EMPLOYMENT TRIBUNALS

Claimant: **Mr B LINGARD**

Respondents: **(1) SUSSEX PARTNERSHIP NHS FOUNDATION TRUST**
(2) SAMANTHA ALLEN
(3) SIMONE BUTTON
(4) JOHN CHILD

Heard at: **Bristol** **On: 5 January 2022**

Before: Employment Judge Midgley

Representation
Claimant: In person.
Respondent: Mr J Jupp, Counsel

RESERVED JUDGMENT

1. The respondent's application to strike out the claim on the grounds that it is an abuse of process because it contravenes the rule in Henderson v Henderson, and/or that it is estopped, is granted.

2. The claim is dismissed.

REASONS

The application

1. In this case the respondent applied to strike out the claims on the basis that they amounted to an abuse of the Tribunal's process because they a contravened the rule in Henderson v Henderson, and/or that they were caught by issue or action estoppel, on the grounds that they were in almost identical terms to claims that had previously been issued and dismissed on withdrawal, or issued and dismissed on the basis that they breached the rule in Henderson or were caught by issue or action estoppel.

Claims and Parties

2. By a claim form presented on 12 April 2021, the claimant brought claims of direct disability discrimination, discrimination arising from disability, indirect discrimination, failure to make reasonable adjustments, harassment and victimisation. The claimant relied upon PTSD and depression as mental conditions amounting to disabilities within the meaning of s6 and schedule 1 EQA 2010.

3. The claim was made in respect of the claimant's engagement by the First Respondent as a Temporary worker on the "Bank", working as a Nurse Support Worker in the period June 2019 until 1 August 2019, and subsequently in relation to his employment as a mental health nurse between 1 August 2019 and 27 February 2020, when the claimant's employment ended following his resignation.

4. The Second Respondent is the Chief Executive of the First Respondent, the Third Respondent the First Respondent's Chief Operating Officer, and the Fourth Respondent the First Respondent's Director of Adult Services.

5. The Fourth Respondent heard and dismissed the claimant's complaint of bullying and harassment on 27 February 2020. The Third Respondent dismissed the claimant's appeal against that decision on 9 April 2020.

6. In the grounds of complaint, which were attached to ET1 and which were approximately 38 pages long, the claimant broadly alleged that the Second, Third and Fourth respondents conspired to prevent an investigation into his complaints of disability discrimination, and in a general sense that their failures constituted direct discrimination, indirect discrimination, or victimisation, harassment, and a failure to make reasonable adjustments.

The previous litigation

7. On 26 December 2019 the claimant issued claim 1406410/2019 ("The First Claim") against the First Respondent in the Bristol Employment Tribunal. The claim included complaints of disability discrimination and detriment on the grounds of protected disclosure. The protected disclosures relied upon was a complaint on 11 September 2019 that an audit revealed that the First Respondent's compliance with a mental health requirements was 20%. The claimant relied upon the mental condition of Post Traumatic Stress Disorder ("PTSD") as a disability. He complained of a failure to make reasonable adjustments by Mr Plant in or about 1 July 2019.

8. On 4 February 2020, the First Respondent presented a response resisting the claims.

9. On the 9 February 2020, the claimant withdrew the First Claim.

10. On the 26 February 2020, the First Claim was dismissed following its withdrawal by the claimant and a dismissal Judgment was issued.

11. On 9 March 2020, the claimant presented claim 2300941/2020 ("The Second Claim") in London South Employment Tribunal. Again, the claimant complained of disability discrimination and unlawful detriment as a consequence of making protected disclosures. The detriments relied upon included those in the First Claim but listed many more besides. Additionally,

the claimant complained of automatically unfair dismissal contrary to section 103A ERA 1996.

12. The First Respondent requested further and better particulars of the Second Claim on 18 December 2020 and the claimant provided them in a 52 page document.

13. At a preliminary hearing before Employment Judge Richardson on 3 and 4 March 2021, at which the question of amendment was potentially to be address, the Employment Judge struck out the Second Claim on the grounds that the allegations of whistleblowing detriment and disability discrimination were estopped in accordance with the rule of res judicata to the extent that they repeated the substance of the First Claim, and secondly that the complaints under section 103A ERA 1996 relied upon the allegations pleaded in the First Claim, and was therefore caught by the rule in Henderson.

14. The Second Claim was therefore dismissed in its entirety.

15. On 12 April 2021, the claimant issued the Third Claim.

16. The respondents argue that all of the allegations and claims within the Third Claim should be struck out either on the grounds of res judicata or issue estoppel as a consequence of the dismissal of the First and Second Claims, or on the basis of the rule in Henderson that the matters relied upon should have been raised in the First or Second Claims.

Procedure, Hearing and Evidence

17. The respondent had prepared a bundle of documents consisting of the pleadings, Tribunal Orders and Judgments and other relevant documents of approximately 580 pages.

18. In accordance with the Tribunal's Directions the claimant and the respondent had prepared and exchanged skeleton arguments. The respondent's skeleton argument was supported by an Authorities Bundle. Attached to the Skeleton argument was a 12-page Schedule which carefully analysed each of the factual allegations and the legal claims made in the First, Second, and Third Claims. A copy of the schedule is annexed hereto as Annex 1 ("the Schedule").

19. I heard oral submissions from Mr Jupp for the respondent and from the claimant. In the event, I was referred to a helpfully limited number of documents from the Bundle by Mr Jupp, and almost none by the claimant.

20. At the end of his submissions, the claimant suggested that he had had insufficient time to consider or respond to the Schedule and so was unable to identify any inaccuracies in it. He therefore requested I permitted him to file further written submissions in which he could conduct the necessary analysis and critique.

21. On 15 January 2022, the claimant submitted a six-page document which consisted of his further arguments. The last page of that document was blank, and the claimant did not conduct the analysis which the additional submissions were permitted to address.

The Relevant Law

22. Rule 52 of the Employment Tribunal Rules provides:

Dismissal following withdrawal

52. Where a claim, or part of it, has been withdrawn under rule 51, 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—

(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or

(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

23. The effect of Rule 52 was considered by the EAT in Biktasheva v University of Liverpool, UKEAT/0253/19 when it was ruled that at [14] and [15] that the effect is wider than cause of action estoppel and

> *"the words in parenthesis are designed to be explanatory, explaining to parties the gist of the common law, that where a judgment on withdrawal has been issued they will be prevented from raising a further similar claim. The law that underlines the determination of whether further proceedings can be brought is that of res judicata, including cause of action estoppel".*

24. At [33] the EAT confirmed the decision in Virgin Atlantic Airways Ltd v Zodiac Seats Limited [2014] AC 160 at para 26 that cause of action estoppel prevents a party from bringing 'a claim identical to that which has previously been determined. It does not require that the evidence relied upon to advance the claim to be identical.' Thus, even if new evidence came to light in relation to the claims previously made, or there was a material change of circumstances, a claimant could not re-litigate the claims.

25. In Biktasheva the EAT concluded at [56] and [57] that where a claimant sought to re-litigate claims in that manner the only proper conclusion was for the later claim to be struck out because it was precluded by cause of action estoppel and/or operation of Rule 52 of the ET rules.

Res Judicata

26. The principles of the broad term, res judicata, were set out by Lord Sumption in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd) [2013] UKSC 46, [2104] AC 160 at [17] (which are repeated below for ease of reference):

> [1] The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.

> [2] Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336.
>
> [3] Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494 , 504 (Parke B).
>
> [4] Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 State Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181 , 197–198.
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> [5] Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.
>
> [6] Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.

27. A party may be bound by an earlier decision affecting another party where there is a sufficient degree of identification, or privity, between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party (per Megarry VC in Gleeson v J Wippell & Co Limited [1977] 1 WLR 510, at 515).

The parties' arguments

28. The respondent's arguments may perhaps be concisely paraphrased in this way: first, any claim or allegation which was common to the First or Second Claim and the Third Claim is estopped, whether a consequence of Rule 52 or as a consequence of cause of action or issue estoppel. Secondly, the claimant could not avoid that rule by suggesting that the claims and allegations in the Third Claim were pursued against different respondents to those in either of the proceeding claims, following Gleeson. Finally, any claim or allegation that related to an event which had occurred prior to the 9 March 2020 or the filing of the Further and Better Particulars in respect of the Second Claim in approximately January 2021 was caught by the rule in Henderson v Henderson as it could and should have been included within the First or Second Claims.

29. The respondent relied, quite sensibly, on the very detailed and helpful

Schedule and invited me to review it carefully.

30. The claimant sought to argue that the respondent had contrived to conflate two separate and distinct complaints: those of whistleblowing detriment and those of disability discrimination. His written argument contained a detailed timeline of events in respect of the two allegations. In particular, the claimant sought to stress that his resignation in February 2020 was in response to the First Respondent's failure to investigate his whistleblowing complaints which he had first raised in September 2019.

31. In contrast, he argued, his complaints relating to discrimination were first raised in a solicitors' letter in October 2019. Those complaints were investigated by the Fourth Respondent, and the claimant alleged that he failed to make reasonable adjustments when seeking to clarify the terms of reference with the claimant. The claimant argued that the Third Respondent told him that the October complaint was not one of disability discrimination, that that communication occurred in April 2020 which was after his resignation and so cannot have formed part of the First Claim.

32. It appears therefore that the claimant may tacitly concede that complaints of of whistleblowing detriment and/or dismissal on the grounds of having made a protected disclosure are made with the First and Second Claims respectively, but seeks to argue that allegations relating to the failure to investigate his complaints of disability discrimination were not raised in the First Claim.

Discussion and Conclusions

33. I carefully reviewed the Schedule and found it to be accurate in the manner in which it recorded the details of the claims and allegations contained in the claims. The claimant, despite being given the opportunity to do so, did not identify any particulars in which the Schedule was inaccurate.

34. I address the claimant's argument first. I cannot accept his suggestion that he made no complaint in either the First or Second Claim relating to the failure to investigate his complaint of disability discrimination: there are multiple and varied references to it in the Second Claim, and to a lesser extent in the First.

35. Thus, by way of brief example, paragraph 3 of the Grounds of Complaint attached to the Second Claim records,

> *"The Claimant raises multiple breeches [sic] of the Equality Act (2010)"… he was dismissed from his placement on Amberley Ward… for asking for a Work Place adjustment. Subsequently the claimant suffered Victimization from raising this concern where the claimant was restricted from working on this Ward. Examples include Work Place Adjustments denied, Job Applications unsuccessful and a withdrawal of a legal binding job offer.*

36. From paragraph 14 onwards, the claimant details the complaints of discrimination that he is making. These include:

    36.1. Para 16 - a failure to make reasonable adjustments in July 2019

    36.2. Para 17 – suspending the claimant's intended workplace placement

in July 2019;

36.3. Para 38 – delay in concluding the investigation in the claimant's complaints that the respondent had failed to make reasonable adjustments;

36.4. Para 64 – failure to make reasonable adjustments in relation to the speed at which the investigation of the claimant's complaints was concluded;

36.5. Para 71 – Sam Allen (Second Respondent) agreed to investigate the claimant's complaints that he was being treated unfairly because of his whistleblowing allegations.

37. The claimant alleged that the events at 35.1 and 35.2 breached both s.13 and s.20 EQA 2010 (see para 19) and amounted to victimisation (see paras 20-21, 25, 33); and that that at para 38 (35.3 above) was victimization (see para 38). In addition, at paragraph 76 he complained that the failure to investigate his whistleblowing complaint had affected his mental health (and so potentially, by implication, constituted discrimination arising from his disability).

38. The First Claim records that:

> *"I had two occupational health reports which advised the trust to speed up the investigations as my health was effected. This didn't happen….*
>
> *I also met with the chief executive and chief nurse to raise my concerns why the policies and procedures were not followed.*
>
> *They were aware of my mental health condition and they were advised by there [sic] own occupational health team, that I was covered by the equality act 2010.*
>
> *When I first made an effort to go back to work I got no support to go back to work and believe I was discriminated against due to my disability and due to the whistleblowing.*
>
> *This was a common theme as around July 1st whilst in Eastbourne working, Darren Plant refused me reasonable adjustments when I was suffering with mental Illness at work"*

39. As I have indicated, a careful and thorough review of the claims and allegations in the Third Claim reveal that each of that allegations was raised directly or referenced in First, but largely the Second Claim and/or the very lengthy further and better particulars that were submitted by way of clarification of those claims.

40. In so far as the claimant argues that the Further and Better Particulars were not accepted as an amendment of the Second Claim and therefore it cannot be said that the matters referenced in the Further and Better Particulars ("FBP") formed part of the Second Claim and would therefore not operate to prevent him raising the same allegations in the Third Claim, his argument is misconceived for the reasons detailed in the paragraph below.

41. Whilst the claimant is right that if the FBP were not accepted as an amendment, he could not be estopped on the basis of res judicata (action estoppel) from pursing matters in the FBP in the Third Claim, that would not prevent consideration of whether the claims and allegations were res judicata on the basis of issue estoppel or the rule in Henderson.

42. Addressing the latter rule first (Henderson), if the allegations could and should have been included in the Second or First Claims, and self-evidently they could as the claimant was able to identify them in the FBP, then they should have been included in those claims, and he cannot rely upon his failure to raise them timeously to support his efforts to defeat the respondent's application. The claims would be an abuse of process.

43. Secondly, the claims in the Third Claim would be caught by issue estoppel because they rely on events and/or issues which are necessarily common to both the First and Second Claims. Those claims having been judicially determined by their dismissal in accordance with Rule 52, the claimant cannot now re-litigate them by issuing the Third Claim.

44. It follows that the Third Claim is estopped and must be dismissed.

Employment Judge Midgley
Date: 03 March 2022.

Judgment & Reasons sent to the Parties: 04 March 2022

FOR THE TRIBUNAL OFFICE