EMPLOYMENT TRIBUNALS

Claimant: Mr B Hussain

Respondent: Lacura Care Services Ltd

Heard at: Manchester (by video) **On:** 17 January 2025

Before: Employment Judge Slater

Representation
Claimant: Ms R Parvez, lay representative
Respondent: Mr B Thomson, operations manager

RESERVED JUDGMENT

1. The judgment in case number 2402686/24 dismissing that complaint on withdrawal is revoked on reconsideration.

2. Case number 2402686/24 remains closed, having been withdrawn.

3. The application to strike out the claim in case number 2403748/24 on the grounds that it is an abuse of process and vexatious, is refused.

4. Case number 2403748/24 proceeds.

REASONS

Introduction

1. This was a public preliminary hearing held by video conference (CVP).

2. The claimant presented a claim (case number 2402686/24) against the respondent which he subsequently withdrew (the first claim). He then presented another claim against the respondent (case number 2403748/24) (the second claim). The wording of the particulars of claim in the two claims were not identical but both were complaints of unfair dismissal. Ms Parvez confirmed at this hearing

that both claims were for "ordinary" unfair dismissal and "automatic" unfair dismissal, the reason or principal reason for dismissal asserted to be a TUPE transfer. Ms Parvaz clarified that there was no intention to bring a protected disclosure (whistleblowing) unfair dismissal or detriment complaint (although the claimant had ticked a box about whistleblowing on the second claim form) or disability discrimination.

3. This was a public preliminary hearing listed in the second claim to consider, if the judge considered this appropriate, whether the claimant was able to pursue the second claim, when he had withdrawn the first claim, under the principles in **Henderson v Henderson**, and/or res judicata and/or whether the new claim was an abuse of process.

4. At the start of the hearing, after clarifying the complaints brought by the claimant, I informed the parties that I was considering reconsidering the dismissal on withdrawal judgment in the first case on my own initiative. I explained that, given the complaints in the second claim were the same as the first, the second claim could not continue, under the principle of res judicata, unless the judgment in the first claim was revoked. Given the circumstances, where the claimant had indicated in correspondence that he wanted to proceed with a claim and had presented a second claim before the first claim was dismissed, I was considering reconsidering, and possibly revoking, the judgment dismissing the first claim. I explained the procedure that would normally be followed where a judge was considering reconsidering a judgment of their own initiative, where the parties would receive a letter about this and have time to respond to that in writing, including expressing a view as to whether a hearing was required. I said that, if the parties agreed, I could deal with the reconsideration today. However, if they wanted time to think about it and to go through the normal procedure, I would postpone the hearing and go through that process. Both parties wanted to go ahead today.

5. We did not have a bundle of documents prepared with documents relevant to the reconsideration. Both parties had the claim forms and responses from both claims but not all the correspondence to hand. I, therefore, adjourned the hearing while I prepared, from the Tribunal electronic files, a small bundle of key correspondence relevant to the reconsideration and a chronology of key dates. These were sent to the parties who had some time to consider them before we resumed the hearing.

6. Having reflected on the best way to proceed, during the adjournment, I told the parties I would like to hear their arguments about the reconsideration and the abuse of process argument at the same time, since the matter of whether bringing a second claim about the same thing after withdrawing the first claim was an abuse of process would be relevant to whether it was in the interests of justice to revoke the judgment dismissing the first claim. I gave the parties some further time to get their thoughts in order before I heard submissions from both of them on the reconsideration and abuse of process arguments. During these submissions, we had another adjournment so that the claimant could send some medical evidence he thought relevant. Mr Thomson read, in large part, from written arguments contained in the agenda for this hearing when making his submissions. I have read these before making my decision. Ms Parvez also referred me to written arguments she had sent to the Tribunal opposing the respondent's applications. I have also

read these before making my decision. Ms Parvez had not sent a copy of these arguments to the respondent so I asked her to do so and reminded both parties that, when they wrote to the Tribunal, they must copy their letters to the other party.

7. Some of Mr Thomson's arguments in his document related to an argument about striking out the claim or ordering a deposit because of what the respondent says are the low prospects of the claim succeeding and also a costs application. I said I would not be considering these applications today but, if the case proceeded, I would consider whether or not it was appropriate to hold a preliminary hearing to consider those applications.

8. I reserved my judgment and said that, if the case was allowed to proceed, I would consider whether I could do case management on paper and, if not, would arrange a further preliminary hearing.

9. After I reserved judgment, the claimant's representative sent me a chronology of events leading up to presentation of the first claim and a further document, copied to the respondent. I have looked at these, but do not consider them relevant to the reconsideration/abuse of process issues, so have not relied on them.

10. After I had made a decision, but before this judgment and reasons were promulgated, the parties sent me further correspondence on 17 and 21 January 2025. I have read this correspondence but it contains nothing which would have made any difference to my decision.

11. I considered the parties' oral and written submissions (contained in documents sent to the Tribunal prior to the hearing), in making my decision.

Issues and relevant law

12. In relation to the first claim, in accordance with rule 68 of the Employment Tribunal Procedure Rules 2024 (the 2024 Rules), I may reconsider the judgment where it is necessary in the interests of justice to do so. On reconsideration, I may confirm, vary or revoke that judgment.

13. If the judgment is not revoked, the second claim may not proceed since the causes of action in the second claim, which are the same as the first, have been decided by the Tribunal, even though there has been no adjudication of the claim on the merits. The claimant is barred, or "estopped" from raising the same complaints in a new case. This is a type of "res judicata". The Court of Appeal in **Barber v Staffordshire County Council 1996 ICR 379** held that cause of action estoppel is not restricted to cases where a tribunal has given a reasoned decision on the issues of fact and law in previous litigation; a dismissal on withdrawal judgment is a judicial decision which stops a claimant proceeding with a new claim about the same thing.

14. Rule 38(1)(a) of the 2024 Rules provides, amongst other things, that the Tribunal make strike out a claim on the grounds that it is "vexatious". This will include anything that is an abuse of process: **Attorney General v Barker [2000] 1 FLR 759**. An example of where there may be an abuse of process, in accordance with the principle in **Henderson v Henderson 1843 3 Hare 100, ChD,** is where a

claimant could, and should, have brought forward their whole case in earlier proceedings, but did not. The concept of abuse of process is not, however, limited to the **Henderson v Henderson** type of situation.

15. Withdrawal of a claim, under rule 51 as it was in the 2013 Rules of Procedure (now in the same form in rule 50 of the 2024 Rules), brings the claim to an end, subject to any application the respondent may make for a costs, preparation time or wasted costs order.

16. Under rule 52 in the 2013 Rules (now with some changes to the wording in rule 51 in the 2024 Rules), where a claim has been withdrawn, the Tribunal must issue a judgment dismissing it unless either "the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or "(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice."

Relevant facts

17. The claimant was dismissed on 18 April 2024. He engaged in early conciliation with ACAS between 1 and 3 May 2024. His first claim was presented on 3 May 2024. At the time the claim was presented, the claimant was represented by Ms Parvez, who is now representing claimant again. Ms Parvez wrote to the tribunal on 25 June 2024, writing that she was no longer dealing with the case for the claimant and that his solicitor had taken over the case and would be contacting the tribunal.

18. The response was received from the respondent on 14 June 2024 and accepted and sent to the claimant on 18 June 2024.

19. On 28 June 2024, the claimant emailed the tribunal withdrawing his claim. He wrote: "I am Babar Hussain, I am writing this letter to inform about my case Ref. 2402686/2024. I want to withdraw my claimant or case for the reason that I don't have enough fund for Lawyer. I'm not entitled for legal Aid."

20. In accordance with what was then rule 51 of the 2013 Rules of Procedure, this withdrawal brought the claim to an end. The claimant did not, in his email, express a wish to reserve the right to bring a further claim.

21. There appears to have been an administrative delay in actioning the withdrawal and in linking this email to the tribunal's case file so there were some instructions given by judges and letters written to the parties after 28 June 2024 without the judges being aware that the case had been withdrawn. These letters would have given the parties the impression that the case was proceeding.

22. On 5 July 2024, Ms Parvez wrote to the tribunal, writing that she had agreed to continue representing the claimant. She wrote that he was unable to afford a solicitor currently.

23. On 12 July 2024, the tribunal wrote to the claimant, copied to the respondent, thanking the claimant for informing the tribunal that he had withdrawn his claim and cancelling the hearing listed for 29 October 2024.

24. It appears, from a reference in Ms Parvez's email of 12 July 2024, and from what she told me at this hearing, that she telephoned the tribunal in response to this email and was advised to submit a new claim.

25. The claimant presented the second claim on 12 July 2024. There was some difference in the wording of the particulars of claim but it was still a claim of unfair dismissal. At this hearing, Ms Parvez has confirmed that the complaints of unfair dismissal in the first and second claims are the same i.e. "ordinary" unfair dismissal and TUPE "automatic" unfair dismissal.

26. On 12 July 2024, Ms Parvez emailed the tribunal. She wrote that the claimant had tried to get representation from a local solicitor but was quoted £6000 plus in fees, he panicked and emailed the tribunal to withdraw his claim explaining that he could not afford representation. She wrote that he did not explain that, as he is dyslexic, he is not able to represent himself. She wrote that she had agreed to represent him on the understanding that he would pay for her time if he was awarded losses. She wrote that she had submitted a new form for his case and hoped that the tribunal could accept this case as it would really impact his future job prospects if he did not clear his name.

27. Later on 12 July 2024, the claimant personally also emailed the tribunal. He wrote that he was dyslexic so could not represent himself and, after learning how much the solicitor would charge, he panicked and sent the email. He wrote that he had sent another email straight after the first to withdraw his request to cancel the case explaining that someone had agreed to represent him now. If such an email was sent, it does not appear to have been placed on the tribunal file and I have not seen it. He wrote that Ms Parvez had agreed to take over his case and represent him as he could not afford to pay the solicitor. He wrote that she had called the tribunal office to explain was but was advised that it could not be reinstated and would have to be resubmitted. He wrote that she had submitted a new case on his behalf and asked if the tribunal could accept his case. He apologised for his mistake in desperation and for the inconvenience caused.

28. On 25 July 2024, a legal officer signed a dismissal on withdrawal judgment for the first claim. This was sent to the parties on 5 August 2024. A note on the judgment informed the parties that, under regulation 10A(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013, because this decision had been made by a legal officer, the party could apply in writing to the tribunal for the decision to be considered afresh by an employment judge. The note stated that such an application must be made within 14 days after the date this decision was sent to the parties. No such application was made to the tribunal. The letter accompanying the judgment also informed the parties of the right to ask the tribunal to reconsider the judgment. No application was made to reconsider the judgment.

29. Between the judgment being signed and being sent to the parties, on 29 July 2024, the Tribunal served the second claim on the respondent and sent the parties notice of this preliminary hearing on 17 January 2025. The letter of 29 July 2024 informed the parties that, at this hearing, the tribunal may decide whether the claimant is able to pursue his new claim, when the previous claim he brought

against the same employer was withdrawn (applying the principles set out in the case of **Henderson v Henderson** and/or res judicata and/or considering whether the new claim is an abuse of process) but that issue would only be determined if the employment judge conducting the hearing considered that it was appropriate to determine the issue at the hearing.

30. The medical documents sent by the claimant during the hearing appear to be screenshots from an NHS app. One refers to a prescription of Sertraline, an antidepressant, in 2012. Another is for Zopiclone (a medication used for sleeping problems) in April 2024 and another for Amitriptyline (an antidepressant) in December 2024.

The parties' submissions

31. Ms Parvez argued, for the claimant, that it would be in the interests of justice to revoke the judgment. There were administrative delays between the withdrawal and processing of the judgment. It was not an abuse of process to present a new claim. The claimant was in serious emotional distress. The claimant was put in a dire situation as a result of being unfairly dismissed. He could not afford rent and other bills. He could not afford solicitors' fees and could not see a way to clear his name or hold his employer accountable. He could no longer cope and withdrew his claim. He was prescribed medication for depression, anxiety and not being able to sleep. When he was offered support, and with the help of medication, he picked himself up and started the claim again. The claimant believes he has been treated unfairly. The process can be daunting and confusing for an average person.

32. The respondent's principal argument was that the claimant had abused the Tribunal process by presenting one claim, withdrawing it, and then resubmitting it, after getting advice from a solicitor, and having the advantage of being able to change it, in the light of what was in the response to the first claim. Mr Thomson argued that this was an attempt to manipulate the litigation to the claimant's advantage, forcing the respondent to respond to new, unsubstantiated allegations that were strategically introduced after what Mr Thomson asserted was the refutation of the original claims.

Conclusions

33. I may revoke the judgment on reconsideration if I consider it in the interests of justice to do so.

34. I will consider first whether bringing a second claim after withdrawing the first would be an abuse of process, if there was no judgment dismissing the claim, because I consider this relevant to deciding whether it is in the interests of justice to revoke the judgment. I do not consider it could be in the interests of justice to revoke the judgment if the second claim would be struck out as being an abuse of process (under the rule which allows a vexatious claim to be struck out).

35. The second claim contains the same complaints of unfair dismissal as the first claim, both "ordinary" and TUPE "automatic" unfair dismissal. Although the particulars of claim are not identical, I consider the essence of the complaints to be the same. The particulars of the second claim do not suggest, as argued by the

respondent, that the claimant has manipulated the process so that he could present new allegations, with the benefit of having seen the respondent's response to the first claim.

36. The second claim has been presented within the required time limit from the effective date of termination, as extended by the early conciliation period.

37. The claimant has plausible reasons for withdrawing the first claim; being unable to afford legal representation, feeling unable to represent himself and panicking about having to do so. I accept that this was at a time of emotional distress. The medical evidence provided to me is not sufficient to prove that he was suffering from depression at the time. I have no evidence of a dyslexia diagnosis but accept, on the basis of correspondence from the claimant, that he has some difficulty in expressing himself on paper, whether due to dyslexia or language issues, and that this would make it more difficult for the claimant to feel he could represent himself in Tribunal proceedings.

38. Immediately after learning that his claim was treated as having been brought to an end because of his withdrawal, the claimant, with the assistance of Ms Parvez, took steps to try to continue to pursue a claim. The new claim was issued on the same day as the letter from the Tribunal acknowledging withdrawal of the claim. Other correspondence from the Tribunal between the withdrawal and 12 July suggested that the claim was continuing. The claimant and Ms Parvez wrote to the Tribunal explaining why the claimant had withdrawn his claim but wanted to pursue a new claim against the respondent.

39. In these circumstances, I do not consider that it would be an abuse of process for the claimant to pursue his second claim, having withdrawn the first claim, if there was no judgment dismissing the first claim.

40. Before the legal officer dismissed the first claim, the claimant had presented his second claim and he and Ms Parvez had written to the Tribunal making it clear that he wanted to pursue a new claim against the respondent for unfair dismissal. If I was making the decision in the knowledge of those circumstances, I would not consider that it was in the interests of justice to issue a judgment dismissing the first claim, which would prevent the claimant from pursuing his second claim. I consider it in in the interests of justice that I revoke the judgment dismissing the first claim and do so.

41. The second claim can, therefore, proceed. I have issued separate case management orders relating to the case management of the second claim.

Employment Judge Slater

Date: 22 January 2025

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

31 January 2025

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