EMPLOYMENT TRIBUNALS

Claimant: **Mr J. Sidhu**

Respondent: **Our Place Schools Ltd**

Heard at: **Birmingham**
By video (Cloud Video Platform) **On: 25 & 26 October 2022**

Before: **Employment Judge V. Jones**
Members:

Representation

Claimant: **In person**
Respondent: **Mr I. Wheaton, Counsel**

REASONS

Background

1. By his ET1 dated 26 February 2020, after a period of ACAS early conciliation, the claimant brought a claim of unfair dismissal and complaints of discrimination because of race and religious belief. This was an Open Preliminary Hearing to determine the respondent's application to strike out the claimant's claims in their entirety or, in the alternative, for a deposit order to be made against the claimant as a condition of his claims proceeding. These reasons are provided at the request of the respondent.

2. The claimant appeared in person. The respondent was represented by Mr Wheaton of counsel. The respondent had prepared an agreed bundle of documents for the hearing and references, in these reasons, to page numbers are to pages in that bundle.

3. The claimant has previously brought complaints to the employment tribunal of race discrimination and religious belief discrimination under case number 1303155/2018. Those complaints were heard by an employment tribunal at a seven day hearing in January 2020. In a unanimous decision, delivered by a reserved Judgment dated 4 May 2020, the tribunal panel dismissed all the claimant's claims.

4. The claimant has appealed to the Employment Appeal Tribunal against that decision. His appeal was considered at a preliminary hearing before Judge Keith on 9 March 2021. The appeal was allowed to proceed on two grounds:

   4.1 in its analysis of the claimant's allegation that he found the "sawing hand gesture" of Mr Beedle and his actions in raising, in graphic detail, the issue of the sectarian murder of those of Sikh faith highly distressing, the employment tribunal had arguably failed to correctly apply section 26 of the Equality Act 2010 and

arguably discounted the claimant's evidence as to the conduct being unwanted as mere assertion;

4.2 in respect of the claimant's allegation relating to Ms Green's reference to "coloured people" the employment tribunal had arguably erred in referring to there being no evidence from which it could conclude the claimant felt his dignity to have been violated, which ignored the claimant's description of racist remarks in his claim form and, arguably impermissibly, included irrelevant factors such as the fact that it was a "one off" incident and that the claimant had delayed in making a complaint (page 68).

5. At the date of this hearing no date had been fixed for a substantive hearing by the EAT.

Application to strike out the claim or, in the alternative, for a deposit order to be made under Rule 39 Employment Tribunal Rules of Procedure.

6. The claimant has set out seven numbered complaints in para 8.2 of his ET1 dated 26 February 2020. At the outset, I went through each of these complaints with the claimant to clarify and identify the issues raised. I have considered each of the complaints individually, below. After summarising each complaint, I have set out the respondent's arguments for why it should be struck out or, alternatively, a deposit order made, followed by the claimant's response to the application.

<u>Complaint 1</u>

7. The first paragraph in Box 8.2 of the ET1 contains two claims. I have numbered these 1a and 1b.

<u>Complaint 1a - Unfair dismissal</u>

8. At the time he brought his first ET1 (19 June 2018) the claimant was still employed by the respondent. He was dismissed on 25 November 2019 after he had been off sick for an extended period. He appealed against that decision under the respondent's internal procedure. At that time he was still waiting for his first ET1 claim to be heard. That was subsequently heard between 20 and 29 January 2020. In the meantime the claimant commenced early conciliation with ACAS in respect of his dismissal on 24 December 2019 and ACAS issued an early conciliation certificate on 31 December 2019.

9. The claimant accepts he has not, in his ET1, provided any particulars of why he considered his dismissal to be unfair. He particularised his claim at this hearing as follows:

a) he was dismissed 6-7 weeks before his first claim was due to be heard by the employment tribunal and considers the dismissal was a "tactical manoeuvre" on the part of the respondent designed to distract him from preparing his case. His internal appeal against his dismissal had to be lodged before the end of December 2019 which was the very time he should have been focusing on preparing his tribunal case;

b) the respondent should have made an accommodation for the claimant as an alternative to dismissing him. The claimant had made it clear that he could not return to his original post due to the "toxic environment" of race discrimination, religious discrimination and harassment which had caused him to go off sick. He asked the respondent to offer him alternative employment at a satellite campus

away from Worcestershire which encompassed a more diverse workforce, for example in Birmingham or Wolverhampton. He said this was a realistic possibility at the time because the respondent was actively engaged in internal discussions about setting up a satellite campus elsewhere.

10. For the respondent Mr Wheaton submitted this complaint was simply an extension of the race and religious belief discrimination claims which were determined in the claimant's first claim. The claimant alleges he was discriminated against and should have been removed from a "toxic" or "hostile" environment, but his claim of discrimination has been dismissed. Mr Wheaton submitted that the claimant's argument that the respondent should have created a new post for him at a new campus is unrealistic. No alternative campus has been set up in either Birmingham or Wolverhampton. Mr McGuinness (Managing Director) who attended the Hearing told me that a new centre (Lakeside) has been established at the same (Worcestershire) site where the claimant worked, but the centre did not become registered or fully operational until April 2020, by which time the claimant had left. Before this (in the latter part of 2019) the centre was partly operating but had only one to two children. There are now nine children. Mr McGuinness did not have details of the staffing of the centre, but said this was built up gradually, with staff from the main site covering the work during 2019. Mr Wheaton submitted this arrangement would not have met the claimant's demands as it was on the same site and there was not a guaranteed diverse workforce.

11. The claimant said at this hearing that he would have considered alternative employment at Lakeside but none was offered to him. He maintains his unfair dismissal claim has reasonable prospects of success and should proceed.

Complaint 1b - Victimisation

12. On 3 October 2017 the claimant raised a safeguarding allegation in relation to a 9-year old black/minority ethnic (BAME) child with special educational needs. On 5 October 2017 he says he was victimised when fellow employees made a malicious allegation that he had ill-treated the boy. After referring the claimant to the definition in section 27 of the Equality Act 2010 I asked him to clarify the protected act he relied on for the purposes of this claim. The claimant said the protected act was his allegation that the boy was being neglected or treated differently because of his race.

13. Mr Wheaton submitted that this claim was a duplication of the claimant's earlier claim about exactly the same matter. The first tribunal dealt with that claim and dismissed it. When the claimant made his original allegation in relation to the boy he had made no reference to the boy's race. Mr Wheaton submitted the claimant has now "added race on" in order to found a victimisation claim. Referring me to Henderson v Henderson (1843) 3 Hare 100 Mr Wheaton submitted that any potential claim the claimant had, which existed at the time of his original ET1, should have been included within that claim. The relevant facts were all known to the claimant at the time. Res judicata therefore applies.

14. The claimant conceded at this hearing that he had not made allegations of race discrimination in relation to the boy at the time he was suspended, or when the safeguarding allegation was made against him.

Complaint 2 - suspension

15. The respondent suspended the claimant after allegations were made against him by his colleagues. The claimant says suspension is not a neutral act, and it was done

because of his race/religious belief. Since his first claim was heard the claimant has read the respondent's safeguarding policies online and learnt that suspension should not be an automatic response when safeguarding issues are raised. Instead of being suspended he says he should have been found an alternative job role while the safeguarding investigations were taking place.

16. Mr Wheaton submitted that the issue of the claimant's suspension was raised by the claimant in his first ET1 and cannot be litigated again simply because the claimant has now found new evidence to "backfill" the gaps in evidence he produced at the time.

17. The claimant said he had only recently found the documents about safeguarding in an internet search and he was disadvantaged in the earlier proceedings because he was not represented.

Complaint 3 – failure to take action against the claimant's colleagues

18. The claimant's third claim is that witnesses who were involved in the safeguarding allegation are still at the school and no disciplinary action has been taken against them. These people harassed and victimised him throughout the safeguarding investigation and afterwards.

19. The claimant withdrew this part of his complaint at this hearing and by consent, it was dismissed.

Complaint 4 – toxic environment

20. The claimant's fourth complaint is that the respondent operated a toxic and hostile discriminatory environment which has caused the claimant much stress/anxiety, leading to long term medical issues. The claimant says that if Mr French had accommodated his needs, he would have moved the claimant to work elsewhere.

21. Mr Wheaton submitted this issue has already been litigated and referred me to paragraph 15.41 of the ET decision of 4 May 2020 where the tribunal quotes from an email sent by the claimant to Lena Graham referring to the school's "toxic environment". Mr Wheaton says the Tribunal has dealt with this matter and it cannot be re-litigated.

22. The claimant says the claim about the "toxic environment" has been the central theme of his whole case. He accepts this issue was part of his previous claim but says he has put it in again because the whole chain of events he complains of was toxic.

Complaints 5 and 7 – second police investigation and Ofsted

23. These two complaints are linked. The claimant wishes to make claims against Chris Coombs (Headteacher) and James Borland (Local Authority Designated Officer (LADO) at Worcestershire) in relation to the second referral to the police. He says these are new matters he has not raised before. He says he learned in the course of the respondent's evidence at the hearing of his first claim that no other employee has been the subject of two police investigations. He has also discovered, through reading the School's Ofsted reports, that the school was criticised for not having adequate safeguarding procedures. He submits that together these two matters show he has been singled out for different treatment.

24. Mr Wheaton submits that the claimant is not correct in stating this is a new matter. The second police investigation is referred to at paragraphs 15.29 and 15.30 of the Tribunal's decision on the first complaint. As far as the contents of the Ofsted report are concerned, these were or should have been known to Mr Sidhu at the date of the earlier claim. The information was in the public domain and was available to the claimant at the time.

25. The claimant submits that in his first ET1 he only made complaints against Georgina Martin. His complaints against Chris Coombs and James Borland in relation to the second police referral are therefore new matters. He said it only came to light during the tribunal hearing of his first claim that he was unique in having been through two police investigations. He went back through his documents after that hearing and "joined the dots". He says he was not on an even footing with the respondent due to not being represented and was learning as he went.

Complaint 6 – Lena Graham's evidence to the tribunal

26. The claimant raises two complaints about Lena Graham. First, in her evidence to the first tribunal she says she had only learnt two days previously that the word "coloured" was offensive. The claimant says this was not correct because he had brought it to her attention during the appeal process.

27. Second, when Ms Graham was asked by the Tribunal whether she would change her decision in the light of this information, she said she would not. The claimant says this was a further act of harassment by Ms Graham.

28. Mr Wheaton says the claimant could and should have raised the matter of bringing to Ms. Graham's attention that the word "coloured" was offensive at the first hearing. The matter has now been litigated. As for her refusal to reconsider her decision, Mr Wheaton submits this matter is covered by litigation privilege and the claimant cannot pursue a claim in relation to it.

Other claims

29. The claimant has ticked the box at section 8.1 of his ET1 indicating he has other claims against the respondent. At this hearing he clarified that his claims are those listed above; there are no additional claims. He said he ticked the "other claims" box because he is seeking compensation for the time he was off sick as a result of the respondent's discriminatory treatment of him. He now accepts that this is properly part of his discrimination claim.

30. For completeness, although the claimant has raised complaints about an employee of Worcestershire County Council, he accepts the Council is not a respondent in this matter. That was made clear by Judge Gaskell in his Case Management Order in these proceedings. The claimant said he has brought a fresh claim against Worcestershire County Council which is to proceed to a Preliminary Hearing in February 2023.

Time limits

31. Mr Wheaton made further submissions that, with the exception of his dismissal, the matters the claimant raises are substantially out of time: the police referrals took place in 2018, the allegation about the use of the term "coloured" took place in 2018. Effectively, the claimant is now trying to have another bite of the cherry.

32. In response, the claimant said his complaints form part of a continuing act or state of affairs culminating in his dismissal and are not therefore out of time. Alternatively he says it would be just and equitable to allow his claims to proceed because he was not legally represented on the first occasion and, like other first time litigants, was learning as he went.

33. The claimant submits he was not on an equal footing with the respondent and was therefore seriously disadvantaged. I asked him to clarify whether it was his case that, because of this, he should be allowed to raise issues from his first claim again. He said this was "partly" the case. He said he was only 50% informed at the time of his first claim and now he has "joined the dots" he feels he did not have a fair "shot" at the original hearing. He said if he had been legally represented he would agree with Mr Wheaton. But he said he was a novice and his case should therefore fall into one of the "narrow exceptions" to the doctrine of res judicata.

The law

34. Rule 37(1)(a) of the Employment Tribunal Rules 2013 provides that at any stage of the proceedings an employment tribunal may strike out all or part of a claim or response on the ground that it is scandalous or vexatious or has no reasonable prospect of success.

34. Rule 39(1) of the Rules provides that where at a preliminary hearing the tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.

Res Judicata

35. A judgment of an employment tribunal is binding as between the parties so as to prevent them from litigating the same issues again in any future legal proceedings. Such a judgment is covered by the doctrine of "res judicata". The rationale of the doctrine is that there must be finality of litigation and the avoidance of multiplicity of proceedings on the same issue.

36. In Virgin Atlantic Airways Ltd v Zodiak Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 46, the Supreme Court held that the term res judicata describes a number of different legal principles with different juridical origins. The general principles of res judicata were set out by Lord Sumption as follows (para 17):

> "*The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages…. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action…. Fourth, there is the principle that even where the cause of action is not the same in*

the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties…. "Issue estoppel" … (was) the expression devised to describe this principle. Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles.."

37. 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. 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.

38. 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.

39. In Johnson v Gore-Wood & Co [2002] 2 AC 1, Lord Bingham held

"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. ……
…It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

Judicial proceedings immunity

40. In Hall v Symons [2002] 1AC 693 Lord Bingley, referring to the "well-established rule" that a witness is immune from liability for anything which s/he says in court, said (at p697):

> *"The policy of this rule is to encourage persons who take part in court proceedings to express themselves freely. The interests of justice require that they should not feel inhibited by the thought that they might be sued for something they say. And, as Fry LJ explained in ……Munster v Lamb 11 QBD 588 , 607 this policy is regarded as so important that it requires not merely qualified privilege but absolute immunity."*

Conclusions

41. The claimant has withdrawn allegation 3 on his ET1. In relation to the remaining claims I set out my conclusions below.

42. In para 8.1 of the claimant's first ET1 he clearly raised an allegation that he was discriminated against because he raised a safeguarding allegation in relation to a child. He now says this is a victimisation claim because he had alleged the boy was being discriminated against and this was a protected act. I find the matters he now relies on were known to him at the time of his first claim and he did not need expert legal advice to raise them. He could with reasonable diligence have raised this allegation at the time of his first claim. He has provided no credible explanation for why he failed to do so. I find this claim therefore falls within the "Henderson v Henderson abuse of process" category of res judicata.

43. In his first ET1 the claimant raised a complaint of discrimination in relation to his suspension and that issue was dealt with by the first tribunal. The "new evidence" he has now provided about safeguarding policies was available to him at the time of the first tribunal and with reasonable diligence could have been obtained then. I find he should have produced that evidence at the time of his first claim and reject his arguments that he was unable to do so because he was not legally advised and was "learning as he went". There was nothing to prevent the claimant, at the time of the previous proceedings, from carrying out the internet research he has now done. Having regard to all the circumstances, I find issue estoppel applies and, in the alternative, having regard to Henderson v Henderson it is an abuse of process to attempt to have this claim re-litigated.

44. The claimant admits he has previously brought a complaint about the "toxic environment" operating at the respondent's Worcestershire site. Indeed he says it underpins the entirety of his claims. I find this issue is identical to the issue brought in his previous claim and is barred by issue estoppel.

45. In relation to the second police investigation and the "new evidence" of the Ofsted investigation, again, these are matters which were specifically dealt with by the first ET. With reasonable diligence, the claimant could have referred to the Ofsted report in those proceedings. The allegation against Georgina Martin was found not to be well-founded, the Tribunal concluding that she would have made the safeguarding allegation against a hypothetical comparator without the claimant's protected characteristics. Further, the tribunal found the matter would have been reported to the police by the respondent if the LADO had so advised. The Tribunal found there had not been less favourable treatment of the claimant by the respondent and said it was not relevant to their finding that, in due course, the allegations were found to be unsubstantiated. I find issue estoppel applies.

46. At paras 15.25-15.32 of its decision, the first Tribunal dealt with the events regarding the claimant's suspension and the police investigations. There were two "Position of Trust" meetings on 18 October, 17 and 22 November 2017, both of which involved Chris Coombs. He is referred to by name in the decision. After the first of these meetings, the claimant was interviewed by the police (on 2 and 18 November) the Tribunal found that "contrary to the claimant's assertions, the respondent played no part in the reactivation of the police investigation". That issue was essential to the tribunal's decision on the claimant's first claim and has been determined. The claimant's submission that he has only subsequently "joined the dots" in relation to the Ofsted evidence does not provide reasons to depart from the doctrine or res judicata. With reasonable diligence he could and should have raised these points at the first tribunal.

47. I have rejected the claimant's submission that his case should be treated as an exception to the principles of res judicata because he was not legally represented previously or did not receive sufficient legal advice before the hearing of his first claim and was therefore at a disadvantage. The claimant is an intelligent man who has shown at this hearing that he is well able to conduct research on the internet about aspects of his case. He had a McKenzie friend with him at his first hearing and it was open to him to obtain further legal advice if he thought he needed it. I find he could and should have raised the "new evidence" he now seeks to raise, at the first tribunal. I therefore conclude that the doctrine or res judicata applies to complaints 1b, 2, 4, 5 and 7 in box 8.1 of the claimants ET1. Those complaints are accordingly struck out.

Complaint 6 against Lena Graham

48. In relation to allegation 6 in the claimant's ET1, the claimant complains a) that Lena Graham's evidence that she had only recently been made aware that the term "coloured" was offensive was incorrect, because he had made her aware of this in the appeal hearing; and b) that Lena Graham committed an act of harassment, or discrimination against him by refusing to reconsider her decision when invited to do so by the tribunal.

49. In relation to the date of Ms Graham's knowledge that the term "coloured" was offensive, the claimant was present at the hearing when Ms Graham gave her evidence. I find he could with reasonable diligence have challenged it at the time and should have done so. The Rule in Henderson v Henderson therefore applies to this issue.

50. In relation to her refusal to change her decision, the complaint about this issue relates solely to what was said by Ms Graham in evidence before the tribunal. I find her evidence is subject to judicial proceedings immunity. Having regard to Hall v Symons, I find Ms Graham has absolute immunity from action in relation to the evidence she gave in court.

Unfair dismissal

51. With regard to the claimant's unfair dismissal claim, I accept this is a new cause of action which, as Mr Wheaton concedes has been brought in time.

52. The claimant makes two arguments on unfairness: -

    52.1 the decision to dismiss was made as a strategy to throw him off preparing his tribunal case;

    52.2 dismissal could have been avoided if the respondent had relocated him to another centre with a more diverse workforce. The claimant said at this Hearing that he would have relocated to the new Lakeside Centre.

53. Mr Wheaton submits this claim should be struck out as having no reasonable prospects of success or in the alternative a deposit order should be made on the ground that the claim has no reasonable prospect of success. He said this is because the claim depends for its success on the claimant establishing he had been discriminated against. He has not been able to do this as his claim was dismissed by the previous tribunal. Second, he says the claimant's belief that the respondent should have created a new role for him at another centre, yet to be opened, was

wholly unrealistic. His suggestion at this hearing that he would have moved to Lakeside would not have given the claimant the more diverse environment outside Worcestershire he said he was seeking.

54. I was not persuaded on the basis of the submissions made by the respondent that there is no reasonable prospect of the claimant succeeding in his claim of unfair dismissal. Nor am I persuaded the claim has little reasonable prospect of success. This will depend on the evidence the claimant can bring to the hearing to support his allegation at para 52.1 above and the evidence as to what if any opportunities were available at Lakeside, what consideration was given to relocating the claimant there and the reasonableness of the respondent's failure to offer this alternative.

55. I reject the respondent's submission that the unfair dismissal depends for its success on there being a finding of discrimination by the first Tribunal, and, as no such finding was made, the claim must fail. This is because the EAT has not yet given judgment on the claimant's appeal.

56. I therefore dismiss the respondent's applications to strike out the claimant's unfair dismissal claim or make a deposit order in relation to it. That claim will now proceed and I have made directions in a separate order for the future conduct of that case.

Employment Judge V. Jones

Dated 3 December 2022