EMPLOYMENT TRIBUNALS

Claimant: **Simwinji Zeko**

Respondent: **The University of the West of England and others**

Heard at: **Bristol** **On: 17th May 2022**

Before: **Employment Judge P Cadney**

Representation:
Claimant: In Person
Respondent: Mr D Mitchell (Counsel)

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

i) The claimant's claims of public interest disclosure detriment contrary to s47B Employment Rights Act 1996 as set out in claim number 1405457/2020 are dismissed as having been presented out of time.

ii) The claimant's applications for preparation time orders are not well founded and are dismissed.

iii) The claimant's application to amend claim number 1403339/19 to add a claim pursuant to s145B TULR(C)A 1992 is dismissed.

iv) The claimant's application to amend claim number 1400283/18 to add a claim of victmisation pursuant to s27 Equality Act 2010 is dismissed.

v) The claimant's application that the respondent be ordered to pay a deposit as a condition of being permitted to advance its response in claim number 1400615/2019 is dismissed.

Reasons

1. The claimant has presented four claims against the University of the West of England and various of its employees. Claims 1400283/2018, 1400615/2019, and 1403339/19 were the subject of case management orders made by EJ Midgely at a hearing on 31st March 2022. They are listed for a nine day final hearing in May 2023.

2. EJ Midgley also listed claim 1405457/2020 for a preliminary hearing today to determine whether the claims:

   i) Had been brought out of time;

   ii) Whether any claim or allegation should be struck out as having no reasonable prospect of success ;

   iii) Whether a deposit order should be made in respect of any allegation having little reasonable prospect of success;

   iv) Whether the claims should be struck out pursuant to the rule in Henderson v Henderson.

3. In addition to those matters there are a number of other issues to be determined at this hearing.

   i) The claimant's application for two preparation time orders.

   ii) The claimant's application to amend claim number 1403339/2019 to add a claim pursuant to s145B TULR(C)A 1992

   iii) In addition by an application dated 16th May 2022 the claimant makes an application:

   a) To amend claim 1400283/18 to add a claim of victimisation;

   b) To amend the particulars of personal injury in that claim;

   c) To seek a deposit order against the respondent as a condition of it being permitted to advance its responses to case 1400615/19.

4. In respect of the most recent applications Mr Mitchell was content that they were dealt with at this hearing despite only having been made yesterday.

5. At the hearing on 31st March 2022 EJ Midgley struck out claims against a number of individually named respondents as the claimant had not during the hearing been able to identify any allegation made against them. This is the

subject of a reconsideration application but does not affect the issues to be determined in this hearing.

1405457/2020

6. The claims this case were identified by EJ Midgely as being claims of public interest disclosure detriment (s47B ERA 1996) and automatically unfair dismissal (s103A ERA 1996). The public interest disclosures are alleged to be contained in the claimant's written grievance sent in November 2017; the detriments to have occurred in May and June 2019; and the claimant was dismissed on 31st July 2019. The claim for automatically unfair dismissal is already before the tribunal, being one of the claims brought in 1403339/2019, and in the course of the hearing the claimant confirmed that the only claims being pursued in this claim are those for whistleblowing detriment.

Time Limits

7. The primary limitation period for all of the claims (taking the date of termination as the last possible date) expired on 30th October 2019. The claimant obtained an ACAS EC certificate with dates A and B both being given as 14th November 2019. As this is outside the primary limitation period the claimant does not get the benefit of any extension of time. The claim was presented on 10th October 2020 twenty days short of being one year out of time.

8. The time limits for the presentation of protected disclosure detriment claims is within three months from the act complained of as set out above, or "*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*"

9. The law is correctly summarised in the respondent's skeleton argument and is well known:

   i) The burden of proof lies on the claimant (*Porter v Bandbridge*); but

   ii) Should be applied liberally in favour of the employee (*Dedman v British Building and Engineering Appliance*s);

   iii) Reasonably practicable means "reasonably feasible" and requires the tribunal to ask whether "it was reasonable to expect that which was possible to have been done" (*Asda Stores v Krause*)

10. The first question is, therefore whether it was reasonably practicable to have brought the clams within the primary limitation period and the second, if not whether they were presented within a reasonable time thereafter.

11. Between 31st July 2019 and 10th October 2020 the claimant firstly submitted claim 1403339/19 on 6th August 2019. There was a preliminary hearing held on

14th August 2019; and a further PH on 13th January 2020. On 27th February 2020 the claimant issued his claim in the High Court and a further PH took place on 3rd / 4th March 2020. The case was listed for a final hearing starting on 16th November 2020. However following a telephone hearing on 9th October 2020 EJ Bax stayed the proceedings pending the outcome of the High Court claim. The current claim was issued the next day. For completeness sake the High Court claims were dismissed on 3rd December 2020.

12. There are a number of obvious points to make. Firstly there was clearly no impediment to the claimant bringing the claim at any point during that period as he did bring both a further employment tribunal claim on 6th August 2019, and the High Court claim in February 2020; and participated in at least three preliminary hearings. Secondly he was clearly by that point to familiar with the process of bringing a claim in the Employment Tribunal, and thirdly the claim brought on 6th August 2019 did bring claims relating to his dismissal, including a claim for automatically unfair dismissal which is repeated in this claim.

13. The claimant contends that it was not reasonably practicable to have submitted the claim within time; and was submitted within a reasonable time thereafter. The basis for that is that his case has to be viewed in context and is linked with that of Dr van den Anker. His submission is that the internal processes in her case were ongoing and did not conclude until October 2020. He submits that in those circumstances that it was reasonable not to submit the detriment claims until that internal process in her case had concluded as he was hopeful of being reinstated to his role. I confess I find this extremely difficult to follow. Within one week of being dismissed the claimant had brought a claim relating explicitly to his dismissal but chose not to bring claims relating to pre-dismissal detriment until the conclusion of internal processes that did not directly relate to him in any event, and which could not in and of themselves have resulted in his job being restored irrespective of the outcome for Dr van den Anker.

14. However, whatever the merits of the claimant's decision, the fact is that he chose not to bring the current claim during a period in which he did bring another tribunal claim and started High Court litigation. The factual circumstances surrounding to and leading to his dismissal had been put in issue as early as August 6th 2019 and the current claims relate to those events. In the circumstances I am unable to identify any impediment to presenting the claim that would mean that it was not reasonably practicable for it to have been presented within the primary limitation period. As a result I am bound to dismiss the claims for whistleblowing detriment as having been submitted out of time.

<u>Henderson v Henderson</u>

15. As the claims have been dismissed as being out of time this issue has fallen away. However, as discussed with the parties orally I agreed that I would deal with all the issues before me although in the circumstances I can do so relatively briefly.

16. The test for application of the rule in Henderson v Henderson was set out by Lord Bingham in *Johnson v Gore Wood and Co [2002] AC 1*:

> This form of abuse of process has in recent years been taken to be that described by Sir James Wigram V.-C. in *Henderson v. Henderson* (1843) 3 Hare 100 at 114 where he said:
> "In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, 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."
>
> 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. (My underlining)

17. The respondents case is that after his dismissal the claimant brought a new claim (1403339/19) which brought claims relating to his dismissal and expressly brought a claim of automatically unfair dismissal (S103A ERA1996 - whistleblowing) together with an interim relief application; as well as claims for "ordinary" unfair dismissal and harassment under the Equality Act 2010. It set out in detail the provisions relating to public interest disclosure in the Employment Rights Act 1996. It at least appeared to comprehensively set out all claims relating to public interest disclosure and his dismissal. Had he also wished to bring claims of whistleblowing detriment relating to the same process that was the opportunity to bring them. It submits that it is clearly a misuse or abuse of the court's processes to bring a claim over a year later which could and should have been brought at the time.

18. Moreover as set out above in relation to time limits the claimant's case is that he did not choose to advance one part of his claim, the public interest detriment claim, whilst advancing others. On the claimant's own case he decided to pick and choose when to bring different claims arising out of the same events, and to do so is necessarily a misuse or abuse of the process.

19. The claimant essentially submits that his conduct was reasonable for the reasons set out above, and relies on the proposition that it is not necessarily or automatically an abuse to bring a claim which could have been brought earlier, and that the broad merits of the claim would not justify striking it out.

20. In my judgement the respondent's analysis is correct and had the claims not already been dismissed as being out of time I would have struck them out as being an abuse of process.

Strike Out / Deposit Order

21. The respondent has confirmed that there is no application for a strike out or deposit order on any other basis than those set out above.

Preparation Time Orders

First Application

22. On 3rd / 4th March 2020 EJ Midgely held a preliminary hearing. One of the issues was the respondents' application for strike out and/or deposit orders. He dismissed an application that the claims should be dismissed in their entirety on the grounds of the claimant's conduct and a further application to strike out automatically unfair dismissal claim (s103A ERA1996 : claim no. 1403339/19) on the grounds that it had no reasonable prospect of success); but of his own volition dismissed a number of other claims and made deposit orders in respect of others. On 9th March 2020 he sought a preparation time order (PTO) of £97.50 (2.5x £39) in respect of preparation to meet the respondents strike out application. The only basis is EJ Midgely's conclusion that it was not well founded.

23. The grounds for making a PTO are identical to those for making a costs order as set out in r76 Employment Tribunals Rules of Procedure. The simple fact that an application is unsuccessful is not in and of itself the basis for making a PTO or costs order and the claimant has not identified any specific basis falling within r76. In any event EJ Midgely has set out a detailed analysis of the application (paras 1-26 Reasons) and concluded that the claimant had acted unreasonably (paras 10 -12) and had failed comply with tribunal orders (para 22) but that a fair trial was still possible and the matters identified could be met with costs orders (para 15) and an unless order (para 24). In the circumstances whilst the respondent did not achieve the outcome it sought, on the basis of EJ Midgely's findings, in my judgement there is nothing in the making of the application itself which would cross the threshold for making a PTO order,

Second Application

24. The second is an application made on 9th September 2020 is for a PTO in the sum of £60 (1.5 x £40). This relates to the alleged failure of the respondents to comply with case management orders in July 2020.

25. On 4th June 2020 EJ Livesey agreed proposed case management orders one of which was for the parties to agree the final bundle index by 15th July2020. On 14th July 2020 the respondent sought an extension to 22nd July 2020 due to the unexpected absence from the office of the relevant fee earner. The claimant agreed by email on 15th July 2020. In fact that deadline was missed and the bundle index was supplied to the claimant on 31st July 2020. In his application the claimant describes writing to the respondent on 23rd July to which they replied on 28th July 2020. However the PTO application does not relate to that letter but to "requests for deferment and responding to the non-compliance between 4th June 2020 and 28 June 2020." On the face of it none of the factual matters relied in support of the application relate to the application itself.

26. In addition there are often delays I complying with case management orders in litigation, and where, as here, a delay of eight days could not have had any effect on the parties ability to prepare for the hearing then due to take place in November 220, I would not exercise my discretion to make a PTO in any event.

Application to Amend claim 1403339/2019

27. By an application dated 15th April 2022 the claimant applies to amend claim 1403339/2019. The application relates to the allegation that prior to his dismissal on 31st July 2019 he had been offered re-engagement on the expiry of his fixed term contract. However the terms were different from those his previous contract essentially in that the offer was for a zero hours rather than a fixed hours contract. The claimant's case is that the offer of a new contract on different terms was "a direct offer bypassing my union's collective bargaining agreement being made" contrary to s145B TULR (C) A 1992 which provides that:

> ***145B Inducements relating to collective bargaining***
>
> *(1) A worker who is a member of an independent trade union which is recognised, or seeking to be recognised, by his employer has the right not to have an offer made to him by his employer if–*
>
> *(a) acceptance of the offer, together with other workers' acceptance of offers which the employer also makes to them, would have the prohibited result, and*
>
> *(b) the employer's sole or main purpose in making the offers is to achieve that result.*
>
> *(2) The prohibited result is that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union*.

28. In support of his application he relies on *Kostal UK Ltd v Dunkley and others [2021] UKSC 47*; and submits that this is simply a re-labelling of his existing pleaded claim as the offer of new employment is part of the factual background to his existing claims.

29. The respondent objects on a number of bases. Firstly this is not simply re-labelling but a wholly new claim legally and factually. Whilst the offer of new employment is part of the factual background there is no claim relating to it. Secondly the application is out of time. The date of the offer was July 2019 which means that the primary time limit for bringing the claim expired in October 2019 and the application is some eighteen months out of time. Thirdly and fundamentally they contend that it is impossible to see how s145B is engaged at all. The claimant's existing fixed term contract expired on 31st July 2019 with the result that his employment would end unless he was offered and accepted a new contract. One was offered but declined. The question of the bypassing or avoidance of collective agreement with a recognised trade union simply does not arise and has no bearing on any issue in this case.

30. As put orally the claimant contends that the respondent was obliged consult or confer with his trade union representative in respect of any new contract,

particularly if the terms were less advantageous to him, and that the failure to do so brings the claim within s145B.

31. The difficulty with the claimant's case is that whilst there may be an obligation to reach collective agreement as to the terms of any particular type of contract, the duty does not extend to individual consultation with an individual trade union representative about the offer of a contract or the contractual terms offered to an individual employee. In addition there is on any analysis no prospect of the claimant successfully asserting that an offer of a particular type contract to him has any bearing on collective bargaining or could possibly have the sole or main purpose of achieving the prohibited result. In my judgment the respondent must be correct and even taking the claimant's case at its highest the issues for determination in s145B simply do not arise in this case.

32. In my judgement, making every allowance for the claimant, the proposed claim is bound to fail and there is no purpose in permitting any amendment in any event, before even considering the effect of the claim being out of time has on the exercise of any discretion.

Application to amend claim no. 1400283/2018

Victimisation (s27 Equality Act 2010)

33. One of the decisions made by EJ Midgely in the hearing on 3rd / 4th March 2020 was to dismiss the claimant's claim for victimisation as having no reasonable prospects of success, on the basis that he had not on his own case done a protected act but was relying on a protected act of Dr van den Anker (Reasons paras 31-34). There was, as far as I am aware, no application for reconsideration of that decision or any appeal against. The claimant now contends that the decision is wrong and the has identified a number of protected disclosures he alleges he has made, and now applies to restore that claim by way of amendment.

34. As indicated orally in my view I have no power to restore by way of amendment a claim that has already been dismissed. The only way of varying or revoking that decision would be by way of an application for reconsideration and/or appeal (both of which would now be out of time). As an application for an amendment it is bound to be dismissed.

Particulars of Personal Injury

35. As Mr Mitchell pointed out the claimant does not need permission to amend to provide further detail of the claim of the injury allegedly sustained in his for damages for personal injury in the event that any relevant claim is successful. This is correct and so the details will be accepted as further information as to that part of the claim.

Application for a deposit order – claim 1400615/2019

36. In summary a part of the claimant's claim is that he was entitled to a permanent contract of employment having been employed on a series of fixed term contracts for a period of four years or more. The respondent asserts that it was objectively justified in not doing so in that the claimant was engaged under the terms of the Access to Work Scheme which required support workers to be engaged on fixed term contracts (see EJ Midgely 3rd /4th March 2020 CMO para 16.3 – 16.5). The claimant contends that this is contradicted by an email dated 5th March 2019 from the respondent's HR department to Dr van den Anker relating to the renewal of the claimant's contract, in which the view was expressed that any further fixed term contract would have to be objectively justified and that "funding" was not an objective justification.

37. In my judgment this is an insufficient basis from which to conclude that the response has little reasonable prospect of success. Firstly it depends in part by what is meant by "funding" in the email; secondly the view of the respondent's HR department would not be binding on the tribunal which would need to analyse the justification defence for itself; and thirdly in any event the advice is given to Dr van den Anker in the context of whether to renew the agreement as a fixed term rather than a permanent contract, and claimant's fixed term contract was not renewed. Fundamentally in my judgment it is unsafe to conclude that the response has little reasonable prospect of success on the basis of one comment in one email taken in isolation. It is certainly not sufficient to persuade me that this is an appropriate case in which to make a deposit order.

Ms D England

38. One of the original respondents to claim 1400615/2019 was Ms D England. That claim was withdrawn and dismissed by a judgment of EJ Oliver on 8th April 2019. She is also a respondent to claim 1405457/2020. That claim has been dismissed as having been presented out of time (see above) . She is therefore, no longer a respondent to these proceedings.

39. However she remains potentially a witness and she is a non-legal member of the Employment Tribunal and who sits in Bristol. This raises potential issues as to whether it is appropriate for the claims to be heard in Bristol/South West Region or whether it should be transferred, or a panel from another region being requested to hear the claim. These issues have been addressed in correspondence with the parties by REJ Pirani. The claimant replied on 29th April 2022 stating that he is alleging that Ms England is involved in a number of the factual allegations but is content for the case to be heard in Bristol. The respondent replied on 6thay 2022 repeating points made in an earlier email of 10th February 2022. Claim 1405457/2020 having been dismissed the only question is whether she is to be called as a witness which they have confirmed that they do not intend to do. In addition they assert that whilst she may have been involved in correspondence in the background of the claims she was not a decision maker in relation to any of the matters in issue. It is also content that

there is no potential for conflict and that it is happy for the claim to remain as listed to be heard by a panel comprising a Bristol Judge and members.

40. The current position is, therefore, that neither party is seeking an variation of the current listing of the final hearing in Bristol in May 2023. The issue will be referred back the REJ to consider whether in those circumstances he is content for the case to remain as currently listed.

Employment Judge P Cadney
Date: 19 May 2022

Order sent to the parties: 14 June 2022

FOR THE TRIBUNAL OFFICE