Case No: 2601211/2021

EMPLOYMENT TRIBUNALS

Between:

C **and** The Chief Constable of Derbyshire Constabulary

Claimant **Respondents**

Record of an Open Preliminary Hearing by CVP at the Employment Tribunal

Held at: Nottingham **On**: 24 November and 1 December 2021

Before: Employment Judge P Britton (sitting alone)

Representation

For the Claimant: **Mr T O'Halloran, Counsel**
For the Respondent: **Mr John-Paul Waite, Counsel**

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

1. The application of the Respondents succeeds; the claim is dismissed it being an abuse of process.

REASONS

Introduction

1. The current claim (ET1 no2) was presented to the Tribunal by the Claimant's Solicitors, Penningtons on 26 May 2021. On 16 July 2021 the Respondent objected to the claim, summarised on the res judicata/abuse of process principle. It therefore sought Strike Out or a Deposit Order. On 23 July 2021 the Claimant's Solicitors replied and to put at its simplest they withdrew all elements of the claim other than those which relate to what I will describe as the WhatsApp messages exchanged between PC A and PC B[1]. The matter came before this Judge on 9 August 2021 at a Case Management Hearing. Having set out the history of the claim and its predecessor I decided that the Respondent's application that the surviving part of the claim should be struck out as abuse of process merited a Preliminary Hearing hence the listing of the same before me today.

Procedural history of the first claim 2603286/2019

2. On 7 November 2019 the Claimant brought a claim (ET no1) to the Tribunal. It is 2603286/2019 (commencing at Bp70[2]). It was presented by his then Solicitors, Slater and Gordon. Mr Reeves was the solicitor acting and seems to have done so throughout that firm's involvement. Put at its simplest, the Claimant at that stage was still a serving Police Officer with the Respondent. His claim was about what was by then an ensuing disciplinary process alleging misconduct by him. Essentially what was pleaded was that the way in which that internal proceeding had been incepted and was being conducted constituted sex and race discrimination, him being of an ethnic minority namely Sikh and the principle perpetrators against him being white female serving Police Officers.

3. Having been served the claim, on 19 December 2019 the Respondent sought a stay of the proceedings, including filing a response (ET3) for the time being, to await the outcome of the internal proceeding. It obviously had in mind that if the Claimant were to be found guilty so to speak of what were prima facie serious offences of misconduct against him and thus brought a second claim to Tribunal because he had been dismissed presumably based upon race or sex discrimination grounds, then it would make abundant sense that the proceedings be consolidated and matters dealt with in the round.

[1] Their names are at the request of the parties anonymised.
[2] Bp = page number in the bundle put before me.

4. The Claimant opposed that application on 24 December 2019. His solicitors cited the Claimant's deteriorating mental health because of the ordeal that he was suffering viz the internal proceeding, and that he wished to proceed with the current litigation and not wait the outcome of what might occur in due course, predicting that the internal process might take considerable time to complete, which indeed it did. On circa 6 January 2020 another employment Judge therefore refused the Respondent's application and ordered it to file an ET3 and which it duly did. On 30 January 2020 a case management hearing (see Bp1) took place before Employment Judge Batten. She made directions for a main hearing and listed the same to take place before a full Tribunal at Nottingham over three days commencing 11 March 2021.

5. In accordance with those directions the parties following discovery prepared a bundle via the Respondent. On 24 February 2021, just a few days before witness statements were due to be exchanged, the Claimant's Solicitors wrote into the Tribunal (Bp133) requesting a postponement of the imminent Hearing. Of importance is paragraph 2. Stated was how the Claimant had in fact now been dismissed on 8 February 2021. The misconduct panel undertaking the internal disciplinary process having found him guilty of gross misconduct. Set out was, therefore: -

> *"We are instructed that C intends to submit a new discrimination claim arising from his dismissal on 8 February 2021. As well as the dismissal itself, the prospective new claim will encompass the misconduct investigation/procedure that led to the dismissal and the Claimant believes that the issues to be determined at the forthcoming hearing in March are linked to the subsequent events giving rise to the prospective new claim, in particular, the misconduct investigation/procedure that culminated in the Claimant's dismissal on 5 February 2021 had been ongoing since June 2019 and the allegations of discrimination in the existing claim (which cover the period from 1 July to 20 September 2019) arise from the early continuing course of discriminatory conduct since 2019…"*

6. And then later in the same extensive paragraph: -

> "*Accordingly, if the application to postpone is granted it is envisaged once a new claim has been issued the Claimant will apply for it to be joined to the existing claim so that the consolidated claims can be heard together at a future date".*

7. Also referred to again was that the Claimant's mental health had in any event deteriorated. The implication if not spelt out as such was that he would therefore not be fit to participate in the Hearing scheduled to start on 11th March.

8. The Respondent objected to the application by its email to the Tribunal of 25 February (Bp133). It cited the history as I have now given it, and therefore bearing in mind that the Claimant had objected to its original application and as a consequence it had fully prepared for the Hearing; arranged its witness

availability etc that the existing claim should proceed to the scheduled hearing. Suffice to say, that another Employment Judge so ordered.

9. Stopping there, in the run up to his application the Claimant had submitted amended particulars of the original complaint on 11 February 2021. It is before me commencing at Bp69. That had been sent in by Slater and Gordon. No reference was made to the dismissal or the discovery of the WhatsApp exchanges between PC's A and B which for reasons I shall come had been disclosed to the Claimant circa 29 January 2021 in the disciplinary proceedings. The Respondent had not objected to the application to amend. Then on 1 March 2021 via his solicitor the Claimant served his witness statement and which was served on 1 March (Bp 114-127). This did refer to the WhatsApp exchange. I shall return to the significance in due course.

10. In any event, the postponement having been refused, the Clamant incepted negotiations to settle via Slater and Gordon on 2 March. Privilege has self-evidently been waived as those documents are before me[3]. Suffice it to say, that these negotiations started off at 13.19 with Mr Reeves proposing: -

"Further to our conversation this morning my client has instructed me to put forward an offer of £10,000 in full and final settlement of:

a. The existing ET claim.

b. Any further ET claim he has or may have including any claim arising from the misconduct procedures/dismissal.

c. Any Civil claim he has or may have including any claim arising from his arrest.

My client has confirmed that his intention in entering into the proposed agreement would be to draw a line under all matters arising from his service with the Force and that he would be willing to enter into a confidentiality agreement as part of the settlement if terms can be agreed. I propose the settlement be completed via an ACAS COT3".

11. Having been chased, at 17.42 on 4 March, Rajeena Loyal, the in house solicitor with conduct of the matter for the Respondent, replied: -

"…my client rejects this offer. In the alternative, my client proposes the following:

Should your client withdraw his claim by ***4pm, Friday 5 March 2021,*** *the Respondent will not pursue any incurred costs to date.*

However, should this matter proceed and/or in the event your client does not withdraw his claim by that date and time….. and either withdraws it subsequently or the claim is dismissed at Tribunal …. will seek costs".

[3] They are in the main supplemental documents and not numbered.

12. At 10.51 the following day she added:

> "*Does your client still intend on bringing the claim regarding his dismissal and a civil claim regarding his arrest? If not, would your client be agreeable to a COT3 agreement in place?"*

13. What then happened is that at 10.52 that morning Mr Reeves wrote to the Tribunal marked "Urgent" which of course was because the trial was imminent.

> *"We act for the Claimant in the above claim which is listed to be heard over 5 days next week for 8-12 March*
> ***Please note that we are instructed by the Claimant to hereby withdraw this claim in its entirety …***
>
> *The Claimant is withdrawing the claim on the understanding that both sides bear their own costs and that no Costs Order shall be sought by the Respondent (or by the Claimant) in relation to the claim.*
>
> *We have confirmed that the Respondent's representatives in advance of sending this correspondence that they do not object to the Claimant withdrawing his claim on this basis. However, if he does object to our correspondence in any way, we would be obliged if these objections could be sent to the Tribunal in writing and copied to us".*

14. At 11.07, Miss Loyal was querying the terms as in effect she thought: -

"…*The drop hands offer being made for both parties to walk away from this matter and those t**hreatened**[4] bearing their own costs. If there is regarding this, my clients wishes to clarify its position now and requests a COT3 to be put in place to confirm this. I would be grateful for an urgent return."*

15. Mr Reeves promptly replied the same day at 14.09. He made plain in its reply that this wasn't the case because there hadn't been an agreement on the £10,000 deal. Thus what was being withdrawn was only the current claim.

16. Prior thereto at 13.17 had written to the Tribunal: -

> *"I confirm the Respondent does not object to the below we shall await the dismissal order".*

17. The reference to "the below" was the email which I have recited from Mr Reeves to the Tribunal withdrawing the existing claim at 10.52. She never corrected that reply if she thought she had only agreed to the withdrawal if it encompassed the not bring of a future claim relating to the dismissal.

[4] My emphasis.

18. On 11 March a Judgment dismissing that proceeding upon withdrawal was issued by Regional Employment Judge Swann.

19. Given the run up thereto which I have recited it must follow that the Claimant was not precluded from bring a future claim relating to the dismissal.

The remaining claim 2601211/2021

20. ET1 (no2) was presented to the Tribunal for the Claimant on 3 June 2021 by Penningtons. The solicitor acting is Ms Gaddu who has been present today. Slater and Gordon had by now ceased to act. The pleading commences at Bp18. Much is a paste and cut from ET1 (No1). Thus it is clearly covered by the maxim Res Judicata insofar as the Claimant was seeking to re-litigate ET1 (no1).

21. That brings me to that part of that pleading commencing at paragraph 17. These paragraphs refer to that on 29 January 2021 when the internal misconduct hearing was about to start, the Claimant had been provided with some WhatsApp messages sent between PC A and PC B. Therein reference was made to the Claimant as being "a dirty Asian cunt". This dialogue appeared to have taken place in 2019. The point being pleaded is that it should have been disclosed to him well before it was and that in any event it showed in itself incontrovertible direct sex and race discrimination.

22. Having been served ET1 (no 2) on16 July 2021 Ms Loyal for the Respondent made application to the Tribunal for inter alia strike out of the entire Claim as an abuse of process in support she cited the core jurisprudence to which I shall come and which is set out in the written submissions of both Counsel.

23. On 23 July 2021 Ms Gaddu wrote to the Tribunal. Having stated that the Claimant had "lodged a protective claim", having now take further instructions she stated:

> *" We confirm that the Claimant has instructed us to withdraw those parts of the his claim that do not relate to the racially discriminatory message as mentioned at paragraph 17 of the Claimant's grounds of complaint. For the avoidance of doubt , we confirm that the Claimant's remaining claim will therefore be based on the following:*
>
> 1. *Direct sex discrimination: - Purposely suppressing and ignoring the contents of the message and only disclosing this on 29 January 2021; and*
>   – *Failing to take formal against against PC (*A*) in respect of the discriminatory message.*
> 2. *Direct race discrimination*
>   *(*the same allegations are then repeated*)*
> 3. *Harassment*
>   *– the discriminatory message by PC (*A*).*

24. She submitted that the strike out / deposit applications were longer relevant and should be withdrawn .

25. So, I am left with the part of ET1 (no 1) which relates to the WhatsApp messages between PC's A and B.

26. On 9 August 2021 I heard the case management hearing to which I referred at the start of this Judgment. As per my orders on 3 September Ms Gaddhu confirmed my understanding as to what was left and added and which goes to the abuse of process issue:

> *"Furthermore we wish to clarify that at the point our client gained knowledge of the racial message on 29 January 2021, it was after he had submitted the previously withdrawn claim (case number 2603286/209). As such, it is our client's stance that the estoppel point is not applicable to the racial message".*

26. She made no reference to the Claimant's statement of the 1 March 2021 or the amendment of the 11 February or the withdrawal of the first claim.[5]

27. The Respondent replied as per my directions repeating that it still wanted adjudication on the abuse of process issue. I had envisaged that in my orders. Hence the hearing today.

Submissions and my findings on the abuse of process issue

28. The Respondent's application and the submissions of Mr Waite are based upon the well known rule in ***Henderson v Henderson 1843 3 Hare 100, PC*** to the effect that the issue could and should[6] have been brought in ET1 (no 1) by way of an amendment.

29. In that respect relied on in particular is the amendment of the 11 February the statement served on 1 March. As to the latter I will first refer to paragraph 44 (Bp125). The Claimant therein states says by reference to the internal disciplinary hearing how circa 26 January 2021 he received further documentation from the Respondent previously classed as unused material.

> *"The material was disclosed to me on 26 January 2021 and included a text message from (*PC A*) to another Police Officer (*PC B*) on 23 December 2018 in which she referred to me as "dirty Asian cunt…" I understand that this email has been in PSD's possession since January 2020 at the latest and yet they have not disclosed it and also taken no action to investigate or discipline (*PC A*) over it.*

[5] It is now clear that neither she or therefore Ms O' Halloran knew of the amended claim on 11 February or the statement of March 20 21 util the recent discovery from the Respondent.

[6] See Mr Waite's submissions and the reference to ***London Borough of Haringey v |O'Brien EAT 0004/16*** and that the principle applies to matters which could and should have been raised by way of an amendment to the grounds lodged in the previous proceedings.

> And thence at paragraph 53, *"the fact that PSD failed to act on (*PC A's *)text message calling me "dirty Asian cunt" and that they appeared to have tried to supress this evidence, only disclosing it when forced to at the misconduct hearing on 26 January 2021 underlined for me how differently I have been treated when compared to (*PC A*)".*

30. The point of course being that therefore being deployed before its withdrawal in ET1(no1) and thus to be utilised at the hearing commencing on 8 March was this "dynamite" evidence[7] concerning PCs A and B. And it went very much to the underlying theme so to speak of ET1(no1), namely the Claimant had been the victim of an investigation which was tainted by sex and race discrimination and that here was first hand evidence of just that which had been suppressed by the Respondent. And in my extensive experience as first a solicitor with an extensive litigation practice and then as a Judge of many years standing, I find it most unlikely, indeed bordering on the inconceivable, that given the late disclosure of the evidence, a Judge or Tribunal would rule against it being deployed at the hearing. Of course, it was then taken over by the negotiations starting on the following day.

31. And the next point becomes this, before I get into looking at all the material circumstances on "a broad merits based Judgment approach", and which is that I am well aware that Slater and Gordon is a large practice which holds itself out as being at the forefront of inter alia discrimination based litigation practice. Therefore, why not make plain in the postponement application which came so soon before the service of the statement, that there was this new evidence and thus it was an additional factor in support of the postponement application. Furthermore that it now sought to further amend the claim post 11 February in order to deploy this evidence as not only supporting the clam to date but also as a separate claim in the context thereof. That to me is an extremely important point.

32. That brings me to the Claimant's witness statement submitted for the purposes of this Hearing. It is dated and signed as of 17 November 2021. He sets out how in terms of the internal misconduct proceeding he changed Solicitors from Straw and Pearce to Taylor Law in November 2020. He refers to how the disclosure came about. In that context I have looked in the bundle at the pre-hearing before the Independently appointed legally qualified Chairman of the Police Misconduct Panel circa 19 January 2021 cross referenced to the statement of the Solicitor for the Respondent, David Ring who had the conduct of the misconduct proceedings. Circa 19 January he received from the Investigating Case Officer, who would have been a Police Officer, a spreadsheet with reference to unused material. He immediately sent it to the Claimant's Solicitors who in turn had instructed Queens Counsel for the misconduct proceeding. And by interrogating the spreadsheet, which I assume must have been electronic, they were able to find therein the WhatsApp exchange. It was deployed in the internal proceedings and for instance by cross examination of PC A on behalf of the

[7] My reference

Claimant. So, in that respect I do not find that this was necessarily improper behaviour by the Respondent which prejudiced him as alleged by the Claimant.

33. Mr Ring says he did not supress the information. The Claimant says that it must have been suppressed by someone. If not Mr Ring, then by the investigating officer responsible for preparing the misconduct investigation report.

34. I do not need to resolve that conflict in that the Claimant's legal team were clearly in possession of the information by at latest 25 January. Then I bear in mind that the Police Federation was funding not only the Claimant's legal representation for the internal proceeding, but also Slater and Gordon for the employment tribunal litigation. Ms O'Halloran for the Claimant submits that this disclosure ought to have been provided by Ms Loyal ie assume circa end of January 2021 latest, to Slater and Gordon for the purpose of the employment tribunal proceeding. I gather that by now she may have become unwell and she certainly isn't presently in work for the Respondent. But, in any event the Claimant himself having seen this new disclosure by 29 January latest why didn't he give it to his solicitor, Mr Reeves, at Slater and Gordon?

35. Or to turn it around another way did Slater and Gordon get it and, if so, when? What I can detect from the evidence, and it comes in fact from the Claimant, is that by mid-February the WhatsApp messages were with Mr Reeves at Slater and Gordon. But he did not refer to them in the amendment submitted circa 11 February 2021. Maybe on the timings this is because this was before the Claimant provided him with them. In any event Slater and Gordon must have had them before 1 March and because the WhatsApp messages are referred to in the Claimant's statement of that date and which he has told me was prepared by his solicitors ie Mr Reeves.

36. So why not simply make plain as I have already said that not only was that evidence to be deployed in relation to then claim, but it would also be relied upon to include an additional claim of direct sex and race discrimination by PCs A and B them at the material time being employees of the Respondent. Why didn't it happen? Reference has been made by the Claimant to his ill health and lack of funds. But his health is irrelevant as Slater and Gordon had by now the evidence and he was deploying it via that statement. As to lack of funds, post the Claimant's dismissal the Police Federation decided to no longer fund him. In passing the Claimant did not appeal his dismissal and of course there is no longer any claim before the tribunal on that issue post the withdrawal on 23 July 2021

37. In any event, his Police Federation representative, Ms Bunn who was also liaising on his behalf with Slater and Gordon, lobbied the Police Federation to see if they would agree to extend funding. It seems by circa 1 March the decision had been made that there would be no further funding. The Claimant was informed by Slater and Gordon that he would need to find about £17,000 for them to continue to represent him and of course the main hearing of ET1 (no 1) was imminent. But it did not stop Slater and Gordon serving the witness statement on 1 March or seeking to negotiate on his behalf a settlement. In other words, if they retained

conduct of the case, which they clearly must have done at least until 5 March, then professionally they were still obliged to utilise their best endeavours in relation to the Claimant's current claim. So why not simply make plain there would be this amendment when issuing the witness statement of 1 March if not before? It comes down to, it seems, that the Claimant was advised, he says, by Slater and Gordon that they were not confident that the application to amend would succeed. I repeat as a very experienced Judge that I would be very surprised indeed if an Employment Judge seized of that new evidence by way of that statement of 1 March it obviously only having come to light relatively shortly prior thereto circa 29 January, would not there and then have granted such an application. Also, of course, given the history of the Respondent in not opposing the previous application and this being late disclosure, it is highly unlikely that they would have opposed.

38. I have not heard from Slater and Gordon. I have no statement on its behalf. I gather from the Claimant that Mr Reeves has left the employ. I have had no written advice disclosed to me and of course the Claimant could have done so if he received any.

Conclusions

39. First I am not persuaded by the submission of Ms O'Halloran that the interchange over the settlement negotiations means that the Respondent is estopped from making its application to strike out the claim as an abuse of process. It is quite clear that Ms Loyal was not ad idem with Mr Reeves in those negotiations and she only in any event agreed in her email to the Tribunal to the settlement of the current claim.

40. Factoring in C's mental health, and I will accept what the medical evidence before me says, it did not stop him giving evidence on his own behalf in the misconduct proceeding or being able to read and agree the comprehensive statement of 1 March or being able to participate in this hearing and lucidly reply when cross examined. And his credibility was considerably undermined by in particular the statement of the 1 March and which he had not referred to in the statement he signed and dated on 17 November for the purposes of this hearing.

41. That brings me back to the seminal dicta viz Henderson v Henderson as per Lord Bingham ***Johnson v Gore Wood and Co [2002] 2AC1HL***. Inter alia the rigid approach viz Henderson v Henderson, of course a Judgment given as long ago as 1843, had to be adjusted to take account of Article 6 of the European Convention on Human Rights. He offered the following guidance (see p31A-F)[8] : -

"...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

[8] I have taken the passage from paragraph 50 of the submissions of Mr Waite.

them. The underlying public interest is the same: that there should be finality in litigation that a party should not be twice vexed in the same matter. The public interest is re-enforced by the current emphasis on efficiency and economy in the conduct of litigation in the interest of the parties and the public as a whole. The bringing of a claim or the raising of a defence in latter proceedings may without more amount to an abuse if the Court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse maybe found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the latter proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the collateral 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 any later proceedings necessarily abusive. That is to adopt too dogmatic an approach to 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, 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..".

In other words summarised by Mr Waite, could and should.

42. Reference has been made in the submissions of both Counsel to the Judgment of HHJ Eady QC, in ***London Borough of Haringey v Mrs C A O'Brien UKAET/004/16/LA.*** It is set out comprehensively in the written submissions of Mr Waite commencing at his paragraph 13 wherein he sets out paragraphs 49-60 of her judgement. Inter alia she made clear: -

"*I need only add that its quite obvious that included in the context can be where there has been a failure to amend which could and should have been made to the current claim".*

43. And on that issue within paragraph 60 that:

"…it is common ground that it is possible to amend a claim to include matters occurring after its presentation (Prakash supra).."

44. This is a reference to **Prakash v Wolverhampton County Council [2006] UKEAT/010/06.** I am very familiar with this authority and because it comes up frequently. Essentially, a litigant can bolt on to an existing claim matters that arise subsequent to it which are part and parcel of a continuing series of events, ie as in this case, apart from the WhatsApp exchange between PCs A and B, the dismissal. And of which as per the settlements negotiations Slater and Gordon were well aware of before ET1 (No 1) was withdrawn.

45. I have rehearsed and made findings on all the circumstances. A reasonable and competent lawyer such as Mr Reeves[9] could and should have applied to amend the then claim (ET1 no 1).

46. If I therefore let the Claimant proceed the Respondent will have to revisit all the circumstances covered by ET1 (no 1) and because the WhatsApp exchange cannot be viewed in isolation, bearing in mind that the Claimant was found by an independent disciplinary panel chaired by a lawyer to have committed very serious sexual misconduct against female colleagues. This outweighs the prejudice to him of allowing the proceedings to continue given I have found that the WhatsApp issue could and should have been added to ET1 no1. Indeed, in terms of the statement of 1 March 2021, it in effect was.

Conclusion

47. Accordingly, I dismiss the remains of this claim as an abuse of process.

Costs Application

48. The Respondent seeks its costs. Essentially, what it relies upon is the threshold at Rule 76 of the Employment Tribunals Constitution and Rules of Procedure 2013 and limb 1 thereof on the basis that this was unreasonable conduct in bringing the proceedings per se because of : -

a. res judicata in terms of seeking to relitigate maters already withdrawn viz ET1 (no1) and
b. an abuse process as per my findings.

49. The Claimant's contention via Ms O'Halloran can be summarised thus: -

49.1 As soon as the Respondent made plain that parts of this claim were covered by res judicata because of the withdrawal of ET1 (no1) Ms Gaddu on behalf of the Claimant promptly withdrew those parts of the claim.

49.2 As to that which remained, this preliminary hearing was listed for only 3 hours but has in fact taken two days. It is not suggested that this Judge has unnecessarily delayed in the way he has approached matters, Counsel in fact have made absolutely plain, which is perhaps obvious from their written submissions, that this case needed much more than 3 hours as has proved to be the case. Thus, there was a triable issue and therefore the Claimant has not behaved unreasonably.

[9] From the correspondence etc which I have rehearsed, and that he was a solicitor in the employ of Slater and Gordon, I have no reason to believe that he was incompetent. It may be that the focus of his instructions was to seek to negotiate a settlement. If so, it does not detract from the contents of the statement of the 1 March. Thus the Claimant cannot escape the consequences.

50. The core point to me is this; And it comes back to whether or not no Judge sitting on this case could have concluded other than that this was an abuse of process. My decision was a finely balanced one as I made plain. What it means is that I fall back on that there is nothing vexatious about the way this claim was brought. It has not been conducted in an abusive way. It is a question of whether or not to bring it in the first place was to use the old parlance misconceived i.e. no reasonable prospect of success and because of it being an abuse of process.

51. I have concluded that I cannot rule out that another Judge dealing with this case might have gone the other way from me. It follows that I have decided that I am going to not award costs other than for a limited part of the preparation of the response (ET3) in terms of the pleading of res judicata relating to the withdrawn ET1 (no1). To turn it around another way, it was unreasonable to bring that part of ET1(2) which sought to revisit the matters withdrawn by claim number one as of course it was covered by Res Judicata. It was, of course, abandoned promptly by the Claimant via his Solicitors once that was flagged up by the Respondent in July and before I ever heard my first Case Management Discussion. Thus the costs sought by the Respondent are limited.

ORDERS
Made pursuant to the Employment Tribunal Rules 2013

1. The Respondent will serve upon the Claimant's Solicitors a schedule of costs confined as set out above. It will do this **within 21 days of the issuing of this Judgment.**

2. The Claimant's Solicitors having received the same will provide their observations as to the costs schedule **within 14 days thereof**.

3. The parties to then notify the Tribunal **within 14 days** thereof if a cost hearing is needed. If not that the costs sought are agree leaving me to thus simply make a costs order in the sum thereby agreed.

4. If they are not agreed, a costs hearing to assess the same will then be listed before this Judge, time estimate 2 hours.

Employment Judge P Britton

Date: 10 December 2021

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