EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Mr B Lingard	Sussex Partnership NHS Foundation Trust (1) Mr G Wright (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Croydon **ON** 3rd and 4th March 2021

EMPLOYMENT JUDGE A Richardson

Representation
For the Claimant: in person
For the Respondent: Mr G Burke, Counsel

REASONS

At the request of the claimant the reasons for the judgment delivered orally on 4th March 2021 are as follows:

Issues

1. The first issue to be determined today was whether the claimant' s claims should be struck out on the basis of res judicata/issue estoppel, Provided the claimant's claims survived that first issue, the following issues would be dealt with: (ii) that some or all of the claims were out of time; (iii) a deposit order; and (iv) whether the claimant had waived legal privilege advice.

The res judicata issue.

2. I was provided with the respondent's bundle in two parts of 480 pages and the claimant's bundle, also in two parts, of 405 pages. The claimant was unable to agree the respondent's bundle because he did not 'recognise' how the respondent had arranged its documents. Both bundles contained largely the same documents. Very few of the documents in either bundle were referred to. I

was also provided with several authorities from both parties, and chronology prepared by the respondent. I was also provided with an authorities bundle by both parties. I heard oral evidence from the claimant about the withdrawal of his first ET 1 case no. 1406410/2019 filed in December 2019 in Bristol (the first claim). The claimant was cross examined. I heard submissions from both parties set out below.

Findings of Fact

3. My findings of fact are made for the purposes of this hearing. Conflicts of evidence have been decided on the balance of probabilities. They are based the pleadings, contemporaneous documents and the claimant's oral evidence which was strictly limited to the withdrawal of the first ET claim form. I have had reference to various authorities. I say as a standard precautionary formality that any subsequent EJ may well find alternative findings of fact after having had the benefit of hearing full evidence and seeing full disclosure in the event of a final hearing of this matter.

3.1 The claimant issued proceedings against the first respondent on 26th December 2019 in the Bristol employment tribunals following a period of early conciliation between 26th October 2019 and on 26th November 2019. A response was filed.

3.2 The claims in the first ET1 related to an alleged qualifying disclosure made by the claimant on 11th September 2019 during a supervision session between the claimant and his line manager Sharon Waghorn. He informed Sharon Waghorn of his mental health audit compliance level on Woodlands Ward was low. The claimant claims on 12th September 2019 he was then subjected to the detriment of being given double the amount of work to do compared to other nurses, on the instruction of a nurse LS, who worked on Castle Ward. He claims that when he complained about this to his manager and LS's manager, he was told there had been complaints about his work.

3.3 The claimant signed off sick between 20 September 2019 and 26th December; the claimant made various complaints of bullying and failure to make reasonable adjustments for his historic mental health condition of PTSD. The claimant's complaints were escalated to Mr G Wright, Director of HR and second respondent at the end of September 2019. A grievance investigation officer was appointed, Ms J Bunce, and she met the claimant on 31st October 2019 following which the claimant made a further grievance concerning the refusal by Ms Bunce to increase the scope of the investigation and the length of time that the investigation was taking. A further complaint regarding a refusal to make a reasonable adjustment for the claimant's mental health condition was lodged on 14th November 2019.

3.4 At the end of November 2019 the claimant raised his concerns to the CEO of the first respondent about why the first respondent's policies and procedures were not being followed.

3.5 The first claim was lodged on 26th December 2019 under case number 1406410/2019.

3.6 Thereafter between 26th December 2019 and 26th February 2020 the claimant filed a further three grievances related to the same issues that were concerning him, as above.

3.7 On 4th February 2020 the respondent filed its response to the claimant's first claim and requested the matter should be listed for a preliminary hearing including the potential strike out of the whistleblowing claims or in the alternative the making of a deposit order.

3.8 On 9th February 2020 the claimant emailed the respondent's solicitors Ms Daw to say:

> *"After seeking advice over the weekend, I can confirm I wish to withdraw my employment tribunal in its entirety.*
> *It would seem your view is correct that this case could be [struck] out on technicality. However as you properly aware its not down to the strength of the case.*
> *As you are objection to the case, I'm advised I'm still in time to raise these concerns and will get a solicitor to do my F1 form if no settlement can be reach through early resolution"*

3.9 On 10th February Ms Daw wrote to the tribunal in Bristol forwarding the claimant's email of 9th February and applied for the claimant's first 1406410/2019 to be dismissed on withdrawal. Ms Daw added in her email that the claimant had been copied in on her email and advised that the claimant should set out his objections in writing as soon as possible if he objected to the dismissal application. Ms Daw also confirmed that the claimant should seek legal advice from his if he was unclear on the matter.

3.10 In response to Ms Daw's email the claimant emailed the tribunal on 10th February 2020 stating:

> "*I can confirm that I believe the solicitor Catherine Daw was correct in her assumption that this case on the balance of [probability] would be struck out. However this is due to technical reasons with the claim rather than substance.*
> *Consequently I'm happy to confirm that I wish to withdraw the tribunal claim I wrote on 26th December 2019. As time allows a new case has [been set] out."*

3.11 On 12th February 2020 the tribunal clerk acknowledged receipt of the claimant's notice that he had withdrawn his claim and confirmed that the file would be retained until February 2021 and then destroyed. It stated that a dismissal judgment would follow in due course.

3.12 Two weeks later on 26th February 2020 a dismissal judgment was signed by EJ Midgeley.

Submissions

4. ***The respondent's submissions are summarised as follows:***

4.1 The claimant referred in his withdrawal letter to the tribunal that he was bringing a new claim;
4.2 the claimant described his claim in the first claim as based on hurt feelings of whistleblowing, discrimination because of disability and public interest disclosure;
4.3 the claimant admits to having taken legal advice prior to withdrawing his claim but now claims it was not professional legal advice, but informal advice taken from someone who had been through the tribunal process;
the second claim revives his claim of disability discrimination and public interest detriments which have already been decided upon;
4.4 additionally the case of Henderson is relied upon, namely that a party is precluded in subsequent proceedings from bringing matters which could and should have been raised in earlier proceedings.

5. With specific reference to the first claim and second claim grounds of complaint [cross referencing 1 – 14 paragraphs in the first claim with the numbered paragraphs in the second claim:

Claim no. 1 Page 16 of R's bundle part 1 – para 3 – without criticising C it is sometime difficult to seek out what the allegation is – the complaint is dismissal from Amberley Ward after making a disclosure of his disability (PTSD) and asking for a work place adjustment – the adjustment was to work on the opposite shift to another employee. This is estopped by para 13 – it is the same ward, Amberley Ward, and the same time frame – note in para 3 of ET no. 2 he refers to July 2019.

Claim no 2 Para 5 of ET no. 2 is in the original ET1 at para 2 - whistleblowing reference September 2019 supervision meeting with Sharon Waghorn.

Claim no. 3 ET no. 2 para 6 is para 2 of ET no. 1
Para 7- excellent feedback during supervision with SW then suffering detrimental treatment is in paras 2 and 3 of ET no. 1

Claim no. 4 ET no. 2 is Para 8 Gavin Wright's delay in starting investigation of bullying and harassment – raised in para 7 of ET no. 1

Claim no. 5 Para 8b of ET no. 2 complaint of a failure around bullying and harassment – see ET no. 1 at para 9 and possibility para 10. Failure to abide by policy.

Para 9 of ET2 – wanted peace of mind – public concerns not acted up and requests denied - - illegal use of medication to service users – related to para 2 of the ET no.1 and also the earlier references to concerns not being acted upon – a rephrasing of his concerns in para 10 ET no. 1

Claim no. 6 Para 10 of ET no. 2 – essentially that Gavin Wright failed in his duty of care, failed to follow trust policy – this is essentially repackaged of paras 7 to 10 in original ET no. 1 – complaint to GW – refusal to investigate bullying and harassment and policies and procedures not being followed
Para 11 – a deliberate failure to act for five months – needs more particularity. Arguably para 11 is covered off with paras 9 and 10 in original ET no. 1 in tht Jane Bunce refused to follow procedures and policies. Ie. under claim no. 6.

Claim no. 7 Para 12 of ET no. 2 is CUD - a new claim - claimant complains that he was "*subjected to multiple breeches of contract – failures to grant WPA, failure to investigate C's complaints around the detriment to whistleblowing and discrimination."*

Para 13 and unnumbered para immediately below: But claimant resigned on 27th Feb 2019 and this is a restatement that procedures not being followed and Jane Bunce's investigation not being done quickly enough.
Also Protected disclosures that he contends were raised in the original ET1 at para 2.
There is a complaint about OH reports in original ET no. 1 at para 8, para 10 and 11, and failure to make adjustments at para 12 and 13.

Claim no. 8 the paras immediately below para 13 is a restatement of delays/ detriment, however should the court not agree – although a longer time period, the essential ingredients are in the ET no. 1 that have just been mentioned

Claim no. 9 Discrimination case 1 para 14 – 18 – these all have the essential ingredient contained in para 13 of the original ET1 namely that adjustments were not made for Mr Lingard, he says, when working in Amberley ward at Eastbourne. This is contained in the ET1 original at para 13 but also he is very significantly out of time.

Claim no. 10 Para 19 – considering paras 14 – 18 this is also a cause of action or issue estopped as clearly relying on the same matters of para 14 – 18 outlined in para 13 of the original, but further to that at 19A the complaint is that

essentially that normal process is not being followed. That is a policy and the claimant complained to the CEO and Chief Nurse that policies and procedures were not being followed.
Same point at 19B as well.

Claim no. 11 Para 19C- this para challenging R on how easy an adjustment is to implement - is clearly related to the claimant's problems when he was on placement at Eastbourne. R says that because looking back at 18, 17, 16 he is referring to Mr Plant, his line manager. That is estopped by para 13 of the original ET1 where C refers to Darren plant refusing him reasonable adjustments.

Claim no. 12 The following paras are narrative. The next complaint is at paras 27 - 29 – the failure of Mr Wright to redeploy him to another ward after receiving OH report – he complains in the original ET1 at para 7 and in the original ET no. 1 at 12 -1 4 he complains that no support because refused reasonable adjustments.
Para 27 is the same as 12 – 14 just repackaged.
At para 30 C refers to a complaint to Judy Lake about another reasonable adjustment turned down – fits into his original complaint that reasonable adjustments weren't made in ET no. 1

Claim no. 13 - in ET no. 2 Paras 31 – 34 are about failure to make reasonable adjustments and failure to support a return to work, referring to Plant – covered in para 13 in the original ET no. 1 – complaints about Mr Plant.

Claim no. 14 Para 35, ET no. 2 – a criticism of Wright response to OH – dealt with at para 7 and 8 of the original ET no.1 – where Wright is named and two health reports in para 8 and it didn't happened in para 9 of ET no. 1

Claim no. 15 ET no. 2 Allegation para 38 – new complaint - jurisdiction time point which I will pick up later. Here a complaint about things not being speeded up – investigation speed – dealt with at para 9 of the ET no. 1
ET no. 2 Para 39 - must be referring to C falling out with a couple of other nurses and shift patterns weren't changed and his placement had to change – dealt with in the original ET no. 1 at para 13.
No consideration given to bullying and harassment in its own right – referring to Mr Plant – see para 13 of original ET no. 1
C complains about no consideration of act of dismissal of a serious incident of bullying and harassment in its own right, - dealt with at para 9 ET no. 1 and Plant's refusal to make reasonable adjustments - dealt with in the ET no. 1 at para 13

Complaint no. 16 ET no. 2 Para 40 meeting Ms Waghorn – meeting referred to in ET no. 1 at para 1 – paras 40 – 44 inclusive all hinge on meeting with Ms Waghorn referenced already in ET1 and is estopped.

Complaint no. 17 The similarity continues in para 45 where C refers to a number of complaints about work not previously raised with him – para 3 of ET1 no. 1
Para 46 the C recounts being subjected to humiliating treatment to other staff members – dealt with at para 4 of ET no. 1
Para 47 and 48 – being told to stay off sick after raising his concerns and this is covered in 5 and 6 of the ET no. 1 – matron suggested that he stay off work sick.
Para 49 he telephoned Christine Sage, that is not considered in the original ET1 because it relies upon the facts of what happened to him after his meeting with Ms Waghorn, which he raises in ET1 no. 1 if not with me on that then it should have been raised in the original ET no. 1 and because of wasn't he can't rely on it now. Henderson
And the same point at paragraph 50.

Clam no. 18 ET no. 2 and also para 51. See para 6 ET no. 1.
Para 53 – the investigation didn't happen quickly enough – dealt with at para 9 of the original ET1.

Claim no. 19 ET no. 2 Para 54 OH report addressed to Ms Waghorn not acted on - ET no. 1 at paras 8 – 11 deals with OH report not being enacted upon.
Para 55 – starts with a date 31/10/2019 that C getting upset that no investigation of detrimental experience – they are referenced in the original ET no. 1 and at the very least is issue estopped if not cause of action estoppel, - para 9 of ET no. 1 C had a meeting with Ms Bunce and she refused to widen the ambit of her investigation – see para 9 – they are one and the same thing.
Para 56 – "WP exit talks" not to be referred in the claim
Para 57- he refers to Mental Health Act audits and him wanting to see outcome of investigation – relates to protected disclosure and Miss Waghorn at para 2 of the ET1 and although the claiant has widened the time period up to February 2020 – the essential ingredients of protected disclosure and Ms Bunce's investigation are in the original ET no. 1 at paras 2 and 9.

Claim no. 20 ET no. 2 At para 58 C complains of Ms Bunce's failure to investigate his detrimental experiences and that is the same issue as at para 9 of the ET no. 1
And the same point for para 59 ET no. 1 at para 9

Claim no. 21 ET no. 2 at Para 60 – the absence of a dignity work investigation conducted under Dignity a Work policies – at para 10 of the ET no. 1 C references meeting CEO and chief nurse to raise concerns why policies and procedures not being followed – if wrong on that should have been raised in the ET no. 1and an abuse of process
Para 61 – reference ET no. 1 para 9 and if wrong about that it should have been in the original claim.

Claim no. 22 of ET no. 2 - At para 62 the claimant raises concerns about time for his concerns to be addressed – about the process - see para 7 of ET no. 1;

He says key issue of personal harassment could be heard to day as was not in her remit- that is, Ms Bunce's remit, also dealt with in para 9 of ET1 no. 1 .
Para 63 not an allegation

Claim no. 23 of ET no. 2 at Para 64 – the OH reports not being acted upon by Gavin Wright. That is dealt with from para 8 in the ET no. 1 and paras 10, 11 and 12 which we say at the very least have essential ingredients of this claim that policies and procedures not followed – doesn't say OH reports not followed, that is clearly the implication – he says at para 11 they were aware of my mental health condition and advised by Mental health team and at para 12, I got no support on return to work and para 13, I received no reasonable adjustments. That para 13 is out of chronology – the point made there was post September for returning to work, but para 64 – OH reports not being speeded up or acted upon, that is set out in the original ET no. 1
Same point made for para 65
Para 66 – the reasonable adjustments requested were turned down. Para 12 of the ET no. 1 – the same issue being dealt with there.
Para 67 isn't an allegation - relates to a third party.
Para 69 is a reference from Mr Wright dated 14/11/2019 and it refers to the ambit of the report from Jayne Bunce – para 9 of the ET1. What the claimant has done here is tagged on the full report released in February 2020 and what we say that is just a device to try and create an impression of distinction to bring the matter in time in the ET no. 2 whereas the original essential ingredients of the complaint are in para 9.
Page 33 – para 68 widening the ambit of meeting with Mr Allen already in para 10 of ET no. 1
He carries on in paras 71, 72 and 73 essentially that conversation with Mr S Allen didn't actually happen to widen the ambit. But we say that the essential ingredient is at para 9 and if not with me on that Henderson applies – it could and should have been advanced in the original ET1.

Claim no. 24 ET no. 2 Trust policies not being following and too narrow ambit for Jayne Bunce's investigation is in the original ET1 and paras 9 and 10.
Para 74 not an allegation

Complaint no. 25 ET no. 2 at Paras 75 – 78 a complaint that the Trust took too long to investigate into whistleblowing but in terms of the res judicata cause estoppel, this hinges on the original claim that there was a protected disclosure at para 2 of the ET no. 1 which he withdrew and cannot litigate upon.

Complaint no. 26 ET no. 2 at Para 78 appears to be saying that the claimant got increased symptoms of PTSD from trauma from September 2019 onwards referring occupational health advice and delays. And failure of policy which we say are the essential ingredients are in ET no. 1 PTSD at para 14, intended Protected disclosures at para 2 and purported Negligence of G Wright at paras 7, 8 and 9 of the ET no. 1

Failure of OH and being inactive at paras 8 and 9 of ET no. 1
Para 79 hinges on Jane Bunce's report but doesn't seem to be raising in that para or in para 80 or 81.

Complaint 27 – ET no. 2 4 Case 3 – 7b Complaint against Mr Wright trying to cover up findings of poor patient care - for not doing what he should have which is essentially what paras 7, 8, and 9 of the original ET no. 1 states
On page 38 – Oct – Nov – complains about not keeping C informed, this part no covered in the ET no. 1 unless it is a policy which he says is not being followed which is covered in ET no. 1 at para 10.
Allegation of a serious failure to act by Mr Wright – a reheating of complaint against Ms Bunce's investigation and is covered in para 9 of the ET no. 1
In February 2020 page 38 and extension of broadening out the time and the complaint about not doing a proper investigation already trailed before that date.
The support for that position is in last para page 38 – refers to a meeting with Ms Bunce on 31st October 2019 and original ET no. 1 was 26th December 2019.
Page 39 (73) Mr Wright stated to have refused to start a prompt investigation and refers to a letter he wrote on 13th November 2019 – a reheating of a claim that the ambit wasn't wide enough in the Ms Bunce investigation and falls foul of the Henderson Rule and should have been advanced in earlier proceedings.
Page 39 (1) – ignoring OH advice – covered in ET no. 1 in paras 11, 12 and para 8 re speed of investigations.
Speeding up of investigations also at para 2 on page 39 and we make the same allegation in relation to that.
Page 39 last para – brings together by saying Wright trying to cover up findings of poor patient care – a device to bring a claim against Wright into time because constituent parts were clear to the Claimant from October and November 2019 – referenced in ET1 in para 7 – criticism, para 8 report not speeded up, para 9 and para 10 not following polices and procedures not followed.
And it is res judicata, but otherwise cause of action estopped/Henderson as it could have been raised in the original ET no. 1

Claim no. 28 ET no. 2 at Page 40 constructive dismissal.
C says there was a serious breach….. relates to C's protected disclosures in September 2019 referenced in his ET no. 1 in para 2 and the detriments that he encountered after that at paras 3, 4, 5 and 6 and 8 of the original ET1.
Page 41 – a vacuum of 21 days and how his mental health deteriorated – para 14 of the original ET1 he refers to his PTSD but I need to make clear that is in reference to the protected disclosure made in September 2019 – and in the original ET no. 1 his PTSD has been exacerbated and what he puts at page 41 is essentially that claim again but with a wider time frame, impermissible now that he withdrew his claim.
On the basis of the above, the claim is barred due to abuse of process.

6. ***The claimant's submissions***

The claimant's submissions can be summarised as follows:

6.1 I struggled at the time with my English and grammar and I have not been well;

6.2 Res judicata does not apply to this case. The tribunal must consider whether the claimant withdrew of his own free will, and the motive for withdrawal by an unrepresented party who was sick and was making a claim for the first time;

6.3 According to AKO v Rothschild Asset Management 2002 IRC 899 the court can take into the account the factual circumstances of withdrawal in order to understand its meaning and effect and reasons for withdrawal, where reasons for withdrawal shed light on the crucial issue of whether the person was withdrawing the application and intended thereby to abandon his claim or course of action.

6.4 Rule 52 (a) was intended to help the court to deal with people who make an honest mistake.

6.5 I didn't take legal advice; I was unwell, I didn't get a solicitor.
I stated it was not down to the strength of the case for technical reasons.
There was no delay in filing the second complaint

6.6 A judge has a responsibility to make sure that a claim understood the effect of a decision to withdraw. He had a duty to make a reasonable inquiry as I was a litigant in person. A knowledgeable judge would have realised that I wanted to relitigate. It was my lack of knowledge of the court system.

6.7 Res judicata doesn't apply. The claims in the first claim were substantially in time. Discrimination continued after December 2019.

6.8 The overriding objective requires the parties to be on an equal footing. I was unwell, trying to make an honest claim and to expand on it. In the interests of justice the clams should be kept alive.

6.9 There were serious issues going on, cover up; the whole case needs to go forward on the full facts.

The law

7. The law is set out in rules 51 and 52 of the ETs (Constitutional & Rules of Procedure) Regs 2013 Sch. 1

End of claim

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

Dismissal following withdrawal

52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless –
(a) the claimant has expressed at the time of withdrawal a wish to reserve the
right to bring such a further claimant and the Tribunal is satisfied that there would be legitimate reason for doing so; or
(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.'

8. I also made reference to rules 70-72 for the benefit of the claimant.

9. I was referred to AKO v Rothschild Asset Management 2002 IRC 899 by the claimant. The respondent referred me to a relevant passage from the IDS handbook and Biktasheva v University of Liverpool, EAT 0253/19.

Conclusions

10. When the Employment Judge signed the dismissal judgment on 26th February 2020 he had before him on the tribunal file the emails set out in full above at paragraphs 3.8 and 3.10. The claimant submits to me now that it is clear from his email that he had at that time no intention to abandon his claim. He relied on two phrases in particular in relation to the belief that he thought his claim could be struck out, it was

"*due to technical reasons with the claim rather than substance."*

and

"As time allows a new case has [been set] out."

11. The claimant did indeed file another, fuller claim in the London South Tribunals on 9th March 2020, case no. 2300941/2020 (the second claim) .

12. The respondent claims that this second claim of 9th March 2020, is entirely res judicata or otherwise caught by the principle of Henderson v Henderson which is that where there is a new cause of action that could and should have been brought in previous proceedings, but was instead brought in the new proceedings, it is likewise estopped.

I have given this considerable thought. A lot hangs on it from both parties' points of view. My conclusions are as follows:

13. I am unable to ignore the dismissal judgment of EJ Midgely and proceed with hearing the other issues in this Open Preliminary Hearing. As it stands, the elements of the second claim which are found in, and are repetitive of, the first claim are, in law, res judicata. There is nothing I can do about that. I cannot overturn the judgment of EJ Midgely as I do not have the jurisdiction to do so.

14. At the time that EJ Midgley signed the dismissal judgment on 26th February 2019, two weeks after the claimant's email withdrawing the claim, he will have seen the email exchange between the claimant and Ms Daw and the claimant's email of withdrawal in the tribunal case file. He will also have been aware of rule 52. I must assume that EJ Midgley signed the dismissal judgment with rule 52 in mind and he did not consider that the claimant had reserved his right, adequately or at all, to bring such a further claim, especially in view of the warning that Ms Daw had given the claimant – a warning to seek legal advice. I must also assume that EJ Midgley did not believe issuing the judgment was not in the interests of justice.

15. The case law to which I have been referred is clear. Cause of action estoppel prevents a person from bringing a claim that raises a cause of action that is identical to that which has been previously determined. EJ Midgley's dismissal judgment was a determination. Even though there may be new evidence relating to the same causes of action, there can still be no re-litigation.

16. The two possible courses of action for the claimant at the time of the dismissal judgment would have been to have left his claim form filed with the Bristol tribunal and provided further and better particulars of his claim when they were requested by the respondent and ordered by the tribunal.

17. The alternative and equally appropriate course of action for the claimant to have taken, would have been apparent to him if he had taken legal advice or done his research at the time – he could have made an application under rules 72 and 72 within 14 days after 26th February 2020 seeking a reconsideration of the dismissal judgment by EJ Midgley. Had EJ Midgley revoked his dismissal judgment following an application for a reconsideration, the problem of res judicata would not arise. A withdrawal of claim without a dismissal judgment leaves the claim potentially 'live' because there has been no judicial determination. Once a dismissal judgment is made under rule 52, the claim is extinguished.

18. Unfortunately the claimant did not make that application. A year later, he is now out of time unless he can persuade the relevant judge it would be in the interests of justice to extend time. If it is not possible for EJ Midgley to consider a reconsideration application, under rule 72(3) a Regional Judge can appoint another judge if it is not reasonably practicable for EJ Midgley to consider a reconsideration application.

19. I should add for the avoidance of doubt that there is no discretion that I can exercise to get around the res judicata point relating to the first ET1 dismissal judgement. I have no discretion to exercise on the res judicata point under "in the interest of justice" as the claimant submits. It is a strict application of the law and of the tribunal rules. The possibility to exercise discretion arose earlier under S52 (a) and (b) with another judge, Employment Judge Midgley. Only he can rebut my assumption that he had taken into account the emails on the tribunal file when he made his decision.

20. The situation in summary is therefore that the second claim, the current ET1 2300941/2020 grounds of complaint cannot be pursued; they are res judicata to the extent that they are repetitive of the first claim case no.140641/2019.

21. New information and new causes of action can be pursued ***provided*** they do not rely on the already pleaded facts and causes of action in the first ET1. The respondent submitted yesterday that virtually if not all of the grounds of complaint in the current second claim relate back to the first claim and are therefore res judicata/ or Henderson v Henderson applies – ie. that the claims could and should have been raised in the first claim and were not, and they are therefore estopped.

22. The claimant did not respond at any of those submissions which cross referenced the complaints as identified by the respondents in the second claim, with the complaints in the first claim.

23. I have read the first and the second claims and I have read the cross referencing between the by the Respondent.

24. The cross references related to fourteen paragraphs in the first claim which we numbered manually during the course of the hearing 1 - 14, and the 28 claims which had been identified by the respondents in the second claim and set out helpfully in the respondent's submissions.

25. The grounds of complaint of the second claim were lengthy and combined a mixture of causes of action/allegations, statements of law, statements of fact observations and opinions on the respondents' conduct. The claimant did not object to the respondent's identification of the 28 complaints within the narrative

of the second claim grounds of complaint, as were set out in a schedule contained in Mr Burke's submissions and provided to the claimant.

26. I took detailed full note of the respondent's submissions identifying each claim in the second claim having been either claimed in, or having its origins in, the claims set out in the first claim. There was no immediately identifiable shortfall in the exercise undertaken by the Respondent. The claimant did not challenge either the identification of his claims in the second claim form, nor the submissions made by the respondents that each of the identified claims related back to the first claim either in cause of action or because of being based in the same pleaded facts. Nor did he raise any objection to the points where the respondent had relied on Henderson.

27. The claimant was on notice of the respondent's approach to the res judicata point which obviously needed further detailed consideration by the claimant; it is for him to identify where his claims are new and not subject to res judicata or the Henderson principle.

28. The respondents' submissions have been carefully thought through. The claimant focussed in his submissions on how the Employment Judge issuing the dismissal judgment should have acted differently. With regard to an analysis of the cross referencing between the causes of action and facts pleaded in the first and second claims, the claimant's view it was "*was in interests of justice to allow the case to go ahead in full. Just go ahead and don't deal with this amount of detail".* In the absence of anything but a blanket comment from the claimant that I should not bother with all this detail and no contribution from the claimant to the analysis of his claims by the respondent, my decision is that the second claim [2300941/2020] is res judicata and cannot be pursued. For the avoidance of doubt, I have accepted that the constructive unfair dismissal claim was, in title, a new claim but it relies on allegations pleaded in the first ET1. Therefore Henderson applies.

29. The claims are dismissed in their entirety. The other issues to be determined now fall away.

Employment Judge A Richardson
Reasons signed on 29th March 2021