EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	Respondent
Mrs N Leeks		**Kings College Hospital NHS Foundation Trust**

TELEPHONE PRELIMINARY HEARING

HELD AT **London South** **ON** **1 June 2021**

EMPLOYMENT JUDGE G Phillips

APPEARANCES:

For the Claimant: **In person**
For the Respondent: **L Harris, of Counsel**

RESERVED JUDGMENT

The Respondent's application to strike out the Claimant's complaint in case number 2302214/20 is successful. This claim number 2302214/20 is accordingly struck out.

REASONS

1. I shall, for ease, refer to the parties as the Claimant and the Respondent. References to rule numbers below are to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. References to page numbers **[xx]** are to the 197-page Bundle of documents that the Respondent had prepared for the purposes of the Preliminary Hearing. References to **[§xx]** are to individual paragraph numbers in specifically identified documents. In addition to that Bundle, I had, as a separate document, the Statement of Claim attached to the Claimant's ET1 in this claim, which had been erroneously omitted from the Bundle due to an oversight on the Respondent's part. I also had copies of recent

correspondence between the Claimant, the Respondent and the Tribunal with regard to the Claimant's request to vacate today's hearing.

2. This hearing was listed as an Open Preliminary Hearing, for today, at the Respondent's request, to consider an application by it that the claims made by the Claimant in this case number 2302214/20 should be struck out.

Procedural background

3. The Claimant, who is unrepresented, brought four claims against the Respondent between 2017 and 2018: (2302989/2017 (hereinafter the "First Claim"), 2300701/2018 (hereinafter the "Second Claim"), 2300721/2018 (hereinafter the "Third Claim") and 2304009/2018 (hereinafter the "Fourth Claim")). Copies of these claims, in the forms of ET1s, ET3s and key communications from the Tribunal about them, were in the Bundle [1-159].

4. In brief, the Claimant was employed in a Band 2 Healthcare Assistant position at the Respondent hospital, which is based in Camberwell in London, between 15 February 2016 and 20 July 2017. Her First Claim **[2-27**] dated 19 October 2017, makes claims (1) of discrimination on the grounds of age, religion or belief, race, disability and sex, (2) for notice pay, holiday pay and other payments; and (3) for victimisation, whistleblowing, harassment and bullying against 5 named Respondents, including the Respondent in this case, Kings College Hospital HNS Foundation Trust. The claims all arise out of the Claimant's employment with the Respondent between 2016-207.

5. The First Claim contains a detailed set of factual allegations made against the Respondent and the various named individuals. These include details of an incident on 6 October 2016 arising out of the Claimant's use of the spiritual sanctuary room at Kings **[§53-89],** which apparently ultimately led to her dismissal in July 2017. It also referred to issues relating to allegations about eating patient's sandwiches and leaving bandages on food trays **[§108-110];** to whistle blowing **[§10, 111, 112]**; to issues relating to annual leave **[§13,27,33];** and to issues arising out of references **[§106, 114]**. The Respondent in its ET3 **[§28-54**] denied the claims, submitted many dated back to what it described as "discreet and unconnected allegations" from 2016, and says that the Claimant was summarily dismissed for gross misconduct. It is fair to say that the facts underlying this First Claim are hotly contested.

6. The Second Claim **[69-81]** was issued on 25 February 2018 against the Respondent and arises out of the withdrawal of a job offer to the Claimant by Cambridge University Hospitals NHS Foundation Trust in December 2017, on the grounds of lack of satisfactory pre-employment checks, arising from an allegedly unsatisfactory employment reference from the Respondent. This Second Claim refers **[paragraph 8.1 of the ET1 form]** to whistle blowing and victimisation; and to the provision of references being "negative, malicious", and amounting to victimisation, a detriment and backlisting **[§2, 6, 7**]. The Respondent in its ET3 **[§82-94]** denied that the reference was malicious or amounted to victimisation, or that it was direct discrimination, or that it amounted to a detriment on the ground of making a protected disclosure. It says that its employment reference was

factually accurate, reasonable, and appropriate. It denied that the reference was connected to any protected characteristic of the Claimant and/or to the fact of "her history (as alleged in the ET1) of being an NHS whistle blower".

7. The Third Claim **[96-109**] was issued on 26 February 2018 and referred to a similar post dismissal detriment and discrimination complaint as set out above with regard to the Second Claim, this time in regard to a job offer at Brighton and Sussex University NHS Trust. This refers **[paragraph 8.1 of the ET1 form**] to whistle blowing; and to the provision of references being negative, malicious, and amounting to victimisation, a detriment and backlisting **[§2, 5, 7**]. The Respondent's ET3 **[§110-121**] contains similar denials as in the Second Claim.

8. At a Preliminary Hearing on 31 July 2018, the first three claims were consolidated by agreement.

9. The Fourth Claim **[131-146**] was issued on 7 November 2018 against this Respondent and one of the individuals named in the First Claim. It made a number of complaints about annual leave and various other financial matters and also made similar post dismissal detriment and discrimination complaints as set out above with regard to the Second and Third Claims, this time in regard to internal posts at Croydon Healthcare NHS Trust and/or University College Hospital London NHS Foundation Trust in or around July 2017. This refers, amongst other things to the Claimant's history of whistle blowing, and victimisation, [**paragraph 8.1 of the ET1 form and §43**]; to issues around annual leave **[§8**]; and to the provision of references being malign and amounting to a post-employment detriment **[§15, 19, 39]**. The Respondent's ET3 **[147-159**b contains similar denials as in the Second and Third Claims to the post-dismissal complaints and specific denials with regard to the other claims, a number of which the Respondent said out of time.

10. A hearing in respect of all four of these claims took place over ten days in July 2019 but went part-heard. The Claimant gave and concluded her evidence, as did one of the Respondent's witnesses. Owing to the impact of the Covid-19 pandemic, the remainder of the case has now been listed to take place over five days in early August 2021.

11. On 20 April 2020, the Claimant completed an ACAS Early Conciliation Notification form with regard to a fifth claim. On 19 May 2020, the Early Conciliation period was extended, and on the 27 May 2020, ACAS issued the Early Conciliation Certificate. The ET1 in this fifth claim was issued on 2 June 2020 (case number 2302214/2020: herein after the Fifth Claim) [**161-172**]. The Respondent filed its ET3 Response [**173-186**] on 14 August 2020.

12. In this her Fifth Claim against the Respondent, the Claimant ticked the boxes for claims of religion or belief, race, sex and disability (but not age). She also made claims for "other payments" and has ticked the box for making another type of claim that the Tribunal can deal with. In that box she has written:

> "Whistle blowing victimisation by Kings College Hospital NHS Foundation Trust, for my 2010 history of raising concerns in a responsible manner during my employment period at St George's Healthcare NHS Trust … and whistle blowing victimisation for my having also raised concerns during the course of my (2016? 2017) employment period with King's College Hospital NHS Foundation Trust"

13. The Claimant attached a separate Statement of Claim to her ET1. In that she raised post dismissal detriment and discrimination complaints in similar terms as set out above with regard to the Second, Third and Fourth Claims, in regard to a Laboratory Aid position at the Royal Wolverhampton Hospital NHS Trust, for which she had applied in November 2019. She says that she made a number of disclosures in her employment application to the Respondent including that (1) she had been dismissed from a previous NHS employment (St George's Healthcare NHS Trust) on account of "whistle blowing victimisation allegations of unauthorised access to HR employee files that were made against me"; and (2) that she had been dismissed without notice by the Respondent, King's College Hospital NHS Foundation Trust, on 20/07/2017, as "disciplinary sanction for my action on Thurs 06 October 2016, of having a 5 minutes quiet meditation (during my unpaid lunch time break) in the multi faith KCH NHS FT spiritual Sanctuary meditation room for non-Muslims and non-Christians".

14. The Claimant says she was interviewed by the Royal Wolverhampton Hospital NHS Trust and received employment offers, but that on 28 January 2020, the Trust withdrew the offers on the basis of failed pre-employment checks. On 20 April 2020, she says the Royal Wolverhampton Hospital NHS informed her the job offer(s) were withdrawn on account of the nature of reference received from the Respondent.

15. In addition to the complaint about post dismissal detriment and discrimination arising out of the withdrawal of the job offer, the Statement of Claim refers to a number of other matters, including

- "Adverse Detriments meted out by the Respondent to claimant in the period of time from 15 February 2016 – 20 April 2020 and currently still ongoing";
- denial of her employment rights of 20 Minutes uninterrupted rest breaks – in respect of various instances but "most notable incident being the 06 October 2016";
- denial of her rights of freedom of worship – "notable incident being the 06 October 2016";
- denial of line management by Band 6 Charge Nurses;
- "victimisation for my history of whistle blowing – during my employment period with St George's Healthcare NHS Trust, and victimisation for my raising concerns about the KCH NHS FT staff pilfering of patient's food, using of Patient's Fridge, and leaving blood stained wound dressings/ bandages on patient's food service trays";
- denial of a fair and balanced employment reference;
- "detrimental treatment of false claims made by Denny Paterson of being my line manager and claims made by Denny Paterson that only he must provide employment reference information about me – which claims are contrary to NHS Jobs guidelines for who can be a referee and which claims of Paterson is contradicted by other Ward Managers and Matrons in KCH NHS Trust".
- "detrimental of being falsely accused of feigning illnesses and disability symptoms";
- "detriment of being perjured in an employment reference by the Respondent, who are still to date mischaracterising my action of taking a restful break as a misconduct";

- "detriment of being subjected various ad hominem fallacy propaganda in various managerial documents about me and about various aspects of my working life.";
- "continuous ad hominem attacks directed against me in such documents such as KCH investigation reports, wherein also demeaning comments were made even on occasion I had rib fracture";
- the incident in the sanctuary on 6 October 2016;
- breach of trust by the Respondent;
- lack of notice by the Respondent;
- a failure by the Respondent to refer the Claimant to occupational health on capability grounds;
- the Respondent's "malicious pretentions of not being in full knowledge of my disability";
- the Respondent's "continuing detrimental actions of giving me false employment references wherein the Trust are continuing maligning me by spreading the false rumours that I have committed a misconduct of restful break in a 24/7 public access sanctuary despite the fact of my behaviour being in compliant with the Trust guidance of standards of behaviour expected of staff working with Patients".

16. In the Grounds of Resistance accompanying its ET3 Response, the Respondent said the Claimant's claims were misconceived. It asked **[§37**] for the Claimant to provide Further and Better Particulars of her complaints of race, religion or belief, sex, and disability discrimination as well as with regard to any complaint of whistleblowing detriment, and the claim for "other payments". The Claimant has not provided any such particulars. The Respondent also raised four jurisdictional arguments with regard to the totality of the Claimant's Fifth Claim, and sought a strike out of it.

17. The Respondent made an application in the Grounds of Resistance, [at paragraph 13] for an urgent Preliminary Hearing in order to determine these matters. The Respondent argued that it was incumbent upon the Tribunal to determine any matters of a jurisdictional nature and that it was proportionate and reasonable for that determination to take place in advance of the resumed Hearing on the First – Fourth Claims in August 2021, because the outcome of the Preliminary Hearing may have a bearing on the Hearing in August 2021.

18. By Notice dated 15 December 2020, unfortunately wrongly headed Case Number: 2302989/2017 (i.e the case number of the First Claim) Employment Judge Freer directed that there should be a Preliminary Hearing on 5 March 2021 to consider the Respondent's Strike Out application.

19. On 29 December 2020, the Claimant applied to vacate the 5 March hearing, on the basis, amongst others that the Respondent had not applied for "a strike out application against claimant's case 2302989/2017" and that this claim was part of a part-heard claim, heard in July 2019 and adjourned and due to be reconvened in August 2021. The Claimant also suggested in general terms that she was unable to attend the Preliminary Hearing by reason of ill health and/or any medical appointments. She set out a list of the symptoms and illnesses that she says she suffers with.

20. The Respondent objected to the Claimant's request for the Preliminary Hearing to be vacated. The Claimant responded to say that the Fifth Claim had not been consolidated with the First Claim, and hence should not be "fraudulently subsumed into claims 2302989/2017" - which claim had been ongoing since 2017. She said that the First Claim was sub judice and "hence it is a gross abuse of the due process and abuse of the rule of Law, and a gross error of law, for an employment Judge to list the claim for a Strike out hearing".

21. On 4 March 2021, the Tribunal wrote to the parties to tell them that the Preliminary Hearing listed for 5 March 2021 would be vacated because it referred to the First Claim, when it should have referred to the Fifth Claim. It said the strike out hearing should relate to the Fifth Claim only. A telephone Preliminary Hearing was listed for today, 1 June 2020.

22. Subsequently, the Claimant further sought (by emails dated 5, 16 and 28 May, and 1 June) for a variety of reasons, mainly around her medical symptoms and general health, to vacate the Preliminary Hearing or for the hearing to be dealt with on the papers or for written reasons. That request was refused at the time by the Regional Employment Tribunal Judge. Having read the papers in advance of today's hearing, I was not satisfied that it would be in the interests of justice to adjourn this hearing, which is to deal with one discreet matter, which needs to be dealt with in a timely manner because of the listing of the part-heard hearing in the First-Fourth Claims for early August. By the time I was ready for the hearing to commence, I had read the papers carefully and was ready to proceed with the case. In the event, the hearing went ahead as planned on 1 June. The Claimant appeared on the telephone call at the appropriate time and participated fully in the hearing. Other than the general concerns she had already expressed in her prior communications with the Tribunal, she did not raise before me any specific health impediments as impacting on her ability to participate in this hearing. She made her points clearly and with energy and determination.

23. One particular point that the Claimant made at the outset was that she had not been sent a copy of the Bundle. Mr Harris, having checked with his client, disputed this. The Claimant remained adamant that the Respondent's solicitors had refused to send her the Bundle or the Index to it. She said that the Respondent had not prepared honestly for the case. I considered whether this created unfairness to or prejudiced the Claimant at this hearing. I considered the contents of the Bundle, which consisted of the ET1s, ET3s and communications from the Tribunal in all the claims [1-159]. [As mentioned, the Statement of Claim in the Fifth Claim was provided separately]). I felt that the Claimant would be very familiar with the contents of the various ET statements of case; it appeared this Bundle had been prepared as much as anything, for my benefit as the Judge hearing the case. The Bundle did not contain any extraneous documents or evidence. In the circumstances, I did not believe that, if the Claimant did not have access to it, this would have created any unfairness or prejudiced the Claimant at this hearing. In her presentation to me, the Claimant demonstrated her familiarity with the contents and details of all her claims.

The Respondent's application

24. In the Grounds of Resistance accompanying their Response to the Fifth Claim, the Respondent says the Claimant's claims are misconceived. It also raised four jurisdictional arguments with regard to the totality of the Claimant's Fifth Claim, namely that: (1) no arguable case had been pleaded; (2) the allegations relied upon were out of time; (3) the principle of res judicata applied because the Claimant appeared to complain about matters which had already been heard in part at the Hearing in July 2019 and which were to be concluded at the Hearing in August 2021; and (4) the Claimant's claim constituted an abuse of process in accordance with the principle in *Henderson v Henderson*. The Respondent made an application in the Grounds of Resistance, **[§13**] for an urgent Preliminary Hearing in order to determine these matters.

Relevant rules and case law

Strike out

25. Rule 37 deals with striking out. It states that

> **"**(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

26. In *Johnson v Gore Wood & Co* [2000] UKHL 65, the House of Lords, as it then was, looked at abuse of process, (albeit in a company law setting), relating to litigating issues which have already been determined in prior litigation or by way of settlement. The Court considered previous decisions in relation to abuse of process. It stressed that the courts needed to find a balance between the proper administration of justice and avoiding defendants being vexed by duplicative litigation, and the need to ensure that persons with a proper claim were able to have those claims heard and determined. The court referred to what was known as "the rule in *Henderson v Henderson*" (see below) but said that rule had now evolved a long way from the original judgment after which it was named. They said the rule against abuse of process was similar to rule relating to cause of action estoppel but they were not the same. However, it said both were concerned with the same underlying public interest. The court was reluctant to set down hard and fast rules as to what would amount to abuse of process when claims which might conveniently have been brought at an earlier were only made at a later time.

Courts need to be mindful not to confuse the fact that a litigant *could* have brought his claims at an earlier stage with the proposition that he *should* have done so. Only in the latter case would it be an abuse of process to subsequently litigate those claims. The Court felt that the courts should take a broad, merit-based approach to account for the public and private interests involved (including a citizen's right of access to the court).

27. In *Blockbuster Entertainment Ltd v James* [2006] IRLR 630, CA, it was held that a power to strike out was a 'draconic power not to be too readily exercised'. See too *Tayside Public Transport Co Ltd v Reilly* [2012] IRLR 755 (Court of Session), *Rodrigues v Co-Op Group Ltd* (UKEAT/0022/12), *Harris v Academies Enterprise Trust* [2015] IRLR 208 and *Mbuisa v Cygnet Healthcare Ltd* (UKEAT/0119/18). Discrimination cases should, say the courts, rarely be struck out. In *Anyanwu v South Bank Students' Union* [2001] IRLR 305, HL, Lord Steyn stated:

> "For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

28. In *Arriva London North Ltd v Maseya* (UKEAT/0096/16)*,* Simler J stated there is nothing automatic about a decision to strike out. Rather, a tribunal is required to exercise a judicial discretion by reference to the appropriate principles. The EAT urged caution to be exercised where a case is badly pleaded, for example by a litigant in person, in *Mbuisa v Cygnet Healthcare Ltd* (UKEAT/0119/18).

Res judicata - cause of action estoppel

29. The doctrine of estoppel by res judicata was first formulated in *Henderson v Henderson* (1843) 3 Hare 100. It precludes a party from raising in subsequent proceedings matters which could and should have been raised in the earlier ones. It has two principles: issue estoppel and cause of action estoppel. Each is defined as per the explanation in *Arnold v National Westminster Bank plc* [1991] 3 All ER 41*:*

a. Issue estoppel – "…may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen the issues."

b. Cause of action estoppel – "…applies where a cause of action in a second action is identical to a cause of action in the first, the latter having been between the same parties or their privies and having involved the same subject matter."

30. The two principles of estoppel were considered by the Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 at [17] to [26]. Lord Sumption made clear in that case that the policy underlying these principles is a procedural rule against abusive proceedings [17].

Section 123 Equality Act 2010

31. Under s 123(1) Equality Act 2010, any complaints of discrimination must be brought within three months, starting with the date the act or actions complained of took place, or such other period as the tribunal considers just and equitable.

32. A useful overview of the principles that need to be considered in regard to the exercise of the "just and equitable" discretion is given in *Miller v The Ministry of Justice* [2016] UKEAT/0003/15:

> "10. There are five points which are relevant to the issues in these appeals. i. The discretion to extend time is a wide one: *Robertson v Bexley Community Centre* [2003] EWCA Civ 576; [2003] IRLR 434, paragraphs 23 and 24. ii. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule (ibid, paragraph 25). In *Chief Constable of Lincolnshire v Caston* [2010] EWCA Civ 1298; [2010] IRLR 327 Wall LJ (with whom Longmore LJ agreed), at paragraph 25, put a gloss on that passage in Robertson, but did not, in my judgment, overrule it. ..... iii. If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence. No authority is needed for that proposition. iv. What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET (*DCA v Jones* [2007] EWCA Civ 894; [2007] IRLR 128). The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases (ibid, paragraph 44). v. The ET may find the checklist of factors in section 33 of the Limitation Act 1980 ("the 1980 Act") helpful (*British Coal Corporation v Keeble* [1997] IRLR 336 EAT; the EAT (presided over by Holland J) on an earlier appeal in that case had suggested this, and Smith J (as she then was) recorded, at paragraph 8 of her Judgment, that nobody had suggested that this was wrong. This is not a requirement, however, and an ET will only err in law if it omits something significant: *Afolabi v Southwark London Borough Council* [2003] ICR 800; [2003] EWCA Civ 15, at paragraph 33.
> 11. *DCA v Jones* was an unsuccessful appeal against a decision by an ET to extend time in a disability discrimination claim. The Claimant had not made such a claim during the limitation period as he did not want to admit to himself that he had a disability. At paragraph 50, Pill LJ said this: "The guidelines expressed in *Keeble* are a valuable reminder of factors which may be taken into account. Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found. It is inconceivable in my judgment that when he used the word "pertinent" the Chairman, who had reasoned the whole issue very carefully, was saying that the state of mind of the respondent and the reason for the delay was not a relevant factor in the situation."

> 12. I should also say a little more about points 10(iii)-(v). There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses. ....
> 13. ..... It is clear from paragraph 50 of Pill LJ's judgment in *DCA v Jones* that it is for the ET to decide, on the facts of any particular case, which potentially relevant factor or factors is or are actually relevant to the exercise of its discretion in any case. *DCA v Jones* also makes clear (at paragraph 44) that the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive. But, as Mr Bourne put it in his oral submissions in the second appeal, the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts; and the facts are for the ET. .....

33. In *British Coal Corporation v Keeble*, the EAT advised that tribunals deciding whether or not to extend the time for presentation of a claim under what is now the Equality Act should consider in particular the following factors: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had cooperated with any requests for information; (d) the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action.

34. Where a number of discriminatory acts occur over a period of time, s123 Equality Act 2010 (EqA) also provides that these acts can be treated as one 'continuing act'. This means that the time limit for presenting a claim, in respect of the entire course of discriminatory conduct, will not start to run until the date of the last act of discrimination. Section 123(3) says (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it.

35. The approach to time limits in discrimination cases has been the subject of extensive consideration in the appellate courts. The starting point is the guidance provided by Mummery LJ in the case of *Hendricks v The Commissioner of Police for the Metropolis* [2003] IRLR 96:

> "51. In my judgment, the approach of both the Employment Tribunal and the Appeal Tribunal to the language of the authorities on 'continuing acts' was too literal. They concentrated on whether the concepts of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case: see *Owusu v London Fire & Civil Defence Authority* [1995] IRLR 574 at paragraphs 21-23; *Rovenska v General Medical Council* [1998] ICR 85 at p.96; *Cast v Croydon College* [1998] ICR 500 at p.509 (cf the approach of the Appeal Tribunal in *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833 at p.841 where there was an 'accumulation of events

over a period of time' and a finding of a 'climate of racial abuse' of which the employers were aware, but had done nothing. That was treated as 'continuing conduct' and a 'continuing failure' on the part of the UKEAT/0517/13/SM -8- employers to prevent racial abuse and discrimination, and as amounting to 'other detriment' within section 4(2)(c) of the 1976 Act).

52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period.' I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

36. Mummery LJ had occasion to revisit this issue in the case of *Arthur v London Eastern Railway Limited* [2007] IRLR 58, a case involving the analogous time provisions in whistleblowing cases:

37. "31. The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the 3 month period and some outside it. The acts occurring in the 3 month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. Section 48(3) is designed to cover such a case. There must be some relevant connection between the acts in the 3 month period and those outside it. The necessary connections were correctly identified by HHJ Reid as (a) being part of a 'series' and (b) being acts which are 'similar' to one another. […] UKEAT/0517/13/SM -9- 35. In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the 3 month period and the acts outside the 3 month period.

38. More recently, the EAT in *South Western Ambulance Service NHS Foundation Trust v King*, UKEAT/0056/19/ noted that there are generally two ways that conduct might be said to form a continuing act. The first is where there are a series of separate discriminatory acts which are somehow linked (as opposed to being isolated or unconnected). The second is where there is a discriminatory policy or practice, the application of which causes a continuing act of discrimination.

39. Put briefly therefore, the appropriate test for a "continuing act" is (following on from *Hendricks)* is whether the employer is responsible for "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents; or put another way, that the alleged incidents of discrimination are linked to one another

and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'.

Respondent's submissions

40. Mr Harris said that the Claimant was a serial litigator. He explained that there was a part-heard full merits hearing, which had taken place in 2019 and was due to be concluded this August, which related to four pre-existing claims against this Respondent. He said that the majority of claims set out in this claim related to the period from 2016-2017 when the Claimant had been employed by the Respondent. He said there was one aspect that was arguably later (relating to a potential victimisation/whistleblowing claim - see below). With regard to the majority of the claims, however, Mr Harris said,

a. these related to 2016-2017, so were very much out of time,
b. there were four pre-existing claims covering that same period of employment and many of the same facts
c. there was a part heard hearing relating to these claims, where the Claimant had given her evidence along with 1 witness for the Respondent
d. that hearing is due to re-commence on 2 August
e. the First Claim was fairly substantial with a wide variety of allegations covering heads of age, religion, race, sex and disability as well as whistleblowing which overlap entirely with this Fifth Claim.

41. Further, if there are any new matters, Mr Harris said, it would be an abuse of process to allow these to proceed. If these claims were to be dealt with at the part-heard hearing, the Claimant and the Respondent's witness who had already given evidence, would have to be recalled.

42. Mr Harris said the Statement of Claim attached to the ET1 was deficient, in that it was not clear what the claims were, there were no links to detriments or unfavourable treatment with regard to the heads of claim.

43. In terms of one matter that might be a new matter, that was in time, Mr Harris referred to the Claimant's allegations relating to her application for a job at the Royal Wolverhampton Hospital [§11 of her Statement of Claim], where she said the offer was withdrawn by the Royal Wolverhampton Hospital on 28 January 2020 because of a reference from the Respondent. While the Respondent has no knowledge of the facts regarding this application, if they were correct, this could, Mr Harris accepted, possibly form the basis for either (a) a victimisation claim, *if* the Claimant could link it to a protected act, and/or (b) a post termination whistle blowing claim, *if* there was a protected disclosure. However, Mr Harris submitted, neither a protected act nor a protected disclosure had been set out by the Claimant. The only matter that might provide evidence for these was at §23 of her Statement of Claim, where she referred to taking an authorised 20-minute rest break on 6 October 2016:

> "Denial of my Employment rights of 20 Minutes uninterrupted rest breaks – various instances exist but most notable incident being the 06 October 2016 for which action of taking a restbreak, the

> respondent has over the past 3 years been continually subjecting me to the adverse treatment of adhominem fallacy propaganda of maliciously describing my period of restful break as a misconduct in Employment references despite the fact that the Uk Employment law clearly states that all workers have a right to a 20 minutes uninterrupted break."

44. There is more detail about this at §43 of the Statement of Claim:

> "I usually take a restive break in the sanctuary – but on the 06 October 2016, my rest break was thrice interrupted. This incident was supposed to be investigated by the Trust chaplaincy – but Denny Paterson asserted having overall control of management over me – He instigated an unlawful unauthorised (by KCH employment policy) investigation, and thereafter continue to falsely and perversely provide the false information on my employment reference that asserts I was dismissed for a misconduct (without paying any heeds to written comments of one London South ET Judge during one of the earliest PHR hearing in ET case 2302989 between the claimant and KCH NHS FT) whereas the Truth was that I was subjected then to unlawful and unreasonable acts of punishment for taking a legally approved employment break."

45. Mr Harris said the Respondent's position is that this was in fact an act of misconduct, in which case he submits, referring to the rest break per se could not be either a protected act or a protected disclosure. He said, looked at overall, this was simply not a good claim. Mr Harris said this was the only aspect that might be new, but as there were no grounds in the Statement of Claim providing the basis for any arguable claim, this should be struck out.

46. With regard to the reference point, Mr Harris said it was a fact that the Claimant had been dismissed for gross misconduct and any reference was going to say that. She doesn't say in the Statement of Case what the reference said. But in any event supplying the reference is not a protected act and is not pleaded as such. She already has substantial proceedings before the Tribunal, due for a hearing shortly, which cover identical ground. The complaint here could sound in damages in that case, if she were to be successful in it.

47. The Respondent had asserted in its ET3 that while the Claimant has ticked the boxes for claims of race, religion or belief, disability or sex discrimination in the body of the ET1, and has separately referred to whistleblowing detriment, she has with regard to those matters, failed to set out any facts or matters supporting them in either her Claim Form or the Statement of Claim. It is unclear as to what events she is relying on for these claims, and whether (and if so how) she alleges she was discriminated against or whether and how she suffered detriment. It is also unclear what her claim for "other payments" relates to. Mr Harris submits that there is no pleaded basis for these claims.

48. As far as claims being out of time, the Claimant commenced the ACAS Early Conciliation Process on 20 April 2020. The Respondent asserted in its ET3 that as the Claimant's claims for race, religion or belief, disability, sex discrimination and whistleblowing detriment and the dates of any alleged

discriminatory acts are currently unclear, any allegations prior to 21 January 2020 are on the face of it out of time. The Respondent submits therefore that the vast bulk of the matters set out in the Fifth Claim are out of time, so the Employment Tribunal does not have jurisdiction to hear these claims and they should therefore be struck out. No explanation has been offered by the Claimant for the delay in bringing these claims. The Respondent submits that there are no grounds upon which it is just and equitable to extend the time limit in this case. It is denied that there have been any continuing acts of discrimination if this is alleged.

49. As far as the res judicata challenge is concerned, in its ET3, as referred to above, the Respondent said while the Claimant had not supplied dates for most of the matters about which she complained, it was evident from the Statement of Claim that many of the events she refers to occurred during the course of the Claimant's employment, which ended on 20 July 2017. Further, many of the allegations listed in the Statement of Claim that took place during the course of the Claimant's employment are already the subject of part-heard previous litigation. The Respondent says the Claimant should not now be permitted to rely upon the same facts to found a new cause of action. As the Claimant's previous four claims have already been partially heard in relation to the allegations that took place during the course of the Claimant's employment, the Respondent avers that to allow the Claimant to seek a further remedy in this claim would breach the principle of res judicata and lead to double recovery.

50. As far as the abuse of process head of challenge is concerned, Mr Harris drew my attention to the fact that the Second and Third Claims both specifically dealt with the issue of post-termination employment references (from September 2017). In its ET3, the Respondent submits that the Fifth Claim amounts to an abuse of process, designed to harass and oppress the Respondent. It points out it is the fifth claim brought by the Claimant in respect of the same period of employment, concerning post-termination references and against the same Respondent. The Respondent submits that the Tribunal should exercise its judicial discretion to strike out the present claim under the principle laid out in *Henderson v Henderson* [1843 – 1860] All ER Rep 378. The Respondent submits that application of the principles set out in *Johnson v Gore Wood* [2000] UKHL 65 favours the Respondent and that, accordingly, the Claimant's claim should be struck out.

51. Mr Harris therefore submitted that for all the reasons set out above, the Employment Tribunal does not have jurisdiction to hear the Claimant's Fifth Claim and that it should therefore be struck out in its entirety.

Claimant's submissions

52. The Claimant made a number of oral submissions, as summarised below, in opposing the strike out application. Opposing the application to strike out, she said this claim should be stayed until after the other cases had been determined. She said that it was possible to be discriminated against, before, during and after employment. She said this Fifth Claim related to the provision of a bad reference. The Claimant said that the reference referred to "professional

misconduct" which was not the case: she did not and was not accused of professional misconduct".

53. The Claimant emphasised that the provision of references by the Respondent meant that she continued to be discriminated against. She said that all her jobs since July 2017 had had to go through the Respondent, who was victimising her by continuing to provide an unfavourable reference, which directly impacted on her ability to get another job. She pointed out the impact that had on her ability to feed her family. To a point made by Mr Harris, that she could in theory continue to issue separate new employment tribunals claims each time she sought a new job, she said this state of affairs would exist for 3 years, when all job applications by her had to go through Kings. It would not exist beyond July 2020, she implied. She said the reference was dishonest.

54. The Claimant also referred me to §27 of her Statement of case:

> "Victimisation for my history of whistle blowing – during my employment period with St George's Healthcare NHS Trust , and victimisation for my raising concerns about the KCH NHS FT staff pilfering of patient's food, s using of Patient's Fridge, and leaving blood stained wound dressings/ bandages on patient's food service trays."

55. The Claimant said that her break in the sanctuary was for spiritual relief – which was the basis of her claim for religious discrimination. She said she was taking a statutory rest break to which she was entitled.

56. Overall the Claimant said that she was the subject of injustice and that the strike out should be refused.

Discussion

57. I start this discussion and my assessment of the Respondent's application from a starting point that the power to strike out is a 'draconic power' which should not be 'too readily exercised' and that discrimination cases in particular should rarely be struck out. Rule 37 also states that a claim should not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing. I was satisfied that the Claimant had had a reasonable opportunity to make representations. For the reasons set out below, I have concluded that this is an exceptional case and the Fifth Claim and the various claims made within it should be stuck out in their entirety. In my judgment, the Claimant's Fifth Claim is a plain and obvious case of abuse. Not least because, accepting that discrimination cases are generally fact-sensitive which will need to be determined at a full hearing, in this case the vast majority of the underlying facts are already the subject of a part-heard claim and so the merits will – and indeed have already begun to – be examined. There are four other extant claims which will continue irrespective of the strike out of this claim, which will explore most of the facts relevant to this claim. Further, many of the factual matters relied upon are out of time. Moreover, in my judgment, the prejudice which the Respondent here would suffer if this claim were

allowed to continue or were stayed, in terms of the duplication of time and resources and the overlap of issues, is clearly out of all proportion to any possible benefit to the Claimant.

58. The claim arising from the notification from the Royal Wolverhampton Hospital on 20 April 2020 is clearly in time. That is a new claim which has not previously been articulated, although it is in identical terms and made on an identical basis to similar claims in the Second, Third and Fourth Claims.

59. As far as I can tell, all of the other matters raised by the Claimant in her ET1 / the attached Statement of Claim [see the summary at paragraph 15 above] for the Fifth Claim, save for (1) the specific claim referred to at paragraph 58 above with regard to the Royal Wolverhampton Hospital; and (2) the reference to a denial of employment rights relating to taking 20 minute rest breaks, both of which I will return to below, are (1) seriously out of time; and/or also (2) duplicate matters which have already been raised in the First - Fourth Claims.

60. In terms of duplication and overlap, the claim in respect of a denial of her rights of freedom of worship – "notable incident being the 06 October 2016" **[§10, 24, 46**] is very much at the heart of the First Claim **[§53 onwards**] as is the complaint that the Respondent should not have treated the Claimant's rest break on this date as misconduct; references to the Claimant's alleged victimisation for her "history of whistle blowing – during my employment period with St George's Healthcare NHS Trust, and victimisation for my raising concerns about the KCH NHS FT staff pilfering of patient's food, using of Patient's Fridge, and leaving blood stained wound dressings/ bandages on patient's food service trays" occur specifically in the First Claim **[§9, 10, 108,109,110, 112**] and is responded to in the ET3 Response **[§58, 59, 60**] and more general references to whistleblowing and victimization are made in the Second **[§8**], Third **[§8**]and Fourth **[§8.**1] Claims; references to the detriment of denial of fair and balanced employment references **[§38, 49**] are made in all four claims and are responded to at some length and detail in the ET3 Response in the First Claim **[§58-62**]; a specific reference **[§25,26**] to the denial of line management by Band 6 Charge Nurses appears at paragraph 101 of the First Claim; **[§29**] Mr Paterson is a named Respondent in the First Claim, where a number of complaints are articulated about his conduct towards the Claimant; allegations that the Respondent did not believe or have full knowledge of the Claimant's illnesses and disability symptoms **[§30**] are made at paragraphs 26-28 of the First Claim; the claim of a failure by the Respondent to refer the Claimant to occupational health on capability grounds **[§47**] appears at paragraphs 14-20 of the First Claim; lack of notice pay is a claim made in the First Claim **[§8.1 of the ET1**], is specifically responded to in the Respondent's ET3 Response **[§63-64**] and is reflected in the Case Management Order of 24 January 2018 **[55**].

61. All of these claims appear to be already included in and covered by the four pre-existing claims, which are the subject of the part-heard hearing listed for August. They are also seriously out of time and the Claimant advanced no justification for raising them at this late stage. It does not appear to me that it would be either fair or in the interests of justice to allow these claims to be repeated or – as the Claimant suggests – stayed until after the August hearing. A stay would simply be allowing these matters to be re-litigated, which would in my judgment be

a clear abuse of process. The doctrine of estoppel by res judicata precludes a party from raising in subsequent proceedings matters which could and should have been raised in the earlier ones. In my judgment all of these claims have not only already been raised but are in the process of being determined. For these reasons, in my judgment it would be an abuse and res judicata to allow these claims to continue and so these claims are all struck out.

62. There are also a number of generalised assertions and complaints made in the Fifth Claim that I could not trace directly to any of the pre-existing claims – for example the allegation of a "detriment of being subjected various ad hominem fallacy propaganda in various managerial documents about me and about various aspects of my working life" **[§ 39**] and of "continuous ad hominem attacks directed against me in such documents such as KCH investigation reports, wherein also demeaning comments were made even on occasion I had rib fracture" **[§40**] – although there is reference to the rib fracture **[§41**] in the First Claim **[§112**] – and a general breach of trust allegation. These claims are all lacking in any specificity or particulars. Moreover, they appear to be also seriously out of time as they clearly relate back to when the Claimant was employed by the Respondent and the Claimant advanced no justification for raising them at this late stage. To the extent that it is necessary, no grounds or explanation having been advanced by the Claimant, and given the lack of specify and the length of the delay, it does not appear to me that it would be just and equitable to extend the time limits in this case.

63. Where there is a reference or suggestion that any of the acts of discrimination are continuing acts of discrimination, (for example **[§22** refers to "Adverse Detriments meted out by the Respondent to claimant in the period of time from 15 February 2016 – 20 April 2020 and currently still ongoing") this was not argued before me today by the Claimant as a continuing act, nor was any explanation given for the delay in bringing the claim. Further, with regard to **§22**, this appears to be covered by the factual material relied upon in the First - Fourth claims. For these reasons, in my judgment, these claims must also be struck out.

64. Further to the extent that the Fifth Claim seeks to bring further claims of race, religion or belief, disability or sex discrimination or whistleblowing detriment claims as suggested at 8.1 of the ET1, no arguable case with regard to any of these matters has been articulated or particularised. There are no pleadings relating to this in the ET1 or the Statement of Claim. It is unclear what events are being relied upon, or whether (and if so how) it is alleged the Claimant was discriminated against or whether and how she suffered any detriment. In my judgment, there does not appear to be any basis for these claims and for that reason, these claims are also struck out.

65. In terms of the Claimant's allegations relating to her application for a job at the Royal Wolverhampton Hospital **[§11 – 19** of her Statement of Claim], while this is a fresh claim on fresh facts and is in time, it is a duplication in terms of the underlying law, principles and issues of the matters already raised in the Second, Third and Fourth Claims, which are part heard and due to recommence in August. It appeared to me that should the Claimant succeed in any of these claims, then this allegation would become part and parcel of any subsequent remedy hearing – and that ultimately would sound in any damages award. Further, in any event supplying the reference is not a protected act or disclosure and is not pleaded as

such. Neither a protected act nor a protected disclosure have been set out by the Claimant in her Statement of Claim, which in other regards is wide ranging and extensive. Mr Harris said it was a fact that the Claimant had been dismissed for gross misconduct and any reference was always going to say that. For this reason, in my judgment, this aspect of the Fifth Claim, albeit that it is in time, is effectively a duplication and no real or actual prejudice will be suffered by the Claimant if it is struck out, as the Claimant already has substantial proceedings before the Tribunal, which are due for a hearing shortly, which cover effectively identical ground. The complaint here could sound in damages in that case, if the Claimant were to be successful in it. For these reasons, in my judgment this claim should also be struck out as an abuse of process.

66. As far as the reference to rest periods are concerned, Mr Harris took me to **§23** and **§43** of the Statement of Claim, where there are references to the taking of an authorised 20-minute rest break on 6 October 2016, and to this amounting to a denial of employment rights relating to "20 Minutes uninterrupted rest breaks" and to the Claimant being subjected to "unlawful and unreasonable acts of punishment for taking a legally approved employment break." While there are references in the First Claim [for example **§30, 55**] to the Claimant taking breaks and to her using the sanctuary during her break times, these are not articulated as a claim relating to her 20-minute rest break entitlement. This does therefore seem to be a new claim. To the extent that this is a stand-alone new claim, it is lacking in specificity and particulars – there is a reference to the 6 October incident, but no other details are given. Moreover, unless it can be related to a claim that it is in time, such as on the back of the reference claim, it is seriously out of time as it relates back to when the Claimant was employed by the Respondent; further the Claimant has advanced no justification for raising this specific claim at this late stage.

67. Further, both the central claims in the Second and Third Claims are based around the provision of references that are said, like the reference under consideration in the Fifth Claim, to be malicious or to amount to victimisation, or to amount to a detriment on the ground of making a protected disclosure. These are issues that will get fully rehearsed in an identical context at the hearing in August with regard to the part-heard claims.

68. The Respondent's position is that what happened on 6 October was in fact an act of misconduct. In my judgment, as the incident at the sanctuary on 6 October is, as I have said, a key part of the First Claim, there can be nothing to gain in my judgment in allowing this one discreet matter to either proceed separately from the other claims, or to be stayed, not least because no grounds or facts are identified by the Claimant in the Statement of Claim to provide the basis for any arguable claim, but also because of the impending commencement of the part-heard hearing with regard to the other four claims. For these reasons, in my judgment this claim cannot be allowed to continue and so must also be struck out.

Conclusion

69. Taking all these various findings into account, in my judgment, for the reasons set out above, the Fifth Claim should be struck out in its entirety under Rule 37 on the basis that it is an abuse of process and / or that the matters pleaded are duplications and are already being litigated and/or are out of time, with no reason having being advanced as to why the time limit should be extended.

Employment Judge Phillips
13 June 2021
London South
Date and place of Order

25 June.2021
Date sent to the parties