EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	**Respondent**
Mr C. Povey		**Environment Agency**

Held at: Exeter **On: 29 February 2024**

Before: Employment Judge Smail

Appearances

Claimant: In Person
Respondent: Mr L. Dilaimi (Counsel)

JUDGMENT

This claim no. 6001680/2023 is struck out under Rule 37(1)(a) of the Employment Tribunal Rules. It has no reasonable prospects of success as the complaints in it were or should have been (insofar as they may be brought before an Employment Tribunal) the subject of claim no. 1402514/2021. That claim has been litigated and dismissed because the complaints in it were brought out-of-time. The bringing of the present claim is tantamount to an abuse of process.

REASONS

1. The Respondent applies to strike out/dismiss this Claim Form (case no. 6001680/2023) on the grounds that –

   (a) Its subject matter has already been litigated under case no. 1402514/2021 when the claim was dismissed for being out of time; or

   (b) It has no reasonable prospects of success because (i) any claim should have been brought in the High Court by way of an appeal under

s.151(4) of the Pensions Act 1993 or by way of a claim for judicial review against the Pensions Ombudsman; and/or (ii) the Claimant compromised his right to bring these claims under a valid settlement agreement; or

(c) It is out-of-time.

2. The present claim form was presented on 31 August 2023. The Claimant was employed as an Environment Officer between 20 September 2004 and 30 November 2016. In it he seeks Recommendations to the following effect:

(a) The Respondent failed to make a decision on whether I had an injury under the occupational injury allowance regulations and should now do so.

(b) The Respondent failed to make a decision under the EALGPS (Environment Agency Local Government Pension Scheme) ill health early retirement from active service and should belatedly do so.

(c) The Environment Agency should consider carefully any decision not to reduce any resulting pension for taking it early, especially bearing in mind the reason for the pension is an injury caused by them and considering the 7 year delay in obtaining a decision on ill health early retirement.

(d) There has been a deliberate pattern of misrepresentation over many years to my detriment. I would ask the Tribunal to consider this pattern of behaviour and advise the Environment Agency in writing about the way they have conducted themselves.

3. The Claimant ticks the disability discrimination and whistleblowing jurisdiction boxes.

4. An earlier Employment Tribunal claim was brought under case no. 1402514/2021. The Respondent asserts the facts and circumstances are the same. The claim was dismissed for being out-of-time following a Preliminary Hearing on 4 April 2023. That claim was for disability discrimination. It related to (i) the Respondent's decision not to exercise its discretion in 2016 to pay the Claimant an occupational injury allowance under the Local Government (Discretionary Payments) (Injury Allowances) Regulations 2011; and (ii) the Respondent's failure to make a decision before his employment ceased on 30 November 2026 that he should have been granted early retirement on the grounds of ill health in respect of his *active* pension. The Respondent asserts *res judicata*: the matter has already been decided.

5. Fundamentally, on time limits, the Respondent asserts that from 30 November 2016 it was no longer possible under the Benefits Regulations to pay any enhanced early ill health retirement benefits.

6. The Respondent asserts that the Claimant had previously submitted complaints to the Pensions Ombudsman in respect of the Respondent not paying him an occupational injury allowance or granting him early retirement on the grounds of ill health in respect of his active pension prior to 30 November 2016. A written determination dismissing the complaints was made by Pensions Ombudsman Anthony Arter dated 28 September 2021. The Respondent contends that the substance of the complaints does not fall within the Employment Tribunal's jurisdiction. They are not discrimination or whistleblowing complaints properly-so-called; they care complaints brought under (i) The Injury Allowances Regulations and (ii) The Benefits Regulations.

Background

7. The Response to the present claim sets out some important information. John Morgan, a Senior Lawyer at the Respondent, also provided evidence dealing with the circumstances leading up to the Compromise Agreement.

8. During the 5 years before the end of his employment, the Claimant took a leading role in bringing prosecutions and proceedings under the Proceeds from Crime Act against a particular waste operator. On a farm visit, accompanied by police officers, the Claimant was subjected to threats of violence for which the individual concerned was successfully prosecuted. In 2015 CCTV was installed at his home following neighbours reporting suspicious activity at his home. In April 2015 CCTV captured an intruder trying to remove part of the CCTV. That same month a sandwich carton had been placed over a beam detector by way of further interference with the CCTV system.

9. In 2015 the Claimant developed a psychiatric illness that led to a series of long-term absences from work in 2015. Then from 25 November 2015 to 6 January 2016, from 26 January 2016 to 31 March 2016. From 15 August 2016 until his employment ended on 30 November 2016. Occupational Health confirmed the Claimant was suffering from anxiety and depression.

10. Whilst there was sympathy for the predicament he found himself in, an occupational health report dated 14 June 2016 suggested the Claimant would not meet the criteria for ill health retirement because there was the option of moving him out of the area and to a different role.

11. In August 2016 the Claimant via his trade union rep was in without prejudice discussions and correspondence with management to see if there could be mutually agreed severance through the Voluntary Early Release Scheme. A relocation sum was agreed. There was express negotiation over whether a payment could be made in respect of injury allowance. The Response states that the Environment Agency declined

because in respect of an incapacitated worker there was a degree of financial protection for such a worker relating to a) a generous sick pay scheme; b) ill health retirement under the Local Government Pension Scheme if criteria are met; there is personal accident insurance cover and an employee can claim compensation for negligence/breach of statutory duty where appropriate.

12. The Compromise Agreement was signed without provision for injury allowance. The Claimant brought High Court proceedings for personal injury in 2018 which were settled in November 2019. I do not know whether the terms of that settlement would be relevant to this case, if this case were permitted to proceed.

13. Mr Morgan tells us that at the time of the Compromise Agreement the Claimant had a choice: either transfer to Fisheries, involving a move; or leave employment under the Voluntary Early Release Scheme. He chose the latter. It was negotiated on his behalf that the Compromise Agreement would not purport to settle a proposed negligence/breach of statutory duty claim in respect of the psychiatric injury he had suffered as result of the threats from the prosecuted waste disposal contractor. On 15 September 2016 the Claimant emailed the Respondent asking for details of the injury allowance benefit scheme. In an email dated 26 September 2021, the Claimant questioned why he had not been provided with an injury allowance under the Respondent's discretionary policy. That exchange occurred prior to entering into the Compromise Agreement.

14. The Claimant was advised by a barrister in connection with the Compromise Agreement before it was signed.

15. The Claimant brough two complaints to the Pensions Ombudsman in July 2019. First, that the Environment Agency failed to notify the Claimant that he could have been eligible for an injury award; and an award was not made under the Injury Allowances Regulations. Secondly that the Environment Agency and the Environment Agency Pension Fund had not properly considered him for ill health early retirement whilst he was an active (i.e. serving) member and had not made him aware that he could so have been considered.

16. On 9 June 2021 the Pensions Ombudsman Adjudicator wrote indicating that he was recommending to the Pensions Ombudsman that both complaints should be discontinued on the grounds that a) in respect of an injury allowance, the Claimant had waived his right under the terms of the 'full and final' compromise agreement; and b) the Claimant knew he could be considered for ill health retirement. Enquiry had been made about it in the negotiations. It was obstructed by the terms of the occupational health assessment dated June 2016, which was to the effect that if he obtained an alternative role there was the potential to improve his psychological well-being sufficiently to be able to return to his own duties and gainful employment. The final determination of the Pensions Ombudsman on 28

September 2021 was to discontinue investigating the complaints for the same reason.

Case No. 1402514/2021

17. The issues in that case were identified in a Preliminary Hearing before Employment Judge Bax on 20 December 2022. It is recorded that the issues were agreed as issues. They were:

    (a) Time limits. The claim was issued on 14 July 2021 in respect of decisions that were or were not taken between 11 October 2016 and 30 November 2016, some 5 years previously.

    (b) Whether the Claimant was a disabled person at the relevant times.

    (c) Discrimination arising from disability in respect of

        i) the Respondent's failure to make a decision in relation to Ill Health Early Retirement under regulations 35 and 36 of the 2013 regulations, the failure being between 11 October 2016 and 30 November 2016; and

        ii) the Respondent's failure to make a decision in relation to an allowance under regulation 9(1) of the 2011 Regulations, the failure being between 11 October 2016 and 30 November 2016.

18. Those are the issues in this case, too. Whistleblowing should have been raised in those earlier proceedings also, if the claim was to be pursued.

19. In any event, Employment Judge King dismissed the claims as being out-of-time on 4 April 2023. He did not extend time. He found it would not be just and equitable to do so. I have not been told of any appeal made to the Employment Appeal Tribunal, successfully or at all.

The Compromise Agreement dated 11 October 2016

20. The Claimant received a termination payment of £51,914 including a relocation payment of £18,000. The principal part was from the Respondent's Early Release Scheme. At clause 6.2 the Claimant acknowledged he switched from an active to a deferred member of the pension scheme from the termination date, which was 30 November 2016. Potential claims extant on 11 October 2016 (other than in respect of accrued pension rights; as yet unknown personal injury; the known psychiatric injury; and enforcing the Compromise Agreement (clause 12.3), were compromised.

The letter from the Environment Agency Pension Fund dated 14 August 2023

21. The Claimant argues that this letter constitutes a new development entitling him to bring the present claim. The Claimant made an application under the Internal Dispute Resolution Procedure of the Local Government Pension Scheme Regulations dated 17 October 2022. This was a Dispute within the Environment Agency Pension Fund. David Williams, a Pensions Manager, concluded that the application was out-of-time and declined to extend time. Ordinarily, an application must be brought within 6 months of the date of notification of a Scheme decision by an employer or administering authority or the date of the act or omission which is the cause of the disagreement, or if more than one, the last of them (Regulation 74(2) and (3); Regulation 74(4) gives a discretion to extend time).

22. Mr Williams noted the events were 7 years ago and the Employment Tribunal under Case No. 1402514/2021 ruled the complaint was out-of-time. The Pensions Ombudsman's decision was that the compromise agreement of 11 October 2016 continued to be effective to compromise his Ill Health Early Retirement claim.

23. The Pension Ombudsman had held that the Claimant's right to an Ill Health Early Retirement from active membership is not an accrued right, and therefore unlike a deferred pension is not a preserved pension right within the meaning of clause 12.3 of the Compromise Agreement.

24. The point in essence was that it had been acknowledged at clause 6.2 of the Compromise Agreement that at the Termination Date he switched from active to deferred membership. Injury Allowance could only be claimed from active membership. If the Claimant and his Counsel who was advising him at the time wanted to preserve this argument, it could have been an express exception in the Compromise Agreement.

25. There was nothing substantively new in the letter dated 14 August 2023.

Lack of medical support for the Claimant's position until 2019

26. Even if the matter has not already been litigated under the res judicata principle, it is a fundamental problem for the Claimant's position in the litigation that it was not until Dr Nick Walker's letter of 25 July 2019 as amended on 13 August 2019 that there was medical support for the Claimant's position. Dr Walker, a Consultant Occupational Health Physician, did support the Claimant. He said that the Claimant was suffering from persistent moderately severe depression with features consistent with post traumatic stress disorder. He has exhausted all available treatment options. He has a poor prognosis because of the persistence of the condition and because of his previous history of post-traumatic stress disorder (most sadly around the death of his son).

27. This contrasts with the position of Dr F. Folkes, Consultant Occupational, Health Physician dated 14 June 2016. Her position was that if the Claimant moved to another work area, away from the stressors he was experiencing in terms of living in a fortress and so on, a return to normality was probable. That is why Mr Morgan suggests the Claimant had a choice: move to Fisheries or leave employment under the Voluntary Early Release Scheme.

The law on Res Judicata

28. I adopt Mr Dilaimi's statement of the law on res judicata as follows.

29. *As noted by Lord Sumption in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2014] AC 160, SC, 'res judicata' is a* "portmanteau term" *which is used to describe any of the following legal principles:*

    a. *Cause of action estoppel, which prevents a party pursuing a cause of action which has been dealt with in earlier proceedings involving the same parties;*

    b. *Issue estoppel, which prevents a party reopening an issue which has been decided in earlier proceedings involving the same parties; and*

    c. *Henderson abuse of process (arising from Henderson v Henderson [1843] 3 Hare 100, ChD), which precludes a party from raising in subsequent proceedings matters which were not raised in the earlier proceedings but which could with reasonable diligence have been raised and which should in all the circumstances have been raised.*

30. *In Johnson v Gore Wood & Co [2002] 2 AC 1, Lord Bingham described Henderson abuse of process as follows:* "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 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 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 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. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances."

31. *Where a tribunal dismisses a claim for want of jurisdiction because it is out of time, it might be an abuse of process for the claimant to bringing a second claim relying on the same facts, even if the second claim also relies on later events. To quote the headnote of Agbenowossi-Koffi v Donvand Ltd (trading as Gullivers Travel Associates) [2014] EWCA Civ 855, [2014] ICR D27, CA:* "When a race discrimination claim by the claimant that she had been racially abused by her supervisor was dismissed on the ground that it was out of time and that it would not be just and equitable to extend time, the claimant brought a second claim making the same allegation but introducing additional complaints designed to show a state of affairs constituting conduct extending over a period for the purposes of the time limit provisions of section 123 of the Equality Act 2010. An employment judge struck out the claim on the ground that it was an abuse of process, and the Employment Appeal Tribunal dismissed an appeal by the claimant." *The Court of Appeal then dismissed the claimant's further appeal.* Per *Lord Dyson MR (as paraphrased in [2014] ICR D27),* "While it was true that there was no evidence that the employee had issued the second claim in order to harass or oppress the employer, it did not follow that the second claim was not an abuse of process in the particular circumstances of the case. As Lord Millet said in [Johnson v Gore Wood & Co [2002] 2 AC 1], the abuse of process doctrine in the present context was a procedural rule "based on the need to protect the process of the court from abuse and the defendant from oppression", and the question was whether "it was oppressive or otherwise an abuse of the process of the court" for the claimant to raise in the second proceedings a claim which he could have raised in the first proceedings. The very fact that a defendant was faced with two claims where one could and should have sufficed would often of itself constitute oppression. It was not necessary to show that there had been harassment beyond that which was inherent in the fact of having to face further proceedings."

The Claimant's skeleton argument: allegations of fraud and collusion

32. The Claimant's skeleton argument is less about employment and discrimination law then it is an allegation of fraud by those representing the Respondent and its pension scheme. The Claimant introduces his observations with this:-

> The matters relate to fraud and collusion by Mr Craig Martin (Chief Pension Officer of the EALGPS) and the erstwhile directorate of legal services including the then Director Peter Kellett and Senior Lawyer John Morgan.

33. Those are not causes of action falling within the jurisdiction of the Employment Tribunal.

The Claimant's email of 6 March 2024

34. The Claimant sent this email after the hearing. He provided further information on the effect of not having Ill Health Early Retirement from active membership of the pension. He tells me -

> 'The pension I was awarded in 2019 is around 10k pa. This is IHER from Deferred membership of the EALGPS. This pension is based upon a refund of contributions and has no cost and places no strain upon the pension fund. The pension I requested in May 2016 was IHER from active membership of the EALGPS. This would have incurred an extra cost/strain on the pension scheme (especially if the pension was not reduced for taking it early). The EALGPS have declined to tell me what this pension would have been, I believe it may have been around 20k pa.'

35. So that is the financial context of the point. The 2019 medical position helped him get an Ill Health early retirement from deferred membership. That was not open to him from active membership. During active membership, the June 2016 Occupational Health assessment was not supportive of Ill Health Early Retirement.

36. Disputes about the operation of the Pension Scheme post termination of employment are not justiciable in the Employment Tribunal. There is no apt cause of action. It is clear what the position was leading up to the making of the Compromise Agreement, however.

Conclusions

37. The matters the subject of the present claim were - and in the case of the whistleblowing claim should have been – the subject of claim no. 1402514/2021, if they were justiciable before the Employment Tribunal at all. The complaints in that claim were dismissed as being out-of-time. That is understandable bearing in mind the complaints concern the terms of and the events leading up to the Compromise Agreement dated 11 October 2016.

38. The present claim has no reasonable prospects of success. The complaints in it (insofar as they were justiciable before the Employment Tribunal) were litigated and dismissed in case no. 1402514/2021. The Respondent's plea of res judicata is sound. The matters have been litigated; and have failed because they are time-barred. The present claim is tantamount to an abuse of process.

39. Aside from the res judicata points, which amount to an absolute defence anyway, the underlying 2016 merits of the claim are doubtful. The Claimant explored injury allowance at the time. He was unsuccessful in obtaining that. He was advised by Counsel at the time. That was a matter of express negotiation. The Compromise Agreement noted that the Claimant was switching from active to deferred membership of the pension scheme. The Occupational Health assessment of June 2016 was not supportive of Early Ill Health Retirement. The view was that if the Claimant moved to a new role, he should return to normal. That is why Mr Morgan suggests the Claimant had a choice: move to Fisheries or leave under the Voluntary Early Release Scheme. He chose the latter.

40. The medical position changed in 2019 but by then the Claimant was a deferred member of the Scheme. Any disputes about the operation of the Pension Scheme after the Claimant left employment appear not to be aptly brought before the Employment Tribunal.

41. There is acknowledgment that the Claimant was abused by the offender who was successfully prosecuted for pollution. There was sympathy for the Claimant's position. That led to the terms of the Compromise Agreement, including the payment of £51,914.

42. The present claim, however, has no reasonable prospects of success and is tantamount to an abuse of process.

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Employment Judge Smail
24 June 2024

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Judgment sent to the parties on
9th July 2024

For the Employment Tribunal