EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs S Virdi **v** **Secretary of State for Justice**

Heard at: Watford (by CVP) **On**: 8 July 2021
Before: Employment Judge R Lewis

Appearances
For the Claimant: Mr A Watson, Counsel
For the Respondent: Mr S Stevens, Counsel

RESERVED JUDGMENT

1. The respondent's applications for strike out are refused.

2. The respondent's application for a deposit order or orders is refused.

REASONS

1. This was the preliminary hearing directed by Employment Judge Kurrein following a hearing on 9 December 2020. The original listing, for 31 May, was given erroneously, that day being a Bank Holiday.

2. In paragraph 18 of his order, Judge Kurrein had listed this hearing to consider strike out on a number of grounds, and a deposit application. References in these reasons to the claimant's first claim are references to Case 3301938/2020. The present case is her second claim.

This hearing

3. This hearing proceeded by CVP. The claimant was present by video. I record my appreciation to both counsel for a courteous and constructive approach, wholly in accordance with the letter and spirit of the overring objective.

4. The tribunal was provided with an agreed bundle, with some further pages by way of addition. The bundle did not contain the claimant's resignation

letter, dated 13 December 2019. At my request, Mr Stevens kindly arranged for it to be provided by email in the course of the day.

5. There were witness statements from the claimant, and from Ms N Riley, employed by the respondent as HR Officer. In the event, the claimant gave evidence, and Ms Riley did not. The claimant was briefly cross examined.

6. After the claimant's evidence, I heard submissions. Both counsel had prepared written submissions, which were most helpful. There was an agreed bundle of authorities, to which I was referred.

7. In the course of the hearing, I was troubled by an issue which appeared not to have been raised before Employment Judge Kurrein, and I invited the parties' views on how it should be dealt with. That was the question of the effect on the respondent's applications if the tribunal were to rule that the first claim was not properly accepted. Although delay and potentially avoidable costs are regrettable, it seemed to me that the only fair way to deal with the point was to adjourn; to check the tribunal's paper file, and tell the parties what could be elicited from the tribunal file, if it could be found; and to offer both parties the opportunity of further written submissions.

8. In order to avoid yet further delay, I took the opportunity, before adjourning, to list the case for a four-day hearing, and a separate case management order is to be made, confirming that case preparations are to be completed several months before the listed hearing, and that the listed hearing is to deal with all issues including remedy if required.

9. After the adjournment, and after checking all reasonable steps which were available to me with the tribunal staff at Watford, I notified the parties that the tribunal paper file for the claimant's first claim could not be found, and that therefore I could not add to the information available to the parties. Mr Stevens submitted additional submissions on 30 July, and Mr Watson replied on 13 August; I refer to both below as the second submissions. I apologise for the delay since then in sending these reasons.

Background setting

10. The purpose of this part of these reasons is to set out the limited relevant factual matrix, without need of fact finding on contentious matters.

11. The claimant was born in 1982 and was employed as a Prison Officer from May 2015 until 13 December 2019.

12. I understood it to be common ground that the claimant was assaulted at work in January 2019, following which the prisoner assailant was convicted of an offence, and the claimant had a period of sick leave. I understood it to be common ground that the claimant was entitled to full pay while off sick as a result of an assault at work, and that there was, at least, significant delay in meeting the claimant's entitlement to full pay. This was understandably a source of stress and grievance.

13. In 2019 the respondent conducted an investigation into the claimant's professional and personal interactions with a colleague.

14. The investigation led to a disciplinary hearing, following which in October 2019 the respondent issued a final written warning.

15. The claimant appealed, and her appeal was part upheld. On 4 December 2019 the respondent informed the claimant that the sanction against her was reduced to a written warning.

16. The claimant resigned by letter of 13 December 2019 with immediate effect. The letter was six pages long, and was addressed to the prison Governor, Mr Butler. It is clearly the product of professional drafting. The penultimate paragraph states:

> "It is my case that HMP's failure to fully exonerate me of any wrongdoing amounts to a repudiatory breach of contract, and on this basis my continued employment is fundamentally untenable."

17. The claimant's employment was agreed to end that day.

18. The bundle available at this hearing included pages from the claimant's GP records. The records indicate that between January 2019 and about January 2020 the claimant was prescribed antidepressants (52-53). The GP's record of a consultation on 13 January 2020 reads: "Wants to come off antidepressants recently resigned from the Prison Service" (51).

The first claim

19. On 21 December 2019 the claimant commenced early conciliation. Certificate R811534/19/03 was issued on 22 January 2020. The prospective respondent was "Her Majesty's Prison and Probation Service." That is an agency of the Ministry of Justice, and is for all purposes the same entity as the present respondent.

20. On 23 January 2020, the claimant issued her first claim, 3301938/2020. She acted in person throughout the first claim. No representative was named on the ET1, which shows no sign of professional drafting.

21. At box 2.1, for name of respondent, she put the name of Mr Butler. At box 2.2, giving that person's address, she wrote Her Majesty's Prison and Probation Service and then the work address. She correctly set out the ECC number above.

22. At box 8.1, she ticked unfair dismissal, race discrimination, sex discrimination, holiday pay and arrears of pay.

23. At box 8.2 she set out a number of points about her grievances, notably her grievances about arrears of sick pay. Box 8.2 contained no reference to

dismissal or a dismissal claim. At box 9.2 she set out a request for compensation for loss of earnings "from December 19 to present" and for injury to feelings. Box 9.2 referred among others to future losses, and referred to the claimant's 'resignation.' Box 10.1 (protected disclosure) was also ticked.

24. When asked by Mr Stevens about the contents of boxes 8.2 and 9.2 in her first claim, the claimant answered that she could not remember writing them, and that she did not know, was not sure, or could not explain the variety of claim boxes which she had ticked. As Mr Stevens pointed out, this form was completed just about the time when she told the GP that her stress levels had reduced, and that she wished to begin coming off antidepressants.

25. The claim was served on Mr Butler, and the claimant was then in correspondence with among others the Government Legal Department. On 26 April 2020, she emailed GLD. The subject hearing was Acas Certificate R811534/19. The attachment was entitled "Withdraw claim". The narrative starts, "I would like to withdraw the above case and therefore I have attached my withdrawal letter to be forwarded to the tribunal and the respondent" (111). The attachment, a letter of 26 April 2020 addressed to the tribunal, and headed with the case number, the claimant's name and Mr Butler as respondent, stated:

> "Dear Sir/Madam, withdrawal all of my claim
>
> I would like to withdraw all of my claim for this case." (112)

26. Government Legal Department asked for greater clarity, and on 27 April, the claimant emailed the Watford Tribunal inbox, quoting her case number, and stating, "This is a written confirmation to withdraw from the about case." (116). The attachment letter of 27 April, with the same heading as above, stated,

> "Dear Sir/Madam withdraw all of my claim
>
> I would like to withdraw all of my claim in regard to this claim."

27. Employment Judge Smail signed a dismissal judgment on 22 June 2020. Tribunal staff sent the judgment to the parties on 29 August 2020 (119).

The present claim

28. At a time and in circumstances which were unclear, the claimant instructed solicitors. The claimant's evidence was that she had not told her solicitors at any time before 27 April 2020 that she had issued a first claim, which was already before the tribunal, and she did not tell them that she had withdrawn it. Her reason was that she thought that the first claim was entirely about sick pay, which was not a matter with which the solicitors were concerned.

29. The claimant re-commenced early conciliation on 18 December 2019 and a certificate was issued on 14 January 2020 (R810379/19/19). The prospective respondent was Her Majesty's Prison and Probation Service.

30. The present claim , which quotes the above ECC reference, was received at the tribunal on 25 March 2020. It is a claim of unfair dismissal and for notice pay only and makes no other claims. It is supported by professionally pleaded particulars of claim.

31. The pleaded particulars set out the narrative of a claim for constructive dismissal at six pages length. Paragraph 20 states in its entirety:

> "The claimant tendered her resignation with immediate effect via letter dated 13 December 19, citing that the respondent's failure to exonerate her of any wrongdoing in the circumstances constituted a repudiatory breach of the implied term of mutual trust and confidence entitling her to resign with immediate effect."

32. The claim was served by letter dated 14 April. As no response was received, on 7 October 2020 Employment Judge Ord signed judgment under Rule 21, which was sent to the parties on 9 November. On 22 November the tribunal sent the parties notice of a remedy hearing to take place on 9 December.

33. On 24 November 2020 the Government Legal Department commenced correspondence about this case with the tribunal. It submitted a draft response on 2 December, leading to the hearing before Judge Kurrein being converted from remedy hearing to case management.

Procedural chronology

34. Drawing the above together, the procedural chronology was:

- The claimant resigned with immediate effect on 13 December 2019;
- Day A for ECC R810379 was 18 December;
- Day A for ECC R811534 was 21 December;
- ECC R810379 was issued on 14 January 2020;
- ECC R811534 was issued on 22 January;
- Both ECCs named Her Majesty's Prison and Probation Service as prospective respondent;
- The claimant's first claim (**1938/20), which relied on ECC R811534, was presented by the claimant in person against Mr Butler on 23 January;
- The claimant's second claim (the present claim), which relied on ECC R810379, was presented by the claimant's solicitors against HMPPS on 25 March;
- The claimant's second claim was served on 14 April;
- The claimant's first claim was withdrawn on 26/27 April;
- The first preliminary hearing in the present claim was on 9 December 2020.

Today's issue

35. Before further discussion, I should not lose sight of the reality that this case involves a completely unexceptional sequence of events in the life of an employment tribunal. In short, the claimant was, in 2019, involved in negative events at work which affected her mental health, and which contributed or led to her resignation. It appears (although I make no finding) that in relation to at least one event (underpayment) she was entirely in the right. She initiated the tribunal process to resolve things, and made a number of mistakes about the procedure. When she put her complaints on paper, she did not express herself well. Eventually, she put matters in the hands of a solicitor. Tribunals manage this type of situation as a matter of daily routine.

36. At paragraph 18.1 of his order, Judge Kurrein identified the following issues for consideration at this hearing, (to which, in the course of this hearing, I added the issue summarised at #7 above):

> "Whether the claimant's claims should be struck out because they are contrary to Rule 52, they are res judicata, they offend the rule in Henderson v Henderson, are an abuse of the process, have been conducted unreasonably, and/or have no reasonable prospect of success."

Rule 37 application

37. Mr Stevens also applied that this claim be struck out pursuant to Rule 37, which provides:

> "At any stage of the proceedings, either on his own initiative or on the application of a party, the tribunal may strike out all or part of a claim or response on any of the following grounds –
>
> (a) That it.. has no reasonable prospect of success;
>
> (b) That the manner in which the proceedings have been conducted .. has been scandalous, unreasonable or vexatious."

38. The application had two limbs. For the first application, which was that the claim had no reasonable prospect of success, he relied on paragraph 20 of the claimant's particulars, set out in full above. Mr Stevens' point was straightforward (I paraphrase): a claimant has no basis on which to claim that failure to exonerate her in disciplinary proceedings meets the test of repudiatory conduct. To say so first disregards the "proper cause" element of the test of constructive dismissal; and secondly it implies a contractual right to a particular disciplinary outcome. Neither of these is or can be the case, and a claim of constructive dismissal based on dissatisfaction with a disciplinary outcome is bound to fail. I agree with Mr Stevens on all points in principle.

39. My concern about this submission led me, as stated above, to ask to see a copy of the entire resignation letter, which had not been in today's bundle. Having read it in full, I am satisfied that paragraph 20 of the ET1 does not

do justice to the narrative advanced by the claimant in her resignation letter, in which the claimant set out a history of a large number of events, culminating in the disciplinary outcome. Taking the resignation letter as a whole as the best evidence available today of the material reasons for resignation, I cannot conclude that the claim for constructive dismissal has no reasonable prospect of success, and the application is rejected.

40. Mr Stevens' second limb was that the claimant had conducted the case unreasonably by issuing a claim, then a second duplicate claim, and then withdrawing the first claim. He submitted that duplicate (or duplicative, if there is a difference in meaning) litigation, with duplicate costs, is unreasonable conduct, and that it was in the interests of justice to strike out in consequence. Mr Watson in reply suggested that Mr Stevens' approach was that of an earlier era, concentrating on form rather than substance.

41. Mr Stevens submitted in the alternative, that the present, second claim is itself an abuse of process, the abuse consisting of issuing two claims for the same case.

42. What Mr Stevens has described illustrates the daily experience of the employment tribunal. The claimant had a statutory right (Employment Tribunals Act s.6) to litigate in person. The tribunal has a corresponding duty, which forms the first element in the overriding objective (rule 2(a)), to seek to place parties on an equal footing. The tribunal is also duty bound (rule 2(c)) to avoid formality and seek flexibility.

43. On a daily basis, the tribunal is called upon to do justice to members of the public who, possibly for the only time in their lives, engage with the system of justice. The claimant's decisions about her tribunal cases may be criticised, and I have not found her explanations of her actions wholly convincing. I accept that like many litigants in person, the claimant was confused by the rules and procedure of the tribunal, and made mistakes. I accept that there may be cases where repeated or overlapping litigation is unreasonable conduct, but I do not find that this is such a case. I do not agree that the mere act of presenting two overlapping claims, of itself and without more, constitutes unreasonable conduct or abuse of process.

44. Further, Mr Stevens' argument is at heart counter-intuitive. I understand that (to take a simple but real-life example) a claimant may not pursue the same or near identical claims in two different tribunal regions, or in the tribunal and in the County Court. By contrast, it is difficult in principle to accept that a party who has brought two claims and dropped one without a hearing should automatically then lose the right to a hearing in the remaining case.

45. I also consider that it would not be in the interests of justice to deprive a party of a hearing for having made technical mistakes which are the daily currency of the tribunal.

46. If, in the alterative, I am asked on the first of these grounds to order a deposit, I decline to do so. There are evident difficulties in any case of

constructive dismissal, but I repeat that in light of the resignation letter taken as a whole, I cannot conclude that the claim has little reasonable prospect of success. In any event, even allowing for its apparent weakness, it does not seem to me in the interests of justice to impose a deposit in this case.

Rule 52 and rule 12 acceptance

47. Judge Kurrein listed today's hearing under, among others, rule 52 of the tribunal's rules, which provides as follows:

> "Where a claim, or part of it, has been withdrawn.. 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 –"

48. In the course of the day, I was troubled by the application to the first claim of Rule 12. Rule 12 provides so far as material as follows:

> "(1) The staff of the tribunal office shall refer a claim to an Employment Judge if they consider that the claim or part of it may be…
>
> (f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate..
>
> (2) The claim or part of it shall be rejected if the Judge considers that the claim or part of it is of a kind described in sub-paragraph ..(f).. unless the Judge considers that the claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim.
>
> (3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim.."

49. It was apparent from the above that the claimant had not engaged in early conciliation with the respondent identified at box 2.1 of her first ET1. The prospective respondent on the ECC was HMPPS. At box 2.1, the claimant had put the name of Mr Butler; and at box 2.2, she had named HMPPS as the first line of Mr Butler's address.

50. I add that this is not at all an unusual error, and that it may well be attributable to confusion caused by the wording of Form ET1, which, at box 2.1, contains the words: "Give the name of your employer or the person or organisation you are claiming against." It is a frequent source of error that a claimant names the individual with whom he or she is in dispute, rather than the organisational employer.

51. The correct procedure for dealing with the claim was that the ET1 should have been referred by tribunal staff to a Judge in accordance with rule 12(1)(f) for consideration of the discrepancy between the name on the ECC and that on the ET1.

52. There is no record of whether this was done (sometimes erroneously this does not happen). There is no record of what a Judge decided if one was asked to do so. I have therefore considered what might have happened if the file had been referred to a Judge.

53. If called upon to consider the ET1, the Judge could not properly direct acceptance of the claim against Mr Butler as an individual, because the claimant had not engaged in early conciliation with him. The Judge might therefore have rejected the claim in its entirety as a result of the discrepancy.

54. The Judge might, at that stage, have also noted that while the claims of discrimination could in law be brought against an individual manager (as well as HMPPS), those of unfair dismissal, and for arrears of pay, could not. They could only be brought against HMPPS.

55. Alternatively, the Judge could, in my view, have directed acceptance against HMPPS. It was open to the Judge to decide that the claimant had made the minor error of naming Mr Butler in box 2.1 and HMPPS in box 2.2; or the Judge might have concluded that the requirements of the Rule had been fulfilled by naming the correct respondent (HMPPS) albeit in the wrong box (box 2.2 rather than box 2.1). The final alternative of course is that the Judge simply made a mistake and accepted the claim against Mr Butler.

56. When a claim is accepted, and before it is served, tribunal staff log into the tribunal systems the information about the parties, which will subsequently be generated in the heading of correspondence or orders, namely the name of the claimant, name of the respondent, and the case number. All correspondence which I have seen from the tribunal on this case consistently identifies Mr Butler as respondent. That remains the case until and including the final document issued by the tribunal, the judgment under Rule 52. I have seen no document or letter issued by the tribunal in relation to the first claim in which HMPPS or the Secretary of State is named as respondent. I accept that one explanation for this could be that while a Judge directed that the claim be accepted against HMPPS, tribunal staff erroneously logged the respondent as Mr Butler. While that might have happened, there is no evidence or record of it.

57. The tribunal's IT record shows that tribunal staff logged acceptance of all claims which were ticked by the claimant: discrimination on grounds of race and of sex; and claims for unfair dismissal and unlawful deductions. In the absence of the file, there is no evidence whether this analysis was administrative or judicial.

58. The correspondence from GLD, including the response and grounds of resistance, name Mr Butler as respondent, but that represents no more than consistency with what has been described in the previous paragraphs.

59. In submission, Mr Stevens invited me to find that the tribunal processed the matter correctly, by accepting the claim against HMPPS, leaving an uncorrected mistake only in the logging of the name of the respondent. I

accept that that may have happened. In the absence of evidence, I decline to follow any presumption to that effect. I decline to find either that matters were processed correctly; or that one type of mistake was made (of which there is no evidence) rather than the mistake of which there is some evidence.

60. I can see that I may be in the unattractive position of first having to make a finding of fact between a choice of mistakes; and secondly, that any mistake which was made was that of the party who is the respondent to the case. I consider that I must disregard both of those points.

61. There is no evidence which indicates acceptance of the first claim against HMPPS or the Secretary of State; and all the available evidence indicates acceptance of the claim against Mr Butler. I conclude that acceptance of the claim against Mr Butler was what happened. I accept that that was a mistake by a member of tribunal staff, and / or by an Employment Judge. While I have no recollection of the matter, I may have been the Judge who made the mistake, but I do not know.

62. The consequence was summarised, in a short phrase in a long judgment by the EAT in EON Control v Caspall UKEAT/0003/19, at #53, emphasis added.

> 'Where the claim fails to comply with the requirements of Rules 10 and 12, it is to be rejected and returned to the Claimant: there are no proceedings before the ET in respect of which Rule 6 might apply.

63. It follows that in my judgment, the first claim was a nullity from the start. It should not have been accepted, and its erroneous acceptance does not circumvent the wording of Rule 12; if it did, administrative or judicial mistake would operate to confer jurisdiction in a case where the tribunal does not have it. I ask myself what might have happened if the claimant had obtained Rule 21 judgment or a financial award against Mr Butler; in my view, the award would have been unenforceable and void, because it was based on proceedings which could not and should not have been commenced.

64. What then is the effect of the tribunal's judgment, and how does it impact on Rule 52? That is a nice question. I bear in mind that the purpose of Rule 52 is to prevent a claimant from concluding one claim and relitigating the claim which he or she has brought to an end.

65. In the second submissions, Mr Stevens wrote, with reliance on Watt v Ahsan 2007 UKHL 51, that as the tribunal had in effect accepted jurisdiction in the first claim, the tribunal had in this separate case no power to go behind that decision. Mr Watson replied that that case was not on point, as there is no evidence that the tribunal made a positive decision to accept jurisdiction in the first case. I agree with Mr Watson that there was, at highest, acceptance in accordance with rules 10 and 12 of the first case. I agree that such acceptance was open to challenge, in the same proceedings, at any stage on jurisdictional grounds. That did not happen, and there was, in the first case, no evidence of judicial determination of the

question of jurisdiction. I agree further with Mr Watson that I should not interpret the rule 52 dismissal as implying an adjudication on jurisdiction.

66. In my judgment, the first claim was liable at any time to be dismissed on grounds of lack of jurisdiction (after the parties had been given an opportunity to make representations). Judge Smail's judgment reached the right conclusion, albeit not necessarily for the right reason.

67. My primary conclusion is that the withdrawal of the first claim, and the judgment dismissing it, cannot fall within the framework of Rule 52, because the proceedings to which the judgement relates were a nullity. However, that point is not determinative.

68. In my judgment the determinative point is that rule 52 describes the effect of withdrawal as, emphasis added, "the claimant may not commence a further claim." I do not need to decide if these words are legislative or explanatory. The words 'commence' and 'further,' are plain English words, which, when read together in context, must mean an event after withdrawal. Mr Stevens' approach would require me to read the words 'commence a further clam' as also meaning 'continue another current claim.' I decline to do so as a matter of plain interpretation. It seems to me a matter of common sense that issuing a second claim in March and withdrawing the first one in April is not the sequence of events to which rule 52 applies. It follows that I decline to strike out this claim under the provisions of rule 52.

Alternative hypothesis

69. I then turn to the hypothetical question, which was what the position would be if, contrary to such evidence as is available, and contrary to my own conclusions above, the tribunal did indeed accept the first claim against HMPPS.

70. The first point is whether that claim included a claim for unfair dismissal. The ET1 was unclear, but in that respect no different from countless claim forms presented to the tribunal by litigants in person. Mr Watson submitted that the claimant had not intended to present a claim for unfair dismissal; that she had intended to further her grievance about sick pay, and the fact that she instructed a solicitor separately to present a claim for unfair dismissal is some evidence that she did not know that she had already done so.

71. I cannot accept that reading. The claimant ticked the unfair dismissal box. She did not, as some claimants unfortunately do, tick every available box; and the fact that she ticked some boxes, not all, indicates the application of a thought process to selection. I attach a very little weight to her occasional usages of phrases which engage the vocabulary of unfair dismissal. I was not convinced that they took matters much further. I accept that if accepted by the tribunal against HMPPS, the first ET1 was on its face a valid claim of unfair dismissal, albeit one which required additional information from the claimant.

72. I then ask whether proceeding on this alternative leads me to change any of the conclusions which I have reached above. In my view, the discussion and conclusions at #41-45 above (abuse and duplication) remain undisturbed. The main part of the discussion at #47-67, and what I refer to at #67 as my primary conclusion, fall away. My conclusion at #68 remains firmly in place.

73. Counsel referred to a number of principles and authorities on res judicata, issue estoppel, and the rule in Henderson v Henderson. I have not found the authorities easy to grasp, and despite its difficulty, I have found most helpful Srivasta v Secretary of State for Health 2018 EWCA Civ 936 (Court of Appeal).

74. I was grateful to be referred to a concise reminder of the purpose of these principles in the dictum of Lord Sumption in Virgin Atlantic v Zodiac Seats UK 2013 UKSC 46, cited with emphasis in Srivasta (#26), as that of

> 'limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive.'

75. In Srivasta, that approach led to a discussion of the circumstances in which the claimant withdrew his tribunal claim (some six months before issuing the High Court claim in question), and whether the circumstances of withdrawal indicated an intention to abandon or concede the merits of the claim.

76. In the present case, there is compelling evidence that on 26 / 27 April 2020 the claimant had no intention to abandon or concede her unfair dismissal claim. It is found in the chronology. She had issued a professionally drafted unfair dismissal claim which was live and in the hands of solicitors at the time of withdrawal of the first claim. It is difficult to think of stronger evidence that at time of withdrawal of the first claim she had every intention to seek a determination of the fairness of her dismissal.

77. I add a further point on duplication. As I understand it, the evil to be avoided is that of a claimant seeking more than one determination of a single claim or issue. Having litigated their dispute in Canada, it was not open to the Henderson family to seek a different outcome in London. There was no suggestion in the present case that the claimant sought more than one determination of her claim of unfair dismissal.

78. I have rejected the submission that there has been any element of abuse in the claimant's conduct of proceedings, and I have found that the claimant has not been shown to have intended abandonment of her claim. That being so, I rely on two further dicta relied on by Mr Watson. In Nayif v High Commision of Brunei 2015 IRLR 134, Elias LJ observed that applying the principle of finality in litigation was not justified if there were,

> 'no actual adjudication of any issue .. which would justify treating him as having consented, either expressly or by implication, to having conceded the issue by choosing not have the matter formally determined.'

79. The Court concluded its Judgment in Srivasta with reference to Sajid v Sussex Muslim Society 2001 EWCA Civ 1684, as follows (#47), which (subject to my reservation about the application to the present case of the word 'swipe') seem fully applicable to this case:

> "In my judgment the circumstances at the time of the withdrawal of the ET proceedings do not lead to the conclusion that Dr Srivatsa intended to concede the merits of his claim. In respectful disagreement with the judge I would hold that he is not precluded from continuing his High Court claim. The effect of the judge's decision is that, in the words of Mummery LJ in *Sajid*:
>
> > 'by a neat, technical swipe the [Defendants] would have eliminated a substantial claim without any tribunal or court having heard any evidence or argument about it. That seems to be a decision to which this court is not driven by any principle of cause of action estoppel'."

80. At paragraph 31 of his first submissions, Mr Watson wrote (emphases in original):

> "It is important to note that when these rules are expressed, it is always in terms of "*subsequent proceedings*" or "*later actions*." When they are applied the subsequent proceedings are always launched *after* the earlier proceedings have concluded. The focus of the court is whether the second claim can be *brought.* There is no authority of which this author is aware which supports the proposition that where two separate claims are issued, and the first is withdrawn and dismissed *after* the second is issued, the judgment in the first claim creates and estoppel to prevent the *continuation* of the second claim.

81. That indeed seems to me the heart of the matter and a proposition of common sense. Mr Stevens' submissions imply that at the point where the claimant had two live valid claims for unfair dismissal, her withdrawal of one leads automatically to strike out of the second. That cannot be common sense or justice or indeed practice.

82. While I am troubled by the quality of the claimant's evidence about the processes which led to this situation, I do note that she issued one claim as a litigant in person and pursues the second claim through solicitors. It cannot be right or just that a claimant who litigates in person, and disposes of a claim in person, is thereby debarred from proceeding with the claim in which she is professionally represented. That approach would, it seems to me, have a chilling effect on the ability of parties to conduct litigation in person, as they have a statutory right to, and are encouraged to do.

Case management

83. I have accompanied these reasons with a further case management order, in which I draw to the attention of the parties two fresh points. I have made provision for applications for judicial mediation; and for excess of caution, I have recused from the final hearing of this matter, but not from further case management.

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Employment Judge R Lewis

Date:20/8/2021

Sent to the parties on: 13/9/2021

N Gotecha

For the Tribunal Office