EMPLOYMENT TRIBUNALS

Claimant: Mr Hafeez Ahmed

Respondent: Department for Work and Pensions

Heard at: Midlands West Employment Tribunal (by CVP) **On:** 28 November 2023
Before: Employment Judge C L Taylor

REPRESENTATION:

Claimant: In person
Respondent: Counsel

PRELIMINARY HEARING IN PUBLIC
RESERVED JUDGMENT AND REASONS

The judgment of the Tribunal is as follows:

1. The Tribunal does not have jurisdiction to hear the claimant's seventh claim, number 1303773/2022 because it is barred by issue estoppel. The Tribunal therefore also does not have jurisdiction to consider the application to amend this claim.
2. The claimant's application to strike out the respondent's responses to claims 3 and 7 is refused.

REASONS

Introduction

1. The claimant has brought eight claims against the respondent. I am concerned today with claims 7 and 3 - 1303773/2022 and 1801971/2019.

2. Claim 3 was heard in September 2021 and involves a dispute about payment of compensation by the respondent arising out of an earlier claim. Evidence and submissions were completed, but judgment was not given because of illness experienced by the Employment Judge. On 10 November 2022 the Regional Employment Judge decided that the case would have to be re-listed and re-heard

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3. Claim 7 was brought on 25 August 2022 and concerns the circumstances in which the respondent offered the claimant a working arrangement known as the Employee Deal. There was an earlier Employee Deal offered in 2016 which has also been the subject of litigation, I will therefore refer to the Employee Deal offered in 2022, which is the subject of this claim, as the New Deal.

Claims and Issues

4. The applications before me are as follows:

   4.1 The claimant's application to amend his claim 7, dated 08 June 2023, which the respondent opposes;
   4.2 The respondent's application to have claim 7 struck out; and
   4.3 The claimant's application to have the respondent's responses to claims 3 and 7 struck out due to unreasonable and abusive conduct.

5. The claimant's original claim 7 is a claim for failure to make reasonable adjustments. The reasonable adjustment sought was to allow the claimant to access the New Deal, whilst only being required to work his current working pattern.

6. The claimant seeks to amend his claim to include a claim for discrimination arising from disability under s 15 of the Equality Act 2010. The claimant describes the "something arising" as a permanent need to work his current working pattern and avers that the unfavourable treatment is the respondent not acceding to the claimant's request to work his current working pattern whilst accessing the New Deal.

7. The basis of the respondent's opposition to the amendment and application to strike out claim 7 is that the claimant is estopped, as a matter of law, from bringing his claims as they were determined by the Employment Tribunal in claim number 5.

Procedure, Documents and Evidence Heard

8. I had before me a bundle of 80 pages which included the Judgment in respect of claim 5 issued on 09 September 2022, written submissions and an application to strike out in the form of an email from the claimant dated 20 November 2023 with a document setting out his submissions attached. I have considered all of the evidence before me, even where it is not specifically referred to in this decision.

9. The claimant had indicated in his email of 20 November 2023 that he would not be attending the PH and would be relying on his written submissions. The claimant did join the CVP hearing by telephone and not by video.. The claimant stated that this was required because he suffers from social anxiety. It was difficult to hear the claimant, although he could hear the respondent's representative and myself. The claimant tried to join the hearing via CVP with his camera turned off, however he did not remain in the hearing by this format.

10. The claimant re-joined the hearing by telephone and although the line was not much improved he spoke at a level that allowed him to be heard and which meant the hearing could be conducted fairly.

11. The claimant became frustrated at the technical difficulties which he blamed upon the respondent making an application for the preliminary hearing to be listed via CVP rather than in person. The respondent made this application after the claimant had indicated that he would not be attending the hearing and on the basis of saving time and costs and in accordance with the overriding objective. The decision of the format of the hearing was not made by myself, however I see no issue with the respondent making the application in the circumstances it did.
12. When I explained that I was reserving my decision the claimant sought that claim 3 was separately listed. I declined to do so, at some point a decision to consolidate claims 3 and 7 had been made and I would not go behind that decision. The issue of re-listing would need to be dealt with once I had made my decision in respect of the applications before me today.

13. The hearing proceeded on the basis of submissions only.

Submissions

14. The respondent's position can be summarised as; both the claimant's claim 7 and the amendment he applies for, were decided within his fifth claim and/or could and should have been brought within claim 5.

15. The claimant's position is essentially that claim 7 is different to claim 5 because claim 5 related to an application to join Employee Deal four years after it started, whereas claim 7 relates to a request for a reasonable adjustment to be made in order for him to join the Employee Deal re-offer before it started.

16. The claimant asserts that claim 5 has not been finally determined because he has appealed that decision. He believes that his claim was dismissed because the Employment Judge decided that he should have applied to join the Employee Deal in 2016. The Tribunal in claim 5 dealt with the 2016 Employee

Deal, the 2022 Deal did not exist then. There are factual disputes which need to be heard at a full hearing and the respondent should have considered the impact of their application to strike out on him.

17. In respect of his application to amend the claimant submits that this is nothing more than a re-labelling and that all the significant facts relied upon were included within his ET1. The claimant states that the claim was not included in the ET1 because of the effects of depression. No extra time would be required to deal with the amendment and there is no significant prejudice to the respondent. It would be in the interests of justice for the claim to be amended and a fair trial of the claim is possible.

18. The claimant applies for the respondent's responses to claims 3 and 7 to be struck out because, at a case management hearing, the respondent agreed that the issues of cause of action and issue estoppel and abuse of process could be dealt with at the final hearing and, after he made his application for amendment, the respondent changed their position and sought a preliminary hearing to decide that issue. The claimant submitted that the respondent has behaved abusively and unreasonably in doing so and that this has resulted in the hearing of his claims being delayed, including claim 3 which has been outstanding for 5 years and that a fair hearing is no longer possible within a reasonable time.

19. The respondent's response to the claimant's application to strike out was that there is no basis for strike out and it would be draconian to do so. A litigant in proceedings is entitled to review their position and make application it deems appropriate in the circumstances of the case. The respondent has diligently and fairly applied the overriding objective as the claim has evolved and developed and has pursued legal points raised in the response.

Law

20. The principle of res judicata was considered by the Supreme Court in the case of Virgin Atlantic Airways Limited v Zodiac Seats UK Limited [2014] 1 AC 160. Lord Sumption set out his analysis of the various principles making up the overarching principle of res judicata. He said that term is a portmanteau term which is used to describe a number of different legal principles with different judicial origins. They include cause of action estoppel, the doctrine of merger, issue estoppel and the rule in Henderson v Henderson.

21. Lord Sumption explained the following principles. He added that there is a more general procedural rule against abusive proceedings which may be regarded as the policy underlying all of the above principles outlined below, with the possible exception of the doctoring of merger.

22. Cause of action estoppel means 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. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.

23. Where a claimant succeeds 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. That was set out in the case of Conquer v Boot [1928] 2 KB 336. That principle appeared not to be in issue here because the claim that the claimant seeks to pursue is in respect of matters that did not succeed at the prior hearing.

24. The doctrine of merger is not relevant to this claim.

25. The principle of issue estoppel means that where a cause of action is not the same in the later action as it was in the earlier one, but some issue is necessarily common to both was decided on the earlier occasion, the earlier decision is binding on the parties. It is normally essential, where this issue is raised as a defence in subsequent proceedings, that the issues in those proceedings are identical with those that were determined in the earlier proceedings and also that the findings of fact in the Judgment in the earlier proceedings are clear and precise. If they are not, then a plea of issue estoppel will not succeed; it will not bar subsequent proceedings. It is also essential that the findings in the first proceedings were necessary for the decision in that case.

26. The rule in Henderson v Henderson is a rule which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.

27. Lord Sumption explained that, where res judicata or cause of action estoppel applies the bar is absolute bar to relitigating the issue. Special circumstances cannot provide an exception to the operation of the rule. In relation to the principle in Henderson v Henderson, there is no strict rule that the proceedings that could have been brought in earlier proceedings are barred. However, it may be that proceedings will be determined to be an abuse of process 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.

28. In the case of Henderson v Henderson where that principle was set out, Sir James Wigram the VC at the time 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 the 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 through negligence, inadvertence, or even accident omitted part of the case. A plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation and which the parties exercising reasonable diligence might have brought forward at the time.'

29. The terms in which that principle was set out in Henderson v Henderson might suggest that the only consideration is whether the claim now sought to be pursued could have been brought in the earlier proceedings. However, subsequent cases have made it clear that it's not the test. It is a form of estoppel based on abuse of process and it involves the court striking a balance between a claimant's rights to bring before the court genuine and legitimate claims and balancing that with a defendant's right to be protected from being harassed by multiple proceedings where one should have sufficed.

30. The public interest underpinning the rule in Henderson v Henderson is the same as in cause of action estoppel and issue estoppel. It is that there should be finality in litigation and that a party should not be twice vexed in the same matter to avoid the oppression of subjecting a defendant unnecessarily to success of actions.

31. Lord Bingham in Johnson v Gore-Wood & Co [2002] 2 AC 1 set out what is regarded as the leading formulation of the principles to be applied when determining whether a claim should be struck out as an abuse of process under the rule in Henderson v Henderson. He said the onus is on the party alleging abuse to satisfy the court that the claim should have been raised in the earlier proceedings if it was to be raised at all. It would be wrong however to hold that because a matter could have been raised in earlier proceedings it should have been. What is required is a broad merits based judgement taking into account the public and private interests involved and the facts of the case focusing attention on the crucial question of 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.

32. The situation is different, if the court or tribunal makes a finding about a matter which it is not necessary for it to make in order to determine the issues in the first piece of litigation. See for example **Foster v Bon Groundwork Ltd 2012 ICR 1027 CA;** In that case, there had been a previous claim for a redundancy payment. The tribunal had made some findings which it was not necessary for

it to make about the reason for dismissal, and those findings should not have been treated as binding in respect of a subsequent unfair dismissal claim. Elias LJ said that **the parties are only bound by an issue which it was necessary for the court/tribunal to determine in the earlier claim**.

Conclusions

33. The claimant's fifth claim was heard on 8-10 June 2022 and Judgment was given in writing with reasons on 06 September 2022. The Tribunal very carefully set out the claims being considered in that decision as follows:

> *"Our analysis and understanding of the claimant's claim for discrimination arising from disability is as follows:*
>
> *(a) The respondent's decision in August 2020 to refuse him access to the*
>
> *Deal was unfavourable treatment*
>
> *(b) The claimant's decision in August 2016 to opt-out of the Deal was a*
>
> *decision he took because he was disabled. Accordingly, that decision arose from his disability and therefore the unfavourable treatment in July 2020 was for a reason arising from disability.*
>
> *(c) The claimants case that the unfavourable treatment cannot be*
>
> *objectively justified.*
>
> *So far as the adjustments claim is concerned, the claimants case is that the PCP prohibiting transfer into the Deal after opting-out in August 2016 created disadvantage to him as a disabled person compared with non- disabled employees. That PCP was applied to the claimant's disadvantage in August 2020 when he requested transfer into the Deal. The reasonable adjustment for which he contends would have been to permit late transfer into the Deal."*

34. The Tribunal made findings about the Employee Deal as follows;

> *"Information provided to employees made clear that new working arrangements would not necessarily be introduced straightaway; and may not be introduced at all in some job centres. Three months' notice would be given of any actual changes, and six months' if weekend working was required. Furthermore, the*

terms of the Deal specifically reminded managers of the requirement to have regard to individual circumstances and preferences including those of disabled employees. When new working arrangements were proposed employees under the Deal had a specific opportunity to challenge any disproportionate impact upon them - including to a newly established Independent Panel."

35. I have considered whether this finding is a finding about a matter which it was not necessary for the Tribunal to make in order to determine the issues in the first piece of litigation. This is not the case because of the way the claimant advanced his case, which was summarised in the determination as below:

> *"In summary, the claimant's case is that in the summer of 2016 he was*
>
> *in dispute with management because of their having disciplined him for poor timekeeping and having downgraded his appraisal for the same reason. He therefore had no confidence that he would be treated fairly under the Deal and that he may therefore be subjected to patterns of working hours which with which he could not cope because of his disability. Once he was successful in the Employment Tribunal in August 2017, he had* ***more*** *confidence that managers would recognise his disability and the effects of upon him. His explanation for failing to request a transfer to the Deal at that time is that it was only later that he became aware some exceptional late transfers."*

36. The claimant raised the issue of being subjected to patterns of working hours with which he could not cope because of his disability. This is the same issue as requiring the claimant's working pattern to remain the same.

37. The Judgment in respect of claim number 5 gave consideration to the working arrangements required by the Employee Deal and made findings about how any change in working pattens would be dealt with under the Employee Deal. The Employee Deal required specific consideration to be given to individual circumstances and preferences, including those of disabled employees and gave a specific way to challenge the disproportionate impact of any new working arrangements.

38. It seems to me that the factual assertion made by the claimant in respect of claim 7, and his application to amend, is that he needed to only be required to work his current working pattern, whether this is pleaded as a failure to make reasonable adjustments or a claim for discrimination arising from disability, the underlying factual assertion is the same. It is clear from the finding made in determination of claim 5 that the manner in which working arrangements would be imposed under the Employee Deal were considered by that Tribunal and the

issue of the claimant being subjected to patterns of working hours with which he could not cope was also considered and determined.

39. The claimant has submitted that claim 5 relates to his application to join the Employee Deal four years after it started whilst claim 7 relates to a request for reasonable adjustments before the Employee Deal started. I do not consider that this point is relevant, the substance of both claims relates to the claimant's working pattern, whether his request for reasonable adjustments around his working pattern was made before or after the Employee Deal started does not change the substance of the claims.

40. Whilst claim 7 relates to a further opportunity to join the Employee Deal, the essential complaint is that the respondent did not take into account the claimant's working pattern requirements i.e. the respondent failed to make reasonable adjustments allowing the claimant to opt in to the Employee Deal. The previous Tribunal has already made a finding about how the respondent took decisions in respect of working arrangements, how these would be implemented and how a challenge could be made if an employee disagreed with those arrangements.

41. Claim 7 and the claimant's application to amend therefore raise points which have already been determined and issue estoppel applies. On that basis, the claimant's application to strike out the respondent's response to that claim cannot succeed.

42. I do not accept the claimant's position that the response to claim 3 should be struck out because the respondent made an application for the estoppel and abuse of process issues to be considered at a preliminary hearing. The Employment Judge did not decide at the case management hearing on 01 March 2023 that there could be no preliminary hearing in respect of the estoppel issues, the order merely records the position of the respondent at the time of that hearing. It is neither abusive nor unreasonable for the respondent to change their position following the claimant making an application to amend.

43. The claimant's third claim, number 1801971/2019 shall proceed to a final hearing.

Employment Judge C L Taylor
29 January 2024

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