EMPLOYMENT TRIBUNALS

Claimant: Ms J Wilkinson

Respondent: Cleveland Fire Authority

Heard at: Teesside Justice Centre **On:** 3 and 4 June 2024

Before: Employment Judge G Johnson
Mrs B G Kirby
Ms D Newey

REPRESENTATION:

Claimant: Mr S Gittins of Counsel
Respondent: Mr B Williams of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. Those claims set out by the claimant in these proceedings are an abuse of process and fall foul of the “res judicata” principles and of the principles established in **Henderson v Henderson**.

2. All of the claimant's claims of unlawful sex discrimination contrary to sections 13, 26 and 27 of the Equality Act 2010 are struck out and dismissed.

REASONS

1. By a claim form presented on 17 December 2022 (following ACAS early conciliation which began on 24 November 2022 and in respect of which an ACAS early conciliation certificate was issued on 8 December 2022) the claimant brought complaints of unlawful sex discrimination. The respondent defended the claims.

2. The case was extensively case managed, with preliminary hearings taking place before Employment Judge Murphy on 18 April 2023, Employment Judge Martin on 6 June 2023, Employment Judge Jeram on 30 August 2023 and Employment Judge Sweeney on 3 November 2023.

3. Orders were made at each of those preliminary hearings, including orders for the claimant to provide further information about her complaints of direct sex discrimination contrary to section 13 of the Equality Act 2010, harassment contrary to section 26 of the Equality Act 2010 and victimisation contrary to section 27 of the Equality Act 2010. Following presentation of its response on 3 February 2023, the respondent filed an amended response on 23 March 2023.

4. The allegations raised by the claimant relate to incidents which occurred on 15 and 16 February 2022 and in respect of which the claimant lodged a grievance on 27 February 2022. The claimant's allegations were that, having telephoned the respondent to state that she would not be attending for work due to illness, male employees of the respondent attended and entered her home without her permission on both 15 and 16 February. The respondent admits that its employees attended at and entered the claimant's home, but maintains that those visits were because of genuine concern for the claimant's welfare. The claimant alleged that the visits themselves amounted to acts of unlawful sex discrimination. The claimant further alleged that the conduct of the investigation into her grievance about those matters, the grievance outcome and the dismissal of her appeal against that outcome, also amounted to acts of unlawful sex discrimination.

5. The first day of this final hearing (Monday 3 June) was listed to be used as a "reading day" for the Tribunal members, with the parties, their witnesses and representatives not being required to attend until the morning of Tuesday 4 June. However, the parties, their witnesses and representatives all attended on the morning of Monday 3 June. Mr Gittins for the claimant and Mr Williams for the respondent were called into the Tribunal hearing room to explain why everyone had attended that day. Mr Williams for the respondent informed the Tribunal that he wished to make an application to have all of the claimant's claims struck out and dismissed, as the presentation of those claims was contrary to the principles of "res judicata" and those established in **Henderson v Henderson [1843] 3 Hare 100**. In simple terms, Mr Williams submitted that the subject matter of these claims had already been litigated by the claimant in the Employment Tribunal and any which had not been so litigated, could and should have been included in those earlier proceedings. When asked by the Tribunal, Mr Williams confirmed that he had not made any formal written application. Mr Williams further confirmed that his application was not for a strike-out order pursuant to rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, but that the application was made "on common law principles".

6. The Tribunal enquired of Mr Gittins for the claimant as to whether he was taken by surprise by the application and if not whether he was in a position to meet it. Mr Gittins confirmed that he and Mr Williams had discussed the application, that he did not object to the application being made and was in a position to meet it.

7. Mr Williams had prepared a skeleton argument, together with a separate bundle of documents comprising an A4 ring binder containing his skeleton argument, a chronology, the Judgment of the Employment Tribunal in the previous proceedings, the claimant's witness statement from those proceedings, her list of allegations in the current proceedings and a list of authorities. Unfortunately, those bundles had not been delivered to the Employment Tribunal and it was agreed that Mr Williams would make arrangements to have those bundles brought from Leeds to the Employment Tribunal Hearing Centre during the course of the day.

8. Mr Gittins intimated that he did not intend to prepare a skeleton argument, but that having read Mr Williams' skeleton argument, he accepted that the statement of law contained therein was accurate and would not be challenged by him. Mr Gittins indicated that he would call the claimant to give evidence about her explanation as to why the allegations in the current proceedings had not been pursued in the previous Employment Tribunal proceedings. Mr Gittins agreed to prepare a witness statement for the claimant and to send it to Mr Williams for the respondent and the Employment Tribunal during the course of the day.

9. It was agreed that the Tribunal would continue with their reading during the course of Monday 3 June and that on the morning of Tuesday 4 June the Tribunal would hear and dispose of Mr Williams' application on behalf of the respondent.

10. Mr Williams and Mr Gittins had agreed a chronology, displaying the relevant dates which would need to be considered by the Tribunal. Those relevant dates are as follows:

(1) In April 2022 the claimant commenced proceedings in the Employment Tribunal under case number 2500877/2022. Those proceedings focussed exclusively on allegations said to have occurred on 22 December 2021 and 31 January 2022.

(2) A preliminary hearing in those proceedings took place on 15 September 2022, when the issues to be decided by the Employment Tribunal in those proceedings were clarified.

(3) The hearing of those claims took place on 12 and 13 January 2023 and in respect of which a Reserved Judgment was promulgated on 25 January 2023. The Tribunal upheld the claimant's complaints of unlawful sex discrimination.

(4) The incidents which form the subject matter of the current proceedings took place on 15 and 16 February 2022.

(5) The claimant lodged a grievance in respect of those matters on 27 February 2022. The grievance hearing took place on 4 April 2022. The claimant added further matters to the grievance on 20 April 2022. The outcome of that grievance was sent to the claimant on 17 June 2022. The claimant appealed against that outcome on 20 June 2022 and the grievance appeal hearing took place on 10 August 2022. A further grievance was added on 6 October 2022 and the claimant's appeal against the refusal of her grievance was dismissed on 1 November 2022.

(6) The present claim in proceedings 2502417/2022 was lodged on 17 December 2022.

11. On examining that chronology, it is abundantly clear that those allegations in the present proceedings which relate to the 15 and 16 February 2022 took place prior to the issue of the first set of proceedings. It is accepted by the claimant that she was aware of those incidents at the time she commenced the first set of proceedings, and that she remained aware of them throughout the case management of those proceedings and up to and including the final hearing in January 2023. It is accepted by the claimant that at no stage did she seek to

introduce those allegations as acts of unlawful sex discrimination at any time throughout the first proceedings.

12. In addition to her complaints relating to the incidents on 15 and 16 February 2022, the claimant alleges that the process followed by the respondent in dealing with her grievance about those matters was itself tainted by unlawful sex discrimination. The respondent accepts that the process which ultimately led to the dismissal of the claimant's appeal in the grievance was not concluded until 1 November 2022. That was still some 2½ months prior to the start of the final hearing in the first set of proceedings.

13. It was submitted by Mr Williams (and accepted by Mr Gittins) that this strike out application to be considered by this Tribunal was an "all or nothing" application. Put another way, the Tribunal would not be invited to strike out some of the claims and allow others to proceed to a final hearing. Both counsel agreed and accepted that the foundation of all the claims in the current proceedings rested upon the incidents on 15 and 16 February 2022.

14. In its Judgment in the first proceedings, the Employment Tribunal made specific findings of fact about the incidents on 15 and 16 February 2022. Those findings record that the claimant called in sick and that three members of the respondent's staff had called at the claimant's property on a number of occasions over those two days. The Tribunal's findings of fact are set out in detail in paragraphs 26-31 of its Judgment. At paragraphs 33-49 the Tribunal sets out its findings in respect of the claimant's subsequent grievance.

15. It was accepted by Mr Williams and Mr Gittins that this Tribunal hearing the second claim would be bound by the findings of fact made by the Tribunal in the first claim.

16. The claimant produced a witness statement by way of response to Mr Williams' application to strike out her claim. The main purpose of that statement is to enable the claimant to explain why her claims in the current proceedings were not included in the first set of proceedings. The relevant extracts from the claimant's witness statement state as follows:

> (1) On 25 May 2022 my solicitor at the time informed me that I was unable to bring a claim relating to my colleagues entering my home on the basis that it had no reasonable prospects of success.
>
> (2) I received the outcome of my grievance on 17 June 2022. The grievance outcome disclosed information I had not been made aware of before, for example I discovered my colleagues had entered my home on the morning of 15 February and searched and recorded it whilst my daughter was asleep in bed.
>
> (3) After I found out about this incident, I called Cleveland Police who advised me that it was not a criminal matter as it was trespass and therefore a civil matter. I phoned Thompsons Solicitors as my FBU representatives. They did not agree with the police and told me to take advice. My FBU representative was of the same mind as me and said it

was my employer who had been harassing and intimidating me and that was a matter for the Employment Tribunal.

(4) On 1 July 2022 I emailed the FBU representative and told him I was looking to submit a further claim. They told me I could not go directly to Thompsons Solicitors as this was only available via regional officials or higher. I explained that my claims were a breach of my sensitive data and other regards my employer entering my property without my permission.

(5) On 13 July 2022 I was told I could not bring a claim for trespass in the Employment Tribunal as they do not have jurisdiction.

(6) After no success with my solicitor, I visited Citizens Advice Bureau who informed me of the local college Legal Department who could be of assistance.

(7) On 11 October 2022 I submitted a request for assistance with my civil litigation matter from another firm of solicitors, who had replied the same day to state they do not have capacity to take on my case.

(8) I also submitted a request for assistance to another firm of solicitors and had a telephone call with them. Again, I was told this was a civil matter and it could not be pursued in the Employment Tribunal.

17. The claimant goes on to say at paragraph 13 of her statement:

"At every opportunity I tried to have this matter heard alongside my first claim and at the hearing in January 2023. I have no legal knowledge and my representative at the time refused to have it heard. I believe I did everything I could to get representation."

18. The thrust of Mr Williams' submission on behalf of the respondent was that:

(1) The claimant could have presented her current complaints in the first set of proceedings.

(2) The claimant should have presented those complaints in the first set of proceedings.

(3) Her attempts to litigate these matters in new proceedings is an abuse of the process of the court.

19. The Tribunal enquired of Mr Williams as to whether his was an application under rule 37, which entitles the Employment Tribunal to strike out a claim at any stage of the proceedings on any of the following grounds:

(a) That it is scandalous or vexatious or has no reasonable prospect of success;

(b) That the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious;

(c) For non-compliance with any of these rules or with an order of the Tribunal;

(d) That it has not been actively pursued;

(e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

20. Mr Williams' submission was that, whilst he recognises that the Employment Tribunal is a creation of statute and thus is governed by statutory provisions and its own procedural rules, that there are common law principles known as "res judicata" which apply to the Employment Tribunal and which, when properly applied to the claimant's case, must mean that the Tribunal has no jurisdiction to hear those claims and they should be struck out and dismissed. Mr Williams further accepted that there was no formal written application and that the first the Employment Tribunal were aware of the application was on the morning of Monday 3 June.

21. Mr Gittins for the claimant accepted that the legal principles asserted by Mr Williams would and did apply to the Employment Tribunal and therefore that the claimant's claims would be subject to those legal principles. Mr Gittins' position on behalf of the claimant was that it was for the respondent to establish that the claimant could and should have presented these allegations in the first set of proceedings and that it was an abuse of the court's process not to do so.

22. Mr Williams presented a detailed and most helpful skeleton argument, which makes reference to all of the relevant authorities on such matters. Mr Williams provided complete copies of those authorities. Again, Mr Gittins acknowledged and accepted that Mr Williams' statement of the law and his application of those authorities would not be challenged. A brief summary of those principles is as follows:

(1) A judgment of the Employment Tribunal is binding as between the parties so as to prevent them from litigating the same issues over again in any future legal proceedings. That is 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 issues.

(2) "Res judicata" is "a portmanteau term which is used to describe a number of different legal principles with different juridical origins". Three of those principles relate to cause of action estoppel, issue estoppel and the rule in **Henderson v Henderson**.

(3) 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.

(4) The term "issue estoppel" means that where the cause of action is not the same in the later action as it was in the early one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties.

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

23. Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. They are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims.

24. As was said in **Henderson v Henderson**:

> "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 matters 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 the case."

25. It is acknowledged that the rule in **Henderson v Henderson** involves the court striking a balance between a claimant's right to bring before the court genuine and legitimate claims and a defendant's right to be protected from being harassed by multiple proceedings where one should have sufficed.

26. There have been a number of cases decided by the higher courts which give guidance as to the application of those principles. Those include the following:

- Johnson v Gore Wood [2002] 2-AC
- Aldi Stores Limited v WSB London Limited [2007] EWCA Civ 1260
- London Borough of Haringey v O'Brien (UKEAT/004/16)
- Virgin Atlantic Airways Limited v Zodiac [2013] UKSC 46
- King v Thales DIS UK Limited (EA-2021-0011)

27. In the case of **King v Thales**, Judge Tayler sitting in the Employment Appeal Tribunal earlier this year, confirmed that, when considering such matters, it is for the Employment Tribunal to determine all of the material factors which are likely to include:

(a) The precise nature of the discrimination claims which the claimant wishes to bring;

(b) Why the claimant did not bring those claims in the first claim;

(c) Whether the failure to bring the discrimination claims was affected by the claimant's disability;

(d) Why the claimant did not apply to amend the first claim during the period that she was represented by a solicitor and counsel;

(e) The prejudice that the respondent would face should the second claim proceed;

(f) The wider public interest in finality of litigation;

(g) Possibly, subject to full argument, any time issues.

28. The Tribunal spent some considerable time in properly outlining the chronology of the events in this case. The Tribunal gave careful consideration to the submissions made by Mr Williams as to the present state of the law in respect of such applications (with which Mr Gittins agreed). Having undertaken that exercise the Tribunal found as follows:

(1) It is clear beyond conjecture that the claimant could have included in the first proceedings the complaints which she now raises in the current proceedings. They could have been included in the first claim form and could have been the subject matter of an application to amend the claim at any stage up to the final hearing in January 2023.

(2) There was no impediment which prevented the claimant from including those allegations in the first claim. Whilst the first Tribunal acknowledged that the claimant suffered from stress and anxiety (and this indeed was the reason for her lengthy absence from work) the Tribunal was not satisfied that this prevented her from properly including those claims at the relevant time. It is clear from the claimant's own witness statement that she had access to legal advice and assistance throughout the relevant period and was able to conduct the first set of proceedings with the assistance of solicitors and counsel.

(3) The Tribunal was satisfied that the claimant should have included these allegations in the first set of proceedings. Again, the Tribunal was not persuaded by the arguments put forward on the claimant's behalf by Mr Gittins. The claimant's position seems to be that whenever she raised the possibility of those claims being introduced, she was advised that she could not do so. It is not for this Tribunal to comment upon the sufficiency or adequacy of that advice, but if that advice was either negligent, inadvertent or accidental, it is still caught by the decision in **Henderson v Henderson**. The Tribunal was satisfied that the claimant should have brought these claims in the first set of proceedings.

(4) When questioned by the Tribunal, Mr Williams for the respondent accepted that there could still be a fair trial of the issues raised by the claimant, which could produce a just outcome. Mr Williams acknowledged that the respondent’s records of its investigation into the claimant's grievance were still available and that witness statements had been prepared by all of the relevant witnesses for the respondent. However, Mr Williams properly pointed out that those employees of the respondent who had visited and entered the claimant's property on 15 and 16 February 2022 had not been called to give evidence at the

hearing of the first claims, because those visits to the claimant’s property did not form the subject matter of any of the claimant's allegations. The claimant introduced those matters as “background information”. The Employment Tribunal went on to make specific findings of fact in that regard, which is thus prejudicial to the respondent in the current set of proceedings. The Tribunal accepted those submissions.

(5) The respondent has been put to the time and expense of preparing for a seven-day hearing to answer allegations raised by the claimant which could and should have been raised in the first set of proceedings. The Tribunal was satisfied that the claimant's approach to this litigation falls foul of the principles of “res judicata”. The cause of action pursued by the claimant is of unlawful sex discrimination, which was the cause of action pursued by the claimant in the first set of proceedings. The factual allegations could and should have been included in those proceedings and therefore are caught by the principles of cause of action estoppel. Similarly, they are caught by the principles of issue estoppel, due to the findings of fact made by the Employment Tribunal in respect of the visits to the claimant's home on 15 and 16 February 2022. The claimant has failed to provide any meaningful explanation as to why the claims were not included in the first set of proceedings. There is no explanation whatsoever as to why there was no application to amend the first set of proceedings so as to include those allegations. The Tribunal was satisfied that there was ample time and opportunity for the claimant to do so. The Tribunal was not persuaded by the claimant's evidence that she only discovered matters relating to the visits to her home in either June, August or November 2022. Whatever information came into the claimant's possession on those occasions could not reasonably be described as information which would make a difference as to whether or not those claims could and should have been included in the first set of proceedings.

(6) Time issues are relevant. The foundation of the claims are the visits on 15 and 16 February 2022 in respect of which (at the very latest) ACAS early conciliation should have started on 16 May 2022. Those allegations are well out of time.

29. The Tribunal is satisfied that the respondent is prejudiced by the claimant’s failure to include these complaints in the first set of proceedings. The claimant's approach to this litigation is a clear and obvious breach of the “res judicata” principles. The Employment Tribunal does not have jurisdiction to hear those claims. Those claims are struck out and dismissed.

_G Johnson_____________________________

Employment Judge G Johnson

Date:6 June 2024

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