EMPLOYMENT TRIBUNALS

Claimant: Ms Y Ameyaw v **Respondent:** Pricewaterhousecoopers Services Limited

Heard at: London South (via CVP) **On:** 10 January 2023

Before: Employment Judge Fredericks

Appearances
For the claimant: Did not attend
For the respondent: Ms C Darwin (Council)

JUDGMENT AT OPEN PRELIMINARY HEARING

1. The hearing continued in the absence of the claimant under _Rule 47_ of _The Employment Tribunal Rules of Procedure_ **("Rules")**.

2. The claims advanced by paragraphs 4, 6, 7, 8, 13 and 19 of the claimant's particulars of claim are struck out because they have no reasonable prospect of success – the respondent is immune from complaints based upon actions in previous litigation between the parties.

3. The claims advanced by paragraphs 5, 11 and 20 of the claimant's particulars of claim are struck out because they have no reasonable prospect of success – they are matters which have either been determined previously in proceedings, or which offend the rule from _Henderson v Henderson_ that parties cannot litigate matters which should have been raised previously in already-decided proceedings.

4. The claims made by the claimant relating to fraud, human rights, reputational damage and damage to employability are dismissed because the Tribunal has no jurisdiction to hear such complaints.

5. Any other matters raised by the claimant in her particulars of claim which relate to her dismissal in 2017 are dismissed because they are out of time and it was reasonably practicable for them to have been brought in time when she brought her other complaints following her dismissal.

6. For completeness, it is recorded that none of the claimant's claims brought under this claim number survive this judgment.

REASONS

Introduction

1. This is the latest in a protracted series of proceedings between the parties which have involved the Employment Tribunal, the Employment Appeal Tribunal, the Queens' Bench Division (as was), and the Court of Appeal:-

   1.1. The original proceedings between the parties were brought by the claimant on 6 October 2015, when she brought claims alleging sex and race discrimination against the respondent. A second set of proceedings with further allegations were brought on 9 August 2016 and a third on 11 November 2016. The claimant was then dismissed by the respondent following her conduct during a preliminary hearing on 31 January 2021. The original claims themselves were dismissed following a 25-day hearing ending 12 May 2017. An appeal against that decision was dismissed by the Employment Appeal Tribunal on 11 December 2019.

   1.2. On 1 May 2017, the claimant brought an unfair dismissal and whistleblowing claim against the respondent. That was dismissed following a 7-day hearing ending 24 January 2017.

   1.3. The claimant brought a claim in the Queen's Bench Division about the damaging effect of statements which were said to have been made during the course of the Employment Tribunal proceedings. This was dismissed on 12 November 2020. An application to amend that claim in response to the judgment was refused following a public hearing on 17 December 2021.

   1.4. The claimant has also appealed against refusals to reconsider decisions; the latest one I was referred to being from the Court of Appeal (Civil Decision) on 22 February 2022.

2. This claim was brought on 28 December 2021. In its response, the respondent asked for the claims to be struck out. On 10 April 2022, the claimant wrote to say that she could not take part in proceedings temporarily due to ill health. A one-day hearing was listed for 16 September 2022. The claimant wrote on 1 July 2022 asking for that hearing to be transferred to a different region. That request to transfer was refused and the hearing took place on the allotted date.

3. The claimant attended the hearing on 16 September 2022 but protested the hearing on grounds related to the refusal to transfer and her experiences of the Employment Tribunal's London South region. The hearing was adjourned to this date in order that the parties were absolutely clear on the purpose of this hearing – to consider the respondent's application to strike out the claimant's claims and, if they are not struck out, to consider whether they should be subjected to a deposit order. Any surviving claims would then be case managed to ensure progression to a final hearing.

4. The respondent provided a bundle of documents at the hearing which ran to 474 pages. Pages 171 to 474 was made up of previous judgments in litigation between the parties.

The claimant's non-attendance

5. The claimant submitted a "second protest notice" ahead of this hearing. The first complaint in that document was rooted in her apparent inability to attend the hearing remotely at short notice. The claimant did not give reasons for this inability to attend remotely. Her ET1 form indicates that she is able to attend remote hearings. I note that a number of previous hearings were conducted remotely without any issues. The Tribunal is able to convert a hearing to be heard remotely according to the available judicial resources.

6. The claimant's protest is predicated on historic experiences with the London South Employment Tribunal, and both of her protests focus significantly on a claimed 'lack of accountability' or 'conflict of interest' relating to judges in the region. In her words, she says: *"The London South Employment Tribunal continues to feign neutrality even though the conduct of a resident judge… [NAMED]… is central to the issues in the claim, and, in addition, several of its officers have continued to wield administrative violence against me for more than 6 years and show no sign or willingness to change".* I pause here to note that, whilst the claim was not transferred out of the region as the claimant requested, this hearing was resourced through the Employment Tribunal's virtual region. I am not a London South judge and I have never met any of the previous judges involved with the claimant's various claims, or the Regional Employment Judge.

7. The protest also raises issues relating to the case management decisions made previously, including the adjournment of the 16 September 2022 hearing. The claimant was not present to present these points orally, and the document makes clear it is not to be construed as an 'application' which requires me to respond. Consequently, I do not act upon the contents of the document. I note, though, that *Rule 29* of the Rules is a very broad provision allowing the Employment Tribunal to make case management orders, which are to be applied in accordance with the overriding objective.

8. Towards the end of the protest, the claimant says *"this leads me to conclude that my presence or participation at the PHR will not add to a predetermined outcome. I therefore do not consider that I have a meaningful role to play at the oral hearing…"*. Unfortunately, therefore, the claimant chose to deprive herself of the opportunity to make representations at the hearing – nor did she ask for it to be adjourned or postponed. She did not attend the hearing. The tribunal clerk sent an e-mail at the start of the hearing. We waited until 11:00am to begin and then adjourned for a further half an hour. At 11:30am, I decided we should begin the hearing.

9. *Rule 47* allows a Tribunal to dismiss the claim or continue in the absence of a claimant. Before any such decision is made, I should take account of the information available about the non-attendance. I did not consider that this is the sort of case where a claim might be dismissed simply the claimant does not attend. The claimant is not indicating that she has abandoned her claim and she has not completely ignored the hearing which took place. For her own reasons, she decided not to attend this hearing. It would, in my view, not be in accordance with the overriding objective to deal with matters fairly and justly to simply dismiss the claim. It is implicitly clear to me that the claimant opposes the application to strike out her claims. If she did

not oppose the application, then she would not have gone to the efforts she has to protest the hearing of the application.

10. In the circumstances, I considered that the substance of the hearing could take place without the claimant present. The respondent was able to present its application. I was able to take, as I am required, the claimant's claims at their highest as they are pleaded and then consider whether there are any reasonable prospects of success. I therefore applied *Rule 47* to continue in the claimant's absence.

The application to strike out the claims

11. The respondent's application is made under *Rule 37*. Ms Darwin's submissions centred on the claims being advanced by the claimant being unarguable for one of several reasons, rather than any points being taken about the claimant's conduct in the proceedings. *Rule 37(1)* and *Rule 37(1)(a)* read:

> *"… a Tribunal may strike out all or part of a claim or response on any of the following grounds… (a) that it is scandalous or vexatious or has no reasonable prospects of success".*

12. *Rule 37(2)* provides a procedural safeguard to stop a claim being struck out without giving the claimant a fair opportunity to make representations. It reads:

> *"a claim… may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."*

13. The claimant was given notice of this hearing and that contained a written notice about the respondent's application to strike out the claim with the reasons for that application. The claimant has provided written submissions about the hearing today, and was afforded the opportunity to attend this hearing in order to be heard orally. I do not consider that her decision to miss this hearing has rendered the *Rule 37(2)* safeguard ineffective. All steps have been completed which would allow me to strike out the claims in the hearing if I grant the respondent's application.

14. The application was brought on the following grounds (pages 37 to 38):-

> *"(1) This claim, at least in large part, relates to steps taken by the respondent in the course of judicial proceedings. Such steps contain absolute immunity from suit.*
>
> *(2) Parts of the claimant's claim offends the rule in Henderson v Henderson, namely they are points which the claimant could have brought forward at the same time as her other claims, but chose not to do so. It is an abuse of process to seek to bring those points forward by way of further proceedings.*
>
> *(3) Other parts of the claimant's claim are an attempt to re-litigate matters which are already the subject of findings in the ET, EAT or High Court which are binding on the Claimant by reason of res judicata/issue estoppel/abuse of process.*

(4) The ET has no jurisdiction to hear claims of fraud or claims against the respondent pursuant to the European Convention of Human Rights…

(5) Finally, most, if not all of the claimant's claims are long out of time."

Claimant's claims relating to respondent's actions in previous litigation

15. The claimant's particulars of claim's paragraphs 4, 6, 7, 8, 12 and 19 outline complaints against the respondent arising from litigation. In particular, the claimant alleges that the respondent has used the proceedings to discriminate against her on the grounds of sex and race. She says that the respondent has supplied false information and malicious falsehoods in proceedings which has meant that it has been impossible to have her case heard fairly, which must have been sanctioned internally at the respondent and which have caused her distress.

16. It is the normal course of litigation for each party to present their positions and support those positions with evidence that they consider supports them. In any litigation, there is a dispute. The claimant asserted that he had been discriminated against and unfairly dismissed. The respondent denied these claims. It does not appear to me that anything untoward has occurred in the previous proceedings, although I understand how the claimant would feel aggrieved at having lost all of the previous substantive proceedings.

17. However, there is a legal principle protecting a party from further litigation arising from positions taken or statements made in the course of litigation between them and the complaining party. This is not new information to the claimant, as the issue arose before Mr Justice Warby (as he then was) in proceedings between these very parties. Commenting on a largely identical complaint brought by the claimant against the respondent and others, he said (para 99 *Ameyaw v McGoldrick and others [2020] EWHC 3035 (QB)*:

> *"The claimant complains of statements made to the Tribunal in the course of these proceedings, in an application for an order. It is beyond sensible dispute that the publication complained of was made on an occasion of absolute privilege. This has been the applicable law for centuries. The 19th and 20th Century authorities were reviewed by Nicklin J in the case cited by the defendants, Huda v Wells… Depending on how one analyses the matter, the present case falls firmly into the first or second of the three categories identified by Devlin LJ 60 years ago, in Lincoln v Daniels [1962 1 QB 237, 257-258. Those are categories to which the application of the privilege is firmly established."*

18. The claimant's claims, as with arguments advanced in front of Warby J, appear to consider that she is able to complain to the Employment Tribunal where the statements given by the respondent in the proceedings are found to be 'malicious falsehoods'. The first, and most obvious, point to my mind is that the respondent has never been found to have been dishonest or to have supplied falsehoods in either of the substantive Employment Tribunal trials between these parties. The second point is summarised, again, by Warby J at paragraph 110 of the same judgment as above:

> *"… absolute immunity from suit is precisely that: it is absolute and not defeasible by proof of malice".*

19. Without wishing to labour the point, I also note that Mr Justice Nicklin (as was) dealt with this issue in litigation between these parties, in *Ameyaw v McGoldrick and others [2021] EWHC 3597 (QB)*, at paragraphs 45 and 47, where he finds that the claimant cannot bring a claim in the High Court for harassment done by the respondent when writing to the Employment Tribunal during proceedings between the parties.

20. It is long established and well settled law that the claimant cannot sustain claims against the respondent for things which the respondent did in the course of litigation between the parties. There is an absolute immunity from the sort of claim that the claimant has sought to bring in these paragraphs of her particulars of claim. In my judgment, it is plain that these parts of her claim have no reasonable prospect of success. Consequently, they are struck out.

21. In circumstances where the claimant has been told by two High Court Judges about the immunity from suit and how it applied to her complaints, I also consider that the claimant should know that the complaints are unarguable and that it is unreasonable to have sustained them to date.

Arguments which have already been decided, or which ought to have been made in previous proceedings

22. Paragraph 5 of the particulars of claim outline that the claimant was dismissed following circulation of Employment Judge Hall-Smith's judgment from the preliminary hearing held on 31 January 2017. That judgment was said to be incorrect and based at least in part on false information given by the respondent. Paragraph 11 of the particulars of claim outline the claimant's correspondence with the respondent asserting that her dismissal was 'null and void' and so she was owed salary. Paragraph 20 seeks that the Employment Tribunal, in these proceedings, declare that earlier dismissal as 'null and void'.

23. The respondent relies upon two of the principles often grouped under the term '*res judicata'* – a term which Lord Sumption described as a *"portmanteau term"* in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46. The first is that there should be finality in litigation and that parties cannot seek to re-litigate matters already decided in proceedings. This principle is often cited in Employment Tribunal proceedings where matters are sought to be reconsidered, and in particular the words of Mr Justice Flint in *Flint v Eastern Electricity Board [1975] ICR 936*: *"it is very much in the interests of the general public that proceedings of this kind should be as final as possible…"*. He also cautioned against the loser being afforded a *"second bite of the cherry"*, which was not permitted. The second is what is known as the rule from *Henderson v Henderson [1843] 3 Hare 100, 115*, where Wigram VC said:

> *"…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 (unless under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been*

> *forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."*

24. Lord Sumption summarised the Henderson v Henderson rule in simple terms at paragraph 24 of Virgin Atlantic Airways, when he said the rule is *"directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before".*

25. Ms Darwin directed me to the judgments where the claimant's unfair dismissal complaint was determined in prior proceedings. This was first considered by a panel chaired by Employment Judge Grewell in January 2019. That judgment, dated 12 April 2019, found the complaint of unfair dismissal to have been not well founded and dismissed. In particular, at paragraph 136, EJ Grewell said:

> *"We concluded that the reason for the dismissal was the claimant's behaviour at the preliminary hearing on 31 January… That was conduct that was likely to bring the respondent into disrepute. That is a reason related to conduct and a potentially fair reason for dismissal."*

26. At the end of paragraph 137, EJ Grewell said:

> *"The procedure and the process followed was fair. The decision to dismiss fell within the range of reasonable responses available to a reasonable employer in the circumstances. We concluded that the dismissal was fair."*

27. These conclusions were drawn following findings of fact and the application of relevant law. Amongst those findings of fact were, at paragraph 65, that the claimant was involved with 'heated exchanges' and 'arguments' with the judge that included her 'shouting'. The claimant is bound by those factual findings and I cannot see a route to her being able to overcome those to the extent that the respondent can be found to have procured those findings by falsehood or fraud – the panel had seen EJ Hall-Smith's judgment recording what had happened in that hearing.

28. The unfair dismissal decision was appealed and that appeal was heard by Matthew Gillick KC sitting as a Judge of the High Court. He dismissed the appeal. That decision was in turn appealed to the Court of Appeal, including a complaint about the evidence presented at the ET, and that appeal was dismissed on the papers by Lord Justice Snowden.

29. In those circumstances, where the claimant's unfair dismissal claim has been determined already, and confirmed in full or part by two superior courts, I do not consider how the claimant could possibly re-open any part of the issues relating to that dismissal. The issue has been decided. To the extent that anything that the claimant is now claiming is 'new' and not put before previous courts or tribunals, then I simply must conclude that the arguments should have been put previously. The claimant has known about her claim and the reasons why she considers she was unfairly dismissed. The claimant has not presented any new evidence or argument in these proceedings which might give any cause for a Judge to reconsider the decided points – and this ignores the problems faced as a result of the length of time which has passed since those judgments were issued.

30. Consequently, the claims advanced by these paragraphs of the particulars of claim also have no reasonable prospect of success and are struck out. I consider that they are an abuse of process.

Claims beyond jurisdiction of the Tribunal

31. The claimant mentions complaints relating to fraud, human rights, reputational damage, and damage to employability. These are not claims that the Tribunal has any jurisdiction to hear and so, to the extent that they are advanced as causes for action rather than passive complaints, they are dismissed because there is no basis upon which to bring them in this forum.

Any other claims out of time

32. In my view, the above paragraphs deal with all of the claims advanced by the claimant. Certainly, no claim relating to prior proceedings survive to be considered at this point. The only other matters which could be complained of date to the time of or even before the claimant's dismissal in October 2017. It was over 4 years until she brought this claim. Any complaint she may have in the circumstances should have been brought within the primary time limit of 3 months. Time could only be extended if, depending on the claim, the claimant can show that (1) it was not reasonably practicable for her to have brought her claim within three months but that it was reasonable for her to have brought the claim when she did, or (2) that it is just and equitable to extend time in the circumstances.

33. I do not consider that the claimant could ever benefit from an extension under (1) above. She did bring claims relating to her dismissal within that primary time period and so it must have been reasonably practicable for her to have brought any additional complaints, too.

34. It is more difficult to determine (2), but in all the circumstances of the case, given that there is so much overlap between the limbs which are now struck out due to immunity from suit/res judicata/*Henderson*, I consider it extremely unlikely that a Judge would extend time to bring any claim which does survive to be considered at this stage. Consequently, even if anything had survived my earlier determination, I consider that it would have no reasonable prospect of success as a stand-alone claim brought out of time, and so it would in any event be struck out.

Conclusions

35. None of the claimant's claim survives this judgment. I hope that this is an end to proceedings between the parties, because it appears to me that the claimant has exhausted all reasonable and sensible avenues in an effort to prove her claims. That effort has now been met with negative determinations by several judges, and it might be that the claimant is best served from accepting those determinations.

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Employment Judge Fredericks
Date: 3 April 2023