THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Wenigha	**v**	**(1) Moorfields Eye Hospital NHS Foundation Trust** **(2) Ms Z Marjoram** **(3) Ms F Trodd** **(4) Ms M Masih**

Heard at: London Central **On**: 6 and 7 December 2022

Before:

Representation:
Claimant: Mr K Harris (Counsel)
Respondent: Mr A Shellum (Counsel)

JUDGMENT ON PRELIMINARY HEARING

1. **Claim number 2307846/2020 is struck out as an abuse of process to the extent that it raises claims that pre-date 23 December 2019 but not to the extent that it raises claims that arose on or after that date.**

2. **The Claimant's application to amend claim number 2305664/2019 is refused.**

3. **The Claimant shall by 24 January 2023 send to the Respondent and to the Tribunal a draft list of issues which clearly and succinctly summarises the claims which are proceeding in the light of this judgment.**

REASONS

1. This preliminary hearing was listed to consider:

   1.1 The Respondents' application to strike out claim number 2307846/2020 on the basis that the Tribunal does not have

jurisdiction to hear it, as an abuse of process under the principle in **Henderson v Henderson**.

1.2 The Claimant's application to amend the claim form in claim number 2305664/2019.

2. There was a preliminary issue about privilege which was the subject of a separate order which I made having heard argument at the commencement of the hearing. I then heard evidence from the Claimant and submissions from both counsel on the issues set out above, and reserved my judgment.

3. Both counsel provided detailed skeleton arguments. There was an agreed bundle of documents containing 213 pages and page numbers in these reasons refer to that bundle unless otherwise indicated.

Procedural history

4. Claim number 2305664/2019 ("the first claim") was presented on 23 December 2019. The Grounds of Complaint, which were drafted by solicitors (Hanne & Co), identified complaints of detriment on ground of making protected disclosures ("whistleblowing detriment"); direct discrimination because of race or harassment related to race; and victimisation. I found the Grounds of Complaint, which ran to 6 pages (pages 13-18), clear and well organised. One Respondent (the First Respondent, "Moorfields"), was named

5. There was some delay in Moorfields receiving the claim. A response was presented on 6 July 2020 in which, among other matters, it was contended (at page 28) that complaints about matters which occurred on or before 24 July 2019 were out of time.

6. The Claimant was dismissed on 28 August 2020.

7. On 27 November 2020 the Claimant, again with the assistance of solicitors (Setfords), presented claim number 2307846/2020 ("the second claim"). Four Respondents were named, namely Moorfields, Ms Marjoram, Ms Trodd and Ms Masih. The Grounds of Complaint (pages 61-100) ran to 40 pages and included events that occurred both before and after the date of presentation of the first claim, i.e. 23 December 2019. The following explanation was given in paragraphs 4 and 5 of the Grounds of Claim, at page 62:

"4. The Claimant has issued an employment tribunal claim with case reference number 2305664/2019 (Original Claim). These particulars of claim are intended to bring additional claims which have not been pleaded in the original claims, provide further background information to the claims pleaded in the Original Claim to bring claims which have occurred since the Original Claim has been issued.

"5. For the convenience of the Tribunal this claim will include some repetition of background information."

8. The second claim made complaints of discrimination rising from disability; indirect disability discrimination; failure to make reasonable adjustments; victimisation; whistleblowing detriments; automatic unfair dismissal (whistleblowing); "ordinary" unfair dismissal; and unlawful deduction from wages / breach of contract.

9. On the same date (27 November 2020) the Claimant's solicitors sent an email at pages 40-42 applying for permission to amend the first claim by replacing it with the second claim, including the addition as respondents of Ms Marjoram, Ms Trodd and Ms Masih. The individual solicitor involved was Ms Ricci, who had previously advised the Claimant at Hanne & Co (although she did not draft the first claim) and was now advising him at Setfords.

10. There was again a delay in the second claim being received by the Respondents, and a response was presented on behalf of all 4 of them on 7 July 2021.

11. On 6 January 2022 a preliminary hearing for case management took place before Employment Judge Spencer, the record of this being at pages 149-152. At this point, the claims were being considered with claims by the Claimant's former line manager, which are no longer before the Tribunal. EJ Spencer listed a 2-day preliminary hearing to take place on 26 and 27 July 2022 to determine (among other matters) the **Henderson v Henderson** issue and "any application to further amend….[the first claim] made on or before 27 January 2022".

12. In paragraph 3 of the directions relevant to the preliminary hearing, EJ Spencer ordered that if the Claimant intended to make an application to amend any claim, a fully particularised and pleaded application should be sent to the Respondents and to the Tribunal by 27 January 2022.

13. The substantive preliminary hearing came before Employment Judge Heath on 26 July 2022, the record of that hearing being at pages 167-173. Mr Harris informed EJ Heath that the Claimant had provided a witness statement and two sick notes for the purposes of the **Henderson v Henderson** issue. These were then produced, not having previously been seen by the Respondents' advisers.

14. EJ Heath heard argument and decided that the hearing should be adjourned, essentially in order to give the Respondents the opportunity to consider the witness statement and whether there was an issue as to waiver of privilege (which was also listed for determination at this hearing, and which is the subject of my separate order).

15. So far as the amendment application was concerned, EJ Heath observed that, on a first reading of the Grounds of Complaint in the second claim, it

was impossible for him to tell which matters were background, which were claims already pleaded and which were new claims. EJ Heath therefore made an order for the Claimant to provide a red-line amendment of the first claim by 2 September 2022.

16. The Claimant provided such a document on 2 September 2022 at pages 177-201 (24 pages in all). By a letter of 3 October 2022 the Respondents objected to the amendments.

Henderson v Henderson

17. The modern approach to the **Henderson v Henderson** principle was set out by Lord Bingham in the following terms in **Johnson v Gore Wood & Co [2002] 2 AC 1**:

"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…… It is, however, wrong to hold that because a matter could have been raised in earlier 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 judgement 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."

18. In **Franked Income Investment Group Litigation v Revenue and Customs Commissioners [2020] UKSC 47** Lord Reed and Lord Hodge (with whom Lord Lloyd-Jones and Lord Hamblen agreed) stated that determining issues as to abuse of process did not involve the exercise of a discretion, saying that:

"75 ……..If the court, on making the broad, merits based judgment of which Lord Bingham spoke, concludes that a claim, a defence, or an amendment of a claim or of a defence involves an abuse of process or oppression of the opposing party, it must exclude that claim, defence or amendment. A finding of abuse of process operates as a bar."

Lord Reed and Lord Hodge continued:

"76 ……it is clear that for the courts to uphold a plea of abuse of process as a bar to a claim or a defence it must be satisfied that the party in question is misusing or abusing the process of the court by oppressing the other party by repeated challenges relating to the same subject matter. It is not sufficient to establish abuse of process for a party to show that a challenge could have been raised in a prior litigation or at an earlier stage in the same proceedings. It must be shown both that the challenge should

have been raised on that earlier occasion and that the later raising of the challenge is abusive."

19. Although the issue to be determined was framed as one of jurisdiction, Mr Shellum approached it as an application to strike out, and Mr Harris did not dissent from that terminology as such. I concluded that the terminology used made no difference to the substance of the issue.

20. The Claimant gave evidence by reference to his witness statement and in answer to cross-examination by Mr Shellum. In paragraphs 3 and 4 of his witness statement, the Claimant said that, having been suspended in August 2019, he was hopeful of being reinstated after his concerns had been investigated. In paragraph 6 he said that he approached Hanne & Co in September 2019 and that Ms Ricci wrote to Moorfields on his behalf. His hopes were renewed when an investigating officer was appointed in November 2019.

21. In paragraph 10 of his statement the Claimant said that he was advised about time limits for making a claim to the Tribunal. In paragraph 11 he said that he was worried about how commencing proceedings might jeopardise the investigation process, although accepting that his solicitor told him that there were legal protections against being subjected to detriments for brining a claim. In paragraph 13 he said that that he was "terrified as to what sort of consequences there will be if I actually issue a claim against Ms Marjoram or the trust as a result of actions of Ms Marjoram." Further to this, in paragraph 15 the Claimant stated that "I knew that if I issued a claim against the employer including any of the individual people involved, that there was no chance of recovery or protection from senior management if something went wrong again".

22. In paragraph 17 the Claimant said he tried to focus on things done by employees who had already left the trust and "whose wrath would be minimal if the situation was resolved" and made reference to striking a balance. When asked about this paragraph, he said that he was trying to strike a balance between protecting his position regarding time limits and putting forward his full claims. He said that the first claim "reflected what was happening at the time" and that the things that he "held back" were those he was hoping the internal process would resolve. The Claimant agreed that he struck the balance to which he referred with knowledge of the legal protection available to him. In re-examination he said that the advice about legal protection did not reassure him completely as he was still employed.

23. The Claimant also said that at the time of presenting the first claim he had mental health issues, although he agreed that there was no documentary evidence of that (the medical certificates that he provided related to the period October 2020 to April 2021, during which the second claim was presented). In paragraph 19 of his statement the Claimant said that his claim was passed from Ms Ricci to Mr Taylor at Hanne & Co when the first

claim was being prepared, and that he became "muddled" about what he had said previously and what he now needed to say.

24. Mr Shellum submitted that the proper process would have been for the Claimant to put forward the entirety of his claims (necessarily, those that had arisen by that point) in claim 1. That is undoubtedly the ideal approach and one that would have avoided the complications that have now occurred. Mr Shellum continued that, if the Claimant then realised that he had failed to advance the whole of his claim, he should have applied to amend the first claim; and, further, that an application to amend was the correct approach if further claims arose subsequently.

25. I commented in the course of Mr Shellum's submissions that it was my experience that, where matters arose after the presentation of a claim (for example, a dismissal) claimants sometimes applied to amend the existing the claim in order to plead the new matters, and sometimes presented a new claim, and that I was unaware of respondents having objected as a matter of procedure to the latter course. Mr Shellum pointed to the decision of the Employment Appeal Tribunal in **London Borough of Haringey v O'Brien [2016] EAT 0004/16**. In that case, the claim was presented on 30 March 2011 and was heard in December 2011. After the hearing the Claimant presented a further claim relying on events that occurred before 30 March 2011 and in July 2011. The EAT held that the employment tribunal erred in ruling out the pre-March 2011 incidents under **Henderson v Henderson** but treating the July 2011 events differently: the latter should also have been ruled out.

26. In paragraph 60 of his judgment Langstaff J stated that it was common ground that it was possible to amend a claim to include matters occurring after its presentation and that a pre-hearing review in August 2011 would have provided the opportunity to do so. I do not read this as meaning that an amendment to existing proceedings is the only way in which to raise claims which have arisen between the presentation of that claim and the hearing of it: it is purely the context in which the broader point was being made, that those claims should have been raised before the hearing. This is reflected in the concluding words of paragraph 60, where Langstaff J stated that "If the ET was entitled to find it was a **Henderson** abuse of process to pursue complaints in the second proceedings regarding matters occurring prior to the lodgement of the first claim – and I have concluded that it was – the same reasoning would apply in respect of events occurring thereafter, prior to the Full Merits Hearing (or, at least, sufficiently prior to have allowed for an amendment of the claim)".

27. I do not, therefore, consider that it would have been of itself an abuse or otherwise objectionable for the Claimant to have presented a second claim (rather than applying to amend the first one) in order to make claims that had arisen after he had presented the first.

28. The second claim, however, sought to do more than that. I agree with EJ Heath's observation about the difficulty in telling what information in the

second claim is intended as background and what is intended to be part of the claims to be adjudicated upon. However, it is clear (and the Claimant says this in paragraph 4 of the Grounds of Claim) that the claim includes claims that pre-date the presentation of the first claim. These additional earlier claims include claims against Ms Marjoram and Ms Trodd (Ms Masih only comes into the picture in relation to claims arising after 23 December 2019).

29. I find that the pre-23 December 2019 claims could and should have been raised in the first claim. The Claimant's evidence shows that he made a conscious decision about what to include, and what not to include, in the first claim. The reasons that he gave for that decision were concern about jeopardising the internal process; fear of consequences; and hope that the internal process would resolve matters. I find that these were matters for him. Making a claim in legal proceedings (particularly in employment tribunal proceedings, where matters can have lengthy histories) frequently involves decisions as to what to include and what not to include. It is not suggested that the Claimant has discovered information previously unknown to him, or that a new legal approach has been suggested or has occurred to him. The Claimant decided to strike a balance between protecting his position regarding time limits and putting forward everything that could possibly be included.

30. I also take into account the fact that the Claimant was legally represented at all times. He was advised about the protections available to him but was not reassured by this. It may be that once he had been dismissed, the Claimant felt that there was no longer anything to be concerned about; but again, I find that he made a conscious decision to omit matters from the first claim.

31. I do not find that the Claimant's mental health was a significant factor in the decision that he made. The medical certificate covering the period during which the second claim was presented (at page 165) refers to very poor concentration, but the Claimant was evidently able to give instructions such as to enable the second claim to be prepared. There is no evidence that his condition was any worse at the time the first claim was presented.

32. I also find that it was an abuse of process to include the pre-23 December 2019 claims in the second claim, against all 4 respondents. The correct approach would have been to apply to amend the first claim so as to include these, at which point Moorfields and the potential second to fourth respondents would have had the opportunity to make representations about the application. (This is, of course, in part what the Claimant's solicitors sought to do in the email of 27 November 2020 at pages 40-42. I shall address the amendment application below).

33. Mr Shellum submitted that the second claim was an abuse of process in its entirety. I find that the approach of failing to separate the pre- and post-23 December 2019 claims for the purposes of an amendment in the case of the former and an amendment or a new claim in the case of the latter, and

instead presenting a single new claim purporting to cover everything, was unhelpful. I do not, however, find that it was an abuse of process to present a second claim raising new (i.e. post-23 December 2019) complaints. Taking a broad, merits based judgement, I find that I should not characterise the whole of the second claim as an abuse of process as a result of finding that part of it (i.e. the pre-23 December 2019 complaints) amounted to such an abuse. I consider that it would be unjust to penalise the Claimant for seeking to bring the earlier claims by striking out claims that he would have been able to bring without objection had he not included the earlier ones.

34. Mr Harris submitted that, in any event, the second claim could not amount to an abuse of process with regard to any claims against the second to fourth respondents, as they had not been named as parties to the first claim; this was not, therefore, the second claim against them. Mr Harris contended that the **Henderson v Henderson** is designed to address the problem of a party being vexed by the same issues twice.

35. I concluded that the **Henderson v Henderson** principle is in truth wider than that. As explained by Lord Bingham in **Johnson v Gore Wood**, the principle applies where a claim should have been raised, if at all, in earlier proceedings. I find that it would not be correct to hold that the principle does not arise for consideration where the new claim is brought against a party who could have been, but was not, joined in the original proceedings. That would be to allow the process of applying to amend the original proceedings to be circumvented. Although the words of Lord Reed and Lord Hodge in the **Franked Income** case refer to "oppressing the other party by repeated challenges", I consider that these reflect the facts of that case and should not be read as restricting the principle to situations involving only the same parties as in the original proceedings.

36. I have therefore concluded that the second claim should be struck out as an abuse of process with regard to claims pre-dating 23 December 2019, but not with regard to claims post-dating 23 December 2019; and that this should be the case in relation to all 4 respondents. I find no basis on which the Tribunal could (should it wish to) decide at this point that the Claimant should not be permitted to make claims against the individual respondents.

Amendment application

37. The principles governing applications to amend were reviewed by HHJ Tayler in **Vaughan v Modality Pafrtnerships [2021] IRLR 97**. HHJ Tayler referred to the well-known authority of **Selkent**, emphasising that the Tribunal's focus should be on the balance of hardship and justice as between the parties. The **Selkent** factors (the nature of the amendment, the applicability of time limits and the timing and manner of the application) are not a checklist, but factors that may come into play when that balancing exercise is carried out.

38. Given my decision on the **Henderson v Henderson** issue, it is not necessary for me to decide the amendment application in relation to the post-23 December 2019 claims. I have considered whether I should determine the fate of the pre-23 December claims in terms of the amendment application, in case I am wrong about the **Henderson v Henderson** issue. I have concluded that there would be little value in doing so, because the outcome of that exercise might vary according to why I might be wrong.

39. It is, however, relevant to consider the application to amend in relation to the pre-23 December 2019 claims.

40. Mr Harris confirmed in his submissions that, in the event and to the extent that he was unsuccessful on **Henderson v Henderson**, he would rely on the red line amendments of 2 September 2022.

41. I considered the balance of hardship as between the parties in the event that I were to allow the amendments, and in the event that I were to refuse them. I considered that I could view the pre-23 December 2019 claims as a whole, since it was not suggested that there were any relevant factors that applied to some, but not all of them.

42. There would be hardship to the Claimant if I were to refuse the amendments, in the sense that he would be deprived of the opportunity to put forward claims that he wishes to put forward. I found, however, that this would be mitigated by the following factors:

    42.1 As already explained in relation to **Henderson v Henderson**, I have found that the Claimant made a conscious decision to omit certain pre-23 December 2019 matters from the first claim. It is not as if he was unaware of them or was deprived of the opportunity to include them by some external factor.

    42.2 He is not thereby deprived of the opportunity to bring any claims at all: he has those he decided to include in the first claim and those which arose subsequently and which I have decided can proceed under the second claim.

    42.3 Whether the date of the amendment application is taken to be 27 November 2020 or 2 September 2022, the pre-23 December 2019 claims are on the face of the matter out of time, and the Claimant would need to overcome that hurdle for them to be considered by the Tribunal.

43. I also find that there would be hardship to the First, Second and Third Respondents if I were to allow the amendments. Although I have no evidence of evidential prejudice, the Respondents would be required to address events from 2019 which they have not previously been required to address. The issues to be decided would be extended and the costs of the litigation would be increased. In particular, a longer listing would be

required for the final hearing. There would be an obligation to disclose documents in relation to the pre-23 December 2019 issues.

44. I find that the hardship to the Respondents in allowing the pre-23 December 2019 amendments outweighs that to the Claimant in not allowing them. The application is therefore refused in relation to those amendments.

Further conduct of the case

45. It is unfortunate that I have to record that we are now 3 years on from the presentation of the first claim, and still at an early stage of the litigation in procedural terms. I also regret to say that, although I have decided in principle that the post-23 December 2019 claims against all Respondents can proceed, I am unable to translate this into an order that identifies particular paragraphs of the Claimant's pleadings. I have already referred to, and I agree with, EJ Heath's observations about the Grounds of Claim in the second claim. I have not found the red line amendment of 2 September 2022 much easier to use. The following are some of the difficulties.

45.1 Paragraph 50 appears to contain 27 allegations of whistleblowing detriments, many of them referring to other paragraphs in the pleading. Some of these references are to paragraphs in the original Grounds of Claim; some are to amendments relating to pre-23 December 2019 claims (and so not now in issue) and some are to amendments relating to post-23 December 2019 claims.

45.2 In reality paragraph 50 contains more than 27 allegations, as numbers 25-27 rely on all actions of the Second, Third and Fourth Respondents as set out in the 3 subsequent paragraphs relating to them. Paragraph 62 pleads 7 post-23 December 2019 detriments; paragraph 64 pleads 2 and paragraph 66 pleads 12 (or 26 if each individual date given is taken as a separate detriment).

45.3 Throughout the pleading there are references to "the Respondent", presumably indicating the First Respondent. The other respondents are sometimes referred to by their names, at others as Second, Third or Fourth Respondents.

46. I have therefore included within my judgment what amounts to a case management order for the Claimant to prepare a list of issues reflecting the decision I have made, to be agreed with the Respondents so far as possible. It would assist the Tribunal if the following were to be avoided:

46.1 Repetition.

46.2 References to other paragraphs in the document or the pleadings. The acts relied on, detriments, etc, should be summarised in words.

46.3 Multiple variants of individual allegations created by use of the formulation “and/or”, except where necessary.

47. My intention is that the list of issues should then stand as the definitive account of the Claimant’s case. It is to be hoped that agreement can be reached about the content of the list of issues and that further judicial determination of what is in issue will not be required.

48. As previously ordered, there is to be a further preliminary hearing on 31 January 2023 with a provisional time allocation of 1 day.

Employment Judge Glennie

Dated: …….22 December 2022……..……..

Judgment sent to the parties on:

22/12/2022

For the Tribunal Office