Case Number: 3300969/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss W Yang	v	Johnson Matthey PLC

Heard at: Watford, in person **On**: 19 May 2022

Before: Employment Judge Hyams, sitting alone

Representation:

For the claimant: In person
For the respondent: Mr P Nainthy, solicitor

RESERVED JUDGMENT ON A PRELIMINARY POINT

This case is an abuse of process and is therefore struck out.

REASONS

Introduction; the procedural history so far as relevant and the purpose of the hearing of 19 May 2022

1 This case arises from circumstances which have already been the subject of a determination by an employment tribunal. That determination was made by a full tribunal, consisting of Employment Judge ("EJ") Vowles, Ms C Anderson and Mr D Bean. That determination was made at a 6-day hearing, which took place on 2-6 and 9 November 2020. Judgment was given orally. Written reasons were requested and they were sent to the parties on 7 January 2021. The claims in that case were of breaches of the Equality Act 2010 ("EqA 2010") and of automatically unfair dismissal within the meaning of section 100(1)(c) of the Employment Rights Act 1996 ("ERA 1996"). The case number of that case was 3300406/2019. There were two respondents to the claims made in that case: the first respondent was the respondent to the claims made in this case and the second respondent was Miss Vikki Roberts, who was the claimant's line

manager when she (the claimant) worked for the first respondent. I refer to that case below as "the first case".

2 On 21 January 2021, the claimant applied for the reconsideration of the judgment in the first case. There were two grounds for applying for that reconsideration. The first one was summarised as being based on the proposition that "New evidence has come to light since the hearing. And it raises new points of law not argued below, which can dramatically re-shape the case conclusion". That first ground was in these terms:

> "On 4th November 2020 at the final hearing, Miss Vikki Roberts, who was the 2nd Respondent, gave evidence on oath, saying that the event on 2nd and 3rd August 2018 was the 'straw that broke camel's back' which triggered the performance review meeting that resulted in dismissing the Claimant. The written reasons of Judgement recorded this testimony in Paragraph 76.
>
> The Claimant could not have obtained this evidence with reasonable diligence for the use at the hearing. Miss Vikki Roberts had said things very ambiguously during the dismissal process back in August 2018, moreover, deliberately hid the 'triggering' reason of dismissal, by crossing off the related allegation in the dismissal letter. Both Miss Roberts and the 1st Respondent put down very vague explanation in their ET3, with only few words such as 'capability' or 'do not have the right skills' to describe the reason of dismissal. They've acted evasively throughout the proceeding by refusing to clarify their ET3 and refusing to give written answers upon the Claimant's request.
>
> Given the Respondents' deception and evasiveness, the Claimant could not accurately discern the likely 'principal' reason of dismissal until receiving the Judgement, therefore, had not been able to claim Automatic Unfair Dismissal under section 103A ERA 1996, and alternatively, Detriment under section 47B ERA 1996, concerning 'Protected Disclosure'. The tribunal should allow adducing the new evidence and adding the aforementioned new points of law, to reshape the case conclusion."

3 Paragraph 76 of the judgment in the first case had to be read with the three preceding paragraphs in that judgment. Those paragraphs were in these terms.

> '73. The next allegation of harassment was that the Claimant was unduly criticised whilst expressing different thoughts in that the Claimant recalculated an order for refractory bricks from Derrick Maher and was told that she should not have done so on 2 August 2018. This related to an e-mail exchange at page 230 of the bundle where Mr Maher, a senior officer who was two levels above the Claimant, on 2 August 2018 e-mailed her to say:
>
> "*Open reservations PO needed by Friday 3 August 2018*

> *Please raise this order this afternoon and let me know when it is done*."

74. In her response shortly afterwards, the Claimant replied:

> "*Hello, I'm in the middle of figuring out what quantity we actually need. I understand RHI's frustration that JM has not ordered enough to as verbally estimated from procurement perspective I consider the costs wasted storage capacity lean manufacturing bricking plan availability form* [sic] *other sources along with delivery. Please allow me to sort it today*."

75. Miss Roberts saw that as effectively a failure to comply with a very clear instruction from a senior officer of the 1st Respondent to raise the order that day.

76. There is no doubt from that exchange that the Claimant did question Mr Maher's instructions. It was not undue criticism, it was justified. Miss Roberts said that it was that event which was the straw that broke the camel's back. It was the trigger for the performance review, although that performance review covered a much wider range of performance attitude and conduct as was set out in the dismissal letter. It was not ungrounded criticism.'

4 On 3 February 2021, the claimant presented the ET1 claim form for this case, i.e. case number 3300969/2021. In this case, the claimant seeks to advance the two (new) claims of an automatically unfair dismissal within the meaning of section 103A of the ERA 1996 and of detrimental treatment within the meaning of section 47B of that Act to which she referred in her application for reconsideration of the judgment in the first case. The stated basis for those two claims was the following passage in the particulars of claim for this case:

> '21. On 2nd August 2018, Mr Derrick Maher suddenly asked the Claimant to purchase extra Refractory bricks from supplier RHI.
>
> 22. The Claimant thought it was abnormal business practice to spend money on costly but unnecessary purchase order for buying excessive goods. So she wrote back to Derrick on the same day, explaining she understood the supplier's frustration of receiving less orders than they expected, and she was calculating the right quantity for actual business need, taking consideration of other procurement and supply chain factors.
>
> 23. Few hours later, the Claimant told Derrick the current stocks and coming deliveries were sufficient to meet production demand, and she would adjust the order quantities according to exact business need. The precise calculation also showed in the e-mail.

24. On 3rd August 2018, Mr Derrick Maher said he didn't ask for debate and insisted requiring ordering the quantity the supplier RHI pressured him to purchase. Despite the Claimant considered it was totally against the Respondent's own business interest to do so and it looked 'unusual' in trade, she followed the instruction without further questions.

25. The line manager, Ms Vikki Roberts issued an invitation letter of 'Performance Review Meeting' on 6th August 2018 to the Claimant, right after her return from annual leave. Stated in the letter, the meeting was set on 8th August 2018, and the concern of the Claimant's performance and suitability for the role related to the allegations of:

    (a) Failure to complete tasks in acceptable time frame
    (b) Overly questioning instruction which causes unacceptable delay
    (c) Poor attitude and behaviour towards internal stakeholders
    (d) Short notice requests to work from home

26. The letter also stated the possible outcome of terminating employment and the right to be accompanied by trade union representative or an available work colleague. No other documents were provided.'

5 The last day of the claimant's employment with the respondent (i.e. to this case) was 29 September 2018.

6 On 16 February 2021, the claimant appealed to the Employment Appeal Tribunal ("EAT") against the dismissal of the claims made in the first case.

7 On 11 March 2021, EJ Vowles determined that the claimant's application for reconsideration of the judgment in the first case should be refused. On 13 March 2021, the document stating that determination and the reasons for it was sent to the parties. In regard to the first ground for the application (the "new evidence" ground), the reasons for refusing the application were these:

'9. The reason for dismissal was clearly set out in the Respondents' witnesses evidence and was well-documented. The reasons for the dismissal were considered in detail by the Tribunal which found that (paragraph 33 of Reasons) "*The detailed dismissal letter, quoted at some length above, sets out what the Tribunal found were the true reasons for dismissal.*"

10. The claims did not include any reference to Protected Disclosures. The application to add claims of Automatic Unfair Dismissal under section 103A and Detriment under section 47B Employment Rights Act 1996 involves completely new claims not mentioned at any stage of the proceedings until now. These claims are significantly out of time, beyond the 3 month time limit. The Claimant's employment ended in September 2018, over 2 years ago. The new claims would involve substantial further clarification, investigation and new evidence. There is no

explanation of why such an amendment was not made earlier, for example at the preliminary hearings on 4 October 2019 and 10 January 2020 or at the full merits hearing. The prejudice to the Respondents in granting the application would be substantial in having to conduct further investigations and undergo a further Tribunal hearing. There are no grounds to allow such an amendment at this late stage in the proceedings. The application is refused.'

8 The respondent has not presented a response to this claim. On 25 April 2021, a letter was sent by the tribunal to the claimant in these terms:

'I write at the request of Employment Judge Alliott who directs as follows:

The respondent has failed to present a response to your claim.

Employment Judge Alliott has reviewed the file but has decided that it is not appropriate to issue a judgment because claims arising from the Claimant's employment with the Respondent have already been litigated in claim no. 3300406/2019 and were dismissed on 9 November 2020, judgment dated 31 December 2020. The claimant brings complaints of detriment and automatically unfair dismissal for making a protected disclosure in this claim. She refers to the claim being brought late as "new evidence emerged after the final hearing" and suggests that claim no. 3300406/2019 is on appeal by stating "should the case no. 3300406/2019 be granted for re-hearing".

On 21 January 2021 the claimant made an application for reconsideration of the judgment in claim no. 3300406/2019 relying on "new evidence" to bring new claim of detriment and automatically unfair dismissal, the same claims as are being brought in this claim. On reconsideration the application to amend and for reconsideration were refused.

On the face of it, the matters that the claimant seeks in this claim are the same as those she wanted to raise in claim no. 3300406/2019 and her application to amend was refused.

The claimant is to send to the Tribunal and Respondent by 4:00 pm on 17 May 2021 the following information:

1. What new information has emerged and how she came to know about it.

2. Whether claim no. 3300406/2019 has been appealed and, if so, what stage has been reached.

3. If claim no. 3300406/2019 has been appealed, whether a ground of appeal is that new information has emerged.

4. Why this claim should not be struck out as having no reasonable prospect of success due to the fact that it has already been adjudicated upon and/or is subject to appeal.'

9 The claimant appealed against the refusal to reconsider the judgment in the first case. That appeal and the appeal against that judgment were dismissed after a rule 3(10) hearing conducted by His Honour Judge James Tayler on 27 January 2022. The order directing the dismissal of the applications under rule 3(10) recorded that the appeal against the refusal of the reconsideration application was "not ... pursued".

10 On 12 December 2021, notice of the hearing of 19 May 2022 was given. So far as material, it was in these terms:

> "Employment Judge R Lewis has directed that there will be a Preliminary Hearing to determine the following issue:
>
> To consider whether the claim should be struck out of the grounds that it is out of time and / or an abuse of process and / or has no reasonable prospect of success.
>
> Case management orders may be made at the conclusion of the preliminary hearing."

Participation by the respondent in the hearing of 19 May 2022

11 Given that the respondent had not filed a response to this case, I considered whether to give permission to the respondent to participate fully in the hearing of 19 May 2022. The respondent had (through Mr Nainthy) sent the claimant its skeleton argument and bundle for the hearing only the night before. It nevertheless seemed to me to be in the interests of justice to permit the respondent to participate fully on the basis that if the claimant wanted time to consider the things that the respondent had sent to her only the night before, then she could have it. I therefore said that, and I offered the claimant an opportunity to take such time, but she did not take up that offer. I therefore permitted the respondent to participate in the hearing of 19 May 2022 fully.

The documents before me

12 The claimant had made no witness statement addressing the issue of the reasonable practicability of making her claims within the primary limitation period of three months. In the hearing which I conducted on 19 May 2022 she put before me two skeleton arguments, a bundle of documents and a bundle of authorities.

13 The respondent's documents (which I was given only at the start of the hearing) consisted of a skeleton argument, a chronology, and a bundle of documents in which there were some documents of which there were copies in the claimant's

bundle, as well as complete copies of a number of material documents which were not in the claimant's bundle of documents or of which there were only partial copies in the claimant's bundle of documents.

The applicable law

Abuse of process

14 The main principle of law which applied here was that which was to be found in the case of *Henderson v Henderson* (1843) 3 Hare 100, as considered most authoritatively by the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1. In deciding the issue set out in paragraph 10 above, I took into account the whole of the passage in the speech of Lord Bingham of Cornhill in that case at [2002] 2 AC 1, 22C-31F, all of which was material. The final part of that passage encapsulated the analysis of Lord Bingham, and it was therefore helpful to set it out here. It was at pages 30H-31F:

> 'It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in *Henderson v. Henderson* : A new approach to successive civil actions arising from the same factual matter," 19 Civil Justice Quarterly , (July 2000), page 287), that what is now taken to be the rule in *Henderson v. Henderson* , has diverged from the ruling which Wigram V.-C. made, which was addressed to res judicata. But *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. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of 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) 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 may be 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 later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves 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 early proceedings it should have been, so as to render the raising of it in 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. 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. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.'

15 The claimant in this case relied heavily on the decision of the EAT in *(1) Air Canada and (2) Alpha Catering Services (appellants) v Basra* [2000] IRLR 683. The judgment of the EAT in that case was reserved, but it was sent to the parties on 21 February 2000, so it could have been referred to by one or more parties in the appeal to the House of Lords in *Johnson v Gore Wood*, which was heard on 17, 19 and 20 July 2000. No reference to *Basra* was, however, made in *Johnson v Gore Wood*. In addition, it appeared from some research which I carried out after the hearing of 19 May 2022 had ended that *Basra* had not been the subject of any consideration in any appellate judgment.

16 I could not discern any statement of principle in the EAT's decision in *Basra*. It appeared to me that there was ample justification on the facts of that case for the actual decision of the EAT, but on the basis that there were there special circumstances which justified the conclusion that there was there no abuse of process within the meaning of *Henderson v Henderson*. Those circumstances were that (1) the claimant sought to make a claim of victimisation arising from oral evidence which was given in an earlier case's full merits hearing, having at the end of the evidence in that earlier case but before submissions were made sought permission from the tribunal which determined that earlier case to add a claim of victimisation, and (2) the tribunal hearing that earlier case had refused such permission and when doing so had said that it was open to the claimant to bring a fresh claim and (as recorded in paragraph 14 of the EAT's judgment in *Basra*) "ask the next tribunal to allow the case to proceed on the grounds that she had only just acquired the relevant knowledge to bring a victimisation complaint."

17 The decision of the Court of Appeal in *Divine-Bortey v London Borough of Brent* [1998] IRLR 525 was referred to in *Basra* and was plainly highly material. In *Divine-Bortey* the facts and the decision of the Court of Appeal are helpfully summarised in the headnote to that report, as follows.

> '**The facts:**
>
> Mr Divine-Bortey was dismissed on grounds of redundancy following a reorganisation of the section in which he was employed. The reorganisation

involved the abolition of 12 existing administrative posts and the creation of eight new positions in their place. Following interviews, Mr Divine-Bortey was not selected for one of the new posts. He complained of unfair dismissal, alleging that he should have been one of those appointed.

In the course of the tribunal proceedings, the evidence of one of the employers' witnesses indicated that Mr Divine-Bortey's African accent had a bearing on the decision not to appoint him to one of the new posts. The union official representing Mr Divine-Bortey cross-examined the witness but no application was made to add a complaint under the Race Relations Act. The tribunal concluded that the selection process had been fairly and properly carried out and the dismissal was not unfair. The reasons for that decision did not indicate in terms whether the racial issue had been taken into account in reaching that conclusion.

Mr Divine-Bortey then made a fresh complaint, alleging unlawful racial discrimination. A tribunal chairman dismissed that complaint on jurisdictional grounds, holding the matter to be res judicata. The EAT allowed an appeal against that decision. The EAT concluded that the case was not strictly one of issue estoppel since it was possible that the tribunal had reached its decision on the unfair dismissal complaint without deciding, or even addressing, issues of race discrimination. It further concluded that there were special circumstances for not applying the wider form of issue estoppel established in *Henderson v Henderson* that, ordinarily, a person is precluded from bringing fresh proceedings in respect of a matter which could and should have been litigated in earlier proceedings but was omitted through negligence, inadvertence or accident. According to the EAT, that the proceedings in question arose in an employment tribunal where it is encouraged that cases are conducted by parties without general knowledge of the law, was in itself a special circumstance justifying departure from that rule.

The Court of Appeal held:

The EAT had erred in holding that the applicant could pursue a fresh complaint under the Race Relations Act in respect of his selection for redundancy, notwithstanding that an employment tribunal had already determined his claim that his selection amounted to unfair dismissal and the implication that his selection may have been racially motivated had arisen during the course of those proceedings. In reaching that decision, the EAT had erred in its approach to the proper application of the *Henderson v Henderson* rule in employment tribunals.

The wider form of issue estoppel established in *Henderson v Henderson* applies equally to employment tribunal proceedings. Accordingly, parties to litigation must bring forward their whole case and, except in special circumstances, will not be permitted to bring fresh proceedings in respect of

> a matter which could and should have been litigated in earlier proceedings but was omitted through negligence, inadvertence or accident.
> It is not a "special circumstance" such as to displace that rule that parties in employment tribunal proceedings are encouraged not to be legally represented. The rule applies in full measure in ordinary courts irrespective of whether the person being estopped was or was not legally represented in the earlier proceedings. Moreover, the EAT's own jurisprudence clearly establishes that a point not taken by a party in an employment tribunal cannot be taken on appeal to the EAT, even though the failure to take it originally was due to the lack of skill or experience of the party's advocate and even though the omission could have been rectified by the tribunal taking the point itself. In particular, this is so when the fresh point would require further facts to be investigated. The same considerations apply to the operation of the *Henderson v Henderson* rule in employment tribunals.
>
> Nor, in the present case, were there any special circumstances sufficient to disapply the rule arising from the fact that the possibility that the applicant's selection for redundancy may have been racially motivated did not emerge until the tribunal hearing, when reference to his African accent was made by one of those who carried out the selection interviews. Any complaint of racial discrimination should then and there have been grafted on to the existing unfair dismissal proceedings, if necessary an adjournment being sought for that purpose.
>
> In any event, it could be assumed that the tribunal had taken the question of the applicant's African accent into account in considering whether the dismissal was unfair. Although racial discrimination as such was not part of the unfair dismissal litigation, the fairness of the interviewing procedures lay at the very heart of the case. There was little room for a finding that the dismissal was not unfair and yet the result of racial discrimination.'

18 The EAT in *Basra* distinguished the decision of the Court of Appeal in *Divine-Bortey*. The EAT did so in paragraphs 66-69 of its judgment in *Basra*. I could not see in that passage anything which detracted from the approach that I was required to take as a result of the decision of the House of Lords in *Johnson v Gore Wood*.

19 I found the following passage in section PI of *Harvey on Industrial Relations and Employment Law* ("*Harvey*") to be of particular assistance which is why (with apologies for the length of the quotation) I now set it out. It followed immediately after a description of the approach taken by the Court of Appeal in *Divine-Bortey*.

> "[1040]
> As seen in the extract from his speech in *Johnson v Gore Wood* quoted at para [1031] above, Lord Bingham expressed misgivings about this two-stage approach and preferred a single-stage determination in which all the circumstances would be taken into account. Employment tribunals have since been urged to apply this 'broad merits-based' approach rather than the

two-stage approach adopted in *Divine-Bortey* (see *Parker v Northumbrian Water* [2011] IRLR 652, EAT, at para 70, per Judge Hand QC).

[1041]

The *Parker* case was said by Judge Hand QC to illustrate the dangers of starting from the premise that if subsequent claims could have been advanced in earlier proceedings, then it would be an abuse of process to allow them to proceed unless special circumstances could be established (para 69). The claimant's first claim was for unpaid wages under Part II of the ERA 1996. At a CMD the claim was recast as a claim for a declaration of written particulars of the terms of his employment under Part I of that Act, and at the hearing of the revised claim an employment judge made a declaration of the terms in question. Some time later, after his employment was terminated, he issued a second claim alleging, inter alia, unlawful deduction of wages and various detriments for trying to pursue statutory rights. A second tribunal, following *Divine-Bortey*, held that these claims could have been brought in the first proceedings, therefore there was an abuse of process, and there were no special circumstances in which they could be allowed to proceed. The employment judge referred to 'the very restrictive interpretation of what constitutes special circumstances' (see para 29). Allowing the claimant's appeal, Judge Hand QC held that the employment judge had applied *Henderson* in far too rigid a way. He pointed out that whilst the determination that a claim could have been put forward in earlier proceedings may be the beginning of a consideration of abuse of process, it is not the end of it. There needed to be a discussion as to why it *should* have been raised at the earlier stage. Deciding that it *could* have been raised before, and then considering whether there were special circumstances, was too narrow an approach. If the employment judge had applied a broad merits-based approach, he would, for example, have taken account of the fact that the first claim was considered under Part I of the ERA as a result of case management decisions; that the claimant's agreement to that course could not place primary responsibility on him; and that once the claim was dealt with under Part I instead of Part II, it was unrealistic to complain that the unlawful deductions claim was not brought forward at that time (see para 72). The learned Judge considered the matter afresh by having regard to the broad merits of the case and concluded that there was no abuse of process, and so allowed the claim to continue to a hearing.

[1042]

A similar situation arose in *Foster v Bon Groundwork Ltd* [2011] IRLR 645, EAT, where an employment judge also ignored the broad merits of the case when deciding that an unfair dismissal claim made in a second action should have been brought in earlier proceedings in which the claimant had sought a redundancy payment, and that accordingly the second action was an abuse of process. Allowing the claimant's appeal, Silber J held that the judge should have adopted Lord Bingham's broad merits-based approach. It was not sufficient merely to equate the conclusion that the claimant should have brought the unfair dismissal claim in the first action with a finding of abuse of

process. Nor was there any evidence of the respondent company suffering harassment other than having to face two sets of proceedings, which was not enough. Further, although the employment judge had held that the reasons the claimant had given for his dismissal were inconsistent with his redundancy payment claim, this was incorrect as the latter claim was made whilst the claimant was still employed and was based on the fact that he was laid off rather than that he was dismissed. Moreover, the judge was wrong to hold that if the unfair dismissal claim had been brought in the first action, there would have been no need for a second action, as there were other claims arising from his dismissal that were due to be heard in any event. This factor should have been weighed in the balance. In all the circumstances, Silber J held that there was no basis for the finding of abuse.

[1043]
Although *Foster* went on appeal, it was not necessary to deal with the abuse of process issue as the Court of Appeal dismissed the appeal on other, more fundamental grounds (*Foster v Bon Groundwork Ltd* [2012] EWCA Civ 252, [2012] IRLR 517; see para [1022] above). However, Elias LJ, giving the main judgment, considered Silber J's judgment on the point with apparent, if not explicit approval, and commented that if the matter had fallen for consideration, he would have held that it was not an abuse of process for the claimant to pursue the other dismissal claims in the second action. The factors which he considered to be persuasive were that the claimant was a litigant in person, certain claims had to be considered in any event, and there would on the facts have been a real injustice to the claimant if he were not permitted to pursue the unfair dismissal claims (see para 40).

[1043.01]
A tribunal's finding of abuse of process was upheld in *Agbenowossi-Koffi v Donvand Ltd (t/a Gullivers Travel Associates)* [2014] EWCA Civ 855, where the claimant raised two new matters in a second race discrimination claim following the dismissal of her first claim as being out of time. The reasons for the finding were that both matters pre-dated the drafting of the first claim form and the claimant was aware of them; the claim form was drafted by solicitors who were aware of the time limit problems; if the claimant genuinely believed that the two new matters were acts of race discrimination, they would have been included in the first claim; the fact that they were not included indicated that she did not consider them to be acts of race discrimination, and the only reason they were being raised in the second claim was to attempt to resurrect the claim that had already been dismissed. The Court of Appeal held that the employment judge was entitled in the circumstances to strike out the second claim as being an abuse of process. In his judgment Lord Dyson MR considered Lord Bingham's comment in *Johnson v Gore Wood* that there would 'rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party' (see para [1031] above), and held that whilst it was true that there was no evidence that the claimant issued the second claim in order to harass or oppress the respondent, it did not follow that the second

claim was not an abuse of process in the particular circumstances of the case. He stated (at para 23):

> ‘’The very fact that a defendant is faced with two claims where one could and should have sufficed will often of itself constitute oppression. It is not necessary to show that there has been harassment beyond that which is inherent in the fact of having to face further proceedings.’‘

[1043.02]
When considering whether a claim could and should have been brought in earlier proceedings, it has been held that it is not just claims that accrued before the presentation of the earlier claim that are liable to be dismissed as being an abuse of process but also those that accrued up to the date of the full merits hearing of the claim. According to Judge Eady QC in *London Borough of Haringey v O’Brien* UKEAT/0004/16 (22 December 2016, unreported), where further claims accrue between presentation and the merits hearing, they should be added to the existing proceedings by way of amendment, otherwise it may be an abuse of process to bring them in separate proceedings at a later stage. In *O’Brien* the claimant sought to bring disability discrimination and other claims in a second set of proceedings after similar claims had been disposed of in earlier proceedings. Some of the claims were in respect of matters that preceded the presentation of the first complaint, and these were held to have been rightly dismissed by the employment tribunal as an abuse of process under *Henderson v Henderson*. But some other claims accrued during the period between the presentation of the first complaint (March 2011) and the merits hearing (December 2011), and the employment tribunal allowed them to be heard. Judge Eady held that it was wrong to do so. Given that it was possible for these to have been added by amending the first claim, there was no good reason to differentiate between these matters and the matters occurring before presentation. The cut-off date was the full merits hearing ‘or, at least sufficiently prior to have allowed for an amendment of the claim’ (para 60).”

The applicable time limit and the applicable test for extending it

20 A claim of unfair dismissal must be made in accordance with section 111 of the ERA 1996, subsection 2 of which provides:

> “Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
>
> (a) before the end of the period of three months beginning with the effective date of termination, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.”

21 The "following provisions" of section 111 are not relevant. The claim of detrimental treatment within the meaning of section 47B of the ERA 1996 was made under section 48 of that Act, which contains (in section 48(3)(a) and (b)) so far as material the same time limit provisions. There is much case law concerning the application of the "reasonable practicability" test in sections 48(3)(b) and 111(2)(b) of the ERA 1996. I took into account the passage in paragraphs PI[190]-[190.3] of *Harvey*, where the general approach required by the test of reasonable practicability is discussed. Reference is made there to the case to which I referred in the hearing of 19 May 2022 concerning the possibility of being misled by an employer, namely *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] ICR 372.

The claimant's case on abuse of process

22 The claimant's case on abuse of process was stated by her most succinctly in the following paragraphs of her main skeleton argument:

> "73. According to *Henderson v Henderson* and *Air Canada v Basra*, the Claimant asserts that the current claim does not subject to the bar of *Henderson v Henderson* rule [sic], as the same subject matter has been brought forward in the previous proceedings in the way of application for amendment. There is no necessity for the Claimant to argue special circumstances.
>
> 74. To establish any form of abuse of process, the burden is on the Respondent. The Claimant asserts that the current claim is not an abuse in any form. The tribunal should consider the liberal principles set in *Johnson v Gore Wood*, and the further development in *Stuart v Goldberg* and *Dexter Ltd v Vlieland-Boddy*. The Claimant denies the current claim involves any unjust harassment or oppression to the Respondent. The Claimant'[s] end is to pursue the remedy to repair the serious long-term career damage and put the derailed life back on track."

23 At the end of her supplemental skeleton argument, which concerned only the issue of abuse process, the claimant said this:

> "25. The principle set in *Thomas v Luv One Luv All* should apply in the current claim. The finding of the true reasons for dismissal in the previous judgement is finding of facts which cannot be effectively challenged on appeal. Being estopped from re-arguing the true reasons for dismissal will cause injustice to the Claimant.
>
> 26. Because the doctrine of Res Judicata cannot bar whistleblowing automatic unfair dismissal and detriment claims to be litigated in the current proceedings, the assumption of 'no reasonable prospect of success' based on Res Judicata does not stand."

The claimant's case in regard to the issue of limitation

24 In her main skeleton argument for the hearing of 19 May 2022, the claimant said this:

> "44. The Claimant was aware of her rights to complaint to employment tribunal. The previous claim presented on 10 January 2019 was in time, which was allocated to case no. 3300406/2019. However, at the time of presenting it, the Claimant had no awareness that she had valid cause of action of whistleblowing dismissal and / or detriment.
>
> 45. Such unawareness had last until the Claimant understood the implication of the new information arising at the final hearing of claim no. 33004006/2019, approximately two years after the expiry of time limit. Such new information contained the crucial facts that disclosed what could be the true reason or principle reason for the Claimant's dismissal, which differed from the oral and written reasons given by her line manager before the expire of time limit. The development of the Claimant's belief system as to the reason(s) of dismissal and detriments was detailed in the Claimant's witness statement."

25 She also said this:

> "48. By 27 January 2019, the deadline to bring the current claim, the Claimant could not know that Miss Vikki Roberts deemed the event on 2 August 2018 was the trigger to the 'Performance Review Meeting' which ended up with the Claimant being dismissed. Also, the Claimant could not know that the work-related e-mails dated 27 April 2018 and 28 June 2018 were deemed negatively as complaints by Miss Vikki Roberts. There had not been such information in oral or written form revealed to the Claimant until 3 and 4 November 2020 at the final hearing of the previous proceedings. The Claimant could not foresee what would be said in the oral judgement neither.
>
> 49. Back in August 2018, the allegation of 'Overly questioning instructions which cases unacceptable delay' was withdrawn by Miss Vikki Roberts at the 'Performance Review Meeting' and in the dismissal letter [Bundle 2, para 5]. The withdrawals had seriously misled the Claimant into believing this allegation played no role in Miss Vikki Robert's decision making. Moreover, the Claimant was deceived into totally overlooking the event on 2 August 2018 when discerning the true reason(s) for dismissal."

26 The claimed deception referred to in paragraph 49 of that passage was the result of the following short paragraph in the letter stating the reasons for the claimant's dismissal (it was the fifth paragraph on page 2 of the claimant's bundle of documents):

> "We moved on to discuss overly questioning instructions, but after a discussion around the phrasing, we decided to remove this point from the meeting, as the wording was not clear."

A discussion

27 In coming to my conclusion on the question whether the claim was an abuse of process, I found the following factors to be material.

28 The claimant was well aware at the time of her dismissal of the circumstances described by her in paragraphs 21-26 of the particulars of claim in this case, which I have set out in paragraph 4 above.

29 The paragraph of the dismissal letter of Miss Roberts which I have set out in paragraph 26 above was in no way misleading if it was simply a description of what had occurred at the meeting at the end of which Miss Roberts decided that the claimant should be dismissed. In addition, and in any event, taken on its own, it did not show that Ms Roberts based her decision to dismiss the claimant on the fact that the claimant had been "overly questioning instructions". Rather, it was to the opposite effect.

30 The claimant was arguing that there was new evidence here which either justified or compelled the conclusion that it was not reasonably practicable for her to make the claims in this case before she did in fact make them. That new evidence was paragraph 76 of the determination of the tribunal in the first case. That paragraph is set out in paragraph 3 above, but it must, as I say there, be read with the preceding paragraphs which I have also set out in that paragraph. That sequence of paragraphs in my view had to be read as being to the effect that when the tribunal said in paragraph 76 "It was not undue criticism, it was justified", it was referring to the criticism of Miss Roberts of the claimant, not the claimant's criticism of what Mr Maher had directed her (the claimant) to do. The same was true of the words at the end of paragraph 76, namely "It was not ungrounded criticism."

The claimant's submissions on the effect of the outcome in *Basra*

31 The claimant here sought to persuade me that the outcome in *Basra* required the conclusion that (1) *Henderson v Henderson* did not apply here, and (2) there was here no estoppel because the claims that she now sought to pursue (i.e. of detrimental treatment within the meaning of section 47B of the ERA 1996 and of unfair dismissal within the meaning of section 103A of that Act) had not been determined.

My conclusions

32 In my view, the only thing which the claimant could arguably rely on here as justifying the conclusion that she could not with reasonable diligence have seen at the time of bringing the first case that there was a viable claim of unfair

dismissal under section 103A of the ERA 1996 or of detrimental treatment within the meaning of section 47B of that Act in regard to claimed detrimental treatment other than dismissal, was what was said in paragraph 76 of the reasons for the dismissal of the first case. However, the reference in paragraph 76 to criticism was (as was clear from what was said in paragraph 73 of those reasons, as I say in paragraph 30 above) to the criticism by Ms Roberts and Mr Maher of the claimant's conduct. It was not a reference to criticism by the claimant of Mr Maher's conduct. The tribunal was in paragraph 76 saying that the criticism of the claimant for "expressing different thoughts" "was not undue criticism, it was justified". As paragraph 75 of those reasons showed, Miss Roberts saw the expression of those "different thoughts" as being "effectively a failure to comply with a very clear instruction from a senior officer of the 1st Respondent to raise the order that day". At best, from the point of view of the claimant, paragraph 76 of the reasons referred only implicitly to criticisms made by the claimant of what Mr Maher had required her to do, and it did so only by referring to the claimant's questioning of Mr Maher's instructions.

33 In my judgment paragraph 76 could not be relied on by the claimant as indicating in any way that the claimant's criticisms of what Mr Maher required her to do were justified and that she had been dismissed or otherwise treated detrimentally for making those criticisms except to the extent that, by making those criticisms, she was failing "to comply with a very clear instruction from a senior officer of the 1st Respondent".

34 Therefore, paragraph 76 of the tribunal's reasons in the first case revealed nothing material.

35 In my judgment, there was nothing in the circumstances before me which required the conclusion that the principle in *Henderson v Henderson* did not apply. I accepted the claimant's proposition that the fact that she had not had a determination of her claims of unfair dismissal under section 103A of the ERA 1996 and of detrimental treatment within the meaning of section 47B of that Act meant that there was no issue or cause of action estoppel which in itself precluded her from advancing those claims. However, in my judgment that in turn meant that *Henderson v Henderson* was applicable, in the sense that its application to the facts of this case could lawfully lead to the conclusion that this case was an abuse of process. The real question here was whether or not this case was an abuse of process. That question was to be assessed by looking at the situation as a whole and not just by focusing on the question whether there were special circumstances which could justify, and on the facts did justify, the conclusion that this case was not an abuse of process.

36 When I carried out that assessment, I concluded that this case was an abuse of process and should be struck out as such. That was for the following reasons.

36.1 The claimant plainly could in the first case have made a claim of unfair dismissal within the meaning of section 103A of the ERA 1996, and of

detrimental treatment within the meaning of section 47B of that Act. She chose not to do so.

36.2 Apparently she chose not to do so because of the words in the dismissal letter which I have set out in paragraph 26 above.

36.3 She could have argued at that time that those words were not an accurate description of what was in the mind of Miss Roberts when making her relevant decisions, but she did not do so.

36.4 There was nothing which had emerged in subsequent developments which, read properly, could be taken to have cast doubt on the accuracy of the words set out in paragraph 26 above. That was relevant both to the question whether there was justification for concluding that this case was an abuse of process and to the question whether it was reasonably practicable to make within the primary time limit period of three months the claims which are now sought to be made in this case.

36.5 That which was stated in paragraph 76 of the reasons of the tribunal which determined the first case revealed nothing which was not already apparent before the ET1 in the first case was presented.

36.6 Accordingly, in my judgment the claimant both could and, applying *Henderson v Henderson* as clarified by (1) *Johnson v Gore Wood* and (2) *Agbenowossi-Koffi v Donvand Ltd* (which was, I noted, summarised at [2014] ICR D27), should have brought any claim of detrimental treatment within the meaning of section 47B of the ERA 1996 and of unfair dismissal under section 103A of that Act in the first case. Seeking to make those claims in this case was an abuse of process within the meaning of *Henderson v Henderson* as so clarified.

37 In addition, and in any event, this case was brought long out of time and there was nothing in the circumstances as I have analysed them above which could have justified the conclusion that it was not reasonably practicable to make the current claims of detrimental treatment within the meaning of section 47B of the ERA 1996 and of unfair dismissal under section 103A of that Act in time. The fact that the claimant had not put a witness statement before me explaining why she had not made those claims along with the claims made in the first case was consistent with the fact that she was relying only on the words of paragraph 76 of the reasons of the tribunal which determined the first case as justifying the conclusion that it was not reasonably practicable to make the current claims in time. That paragraph, read properly, did not in my judgment mean that it was not reasonably practicable to make the claims made in this case in time. In my judgment, it plainly was so reasonably practicable.

38 For all of the above reasons, I concluded that this case was an abuse of process and/or had no reasonable prospect of success. This case therefore had to be struck out.

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Employment Judge Hyams

Date: 25 May 2022

SENT TO THE PARTIES ON

26 May 2022

FOR THE TRIBUNAL OFFICE