EMPLOYMENT TRIBUNALS

Claimant: Mr I Yould

Respondent: GXO Logistics UK Ltd

Heard on 2 November 2021 (by telephone)

Before: Employment Judge D N Jones

Appearances
For the claimant: Mr P Farrell, solicitor
For the respondent: Mr P Sands, solicitor

RESERVED JUDGMENT

The applications of the respondent to strike out the claims on the ground they are an abuse of process are dismissed.

REASONS

1. The respondent has applied to strike out the above claims on the ground they are an abuse of process. They were presented on 25 August 2021 and 27 August 2021 respectively, the first by the claimant himself and the second by his solicitors. The two claim forms have been combined into the one claim.

2. The basis for the strike out is said to be that these proceedings are vexatious, because the claimant had litigated about these matters in a claim presented on on 31 January 2020. The claimant subsequently withdrew that claim on 29 July 2020. He had settled his claims with the respondent with the services of ACAS and the agreement was contained in a cot3 dated 29 July 2020.

3. In a skeleton argument in support of the application, Mr Sands says that the pursuit of this claim is an abuse of process, either by way of the principle of issue estoppel or the rule in *Henderson v Henderson*, namely that a party should bring the whole case and may not reopen something which he could and should have brought at that time.

4. The claimant is employed as a warehouse operative based at the respondent's warehouse in Barnsley. Another two warehouses known as Sharps and Hunt are located less than 5 minutes driving distance from the claimant's main place of work.

5. Employees at the Barnsley site are required to carry out duties at the Sharps and Hunt sites. These sites are not permanently manned and so employees carrying out duties at those sites will often need to unlock the gates and lock them back up again when they leave.

6. The cases concern a common theme relating to a condition of ulcerative colitis which affects his bladder/bowel control and the claimant says is exacerbated in situations of high stress or anxiety, one which the claimant says is disability under the Equality Act 2010 ("EqA"). The effect of the condition on the claimant's ability to discharge duties at the Sharps site is also common to both claims.

7. Mr Sands identifies the earlier legal complaints as:
   - 7.1 Harassment, contrary to section 26 of the Equality Act 2010 ("EqA") on the basis that (amongst other things) R had required him to carry out some duties at the external warehouse "Sharps" which he asserted did not have adequate toilet facilities;
   - 7.2 A failure to make reasonable adjustments contrary to sections 20-22 EqA on the basis that R had failed to implement the advice of the Occupational Health adviser – due to (amongst other things) an alleged failure to allow him to work in close proximity to toilet facilities whilst working at Sharps/Hunt;
   - 7.3 Victimisation contrary to section 27 EqA in respect of a threat of suspension for failure to follow a reasonable management instruction (to attend the Sharps warehouse);
   - 7.4 Discrimination arising from a disability contrary to section 15 EqA in respect of a threat of disciplinary action if he failed to follow a reasonable management request to attend the Sharps/Hunt warehouse.

8. In the current case, the claims are set out in the case management order provided with this judgment. The disability discrimination, harassment and victimisation claims concern being required to attend the Sharps site on 21 April 2020 and harassment and victimisation which arose from that. In the claim form the claimant briefly recites the background, which overlaps with the first claim and says the grievance outcome in April 2020 was that he would only be required to attend the Sharps' warehouse as a last resort.

The Law

Strike out of claims

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

10. It has been recognised that an abuse of process will fall with the vexatious criterion of rule 37.

Relitigation, res judicata and abuse of process

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

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

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

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

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

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

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

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

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

Analysis

14. Mr Sands draws attention to paragraph 6 of the agreement, which provides, sets out the following: "*The Claimant agrees that he shall retract any subsisting grievances and/or refrain from presenting any further complaints or grievances regarding or relating to the circumstances which gave rise to the Proceedings and that he shall continue to perform his duties, for the Respondent, to the best of his abilities and in accordance with his contractual terms of employment with the Respondent. The Respondent shall also continue to comply with and honour its obligations and duties to the Claimant, express and/or implied, under the Claimant's contract of employment and statute*." He submits that by presenting this claim, the claimant has done what he promised not to do by this provision and that because the claim was dismissed upon withdrawal, those issues he now complains of were disposed of and continue to apply or ones he could have, but chose not to raise.

15. The fundamental difficulty the respondent faces in these applications, is that the events about which the claimant complains post-date the first claim, which was presented on 31 January 2020, by more than 14 months. The Tribunal made no findings of fact in the case, which in the event was dismissed, about the alleged breaches of duty which occurred a year later.

16. I recognise that one of the many complaints in the first claim would have necessitated a determination of whether there had been any form of disability discrimination in respect of requiring the claimant to drive to the Sharps site. As the claim was withdrawn, no adjudication about that took place, but in any event and more significantly it concerned the events which predated the claim form. Any such determination could not have arrested indefinitely the arrangements which were appropriate for a disabled person, such that no future complaints which touched upon similar facts could not be presented. According to the claimant, an agreement was reached that he should not have to attend the Sharps site in April 2020, but that agreement post-dated the claim which he issued and was no part of the agreement recorded in the cot3. The decision of the Tribunal, in the absence of any amendment, could only deal with matters which arose before 31 January 2020. The concept of issue estoppel and *Henderson v Henderson* simply do not arise. The claimant is not seeking to reopen a matter which could have been determined in those earlier proceedings, nor could he have raised the concerns about harassment or victimisation in and after April 2021, nor any of the current complaints about disability discrimination concerning arrangements made in April 2020.

17. Mr Sands' reference to the cot3 agreement does not seem to me to be principally about issue estoppel or the rule in *Henderson v Henderson*, but a different type of abuse of process, namely the claimant had entered into a contract to compromise his earlier claims and was now acting in breach of a term of that contract, clause 6, in seeking to present further claims with regard to or which related to the circumstances which gave rise to the earlier proceedings.

18. The cot3 recorded an agreement which undoubtedly amounted to a contract, with an offer, acceptance, consideration and an intention to create legal relations. Mr Sands did not vigorously pursue the proposition that the claimant had contracted out of bringing claims in respect of future liabilities, the written application and skeleton argument referring only to estoppel, although it was touched upon in argument. In my view, sensibly so. The wording of the cot3 that the claimant would *refrain from presenting any further complaint regarding or relating to the circumstances which gave rise to the proceedings* could not conceivably be construed as being so far reaching as to have excluded him from pursuing disability discrimination claims about events which had not yet happened, which would require the very clearest and unambiguous of language, see *Royal National Orthopaedic Hospital Trust v Howard 2002 IRLR 849, EAT*. The reference to circumstances which gave rise to the claim is not a reference to future events but to events which have happened. Other passages in the cot3 support that construction, for example clause 5, in which the claimant accepts the settlement in full and final settlement of any claim he has or may have *currently* against the respondent.

Employment Judge D N Jones

Date: 4 November 2021