issues would be considered at a further hearing.

8. During the resumed hearing the Tribunal explored with the claimant the claims of race discrimination, disability discrimination and a claim for a redundancy payment. The claimant had ticked each of these boxes in the claim forms to suggest she was pursuing each type of complaint, but the extensive particulars in both claims and the further particulars seek remedies for only victimisation, see paragraph 145(f). At the hearing on 7 February 2020 the Tribunal therefore focussed upon the victimisation complaint and sought clarification of that.

9. In respect of disability, the claimant explained that she believed the consequence of the actions of the respondents were more severe and had a greater impact upon her because of her mental health at the relevant time, including when she agreed a settlement of her claim with LYPFT on 22 and 23 August 2019. There was not, however, a complaint of disability discrimination and that was withdrawn.

10. The complaint for a redundancy payment related to a belief of the claimant that she could have received a greater sum in settlement of her claim with LYPFT which would have included a sum in compensation for her redundancy. The settlement involved her receiving compensation and an exit package. No complaint could be made by the claimant against any of the respondents for failure to pay a redundancy payment, as she was not employed by any of them. She withdrew that complaint.

11. In respect of the complaint of race discrimination, the claimant explained that that related to a failure to inform her of, or invite her to, a meeting on 24 July 2017 at which she believes a decision was made to suspend her on medical grounds, under the bullying and harassment procedure of LYPFT and failing to inform her that the bullying and harassment procedure existed and had been considered. In addition, she said that the advice she had obtained from the third respondent, by Mr Carruth, in July 2020 that her claim had nil value was an act of race discrimination.

12. The claimant produced particulars of her complaints against all three respondents in a document dated 6 December 2019 which was sent to the Tribunal on 21 December 2019. It was agreed by the parties that that document accurately summarised both the claim forms which she had previously submitted against the first and second respondent on the one hand and the third respondent on the other. That document shall be referred to as the consolidated particulars.

Background

13. On 18 January 2018 the claimant presented complaints in the Employment Tribunal against her employer, LYPFT, in respect of race and disability discrimination. She had been employed by the LYPFT from 30 June 2003. She had presented an earlier complaint against the same respondent in July 2011, for sex and race discrimination in respect of which a settlement was agreed and recorded in a COT 3.

14. In the 2018 proceedings against LYPFT, at a public Preliminary Hearing on the 13 February 2019, Employment Judge Smith held that the claimant was not a disabled person at the time her complaints of disability discrimination related to. Application for reconsideration of that decision was made by the claimant but rejected on 12 April 2019. The remaining complaints of race discrimination were identified in a Schedule. There were 36 paragraphs. That claim was settled on 23 August 2019.

15. The present claims concern the claimant's criticism of the third respondent and its officers in respect of the advice and assistance in her disputes with her employer, LYPFT, including the management of the proceedings which were subsequently issued against them. The current claims cover much of the same subject matter as the claims against the first and third respondent which were issued on the 12 June and 24 June 2018 respectively. These were heard by the Tribunal in a hearing which took place between 10 and 14 December 2018, judgment being delivered on the last of those dates.

16. The claimant made a number of Subject Access Requests for personal data to LYPFT and to the third respondent. Documents disclosed in that process, as well as a bullying and harassment procedure of LYPFT which the claimant said in this hearing she came across by accident in July 2019, formed the basis of an application for reconsideration of the judgment of the 14 December 2018, on 22 November 2019. That application was rejected on 13 December 2019, it being extensively out of time but the Tribunal held that "*the documents would not have affected or altered the findings in the case even if introduced at the original hearing*". These claims had been issued before that decision but shortly after application for reconsideration was made.

17. In paragraph 7 of the consolidated particulars of the current claims, the claimant set out in paragraphs (a) to (s) the detriments and unfavourable treatment. These were in broad headings without sufficient detail to identify a complaint. That is why a further order was made on 7 February 2020 to identify the detriments.

18. At paragraph 9 of the consolidated particulars, the claimant said that the collective actions of the third respondent amounted to victimisation under Sections 27 and Section 57(5) of the Equality Act 2010 (EQA). She stated there had been a continuing course of conduct. She set this out in detail which included, in paragraphs 11 to 115, the events which led up to the hearing before the Tribunal on 10 – 12 December 2018. Many of those events had been contained in the evidence adduced before the Tribunal at that hearing and were the subject of earlier concerns the Tribunal made findings upon. This period shall be referred to as the first category of complaint.

19. In paragraphs 116 to 135 of the consolidated particulars, the claimant set out the history, which principally concerned the continuing claim against LYPFT and the steps being taken by the third respondent, through its officer Mr Carruth, to obtain a merits assessment for the purpose of legal representation in those proceedings. This period shall be referred to as the second category of complaint.

20. At paragraph 131, during that period, the claimant referred to an incident on 28 July 2019 when her personal laptop was hacked leading her to flee her home. She reported her belief that the hacking had been undertaken by LYPFT and that the matter had been reported to the Police. She informed the Tribunal at this hearing that the Police said this was a civil, not a criminal, matter. The claimant has submitted a complaint to the Information Commissioner for investigation. The claimant has now said that she believes the respondents are also complicit or responsible for this hacking of her computer.

21. Paragraphs 140 to 142 of the consolidated particulars concern a race protocol training event the claimant attended, a request to attend a national black members conference and removal of the claimant from the mailing list in regard to attempts by her to gain support and advice from the regional black members group and on 1 November 2019. This period shall be referred to as the third category of complaint.

Legal Principles

Unlawful discrimination

22. By Section 13 of the Equality Act 2010 (EqA): a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

23. By Section 27 of the EqA:-

> *(1) A person (A) victimises another, person (B) if A subjects B to a detriment because –*
>
> *a. B does a protected act, or*
>
> *b. A believes that B has done or may do a protected act.*
>
> *(2) Each of the following is a protected act:-*
>
> *a. Bringing proceedings under this Act;*
>
> *b. Giving evidence or information in connection with proceedings under this act;*
>
> *c. Doing any other thing for the purposes of or in connection with this act;*
>
> *d. Making an allegation (whether or not express) that A or another person has contravened this Act.*

24. Section 57 of the EqA provides that a trade organisation must not discriminate against a person in the way it affords him or her access, or by not providing access, to opportunity for receiving a benefit, facility or service or subjecting that person to any other detriment. A trade union falls within the definition of a trade organisation.

25. By Section 112 of the EqA:-

> *A person (A) must not knowingly help another (B) to do anything which contravenes part …. 5 …. or Section 108(1) or (2) or Section 111*.

Relitigation, res judicata and abuse of process

26. In **Divine Bortey -v- Brent London Borough Council 1998 ICR 886** the Court of Appeal identified three categories of estoppel falling under the doctrine of *Res Judicata*. They were: -

(i) Cause of action estoppel – a party is prevented from pursuing a course of action that has already been dealt with in earlier proceedings involving the same parties;

(ii) Issue estoppel – a party is prevented from reopening an issue that has been decided in earlier proceedings involving the same parties;

(iii) A party may be prevented from raising an issue in proceedings that he or she could and should have raised in earlier proceedings between the same parties – the rule in **Henderson -v- Henderson [1943] 3 Hare 100, PC**;

27. The first form of estoppel prevents a party relitigating the same legal claim in a Civil Court or Tribunal. It is absolute and not subject to the exercise of a discretion. '*Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims*', **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) 2014 AC 160, SC,** per Lord Sumption.

28. The second precludes a party from inviting a different finding in respect of a fact or determination which was a necessary aspect of the determination of the legal complaint, see **Thurday -v- Thurday [1964] P18** and **Arnold -v- National Westminster Bank Plc [1991] 2 AC 93**.

29. The third operates as a bar to raising in subsequent proceedings points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they *could* with reasonable diligence and *should in all the circumstances* have been raised. There is no presumption that the successive action should not be brought because to deny a party the opportunity of litigating, for the first time, a question that has not previously been adjudicated upon is a denial of his or her right of access to the court at common law or as guaranteed by Article 6 of the European Convention on Human Rights. However, the public law principle to be considered is that the process of the court must be protected from abuse and a party from oppression by successive litigation:

> "*Henderson -v- Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation*

and that a party should not be twice vexed in the same matter. The public interest is reinforced by the current emphasis on efficiency and economy and the conduct of the litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) the claim or defence should have been raised in the earlier proceedings if it were to be raised at all. I would not accept that it is necessary before abuse may be found to identity any additional elements such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involve what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings as necessarily abusive. That is to adopt too pragmatic an approach in what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not", per Lord Bingham in **Johnson -v- Gorewood and Co [2002] 2 AC 1**.

Strike out of claims

30. By rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, at any stage of the proceedings, either of its own motion or on the application of a party, a Tribunal may strike out all or part of a claim or response on the ground that it is scandalous or vexatious or has no reasonable prospect of success.

31. In **Attorney General v Barker 2000 1 FLR 759, QBD** Lord Bingham LCJ said that the hallmark of a vexatious proceeding is that it has '*little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*'.

Duties of disclosure

32. By rule 31 a tribunal may order any person in Great Britain to disclose documents or information to a party (by providing documents or information or otherwise) or to allow a party to inspect such material as might be ordered by a county court.

33. The test for whether an order for disclosure of documents should be made is if they are relevant and necessary for fairly disposing of the proceedings, see **Canadian Imperial Bank of Commerce v Beck 2009 IRLR 740, CA**. In **Plymouth City Council v White EAT 0333/**13 the Employment Appeal Tribunal held that an employment judge had erred by ordering disclosure based solely on whether documents were relevant.

Conclusions

The Claims

Victimisation and/or direct race discrimination

34. I have not found it easy to identify from the consolidated claim form or the additional information provided on 13 March 2020, the specific detriments which are the basis of any legal complaint of victimisation or direct race discrimination. The very general description of detriments in paragraph 7(a) to (s) of the consolidated particulars does not supply the information about what was done, or not done, on any occasion by any of the respondents which was detrimental to the claimant, for the purpose of Sections 27(1) (victimisation) of the EQA and Section 57(2)(d) (direct race discrimination by way of detriment). The further information in the '2019 Grounds Take 3' is in similar broad terms and the two documents which are described as 'clarification of detriments' adopt a similar form of narrative to the consolidated particulars. That is a history of events, but does not distinguish between what may be background contextual matter and the subject of any legal complaint. The Take 3 documents include paragraph numbers from the consolidated particulars, but involve speculation of what is relied upon, such that identification of a legal complaint is not possible. For example, the brief labels such as '*breach of COT 3'*, or '*perverting the course of justice*' do not identify the specific respondent or individuals responsible and what they had or had not done which subjected the claimant to a detriment. Counsel for the respondent described this, in her skeleton argument: "*The claimant…has come up with a wide-ranging list of ills that she seeks to lay at Mr Syms' door and then for each of these ills throws out a random selection of paragraphs which she says justifies her in making that charge, even where they say nothing at all about what Mr Syms ever said or did*". I agree with this criticism.

35. In many instances, the claimant raises consequences and impacts of earlier actions which she holds the respondents accountable for, for example, "*managed out of employment and losses*", a detriment alleged against all 3 respondents. The claimant cross references paragraph 135 of the consolidated particulars. Paragraph 135 explains the circumstances in which the claimant entered into the settlement on the 22 August 2020 with LYPFT and the advice given by Mr Carruth. It makes no reference to Mr Bullivant or Mr Syms at all.

36. In her oral submissions the claimant said that Mr Syms, as well as Mr Carruth, had advised her that her claim had nil value and that this had led to her agreeing to the exit proposal and £34,000 in compensation, significantly less than she believed she was entitled to. That is not a pleaded allegation

against Mr Syms in the relevant part of the particulars, at paragraph 135 or anywhere else, nor in the further clarification of detriments in the documents submitted on the 13 March 2020. (See paragraph 57 of document entitled "Mr Syms and UNISON clarified detriments"). Even taking that as the allegation, which would require permission to amend, managing the claimant out of employment is not a description of the action of Mr Syms. He did not require the claimant to leave her employment and settle her claim. That was a decision made by the claimant. She could have rejected the offer and pursued her claims at a hearing.

37. Possibly to rectify this difficulty, which had been raised at an earlier stage on the 7 February 2020, but in any event, the claimant raised Section 112 of the Equality Act 2010: unlawfully aiding another to do anything which contravened part 5 of the EQA. That would require the claimant to set out, in clear particulars, how the other, LYPFT, had acted and which particular provision of the EqA it had contravened. That would need to be followed by a description of precisely what any named respondent had done, knowingly, to aid that act. The particulars do not do this.

38. I have identified from the consolidated claim form, the further information supplied on 13 March 2020, the skeleton argument of the claimant and the clarification she provided in submissions at the hearing, those legal complaints which are distinguishable from background material. That is where I am satisfied there is an allegation that the claimant was subject to some detriment because of a protected act or that a respondent treated the claimant less favourably because of the protected characteristic of race and this was a detriment. There are 6 complaints.

39. In the first category of complaint (paragraph 18 above):

Complaint 1

39.1 Victimisation against the first and third respondents: Paragraph 51 of the Particulars: *October 2017. A further detriment is that Mr Bullivant still failed to refer the claimant to legal advice for advice and assistance around submitting her grievance.*

Complaint 2

39.2 Direct race discrimination against the first and third respondents. Paragraph 32, 33 and 39 of the Particulars: *Failing to issue the claimant with a copy of the bullying and harassment procedure and inform her of, or involve her in, any meeting with respect to her suspension or transfer.*

This complaint only became identifiable as being of direct race discrimination from clarification provided by the claimant in the hearing on 2 June 2020. It is not apparent from reading the claim form alone or the further information provided. The claimant had alleged race discrimination in general terms and makes reference to a lack of knowledge of the bullying and harassment policy. The meeting which the claimant says took place on 24 July 2017 is alluded to

in paragraph 39, although not by date: "*this confirmed Mr Bullivant was privy to this information which would have taken place in a case conference meeting as per PE24 of the Bullying and Harassment Procedure, which UNISON will have been party to*". Only by considering paragraph 35, which refers to a GDPR request for information relating to the involvement of UNISON at a meeting under the bullying and harassment procedure, is it possible to interpret the present complaint, but this is far from clear from the claim form. Had the claimant been legally represented I may have applied a more rigid interpretation to the requirement to plead with particularity a claim of this type, but I have had regard to the overriding objective and sought to ensure, so far as is practicable, that the parties are on an equal footing.

40. In the second category of complaint (paragraph 19 above):

Complaint 3

Direct race discrimination by the third respondent, by Mr Carruth, in advising the claimant that her case was worth nil. She says this led to settling her claim for an under-value against LYPFT. This is referred to in paragraph 135 of the consolidated claim form. It is not immediately apparent that it is a complaint of race discrimination, but that was raised in general terms and this was clarified in the hearing on 2 June 2020. The same observations set out above, in respect of construing a claim which has been drafted by an unrepresented party, apply.

41. In the third category of complaint (paragraph 21 above):

Complaint 4

41.1 Paragraph 140 of the Particulars: Victimisation and direct race discrimination against the second and third respondent. On 19 October 2019, preventing the claimant from attending the race protocol meeting.

Complaint 5

41.2 Paragraph 141 of the Particulars. Victimisation and direct race discrimination against the second and third respondent. On 27 October 2019 telling the claimant that delegates had already been agreed for the National Black members conference.

Complaint 6

41.3 Paragraph 143. Direct discrimination and victimisation against the third respondent. Attempting to prevent the claimant from gaining support and advice from the Regional Black members group.

Relitigaton and *res judicata*

42. The first complaint, at paragraph 39.1 has already been litigated between the first and third respondents. It was one of the three detriments expressly identified as an alleged act of victimisation. This category of estoppel is

absolute and is not subject to any discretion, as explained above. It must therefore be struck out.

43. Much of the material in paragraphs 11 to 115 of the claim form cover the same historical ground as the 2018 claim against the first and third respondent. Had I found that other legal complaints had been made which related to the other two detriments which founded the basis for the victimisation claims decided in December 2018, they too would have been struck out.

44. This principle would not have extended to a claim brought against the second respondent who was not a party to the earlier proceedings, but I have identified no claims against him in the first category.

Henderson -v- Henderson

45. This concerns only those claims which fall in the first category because it is only they which the respondent can contend could have been brought in the 2018 case against the first and third respondents. Of the legal complaints I have been able to identify, that only concerns paragraph 39.2 above, the second complaint.

46. The respondents contend that it is unreasonable of the claimant to bring claims which she could and should reasonably have brought in the 2018 proceedings. It is submitted the fact that two applications for reconsideration of that decision have been made reflects the fact that such conduct is vexatious.

47. The claimant, in response, says that she did not bring the earlier complaints because she was unaware of circumstances which have only come to light following the receipt of a number of documents largely, but not only, through her requests for personal data from her former employer and the third respondent. Moreover, she says the respondents were culpable of breaches of the Tribunal's order for disclosure in the 2018 proceedings and therefore contempt of court.

48. One further consideration I am asked to address is the claimant's belief that her former employer has hacked her computer which she believes is why she has not received certain documents, or documents have gone missing. She says the respondents are complicit or also responsible for this illegal activity. The matter has been reported to the police, who say it is a civil matter. The claimant has also reported the matter to the Information Commissioner's Office which has informed her that she would have to obtain an expert's opinion to support her beliefs before it could take the matter further.

49. After the hearing the claimant has written to ask the Tribunal to stay the proceedings pending receipt of an expert report concerning the hacking of her laptop. This would be a springboard for the Information Commissioner to hold a wider investigation into the hacking of the workplace computers at NYPFT where the respondents also have offices. The respondents oppose that application, saying that the claimant has had the opportunity to obtain any

expert evidence of that nature and that this litigation is hanging over the heads of two individually named respondents.

50. There is no evidence presently before me to support the serious allegation behind the claimant's suspicion. I consider further delay in addressing this case is not in the parties' interest. If an expert's report were available and relevant to any issue, it would be considered.

51. In her written and oral submissions, the claimant said that there were many documents which should have been disclosed by the respondents in the course of the 2018 proceedings, but I have only been able to identify 6 documents, or a classification of documents.

- The first is the bullying and harassment policy of the LYPFT.
- The second is an email dated 24 July 2017 from Mr Taylor, of Carers Leeds, was sent to Elaine Wilks of the LYPFT. Mr Taylor said that the claimant had not returned his calls and texts so he did not know what to do but options included medical suspension or temporary redeployment.
- The third is an email sent by Mr Andrew Walsh of Carers Leeds to Mrs Maureen Cushley of LYPFT. He wrote, "*I am aware that a couple of complaints have been made about the behaviour of [the claimant] from within the NHS and that a process is being set up to investigate and deal with these. Acting in my position as the HR advisor to Carers Leeds, in line with our core values, I have to let you know that we would have serious concerns if she worked in the Carers Leeds offices until your investigation process is completed and there is some resolution to the matter. Therefore, I should be grateful if you would ensure that Lokhi does not come into the office until that time. Once the matter is resolved at your end, I would like to have a discussion with you about how we can ensure that her behaviour is in line with our standards and how we can deal with her behaviour going forward".*
- The fourth is a category of emails concerning a request for an equalities officer to assist the claimant.
- The fifth is the Framework for Personal Responsibility Policy of LYPFT.
- The sixth is the Internet Usage Policy of LYPFT.

52. In respect of the first, the bullying and harassment policy, the claimant said it came into her possession by accident in July 2019. It is not a document issued by the respondent, but I accept it may well have had a copy. The claimant said the failure to disclose it was a breach of the Tribunal's order for disclosure.

53. The claimant said that when she received it, she discovered that this policy should have been used prior to the disciplinary policy which had been applied to her in respect of Ms Wilks' complaint. Had she been advised of this, she said she would have argued for an informal resolution of Ms Wilks' complaint. She says Mr Bullivant failed to advise her of the existence of this policy. Her

view that the bullying and harassment policy takes precedence is expressed in paragraph 33 of the consolidated particulars: "*Page 7 of the bullying and harassment policy states that an informal meeting should have taken place with the claimant and only if it remains unresolved should formal disciplinary action be commenced. No such meeting took place".*

54. In addition, the claimant says that she discovered that a meeting had taken place on 24 July 2017 in respect of Ms Wilks' complaint from disclosure following a subject access request in July 2018. In the second document, the email dated 24 July 2017, Mr Taylor, of Carers Leeds, informed Elaine Wilks, of the LYPFT, that the claimant had not returned his calls and texts so he did not know what to do but options included medical suspension or temporary redeployment and that he understood a meeting was taking place "at the moment". The claimant says this must have been the meeting under Appendix E of the Bullying and Harassment policy, a Case Conference to consider the impact of 'transferring' an employee who has made an allegation of harassment or the alleged harasser. I note it makes no reference to medical suspension which is what happened. She says that the union must have been present at the meeting, under Appendix E. She complains she was not told about this meeting at the time. She says she only realised the union must have been present when she received the bullying and harassment policy, in July 2019. She reasons that concealment of this meeting is evidence of collusion between Mr Bullivant and LYPFT.

55. I do not accept there was a breach of any obligation in respect of disclosure of this policy. The Order of Employment Judge Lancaster was to provide disclosure of documents which were relevant to the issues. The bullying and harassment policy was not a document of the respondents and, even if a copy was in their possession, it had no obvious significance to the three protected disclosures or the three detriments which had been identified as the relevant issues for consideration in the case. Put simply, it was not a relevant document which the respondents would be required to make a search for or disclose.

56. In any event, the claimant's interpretation that the policy takes precedence to the disciplinary procedure is not correct. The page of the policy which the claimant relies upon is displayed in a flowchart. That shows two options; an informal procedure or a formal complaint. Neither has any priority. It the informal procedure is chosen, formal action may be taken at a later stage if the matter is unresolved; but a complainant may choose to make a formal complaint at the outset, in which case there is no informal meeting. Paragraph 2.5.1 of the policy states that managers or supervisors must not discourage employees from recourse to the formal procedure where they prefer that option.

57. Under the policy it is for the complainant, not the accused, to elect either informal resolution or to pursue a formal complaint. It is not clear what detriment or disadvantage the claimant could say she suffered by not seeing the policy or be informed and involved in a meeting, as she would not have been invited or entitled to seek to influence the choice of Ms Wilks. The

managers are expressly warned against that. For the accused to have an input into the choice is inconceivable.

58. The claimant has drawn attention to a form which Ms Wilks completed under Appendix A of the Policy on 28 July 2017. This was received by the claimant on 10 August 2018 in response to a subject access request. This was after the claimant had issued her claims in the 2018 proceedings against these respondents. The claimant had submitted an extensive list of detriments on 5 September 2018 running to 18 pages and a further list on 26 September 2018 running to 18 pages. These extended beyond those identified in her claim form. An application to amend her claim was made to Employment Judge Wade on 6 December 2018 at a time she had the benefit from a solicitor who specialised in employment tribunal claims.

59. The significance of this chronology is that the claimant was on notice that the respondent had a bullying and harassment policy on 10 August 2018, when she saw that Ms Wilks had made allegations on form A of the policy. This was an opportunity for her to request a copy of the policy and seek to amend her claims in respect of the matters of the second complaint in paragraph 39.2 above.

60. In respect of the third document, an email from Mr Walsh, the claimant says Mr Bullivant's conversation with ACAS unequivocally confirms that he was privy to Mr Walsh's email and contradicts his claim in evidence that the information came from the claimant and he was relaying her concerns. She also says that the failure of the respondents to produce it during the proceedings was a breach of the Tribunal's orders and that breach was repeated in the context of the respondents not producing it pursuant to her subject access request.

61. These are not well-founded points. Mr Bullivant was not a party to this email. Nor were Unison. It was a document which would not be expected to be in the possession of the respondents. It was an email between Carers Leeds and NYPFT and would be confidential to those parties. Neither does its production by NYPFT nor its content give any grounds for suggesting it was ever in the possession of either first or third respondent. The claimant asserts that Mr Bullivant was aware of its contents because a note of the early conciliation officer recorded that he had said to her that someone in management wanted the claimant to leave the department. When this note was put to him in evidence at the December 2018 hearing, Mr Bullivant said the information probably came from the claimant. It is by no means clear that the content of this email relates to the same matter, because Mr Walsh does not say he wanted the claimant to leave Carers Leeds. He says that he would have concerns if the claimant was placed in their offices during the investigation, but would be need a discussion afterwards to ensure the behaviour of the claimant did not cause concern. Even if it were Mr Walsh who was the person who had said he wanted the claimant to leave the department, there is no reason to suppose Mr Bullivant discovered that from having seen this email. The inconsistency between its content and his reported comment would suggest he had not seen it. In these circumstances the late discovery of the email

adds nothing. There is no basis to suggest the respondents had hidden it, were in breach of any order of the Tribunal or in contempt of court, as alleged.

62. The fourth category of documents concern a request by the claimant to be put in touch with an experienced equalities officer of the respondent. She was informed this request was passed to Mr Syms. She said these were significant documents because she could have asked Mr Bullivant about their contents in the hearing. It was difficult to understand this point. It was clear from his witness statement that Mr Bullivant was the equalities officer. The claimant had the opportunity to ask him about that. The emails emanated from herself, she knew of her own request and that it had been passed to Mr Syms. These were not documents which were relevant to any issue in the case, it being common ground that Mr Bullivant was the equalities officer by the date of the hearing. They did not relate to any of the issues identified by Employment Judge Lancaster. There was no breach of any order for disclosure.

63. In respect of the fifth document, it would have not have been considered as relevant to the issues. Its absence did not disadvantage the claimant. It was not a document of the respondents and there was no breach of any duty to disclose.

64. The sixth document relates to the alleged violation of the claimant's computer, but was not a document which was relevant to any identified issue. There is presently no evidence that her computer was hacked by the respondents or that they had any knowledge of it.

65. I bear in mind the claimant's Article 6 entitlement to have her civil rights determined at a fair and public hearing and her common law rights to access to the court. I also have regard to the public interest principle that there should be finality in litigation and a party should not be vexed twice with the same matter.

66. In respect of the second complaint the claimant could and should have raised these matters in the 2018 proceedings. I reject her argument that she could not have known about these matters before the determination of those proceedings without reasonable enquiry and have obtained information about them so as to seek to pursue them. In saying that the claims should have been raised, that is not to suggest they establish the basis for a legal complaint. I have considered that in paragraphs 56 and 57 above. Rather, it is to emphasise that the claimant had the opportunity to investigate these areas of concern which she could have advanced in the earlier proceedings.

67. I am satisfied that this is a collateral attack to reopen the decision of the Tribunal in the 2018 proceedings. That is what the claimant asks for at paragraph 7 of her skeleton argument (*The previous judgment to be overturned and made in my favour*). The majority of the consolidated claim form, (paragraphs 11 to 110, 99 of 145 paragraphs) concerns events over the same time period and about the subject matter which was subject to extensive scrutiny in the 2018 proceedings, namely the first and third respondent's involvement in the difficulties the claimant was having at work and the

proceedings which were brought against LYPFT. The claimant has made two previous, unsuccessful applications for reconsideration of the 2018 decision, the last of which was based upon the same documentation relied upon in this hearing.

68. The contents of her claim form are a lengthy criticism of the actions of the respondents, the focus of which is to demonstrate that, in the claimant's belief, the respondents acted in collaboration with LYPFT to compromise the claimant's interests and to advance her employer's. That is with the objective of revisiting the determination in respect of causation analysed in 81 to 88 of the 2018 decision. An example of this is the email from Mr Walsh, which the claimant alleged undermined a finding of the Tribunal at paragraph 86 of the 2018 decision; Mr Bullivant's communication with the ACAS conciliation officer.

69. I am satisfied that this amounts to an abuse of process and is vexatious. The proceedings are being used in a significantly different way to the ordinary and proper purpose. The adaptation of the claims to embrace any possible contravention of the EqA illustrates that.; for example, resort to a race discrimination claim for complaint 2. When it was pointed out by Ms Palmer in the hearing that these events predated any protected act, thus excluding a victimisation claim, the claimant said, for the first time, that this was a race discrimination claim. That was not apparent from the consolidated claim form nor the further 3 documents of clarification. As indicated above, I was prepared to allow that categorisation for the purpose of identifying what the claims might be, acknowledging the difficulties facing a party who is not legally represented. But I do not the circumstances in which that came about, for the purpose of the application for strike out under the *Henderson v Henderson* line of authorities. I am satisfied the claimant is using the proceedings to attempt to identify any conceivable legal claim with a view to reopening the decision in the previous litigation against the first and third respondents.

70. Having had regard to the public interests referred to in **Johnson -v- Gorewood and Co [2002] 2 AC** 1, for the reasons set out I strike out the second complaint.

Amendment

71. The claimant said that the documents submitted on 13 March 2020 included her applications to amend. These documents were of a similar nature to the consolidated claim form and did not set out any identifiable claims in respect of which I could identify any amendment. They did not explain what was new and what the claimant wished to be added to the previous claims.

72. In the circumstances I refuse the application, save for that concerning the second respondent who allegedly advised the claimant that her case against LYPFT was valued at nil. That application was made at the preliminary hearing. The respondents have not had an opportunity to respond and it is appropriate to consider it at the forthcoming hearing.

Remaining preliminary issues

73. That shall be a preliminary hearing to consider issues which arise in respect of complaints 3 to 6. This shall be by reference to the matters raised in paragraphs 1.2, 1.4, 1.5 and 1.6 above. The Tribunal shall also identify the issues which arise for determination in the complaints which are to proceed to a final hearing.

Employment Judge D N Jones
23 June 2020