EMPLOYMENT TRIBUNALS

Claimant: Mr A Oye

Respondent: Tesco Stores Ltd

Heard at: Watford (in person; in public)

On: 6 March 2025

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: In Person
For the respondent: Ms E Wheeler

RESERVED JUDGMENT

1. The time in which to apply for a judge to make a fresh decision about whether to issue a dismissal judgment in case number 3300082/2022 is not extended. The judgment sent to parties on 28 April 2023 is not varied or revoked.

2. Case number 3300082/2022 came to an end by no later than 3 April 2023 (and possibly earlier than that). It cannot be recommenced.

3. It would be an abuse of process for the Claimant to bring complaints (as part of case number 3315267/2023 or at all) which alleged that acts or omissions on or prior to 23 February 2023 were contraventions of the Equality Act 2010 ("EQA") where the protected characteristic was either sex or race.

4. It would be an abuse of process for the Claimant to bring complaints (as part of case number 3315267/2023 or at all) which alleged that acts or omissions on or prior to 4 November 2022 were contraventions of the Equality Act 2010 ("EQA") where the protected characteristic was something other than sex or race.

5. It would be an abuse of process for the Claimant to bring complaints (as part of case number 3315267/2023 or at all) which alleged that there were arrears of pay (whether presented as an unauthorised deduction from wages claim or breach of contract claim) in relation to January 2023 payment from the Respondent or earlier.

6. It would be an abuse of process for the Claimant to bring a complaint (as part of case number 3315267/2023 or at all) which alleged that there had been an unfair dismissal on or before 23 February 2023.

7. It is not an abuse of process for the Claimant to seek rely on any alleged incidents (regardless of the date) to support his argument that there was a constructive dismissal in or around November 2023.

8. To the extent, if at all, that case number 3315267/2023 included any complaints that are identified as being an abuse of process by the judgment above, those complaints are struck out.

REASONS

Introduction

1. This was an in person hearing. I had a bundle of 140 pages. There was the opportunity for the Claimant to be cross-examined by the Respondent about the comments he made to me about reasons for withdrawing Claim 1, but the Respondent did not think that was necessary.

2. I have also taken account of the documents on the tribunal file for this case. The hard copy file for case number 3300082/2022 has been destroyed. I have taken account of such of those documents as have been reproduced and added to the attempted reconstructed file.

3. I also had access to the documents submitted at the previous public preliminary hearing (also before me) on 13 November 2024.

4. The 13 November 2024 hearing had been listed by EJ Dick for the following purposes:

> … the Tribunal will consider the following:
> a. Any application to amend the claim.
> b. Whether the claimant is barred from bringing part of the claim (i.e. issues relating to res judicata and/or abuse of process).
> c. Any application for strike out.
> d. Setting a date for the final hearing (the trial).
> e. Making case preparation orders and settling a list of issues.

5. At that hearing, I scheduled today's public preliminary hearing for the following purposes:

> 4. That hearing may be used to clarify the issues that are in dispute between the parties, and to make any appropriate case management orders, including making or varying orders for the preparation for the final hearing, or in relation to the dates of, or duration of, the final hearing.

> 5. It will continue to work through the matters highlighted in paragraph 3 of EJ Dick's orders from the previous hearing, and might make decisions to strike out all or part of the claim, as set out in those orders, or on any other appropriate basis.

6. Paragraphs 4 to 31 of my summary of the 13 November 2024 hearing (sent to parties on 15 November 2024) give a detailed description of the discussions at that hearing.

7. Prior to that hearing, the Claimant had not complied with case management orders made previously. I made further orders, in particular those at paragraphs 1 and 2 of the document sent on 15 November. The orders had been discussed and explained at the hearing.

8. As set out in that document, the Claimant had to make an amendment application which was to be decided at this 6 March 2025 hearing. Another matter to be decided was the abuse of process argument.

9. It did not appear to me that the Claimant had fully complied with the orders made. There was a discussion about whether it would be appropriate to postpone the decision-making and to set a further date by which the Claimant should comply with the orders. The Claimant did not believe that he would necessarily be able supply any further clarification if given more time, and his preference was that the decision making should be made based on what he had submitted in writing so far, and on what he could say orally during the hearing in response to my questions and/or in response to points raised by the Respondent. In all the circumstances, I agreed to proceed on that basis.

Procedural History for Case Number 3315267/2023 ("Claim 2")

10. On 21 November 2023, the Claimant commenced early conciliation against the Respondent. On 23 November 2023, the early conciliation certificate was issued. On 26 December 2023, the claim was presented to the Tribunal and was allocated case number 3300082/2023. A Notice of Claim letter was sent to the Respondent, and Acknowledgment of Claim letter to the Claimant, on 20 February 2024. I will call this "Claim 2".

11. Within the claim form, the Claimant alleged that he had been an employee of the Respondent between 1 November 2018 and 1 November 2023.

12. Within section 8.1, he ticked the boxes for unfair dismissal and for disability discrimination.

13. Within section 8.2 of the claim form, he stated:

> I have made a claim before in the past and I dropped it due to mental health concerns.

> I have since left the job after the abuse detailed in my previous case continued. This forced me to resign and start up another case.

14. There was no attachment and effectively no other information in the claim form about the intended details of the complaints. (There was a reference number in section 8.2, which was an incomplete extract from the early conciliation certificate number for Claim 1, but neither the extract itself nor the fact that it is incomplete, is relevant to anything that I have to decide.)

15. The Respondent presented a response and Grounds of Resistance which included, among other things:

> 3. The Respondent considers that the doctrine of res judicata applies so as to prevent the Claimant from being able to pursue the Second Claim in so far as it relates to any allegation of discrimination which took place up to and including 7 January 2022, when the Claimant submitted the First Claim.
>
> 5. It is the Respondent's position therefore that any attempt by the Claimant to re-litigate the discrimination complaints made in the First Claim should be barred on the basis of cause of action estoppel, issue estoppel and/or generally on the basis that it is an abuse of process and the Tribunal does not have jurisdiction to hear the Claimant's claims in that regard.

16. Two previous preliminary hearings took place, on 5 September 2024 and 13 November 2024. Case management orders were made at each of those hearings, as well as prior to the first of those hearings.

Procedural history for case number 3300082/2022 ("Claim 1")

17. Previously, the Claimant had contacted ACAS on 21 November 2021 and the early conciliation certificate was issued on 1 January 2022.

18. A claim form had been presented to the Tribunal on 7 January 2022. This claim was allocated number 3300082/2022. Notice of Claim letter and Acknowledgment of Claim letters were sent on 14 February 2022. I will call this "Claim 1".

19. The claim form alleged that the Claimant's employment had started 30 November 2018 and was ongoing. The boxes ticked in Section 8.1 of claim form were for unfair dismissal, race discrimination and sex discrimination, amongst other things. There was no attachment, but section 8.2 contained text, as did sections 9 and 15.

20. The Respondent submitted a response.

21. On 4 November 2022, there was preliminary hearing in private for case management before EJ Wyeth. It listed a final hearing.

22. Amongst other things, the summary included:

> 3. ... The claimant also ticked the box suggesting an arrears of pay claim at 8.1 of the ET1 form. Any such claim was not mentioned further or particularised in any way. Following some discussion the claimant explained that he believed that he had not been paid correctly in May 2021 but, being aware that a claim would be out of time anyway, did not intend to pursue that matter. The respondent defended the claims.
>
> 4. At the start of the hearing I sought to clarify with the claimant the basis for pursuing an unfair dismissal claim given that he continues to be employed by the respondent. The claimant was insistent that he intended to pursue such a complaint. He alleges that around 11 November 2021 he was forced to accept a new temporary flexible contract against his will when, previously, he had been working under a permanent contract requiring him to work 5.5 set hours on a Sunday. The respondent denies acting in this way. It would seem that the claimant is seeking to argue a Hogg v Dover College ([1990] ICR 39) type dismissal. Need it be said, the claimant will have to prove that a new contract was imposed upon him and that in doing so this amounted to the respondent terminating his prior contract in a manner that amounted to a dismissal either expressly or constructively, rather than seeking to vary any existing contract to which the claimant might have acquiesced.

23. Under a heading “The issues”, there was an unnumbered paragraph which read:

> The claims and issues discussed at the preliminary hearing today are set out below. If either party believes them to be wrong or incomplete they must write to the tribunal and the other side within 14 days of this order being sent out, failing which the list will be treated as final unless the tribunal decides otherwise. I now record that the issues between the parties which will fall to be determined by the tribunal are as follows:

24. I do not need to cite extensively from the list of issues set out in that document. Each party received it shortly after it was sent on 10 December 2022, and neither party sought to challenge it.

25. In the bundle for this hearing (6 March 2025), there was a trail of correspondence [Bundle 49 to 41]. It included an email from the Claimant to the Respondent's representative sent Tuesday 21 Feb 2023 at 10:43, which read in full as follows (though I also note and take account of the email exchange up to that date):

> It is also my intention to drop all of the claims except for unfair dismissal.
>
> I have searched Saleh Ahmed’s heart and I did not find racism. I would like for this to be reflected in the pack. The only accusation you will be facing from myself is unfair dismissal.
>
> I will reflect to the judge and I hope that this email serves as evidence.
>
> Saleh Ahmed showed me a love when I really needed it. Although I have serious problems with the way in which he has come across to me, I do not believe he deserves the accusations.

> The reason for these allegations is because of inappropriate language that Saleh has used towards me. Even though this happened, I do not think it was out of malice.
>
> Please let this serve as evidence that the only charge I want to pursue is Unfair Dismissal. I will let you know when I have sent the folder to you.

26. There was no individual respondent to Claim 1 (or to Claim 2), only a claim against the Claimant's employer. The reference to Saleh Ahmed is to a person named in section 8.2 of claim form and in list of issues. For present purposes, I proceed on the basis that both parties regard Saleh Ahmed as (i) an employee of the Respondent and (ii) the Claimant's line manager for some or all of the relevant time period. However, firstly I am making no formal findings of fact about that point, and secondly, the crucial point is that - regardless of Saleh Ahmed's actual status – he was named in the claim form and list of issues as having committed the contraventions of the Equality Act 2010 ("EQA") that are set out in the list of issues at paragraphs 6 and 7.

27. The Claimant sent a follow up 3 minutes later (at 10.46 the same day).

28. 35 minutes after that, the Respondent's representative responded. The Claimant does not allege that there was anything improper about this reply, and, in any event, my decision is that it was reasonable and that it accurately set out the requirements of the Tribunal's rules. The Claimant replied stating, amongst other things:

> I will get this done ASAP.
>
> I am dedicated to putting things right as they should be. Please can you remind me in case I should forget? I have ADHD. Sometimes it is hard for me to remember such things. The folder is ready to go.
>
> Please check up on me tomorrow. In case I forget to send it today. I will send it tomorrow.

29. There was a reminder, after which the Claimant wrote to the Tribunal on 23 February 2023, stating:

> Hello Watford Tribunal and [the Claimant's representative],
>
> I am writing this email to let you know that I will be dropping the case.
>
> The whole case including the unfair dismissal case. The reason is because through my mental health struggles I have realised that the problem has come from my side.
>
> I want to make sure that this case is dropped as efficiently as possible. Forgiveness is the answer
>
> I apologise for the stress I've caused, I have had a lot of stress stored within me.

30. In response to an email from HMCTS, the Claimant replied on 23 March 2023:

> As the claimant I can confirm that I will be withdrawing the claim against the respondent.

31. Then, on 26 March, he wrote:

> I have been thinking and I would not like to completely drop the case.
>
> I would like to drop all claims EXCEPT unfair dismissal.
>
> The reason for my indecision is because I have been in hospital under section 2 of the mental health act.
>
> These circumstances have occurred because of a great amount of stress surrounding many areas of my life.
>
> I will call the tribunal to confirm this within this week.

32. On 3 April he wrote to the Tribunal, copying the Respondent's representative and his mother:

> I was unable to get through to the tribunal. Although I do believe there was a form of constructive dismissal within my case, I do not believe it to be mistreatment from Saleh Ahmed.
>
> I apologise to the tribunal, I have suffered a great deal of mental stress and have been hospitalised because of this under section 2 of the mental health act. I will be completely dropping the case. I am not mentally fit to undertake this case.
>
> I am still employed by Tesco and it is my wish to put this case to bed.
>
> Please close this case. I am sure that this is what it is best for myself and everyone involved in this process. I will try again to get through to the tribunal and I greatly apologise for the differences within my responses as it is due to my own poor mental state.

33. On 28 April 2023, a judgment was sent to the parties. It dismissed the claim on withdrawal and referred to the relevant rules. It was a judgment by a legal officer, and it accurately stated:

> Under regulation 10A(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, because this decision has been made by a Legal Officer, a party may apply in writing to the Tribunal for the decision to be considered afresh by an Employment Judge. Such an application must be made within 14 days after the date this letter/decision is sent to the parties.

34. Prior to Claim 2 being presented, there was no application to the Tribunal in connection with Claim 1, either within 14 days of 28 April 2023 (so by 12 May

2023) or later. The next time the Claimant contacted the Tribunal was the presentation of Claim 2. As mentioned above, the ET1 for Claim 2 referred to Claim 1 by stating that the Claimant had "*dropped it*" and referred to Claim 2 by stating that he was "*starting up another case*". In other words, even the ET1 for Claim 2 did not contain an application that Claim 1 should resume.

35. On 13 November 2024 (so during the previous preliminary hearing) the Claimant submitted an application by email at 13:42) seeking to overturn the April 2023 judgment.

The Claimant's mental health around February and March and April 2023

36. On around 25 February 2023, the Claimant was hospitalised for reasons connected with his mental health. In particular, medical professionals authorised his detention for assessment, based on their opinion that this was appropriate in accordance with Part 2 of the Mental Health Act 1983.

37. The Claimant has not provided the exact date on which he was discharged from hospital. However, he believes it was in March 2023. He returned to work for the Respondent in March 2023.

38. The Claimant worked one day per week for the Respondent (Sunday). I will assume in his favour (without making any formal the finding of fact) that his perception, on his return to work, was that there was a lack of support and a failure to conduct return to work interview. (The comments in this paragraph are not binding on any the Tribunal which deals with the substantive merits of the case, and are simply my assumption for present purposes.)

39. The Sundays in March 2023 were 5, 12, 19, 26.

40. He must have been discharged from hospital prior to 26 March 2023, or else he could not have returned to work within March 2023. On balance of probabilities, he had been discharged prior to Thursday 23 March 2023 (a day on which he emailed the Tribunal).

41. I do proceed on the assumption that, for the period during which the Claimant was hospitalised, he lacked capacity to make decisions in connection with his litigation against the Respondent. I do not proceed on the assumption that his lack of capacity cannot have commenced until the day on which he was hospitalised (which was 25 February 2023); it might have commenced prior to that. It certainly commenced prior to the assessment which led to his being hospitalised, because his behaviour had led to the assessment being arranged.

42. I am not satisfied that the Claimant lacked capacity as of 23 March 2023, or later.

43. On [Bundle 129], there is an extract from the document processing the Claimant's release from hospital. I do not have the date but I am satisfied that it was from earlier than 23 March 2023. (Even on the Claimant's own case, he was discharged from hospital in March). The document includes the paragraph:

> He has capacity to understand information, retain, process, weigh and communicate decision, as he Is relatively stable In mental state arid no more in mental health crisis he is discharged from the BCRHTT for continuous support by his CMHT.

44. I do take into account that this document was not prepared to comment on whether the Claimant had capacity to make decisions affecting employment tribunal litigation. However, it says what it says, and it does not express any limitation on the Claimant's capacity to do the things mentioned.

45. Furthermore, and in any event, by Monday 3 April 2023, the Claimant had been out of hospital for a significant period of time, and had done at least two Sunday shifts back at work for the Respondent.

46. The Claimant had assistance from his mother during Claim 1, and some correspondence from the Tribunal was sent to the Claimant's mother's address. This was an address which the Claimant had nominated and the Claimant remains on good terms with his mother.

47. Regardless of whether the Claimant knew the technical details of which rules applied, he was aware that he had ended his claim. He did not believe that it was ongoing, or merely on hold.

Relevant Law

48. Strike out is covered by rule 38 of the of the Employment Tribunals Rules of Procedure 2024.

> **38.— Striking out**
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response 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 or the respondent (as the case may be) 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).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

49. It is well established that striking out a claim is a draconian step. The consequence of strike out is that the claim is struck out without being considered on the merits; therefore, strike out should only be ordered in clear cut cases.

50. When there are allegations of breach of the Equality Act, or breach of whistleblowing protection, it is particularly important that the tribunal should be slow to strike out claims without consideration of the merits. That is a principle made clear by Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391, for example.

51. The principles were summarised by the Court of Appeal in the case of Mechkarov v Citibank N.A [2016] ICR 1121:

    (1) Only in a clear case should a discrimination case be struck out;

    (2) Where there are core issues of fact that may require a decision to be made based on oral evidence then decisions should not be made without hearing oral evidence

    (3) A strike out hearing should not turn into a mini trial of disputed facts (and oral evidence about disputed facts is not usually appropriate at a strike out hearing).

    (4) On the contrary, the claimant's case should be taken at its highest.

    (5) It is only if the claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents that the strike out decision should be made on the basis that the Claimant has no reasonable prospect of proving the disputed primary facts.

52. The time and resources of Employment Tribunals are not to be taken up by hearing evidence in cases that are bound to fail. Strike out provisions exist for a reason, and the principles which establish that there is a high bar before a strike out decision is made do not imply that strike out can never be appropriate in a discrimination or whistleblowing case.

53. In any case in which a party is not legally, it is important for the judge - before deciding any strike out - to take the time and effort to make sure that they have clearly understood the claim and that the claimant has had a chance to explain it properly.

54. That does not only require asking the claimant questions about the claim (although that is part of it). It requires the judge to spend time looking at all of the background material that is available.

55. It is important to pay attention to the provisions of the Equal Treatment Bench Book and bear in mind that litigants in person potentially may make errors that a lawyer would not make in the way that they set out the claim. They might not identify correctly for example legal principles, but the judge should try to understand what legal principles underlie the allegations that are being made. As was summarised in Cox v Adecco,

> (1) No-one gains by truly hopeless cases being pursued to a hearing;
>
> (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate
>
> (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
>
> (4) The Claimant's case must ordinarily be taken at its highest;
>
> (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;
>
> (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;
>
> (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;
>
> (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;
>
> (9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

56. As summarised in Virgin Atlantic v Zodiac Seats [2013] UKSC 46, res judicata is a term which is used to describe a number of different legal principles with different origins.

57. In terms of one of those, Henderson v Henderson abuse of process, Virgin quoted the earlier case of Johnson v Gore Wood as to the correct approach. I set out some citations in the analysis below.

58. It is not possible to comprehensively list all the possible forms of abuse, but a broad merit based approach should be taken rather than separately first deciding the party's conduct was the type of abuse of process identified in Henderson and then separately and later deciding whether that abuse could be excused or justified by special circumstances.

59. In the 2024 version of the Employment Tribunals Rules of Procedure, Rules 50 and 51 read as mentioned below. The 2013 version (which was the version in force as of February to April 2023) was numbered differently, but the wording of the two rules headed, respectively, "End of claim" and "dismissal following withdrawal" was the same as the corresponding rule in the 2024 version.

> **50. End of claim**
> Where a party advancing a claim informs the Tribunal, either in writing or in the course of a hearing, that their claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the party responding or replying to the claim may make for a costs order, preparation time order or wasted costs order.
>
> **51. Dismissal following withdrawal**
> Where a claim, or part of it, has been withdrawn under rule 50 (end of claim), the Tribunal must issue a judgment dismissing it (which means that the party advancing it may not commence a further claim against the party responding or replying to it raising the same, or substantially the same, complaint) unless—
> (a) the party advancing the claim 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.

60. As per the logic of the decision of the Court of Appeal in Khan v Heywood and Middleton Primary Care Trust (2006] EWCA Civ 1087) (a case decided under a previous version of the rules), the Tribunal does not have a discretion to set aside a claimant's notice of withdrawal. Under Rule 50, the Tribunal must simply make a finding of fact as to whether or not the claimant has informed the Tribunal that the claim (or part of it) is withdrawn. If so, that means that Rule 50 has automatically operated to bring the claim to an end from the point at which the Claimant so informed the tribunal.

61. The discretionary part of the decision is under Rule 51, which requires a decision about whether a dismissal judgment should be issued. A decision to decline to issue such a judgment does not mean that the claim continues (because, as a result of Rule 50, the claim has already come to an end).

62. Rule 5 includes:

(7) The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.

63. Rule 6 includes:

6.— Irregularities and non-compliance

(1) An irregularity resulting from a failure to comply with any provision of these Rules, a practice direction, or any order of the Tribunal does not of itself render void the proceedings or any step taken in the proceedings.

(2) In the case of non-compliance with these Rules, any practice direction or any order of the Tribunal, the Tribunal may take such action as it considers just, which may include any of the following—

(a) waiving or varying the requirement;

(b) striking out the claim or the response, in whole or in part, in accordance with rule 38 (striking out);

(c) barring or restricting a party's participation in the proceedings;

(d) awarding costs in accordance with Part 13 (costs orders, preparation time orders and wasted costs orders).

(3) This rule does not apply to rules 10, 17(1), 24(1) or 26(1), or an order made under rule 28(1)(b), 29(1)(b), 39 or 40.

64. Any decision to extend time under Rule 5 and/or to waive a requirement under Rule 6 has to made taking account of the overriding objective and of the interests of justice. I mention some cases giving further guidance in the analysis below.

65. Reconsideration of judgments is dealt with under Part 12 of the 2024 Rules. Rule 69 specifies a time limit of 14 days for applying for reconsideration of a judgment.

66. I have taken account of the employment tribunal's "Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal Proceedings". The document includes the following passages, amongst others:

35. All judges must have regard to the guidance as to good practice provided in the Equal Treatment Bench Book published by the Judicial College and regularly updated. …

37. The vulnerable status of a party might give rise to a question about their mental capacity to conduct legal proceedings. There is no express provision dealing with this issue in the Employment Tribunal procedural rules (for example, for the appointment of a litigation friend). Nevertheless, the tribunal may use its general case management powers in rule 29 of its procedural rules to appoint a litigation friend

67. The footnote to paragraph 37 refers to the EAT decision Jhuti v Royal Mail Group Ltd [2018] ICR 1077 EAT. The guidance in that case includes:

> 39. ... The CPR do not apply in the Employment Tribunal or Employment Appeal Tribunal. Nevertheless the special provisions contained in CPR 21 provide guidance that is relevant by analogy to the approach to be adopted by employment tribunals where the question of appointment of a litigation friend arises. There are a number of important principles identified by and referred to in CPR 21 that are relevant and seem to me to be capable of being applied by analogy:
>
> (a) First and foremost, a person is assumed to have capacity unless it is established that they lack capacity. The assumption of capacity can only be overridden if the person concerned is assessed as lacking the mental capacity to make a particular decision for themselves at the relevant time: see the Mental Capacity Act 2005, s.3, which provides a formula to be used in making that assessment. The burden of proof is on the person who asserts that capacity is lacking and if there is any doubt as to whether a person lacks capacity, that is to be decided on the balance of probabilities: see s.2(4) Mental Capacity Act 2005 .
>
> (b) Secondly, a person should not be permitted to act as a litigation friend unless he or she can fairly and competently conduct proceedings on behalf of the protected party and has no personal interest in the litigation or an interest adverse to that protected party.
>
> (c) Thirdly, an application for an order appointing a litigation friend must be supported by evidence demonstrating that the person to be appointed is suitable and consents to act. Evidence must also be provided establishing the basis of the litigation friend's belief that the party lacks capacity to conduct the proceedings

68. Chapter 5 of the Equal Treatment Bench Book comments on capacity issues. I note the full contents, which include, among other things:

> 6. The law gives a very specific definition of what it means to lack capacity for the purposes of the Mental Capacity Act (MCA) 2005. It is a legal test, and not a medical test, and is set down in s.2(1) MCA 2005, which provides that: “a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in, the functioning of the mind or the brain”
>
> 11. Where doubt is raised as to mental capacity, the question to ask is not, “Are they capable?” or even, “Are they incapable?”, but rather, “Are they incapable of this particular act or decision at the present time?”
>
> 43. In case of dispute, capacity is a question of fact for the court to decide on the balance of probabilities, with a presumption of capacity. Evidence should be admitted not only from those who can express an opinion as experts, but also those who know the individual.

69. The guidance mentioned above is specifically in connection with how to approach a decision about appointing a Litigation Friend. In this case, the Claimant currently has capacity, and the appointment of Litigation Friend is neither necessary nor appropriate. However, as noted in the guidance, where a party who lacks capacity takes a step in connection with litigation, then that step might be treated as invalid. The guidance is of some assistance to the approach that an employment tribunal should take when capacity is raised as an issue; that is, where it is alleged that because of past lack of capacity, at a particular point in time, a step in the litigation was invalid.

Analysis and Conclusions

Sequence of the decisions for me to make

70. A judgment was sent to the parties on 28 April 2023. Unless that is varied or revoked, then that judgment establishes that (i) Claim 1 was withdrawn (in accordance with the Rules, which were the 2013 Rules at the time) and (ii) it was formally dismissed.

71. Thus, unless that judgment is varied or revoked, my own opinion about whether Claim 1 was withdrawn is irrelevant, because the effect of the judgment is that it was withdrawn.

72. For the reasons explained in due course below, I have decided that the judgment is not varied or revoked.

73. However, for ease of exposition, I will comment on the withdrawal first. For the reasons set out immediately below, my opinion is that there was a valid withdrawal. My decision that the April 2023 judgment dismissing Claim 1 remains effective is the primary reason that the legal status of Claim 1 is that it was dismissed following a withdrawal. However, my own assessment that there was a withdrawal is significant for two reasons:

    73.1. Even if I had decided to revoke the judgment sent to parties on 28 April 2023, and to make a new decision, that new decision would still have been that Claim 1 had been withdrawn. (Albeit, in that hypothetical scenario, I would have had to decide whether to issue a judgment dismissing it, or not.)

    73.2. Had it been my opinion that the Claimant's communications to the Tribunal in February, March, April 2023 did not amount to a withdrawal, that would have been relevant to my decision as to whether to grant an extension of time to enable the Claimant to have a judge take the decision afresh as to whether to issue a dismissal judgment (and, indeed, to make a fresh decision as to whether Claim 1 had come to an end as a result of the emails sent in that period).

Withdrawal Issue

74. The Claimant's email to the Tribunal on 23 February 2023 was clear enough on its face to amount to an unequivocal withdrawal of the entire claim.

74.1. I note the use of future tense ("*I will be dropping …*"). However, taking the email as a whole, its meaning was to inform the Tribunal (and the Respondent, who was copied in) that the claim was over. Read objectively, the Claimant was not simply giving notice that he would send a later email to withdraw, but was making clear that the email itself was notification that the claim was withdrawn. Although a tribunal clerk asked for clarification, the wording of the 23 February email was already clear.

74.2. Generally speaking, a claimant who withdraws their case cannot cancel that withdrawal. The Respondent's stance on the matter is effectively irrelevant, because the withdrawal operates automatically at the point in time that the Tribunal receives the withdrawal.

74.3. That being said, if a claimant lacked capacity to make a decision to withdraw their claim, then that step would have no effect.

74.4. Put another way, while (what is now) Rule 50 (previously Rule 51 in the 2013 rules) simply requires a factual determination as to whether a communication amounts to a withdrawal, if there is a legal determination that the claimant lacked capacity (to make a decision to withdraw) at the relevant time, then the specific wording of the communication becomes irrelevant. The fact that it would have amounted to a withdrawal if sent by a person with capacity is insufficient. The lack of capacity prevents Rule 50 applying.

75. The email was sent two days before medical professionals decided that the Claimant should be admitted to hospital for assessment. I am satisfied that, as of the dates of that decision (so 25 February 2023), the Claimant would not have had capacity to withdraw. In itself, that does not necessarily show that he lacked capacity on 23 February 2023.

76. Four days prior to the enforced hospitalisation, on 21 February 2023, the Claimant had expressed an intention to withdraw the claims barring unfair dismissal. So the 23 February email was consistent with the intention expressed on 23 February, barring the fact that on 23 February he stated that he was withdrawing the whole claim (including unfair dismissal). There is no expert evidence, and no evidence from the Claimant's friends or family, to show that he lacked capacity on 21 February (though the Claimant informed me, and it is my finding, that the events which led to the hospitalisation were that the Claimant's friends and family contacted the relevant authorities because they were concerned for his welfare). On the face of the Claimant's emails on 21 and 23

February, the wording does not demonstrate any irrationality; on their face, they tend to show that he understood what the case management orders required and that he was interacting with the Respondent's representative with a view to complying with them. The nearest that the wording of emails come to suggesting any question mark over capacity is the Claimant's comment that he might forget to write to the Tribunal to withdraw, and that the Respondent's representative might need to remind him. He suggested that that was connected to ADHD.

77. Even if it were hypothetically the case that, on 23 February 2023, the Claimant lacked capacity, he was subsequently discharged from hospital. The onus is on the Claimant to show that he lacked capacity and he has not proven the exact date on which he was discharged, or provided any medical evidence to suggest that he lacked capacity after he was discharged.

78. The Respondent is a major supermarket chain. The Claimant's job required him to sell mobile phone handsets and contracts to customers at one of the Respondent's branches. It was a job which required special training over and above that given to other sales assistants. He returned to work in March 2023. I take into account that it was only one day a week, and I take into account that the Claimant alleges that there was a lack of support and a failure to conduct a proper return to work interview promptly on his return. I take into account that the Claimant reached an agreement with another employer (for whom he worked on days other than Sundays) that they would pay him up for the remainder of his fixed-term contract without requiring him to work. However, he had not provided, for example, a GP Fit Note to say that he was not fit to work for that other employer.

79. I am not persuaded that the Claimant lacked capacity when he wrote to the Tribunal on Thursday 23 March 2023 and repeated that the claim was withdrawn. (Again, he used the future tense, but in context he <u>was</u> stating that the claim was at an end, and he was <u>not</u> merely expressing an intention to take future action to withdraw).

80. However, in any event, having sent a further email on 26 March, he wrote again on 3 April 2023. The evidence as a whole shows that the Claimant did have capacity by that date. Even on the face of the email, he was able to reflect about the reasons for his indecision. By this date, he had had at least two shifts back at work.

81. So, over a period of around 41 days (21 February 2023 to 3 April 2023), the Claimant wrote several emails about withdrawal. The first were to the Respondent's representative only, and not to the Tribunal. Some expressed the intention to keep the unfair dismissal claim going, and to withdraw only the other claims. Although there was a period in which the Claimant lacked capacity, even

if that period commenced on or before 21 February 2023 (which had not been proven) it certainly ended prior to 3 April 2023.

82. If the email at 10.29am on 23 February 2023 withdrew the claim, then, as a matter of logic, no later email "withdrew" the claim because it had already ended automatically at 10.29am on 23 February 2023. Whereas, if not previously withdrawn, if the email at 12.31pm on 23 March 2023 withdrew the claim, then no email later than that "withdrew" it. I do not rule out that the claim ended at 10.29am on 23 February 2023 or, failing that, that it ended at 12.31pm on 23 March 2023. In other words, I do not decide that the Claimant lacked capacity at the time of those emails. However, for present purposes, it suffices to say that, if the claim had not previously been brought to an end, then, at the very latest, it came to an end at 21:23 on 3 April 2023. I do decide that the Claimant had capacity at that time, and that he unambiguously communicated that Claim 1 was withdrawn. Furthermore, he withdrew it because he intended to completely end the litigation; he was not intending to bring a new claim in the future.

Judgment dismissing Claim 1

83. A dismissal judgment was subsequently issued by a legal officer. It was sent to the representative named in the Claimant's claim form for Claim 1, namely his mother. The judgment was clear on its face. It communicated unambiguously that the whole claim was at an end.

84. I do not think that "reconsideration" (under what is now Part 12 of the 2024 rules) comes into play. If it did, then – since the Claimant did not apply for "reconsideration" by 12 May 2023 – one of the things I would have to decide would be whether to extend time for an application to be made. Although the rules allow the Tribunal to reconsider of its own initiative (and there is no time limit for that), a reconsideration is not of the Tribunal's own initiative if it is in response to an application by a party.

85. Where a judgment is issued by a legal officer (as opposed to by a judge), then "reconsideration" is not the correct approach for a challenge to the judgment by a party who disagrees with the decision. Rather than having to apply for the judgment to be revoked, the party has the automatic right to have the judgment nullified, and to have the decision taken afresh by a judge. In other words, the judge is not deciding whether there is a good enough reason to change an earlier decision, and the principles about finality of judgments do not come into play. Rather the judge is simply taking the same approach that the judge would have taken if the legal officer's decision had never been made in the first place.

86. Everything mentioned in the previous paragraph, however, depends on the party making an application for a fresh decision by a judge within 14 days of the legal officer's judgment having been sent to the parties. That was not done in this

case, and so I need to decide whether to exercise the powers granted by Rules 5 and 6, to extend the time period and/or to waive or vary any of the procedural requirements for applying for a judge to make a fresh decision.

87. I note that the Claimant says that he personally did not receive the judgment. However, I am satisfied that his mother did. On his own account, he remains on good terms with his mother. I am not satisfied that the Claimant's mother failed to tell him about the judgment (regardless of whether or not she actually supplied a copy to him). In any event, I am satisfied that the Claimant was aware that, by his actions, he had ended Claim 1. This is not a case where (for example) a party is stating that they wrongly believed that they had (say) 21 or 28 days to challenge the decision, and that they would have challenged it within 14 days had they actually seen the judgment itself (or the covering letter). On the Claimant's own account, at around the time the judgment was issued, he had no intention of seeking to continue Claim 1 (or any other claim) against the Respondent. The Claimant would not have asked a judge to make a fresh decision within 14 days regardless of whether he knew that that was the time limit or not. (Although I have not heard evidence from the Claimant's mother, I also think it is more likely than not that she did mention the contents of the judgment - including the time limit – to him.)

88. As the contents of Claim 2 make clear, when the Claimant presented Claim 2, on 26 December 2023, he was not under the illusion that he was still in time to challenge any decision about the end of Claim 1.

89. Prior to Claim 2, he contacted ACAS on 21 November 2023. So around 6 months after the dismissal judgment for Claim 1 was sent to parties, the Claimant decided that he might wish to bring a new claim against the Respondent.

90. The Claimant did not contact the Tribunal about the fact that Claim 1 had been brought to an end either on 21 November, or within 14 days of then. More than 5 weeks went by before Claim 2 was presented. Even then, there was no request that Claim 1 should continue. Rather, there was an acknowledgement that the Claimant was seeking to present a new claim, with effect from December 2023, so more than 10 months after the 23 February email about withdrawal and more than 8 months (almost 9 months) after the 3 April email about withdrawal.

91. Rule 3 (the overriding objective) must be taken into account when deciding whether to extend time:

> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing,

> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues,
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings,
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues, and
>
> (e) saving expense.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules, or
>
> (b) interprets any rule or practice direction.

92. In Dean-Verity v Khan Solicitors Ltd [2022] EAT 128, the Employment Appeal Tribunal considered an appeal against a refusal to extend a time limit set by the rules (in that case, it was seeking an extension of a 14 day time limit by several years). On the facts, the EAT decided that there had been inadequate attention paid to the prejudice to the Claimant of failing to extend. The correct approach to deciding whether to exercise the power under Rule 5 included the necessity to assess the prejudice to the Claimant (of not extending) as well as the prejudice to the Respondent (of extending) and weighing the respective prejudices.

93. The EAT commented:

> … of course, the delay and the lack of good reason for it are absolutely central to the question whether time should be extended but the prejudice to the claimant of not extending time needs to be weighed properly in the balance and cannot be discounted beforehand because it is also caused by the claimant's delay.

94. In Ezi Floor Trading LLP v Ul-Haq UKEAT/0053/15, the EAT stated:

> It is clear from the authorities, to which I have been referred … that in considering an application for an extension of time for a reconsideration of Tribunal's decision, one of the factors to be taken into account in deciding whether to grant an extension of time is "the merits factor". That is a separate and additional matter to the question of the prejudice, respectively, to the parties of either granting the extension of time or refusing the extension of time. That principle is exemplified in the case of Kwik Save Stores Limited v Swain [1997] ICR 49, in particular at page 55, C to H

95. Ezi was specifically considering circumstances in which a party wanted to have judgment set aside, and a late response to the claim accepted.

96. In both Ezi and Dean-Verity, the EAT made clear that it did not regard the approach set out in Kwik Save as being limited to decisions about whether to grant an extension of time for presentation of a late response, but as setting out guidance that was generally applicable to considering extension of time limits

fixed by the rules. In that case, the EAT's guidance to the exercise of discretion included (my emphasis):

> The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. ... In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.
>
> In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. The process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice. **An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer if the extension is granted?** If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other party, then that is a factor in favour in granting the extension of time, but it is not always decisive. ….
>
> **It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factor** identified by Sir Thomas Bingham M.R. in Costellow v. Somerset County Council [1993] 1 W.L.R. 256:
>
> > *"a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate."*
>
> Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a notice of appearance, the industrial tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed. This does not mean that a party has a right to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. **The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case**.

97. In this case, I reject the Claimant's argument that (part of) the reason for a delay in making an application that the legal officer's decision be disregarded, and that

a judge make the decision afresh (or, more generally, in making any application to challenge the judgment) had anything to do with not receiving a copy of the judgment and/or the covering letter. It was sent to his nominated representative (his mother) and I am not satisfied that his mother failed to mention the contents to him.

98. However, even if I am wrong, and even if the Claimant's mother failed to mention the documents to him (whether because she did not receive them – which is contrary to my findings – or for any other reason), the Claimant's lack of receipt of the judgment was not his reason for failing to challenge the fact that the Tribunal had made a decision that his claim had come to an end.

99. The reason that the Claimant did not challenge the decision at the time was that he did not want to challenge it. He had deliberately decided to withdraw the claim, and he had written to the Tribunal (and to the Respondent's representative) several times about that. Although he equivocated about whether to withdraw the unfair dismissal part of the claim, by 3 April 2023, he had decided to withdraw the whole claim (including unfair dismissal) and he had not changed his mind by 28 April 2023 (when the judgment was sent to the parties) or by 12 May 2023 (which was the expiry of the 14 day time limit).

100. Thus the Claimant's explanation for the delay boils down to the fact that he chose to withdraw the claim at the time, and that he later changed his mind, and that he did not change his mind until several months later, which was after the 14 day deadline (in what is now Rule 7) had elapsed.

    100.1. In relation to the former part of that (his decision to withdraw the claim) he points to the fact that his mental health was strained at the time (which is proven by the fact that medical professionals decided that he should be hospitalised for assessment) and the fact that he had too much on his plate to go ahead with the litigation and that he hoped things would improve at work.

    100.2. In relation to the latter part (the change of mind), he makes the assertion that – contrary to his hopes – matters did not improve at work, and that what he regards as bad treatment by the Respondent continued, and that it was reasonable that he did not change his mind straight away.

101. In terms of the merits of the Claimant's application, I will mention in passing that the legal officer's decision cannot be faulted. The Claimant had withdrawn the claim, and had not expressed any wish to bring a further claim. He had already been contacted (by an Administration Officer) in response to his February withdrawal, and there was no need for the legal officer to make any further enquires to try to find out if there might be some reason that it was not in the interests of justice to issue a dismissal judgment.

102. Of course, on the hypothesis that the Claimant had contacted the Tribunal within 14 days, a judge would be making the decision afresh. The judge would not merely be reviewing the legal officer's decision. Furthermore, the judge would not be limited to merely considering the material available to the legal officer on 26 April 2023, but have been able to – and obliged to – take into account any information available to the judge as of the date the fresh decision was made.

103. Had the application (for a fresh decision to be taken under what was then Rule 52, and is now Rule 51) been made without the Claimant expressing an intention (as part of the application) that he wanted to bring a new claim against the Respondent, then it is likely that a judge – if considering the matter afresh – would have decided that a dismissal judgment should be issued. It is hypothetical, but it is hard to see what would have led the judge to decide that it was not in the interest of justice to issue a dismissal judgment in those circumstances.

104. Had it been the Claimant's opinion, around April/May 2023, that he wanted to bring a new claim against the Respondent, and had he written to the Tribunal to say so (either before the legal officer issued the judgment, or when asking a judge to take a fresh decision) then he may well have persuaded the judge to decline to issue a dismissal judgment. However, around April/May 2023, he would not have said he wanted to bring a new claim, because that was not his intention at the time. Therefore, around April/May 2023, there was not a good chance of persuading a judge not to issue a dismissal judgment (under Rule 52, as it then was) because the likelihood is that a judge would have decided there no reason (or no sufficient reason) to depart from the general rule that a dismissal judgment is issued after a withdrawal.

105. So, in terms of merits, had the Claimant applied, on or before 12 May 2023, for a judge to make a fresh decision, the fresh decision would have been to dismiss Claim 1. That being said, when considering whether to grant an extension of time, I have to think about the merits of the underlying application succeeding if time were to be extended. So I have to take into account the fact that the Claimant has now changed his mind, and does seek to bring a new claim.

106. In terms of prejudice, as I pointed out to the parties during the hearing, the effect of a decision – in reliance on paragraphs (a) or (b) of Rule 52 (now Rule 51) - to decline to issue a judgment dismissing Claim 1 is not that Claim 1 would have continued. Claim 1 would still be at an end in those circumstances. In order for Claim 1 to have continued, there would have had to have been a decision that the conditions in Rule 51 of the 2013 Rules had not been met. That is, the claim was not "come to an end"; there was no "withdrawal".

107. However, even if time was extended (under Rule 5) so that the Claimant could exercise the right (under what is now Rule 7) to have the decision (under what is now Rule 51) taken afresh, then - regardless of what the decision under Rule 51

would be – the decision (under what is now Rule 50) is likely to be the one mentioned above. That is, the decision would be that Claim 1 had come to an end (no earlier than 23 February 2023 but no later than 3 April 2023).

108. So the maximum prejudice to the Claimant if I do not extend time is that he is left with a judgment that Claim 1 was formally dismissed, rather than a situation where Claim 1 had come to an end, but there was no dismissal judgment. (As I say, that is the maximum prejudice; the minimum prejudice would be that he is left with the legal officer's April 2023 judgment dismissing the claim, rather than a 2025 judgment from me dismissing the claim.)

109. The complaints that made up Claim 1 (as shown in list of issues in EJ Wyeth's summary following the 4 November 2022 preliminary hearing) were all complaints that were exclusively with the jurisdiction of the Employment Tribunal. In other words, the existence of a dismissal judgment has not affected the Claimant's hypothetical ability to pursue those complaints in a different court or tribunal, because he could not do that anyway.

110. Even in the absence of a judgment dismissing Claim 1, the Claimant would not have the automatic right (having started Claim 2) to introduce, as part of Claim 2, the complaints that had formed part of Claim 1.

    110.1. He would still have to deal with any res judicata or abuse of process arguments. I address those matters later in these reasons.

    110.2. Furthermore, he would still have to deal with any arguments that time limit arguments would mean that there were no reasonable prospects of success for the complaints that had formed part of Claim 1, given that – on this hypothesis – as part of Claim 2, they would have been presented at least 3 years after the latest of the alleged incidents. I take into account that the Claimant would be likely to argue that later acts and omissions (forming part of Claim 2) formed part of a continuing act, and/or that there would be grounds for a just and equitable extension of time.

111. I therefore consider that the issue of what prejudice there is to the respective parties cannot be decided without considering the questions:

    If there was a judgment dismissing Claim 1, could the Claimant, as part of Claim 2, go forward to a final hearing with (some or all) of the complaints had formed part of Claim 1.

    In the absence of a judgment dismissing Claim 1, could the Claimant, as part of Claim 2, go forward to a final hearing with (some or all) of the complaints had formed part of Claim 1.

If there was a judgment dismissing Claim 1, could the Claimant, as part of Claim 2, go forward to a final hearing with complaints about matters that had NOT formed part of Claim 1, but were, in fact, based on acts and omissions which pre-dated the end of Claim 1.

In the absence of a judgment dismissing Claim 1, could the Claimant, as part of Claim 2, go forward to a final hearing with complaints about matters that had NOT formed part of Claim 1, but were, in fact, based on acts and omissions which pre-dated the end of Claim 1.

112. It therefore seems that sensible to deal with res judicata and abuse of process issues first.

Res Judicata

113. In Bon Groundwork Limited v Foster [2012] EWCA Civ 252, the court of appeal held that – on the facts - the Claimant, bringing a second claim, was not bound by a purported decision in an earlier claim about the reasons for his dismissal. Res judicata did not apply because (amongst other things) the (alleged) reason for the Claimant's dismissal had not been an "essential ingredient" of the first claim. It was noted that:

> 4. ... The principle of res judicata can be summarised as follows: where an issue has been litigated before a judicial body and determined as between the parties, it cannot be re-opened. It is binding as between them and the parties are estopped from re-opening it. The issue may be one of fact or of law. However, the parties are only bound by an issue which it was necessary for the court to determine in the earlier claim. In Arnold v. National Westminster Bank plc [1991] 2 AC 93 Lord Keith of Kinkel observed that the principle applies where:
>
> > *"…a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue."*

114. That particular usage of the phrase "res judicata" has to be considered in light of the Supreme Court's later summary in paragraph 17 of Virgin.

> Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. ...
>
> 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. …
>
> 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 … in Henderson v Henderson (1843) ..., 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 with the possible exception of the doctrine of merger.

115. So the decision in Foster, was based on the "first principle" and the "fourth" from the list above. Each of those principles rely on a decision having been made by the earlier court (and the decision in Foster was to the effect that no relevant decision had been made by the earlier court that prevented the relevant issues being raised in the second claim).

116. In this case, the matters potentially raised by Claim 1 came to an end in different ways.

    116.1. The specific matter of arrears of pay could not go further after the decision by EJ Wyeth on 4 November 2022 that the Claimant had confirmed that he was not pursuing that matter. That was a judicial decision.

    116.2. Similarly, any argument that Claim 1 did present claims other than those in EJ Wyeth's list of issues could not go further after the hearing on 4 November 2022. That was a judicial decision (a case management decision) that was not challenged during Claim 1, and was binding on the parties.

    116.3. The complaints that were identified in list of issues came to an end when Claim 1 was withdrawn. However, the only judicial decision about the outcome of those complaints was the legal officer's dismissal judgment.

117. So, in the absence of the legal officer's judgment for Claim 1, the fifth and sixth principles (only) from the list in Virgin might be relevant, but the others would not apply [Khan v Heywood and Middleton Primary Care Trust decided that the withdrawal of a claim, without a dismissal judgment, was not a judicial act giving rise to cause of action or issue estoppel]. However, the existence of the legal

officer's judgment for Claim 1 potentially means that the first, third and fourth principles would also have to be considered [Barber v Staffordshire County Council 1996 ICR 379, CA, decided the effects of a dismissal judgment.[1]]

118. That being said, as exemplified by the discussion in paragraphs 20 to 22 of the Supreme Court's decision in Virgin, the same "flexibility" that is open to a court in a later case when deciding whether the fifth principle (a Henderson v Henderson argument) prevents the later case from dealing with a particular complaint or argument is open to the court when deciding whether the fourth principle (issue estoppel) has that effect.

119. The correct approach to that "flexibility" was to be found in the earlier decision in Johnson v Gore-Wood & Co [2002] 2 AC 1, specifically the passage (emphasis added):

> 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.

120. This "flexibility" does not apply, however, to the first of the principles listed in Virgin. Where the existence or non-existence of a cause of action has been decided in earlier proceedings, the only route is to seek to appeal against (or seek reconsideration of) the earlier decision. It is not possible to bring a separate later claim which seeks to obtain an outcome on that same cause of action, even if relying on new evidence or arguments, or purporting to give an explanation as to personal circumstances which affected the outcome of the earlier case.

[1] In Srivatsa v Secretary of State for Health, the Court of Appeal held that the mere facts alone that a claimant's withdrawal was followed by a dismissal judgment, and was in circumstances such that the employment tribunal claims had been clearly abandoned, did not necessarily prevent claims being presented outside the employment tribunal. However, I do not need to consider that point further, since Claim 2 is an employment tribunal claim.

121. The “broad merits based approach” does require consideration of all the relevant circumstances. If a claimant had unequivocally intended to abandon a claim (which came to an end without a dismissal judgment) then that will be relevant, though so will the reasons for the abandonment; bringing one set of proceedings to an end with the intention of issuing a new claim in a different court is significantly different to abandoning claims having formed a decision that they will not succeed. A scenario in which the reasons for abandoning the claim (especially if the intention was to bring a fresh claim) were communicated to the other side before, or at the point of, the withdrawal might be relevantly different to the scenario in which there was no such communication (though, either way, the tribunal dealing with the proposed later claim that will have to make findings of fact about the reasons for the withdrawal, if there was no judicial decision in the earlier claim which determined that point.)

122. As in Gore-Wood, where a claimant states that there were valid reasons for not pursuing a particular complaint in the earlier proceedings, those reasons have to be analysed. These would be the reasons (a) for not including the complaint in the claim form as presented [for acts/omissions that pre-date that claim form] and/or (b) for not making an amendment application to add the complaint [for later acts and omissions, or when there was a change in circumstances after the first claim had been presented]. A claimant might have good tactical reasons for their decision, such as not being able to afford to purse all of their complaints at the same time, or such as not wanting to delay the outcome on some matters that could potentially be dealt with quickly by tying them up with matters that would take a long time to come to trial. The fact that the claimant’s reasons for not including particular matters in a claim 1 (and putting them in a claim 2 instead) are sensible and rational will not mean that the court or tribunal inevitably decides that there was no abuse of process. However, the underlying policy is to seek finality of litigation and to avoid respondents unnecessarily having to face duplicate proceedings. The policy is not intended to render it completely impossible to bring a second set of proceedings (covering ground that could legitimately have been included in the first set of proceedings) because there will sometimes be legitimate reasons for that approach.

123. In this case, one of the stated reasons, which the Claimant communicated to both the Tribunal and the Respondent at the time, for withdrawal of Claim 1 was his mental health. However, while the second paragraph of his 3 April email expressed the opinion that he was not well enough to continue with the claim, even in that email he did not say that he would like to pause the litigation until he was well enough. Even in that email, he stated:

> Although I do believe there was a form of constructive dismissal within my case, I do not believe it to be mistreatment from Saleh Ahmed.

124. He had earlier said (on 23 February)

> The reason is because through my mental health struggles I have realised that the problem has come from my side

125. To the Respondent, though not to the Tribunal, he had said (on 21 February 2023):

> I have searched Saleh Ahmed's heart and I did not find racism. I would like for this to be reflected in the pack. The only accusation you will be facing from myself is unfair dismissal.
>
> I will reflect to the judge and I hope that this email serves as evidence.
>
> Saleh Ahmed showed me a love when I really needed it. Although I have serious problems with the way in which he has come across to me, I do not believe he deserves the accusations.
>
> The reason for these allegations is because of inappropriate language that Saleh has used towards me. Even though this happened, I do not think it was out of malice.

126. Thus, at the time, the Claimant was expressly stating that he did not believe the claims of race discrimination (as itemised in EJ Wyeth's list of issues) should succeed. I am satisfied that even though the emails do not expressly refer to the sex discrimination allegations as well, by implication the Claimant is also confirming that he has decided that they ought not to be upheld on the merits.

127. To the extent that the Claimant now wishes to argue that the complaints of sex discrimination or race discrimination (as itemised in EJ Wyeth's list of issues) should proceed, should be decided on the merits, and should be resolved in his favour, he does not claim to have come into possession of new contemporaneous evidence that he did not have at the time. He has changed his mind since his emails of February, March and April 2023, but the only "new" evidence would be that he has taken into account what (allegedly) happened after Claim 1 was abandoned. He couples that argument with the argument that his mental health at the time affected his decision-making; that is, while he did decide at the time that Mr Ahmed had not been motivated by race or sex, he, the Claimant, might not have formed that opinion had he not had the illness which caused his hospitalisation on 25 February 2023.

128. In this case, the Claimant had the opportunity to identify all allegations of alleged breaches of the Equality Act 2010 ("EQA") when he presented his claim form on 7 January 2022. For any alleged acts/omissions occurring after that, he had the opportunity to apply to amend the claim. He could have done that at or before the 4 November 2022 preliminary hearing in private for case management. He could have applied to do it later. If not applying to amend Claim 1, then before he withdrew it, he had the opportunity to present a new claim form and to ask for the complaints in that form to be dealt with at the same time as Claim 1.

129. Given that a final hearing was scheduled for Claim 1, and the parties were ordered to prepare for it, and given that correspondence about those preparations took place, the Respondent was entitled to assume that the Claimant had put forward all the allegations of breach of EQA that he had in mind at the time. Furthermore, given the express wording of the Claimant's emails, the Respondent was entitled to treat those emails as confirmation that the Claimant now had come to the opinion that his manager had not discriminated against him because of either sex or race. The Respondent had no particular reason to address its mind to the protected characteristic of disability prior to the Claimant's hospitalisation. However, as of 4 November 2022, at the preliminary hearing, the Respondent was entitled to assume that if the Claimant believed that there had been any harassment or discrimination connected to any protected characteristic at all (not just sex and race) then the Claimant would have mentioned it by then.

130. The existence (or otherwise) of the April 2023 judgment does make some difference to decision about abuse of process. However, it is not a huge difference. Since my decision is that Claim 1 came to an end (by withdrawal) even if no judgment for Claim 1 existed, I would still have to take a broad merit based approach to decide whether there was abuse of process by seeking to bring a new claim, with a new case number, which either simply exactly duplicated the earlier complaints, and/or which made new allegations of breach of EQA, but about incidents which pre-dated the withdrawal of Claim 1.

131. In this case, for the sex and race discrimination complaints that were part of Claim 1, there is nothing other than a change of mind in the Claimant's case. He does say that the change of mind is connected to mental health issues, but he relies on nothing else. My assessment is that it would be an abuse of process for the Claimant to seek to re-present the complaints from Claim 1, as part of Claim 2, even if the existence of the judgment is ignored.

132. Furthermore, given the length of time that elapsed before the Claimant presented Claim 2, it would also be an abuse of process to seek to present new complaints of sex or race discrimination that occurred on or before 3 April 2023. That is because the Claimant could and should have attempted to have them dealt with as part of Claim 1 (or as part of a new claim to be heard with Claim 1) rather than withdraw Claim 1. The situation is not substantially different to the situation with the claims that actually were already in the list of issues for Claim 1. That is, the Claimant simply changed his mind; he has not received new evidence or information that has led him to think that such new complaints of sex or race discrimination have a better chance of success than he previously thought. Nor was there any financial or technical reason for failing to present them. Given that he has not provided any dates of any of his allegations, he has also not shown

that his mental health issues which led to hospitalisation were the reason for not applying to add these matters to Claim 1.

133. For disability discrimination (and harassment related to disability), I do not think the cut off point should be as late as 3 April 2023. The Claimant was not necessarily, between 4 November 2022 and 3 April 2023 contemplating the possibility of adding any such new complaints to Claim 1. He does complain about his treatment on return to work in March 2023, but by that time he had already written to the Tribunal to withdraw Claim 1. If there were incidents between 4 November 2022 and 3 April 2023 that are now alleged to be harassment related to disability or disability discrimination, then the Claimant might have time limit problems, but that does not mean that it is an abuse of process to seek to bring such complaints.

134. However, as of the preliminary hearing on 4 November 2022, there was no good reason for the Claimant to fail to raise complaints connected to the protected characteristic of disability if any such complaints existed. He has not shown that there were such complaints or explained his thought process for not raising them. There is potentially some overlap between the incidents he mentioned in the public preliminary hearing as connected to disability and those he previously said were sex or race discrimination. For those it would be an abuse of process for the Respondent to now have to deal with the same matters that were previously raised as sex or race complaints, but now under the guise of a disability complaint. The Claimant has not shown that something has changed to convert his opinion from being that the treatment was because of sex/race (an opinion he held from January 2022 to November 2022) to not being for that reason (expressed in February 2023) to being connected to disability (an opinion formed more recently apparently, though it is not clear when or why).

135. Even for incidents that were not actually identified at all, by 4 November 2022, as breaches of EQA, it would be an abuse of process now (having failed to identify those matters in November 2022) to include them in Claim 2 as disability complaints. The Claimant was entitled to, and did, think that all relevant matters up to 4 November 2022 had been put in the list of issues for Claim 1 and that the cessation of Claim 1 brought those matters to an end. It would be unjust to the Respondent to now have to defend any allegations of disability discrimination and harassment related to disability for acts / omissions prior to 4 November 2022.

136. Thus if I decline to extend time for the Claimant to have a fresh decision made by a judge, to replace the legal officer's April 2023 judgment, then the prejudice to the Claimant is fairly small. Even the absence of an April 2023 judgment would not cause me to decide that pursuing, via Claim 2, the matters just mentioned, was something other than an abuse of process.

137. Furthermore, for those same reasons, if I were to be making the decision afresh, I would be likely to simply issue a 2025 judgment that Claim 1 was dismissed on withdrawal, given that it had been withdrawn and that I was not persuaded that it was in the interests of justice to do something other than issue a dismissal judgment.

138. In all the circumstances, I do not extend time, under Rule 5, for the Claimant to have a fresh decision. He did not apply by 12 May 2023 and the consequence is that the legal officer's dismissal judgment (sent to parties on 28 April 2023) stands as the Tribunal's determination that Claim 1 was dismissed on withdrawal.

139. I have made case management orders in a separate document.

Approved by: EMPLOYMENT JUDGE QUILL

Date: 1 June 2025

Reserved Judgment and Reasons: Sent to the parties on: 02/06/2025

For the Tribunal Office