Case Number: 2201102/2022

# THE EMPLOYMENT TRIBUNAL

**SITTING AT:** **LONDON CENTRAL**
**BEFORE:** **EMPLOYMENT JUDGE ELLIOTT**
**BETWEEN:**

**Mr A Moussa**

**Claimant**

**AND**

**(1) First Great Western Ltd**
**(2) Mr A Field**

**Respondents**

**ON:** **22 August 2022**
**Appearances:**
**For the Claimant:** **Mr M Wynne-Jones, counsel**
**For the Respondents:** **Mr R Fitzpatrick, counsel**

## JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Tribunal is that the claims for whistleblowing detriment and victimisation in relation to the claimant's pay are struck out under the rule in ***Henderson v Henderson.***

## REASONS

1. This decision was given orally on 22 August 2022. The claimant requested written reasons.

2. By a claim form presented on 3 March 2022 the claimant Mr A Moussa brings claims of whistleblowing detriment, victimisation and unlawful deductions from wages.

3. The claimant works for the first respondent as a Gateline Assistant/Operative from May 2006. He is currently based at Paddington station.

**This remote hearing**

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

5. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

6. The parties were able to hear what the tribunal heard and see the claimant in his capacity as a witness as seen by the tribunal. From a technical perspective, there were some sound difficulties but there were overcome by asking parties to repeat what they had said and by those who were not speaking, muting their microphones.

7. The participants were told that is was an offence to record the proceedings.

## The issues for this hearing

8. The issues for this hearing were identified at a preliminary hearing on 30 May 2022 before Employment Judge Beyzade as follows:

9. Insofar as this claim relates to matters preceding the filing of the claim on 12 December 2018 under case number 2207012/2018, are those matters an abuse of process by reason of the rule in ***Henderson v Henderson***?

10. To the extent that the respondent sought to argue (submissions paragraph 11) that the claimant's pay claim ought to be struck out as having no reasonable prospect of success, this did not form part of the issues for consideration for this hearing and the claimant was not on notice to it. When this was raised, the respondent withdrew that argument.

11. Any further directions that may be necessary for case management including listing the matter for a final hearing if appropriate.

## Witnesses and documents

12. There was an electronic bundle from the respondent of 155 pages.

13. The tribunal had written submissions from both parties to which counsel spoke. All submissions and authorities referred to were fully considered whether or not expressly referred to below.

14. The tribunal heard evidence from the claimant.

## Findings

15. The claimant has worked for the first respondent since May 2006. The

second respondent Mr Adam Field is an Assistant Station Manager. The claimant initially worked at Ealing station. The background is that he was dismissed in 2013 and reinstated in March 2014 and relocated to Paddington.

16. The claims relate to the claimant's case that he has been subjected to detriment in relation to two matters: a dispute about a discrepancy in wages from the date of his relocation from Ealing to Paddington and the handling of a grievance concerning treatment by a supervisor.

17. The respondent's position was that the claimant cannot rely on any detriments predating the presentation of his claim under case number 2207012/2018 which was presented on 12 December 2018. The respondent's position was that any claim for victimisation or whistleblowing detriment in relation to pay, properly belonged in the 2018 claim.

18. The respondent conceded that the claim for unlawful deductions from wages was not the subject of this application.

<u>Previous claims</u>

19. The claimant has brought four prior claims against the first respondent. These were:

20. A first claim on 30 July 2013 a whistleblowing detriment claim under case number 2204462/2013.

21. The second claim on 29 October 2013 a claim for unfair dismissal, whistleblowing detriment, race and religious discrimination under case number 2204984/2013.

22. These two claims were settled by way of a COT3 settlement. It was part of the terms of settlement that the claimant was transferred from Ealing to Paddington.

23. The third claim on 29 October 2013 under case number 2205166/2013 – this claim was dismissed upon withdrawal.

24. The fourth claim on 12 December 2018 for victimisation, whistleblowing detriment, holiday pay and unlawful deductions from wags. This was heard at London Central Employment Tribunal in late January/early February 2022 before Employment Judge Davidson, Ms S Campbell and Mr D Clay. Judgment was sent to the parties on 14 February 2022. The decision of the tribunal was that the complaints of victimisation for having done a protected act and detriment for having made a protected disclosure succeeded against the first respondent but failed against the second and third respondents in that case.

25. The pleadings, the claimant's supplementary statement and the

Judgment in case number 2207012/2018 were included in the bundle for this preliminary hearing.

The application

26. This application relates to the pay element of the present claim. The claimant says that he has not been paid the correct wages since he was reinstated in 2014 and that this is either or both an act of whistleblowing detriment and/or victimisation. The respondent says that the pay element of this claim is contrary to the rule in ***Henderson v Henderson*** (below) and should be struck out. The application did not relate to the claim for unlawful deductions from wages.

The pleaded case

27. The claimant's pleaded case in the present claim, 2201102/2022, is that he had only just, in early 2021, come to realise that the discrepancy and inconsistency in his pay from 2014 onwards was a "*deliberate punitive targeting of him ….for committing protected acts in 2012-14"* (Particulars of Claim paragraph 10a). He said he only discovered this in early 2021 through "*his own personal enquiries and checks with some colleagues…"* (Particulars of Claim paragraph 14).

28. The claimant's pleaded case was that he raised the matter *"starting on 10th March 2021*". The claimant also pleads that he believes that this detriment is directly linked and caused by the same protected acts which he said were "*already recognised by the said Judgment*" – namely the Judgment sent to him on 14 February 2022 (paragraph 10c).

29. The claimant says he was paid less than his colleague Mr Redouanne Assad. It is not in dispute that Mr Assad was also transferred from Ealing to Paddington at the same time as the claimant and he was part of a "*gang of four*" (claimant's words) who raised protected acts and protected disclosures.

30. In his witness statement the claimant said he saw Mr Assad's payslips in November 2020. He also said this in a supplementary witness statement in the 2018 case dated 17 December 2020: "*I have very recently discovered in November 2020, that, I am being paid less than my colleagues like Redouanne Assad; even we both started at Paddington station at the same time in 2014 and do the exact same job"*. In the final paragraph of that statement, paragraph 194, he said "*I believe it is worth highlighting, as it could be significant and relevant to my present claim".*

31. The claimant's pleaded case as to the explanation he received on 26 March 2021 was that it was because there are two grades, GO1 and GO2 and that GO2 colleagues have additional training to operate mobile ticket equipment and they receive slightly higher pay for this.

32. In paragraph 5 of his witness statement the claimant said he discussed

his wages with a colleague who showed him his payslips and he found out that he was being paid less and did not understand why. Both of them transferred to Paddington at the same time. The claimant's solicitor wrote to the second respondent complaining about the underpayment which went back to 2014.

33. In oral evidence the claimant said that when he returned to work at Paddington in March 2014 this was at a point when he was not well. In his Schedule of Loss at page 67 of the bundle, he put forward that his salary on 15 March 2014 was £24,718 and that by 29 March 2014 it had reduced to £20,244, a reduction of over £4,000 which he agreed was a large sum of money.

34. The claimant's evidence, which I accepted and find, was that when he returned to work in March 2014 he was not focussed on his pay. I also find on his evidence that once he had been back for about a year, by 2015, he did notice that his pay was wrong and that he began to raise this with the respondent.

35. I find that after the claimant had been back at work for a year, by March 2015, he was aware that his pay was over £4,000 less than it had been in mid-March 2014.

36. It was put to the claimant in cross-examination that he could have applied to amend his December 2018 claim to include the pay matter on which he now relies. He said yes he could, but he was waiting for Mr Field the second respondent, to get back to him and to send him meeting minutes. He was hoping Mr Field would deal with it.

37. The claim form in case 2207012/2018 was at page 70 of the bundle. The Judgment in case number 2207012/2018 held that the claims for holiday pay and arrears of pay – being a claim for overtime, failed as acts of whistleblowing detriment or victimisation. The tribunal found that the comparator Redouane Assad, relied on by the claimant as somebody who did receive these additional payments, had also made the protected disclosures and protected acts, so the difference in treatment could not be attributed to those matters (Judgment paragraph 66). Mr Assad made the same disclosures and had done the same protected acts/disclosures and the Tribunal found in February 2022 that the difference in treatment could not be attributed to those acts or disclosures.

38. In terms of the issues Judge Davidson's tribunal was asked to determine, the detriment in relation to arrears of pay and holiday pay was put at paragraph 7.9 as "*the failure to pay 40 days' overtime and the failure to pay 46.55 days' holiday pay".* This was not a determination about the reduction in salary which the claimant seeks to pursue in these proceedings.

39. The claimant raised the matter of this pay discrepancy with the

respondent in March 2021 having been aware since March 2015 that he was receiving over £4,000 less than his pay before his relocation to Paddington.

40. The claimant's reasons for not bringing the claim for victimisation or whistleblowing detriment in relation to this reduction in pay, was because he was following an internal process with the respondent and that he did not know about it when he issued his claim on 12 December 2018.

41. The respondent confirmed that no issue was taken by them in relation to the settlement of the earlier claims and I have not taken the earlier COT3 settlement into account.

**The relevant law**

42. ***Henderson v Henderson 1843 3 Hare 100*** established that parties to litigation must bring forward their whole case. They will not be permitted to bring fresh proceedings in a matter which could and should have been litigated in earlier proceedings, but was omitted through negligence, inadvertence or even accident.

43. The Vice Chancellor's Court held in the above case that a court will not, except in special circumstances, permit the same parties to open the same litigation in respect of a matter which should have been, but was not, presented as part of the original contest, because of negligence, inadvertence, or even accident. The plea of res judicata applied, except in special cases, not only to points which the court was actually required to decide, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

44. The relevant principles were reviewed and restated by the House of Lords in ***Johnson v Gore Wood 2001 2 WLR 72,*** where Lord Bingham said (at paragraph 31) that the court or tribunal must consider:

    i. *whether in all the circumstances the bringing of proceedings is an abuse of process;*
    ii. *the circumstances will include whether the proceedings are brought against the same defendant or respondent; whether the issue could, with reasonable diligence, have been discovered and raised in the previous proceedings; and whether the later action involves unjust harassment or oppression of the party sued.*

45. Applying ***Henderson v Henderson***, the House of Lords said in ***Johnson v Gore Wood***:

    *"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".*

46. The crucial question is whether the claimant is, in all the circumstances, misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before.

47. In considering whether a subsequent claim is a misuse or abuse of process, the tribunal must consider the claimant's reasons for not bringing the claim earlier – see ***James v Public Health Wales NHS Trust EAT/0170/14*** (Langstaff P).

48. In ***London Borough of Haringey v O'Brien EAT/0004/16*** the EAT held that the tribunal should consider not just the events occurring prior to the presentation of a claim but also those occurring after that date but prior to the hearing of that claim (judgment paragraph 60). The EAT said that if the Employment Tribunal was entitled to find that it was a ***Henderson*** abuse of process to pursues complaints in a second set of proceedings regarding matters occurring prior to the presentation of the first claim, the same reasoning would apply to events occurring thereafter and prior to the full merits hearing, or at least sufficiently prior to it to have allowed for an amendment to the claim.

49. The burden is on the employer to establish clearly that it was an abuse of process for it to be subjected to the second claim - ***Agbenowossi-Koffi v Donvand Ltd 2014 ICR D27 (CA).***

50. In ***Arnold v National Westminster Bank Plc (HL) 1991 2 AC 93*** Lord Keith said:

*"It is appropriate to commence by noticing the distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened."*

Lord Keith also said:

*"In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the*

*correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result."*

## Conclusions

51. My finding above is that by March 2015 the claimant was aware that he was being paid over £4,000 less than he was paid prior to his reinstatement and relocation to Paddington.

52. I am not clear whether the claimant believed that he needed a comparator in order to bring claims of victimisation and/or whistleblowing detriment as he has referred to Mr Assad as his comparator. He was legally represented in the 2018 claim, as he is in these proceedings and his solicitors were involved in the raising of issues about his pay in 2021. As a matter of law the respondent correctly submits that no comparator is needed for such claims.

53. As set out above, the claimant's pleaded case was that by November 2020 he was aware of a discrepancy compared with Mr Assad, although no comparator was needed. His pleaded case at paragraph 10c was that he believed that the discrepancy was directly linked and caused by the same protected acts which he said were "*already recognised by the said Judgment*" of February 2022. He relies upon the same acts as causing the pay detriment about which he complains in the present case.

54. The claimant referred to this in his witness statement dated 17 December 2021 at paragraph 194 saying: "*I believe it is worth highlighting, as it could be significant and relevant to my present claim".*

55. In his mind, the claimant made the link between the reduction in pay and his protected acts and disclosures even before the respondent had given explanations about the GO1 and GO2 grading. The claimant had certainly made that connection during the course of his 2018 claim because he said as much in his statement, he believed it was "*significant and relevant"* to his 2018 claim.

56. The claimant was legally represented, but made no application to amend to include this pay reduction which, on his case, was for the same reasons as the other deductions, for overtime and holiday pay.

57. To allow the claims for victimisation and whistleblowing detriment to go ahead based on the same protected acts/disclosures would mean that a tribunal will have to go over the same ground, looking at the very same disclosures and making a decision on causation.

58. My finding is that this claim properly belonged to the subject of case number 2207012/2018 and the claimant thought as much because he said so in paragraph 194 of his supplemental witness statement for that case. Exercising reasonable diligence, the claimant, who was legally represented, could have brought this forward to be heard in late January 2022.

59. He had been aware of the reduction in his pay since 2015. He knew from November 2020 that he was being paid less than Mr Assad. He raised it from March 2021 and did not receive a satisfactory response. He had a claim ongoing from December 2018 that dealt with the same matters of the disclosures he made and the detriments he suffered. Even if he did not include it in his ET1 on 12 December 2018 he could have applied to amend, as the EAT made clear in ***London Borough of Haringey v O'Brien*** (above). It was over 3 years from the issue of that claim until it was heard. There was ample time for an amendment application.

60. The public interest in these matters was set out in ***Johnson v Gore Wood*** (above) that there should be finality in litigation and that a party should not be "*twice vexed*" in the same matter when that claim should have been raised in the 2018 proceedings. Whatever answer the respondent gave in the internal proceedings, the claimant was clearly of the view that it was victimisation and whistleblowing detriment. He had already rejected the respondent's explanation about grading.

61. I find that it is an abuse of process to seek to pursue these claims of whistleblowing detriment and victimisation in relation to pay which could properly have formed part of the 2018 claim, even if by way of amendment.

62. For the avoidance of doubt, the claim for unlawful deductions from wages continues and was not challenged by the respondent in this application.

63. The claims for whistleblowing detriment and victimisation in relation to pay are struck out under the rule in ***Henderson v Henderson***.

64. The other claims proceed to a full merits hearing.

_________________________________

**Employment Judge Elliott**
**Date: 22 August 2022**

Judgment sent to the parties and entered in the Register on: 22/08/2022 : :
.
__________________________________ for the Tribunal