Case No: 2207536.2021
2200268.2023

EMPLOYMENT TRIBUNALS

Claimant: Ms. S Talukdar

Respondent: The Home Office

Heard at: London Central **On:** **19 June 2023**

Before: Employment Judge Joyce

Representation
Claimant: Mr. J Carmody (Solicitor)
Respondent: Ms. L Robinson (Counsel); Ms. A Khan (Solicitor)

UPON APPLICATION made by letter dated 6 January 2023 to reconsider the judgment under rule 71 Employment Tribunals Rules of Procedure 2013 dated 22 November 2022

JUDGMENT

1. The judgment of 22 November 2022 is confirmed.

REASONS

Claims and Issues

2. This matter was listed for a public preliminary hearing to determine the claimant's application of 6 January 2023 for reconsideration of the judgement issued on 22 November 2022 ("Judgment of 22 November 2022"), dismissing her claim of 17 December 2021 which included claims of discrimination arising from disability contrary to section 15 of the Equality Act 2010, failure to make reasonable adjustments contrary to section 20 of the Equality Act 2010 and harassment contrary to s. 26 of the Equality Act 2010 ("First Claim").[1]

[1] These claims had been filed by ET1 and attachment of 17 December 2021.

3. The Judgment of 22 November 2022 was following the claimant's email withdrawing the above claims on 27 September 2022. The claimant subsequently filed claims under sections 15, 20 and 27 of the Equality Act 2010, unfair dismissal and wages act claims in January 2022 ("Second Claim")

4. The claimant's application for reconsideration of the 22 November 2022 Judgment, under Rule 70 of the Rules of Procedure ("RP") was accompanied by an application under Rule 69 of the RP relating to "clerical mistakes and accidental slips".[2]

5. The issues were agreed with the parties at the start of the hearing as follows:

(i) Whether or not to waive the time limit for filing an application for reconsideration within 14 days of the Judgment of 2 November 2022;

(ii) Whether or not it is in the interests of justice to revoke the Judgment of 2 November 2022 dismissing the claimant's First Claim;

(iii) In determining (ii) above applying rules 52 (a) and (b) – whether (i) the claimant expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and (ii) the T is satisfied that there would be a legitimate reason for doing so or; (b) T believes that to issue such a judgment would not be in the interests of justice;

(iv) If the Tribunal finds that the Judgment of 2 November 2022 is revoked, what is the effect of such revocation?: Would it revive the First Claim or, rather, would it allow the Second Claim to proceed in full?;

(v) Whether there is 'cause of action estoppel' because in the Second Claim, the claimant is bringing the same claims in respect of s. 15 discrimination, s.20 failure to make reasonable adjustments and a s.27 claim for victimization;

(vi) Whether or not it is an abuse of process to allow the Second Claim in relation to s.20, s.15, s. 27 of the Equality Act 2010 to continue because they are the same claims as those contained in the First Claim;

(vii) Whether or not it is an abuse of process to allow victimization and wages act claims to be brought if they are related to matters that are alleged to have occurred before 17 December 2021 (i.e. the date of the First Claim) because they should have been included in the First Claim;

(viii) Whether or not the requirements of Rule 69 RP have been met.

[2] Email of 6 January 2023 from the claimant to the Tribunal, PH Bundle p. 52.

6. It emerged at the hearing that the respondent's position was not that the claimant should be prevented from bringing any *cause of action* from her First Claim as part of her Second Claim. Rather, the respondent's position is that the claimant may still bring claims for s.15 and s.20 Equality Act 2010, s. 27 Equality Act 2010, unfair dismissal and wages act claims but may not rely on the same facts/issues that she relied upon in her First Claim.
7. The claimant's position was that the time limit for reconsideration should be extended. She had not understood the legal impact of withdrawing the First Claim and had made it clear she intended to pursue that claim in subsequent proceedings. Applying Rule 52, she should be permitted to bring her First Claim as part of her Second Claim. It would be artificial to allow the same causes of action in the Second Claim as had been advanced in the First Claim without reference to all facts and issues from the First Claim.

Hearing: Procedure, documents and evidence heard

8. There was a full hearing at which a jointly agreed bundle of 125 pages was referenced. The claimant gave oral evidence. The respondent did not present any witnesses. Both parties made oral closing submissions based on their respective written skeleton arguments. Preliminary Hearing Bundle references are in bold square brackets below.

Facts

9. By claim form dated 17 December 2021, the claimant filed the First Claim: a claim for discrimination on grounds of disability. In her attached particulars of claim, the claimant elaborated on her claims as discrimination arising from disability contrary to section 15 of the Equality Act 2010, failure to make reasonable adjustments contrary to section 20 of the Equality Act 2010 and harassment contrary to s. 26 of the Equality Act 2010.

10. In the First Claim, the claimant relied on facts from February 2018 onwards **[14]**. As to her specific claim for s.20 failure to make reasonable adjustments, these were set out at paragraph 95 of her particulars of claim **[24]**. As to the specific contents of her claim for s.15 discrimination arising from disability, this related to (a) subjecting her to the unauthorised absence procedure from 22 July 2021 and (b) subjecting her to a formal absence review meeting on 24 November 2021 **[24]**. Her s.26 harassment claim was based on paragraphs 81, 82, 83, 85, 86, 87 and 88 of her particulars of claim **[22-23]**. These paragraphs relate to the claimant's treatment by Ms Maric at what the claimant refers to as an informal meeting on 6 September 2021. The treatment essentially relates to Ms Maric's alleged negative attitude towards the claimant's requests for reasonable adjustments.

11. Following the claimant's application for a postponement of a preliminary hearing set for 17 March 2022, the hearing was postponed.

12. On 24 March 2022, as a result of the parties' agreement, the proceedings were stayed until 30 June 2022.

13. On 22 June 2022 the claimant sought a further stay of the proceedings pending the outcome of a grievance she had filed.

14. By correspondence of 30 June 2022, the respondent objected to this further stay.

15. On 1 July 2022, the Tribunal issued a letter lifting the stay on the proceedings.

16. On 15 August 2022, the respondent dismissed the claimant from her employment.

17. On 20 September 22 the claimant lodged an internal appeal of the decision to dismiss her.

18. At some point around this time, the claimant spoke with her trade union representative, Mr Brewer, who advised her to withdraw the First Claim.

19. On 26 September 2022, the claimant emailed Mr. Brewer with a draft to send to the Tribunal as follows: "*Dear sir/madam, This ET claim is withdrawn pending the outcome of Appeal against Disability Unfair dismissal for failure to put in place reasonable adjustments*".

20. On the same day, Mr Brewer emailed the claimant back with a revised version as follows: *This ET claim is now withdrawn pending a further claim to be submitted for Unfair dismissal - failure to put in place Reasonable Adjustments and removal from Disability Leave"*

21. On 27 September 2022, the claimant sent this revised version of the email to the Tribunal.

22. On 7 October 2022, the Tribunal wrote to the claimant stating, among others, that "a dismissal on withdrawal judgment will be sent to you in due course".

23. On 26 October 2022, the claimant's internal appeal against her dismissal from the respondent was rejected, and her dismissal was upheld.

24. On 27 October 2022, the respondent wrote to the Tribunal stating it was still awaiting a dismissal judgment following the claimant's withdrawal of the First Claim. The claimant was copied in.

25. On 28 October 2022, the respondent followed up about obtaining dismissal judgement again, copying in the claimant.

26. At around the same time, the claimant was going through a civil service appeal board process.

27. On 1 November 2022, the claimant commenced conciliation with ACAS in relation to her Second Claim.

28. On 22 November 2022, the Tribunal issued the 22 November Judgment, dismissing the claimant's First Claim.

29. On 24 November 2022, the 22 November Judgment was received by the parties, and the claimant sent the judgement to Mr Brewer.

30. In early January 2023, the claimant instructed a legal representative, Mr. Carmody (who now represents her in these proceedings).

31. On 6 January 2023, the claimant filed her application to reconsider the 22 November Judgment.

32. On 12 January 2023, the claimant filed her Second Claim which included claims for discrimination arising from disability under s. 15 Equality Act 2010, failure to make reasonable adjustments under s. 20 Equality Act 2010, victimisation under s. 27 Equality Act 2010, unfair dismissal and wages act claims.

33. The s. 20 reasonable adjustments claim included all of the claims advanced in the First Claim, and included one additional particular: "Extended phased return" **[78].** Part of the reasonable adjustment claims refers failures to make/consider reasonable adjustments having occurred on 11 February 2022, 27 May 2022 and 15 August 2022, all of which post-dated the date of the First Claim.

34. As to the s.15 discrimination arising from disability claim, this was based on an alleged failure to address the claimant's internal grievance from 15 December 2021, which grievance had been raised due to her alleged "removal from reasonable adjustment related disability leave on 12 July 2021" **[67]**; placing the claimant on half-pay occurred on 15 April 2022; failing to fully/properly implement reasonable adjustments; preventing the claimant from returning to work from 27 May 2022; dismissing her on 15 August 2022; not paying her entitlements on termination and rejecting her appeal against dismissal **[78-79].**

35. The, new, victimization claim under s. 27 was brought on the basis of the dismissal on 15 August 2022 which it was claimed was "wholly or in part" due to her First Claim and the grievance from 15 December 2021. The claims for unfair dismissal and unauthorised deduction from wages were also new (having been based on the 15 August dismissal which of course arose after the First Claim) **[79]**. The s.26 harassment claim did not form part of the Second Claim.

36. On 24 January 2023, the respondent replied to the claimant's application for reconsideration of 6 January 2023.

37. On 12 May 2023, the Tribunal issued a notice of hearing for a one-day public preliminary hearing to adjudicate on the claimant's application for reconsideration, and further case management as necessary.

Legal Framework

38. Rules 51 and 52 of the RoP provide:

> **End of claim**
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> **51.Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application thatthe respondent may make for a costs, preparation time or wasted costs order.**

Dismissal following withdrawal

52.Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

(a)the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or

(b)the Tribunal believes that to issue such a judgment would not be in the interests of justice.

39. Rules 70 and 71 regarding Reconsideration of Judgments provide:

Principles

70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Application

71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

40. As to relevant authorities, in *Segor v Goodrich Actuation Systems Ltd [2012] UKEAT/0145/11/DM* ("*Segor*") the EAT made clear that tribunals should always take steps to ensure that litigants, particularly those who are self-represented or have lay representation, who seek to concede a point or abandon it do so on a clear, unambiguous and unequivocal basis before accepting the concession or abandonment indicated. At paragraph 11 Langstaff P held:

"**11. What we should say, however, is this. A tribunal will always want to take care where a litigant, particularly one who is self-represented or who has a lay representative, seeks to concede a point or to abandon it. It may be a matter of great significance. Though it is always for the parties to shape their cases and for a tribunal to rule upon the cases as put before it, and not as the tribunal might think it would have been better expressed by either party, it must take the greatest of care to ensure that if a party during the course of a hearing seeks to abandon a central and important point that that is precisely what the individual wishes to do, that they understand the significance of what is being said, that there is clarity about it, and if they are unrepresented, that they understand some of the consequences that may flow. As a matter of principle we consider that a concession or withdrawal cannot properly be accepted as such unless it is clear, unequivocal and unambiguous**."

41. *Segor was followed by Drysdale v Department of Transport (Maritime and Coastguard Agency) [2014] EWCA Civ 1083* ("*Drysdale*") which provided

as follows at paragraph 81 by reference to Verdin v Harrods Limited [2006] ICR 396 ("Verdin") in relation to the issue of dismissal following withdrawal:

> **"81. The purpose of dismissal under rule 25 was explained by the Appeal Tribunal in a passage in Verdin v Harrods Limited [2006] ICR 396 at paragraphs 35-40 - a passage approved by the Court of Appeal in Khan (see paragraphs 44 and 72). It is sufficient to quote paragraphs 39-40:**
>
> **" "39. So a party who receives a notification of withdrawal of the whole proceedings, and wishes to establish once and for all that there is to be no further litigation on the same questions, may apply for dismissal. The subsequent hearing will then concentrate on the question, which Mummery LJ identified in Ako [v Rothschild Asset Management Ltd [2002] ICR 899]. Is the withdrawing party intending to abandon the claim? If the withdrawing party is intending to resurrect the claim in fresh proceedings, would it be an abuse of the process to allow that to occur? If the answer to either of these questions is yes, then it will be just to dismiss the proceedings. If the answer to both these questions is no, it will be unjust to dismiss the proceedings.**
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> **40. I agree with a submission made by Mr Nicholls, that where one party withdraws the other party will generally be entitled to have the proceedings dismissed. This is because the party who withdraws will generally have no intention of resurrecting the claim again, or if he does will generally have no good reason for doing so. There is sometimes a temptation for a litigant, as the day of battle approaches, to withdraw a claim in the hope of being better prepared on another occasion. That will be unacceptable. Tribunals will no doubt be astute to prevent withdrawal being used as an impermissible substitute for an application for adjournment. Occasionally, however, there will be good reason for withdrawing and bringing a claim in a different way." "**

42. In *Campbell v OCS Group UK Ltd UKEAT/0188/16* the claimant in that case had written '"I am writing with regret that I am withdrawing my case due to ill-health and under medical advice. I attach a medical report from my practitioner." (para 3). She then rescinded the withdrawal citing extreme stress: "The letter sent to the Tribunal and the Respondents stating my decision to withdraw was made at a time when I was suffering from extreme stress and I was not in a right stable frame of mind and I was unwell. My mental capacity at the time of writing my withdrawal letter was impaired, which affected my judgment and as a result I made a decision while being mentally incompetent. I was also advised by my medical practitioner, as the accompanying medical report confirms, but [I] was not legally represented at this time and therefore unaware of the legal ramifications of my letter."

43. At paragraph 19 of *Campbell*, citing *Segor* and *Drysdale* Mrs Justice Simmler stated*:*

> **It seems to me that the approach identified by both of those cases applies in the context of withdrawal and dismissal under Rules 51 and 52 of the 2013 Rules as follows. So far as withdrawal is concerned, as Langstaff P made clear in Segor, tribunals faced with an application to withdraw should consider whether the material available amounts to a clear, unambiguous and unequivocal withdrawal of the claim or part of it.**
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> **Though there is no obligation on tribunals to intervene in such a situation, whether by reason of the overriding objective or any principle of natural justice, tribunals are entitled to make such enquiries as appear fit to check whether a party who is self or**

lay represented intends to withdraw. If the circumstances of withdrawal give rise to reasonable concern on the tribunal's part, it is entitled to make such enquiries as appear appropriate to ensure that the purported withdrawal is clear, unambiguous and unequivocal.

44. *Campbell* further provides (at paragraph 13) that there is no mandatory duty to invite representations before deciding to dismiss a claim. If the material available suggests the claimant intended to resurrect a claim in fresh proceedings or the withdrawal is irrational, then that is a basis for enquiries but the decision on enquiries and their extent is at the Tribunal's discretion. Once there has been a withdrawal, the claim cannot be revived. Para. 19 of the same Judgement provides that Tribunals faced with an application to withdraw should consider whether the material available amounts to a clear, unambiguous and unequivocal withdrawal of the claim.

45. Paragraphs 14 and 15 of *Campbell* provide that the effect of Rule 52 is mandatory. Unless and until the Tribunal has dismissed the claim, the Claimant can seek to rely on Rule 52(b) on the basis that rights were not expressly reserved and it would be in the interests of justice not to dismiss the claim.

46. *Campbell* (paragraph 21) reaffirmed the two questions posed above in *Drysdale*: (i) Whether the withdrawing party is intending to abandon the claim? (ii) If the withdrawing party is intending to resurrect the claim in fresh proceedings, would it be an abuse of process to allow that? If the answer to either question is yes, then it is just to dismiss. If the answer is no, then it is not just to dismiss.

47. At paragraph 30 of *Campbell* the EAT further held that Rule 70 of the 2013 Rules gives Tribunals the power to reconsider a judgment where it is necessary in the interests of justice to do so.

48. In *Baker v Abellio London Appeal No. UKEAT/0250/16/LA ("Baker")* the EAT found that the first instance Tribunal had committed an error of law in having concluded that a claimant's employment was unlawful, and that consequently the claimant should not have been paid during a period of suspension. During the proceedings the claimant had withdrawn her claim for unauthorised deduction of wages and the Tribunal had dismissed the claim upon withdrawal. The EAT concluded that if the Tribunal had not made an error of law in concluding that the claimant was unlawfully employed by the respondent, it would have logically concluded that the claimant's claim for unauthorised deduction from wages was unanswerable. In those circumstances, the EAT concluded that a Tribunal acting reasonably would have concluded it was not in the interests of justice to dismiss the claim.

49. Referencing *Campbell* the EAT held at para. 38 of *Baker* that "If the ET is put on notice that a withdrawal is ill-considered or irrational then it is said that, in accordance with paragraph 24 of the judgment of Simler P, an ET

should make such enquiries before accepting an apparent withdrawal of a claim." However, at para. 45 the EAT continued: "It will be in a very rare case that an Employment Judge does not dismiss a claim following its withdrawal."

50. The fact that the claimant was not professionally represented was also a factor bearing on the EAT's decision: "Bearing in mind that the Claimant was represented by his brother, not a legal representative, and faced with an obviously inconsistent position, in my judgment, an Employment Judge acting reasonably and within the scope of their discretion would undoubtedly have concluded that it was not in the interests of justice to dismiss the claim." In summary, the EAT held that where a withdrawal was "apparently and obviously ill-considered or irrational" as the claim appeared to be unanswerable then "judicial decision making under Rule 52(b) would be triggered. Although it is very rarely triggered, Rule 52 is there for a reason. By Rule 52(b), an ET is given a discretion to be exercised judicially in the interests of justice not to dismiss a claim on its withdrawal."

51. From *Barber v Staffordshire CC [1996] 2 All ER* as to the doctrine of estoppel, I derive the principle that estoppel will apply to an order dismissing proceedings on withdrawal and so the order will operate to bar any future proceedings being brought in respect of the same subject matter.

52. In *Ebury Partners UK Ltd v Davis [2023] EAT 40,* it was held that a central aspect of the interests of justice is that there should be finality in litigation It is unusual for a litigant to be allowed a second bite at the cherry and the jurisdiction to reconsider should be exercised with caution.

53. From *Ironside Ray and Vials v Lindsay [1994] IRLR 318* I derive the principle that the errors or failings of a representative whether professional or otherwise will not generally constitute a ground for review.

54. On the question of estoppel, including cause of action estoppel, issue estoppel and 'Henderson abuse of process' I referred to *Virgin Atlantic Airways Ltd v Zodiac Seats Uk Ltd (formerly Contour Aerospace Ltd) 2014 AC 160 SC*.

55. From *Henderson v Henderson 1843 3 Hare 100, ChD,* I had reference to the following passage relevant to the principle of abuse of process: "where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

Conclusions

Whether or not to extend the time limit for filing an application for reconsideration within 14 days of the Judgment of 2 November 2022;

56. Under Rule 71 RoP, the application for reconsideration should have been filed within 14 days of the date on which the 22 November 2022 was sent to the parties. Therefore, it should have been filed by 5 December 2022.

57. However, I noted that I retain discretion under the overriding objective of the Rules of Procedure to extend time limits. The simple fact is the claimant did not know the potential effect of the withdrawal of her First Claim or the potential effect of the 22 November 2022 Judgment, dismissing her First Claim, until she took legal advice on 4 January 2023. This is why she did not apply earlier.

58. Upon receiving legal advice on 4 January 2023, she applied expeditiously, on 6 January 2023, for reconsideration of the 22 November Judgment. I took the view that reconsideration in and of itself would not cause prejudice to the respondent. The respondent did not identify any practical consequences such that it would be prejudicial to reconsider the dismissal judgment. As such I found it appropriate to extend the time limit and to reconsider the issuance of the 22 November 2022 Judgment.

Whether or not it is in the interests of justice to reconsider the Judgment of 22 November 2022 dismissing the claimant's First Claim;

59. Having considered the application and the respondent's response to that application, I decided that it was in the interests of justice to reconsider the 22 November 2022 Judgment in accordance with Rule 70 RoP. This is because in my view there was an arguable point being raised by the claimant which required careful consideration.

If the Tribunal finds that the Judgment of 2 November 2022 is revoked, what is the effect of such revocation?: Would it revive the First Claim or, rather, would it allow the Second Claim to proceed in full?;

60. I considered that the effect of revoking the judgment of 2 November 2022 would not be to 'revive' the First Claim. Having considered Rule 51 RoP and per the finding in the case of Campbell,[3] a withdrawn claim cannot be revived. The effect of revoking the 22 November 2022 Judgment would be that the claimant could potentially bring her Second Claim to include the claims brought in her First Claim**,** subject to consideration of whether it may be a case of estoppel or abuse to permit her to do so.

[3] Para. 11 of that Judgment.

Applying rules 52 (a) and (b) – whether (i) the claimant expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and (ii) the Tribunal is satisfied that there would be a legitimate reason for doing so or; (b) the Tribunal believes that to issue such a judgment on dismissal would not be in the interests of justice;

61. As to Rule 52 RoP, regarding dismissal following withdrawal, applying Rule 52 (a) I considered the wording of the claimant's email of 27 September 2022 following revision by Mr Brewer, in addition to the wording of the initial draft of that email on 26 September 2022.

62. The respondent's position was that the claimant did not reserve the right to bring the same claim again, rather she stated that she would bring a new (i.e different to her First Claim) claim to include claims of unfair dismissal, discrimination and failure to make reasonable adjustments. Her email of 27 September 2022 referred broadly to causes of action, but was unclear as to the content of her future claim and to what extent, if any, it was proposed it would contain the same or substantially similar claims as those contained in her First Claim.

63. As to the claimant's contention that the Tribunal should have made enquiries, given the wording of the claimant's email, as to why the claimant had reached the decision to withdraw her First Claim, I concluded that on the balance of probabilities it should have done so.

64. I took account of the authorities which provided that there is no obligation on a Tribunal to make further enquiries with a claimant as to their reasons for withdrawing a claim. However, in this instance I concluded that the Tribunal, even for sake of clarity, should have made enquiries with the claimant as to the exact nature and scope of her future claim. In other words, was she expressing the view that she wished to reserve her right to bring her existing claims again, or whether she was referring to the same causes of action but on the basis of different issues, facts and/or evidence?

65. I concluded that to require definitive wording such as "I reserve the right to bring this claim again" would be to impose too high a threshold under Rule 52 (a). As to the claimant's s.15 Equality Act 2010 claim, I noted that the wording of the email lacked clarity in that it referred to "removal from disability leave" but, on balance, I found that this was a reference to the claimant's s.15 discrimination arising from disability claim.

66. Having reconsidered the matter, I found that on balance, the wording of the claimant's email was sufficiently clear that she intended to bring a claim in the future for unfair dismissal and, also, to bring her claims for discrimination arising from disability under s. 15 and failure to make reasonable adjustments under s.20 of Equality Act 2010, from her First Claim, again in the future.

67. But, the matter did not end there. The second limb of Rule 52 (a) also needed to be considered: "*and the Tribunal is satisfied that there would be legitimate reason for doing so*".

68. I proceeded to consider the reasons provided by the claimant as to whether or not they met the requirement of "legitimate reason"**.** The claimant essentially stated, at paragraph 5 of her Witness Statement that she had to withdraw her claim pending a hearing on her dismissal. But, she did not provide a legitimate reason for why she wished to reserve her right to bring a future claim. The claimant relied upon the time constraints involved in pursuing her First Claim due to other ongoing "internal processes" and also her need to attend medical appointments at the time that she had withdrawn the First Claim, which reduced her available time.

69. I had regard to the long history of the case, including the claimant's request for a stay previously, and that a request for a stay by the claimant in June 2021 had been denied by the Tribunal. I also had regard to the fact that she sought to withdraw her First Claim in order to also include her unfair dismissal claim (claimant's Witness Statement para 5) and, on balance, it seemed to me that this was a case to which the above cited *dicta* in *Drysdale* applied: "*There is sometimes a temptation for a litigant, as the day of battle approaches, to withdraw a claim in the hope of being better prepared on another occasion*." Applying Drysdale, this was not, in my view, a legitimate reason.

Whether there is 'cause of action estoppel' because in the Second Claim, the claimant is apparently bringing the same claims in respect of s. 15 discrimination arising from disability, s.20 failure to make reasonable adjustments and a s.27 claim for victimization, all under the Equality Act 2010;

Whether or not it is an "abuse of process" to allow the Second Claim in relation to claims for s. 15 discrimination arising from disability, s.20 failure to make reasonable adjustments and a s.27 claim for victimization, to continue because they are the same claims as those contained in the First Claim;

70. In relation to the above two issues, the only substantive difference is whether allowing the Second Claim to proceed on the basis that it encompassed the claims from the First Claim was a case of 'estoppel', or 'abuse of process' or neither.

71. I proceeded to answer the questions posed in *Drysdale* which related to these issues.[4]

72. I determined that as to the first question in *Drysdale*, based on my previous findings above, I could not be satisfied that the claimant was "intending to abandon" her First Claim. As to the second question, the added complication was that the respondent was not relying on 'cause of action estoppel' in that the respondent's position was, as noted above, that the

[4] "Is the withdrawing party intending to abandon the claim? If the withdrawing party is intending to resurrect the claim in fresh proceedings, would it be an abuse of the process to allow that to occur? If the answer to either of these questions is yes, then it will be just to dismiss the proceedings. If the answer to both these questions is no, it will be unjust to dismiss the proceedings."

claimant could still bring claims for s. 15 discrimination arising from disability and s. 20 in her Second Claim.

73. As such the respondent's position was not that the claimant was estopped from bringing those same causes of action (i.e although referenced in their skeleton argument, the respondent was not in substance claiming cause of action estoppel). Rather, this was a case of abuse of process/ issue estoppel in that the respondent's position was that the claimant should not be allowed to rely on issues or facts that arose before the date of her First Claim in 17 December 2021.[5]

74. I concluded that it was essentially an abuse of process/case of issue estoppel to allow the claimant to rely on issues which had been the subject of her First Claim because, referring back to my findings on "legitimate reason" above, the claimant had withdrawn the First Claim solely due to time constraints, with a view to resurrecting those same issues in the future. Relying on the dicta in *Verdin,* as cited in *Drysdale,* I took the view that this was indeed a case where the claimant is estopped from relying on issues raised in her First Claim as part of her Second Claim, and that to permit her to do so would be an abuse of process.

75. As such, in answer to the second question in *Drysdale*, citing *Verdin*, I found that, 'yes', at the time of withdrawal the claimant intended to resurrect the First Claim in future proceedings, but that there was no legitimate reason for doing so and it would be an abuse of process/case of issue estoppel to allow her to rely on, claims which formed the basis for her First Claim, as part of her Second Claim.

76. As to Rule 52(b) RoP "*whether the Tribunal believes that to issue such a Judgment would not be in the interests of justice*", I did not conclude that it would not be in the interests of justice to issue the 22 November 2022 Judgment dismissing the claimant's First Claim.

77. I noted the claimant's reliance on *Campbell* in relation to the interests of justice test*,* but considered that the facts were distinguishable. In *Campbell*, the claimant made an application to withdraw her claim during the first day of her hearing citing her mental health. Judgment dismissing her claim was issued the following day. The day after that (so just two days after her withdrawal) the claimant made an application for reconsideration in which the claimant sought to 'withdraw her withdrawal' relying on medical evidence which she claimed showed she was mentally impaired when applying to withdraw her claim.

78. The medical evidence proved significant in the EAT's decision in *Campbell*. There was no such evidence in the present case. Rather, the withdrawal had taken place following advice from the claimant's union representative ,Mr Brewer, and was, in my view, because the claimant did not wish to pursue the claim at that time due to competing obligations. I took account of the fact that these obligations included medical appointments, but even on her own account, the claimant had sufficient time available to participate in a hearing on the First Claim.

[5] I noted that in Drysdale, citing paragraphs 39-40 of Verdin v Harrods Limited [2006] ICR 396, the reference to the "same questions" not being subject to further litigation.

79. There were also approximately two months between the application to withdraw and the dismissal judgment being issued. During that time, the respondent had followed up with the Tribunal seeking the issuance of a dismissal judgment and had copied the claimant in on those communications. The claimant had not responded to indicate her disagreement with the issuance of a dismissal judgment.

80. I also considered *Baker* and found it was distinguishable from the present case. In *Baker* the Tribunal had made an error of law on one aspect of the claim. In light of this, the claimant withdrew a claim for unauthorised deduction of wages. Had the Tribunal not made an error of law on the first aspect of the claim, the unauthorised deductions claim would have been "unanswerable". In these circumstances, the EAT considered that the withdrawal was in essence irrational, and it was in the interests of justice not to dismiss the unauthorised deductions claim. There was no such error here: the claimant made the application to withdraw the First Claim of her own volition.

81. In reaching my conclusion that it was not in the interests of justice not to withdraw the 22 November 2022 Judgment, I also took account of the other circumstances in existence: the fact that this case had been ongoing since December 2021 following numerous stays, and that it had been, at the time of the present hearing, almost two years since the First Claim had been filed. Furthermore, the facts supporting that claim dated back to 2018 and were therefore some five years old.

82. I noted the claimant did not have legal representation at the time of withdrawal but considered that (a) she had advice from a union representative and (b) that she could have acted more expeditiously in seeking the legal advice that she eventually obtained from Mr Carmody some three months later in January 2023.

83. I further considered the matter of prejudice as between the parties. The claimant was not being prevented from pursuing her essential causes of action. She could still pursue her s. 15 and s.20 Equality Act 2010 claims, as conceded by the respondent. She could still pursue her claims for unfair dismissal, victimization and wages act claims.

84. In this regard, I noted that, as is evident from the summary of the First Claim **[paragraph 10 of these reasons]** and the Second Claim **[paragraphs 32-35 of these reasons],** that upholding the dismissal of the First Claim did not cause significant prejudice to the claimant. As to her s. 15 disability arising from discrimination claim in the Second Claim, the alleged failure to address the claimant's internal grievance from 15 December 2021, (which grievance had been raised due to her alleged "removal from reasonable adjustment related disability leave on 12 July 2021") was part of the First Claim, and therefore, would not permitted to form part of the Second Claim. However, there were still approximately five other examples of alleged unfavourable treatment to be relied upon by the claimant as part of her second claim, post-dating the First Claim (17 December 2021).

85. As to the s. 20 reasonable adjustments claim, while all but one of the alleged adjustments ('Extended leave' being the exception) seemed to have been requested by the claimant before the First Claim, part of the respondent's

claim was that the dates of the alleged failures/omissions to provide those adjustments were from 2022, i.e. after the date of the First Claim.

86. The essence of this aspect of the s.20 claim in the Second Claim was that (a) what was provided in terms of reasonable adjustments (equipment for example), was inadequate and there was a failure to rectify this on 11 February 2022; (b) that there was a failure to provide the claimant with a new line manager on 27 May 2022; and (c) the respondent's alleged conclusion that the claimant had no reasonable prospect of being able to return to work, even with reasonable adjustments, when the respondent dismissed her on 15 August 2022 was itself a failure to properly consider reasonable adjustments **[Bundle p. 78, para. 74]**. This part of the s. 20 claim would not be barred by upholding/not revoking the dismissal of the First Claim.

87. The s. 27 victimisation claim, unfair dismissal claim and un-authorised deduction from wages claims all post-dated the First Claim and were unaffected by upholding/not revoking the dismissal of the First Claim.

88. On the other hand, there was prejudice to the respondent who had a legitimate expectation of finality in litigation and who had operated under the understanding that the issues raised in the First Claim were no longer live. To require the respondent to now prepare for a hearing based on both the First and Second Claims seemed unfair, particularly where the factual basis for the First Claim dated back to 2018 and the First Claim had been dismissed some three months earlier.

89. As conceded by the respondent's representative in closing submissions, the above decision (i.e. to uphold the 2 November 2022 judgment) does not mean that the facts prior to 17 December 2021 cannot be referred to as part of the overall "factual matrix". However, the facts and issues prior to 17 December 2021 cannot form the basis for any claims within the Second Claim.

Whether or not it is an abuse of process to allow s. 27 victimization and wages act claims to be brought if they are related to matters that are alleged to have occurred before 17 December 2021 (i.e. the date of the First Claim) because they should have been included in the First Claim;

90. The respondent's position was that it would be an abuse of process per the rule in *Henderson* to permit the claimant to bring claims for s.27 victimization and wages act claim if they arise from matters that occurred before 17 December 2021, as they should have been included in the First Claim. It was clarified that the basis for the claimant's victimization claim arose from alleged protected acts in filing the First Claim and also filing a grievance on 15 December 2021. One of the detriments alleged is dismissal. For the wages act claim this related to an alleged shortfall in the claimant's notice pay.

91. As the claimant was necessarily aware of the fact that she had filed the 15 December 2021 grievance when she filed the First Claim (on 17 December 2021), this was in my view barred by the rule in *Henderson*. However, the

remaining matters (i.e. the alleged protected act of filing the First Claim and the detriment of dismissal arose post the First Claim and so I concluded that these aspects of the victimization claim did not constitute an abuse per the rule in Henderson and so could proceed as part of the Second Claim. Similarly, the wages act claim, which arose post the First Claim, was not a case of abuse under the rule in Henderson and so could also proceed as part of the Second Claim.

Whether or not the requirements of Rule 69 RP have been met.

92. Rule 69 is about clerical mistakes or other accidental slips or omissions and in my view was not applicable here. There was no evidence that the 22 November 2022 Judgment was a clerical error of any sort or any other accidental slip or omission. Rather, it was a deliberate action by the Tribunal to issue that Judgment after the respondent had asked about it not having been previously issued.

93. For all of the above reasons, having reconsidered the matter, I upheld the 22 November 2022 Judgment.

Employment Judge **Joyce**
13.10.2023

JUDGMENT SENT TO THE PARTIES ON

16/10/2023

FOR THE TRIBUNAL OFFICE