EMPLOYMENT TRIBUNALS

Claimant: Mr C McDonald

Respondent: University of Derby

JUDGMENT
ON A RECONSIDERATION

The Claimant's application for a reconsideration is refused because there is no reasonable prospect of the decision being varied or revoked.

REASONS

Background

1. The Claimant is employed by the Respondent as a Senior Academic Counsellor and the employment relationship continues.

2. Prior to this claim, the Claimant issued two claims in the Employment Tribunal, under case numbers 2601879/2008 and 2604179/2009. The first claim was dismissed after a determination that the claims were out of time. The judge in the second claim held that the Claimant was estopped from relying on the three allegations raised in the first claim, the fourth allegation was struck out as having no reasonable prospects of success and the fifth dismissed because it was out of time.

3. At a closed telephone preliminary hearing before me on 4 November 2020 the Claimant was ordered to provide further and better particulars of his claim and a lengthy schedule ("the Schedule") containing fifty-one allegations of discrimination dating back to 1991 was produced.

4. An open preliminary hearing was listed on 5 and 6 May 2021 during which I had to consider:

   "15.1 Whether the Claimant is estopped from relying on events that were subject to previous litigation;

15.2 Whether any allegations relied on by the Claimant are out of time and, if so, whether it is just and equitable to extend time;

15.3 To hear the Claimant's application to amend (if necessary); and

15.4 To make further case management orders and list the case for a final hearing."

5. I gave the following judgments followed by written reasons thereafter:

Estoppel:

"The Claimant is estopped from relying on allegations 1 – 20 as set out in the schedule of allegations against the Respondent. Those allegations are, therefore, dismissed".

The application to amend:

"1. The following amendments are allowed:

Allegation 29 in the schedule of allegations
Allegation 42(b) in the schedule of allegations

2. The following amendments are refused:

Allegation 21 in schedule of allegations
Allegation 24 in the schedule of allegations
Allegation 48 (b) in the schedule of allegations"

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules")

6. The Rules provide:

Principles

70. *A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.*

Application

71. *Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent*

(if later) and shall set out why reconsideration of the original decision is necessary.

Process

***72.**— (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application……..*

7. Rule 1 of the Employment Tribunal Rules 2013 sets out the following interpretations:

   'a "judgment", being a decision, made at any stage of the proceedings which finally determines a claim or part of a claim as regards liability, remedy or costs but also any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so, for example an issue whether a claim should be struck out or a jurisdictional issue'.

   "claim" means any proceedings before an Employment Tribunal making a complaint;

   "complaint" means anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal.'

8. Broadly, it is not in the interests of justice to allow a party to reopen matters heard and decided, unless there are special circumstances, such as a procedural irregularity depriving a party of a chance to put their case or where new evidence comes to light that could not reasonably have been brought to the original hearing and which could have a material bearing on the outcome. It is not sufficient for the Claimant to apply for a reconsideration simply because they disagree with the decision.

The reconsideration application - estoppel

9. The Claimant has asked me to reconsider both judgments and I deal with estoppel first. I have summarised the Claimant's application under the headings below.

10. The Claimant says that my judgment amounts to an *"error in law and culminates in a case where it is inappropriate for a preliminary hearing review to estop some aspects of a continuing act. The law is that it should go to a full hearing where the facts can be determined".*

11. As background, the Claimant said at the preliminary hearing before me that on 2 May 2021 he discovered that his contract of employment promoting him to Senior Academic Counsellor ("the contract") had been removed from his personnel file.

<u>Continuing act/no judgment</u>

12. The crux of the Claimant's application is that the matters he relies on in the current claim form part of conduct extending over a period and, therefore, matters occurring prior to 2009 need to be considered and he should not be estopped from relying on them. He says the continuing act is "*singular*" and unless the allegations are heard on the basis of the facts and as a matter of evidence and there is a judgment on the merits, finality of litigation cannot be achieved.

<u>Different cause of action/different parties</u>

13. The Claimant alleges that the Respondent did the following which are different causes of action within the conduct extending over a period:

    i. Did not pay him in accordance with his promotion
    ii. Gave him the opportunity to stay on his promoted contract (with no incremental and annual bonus) or taking what they said was "the best" contract entitled Senior Lecturer. This was "Hobson's choice", i.e.no choice at all
    iii. Fraudulently removed his senior academic counsellor contract from his records giving the impression of him never having been promoted to a high level in the university
    iv. Established through custom and practise an associated pay regime that prevented him from ever getting a bonus
    v. Did not pay him in harmony with his contract annually for 10 years in order to get him to accept an inferior contract

14. Further, in the 2008 and 2009 litigation, his complaints were only about his line manager at the time. Over the next 10 years, there are different parties to the alleged discrimination therefore the parties to the litigation differ. Accordingly, cause of action estoppel and issue estoppel do not apply.

15. In terms of active discrimination occurring after 1998, the Claimant asserts that he could not have known in 1998 that he would not be paid in accordance with his contract over the next 10 years. Accordingly, because he did not know about the discrimination in 2009, he could not have raised it earlier. Further and as above, it forms part of conduct extending over a period and should be considered as a matter of evidence.

16. <u>New evidence</u>

17. The Claimant says the fact that he was not aware that his contract had been removed from his file shows that attempts were made to remove evidence of him ever being promoted. He was not aware of this at the time and, therefore, could not raise the allegations that he says this now proves. He says that "*this is the reason I am treated as a senior lecturer by recent managers".*

Time limits

18. The Claimant alleges that when he raised grievances in the past, namely in 1998 and 2017, the Respondent deliberately failed to conclude them because they would prove discrimination - *"they prefer to leave the process unfinished rather than admit wrongdoing"*.

19. I understand him to be submitting that given that the grievances were not concluded, the primary limit of three months after those grievances are concluded has not yet started running. Therefore, any matters raised in those grievances are in time. He suggests that the Respondent uses this as a tactic so to speak to prevent him from pursuing these matters in the employment tribunal.

The law

20. The Claimant says that exceptions to estoppel are necessary to give the court flexibility to resolve the tension between the requirements for finality and justice to be done. One of the purposes of estoppel is to "*work justice between the parties*". In his case, because the facts have not been proven either way, justice cannot be seen to have been done and this "*unnecessary inflexibility is having precisely the opposite effect of that intended: justice between parties*"

21. He quotes Lord Sumption in *Virgin Atlantic Airways limited v Zodiac Seats UK Limited [2013] UKSC 46* as follows:

> "*It is, however, wrong to hold it because a matter could have been raised in earlier proceedings it should have been calmer so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic and approach to what should in my opinion be a broad, merits based judgement which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before".*

22. The Claimant submits that I have erred in law and that the court has a wide discretion when considering estoppel.

Considerations - estoppel

23. In my judgement dated 21 June 2021, I considered the Claimant's submission that the acts relied on in the present claim formed part of a continuing act which in turns revives any acts that were dismissed in the previous claims. I held that there was no basis in law for re-admitting matters raised in the 2008 and 2009

litigation that the Tribunal does not have jurisdiction to hear. The Claimant does not raise any proposition in this application to persuade me that I am wrong in that conclusion. As I noted in my reasons, *"if a matter has been determined to be outside the jurisdiction of the Employment Tribunal, that determination can only be challenged by way of reconsideration or an appeal. The Claimant did not ask for a reconsideration of the 2008 and 2009 judgments, nor did he appeal. As such, I am satisfied that those judgments stand, and the Tribunal simply has no power to determine matters that it does not have jurisdiction to hear*". Accordingly, the Claimant's submission is an attempt to re-argue a point that I have already considered.

24. The Claimant submits that because there has been no determination of the issues in 2008 and 2009 there is no '*finality of litigation'*. The Claimant advanced this argument at the hearing before me and I held the judgments in both 2008 and 2009 amounted to judgments in accordance with Rule 2 and, therefore, those matters were finally determined. Accordingly, the Claimant's submission is an attempt to re-argue a point that I have already considered.

25. The Claimant submits that the Respondent deliberately fails to conclude his grievances to i) avoid admitting discrimination; and ii) ensure that if he does subsequently litigate the matters raised, they are out of time. I also understand him to submit that in the absence of a grievance response the time limit has not started running. In my view, if the Claimant is aggrieved enough about to matter to cause him to raise a grievance, in the absence of a response from the Respondent, it is still incumbent on him submit a Tribunal claim in respect of it within the relevant time limits – he is not required to wait for the Respondent to conclude an appeal process. The Claimant is familiar with perceived adversity in the workplace and is aware of time importance of time limits (2008 litigation) so this submission seems no more than an attempt to bring into play matters that he is estopped from doing. The Claimant had every opportunity to make this argument before me but did not and has not submitted that there are any special circumstances that prevented him from doing so.

26. The Claimant submits that the matters on which he is estopped from relying on amount to different parties and different causes of action. The Claimant did not make these submissions at the preliminary hearing before me when he had opportunity to do so but, in any event, I remain satisfied that the rule in *Henderson v Henderson* applies. An application for a reconsideration is not a further opportunity to advance arguments that could have been made at the time and the Claimant does not say that there were special circumstances preventing him from doing so.

27. Turning to the new evidence, namely the discovery that the Claimant's contract was not on his file, the Claimant made this submission at the preliminary hearing before me that it amounted to a special circumstance. As I noted in my reasons, this discovery only came to light *after* he issued the current claim which is based on what he alleges is a policy by the Respondent to suppress his promotion, influence and pay because of his race. I remain of the view that this does not amount to special circumstances, particularly given he was able

to submit the current claim absent this knowledge. He did not explain why he was unable to raise the allegations on which he now relies in 2020 but not any earlier, nor does he in this application. Nevertheless, the Claimant had the opportunity to advance his argument in this regard and I rejected it. A reconsideration application is not a further opportunity to expand on matters previously raised.

28. Turning to the law, a party is prevented from re-litigating an issue (issue estoppel) that has already been determined unless special circumstances apply. In my previous judgment I considered whether special circumstances applied, as I am obliged to do, and concluded that they did not. The Claimant may disagree with my conclusions but that does not point to an error in law.

29. In terms of the rule in *Henderson v Henderson*, I am obliged to take a broad merits-based view which I did. I concluded that the Claimant did not persuade me that there was any good reason why he did not raise matters that he now seeks to rely in in 2009 when he had opportunity to do so. Again, the Claimant may disagree with my conclusions, but this does not point to an error in law.

Conclusion - estoppel

30. Having considered the Claimant's submissions in respect of the estoppel judgment, I am satisfied that there is no reasonable prospect of the original decision being varied or revoked and it is not in the interests of justice to reconsider it. The Claimant's application seeks to re-argue points already advanced, or which could have been made at the hearing before me and I am satisfied that I applied the law correctly. The application is, therefore, refused.

Reconsideration application – the amendments

31. At the preliminary hearing I allowed the Claimant to amend his claim in respect of the two out of the five new allegations. The three new allegations that I refused permission to amend on the basis that the balance of injustice and hardship would fall against the Respondent were as follows:

Allegation 21

In 2010, the role of Acting Subject Head was deliberately not advertised because the Claimant was eligible to apply, thereby preventing him from applying. Sam Salt was appointed to the role, who is white, and the individual responsible for that appointment was the Head of Computing at the time. The Claimant is unsure who that individual was but no doubt the Respondent will be able to track him or her.

Allegation 24

The Respondent fabricated a restructure in January 2015 in an attempt to dismiss the Claimant and further, the policy in respect of redeployment was not applied in the same way as in previous redundancy exercises - albeit the Claimant acknowledges that the policy was applied equally in this exercise to his white contemporaries.

Allegation 48(B)

In February 2020, the Claimant's Associate Professor application was submitted but not considered due to lack of funding. The Claimant's white contemporaries' applications were also not considered but the Claimant avers this was to disguise direct discrimination against him and to prevent his appointment to the role.

32. The Claimant's reconsideration application is based on three propositions. Firstly, that although he did not make the formal application to amend until 3 May 2021, he made the Respondent aware of the allegations by including them in the Schedule in September 2020. Secondly, in his view the Respondent takes an unreasonable length of time to deal his grievances so why should he be disadvantaged for the delay in making his application to amend? Thirdly, the allegations form part of conduct extending over a period and should be decided on their merits at a final hearing.

33. The Claimant acknowledges that the formal application to amend was '*very late'* but explains that at the time he was working full-time and engaging in four separate grievances.

Considerations - amendments

34. The Claimant's application is based on further submissions in support of his application to amend that he had full opportunity to raise at the preliminary hearing before me. As above, it is not in the interests of justice to allow a party to reopen matters heard and decided, unless there are special circumstances. The Claimant had the chance to put his case at the time and does not argue that there are special circumstances which would merit him a second bite of the cherry to re-argue his case.

35. The Claimant may disagree with my decision, but this is not sufficient to merit a reconsideration. Accordingly, I am satisfied that there is no reasonable prospect of the original decision being varied or revoked and it is not in the interests of justice to reconsider it. The application for a reconsideration is, therefore, refused.

Employment Judge Victoria Butler

Date: 20 August 2021

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.