



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Liu

**Respondent:** The Crown Prosecution Service

**HELD AT:** London South ET by Cloud Video Platform and telephone **ON:** 14 January 2022

**BEFORE:** Employment Judge Barker

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr A Line, counsel

# JUDGMENT

The claimant's complaints are dismissed because the Tribunal has no jurisdiction to hear them, as per rule 27 of the Employment Tribunals Rules of Procedure 2013, by reason of cause of action estoppel.

# REASONS

1. By order of Employment Judge Wright made on 21 July 2021 the claimant's claim was to stand dismissed on 13 August 2021 without further order unless before that date the claimant explained why the claim should not be dismissed, as per rule 27 of the Employment Tribunals Rules of Procedure 2013.
2. The reason for Judge Wright making this order was that she was of the view that the Tribunal has no jurisdiction to consider the claim and the claim has no reasonable prospect of success as the claimant seeks to re-litigate matters that have already been dismissed by the Tribunal in an earlier claim (number 2300377/2019, hereafter "the First Claim") on the order of Employment Judge Ferguson made on 22 November 2019.
3. The claimant made representations by email on 10 August 2021 as to why the claim should not be dismissed. The claimant says that this claim (the Second

Claim) deals with new evidence that was not available to him when he issued the First Claim.

4. It is the respondent's case that the Second Claim cannot be heard by the Tribunal because the Tribunal has no jurisdiction as the claims are out of time and the claimant is re-litigating points that have already been litigated in the First Claim and dismissed. Furthermore, the respondent will say that the claimant has not established any link between his race and the facts of his treatment by the respondent and so in any event the claim has no reasonable prospects of success.
5. This hearing was conducted by video. The claimant struggled to hear and be heard and to see and be seen by the other parties in the proceedings. I took a careful note of the parties' representations, and where it became apparent that the claimant had not been able to hear what had been said, I paused the hearing to repeat the points that had been made and ensure that the claimant had heard them. However the problem of the claimant's poor connection persisted and after approximately 50 minutes of the two-hour hearing, a decision was made with the consent of the parties to continue the hearing as a telephone hearing only. This was appropriate because although the claimant had prepared a witness statement for this hearing, neither the respondent's counsel nor the Tribunal needed to ask the claimant any questions on the content of the witness statement under oath and once the parties and the Tribunal had established that each party had the relevant documents, there were no issues in proceeding by way of audio only. After the hearing switched to a telephone hearing all parties could be heard clearly and there was no further disruption.

### **Background**

6. The claimant was employed by the respondent between 13 March 2017 and 1 September 2017. He was dismissed on the grounds of capability (performance) and did not successfully complete his probation period. The claimant brought the First Claim in 2019 alleging, inter alia, race discrimination. The claimant is currently, the Tribunal understands, employed as a solicitor.

### **The First Claim**

7. The claimant's First Claim was extensively pleaded and those pleadings were before me at this hearing. The parts of the First Claim that are relevant to these proceedings are set out, for completeness, below. They are contained in several documents which will be considered in turn.
8. Firstly, in the pleadings attached to the claimant's ET1 claim form which was received by the Tribunal on 31 January 2019, which states where relevant as follows:

*"I make the following claim against the Crown Prosecution Service ("the CPS") based on the ground of direct discrimination in pursuant to sections 13 and 149(1) and (3) of the Equality Act 2010 under the protected characteristic of race under sections 4 and 149(7) of the Act.*

1. *Unfair treatment from the CPS South-East (Kent) from 13 March 2017 to 1 September 2017 in contrary to the Act.*

*(a) blocking probation progression*

*.....*

*(c) exclusion from group meetings*

*.....*

*(e) dismissal due to direct racial discrimination*

*[.....]*

*11. My line manager, district prosecutor Kevin Molony conspired with my assigned mentor senior crown prosecutor Sarah Worsley; blocked my probation progression by making me repeat the first month every month until my dismissal...*

*I was not receiving the same as my white comparators and was also excluded from regular group meetings due to Kevin not providing me with notification when the rest of the team who were white received theirs."*

9. In the claimant's List of Issues drawn up as part of case management for the First Claim, the complaints relevant to this hearing were said by him to be:

*"1(b)The Respondent excluded the Claimant from the fortnightly group meetings by not providing email notifications to the Claimant. The Claimant, in total, received one notification which was in the first fortnight of his employment. There were 12 fortnights in total;*

*The rest of the immediate team consists of Kevin Molony, Sarah Worsley, Julia Farbrace, and Victoria Gedge; who are all white. There were other members who occasionally attend the office for meetings but the Claimant is uncertain who they all were;*

*(c) The Respondent abandoned CPS Probation Policy and made the Claimant repeat the first month of prosecuting in GAP and some NGAP court cases supervised every month so that the Claimant would not be able to complete his probation plan.";*

*(d) Conspiring to dismiss the Claimant at the earliest opportunity and dismissing the Claimant;"*

10. At the hearing before Employment Judge Ferguson on 22 November 2019, she clarified the claimant's claims. This is recorded in paragraph 3 of the Tribunal's written reasons. At paragraph 3.1, Judge Ferguson notes:

*"He alleges that during his employment he was excluded from group meetings and he was required to repeat the first part of his probation such that he was unable to complete his probation. He says, in respect of both matters, that this was direct race discrimination by his manager, Kevin Molony."*

11. At paragraph 3.2 of her reasons, Judge Ferguson notes:

*“The Claimant was dismissed on 1 September 2017, ostensibly on performance grounds. He says this was a further act of direct race discrimination by the decision-maker, Nigel Pilkington. He also believes Mr Molony influenced the decision.”*

12. It was the judgment of the Tribunal on 22 November 2019 that the complaints identified at paragraphs 1 (a) to (d) in the claimant’s List of Issues (partly set out above) were dismissed because the Tribunal had no jurisdiction to hear them, because they were out of time when presented in 2019 and the claimant provided no good reason for the delay in presenting the First Claim.

13. The remaining issues in the First Claim were dismissed on withdrawal by the claimant on 15 October 2021, the First Claim having been the subject of a reconsideration request and an unsuccessful application to the Employment Appeal Tribunal.

#### The Second Claim

14. The claimant’s pleadings, attached to the ET1 claim form issued on 21 March 2021 (the Second Claim) are as follows:

*“1) I was excluded from the calendar invites recipient list for the fortnightly team meetings by Kevin Molony (manager) and then later Victoria Gedge (temporary manager from August 2017) due to my race..... I am currently in a Tribunal proceeding number 2300377/2019 against the respondent with the hearing scheduled for 9 August 2021. From disclosure I was provided with the following calendar invites:*

- i) 17 February 2017 to 21 July 2017 (five months, five days)*
- ii) 12 May 2017*
- iii) 1 Sep 2017*

*Referring to ii) being the only relevant invite despite not receiving/accessing to it*

*Referring to i) no relevance because it predates the contract and the employment commencement date and not including the rest of July and the whole of August. It appears to be backdated with an erred blanket period to cover the absence of invites.*

*Referring to iii) no relevance since the meeting was scheduled for 13:30 p.m. and that I was dismissed in the morning. The author did not delete me from the list since there was no need to. I pointed out to the respondent of the discrepancy and requested for invites to cover the entire period of my employment. I was told that there was no more calendar invites on 21 Dec 2020.*

2) *Kevin Molony in the discrimination period, without authority blocked me from completing the probation plan with the intention to dismiss me for poor performance.*

3) *Kevin Molony in the discrimination period, made recommendation for my dismissal and wrote a report with discriminatory considerations which was referred to by the dismissal officer, Nigel Pilkington who dismissed me for poor performance.”*

15. The claimant's submissions to this hearing was that he initially made a mistake in the First Claim by saying that he did not receive email invitations to the regular meetings, which he accepts was incorrect. He accepts he was told by email that team meetings were taking place and also he was orally invited to team meetings by Kevin Molony.
16. The claimant says that, having received disclosure of calendar invites as part of the First Claim litigation process, it was confirmed to him on 21 December 2020 that he was not in the recipient list for the Calendar Invites that arranged his team's meetings. The fact that some of the Calendar Invites that were disclosed to him pre—date the commencement of his employment and that some of them were for after his dismissal is suspicious, according to the claimant. It leads him to conclude that these Calendar Invites were bogus and were created with the purpose of misleading the Tribunal, a submission that the respondent rejects.
17. The Tribunal took time to understand why the claimant believes this demonstrates a new cause of action. It was still not clear why the claimant asserts that there was a material difference between whether he was invited by email to meetings or by Calendar Invites.
18. The Tribunal also sought through a number of discussions with the claimant to understand why the disclosed Calendar Invites indicate that there is evidence that tends to show a link between the claimant's race and his less favourable treatment. The claimant was unable to provide any further clarification and was able to describe his claim only in very general and speculative terms.
19. For example, he repeatedly asserted that he was discriminated against on the basis of his race because all of his team were white and he was replaced in his role by a white person. The claimant was particularly emotional when describing how the person who replaced him was welcomed to the team and sat down at his desk before the claimant had even been dismissed. The claimant told the Tribunal that this was evidence that *“they just did not want me on the team”*.
20. I discussed with the claimant at several points during the hearing that his pleadings showed only a difference in race and a difference in treatment by the respondent, and that there was no suggestion of a link between the different treatment and his race. The “new” allegations did not take the claimant's case any further forward on that basis. This is despite the claimant alleging that the respondent had a clear case to answer on this basis because they had provided him with no explanation for why he was excluded from these Calendar Invites. The claimant considered that this evidence had *“really strong”* prospects of success. However, it is my

assessment that there is no evidence of a link between the lack of Calendar Invites and the claimant's race. There is only speculation on that basis by the claimant, which is insufficient to found a claim for discrimination.

21. The claimant, as well as not accepting that the Calendar Invites issue did not have no reasonable prospect of success, also did not accept that there was any similarity or indeed any overlap between the issues litigated and dismissed in the First Claim and the issues raised in the Second Claim. I find that this cannot be said to be the case on any reading of the evidence or even on the most optimistic assessment of what the claimant may be able to demonstrate at a full merits hearing.
22. The issues raised in the Second Claim have, I find, clearly already been raised and dismissed in the First Claim, that is, of exclusion from invitations to team meetings due to his race, of discrimination in blocking his probation progression, and of discrimination in his dismissal.
23. The claimant also included in his 2021 claim allegations of personal and professional misconduct against former colleagues of his at the respondent. When asked how this related to his claims of race discrimination the claimant told the Tribunal that this was background information to indicate "*what was going on in the CPS and the character of Kevin Molony.*" It was put to the claimant by the Tribunal that the Employment Tribunal was not a forum that could determine allegations of misconduct in a professional capacity against members of the legal profession, or allegations that they were fraudulently holding themselves out as having legal qualifications. The proper forum for this, if any, was clearly the Solicitors Disciplinary Tribunal.
24. The claimant conceded during this hearing that the allegations about his former colleagues had no relevance to his race discrimination complaint.

#### The Respondent's Submissions

25. It was the respondent's submission that the manner in which these proceedings were conducted, including the number of very personal attacks on those working at the respondent, amounted to "*scandalous*" conduct as interpreted in ***Bennett v London Borough of Southwark*** in which "*scandalous*" was interpreted to mean the misuse of the legal process to abuse others.
26. The respondent's other submissions were that the Tribunal has no jurisdiction to determine any of the claims brought in the Second Claim because they are out of time. They cover the same time period as the First Claim, and there is no good reason for extending time for these to be considered late. They . These allegations were ruled to be out of time when Employment Judge Ferguson considered them in 2019.
27. Furthermore, the respondent's submissions were that the claimant was clearly relitigating points that have been already litigated and dismissed even if it is accepted that the calendar invites were new evidence.

28. Finally, the respondent asserts that, according to the rule in *Henderson v Henderson*, the allegation of the claimant's omission from formal calendar invites could have and should have been brought within the First Claim. The claimant's contention is that he did not know these Invites existed until 15 November 2019 at the earliest when they were disclosed to him, but if they made a material difference (as he now asserts) he could have raised this at the hearing on 22 November 2019, but he did not.

### **The law**

29. Cause of action estoppel prevents a party pursuing a cause of action that has been dealt with in earlier proceedings involving the same parties. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) 2014 AC 160, SC*, per Lord Sumption, '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'.
30. If, on an initial consideration of a claim, an Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim (or part of it), or that the claim (or part of it) has no reasonable prospect of success, the Tribunal shall send a notice to the parties setting out the judge's view and the reasons for it and ordering that the claim (or the part in question) shall be dismissed, as per Rule 27 of the Employment Tribunals Rules of Procedure 2013. This shall not be done until the claimant has had the opportunity to make representations on this matter, including if appropriate at a hearing.
31. In *Cox v Adecco and ors 2021 ICR 1307, EAT*, Tribunals were cautioned against striking out claims for a lack of reasonable prospects of success if they turn on factual issues that are disputed. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claims and issues are.
32. The meaning of the word "scandalous" in Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 is the equivalent of conduct that is irrelevant to the complaints brought and abusive to the other party to the litigation, as per *Bennett v London Borough of Southwark [2002] ICR 881, CA*
33. Tribunals considering the principle in *Henderson v Henderson (1843 3 Hare 100, ChD)* regarding abuse of process should consider whether, taking into account all the circumstances, a party is abusing the process of the court by seeking to raise a matter that it should have raised before. In *Henderson*, the court would not permit the same parties to open the same subject of litigation in respect of matters which might have been raised on an earlier occasion but was not, only because they have omitted part of their case. In all the circumstances, is a party misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

### **Application of the Law to the Facts Found**

34. It is clear that this litigation relates to events that have caused the claimant great distress. He is clearly still upset by these events some considerable period of time later. He is still considerably affected by what he perceives to be the respondent having treated him unfairly which he perceives to be on the grounds of his race.
35. However each of the allegations in the Second Claim have clearly already been considered by the Tribunal and dismissed in November 2019 as part of the First Claim. I find that the claimant is barred from re-litigating these matters due to cause of action estoppel.
36. I do not accept the claimant's assertion that the disclosure of calendar invites, as distinct from emails, in relation to the fortnightly team meetings, is evidence of a fresh cause of action. It is the re-litigation of an identical claim, despite the claimant possessing material not available before, as per *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) 2014 AC 160, SC*.
37. This is because the issue of the claimant's exclusion from team meetings was already clearly considered and dismissed in 2019. The fact that further evidence which he believes shows he was excluded from a calendar invite distribution list for those team meetings has become available does not constitute a fresh cause of action but is more evidence relating to the same issue.
38. Furthermore, the claimant's allegations that he was blocked from completing his probation due to his race, and that Mr Molony influenced the decision to dismiss him on the grounds of his race, were also considered and dismissed by Judge Ferguson in 2019 and therefore are also subject to cause of action estoppel.
39. The claimant accepts that the allegations of personal and professional impropriety on the part of his former colleagues contained in the pleadings of the Second Claim, are "background information" and not relevant to his race discrimination claims.
40. It is not necessary to consider the issue of the prospects of success of the claims further, or of the rule in *Henderson v Henderson*, given that the claimant is estopped from continuing with the Second Claim altogether.

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Employment Judge Barker

Date 18 January 2022

JUDGMENT SENT TO THE PARTIES ON

19 January 2022

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