EMPLOYMENT TRIBUNALS

Claimant: Ms Moriarty

Respondent: Wirral University Teaching Hospital NHS Foundation Trust

Heard at: Midlands West **On:** 30 August 2023

Before: Employment Judge Harding

Representation
Claimant: Mr Nickless, Claimant's husband
Respondent: Mr Singh, Solicitor

JUDGMENT having been sent to the parties on 6 September 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS ON A PRELIMINARY HEARING

Summary

1 This case had been listed for a one day public preliminary hearing to determine an application by the respondent to strike out parts of the claimant's claim on the basis of issue estoppel or on an application of the rule set out in **Henderson v Henderson**.

Background

Note: all page references in these reasons are to the PDF counter page reference of the bundle which does not correspond with the typed page number at the bottom right-hand corner of each page.

2 On 8 December 2020 the claimant submitted her first claim to Manchester

Employment Tribunal. The respondents to this claim were Wirral University Teaching Hospital NHS Foundation Trust and Arrowe Park Hospital, albeit it would appear that the Trust was the correct respondent and Arrowe Park Hospital was the claimant's place of work.

3 The claimant had drafted the claim form herself. At section 8.1 of the claim form, page 8, the claimant had ticked boxes to say that she was making claims of age and disability discrimination. She also ticked the box to say she was making another type of claim which the Employment Tribunal could deal with, which she described as having been injured by means of electrocution. The claimant did not tick the box to say that she was making a claim for unfair dismissal.

4 At section 15 of the claim form the claimant listed a number of what she described as failures on the respondent's part which she stated she would like the respondent to acknowledge. By way of example these included; breach of contract (wages stopped), discrimination and victimisation due to age (forcing me to retire), no reasonable adjustments for my disability (no risk assessment in the majority of my subsequent job roles and pretend job role), failure to follow own grievance process, refusal to correct incorrect data in breach of the GDPR, misuse of power by senior management, duty of candour broken on multiple occasions and bullying and harassment within the workplace. There then followed a list of legislation which the claimant asserted the respondent was in breach of which included the Equality Act, what the claimant described as the Employment Act 1996, the Health and Safety at Work Act, the GDPR, and the Fraud Act of 2006.

5 Also attached to the claim form was what was effectively a witness statement, which was 3 pages long. This referred in detail to the claimant having being electrocuted at work in October 2016, the claimant's description of the respondent's response to that incident and the injuries that the claimant said she had suffered as a result of it.

6 Pausing there, amongst all of the narrative and identification of complaints that an Employment Tribunal had no power to deal with, for example breaches of the GDPR and the Fraud Act, there were, as set out above, a number of types of claim referred to by the claimant which a tribunal did have power to deal; what the claimant termed breach of contract in relation to unpaid wages (in other words an unlawful deduction from wages claim under the ERA), discrimination because of age, disability discrimination in the form of a failure to make reasonable adjustments and, on generous reading of the claim form, victimisation.

7 Case management of this claim was clearly required to properly identify the claims and complaints. A case management hearing was listed, I understand, for April 2021. However, before this hearing took place the claimant wrote to the tribunal withdrawing her claim, which was acknowledged by the tribunal by a letter dated 21 April 2021, page 30. In June 2021 a judgment was issued in the following terms;

"The proceedings are dismissed following a withdrawal of the claim by the claimant", page 33.

The second Tribunal clam

8 On 4 June 2022 the claimant submitted a second tribunal claim, this time to Midlands West Employment Tribunal. Once again the respondent was Wirral University Teaching Hospital. In this claim form the claimant made clear that her employment with the respondent had ended on 29 January 2022, page 38.

9 At section 8 of the claim form, page 40, the claimant had ticked boxes to indicate that she was pursuing claims of unfair dismissal, arrears of pay and other payments. She did not tick any of the boxes to say that she was making a claim of discrimination. In section 9 of the claim form, which asks what remedy the claimant wanted if successful, she stated that she was seeking loss of earnings and compensation for 6 years of prolonged abusive behaviour. Attached to the claim form was a witness statement which ran to 14 pages. At the start of the statement the claimant said that she was writing to clarify her reasons for resubmitting her tribunal claim. She went on to say that the first time she had entered the process she was slightly naïve and was not well informed about the nature and methods used by the respondent's solicitors. She wrote that the respondent's solicitors having raised objections to her claim she had not been well advised to withdraw it.

10 She then went on to say that she was submitting a new tribunal claim based upon her forced resignation on 29 January 2022, page 47. She stated that she was claiming for constructive dismissal and that the start of the unsafe behaviour dated back to October 2016, pages 46-47. She also stated that she was proceeding under section 44 of the Health and Safety at Work Act.

11 There then followed a lengthy narrative section of the statement. This again started with a description of the claimant's electrocution at work in October 2016 after which there was a description of various incidents, as the claimant saw them, in the years after that event. Towards the end of the document the claimant stated that she felt she had exhausted all avenues to try and make her place of work safe, she asserted that the respondent had shown no interest in addressing unsafe practices and she stated that she had been forced to hand in her resignation on 29 January 2022, page 59.

12 The respondent, in its grounds of resistance, set out that the claimant's particulars of claim were confused and confusing. Whilst noting that the claimant had stated she was claiming for constructive dismissal and arrears of pay and other payments it was said that it was not possible to discern the basis on which those claims were being bought.

13 There was then a case management preliminary hearing before Employment Judge Platt on 3 January 2023. There was discussion about the claims and complaints that the claimant was pursuing at this hearing. The claimant confirmed to the Judge that she was pursuing one claim only; of constructive

unfair dismissal under section 95 (1)(c) of the ERA. It was identified that the claimant's case was put on the basis of there having been a breach of the implied term of trust and confidence. The Judge then identified with the claimant a list of 13 asserted incidents which on the claimant's case had breach the implied term, pages 83 – 84. It is this list that was the focus of this preliminary hearing.

14 The respondent's application to strike out had initially been made on the basis that the claimant was issue estopped from pursuing complaints about ten of these thirteen matters. We spent some time at the start of this hearing going through each of these ten matters and comparing them with what was written in the first claim. Adopting the numbering set out in the case management order, before me Mr Singh, for the respondent, accepted that the complaints at 1.1.1.2, 1.1.1.7, 1.1.1.8 and 1.1.1.10 were not in the first claim and that the claimant was not issue estopped from pursuing these matters. In adopting this approach Mr Singh took a somewhat different approach to that which the respondent had previously set out in writing therefore.

15 The respondent's refined position was that that the incidents set out at 1.1.1.2, 1.1.1.7, 1.1.1.8 and 1.1.1.10, whilst not contained in the claimant's first claim form, could have formed part of the subject matter of that claim, and accordingly, by virtue of **Henderson v Henderson**, these claims should also be struck out.

16 It was also the respondent's position that the matters at 1.1.1.1, 1.1.1.3, 1.1.1.4, 1.1.1.5, 1.1.1.6 and 1.1.1.9 were estopped by virtue of issue estoppel, and, it was submitted, on this basis should be struck out.

17 I tried to gain an understanding from the claimant, in respect of those matters which were contained within the first claim form, about which head of claim she believed each complaint had belonged to within that first claim. This proved to be an exercise which the claimant found to be very difficult. I was told repeatedly by the claimant's husband that they did not know which matters fell under which type of head of claim and he said several times that they had hoped the Judge would assist them with this when they submitted their claim. At various points the claimant mentioned breaches of policy, breaches of duty of care, a failure to provide a safe place to work, and that the incidents "formed part of the whole story". But what seemed tolerably clear, based on what the claimant said, is that those factual complaints set out at 1.1.1.1, 1.1.1.3, 1.1.1.4, 1.1.1.5, 1.1.1.6 and 1.1.1.9 of the case management order were all matters which the claimant considered fell to be determined as part of the first claim, under whatever head of claim they might fall.

18 Mr Singh applied for a postponement of the hearing at this point on the basis that he now wished to make submissions, in part, on the basis of the application of **Henderson v Henderson**, not issue estoppel, and he wanted further time to consider this before making those submissions. I refused this application for the following reasons. This hearing had specifically been listed to deal with the respondent's application to strike out elements of the claimant's claim. It had been a straightforward exercise for everyone concerned to compare the list of matters drawn up for the constructive unfair

dismissal claim with what was contained in the first claim form to identify matters that had, and had not, been previously mentioned, and it would have been a straightforward matter, therefore, for the respondent to apply its mind to that in advance of this hearing. The respondent had, moreover, been represented throughout this process. Finally, I considered that there was a risk to the current listing for the full hearing if this application was not dealt with today.

Submissions

19 Mr Singh submitted that the matters set out at paragraphs 1.1.1.2, 1.1.1.7, 1.1.1.8 and 1.1.1.10 should be struck out by way of an application of the rule in **Henderson v Henderson**. He reminded me of the words of Wigram VC in that case:

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 a 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.

20 He quoted from paragraph 22 of the judgment in **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46**

Para 22;

Arnold 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.

21 He submitted that those claims which were not contained within the first claim form could have been included in it and it would have been reasonable for the claimant to have had them in her contemplation as giving rise to matters which she was seeking to pursue. He submitted that the claimant's withdrawal of her first claim was without qualification and caveat and he pointed out that the claimant had the benefit of legal advice at the time. He submitted that if she now sought to criticise her legal advisers then her recourse was against them.

22 He submitted that in **Johnson v Gore Wood 2002 AC 1** Lord Bingham had said that **Henderson v Henderson** abuse of process has much in common with

issue estoppel and cause of action estoppel. A party should not be vexed twice in the same matter.

23 He acknowledged that it would be the wrong approach to hold that because the matters could have been raised in the first claim form they should have been and he acknowledged that more than this was required. He stated that whether permitting the claimant to bring these matters forward now amounted to abuse of process was for me to decide in all the circumstances weighing up the private and public interests. He stated that the public interest outweighed the claimant's private interests. He referred me to the case of **MOJ v Burton 2016 EWCA Civ 714** in which, paragraph 21, it was said that the discretion to act in the interests of justice is not open-ended and should be exercised in a principled way. In particular the courts have emphasised the importance of finality. He submitted that the complaints set out at paragraphs 1.1.1.2, 1.1.1.7, 1.1.1.8 and 1.1.1.10 should have been in the first claim form and should be barred.

24 He submitted that it was accepted by the claimant that the matters set out at paragraphs 1.1.1.1, 1.1.1.3, 1.1.1.4, 1.1.1.5, 1.1.1.6 and 1.1.1.9 were contained within the first claim form. They, he submitted, had already been the subject of litigation and it was not open to the claimant to have a second bite of the cherry. He submitted that it was made clear in **Barber v Staffordshire County Council 1996 ICR 379** that a judgment dismissing claims on withdrawal can still give rise to an estoppel. It was, he said, an abuse to seek to overturn a withdrawal.

25 The claimant submitted that it would be in the public interest to allow these matters to proceed because they were all about safety measures. The respondent, it was suggested, had been manipulating and deceiving people and it was in the public interest to expose a dangerous place of work. It was submitted that the claimant had a vacuum in her understanding of the tribunal process. It was said that if all ten matters were struck out the claimant's constructive unfair dismissal claim would comprise only the last three events about which complaint was made, and this would be what was described as a "non-trial". It was said that there was a lot at stake and that the respondent was just protecting itself.

The Law

26 "Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins": paragraph 17 **Virgin Atlantic Airways v Zodiak Seats UK Limted [2014] AC 160**, per Lord Sumption. It covers cause of action estoppel, issue estoppel and the rule in **Henderson v Henderson**.

27 The bar to re-litigating a claim is known as "cause of action estoppel" and the bar to re-litigation of an issue as "issue estoppel". In addition to those bars is a closely related principle of public policy known as the rule in **Henderson v Henderson**, which is that a party will not be permitted to raise a claim in later proceedings which properly belonged to the subject matter of earlier proceedings.

28 Certainty, finality and avoiding multiplicity of actions on the same subject matter are essential to the determination of issues by a court or tribunal. The principle has been said by Mummery LJ in **Sajid v Sussex Muslim Society [2002]**

IRLR 113 to be a principle of justice and not mere public policy: "in the absence of special circumstances, it is unjust for a party who spent time and money in obtaining a final determination of a claim or an issue in a claim to be faced with fresh proceedings from the other party seeking to re-litigate the same cause of action or the same issue."

29 Issue estoppel arises where the causes of action in two sets of proceedings between the same parties are *not* the same. It is explained in the leading textbook on res judicata, Spencer Bower and Handley, Res Judicata, 4th Ed 2009, paragraph 8.01 as follows:

"a decision will create an issue estoppel if it determined an issue in a cause of action as an essential step in its reasoning". Moreover the determination in question may be one of law, fact or mixed fact and law, Spencer Bower and Handley paragraph 8.04.

30 Perhaps the most famous definition of issue estoppel was provided in the case of **Thoday v Thoday [1964] P 181 (CA**). Diplock LJ said: "There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the two parties as there are conditions to be fulfilled by the [claimant] in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first determined that it was."

See also **Arnold and Ors v National Westminster Bank Plc [1991] 2 AC 93**. In this case it was said that issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue.

31 However, as was explained in **Thoday**, the determination by a court of competent jurisdiction of the existence or nonexistence of a fact, the existence of which is not of itself a condition the fulfilment of which is necessary to the cause of action which is being litigated before the court, does not estop, at any rate per rem judicatum, either party in subsequent litigation from asserting the existence or nonexistence of the same fact contrary to the determination of the first court. It may not always be easy to draw the line between facts which give rise to issue estoppel and those which do not, but the distinction is important.

32 Issue estoppel can arise without there having been an adjudication or trial on the merits: see **Lennon v Birmingham City Council [2001] EWCA Civ 435**.

33 A claimant may also be barred from raising a different type of claim from that which has been decided, if the subject-matter of the new claim is related to

the original proceedings, and is one which could, with reasonable diligence, have been put forward at the original hearing, **Henderson v Henderson** ***(1843) 3 Hare 100***. Although originally treated as part of the doctrine of res judicata, this form of estoppel, commonly known as 'the rule in **Henderson v Henderson**, has become recognised as separate and distinct from both cause of action estoppel and issue estoppel (see **Johnson v Gore Wood & Co** **2002 2 AC 1 at 31** per Lord Bingham of Cornhill, HL;

What is now taken to be the rule in *Henderson v Henderson*, has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But *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 an 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 it 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 early 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

34 In considering **Henderson v Henderson** a tribunal should adopt a broad merits based judgement rather than starting from the premise that if the claims could have been advanced at an earlier time then it would be an abuse of process to allow them to be pursued unless special circumstances can be established, **Johnson v Gore Wood** and **Parker v Northumbrian Water** **UKEAT/0221/10**. That would be to adopt too narrow an approach. Whilst the determination that a claim *could* have been put forward in earlier proceedings may be the beginning of a consideration of abuse of process, it is not the end of it. There needs to be consideration as to why it *should* have been raised at the earlier stage, **Parker**, which will almost inevitably include a consideration of why the second claim was not raised at the time of the first claim. The crucial question is whether in all the circumstances, the party is misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before, **Johnson v Gore Wood.**

35 It requires to be remembered that it is one thing to refuse to allow a party to re-litigate a question which has already been decided; it is quite another to deny her the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter, although not the former, is prima facie a denial of a person’s right of access to the court conferred by the common law and

guaranteed by Article 6 of the Convention for the Protection of Human Rights, **Johnson v Gore Wood**.

36 Factors that might be relevant include whether the claimant is a litigant in person, **Foster v Bon Groundwork 2012 EWCA Civ 252**, obiter, and the extent to which the claims overlap factually or legally or are different, **Sheriff v Klyne Tugs (Lowestoft) Ltd 1999 IRLR 481**. It might also be relevant to weigh into the balance whether or not there was a determination of the first claim on the merits, **Thomas v Devon County Council UKEAT/0513/07**.

Conclusions

Issue estoppel

37 Any consideration of issue estoppel would, ordinarily at least, start with identification of the causes of action and the elements of the claim that can be considered to be the groundwork for that cause of action. In respect of the types of legal claim pursued by the claimant under the first claim all that can be said with certainty is that she was pursuing claims of discrimination because of age, a failure to make reasonable adjustments, unlawful deduction from wages and, on a generous reading of the claim form, victimisation. Precisely which of the factual matters, now set out in the case management order at 1.1.1.1, 1.1.1.3, 1.1.1.4, 1.1.1.5, 1.1.1.6 and 1.1.1.9 as part of the constructive dismissal claim, would have come under which head of claim and in what way in the first claim was never clarified and attempting to gain clarity about that today proved a difficult exercise. As set out above, however, what can be said with certainty is that those factual complaints set out at 1.1.1.1, 1.1.1.3, 1.1.1.4, 1.1.1.5, 1.1.1.6 and 1.1.1.9 were all matters which the claimant was seeking a determination on as part of the first claim, under whatever head of claim they might fall.

38 By way of example, complaint 1.1.1.1 under the constructive unfair dismissal claim is that the respondent failed to treat appropriately the claimant's accident at work in October 2016, when she was electrocuted. It was accepted that there was also a complaint contained in the first claim form that, as a matter of fact, the respondent failed to treat the claimant's accident at work in October 2016 appropriately. For the claimant this was the factual basis of a legal claim, as she confirmed before me, albeit she did not know what type of claim that would be.

39 The same can be said for the other factual complaints. For example, complaint 1.1.1.3 of the constructive dismissal claim was a complaint that, as a matter of fact, the respondent had delayed payment of temporary injury allowance to the claimant in breach of its own policies. That exact same factual complaint appeared in the first claim form. Once again, for the claimant this was the factual basis of a legal claim, as she confirmed before me, albeit she could not clarify what type of claim that would be.

40 What is clear in respect of issue estoppel, as set out above, is that if the same factual issue necessarily arises for determination in both sets of proceedings (for example, whether as a matter of fact some interaction did or not take place, or

whether as a matter of fact a particular incident happened in a particular way), issue estoppel will apply.

41 The constructive unfair dismissal claim in the second claim relies, in part, on exactly the same factual allegations as the first claim. Essentially, howsoever the cause of action was described in the first claim (discrimination or victimsation), the factual determination of each matter was required in order to decide the claims which the claimant was pursuing, and that is the case in respect of each of the matters set out at .1.1.1, 1.1.1.3, 1.1.1.4, 1.1.1.5, 1.1.1.6 and 1.1.1.9. Accordingly, I concluded that the same (factual) issue necessarily arises in both sets of proceedings, and the claimant was estopped (issue estoppel) from pursuing these matters, and they are struck out.

Henderson v Henderson

42 As set out above, it was submitted by the respondent that the rule in **Henderson and Henderson** applied to the matters set out at paragraphs 1.1.1.2, 1.1.1.7, 1.1.1.8 and 1.1.1.10 of the case management order. It was submitted that these matters, which were not contained within the first claim form, could have been included in it and it would have been reasonable for the claimant to have had them in her contemplation as giving rise to matters which she was seeking to pursue. However, whilst acknowledging at a later point in submissions that it was insufficient for the rule in **Henderson and Henderson** to apply that a matter *could have* been raised in earlier proceedings, at no stage did Mr Singh identify in his submissions what other factor, in addition to this, could be said to render the raising of these matters in the second claim necessarily abusive. He simply submitted that I would need to examine all the circumstances and that the public interest in finality of litigation should outweigh the claimant's private interests.

43 The factual matters set out at paragraphs 1.1.1.2, 1.1.1.7, 1.1.1.8 and 1.1.1.10 are;

- 1.1.1.2; Ms Adriana Roscoe made a number of abusive phone calls to the claimant between October 2016 and November 2017.
- 1.1.1.7; The respondent recommended during 2019 that the claimant be offered job roles that she would have to refuse as a result of her injuries,
- 1.1.1.8; In June 2020 the claimant's safeguarding line manager (Helen Marx) told the claimant to drop her complaint, and
- 1.1.1.10; In 2020 the respondent's CEO failed to deal with various matters appropriately causing the claimant to go onto sick leave in July 2020. These matters were: there was a failure to address obvious lies, the respondent failed to address gross misconduct by others, there was no indication given of how the respondent was making the workplace safe, the respondent was not providing a safe place of work and the respondent failed to provide the claimant with a permanent job role.

44 The first claim was submitted to the tribunal on 18 June 2020 meaning that this claim form post-dated these matters (apart from possibly 1.1.1.8 and some elements of the complaint at 1.1.1.10) and in that sense all could, therefore, have made their way into the first claim.

45 But, of course, as set out above the essential question to be asked is not whether they could have been in the first claim form but whether they should have been raised then.

46 I considered a factor in favour of striking out was that the factual matters set out at paragraphs 1.1.1.2, 1.1.1.7, 1.1.1.8 and 1.1.1.10 are related to the original proceedings. By this I mean that what the claimant described in the first claim form, over the course of much narrative, were matters which the claimant asserted formed part of a continuum of behaviour on the part of the respondent following on from her accident at work in 2016, and the factual matters at paragraphs 1.1.1.2, 1.1.1.7, 1.1.1.8 and 1.1.1.10 are also part of this continuum. As the claimant herself put it they comprise incidents forming part of the whole story. Additionally, they were incidents of which the claimant was aware when she submitted her first claim (apart from possibly 1.1.1.8 and some elements of the complaint at 1.1.1.10). These, I considered, were points in favour of a conclusion that it was an abuse to allow these matters to proceed now. Likewise, it is relevant that there is significant public interest in finality of litigation and, particularly in these financially constrained times, significant public interest in ensuring that litigation is conducted efficiently and without placing undue pressure on public funds.

47 But, as set out above, I am required to carry out a broad merits based assessment. My task is to draw the balance between the competing claims of the claimant to put her case before the tribunal and of the respondent not to be unjustly hounded, **Johnson v Gore Wood**. The onus is on the party alleging abuse to demonstrate that to permit the litigation to proceed would amount to an abuse. As set out above the respondent did not identify any factor on which it relied, other than that these complaints could have been included in the first claim form.

48 It is relevant to my assessment, I concluded, that the claimant is a litigant in person. Moreover, I make the observation (which is not intended as a criticism) that the claimant clearly has no idea how she should go about pleading/drafting a tribunal claim, nor indeed what types of claim a tribunal has power to make a determination on. A narrative of events is not a legal pleading. Had the first claim continued a judge would have spent time with the claimant at a case management preliminary hearing painstakingly helping the claimant confirm the types of claim she was pursuing and then extracting from the narrative those specific matters which were actually legal claims. In the absence of this exercise having been carried out making a decision as to what could *and should* have been contained within the first claim form was not, in my view, completely straightforward.

49 However, it seemed to me that the lack of clarity that existed in relation to the first claim is something that makes it harder for the respondent to demonstrate that pursuing these factual allegations in the second claim amounts to unjust harassment of it. How can it be said that something *should* have been raised in the first claim when there is no real clarity as to what that first claim form comprised?

50 Additionally, whilst the details of the claims in the first claim were not clear, what was clear from the first claim, it seemed to me, were the types of legal claim that the claimant was seeking to pursue; age discrimination, a failure to make reasonable adjustments, victimisation (on a generous reading) and an unlawful

deduction from wages. None of these types of claim are pursued in the second claim; the only claim is for constructive unfair dismissal. Significantly, in my view, it follows from this that what the claimant was seeking to do in her second claim form was a different exercise to the one she carried out in her first claim; she is now identifying those matters that caused her to resign, and which thus form the basis of her constructive unfair dismissal claim. There was, of course, no claim for unfair dismissal, constructive or otherwise, in the first claim form. Nor could there have been a constructive unfair dismissal claim because the claimant at that had point had not resigned. In the first claim form, therefore, the claimant appeared to be attempting to identify acts or omissions on the part of the respondent which were said to be discriminatory or an act of victimisation; in the second the things that she says caused her to resign (which may or may not also have been discriminatory acts/victimisation).

47 Consequently, it cannot readily be said, in my view, that the factual complaints set out at paragraphs 1.1.1.2, 1.1.1.7, 1.1.1.8 and 1.1.1.10 are matters that *should* have been raised in the first claim form. If something was not asserted to be an act of discrimination/victimisation then it is very difficult to see why it *should* have been raised in the first claim form even if the factual complaint did, in reality, form part of what is asserted to be "the whole story" as to how the respondent conducted itself following on from the claimant's accident at work. Indeed, given that there is no suggestion from the claimant that the complaints set out at paragraphs 1.1.1.2, 1.1.1.7, 1.1.1.8 and 1.1.1.10 are also acts of discrimination/victimisation, and given that the only thing we know with certainty about the first claim is that it was a claim for discrimination/victimisation then it would appear that these matters *should not* have been raised in the first claim form. If, as appears to be the case, these are said to be non-discriminatory acts which caused the claimant to resign their proper place is the second claim.

48 Additionally, as the claimant herself pointed out if these matters were to be struck out her constructive unfair dismissal claim would go forward based on a very small number of complaints indeed. All that the claimant would be left with was that the respondent breached the implied term of trust and confidence because;
1.1.1.11 In September 2021 HR mistakenly said the claimant had not been attending meetings,
1.1.1.12 on 4 January 2022 incorrectly wrote to the claimant that she had failed to attend an occupational health appointment, and
1.1.1.13 failed to respond to a letter that the claimant wrote on 7 January 2022 in a reasonable timeframe.

49 In such circumstances denying the claimant the opportunity to litigate for the first time issues which have not previously been adjudicated upon takes on some significance.

50 For these reasons I concluded that the respondent had not shown that, in all the circumstances, to permit the claimant to pursue these matters would be to permit the claimant to abuse the process of the tribunal and/or unjustly harass the respondent, and this element of the respondent's application therefore failed.

Employment Judge Harding
Case No: 2404619.22
Date: 31 October 2023

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE