EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr Mohamed Awais Ellahi		Royal Mail Group Limited

Heard by: CVP

On: 11 July 2023

Before: Employment Judge Adkin (sitting alone)

Representations

For the Claimant: Claimant, in person
For the Respondent: Ms K Faulkner, solicitor

REASONS

Introduction

1. These are written reasons requested by the Claimant further to the oral reasons given on 11 July 2023 for the judgment extending time for presentation of the response and striking out the claim as an abuse of process.

History

First claim

2. A claim which I shall call the first claim which is case number 2204646/2021 was presented in 2021 although not heard until 2023.

3. On 6 February 2023 seven days before the hearing of the first claim the Claimant was suspended for alleged bullying and harassment and that is the substance of his claim of victimisation a claim in which he says he was victimised for bringing the first claim.

4. On 13 February 2023 at the hearing of the first claim which was heard by Employment Judge Snelson sitting with two non legal members, there was a discussion about the Claimant's application to amend to bring the claim of victimisation arising from events the previous week. He discussed the matter with the judge. Mr Ellahi tells me informed him that there would have to be a further hearing. This is not dealt with in Employment Judge Snelson's reasons dated 9 March 2023 but I infer from what I have been told that it was suggested that there would have to be a further hearing either because the whole claim might have to be postponed or at least that the victimisation claim would have to be listed separately.

5. Mr Ellahi having reflected upon it decided not to pursue the application to amend the claim and the hearing went ahead.

6. A judgment refusing the Respondent's application for strike out and dismissing the claims as not well founded was entered on the register on 23 February 2023. Written reasons were sent out by Employment Judge Snelson in relation to the first claim on 9 March 2023.

7. The Claimant applied for a reconsideration of that decision. This application was refused on 11 April 2023.

Second claim

8. On 28 February 2023 the second claim which is case number 2201746/2023 was presented. In presenting the second claim, the Claimant used the ACAS number from the first claim.

9. In March 2023 the Claimant withdrew the second claim and wrote in a letter withdrawing that claim with the following words "I am withdrawing my claim, as I have been told I cannot use the same ACAS number as previous claim".

10. On that basis it was withdrawn and dismissed by the Tribunal on 29 March 2023.

Third claim

11. On 12 March 2023 a new ACAS early conciliation process was commenced by the Claimant and a certificate was issued by ACAS two days later with a new number which is R142263/23/21.

12. The following day the 15 March 2023 a third claim was presented which is the present claim using the new ACAS number which was issued the previous day.

13. On 28 April 2023 a notice of claim for the third claim was generated and appears to have been sent out to the parties. This contained a deadline for the Respondent to reply by 26 May 2023.

14. I have seen by correspondence in the bundle prepared for this hearing by the Respondent that that was sent to an email address which is hr@sc.appeals@royalmail.com that is at page 84.

15. The Claimant on 29 April 2023 chased an progress on the claim, on the basis that it have been 30 days and he had not heard anything.

16. It seems from an email sent by Ms K Ryan who was a trainee solicitor acting writing on behalf of Weightmans the Respondent's solicitor that the wrong ET1 claim form was attached and accordingly a letter was sent on 3 May 2023 chasing the correct ET1 claim form. She wrote:

> "Please can you provide the correct ET1 in this matter as the one attached is a different claim and has been withdrawn. Further, the Respondent requests an extension of time for the response to been filed, in view of the papers not yet been received and to allow the Respondent sufficient time to prepare a response."

17. I cannot see from the documents available to me whether it was the second or third claim that had been sent out. On the balance of probabilities, I think it most likely that it was the second claim on the basis that the Respondent's solicitor identified that this was the claim that had already been withdrawn.

18. On 9 May 2023 a trimmed version of the correct ET1 was provided to the Respondent but without the notice of claim, that was at page 85 of the bundle. This was the third claim form, the one presented on 15 March 2023.

19. The following day on 10 May Ms Ryan the trainee chased a notice of claim.

20. A notice for today's preliminary hearing was sent on 16 May 2023.

21. In correspondence on 17 May 2023 from the Respondent's solicitor continued to explain that they had not had sight of the correct ET1 and an application was made to extend time on 7 June 2023 which is how the application came before me.

Discussion

22. There are two elements in today's hearing: first the Respondents application to extend time for presentation of the response and if successful second the Respondent application to strike out claims being abuse of process.

Application to extend time

23. If I deal first with the application to extend time under rule 20 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules").

24. The Respondents position at today's hearing was initially that the third claim should have been sent to Sheffield, the office in Sheffield I understand is the

Headquarters for Human Resources matters within Royal Mail nationally but the Claimant pointed out that the second claim was sent to the address at 185 Farringdon Road and that was nevertheless responded to which an argument I acknowledge.

25. In essence the Respondents position is that the notice of claim was not received by them although they did have notice that a claim form had been presented.

26. The law on applications for extension of time for responses is contained within the case **Kwik Save Store v Swain 1987 ICR 49** the considerations are (1) explanation for the delay, (2) merits of the defence and (3) possible prejudice to each party.

27. Having spent some time going through the correspondence it seems to me the most likely explanation for what has occurred and the delay that has occurred is that the Respondent's solicitor was either sent the second claim instead of the third or at least they believed they have been sent the second claim because the third claim was so similar. On balance I consider that it was probably the former.

28. In any event they believed they had not received the notice of claim in which the deadline for presentation of the response would be given, so it is seems possible that there has been some administrative error within the administration of the Tribunal.

29. As to the merits of the defence there is a potential knock out defence which is that the third claim was an abuse of process.

30. Considering the possible prejudice to each party the Claimant might get a windfall successful claim unfairly if the abuse of process point is not considered by the Tribunal. There has not been a substantial delay caused such that the Claimant might be thought to be prejudiced by that delay.

31. Coming to the conclusion on the first application, looking at the matter overall it seems to me likely that there has been an error in the Tribunal administration, there is a defence with merit, the prejudice to the Claimant is minimal and on that basis it seems to me appropriate to allow the application to extend time for presentation of the response.

Strike out application: abuse of process

32. Turning to the second application, which is the application to strike out the claim on the basis that this is abuse, the Respondent's position is that the victimisation claim arising from events in the first week of February 2023 should have been brought as part of the first claim, that is the claim that was dealt with by Employment Judge Snelson together with two non legal members.

33. I have set out the Claimant acknowledges that the application to amend the claim to include this allegation was made by him at the final hearing but then

not pursued because of the potential effect of having to have a hearing on a different date.

34. The Respondent also argues that the Claimant has withdrawn the second claim and ought not to be able to pursue another claim in substantially the same terms.

Law

35. In **Henderson v Henderson** [1843] 3 Hare 100 PC the Court of Chancery confirmed that a party may not raise any claim in subsequent litigation which they ought properly to have raised in a previous action.

36. In **Johnson v Gore Wood & Co** [2002] 2 AC 1 Lord Bingham gave the leading judgment in which he emphasised that the principle in Henderson v Henderson had evolved into a broad, merits based approach in which a balance must be struck between the proper administration of justice and avoiding defendants being vexed by duplicative litigation.

37. As to the law specifically in the employment tribunal context, I have been referred to the case of the **London Borough of Haringey v O'Brien** UKEAT/004/16/LA in that case the Employment Tribunal erred in the way that it approached the Henderson and Henderson point. It approached this point on the basis that it only related to matters predating the presentation of the claim form not predating the hearing. In that case the first claim was presented as 30 March 2011 and the Tribunal took that as being effectively a cut-off for the Henderson v Henderson point.

38. At paragraph 59 HHJ Edie QC (as she then was) said this

> "59. Turning then to the Respondent's appeal on the Henderson abuse point. This assumes that the Claimant would have been able to apply to amend to add matters to the first ET proceedings, even if involving acts post-dating the lodgement of the claim, something the EAT has allowed, see paragraphs 61 to 63 Prakash v Wolverhampton City Council UKEAT/ 0140/06. This was, again, plainly an issue before the ET (see as recorded at paragraphs 4.21 and 4.36, 5.1 and 5.5) and there is 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. In the circumstances, I am bound to agree with the Respondent: the ET's statement - "After the 30 March 2011 the Henderson v Henderson application does not apply" - either discloses an error of law or is simply inadequate in terms of providing an explanation for its ruling.

39. At paragraph 50 of that judgment contained the following citation of the Johnson v Gore Wood case:

50. The form of estoppel thus created was considered by the House of Lords in Johnson v Gore Wood & Co [2002] 2 AC 1, where Lord Bingham offered the following guidance (see p31A-F):

"… 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 the 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 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 proceedings 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. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. …"

Effect of withdrawal of second claim

40. Turning to this particular case I am going to deal with the abuse and process points in reverse order. I am going to start with the second claim first and then deal with the first claim.

41. Dealing with the second claim whether the Claimant is to be stopped from bringing essentially the same claim again applying the broad merits braced approach that I see set out in Johnson v Gore Wood I do not consider that it is an abuse of process for the Claimant to bring the third claim. He recognised that there was an error in trying to use the earlier ACAS number the second claim, withdrew that claim and presented another claim explaining that he was withdrawing it for that reason. In any event I do not see the Respondent has been put to very substantial additional cost since its essentially the same response could be submitted so I do not find that replacing the second claim with a third claim amounted to an abuse.

Abuse in relation to the first claim

42. Turning to the first claim I find that this is more problematic.

43. The Claimant had an opportunity to amend his first claim to complain about the alleged victimisation in February 2023.

44. No doubt for pragmatic reasons he decided not to pursue that at the time.

45. Following the guidance in the O'Brien claim it would be wrong to conclude that since that victimisation event post-dated the claim this could not potentially form part of a Henderson and Henderson abuse of process argument. In fact it is clear that the victimisation claim could have been brought as part of the first claim or at least an amendment to be brought as part of the first claim and it was specifically discussed with the judge at that hearing.

46. The correct approach I must apply is a broad merits based approach.

47. I have some sympathy with Mr Ellahi's position. He made a decision at the hearing of the first claim, no doubt under a degree of pressure to avoid delay and decided not to pursue the matter of the alleged victimisation. That was an understandable and a reasonable decision at that time. Now however having reflected upon it he does want to pursue a claim in relation to that suspension.

48. This is where the Henderson and Henderson point comes in. This is designed to lead to finality in litigation and to prevent a party in this case prevent the Respondent Royal Mail from having to deal with what would be a kind of drip drip of related claims that should have been brought together all at the same time.

49. So, it is my decision that the Claimant's opportunity to pursue the allegations of victimisation in relation to suspension in the week before the hearing was at the hearing or at least at a postponed version of that hearing so that all the matters that were connected could be heard together. He chose not to do that

and my decision is that it would be an abuse to have allowed him to pursue that allegation through this third claim.

50. It follows that I am going to strike out the third claim.

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Employment Judge Adkin

Date 15.8.23

JUDGMENT SENT TO THE PARTIES ON

15/08/2023

FOR THE TRIBUNAL OFFICE