EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Duncan	**v**	**London Borough of Ealing**

Heard at: London Central (in public, by video)

On: 31 March 2023

Before: Employment Judge P Klimov (sitting alone)

Representation:

For the Claimant: Ms L Millin, counsel

For the Respondent: Mr T Lester, counsel

JUDGMENT

1. The following parts of the Claimant's claim are struck out:

   1.1 The Claimant's allegations that the Respondent unfairly dismissed the Claimant as follows:

   ii) ignoring the fact that the Claimant was overworked,
   iv) commencing the unsatisfactory performance procedure without first appraising the Claimant,
   v) inadequate assessment of performance,
   vi) insufficient periods of time for improvement in performance (if required), and
   vii) no clear indication of what must be done to improve performance

   1.2 The Claimant's allegations that she was treated less favourably by the Respondent because of her race or age by Mrs Tamara Quinn and by Mrs Jacky Yates:

   i) inviting the Claimant to a Performance Review Hearing whilst she was on sick leave, and

ii) disregarding the evidence provided by the Claimant at the hearing

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Reasons

These reasons should be read together with the Deposit Order dated 10 April 2023 and the Tribunal's Judgment in the Claimant's first claim (case no: 2206161/2021) sent to the parties on 24 June 2022 to understand the reasoning in full.

Background and Issues

The First Claim

1. The Claimant was employed by the Respondent from 1 October 1988 until her dismissal on 4 August 2022, mainly in the Respondent's transport and travel section and most recently as a senior officer in the department responsible for transportation of children with special needs.

2. By a claim form presented on 9 September 2021, the Claimant brought complaints (Case No: 2206160/2021 – "**the First Claim"**) of direct age and race discrimination. These complaints were about the institution and conduct by the Respondent of a formal performance management process with respect to the Claimant. At that stage the Claimant was still employed by the Respondent, although she was not working due to being on long-term sick leave she had started on 19 April 2021.

3. The First Claim was heard over 7 days on 6-14 June 2022 before a Full Tribunal Panel. All Claimant's claims were dismissed. The Tribunal gave extempore judgment at the end of the hearing and then issued the judgment with written reasons on 24 June 2022.

4. The Claimant appealed the decision. On 6 December 2022, the EAT refused to allow the appeal to progress to a hearing. Her Honour Judge Tucker found that the Claimant's grounds of appeal sought, impermissibly, to relitigate the issues, which had been considered and determined by the Tribunal, and therefore did not appear to disclose any reasonable grounds for bringing the appeal. The Claimant applied for the matter to be heard before a judge under Rule 3 (10) of the EAT Rules. The Rule 3(10) hearing has been listed for 4 May 2023.

The Second Claim

5. On 8 April 2021, the Respondent invited the Claimant to a Stage 3 performance review meeting to take place on 21 April 2021. The Claimant

was informed that dismissal on the grounds of incapability with the appropriate contractual notice could be one possible outcome of the meeting.

6. On 19 April 2021, the Claimant went on long term sick leave. She remained on sick leave until her dismissal.

7. The Stage 3 meeting was re-arranged and took place on 25 April 2022. The Claimant attended with her union representative.

8. On 13 May 2022, the Respondent notified the Claimant of its decision to dismiss the Claimant with 12 weeks paid notice for unsatisfactory performance.

9. On 19 May 2022, the Claimant appealed the decision. The appeal was heard on 9 August 2022 and dismissed. The Claimant was notified of the appeal decision on 16 August 2022 (with a corrected version issued on 23 August 2022).

10. On 30 August 2022, the Claimant presented this claim for unfair dismissal, direct race and/or age discrimination and victimisation ("**the Second Claim**").

11. In her Particulars of Claim the Claimant pleaded that:

> *12. The Respondent unfairly dismissed the Claimant as follows:*
> *i) disregarding her work history of 33 years*
> *ii) ignoring the fact that the Claimant was overworked*
> *iii) ignoring positive appraisals*
> *iv) commencing the unsatisfactory performance procedure without first appraising the Claimant*
> *v) inadequate assessment of performance*
> *vi) insufficient periods of time for improvement in performance (if required)*
> *vii) no clear indication of what must be done to improve performance*
> *viii) no proper consideration of alternative work*
>
> *13. The Respondent unlawfully discriminated against the Claimant because of her age/race as follows:*
> *i) Invoking Stage 3 of the UPP procedure whilst the Claimant was on sick leave*
> *ii) treating the Claimant less favourably by the actions set out in paragraph 12 i) -vii)*
> *iii) informing the entire team that they were underperforming, but only taking action against the Claimant*
> *iv) informing the Claimant at the appeal hearing that she was not have the standard, ability and capability to perform at a job on a lower scale, when the Claimant had received good appraisals.*
>
> *14. The Respondent also victimised the Claimant because she had brought Employment Tribunal proceedings in September 2021 for discrimination on the grounds of age /race (the protected act).*

12. On 20 December 2022, there was a case management preliminary hearing before Employment Judge Henderson. EJ Henderson listed an open preliminary hearing to consider, *inter alia*, the Respondent's application to strike out parts of the Claimant's claim, or, in the alternative, for a deposit

order in relation to the corresponding allegations or arguments. The Judge also ordered the Claimant to provide further information in relation to her discrimination and victimisation claims.

13. On 14 January 2023, the Claimant provided the following further and better particulars of her claims ("**the F&BP**"):

> ***Direct discrimination (age/race)***
> *[…]*
> *2. Despite having been employed by the Respondent since 1st October 1988, with a good employment record, the Claimant was treated less favourably by Mrs Tamara Quinn and by Mrs Jacky Yates by:*
> *i) inviting the Claimant to a Performance Review Hearing whilst she was on sick leave*
> *ii) disregarding the evidence provided by the Claimant at the hearing*
> *iii) treating the Claimant as if she was stupid with Mrs Jacky Yates informing the Claimant that she did not have the ability to perform at a lower grade, let alone represent the Respondent.*
> *iv) deciding that the most severe sanction of dismissal should be imposed, when a lesser sanction could have been to allow time to improve*
> *v) dismissing the Claimant*
>
> *[..]*
>
> ***Victimisation***
>
> *5. The Respondent victimised the Claimant because she had brought Employment Tribunal proceedings for discrimination in September 2021, as set out in paragraph 1. The Claimant was victimised by:*
>
> *i) Tamara Quinn and Jacky Yates holding a Stage 3 Performance Review meeting on 25th April 2022, whilst the Claimant was on sick leave*
> *ii) Jacky Yates taking the decision to dismiss the Claimant, when a lesser sanction could have been imposed, including no case to answer.*
> *iii) Joshua Blacker upholding the decision to dismiss at the appeal hearing on 9th August 2022.*

14. On 20 February 2023, there was an open preliminary hearing before Employment Judge Gordon Walker. The Judge postponed the hearing of the Respondent's application until 31 March 2023 because the application was not clear, and the Claimant had difficulties obtaining the documents in the bundle and therefore was unable to make representations in response to the application.

15. The Judge ordered the Respondent to submit a new application setting out the legal and factual basis for it, and for the parties to submit skeleton arguments and a bundle of documents and a separate bundle of legal authorities.

16. The Judge also ordered the Claimant to provide further information, "*namely the "evidence" referred to at paragraph 2(ii) of the Claimant's further and better particulars of claim dated 14 January 2023"*.

17. Finally, the Judge recorded that the Claimant's claim for unfair dismissal was as particularised at paragraph 12 of the original Particulars of Claim, her direct age and race discrimination claims, was as particularised at paragraphs 2-3 of the F&BP, and her victimisation claim was as particularised at paragraph 5 of the F&BP.

18. I clarified with the parties at the hearing that it was accepted by both parties that the Claimant's race/age discrimination complaints and her victimisation complaint were confined to the pleadings in the F&BP, which effectively replaced her pleaded discrimination and victimisation case in the original Particulars of Claim.

19. On 6 March 2023, the Respondent sent full written grounds for its application. For ease of reference the application is attached as an annex to this Judgment.

20. Both parties submitted written skeleton arguments. I was referred to various documents in a bundle of documents of 595 pages. The parties presented a joint bundle of authorities containing the following judgments:
    1. Johnson v Gore Wood & Co (a firm) [2002] 2 AC
    2. North Glamorgan NHS Trust v Ezsias [2007] IRLR 603
    3. Balls v Downham Market High School & College [2011] IRLR 217
    4. Virgin Airways v Zodiak [2014] A.C. 160
    5. London Borough of Haringey v O Brien [UKEAT/0004/16/LA]

21. I am grateful to both Counsel for their submissions and assistance to the Tribunal.

22. The Claimant gave oral evidence about her financial means and was cross-examined by Mr Lester on this matter.

23. At the end of the hearing, I gave my judgment with reasons orally. Ms Millin requested written reasons.

24. My decision on the Respondent's deposit order application is in a separate Deposit Order of the same date as this Judgment. However, for ease of reference, the reasons for the deposit order are set out in this Judgment.

The Law

Unfair Dismissal

21. The law relating to unfair dismissal is set out in s.98 of the Employment Rights Act 1996 ("**ERA"**).

> "*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
> *(a) The reason (or, if more than one, the principal reason) for the dismissal; and*
> *(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

> *(2) A reason falls within this subsection if it –*
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;*
> *…..*
> *(3) In subsection (2)(a)—*
> *(a) "capability" , in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
> *(b) "qualifications" , in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*

22. It is up to the employer to show the reason for dismissal and that it was a potentially fair one — i.e., one that fell within the scope of s.98(1) and (2) ERA and was capable of justifying the dismissal of the employee. A 'reason for dismissal' has been described as '*a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*' — *Abernethy v Mott, Hay and Anderson* 1974 ICR 323, CA.

23. If the employer shows that the reason for the dismissal is a potentially fair reason under s. 98(1) or 98(2) ERA, the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

> "*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.*"

24. Procedural fairness is an integral part of the reasonableness test is section 98(4) of the ERA. In deciding whether the adopted procedure was fair or unfair the tribunal must not fall into the error of substitution. The question is not whether the tribunal or another employer would have adopted a different and, what the tribunal might consider a fairer procedure, but whether the procedure adopted by the respondent "*lay within the range of conduct which a reasonable employer could have adopted*" (*Williams v Compair Maxam Ltd* [1982] ICR 156).

25. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the tribunal's view, have been appropriate, but rather whether dismissal was within the range of reasonable responses that an employer could reasonably come to in the circumstances. The tribunal must not substitute its view for that of a reasonable employer. (*Iceland Frozen Foods Limited v Jones* 1982 IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* 2003 IRLR 23, and *London Ambulance Service NHS Trust v Small* 2009 IRLR 563).

26. The test of a fair capability dismissal (aside from procedure) has two elements:

    a. does the employer honestly believe the employee is incompetent or unsuitable for the job?

b. are the grounds for that belief reasonable? (*Alidair Ltd v Taylor* 1978 ICR 445, CA)

27. In the great majority of cases employers will not be considered to have acted reasonably in dismissing for incapability unless they have given the employee fair warning and a chance to improve (*Polkey v AE Dayton Services Ltd* 1988 ICR 142, HL).

Direct Discrimination

21. Equality Act 2010 ("**EqA**"), section 13 states:

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*".

22. Age and Race are protected characteristics under the Act.

Victimisation

23. Section 27 EqA states:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

24. The protection is against victimisation for raising a complaint of discrimination. A worker is not protected against victimisation for simply complaining about unfairness. It is important to identify precisely what the claimant said which amounts to a 'protected act'. The protected act must have taken place before the detrimental treatment which is complained of.

25. As with direct discrimination, the discriminator may have been unconsciously motivated by the protected act (*Nagarajan v London Regional Transport [1999]* IRLR 572, HL).

Burden of Proof

26. Section 136 EqA states:

(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

27. The guidance set out in *Igen v Wong* [2005] ICR 9311 (approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054) sets out the correct approach to interpreting the burden of proof provisions. In particular:
    a. it is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude that the employer has committed an act of discrimination, in the absence of an adequate explanation (para 79(1), see also *Ayodele v Citylink Ltd and anor* [2018] ICR 748 at paras 87 - 106);
    b. it is unusual to find direct evidence of discrimination and *'[i]n some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in*"' (para 79(3));
    c. therefore, the outcome of stage 1 of the burden of proof exercise will usually depend on '*what inferences it is proper to draw from the primary facts found by the tribunal*' (para 79(4));
    d. '*in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts'* (para 79(6));
    e. where the claimant has satisfied stage 1 it is for the employer to then prove that the treatment was "*in no sense whatsoever*" on the grounds of the protected characteristic and for the tribunal to '*assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question*' (para 79(11)-(12));
    f. *'[s]ince the facts necessary to prove an explanation would normally be in the possession of the Respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof*' (para 79(13)).

28. In *Igen v Wong* the Court of Appeal cautioned tribunals '*against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground*' (para 51).

29. In *Madarassy v Nomura International PLC* [2007] ICR 867 Mummery LJ stated that: '*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*' (para 58).

Strike out

30. Rule 37(1)(a) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("**the ET Rules**") provides that a claim or a part of a claim may be struck out if there is no reasonable prospect of success.

31. Appellate guidance suggests that strike out is a draconian step and tribunals should be slow to strike out a claim brought by a litigant in person on this basis, particularly if the case has been badly pleaded or brought by someone whose first language is not English. Claims should ordinarily not be struck out if the factual basis is in dispute.

32. In *Anyanwu v South Bank Student Union* [2001] ICR 391, HL, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination. Giving his judgment Lord Steyn said:

> *'[24] …For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.'*

33. In *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126, CA, the Court of Appeal stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. Maurice Kay LJ stated:

> *'[29] it would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation'*

34. The approach to be taken by the Tribunal was helpfully summarised by EAT in *Mechkarov v Citibank N.A* UKEAT/0041/16/DM:

> *'[14] On the basis of those authorities [Anwanyu, Ezsias, and Tayside Public Transport Company Ltd v Reilly [2012] CSIH 46], the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.'*

35. The fact that a given ground for striking out is established gives the tribunal a discretion to do so – it means that it "may" do so. The concern of the tribunal in exercising this discretion is to do justice between parties in accordance with

the overriding objective and the tribunal, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed (see *Twist DX Limited v Dr Niall Armes* UKEAT/0030/20/JOJ).

Deposit Order

36. Rule 39 of the ET Rules provides:

> (1) *Where at a preliminary hearing (under rule 53) the tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
>
> *(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*
>
> *(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*
>
> *(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response has been presented, as set out in rule 21.*
>
> *(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order-*
>
> *(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*
>
> *(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the tribunal orders),*
>
> *otherwise the deposit shall be refunded.*
>
> *(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."*

37. The Employment Appeal Tribunal provided a summary of the principles applicable to the Tribunal's power in this regard in *Arthur v Hertfordshire Partnership University NHS Foundation Trust* UKEAT/0121/19/L*A* per HHJ Eady QC (as she then was) at paragraphs 22 to 24. By way of summary:

    (i) The test for making a deposit order is distinct from the no reasonable prospect of success test which it is necessary to establish prior to the striking out of a claim.

(ii) The distinction is highlighted by the purpose of a deposit order, which is to identify at an early stage those claims with little reasonable prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of an adverse costs order being made.

(iii) When determining whether to make a deposit order the Tribunal is not restricted to considering purely legal questions.

(iv) Rather the Tribunal is entitled to have regard to the likelihood of a party being able to establish the facts essential to its case. The Tribunal, in doing so, is entitled to reach a provisional view as to the credibility of the assertions being put forward by a party.

(v) The purpose of a deposit order is not, however, to make it difficult to access justice or obtain a striking out of a claim by the back door.

Res Judicata/Estoppel

38. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] 1 AC 160, the Supreme Court came to consider the principles underlying the concepts of *res judicata* and abuse of process. At paragraph 17 of the judgment Lord Sumption JSC explained (***my emphasis***):

> "*Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle.* ***The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is cause of action estoppel. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.*** *Secondly, there is the principle, which is not easily described as a species of estoppel, that where the Claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the Claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as of a higher nature and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section 34 of the Civil Jurisdiction and Judgments Act 1982.* ***Fourth, there is the principle that even where the cause of action is not the same in the later action as it as in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties****: Duchess of Kingston s Case (1776) 20State Tr 355. Issue estoppel was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197—198.* ***Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should***

> ***have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.***"

39. Moving to review the pervious authorities on these issues at [22] Lord Sumption JSC said (***my emphasis***):

> *"Arnold v National Westminster Bank plc [1991] 2 AC 93 is accordingly authority for the following propositions. (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.* ***(3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised***."

40. Rejecting at [24] the appellant's submission that the principle in *Henderson v Henderson* 3 Hare 100 had been evolved through recent case law so as to treat it as being concerned with abuse of process and to take it out of the domain of *res judicata* altogether, Lord Sumption JSC cited the dicta of Lord Bingham of Cornhill in *Johnson v Gore-Wood & Co* [2002] 2 AC 1 (***my emphasis***):

> "*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 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 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.***"

41. Finally, at [26] Lord Sumption JSC confirmed that the distinction made in *Arnold* between the principle of absolute estoppel in causes of action "*where it is sought to reargue a point which was raised and rejected on the earlier occasion*" and issue estoppel, where the principle recognises that there might be special circumstances where the absolute bar on raising the same point in subsequent proceedings would cause injustice, remained compelling.

42. In *London Borough of Haringey v O Brien* [UKEAT/0004/16/LA], HHJ Eady QC (as she then was) held at [59] that there was "*no rule of law stating it could not be a Henderson abuse for a party to fail to amend to include all issues live between the parties prior to the full merits determination of the initial claim*" and it was an error of law for the employment tribunal to state that the principle in *Henderson v Henderson* did not apply following the lodgment of the complaint. She went on to hold that on the facts of that case the Claimant had the opportunity at a pre-hearing review to apply to amend her claim to add matters occurring after she had presented her first ET1, and considering the ET's conclusions on the *Henderson* point with respect to the matters arising prior to the lodgment of the first claim the same reasoning would apply with respect of the events occurring after that and prior to the full merits hearing "*(or, at least, sufficiently prior to have allowed for an amendment of the claim)*", i.e. that was a *Henderson* abuse to pursue complaints in the second proceeding related to such events.

Discussions and Conclusions

43. Mr Lester's submissions largely followed the arguments set out in the Respondent's application (see Annex). Mr Millin for the Claimant argued that the Respondent's application should be dismissed because the Claimant could not pursue a claim for unfair dismissal as part of her First Claim (as she was still employed by the Respondent until 9 August 2022), and that is why she had withdrawn it and it was dismissed upon withdrawal in the first set of proceedings.

44. Furthermore, Ms Millin argued, the Tribunal's findings of fact in the First Claim ceased on 13 December 2021, and all those findings had been made in relation to the Claimant's race and age discrimination complaints and events up to that date, and the Tribunal could not have contemplated the Claimant's complaints of unfair dismissal and discrimination in her Second Claim. Therefore, she argued, the issues were not being reopened and there was no *Henderson* abuse for the Claimant to pursue her Second Claim.

45. Finally, Ms Millin countered the Respondent's submission in paragraph 9(i) of the application by arguing that the Claimant was a litigant in person until 23 May 2022, the list of issues in the First Claim had been settled at the preliminary hearing on 14 December 2021. Whilst it was open to the Claimant to make an application to amend at any stage of the proceedings, she was dismissed on 25 April 2022, her appeal was refused only on 16 August 2022. Therefore, it would have been inappropriate to make an application to amend so close to the seven day final hearing in early June 2022.

46. With respect to the submission at paragraph 9(ii) of the application, Ms Millin argued that the discrimination complaints in the Second Claim could not have been litigated in the First Claim as these mostly did not exist at the time of the final hearing of the First Claim because they were part of the ongoing internal disciplinary/capability procedure.

47. I shall deal with each ground for strike out/deposit order in the Respondent's application in turn, starting with paragraph 8(i).

§12(ii) of the Particulars of Claim – ignoring the fact C was overworked.

48. The Tribunal in the First Claim in answering the question: "*Did the Respondent set unreasonable targets/objectives thereafter?*" decided at [193 - 198] that the Claimant was not overworked. In particular, it held (***my emphasis***):

> *196.* ***We had no evidence that the Claimant had a heavier workload than any other transport and travel officer, which might have shown that the expectations were unreasonable.*** *The Claimant did not give any evidence which enabled us to compare her workload at the material times with either her previous workload or the contemporaneous workload of other officers. We preferred Mrs Harrison's detailed and specific evidence to the Claimant's, which again we found vague and unclear.*
>
> *197.* ***The only evidence which might have suggested that the Claimant was working to unreasonable targets was the evidence that she was working in excess of her contracted hours at one stage. However, in the absence of other evidence of difficulties with the targets, it seemed to us likely that the issue was that the Claimant was not working efficiently.***
>
> *198. We did not find that there were unreasonable targets set.*

49. The fact that the Tribunal was dealing with this issue in the context of the Claimant's discrimination complaints and not her claim for unfair dismissal is irrelevant. These are findings of fact which unequivocally determined the issue of whether the Claimant was overworked. The Tribunal, having considered all available evidence, decided that she was not.

50. The Tribunal's extremely detailed findings cover the entire period when the Claimant's performance was assessed and go beyond the date (19 April 2021) when the Claimant commenced her long-term sick leave. The Claimant could not have been overworked when she was on sick leave, which lasted until her dismissal date.

51. I do not consider there are any special circumstances justifying reopening this issue, and Ms Millin did not argue that there any such circumstances. I, therefore, find that this part of the Claimant's claim is *res judicata* and must be stuck out.

§12(iii) – ignoring positive appraisals.

52. The Respondent did not seek to strike out this allegation in its application. However, it was part of Mr Lester's written submissions, where he argued that it should be struck out as offending the principle in *Henderson v Henderson*.

53. I do not accept Mr Lester's submission that "*the rule in Henderson v Henderson should apply where the Claimant could have brought this as one*

of the various detriments regarding the performance management process that she claimed in the last set of proceedings". Whilst the Tribunal did consider Mr Campbell's (the Claimant's former line manager) written statement about the Claimant's prior positive performance appraisal, it made no findings on the issue as to whether Mrs Yates, who decided to dismiss the Claimant, and the appeal panel, which decided to uphold the dismissal, had ignored the Claimant's positive appraisals. There was no claim for unfair dismissal before the Tribunal and it did not need to decide that issue in the context of the Claimant's claims for race or age discrimination. Furthermore, the appeal against the dismissal was heard on 9 August 2022, after the Tribunal's hearing of the First Claim.

54. I do not see any proper basis for the Respondent's assertion that the Claimant ought to have raised that issue (presumably by seeking to amend her claim just three weeks before the start of the final hearing) as an allegation of race or age discrimination. In the present proceedings the Claimant does not allege that the Respondent allegedly ignoring her positive appraisals when deciding to dismiss her was an act of race or age discrimination, but that the alleged ignoring has rendered the dismissal unfair. The Claimant could not have raised this issue in the First Claim, as her complaint of unfair dismissal was not part of it.

55. Accordingly, I do not see any grounds for striking this part of the Claimant's claim out or making a deposit order. To determine this issue the Tribunal hearing the Claimant's unfair dismissal claim will need to hear from the parties' witnesses and consider all other relevant evidence. This part of the Claimant's claim shall proceed to the final hearing.

Paragraph 8(ii) - *§12(iv) – commencing unsatisfactory performance procedure without first conducting an appraisal.*

56. The Tribunal in the First Claim has expressly rejected that argument, observing that "*it was not generally necessary for there to be an appraisal process for employees to understand what tasks were required as part of their work and not necessary on the facts of this case*". Whilst it might be argued that this was in the context of the Claimant's complaints of race and age discrimination, and therefore the Tribunal was not dealing with the question whether the lack of prior appraisal has rendered the dismissal unfair, I find that such argument has no reasonable prospect of success.

57. If, as the Tribunal found, it was unnecessary for the Respondent to conduct a prior appraisal of the Claimant before commencing the unsatisfactory performance procedure, I see no sensible basis upon which it could successfully be argued that not doing something that was unnecessary to do still makes the decision to dismiss unfair because such unnecessary things had not been done.

58. I, therefore, find that this part of the claim is *res judicata,* and to the extent it falls outside the parameters of the issue estoppel, it has no reasonable prospect of success. For these reasons, I strike it out.

Paragraph 8(iii) - *§12(v) – inadequate assessment of performance.*

59. The Tribunal's judgment comprehensively deals with this issue. Having gone through the entire history of the performance management process and having made specific findings of examples of unsatisfactory performance by the Claimant (see, for example, paragraphs 131-136 of the Judgment), the Tribunal concluded at [207] that "*there were significant performance concerns in relation to the Claimant*". At [213] the Tribunal said that it "*was entirely satisfied that there was ample and cogent evidence of the performance concerns and why they needed to be addressed*".

60. The Tribunal equally examined the way in which the Respondent went about assessing and managing the Claimant's unsatisfactory performance and said at [216] that it was satisfied with Mrs Quinn's explanation for the decision to move the Claimant to Stage 3 of the process "*(ie that she was presented with persuasive evidence of the Claimant's ongoing performance issues) and that her decision was free from conscious or unconscious race discrimination*".

61. Except for a relatively minor issue concerning Mr Harrison approaching the Claimant's union representative about the Claimant's performance in August 2020 (see paragraphs 51 and 52 of the Judgment), there is no other criticism of the Respondent's performance process.

62. The Tribunal's findings of fact run up to 13 December 2021. The Claimant went on long-term sick leave on 19 April 2021. Her performance assessment period was up to her going on sick leave. Accordingly, the alleged inadequate assessment of performance in the Second Claim cannot be said to fall outside that period, i.e., the period during which the Tribunal found the assessment of the Claimant's performance was based on legitimate performance concerns and adequate.

63. I, therefore, find that this issue has been comprehensively adjudicated upon and it will be an abuse of process to allow the Claimant to reopen it under the guise of her unfair dismissal claim. This part of her claim is struck out.

Paragraph 8(iv) - *12(vi) – insufficient periods of time for improvement of performance.*

64. The same reasoning applies in relation to this allegation. The Tribunal has examined every step in the performance process up to and including the Respondent inviting the Claimant to a Stage 3 meeting, which the Tribunal found at [205] could result in the Claimant's demotion or dismissal. The Tribunal has made no findings that the process was in any way deficient or otherwise unreasonable.

65. Although it appears the Tribunal did not make specific findings as to how much time the Claimant had been given to improve her performance, nevertheless the Tribunal has thoroughly examined the entire process. If it thought that the process was deficient by reason of the Claimant not being given sufficient time to improve her performance, it would have been bound to record such findings and move on to consider whether the Claimant's race or age played any part in her not being given sufficient time to improve. It has made no such findings.

66. I, therefore, find that this issue has been decided by the Tribunal and cannot be re-opened. Accordingly, I strike out this part of the Claimant's claim.

Paragraph 8(v) - *12(vii) – no clear indication of what must be done to improve performance.*

67. My findings and conclusions on allegations 12(ii), 12(iv), 12(v) and 12(vi) equally apply here. In particular, at [198] the Tribunal specifically said that it "*did not find that there were unreasonable targets set*". Targets are indicators of what must be done to have one's performance considered satisfactory. The issue has been decided. It is *res judicata* and this part of the Claimant's claim must be struck out for this reason.

Paragraph 9(i) - *§2(i) of the Further & Better Particulars of Claim – inviting the Claimant to a performance review hearing while she was on sick leave.*

68. This allegation relates to the second invitation to the Stage 3 meeting on 5 March 2022. The first invitation was sent on 8 April 2021. The Tribunal has dealt with this issue, finding that the Claimant had failed to establish a *prima facie* case that the Respondent inviting her to attend the Stage 3 meeting discriminated against her because of race or age. The Tribunal went on to say that if it were wrong on that, it was satisfied with the Respondent's explanations, concluding that the decision to invite the Claimant to the Stage 3 meeting was free from conscious or unconscious race or age discrimination (see paragraphs 214-216 and 224-230 of the Judgment).

69. I do not accept Mr Lester's submission that this allegation should be debarred under the rule in ***Henderson v Henderson*** on the same rational as the EAT applied in ***O'Brien*** (see paragraph 42 above), that is because the Claimant should have brought her discrimination complaints "up to date" for the final hearing. Unlike in ***O'Brien***, where the case management hearing came after the two matters the Claimant had failed to add to her original claim had arisen, in this case the case management hearing was on 14 December 2021, before the Respondent sent the second Stage 3 meeting invitation on 8 March 2022.

70. By that stage the list of issues for the final hearing had been settled, the dates for exchange of documents (11 and 18 February 2022) had passed, and the bundle was due to be agreed in three days' time, on 11 March 2022. Whilst the final hearing was still three months away, and it was open to the Claimant to apply to add this new allegation to her claim (especially considering that she was pursuing the same kind of allegation with respect to the first

invitation), I do not find that her not doing so in the circumstances could be properly described as an abuse of process.

71. At that stage the Claimant was still a litigant in person. It would not have been reasonably apparent to her that possible issues of estoppel under the rule in *Henderson v Henderson* might arise from her not seeking to amend her claim. By the time she came to be legally represented on 23 May 2022, there was only a few days left before the final hearing. It would have been too late to apply to amend the claim, which application, if made, would have been likely to be refused.

72. That said, I find that this allegation has no reasonable prospect of success. The Tribunal has roundly rejected the Claimant's allegation that inviting her to the Stage 3 meeting on 8 April 2021 was in any way tainted by race or age discrimination. The Claimant says the difference is that the second invitation came when she was off sick. I do not see how it can be sensibly argued that the fact that the Claimant was on sick leave when the Respondent invited her again to the very same meeting was in any way influenced by the Claimant's race or age, when it was clearly established by the Tribunal that the earlier invitation was free from any conscious or unconscious discrimination. I see no reasons why the Claimant's being on sick leave could be sensibly said to turn a non-discriminatory invitation to discriminatory on the grounds of race or age. Ms Millin was unable to offer any such reasons.

73. I see no reasonable prospect for the Claimant to be able to satisfy the first stage of the burden of proof provisions under s.136 EqA. I, therefore, will strike out that part of her claim.

74. I shall now turn to deal with the rest of the Claimant's allegations, starting with her race and age discrimination complaints.

2(ii) disregarding the evidence provided by the Claimant at the hearing.

75. At the preliminary hearing on 20 February 2023, Employment Judge Gordon Walker ordered the Claimant to provide by 6 March 2023 further information *"namely the "evidence" referred to at paragraph 2(ii) of the Claimant's further and better particulars of claim*".

76. On 8 March 2023, the Claimant replied saying that her "evidence", she alleges had been disregarded by the Respondent, were set out on page 2 paragraphs 1-11 of the dismissal letter of 13 May 2022, and that she was "*puzzled why this clarification was sought*".

77. The relevant paragraphs of that latter read:

> *"You and your representative were then provided with the opportunity to present any information. The following, in summary, was stated by either you and/or your trade union representative, Mary Lancaster of UNISON, in response to the management presentation:*
>
> *1. Emails and calls were responded to in the relevant timescales but there had to*

be exceptions. There was a capacity issue within the team. There were too many other competing priorities which meant that responding within the set timescale was not always achievable or realistic. In the main the target was met unless there were more urgent competing priorities. Other colleagues often had the "do not disturb" notice on Skype leaving you as the only team member appearing to be available and having to respond to telephone enquiries coming into the service. This meant that emails and other issues were not dealt with.

2. *Having been in the team for so long, many schools and providers were used to sending emails to your individual work email address rather than to the team inbox. Despite replying to schools and providers correspondence from the team's group email account, these stakeholders continued to write to your individual work email address. Your line manager, Donna Harrison, micromanaged you and was unduly critical. It was contended this was inappropriate given your position (scale 8) within the team and made you feel as if you were not being trusted to carry out your role. You felt suffocated by your line manager's habitual criticisms of your performance.*

3. *You challenged non-completion of eLearning courses and said the courses agreed were Skype for business, managing change and prioritising skills, all of which you had completed. You were not aware of any courses not completed.*

4. *You had been using Teams and Skype effectively.*

5. *You routinely fed back and liaised with parents and schools as appropriate. Whenever feedback regarding referrals was not completed in an agreed timescale this was because pertinent information required for the third parties had had not been available. You were making sure that your manager was aware of any delays.*

6. *The majority of transport requests were dealt with in the agreed timescales and mostly sooner. However, there were occasions where safeguarding and other workload issues impeded this and meant that the process could take longer than anticipated.*

7. *Transport logs and Council incident logs were done and updated on a regular basis, and you were unsure whether any evidence had been produced to show otherwise.*

8. *You totally refuted the statement that "schedules were often not up to date; revised schedules were not always saved and when sent from providers and shared with schools in a timely manner."*

9. *You were bemused by the management statement that "frequent feedback for the main providers at the schools that communicate with SD is ineffective, emails, queries not responded to in a timely manner or at all, leading to potential serious issues." You stated that none of these complaints were ever brought to your attention at the time.*

10. *In response to management's point about not conducting Return to Work interviews within required timescales it was stated that nobody had explained to you that the search engine relating to FirstCare had been changed and this led to difficulties with accessing the relevant information on the system.*

11. *In relation to Risk Assessments, your understanding was clearly that Donna*

said JF and PMR would do the risk assessments relating to children travelling on transport and occasionally update them when necessary.

You gave an account and considerable mitigating circumstances which I have set out in Appendix 2 from the relevant sections of the Minutes as they are too extensive to summarise individually. I have taken these points fully into account and reflected on them before coming to my decision. You did not feel that there were any issues with your performance, examples cited in the management case were not accurate and part of a wider action on the part of your managers to cause you to leave the Council's employment.

[…..]

Following the conclusion of the hearing, I considered the written evidence previously provided by the management side and the further verbal evidence provided by both the management side and you and your representative at the hearing. During the hearing, there was no argument nor evidence to substantiate that your performance had met the required standard or sufficiently improved over the review periods put in place by management, despite the extensive management support and interventions provided over a significant period.

Having considered and reflected upon all the available evidence, my conclusion is that your performance does not meet the level required by the Council to enable it to meet its obligations to service users of the Transport Hub or its other stakeholders. […]"

78. The Claimant did not provide any explanation on what basis she alleges that the very evidence the Respondent listed in the letter and stated that it had taken them "*fully into account and reflected on them before coming to [its] decision*" had been in fact disregarded by the Respondent. She also offered no explanation why she says the alleged disregarding of these evidence was because of her race or age.

79. The Claimant might disagree with the way the Respondent assessed those evidence in coming to its decision to dismiss her, but that is very different to the allegation that it has disregarded them. I see this as being entirely improbable that the Respondent, having gone to the trouble of carefully listing all the Claimant's evidence presented at the hearing and explicitly stating that it has fully taken them into account and reflected on them, in fact had disregarded them.

80. Other than the Claimant disagreeing with the Respondent's decision, there are no other apparent basis for the Claimant to claim that her evidence had been disregarded, less so that it was because of her race or age. This bare allegation without something more will not be enough for the Claimant to establish a *prima facie* case of discrimination. The Claimant did not say what that "something more" was.

81. I, therefore, find that this allegation has no reasonable prospect of success and it is just and proper to strike it out.

2 (iii) treating the Claimant as if she was stupid with Mrs Jacky Yates informing the Claimant that she did not have the ability to perform at a lower grade, let alone represent the Respondent.

82. In essence, the Claimant alleges that Mrs Yates informed her that it would not be appropriate to demote her because the Claimant did not have the necessary ability to perform a lower grade job. The following passages in the dismissal letter address this issue (***my emphasis***):

> *"The Ealing Council Managing Unsatisfactory Performance Procedure V2.0 (1st April 2012) states the possible outcomes of a Stage 3 Performance Review Hearing are:*
>
> *10.9.1 The performance was satisfactory and/or take no further action.*
>
> *10.9.2 A final opportunity to improve performance: This will only be appropriate where there has been some improvement already, and the Hearing Officer believes that a final period of review will lead to the required improvement in performance...*
>
> ***10.9.3 Demotion or transfer to another post.***
>
> *10.9.4 Dismissal on the grounds of incapability with the appropriate contractual notice.*
>
> *[…..]*
>
> *Having considered and reflected upon all the available evidence, my conclusion is that your performance does not meet the level required by the Council to enable it to meet its obligations to service users of the Transport Hub or its other stakeholders.* ***My conclusions on the issues in this matter militates against a lesser sanction being applied.*** *I have therefore decided that you should be dismissed with 12 weeks' paid notice from the date of this letter. Your last day of employment with Ealing Council will be Thursday 4 August 2022, unless you secure another role with the organisation by your last day of service.*
>
> ***Details of any job vacancies at the Council arising during your notice period (which are open to internal applicants only) will be sent to your work email address, which can be accessed through your Microsoft Surface Pro. Other Council job vacancies can be found on its website: https://iobs.ealinq.qov.uk/****"*

83. There is nothing in the Claimant's ET1, nor in the F&BP which explains on what basis the Claimant says that her race or age in any way influenced the Respondent's decision not to offer her a lower grade job. The Respondent specifically stated in the dismissal letter that the Claimant could search and apply for available vacancies and that it would be sending to the Claimant all available vacancies arising during her notice period.

84. Furthermore, the Tribunal in the First Claim found that the performance management process leading up and including inviting the Claimant to the Stage 3 meeting was not in any way tainted by discrimination. The Tribunal found that the Respondent had legitimate concerns about the Claimant's performance and there were cogent evidence showing that the Claimant's performance was unsatisfactory, and the level of the Claimant's unsatisfactory performance was such that it was legitimate for the Respondent to take the

case to the third and final stage of the process, which could result in the Claimant's dismissal.

85. Accordingly, considering this background and the fact that the Claimant cannot reopen the issues determined by the Tribunal, the Claimant's present allegation that Mrs Yates' decision to dismiss the Claimant and not to demote her was in any way influenced consciously or unconsciously by race or age seems far-fetched. She does not advance her case by referencing any comparators.

86. The Claimant does not say what that demoted role would have been, and whether any such roles were available and not offered to her. Her case is also inconsistent with the Respondent telling the Claimant that she could apply for available vacancies and that it would be taking positive steps of regularly sending to the Claimant all vacancies arising during her notice period.

87. I find that this bare allegation without "something more" will be insufficient for the Claimant to meet the initial burden of proof under s.136 EqA. Furthermore, the "something more" that the Claimant argued in the First Claim as indicating possible discriminatory motives were roundly rejected by the Tribunal (see paragraphs 210 – 214, 228, 229 of the Judgment).

88. However, I am conscious that this allegation is against Mrs Yates, whose actions and decisions, unlike those of Mrs Quinn and Mrs Harrison, were not examined by the Tribunal in the First Claim. Whilst I consider that this allegation is far-fetched and not supported by any other allegations which, if proven, would be sufficient to shift the burden on the Respondent, I find that without hearing from Mrs Yates it would be unjust to determine this issue in a summarily fashion.

89. I therefore decline to strike out that part of the Claimant's claim. However, for the reasons stated above, I find that this allegation has little reasonable prospect of success and order that the Claimant must pay a deposit of £25 as a condition of continuing to advance it further.

2 (iv) deciding that the most severe sanction of dismissal should be imposed, when a lesser sanction could have been to allow time to improve
2 (v) dismissing the Claimant

90. These two allegations are essentially one and the same, that is that by imposing the sanction of dismissal rather than a lesser sanction the Respondent discriminated against the Claimant because of her race or age. Accordingly, I shall deal with it as one allegation.

91. My reasons for finding that the allegation 2(iii) has little reasonable prospect of success (see paragraphs 82-89 above) equally apply to this allegation.

92. Although not impossible in theory, I find it is highly unlikely that the decision to dismiss was tainted by discrimination when, as Tribunal in the First Claim

found, all steps leading up to that decision were free from conscious or unconscious discrimination.

93. Furthermore, the Claimant pleaded case does not disclose anything that would be enough to establish, absent the Respondent's non-discriminatory explanations, that her race or age had anything to do with the Respondent's decision to dismiss her. She just makes a bare allegation but offers nothing by way of comparators or anything else which could give grounds for the Tribunal to conclude that her race or age influenced the Respondent's decision to dismiss her.

94. For the same reasons as apply to allegation 2(iii), I do not consider it will be appropriate to strike it out. However, I find that this allegation has little reasonable prospect of success, and it will be just and proper to order that the Claimant must pay a deposit of £25 as a condition of continuing to advance it.

Victimisation

5. The Claimant was victimised by :

i) Tamara Quinn and Jacky Yates holding a Stage 3 Performance Review meeting on 25th April 2022, whilst the Claimant was on sick leave
ii) Jacky Yates taking the decision to dismiss the Claimant, when a lesser sanction could have been imposed, including no case to answer.
iii) Joshua Blacker upholding the decision to dismiss at the appeal hearing on 9th August 2022.

95. For the same reasons as apply to allegations 2(iii), 2(iv) and 2(v), I find that these three allegations of victimisation each has little reasonable prospect of success. The Claimant simply does not provide anything except a bare allegation of victimisation, despite being given ample opportunity to clarify her claims, and explain why she says her initiating the First Claim had anything to do with the Respondent's decision to dismiss her for poor performance and to uphold the dismissal on appeal.

96. At the hearing, in responding to my question on this point, Ms Millin did not provide any reasonable explanations either, except for saying that it "*did not seem right*" if the Claimant were prevented from pursuing her victimisation claim.

97. Also, it is of some significance that the original invitation to the Stage 3 meeting had been sent to the Claimant before she lodged the First Claim. The second invitation appears to be no more than the Respondent re-scheduling the Stage 3 meeting to accommodate the Claimant's sickness absence. It was sent six months after the Claimant had initiated her First Claim. There is no apparent connection between these events.

98. As I found, the Claimant's allegation that inviting her to the Stage 3 meeting whilst she was on sick leave was discriminatory on the grounds of her race or age has no reasonable prospect of success. I find it is highly improbable that

the Claimant's ongoing First Claim was a motivating factor in the Respondent issuing the second invitation.

99. If the Claimant wishes to continue to advance these allegations further, she must pay a deposit of £25 for each of these three allegations.

Unfair dismissal

> *12. The Respondent unfairly dismissed the Claimant as follows:*
>
> *i) disregarding her work history of 33 years*
>
> *viii) no proper consideration of alternative work*

100. Returning to the two remaining allegations as to why the dismissal is said to be unfair, I find to determine them the tribunal will need to examine the relevant evidence and hear from the Respondent's witnesses before making a decision whether and to what extent these issues had been considered when deciding to dismiss the Claimant.

101. I note that the dismissal letter does refer to the fact that the Claimant's union representative drew to Mrs Yates' attention the fact that the Claimant had 33 years of service with clean disciplinary and performance record. I also note that the appeal panel acknowledged the Claimant's "*long and committed history of employment*". However, without hearing from Mrs Yates and Mr Blacker (or another appeal panel's member) it would be wrong for me to determine that they did take the Claimant's long service into account (and to what extent) just because the letters say so.

102. Furthermore, it is not clear from the dismissal letter to what extent the option of alternative work had been explored by Mrs Yates. She appears to have concluded that "*the issues in this matter militates against a lesser sanction being applied*". However, the letter does not provide any further explanations as to what those issues are, and why they are said to militate against a lesser sanction. The tribunal hearing the case will need to hear from Mrs Yates to determine this allegation.

103. For these reasons, I decline to strike out these allegations or make a deposit order in relation to them.

104. For completeness, I do not accept Mr Lester's argument that the Claimant's entire case for race and age discrimination is *res judicata* because the causes of action have already been litigated and determined. The Tribunal in the First Claim has only determined the Claimant's discrimination claims up to and including the Claimant first being invited to the Stage 3 meeting. It did not deal with the second invitation to the Stage 3 meeting, the Stage 3 meeting itself, the decision to dismiss, or the Claimant's appeal. Therefore, these issues cannot be said to have been litigated and determined by the Tribunal.

105. To the extent, Mr Lester says that the Claimant should have applied to amend her claim to include these issues within her First Claim and therefore under the rule in *Henderson* must be estopped from raising these in the Second Claim, for the reasons in paragraphs 69 and 70 above I reject this argument also with respect to the remaining allegations of discrimination, which are allowed to proceed, subject to the Claimant paying a deposit.

106. In deciding whether to make a deposit order and if so, on an appropriate amount, I considered the Claimant's ability to pay. The Claimant told me that she had pension income of £900 per month. Her mortgage is £1,240 per month and she has about £50,000 left to pay. Her other outgoings are approximately £600 - £700 per month. She uses her pension lump sum of £75,000 in her bank account to balance her income and outgoings. She has no other income or capital. She is not actively looking to get back to work. She helps her disabled sister.

107. Taking all the circumstances into account, I decided that £25 was an appropriate amount that the Claimant should be able to afford to pay for each of the allegations, which I found had no reasonable prospect of success. I explained to the Claimant further potential adverse costs consequences for her if she decided to continue to pursue these allegations and lost on those at the final hearing. I urged her to carefully consider all these issues and discuss with Ms Millin before deciding on how to proceed.

108. In summary, the parts of the Claimant's claim set out at paragraphs 12(ii), 12 (iv), 12(v), 12(vi), and 12(vii) of the Particulars of Claim, and paragraphs 2(i) and 2(ii) of the F&BP are struck out.

109. The deposit order is made in relation to the Claimant's allegations set out at paragraphs 2(iii), 2((iv) and (v) – treated as one and the same allegation), 5(i), 5(ii), and 5(iii) of the F&BP.

110. No orders are made in relation to the allegations set out at paragraphs 12(i), 12(iii) and 12(viii) of the Particulars of Claim.

111. The details of the deposit order and how to make the payment are explained in the Deposit Order of the same date.

Employment Judge Klimov

10 April 2023

Sent to the parties on:

11/04/2023

For the Tribunals Office

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and Respondent(s) in a case.

Annex

IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL Claim No. 2206563/2022

B E T W E E N

SHARON DUNCAN

Claimant

-v-

LONDON BOROUGH OF EALING

Respondent

RESPONDENT'S STRIKE OUT / DEPOSIT ORDERS APPLICATION

A. INTRODUCTION

1. The Respondent in its grounds of resistance to the claims set out its position that the Tribunal should dismiss the claims brought by the Claimant, on the grounds of res judicata / abuse of process (grounds of resistance [HB/125] at §4-5, §37, §47, §50, §51, §53, and §68). The basis of the Respondent's position was, and remains, that many of the matters brought in the instant claim having already been determined, or are matters that could and should have been brought, in the Claimant's previous claim (number 2206160/2021). That previous claim was for race and age discrimination, and it was dismissed in full on 14 June 2022 following a seven-day FMH (judgment [HB/39]).

2. In the instant proceedings, in its case management agenda for the preliminary hearing of 20 December 2022, the Respondent set out (on the final page) the detail of its application for strike out of a number of the Claimant's allegations (specified as those contained at paragraphs §12(iv)-(vii), §13(i) and (iii) of the Particulars of Claim) on the basis that they were res judicata in that they had already been determined in the previous proceedings or could and should have been brought as part of the previous claim. The Respondent further applied for deposit orders.

3. This written application is filed pursuant to the 20 February 2023 CMO of EJ Gordon Walker, made at an OPH for the hearing of the Respondent's applications which was adjourned for the reasons set out in that CMO.

4. The Respondent applies to strike out the claims, on the grounds that they are res judicata / abuse of process, and additionally or alternatively on the ground (under rule 37(1)(a) of the Tribunal's procedure rules) that they lack reasonable prospects of success.

5. Additionally or alternatively the Respondent asks the Tribunal to make a deposit order in relation to all or some of the Claimant's allegations or arguments, under rule 39(1) of the rules, for the reason that all of the Claimant's allegations or arguments have at most 'little reasonable prospect of success'.

6. This document sets out the scope and grounds of the Respondent's application. A skeleton argument will be filed in due course in accordance with the 20 February 2023 CMO.

7. The Respondent addresses its application to the claims as they currently stand following the changes made at the 20 February 2023 OPH. In particular, the Respondent does not apply to strike out discrimination allegations set out at paragraph 13 of the Particulars of Claim, because the Claimant made clear at the OPH that the case on discrimination and victimisation is now contained entirely within the Further & Better Particulars that were submitted following the 20 December 2022 preliminary hearing.

B. STRIKE OUT: RES JUDICATA

8. The Respondent seeks strike out of the following allegations contained in the Particulars of Claim [HB/111-112], on the grounds of issue estoppel and/or the rule in Henderson v Henderson:

i. §12(ii) of the Particulars of Claim – ignoring the fact C was overworked

The basis of this allegation was specifically addressed in the judgment, where it was found that there was no evidence C had a heavier workload than others (see inter alia, §196 of judgment, also the Claimant's notice of appeal EAT and the EAT's initial decision to reject her grounds of appeal [HB/145]); issue estoppel or Henderson v Henderson arguments apply;

ii. §12(iv) – commencing an unsatisfactory performance procedure without first conducting an appraisal

This allegation was specifically dealt with in the judgment (see inter ali, §154 of the judgment); issue estoppel or Henderson v Henderson arguments apply;

iii. §12(v) – inadequate assessment of performance

This allegation was addressed comprehensively in the detailed findings of the judgment, which dealt with all relevant matters to this particular claim, because the judgment dealt with all events relating to the performance management process up until the point when the Claimant went on sick leave. I.e. the entire period during which her performance could be, and was, assessed, and the findings were in favour of the Respondent (see inter alia, the findings at §215 of the judgment) – further, as a distinct allegation it could

and should have been raised previously; issue estoppel and Henderson v Henderson arguments apply;

iv. §12(vi) insufficient periods of time for improvement in performance

The reasons this allegation is caught by res judicata are the same as above re: allegation 12(v) and, in particular, is clearly an allegation that could and should have been brought in the previous claim; issue estoppel and Henderson v Henderson arguments apply; and

v. §12(vii) – no clear indication of what must be done to improve performance

The reason this allegation is caught by res judicata is the same as above re: allegation 12(v) and see inter alia the Tribunal's findings at §198 re the allegation of unreasonable targets being set; issue estoppel and Henderson v Henderson arguments apply.

9. The Respondent applies to strike out the following parts of the race and age discrimination claims which, it is understood, are now wholly contained within the Further & Better Particulars of Claim, with the clarifications as to dates as set out in the 20 February 2023 CMO, and with the further information that the Claimant has been ordered to provide by 6 March 2023:

i. §2(i) of the Further & Better Particulars – inviting the Claimant to a performance review hearing whilst she was on sick leave

This allegation relates to an invitation to Stage 3 hearing that was sent by the Respondent to the Claimant on 5 March 2022, some three months before the FMH in the previous claim. The case law on the rule in Henderson v Henderson makes clear that it can be an abuse of process to attempt to bring arguments or points that could and should have been raised in previous proceedings, even if to raise them would have required an amendment. This allegation is clearly one that could easily have been introduced in the previous claim by way of amendment, but no attempt was made to introduce it. The Claimant made another, separate but very similar allegation about the unfairness of her being invited to a Stage 3 hearing in 2021 before she went on sick leave, which was dismissed by the Tribunal (§214-216 of the judgment). The Claimant and her representative were clearly alive to the (in their minds) discriminatory aspect of the Respondent's attempting to move forward to the Stage 3 part of the performance process. Moreover, there is nothing distinct about this new allegation compared to that previously-argued allegation, in terms of relevant matters which could form the basis of a race or age discrimination claim, because the fact of the Claimant being on sick leave has nothing to do with her age or race, and nothing at all has been said in the pleadings to give any basis for a finding that her age or race was causal of the Respondent inviting her to a Stage 3 meeting. The new allegation was clearly one that the tribunal at the (lengthy) FMH in the previous claim would have been very well placed to hear, given that it would have taken very little if any extra time to deal with it in evidence and the witnesses who could speak to it

were at the FMH. It is therefore an allegation which falls under Henderson v Henderson abuse of process.;

ii. §2 and §3 of the Further & Better Particulars (as clarified in the CMO and to be clarified in the further information) – the entirety of the new race and age direct discrimination claims (all allegations)

The Respondent will aver that the discrimination claims are res judicata under the doctrine of cause of action estoppel, and/or separately an abuse of process.

In relation to cause of action estoppel, the Respondent will argue that the basis of these causes of actions has already been litigated and thus cannot be re-opened. The Claimant previously brought claims for race and age discrimination. In doing so, the Claimant raised a number of factual allegations (which, rightly, have not been pleaded in the instant case) in relation to causation (the 'because of' question). Those were matters which she said were reason for the Tribunal to find that there was something on which it could find discrimination, thus shifting the burden of proof onto the Respondent. Those matters were dealt with at §207-230 in the judgment. The Tribunal, on every possible causation issue raised by the Claimant, found that the Claimant fell at the initial (low) bar of showing that there was something on which the Tribunal could find discrimination. The present claims as pleaded do not even attempt to raise matters which it is said should cause the Tribunal to take a view that the alleged detriments were 'because of' discrimination. There are simply no causal matters pleaded at all. Therefore, the entire basis for suggesting that any acts the Claimant now wishes to allege were discriminatory, has already been dealt with in the previous litigation. The fact that the Claimant has not set out any actual basis for alleging discrimination in the instant claim, should be a red flag to the Tribunal indicating that the current discrimination claim might be, in essence, an attempt to resurrect the previous discrimination claims which were roundly rejected by the previous tribunal. These causes of action have already been litigated and dismissed and cannot be revived (per the doctrine of merger).

C. STRIKE OUT OR DEPOSIT ORDERS: NO OR LITTLE REASONABLE PROSPECT OF SUCCESS

10. In the alternative, the Respondent will ask the Tribunal to strike out all the individual allegations addressed in the preceding paragraphs, and the direct discrimination claims as a whole, for lack of merit under rule 37. The reasons the Respondent relies upon for asking for strike out are also those set out in the preceding paragraphs. Should the Tribunal find that specific allegations do not technically meet the specific requirements of any of the branches of res judicata, it will be averred that the lengthy and detailed findings set out in the judgment are conclusive of each particular allegation addressed above. The Respondent will rely, inter alia, on the fact that at no point in its 51-page judgment did the previous tribunal find for the Claimant on any matter in issue that was relevant to the outcome of the claims being dismissed.

11. In relation to the direct discrimination claims, for which strike out is also sought on merits grounds, the Respondent will aver that the matters outlined above regarding the basis for cause of action/abuse of process defence in relation to those claims, are also good grounds for strike out. There is no basis at all being advanced in the present claim to show discrimination due to race or age, and further, what is apparently the only basis that the Claimant had to indicate discrimination because of age or race, was roundly rejected by the tribunal in the previous claim.

12. Further to the foregoing, the Respondent applies to strike out on merits grounds the following aspects of the unfair dismissal claim:

> i. §12(i) of the Particulars of Claim – that the Respondent disregarded the Claimant's work history of 33 years. This is contradicted by the Claimant's own Further & Better Particulars (at paragraph 3; [HB/163]), by the dismissal letter ([HB/449] at paragraph a.), and by the appeal evidence [HB/524].
>
> ii. (To the extent that it is arguable at all – the Respondent notes that it does not appear to be pleaded anywhere in the unfair dismissal claims) the Respondent asks the Tribunal to bar or strike out any range of reasonable responses (harshness of dismissal) argument the Claimant may attempt to bring. The reasons the Respondent will rely on for this strike out request are the nature and extent of the findings against the Claimant in the previous judgment, which included findings that the Claimant had persistent and significant poor performance over an extended period, including instances of poor performance that gave rise to serious safeguarding concerns in relation to vulnerable SEN children. Further, the Respondent will rely on (inter alia) the finding of the Tribunal that the Claimant's evidence reflected a difficulty in accepting the Respondent's view that her performance was poor. It will be submitted that given the damning findings as to the Claimant's performance, whilst some procedural arguments regarding the dismissal may still be argued by the Claimant to amount to unfair dismissal, there can no longer sensibly be said to be a harshness/range of reasonable responses argument that remains live. This is particularly so when the previous tribunal's findings addressed the entire period in which the Claimant was actually assessed and performance managed all the way up until she went on long term sick leave.

13. Finally, the Respondent also applies to strike out the victimisation claim for lack of merit. That claim (set out at paragraph 5 of the Further & Better Particulars) relies on the 25 April 2022 Stage 3 meeting, the decision to dismiss when a lesser sanction could be imposed, and the decision to uphold the dismissal at appeal, as being instances of victimisation. In a case where there is such obvious and overwhelming evidence, in the form of the previous tribunal's detailed findings, that the Claimant was underperforming significantly and persistently for a long time, it will be submitted that it would take some kind of substantial basis to be advanced to show the Tribunal in the instant claim why the dismissal was not simply a capability dismissal carried out for the obvious reasons of the Claimant's incapability that have already been thoroughly established in the previous tribunal claim. However, in this case the Claimant has advanced no basis whatsoever for her suggestion that the

Respondent's motivation for dismissing her was not her long history of significant and damaging levels of poor performance, but instead was the fact that she had brought her previous employment tribunal claim. In such circumstances it will be averred the victimisation claim is simply hopeless. The Respondent will also rely on the matters, and the portions of the previous tribunal's judgment, as will be relied on in relation to the other strike out issues.

14. In the alternative, the Respondent seeks deposit orders in relation to all the claims, arguing there are little prospects of success, on the grounds as noted above.

15. The Respondent will set out its full argument and reasons relating to the above application in a skeleton argument to be filed in due course per the 20 February 2023 CMO.