



EMPLOYMENT TRIBUNALS

Claimant: Ms F Oyinlola

Respondents: (1) NHS North East London Integrated Care Board
(2) Mr S Midlane
(3) Mr J Sheldrake

Heard at: East London Hearing Centre (in public; by CVP)

On: 18th February 2025

Before: Employment Judge J Anderson

Representation

For the Claimant: In person
For the respondents: Mr Rudd (Counsel)

RESERVED JUDGMENT

1. The Claimants application for reconsideration of the rejection of her claim against the First Respondent in case number 6011580/2024 is granted. The defect has been rectified as provided for in Rule 14(1)(b) of the Employment Tribunal Procedure Rules 2024. In accordance with Rule 14(4) case number 6011580/2024 shall be treated as being presented against the First Respondent on 4th October 2024.
2. The Second and Third Respondents application to strike out claim number 6011580/2024 against them is refused.
3. The First, Second and Third Respondents application to strike out claim number 6011580/2024 under Rule 38(1) of the Employment Tribunal Procedure Rules 2024 on the grounds that that it is scandalous or vexatious or has no reasonable prospects of success is refused.

REASONS

Introduction

1. This is my Reserved Judgment following the Public Preliminary Hearing that took place before me on the 18th February 2025.
2. The Public Preliminary Hearing was listed to consider a number of applications. I detail these in the Applications section below.

Procedural Matters

3. The hearing took place by way of video.
4. The listing of one day allowed the time and space for the parties and in particular for the Claimant to take regular breaks in addition to the lunch break.
5. Both parties had supplied documents for me today, which were located across both case numbers on the digital file. I took care at the outset to identify the relevant documents with the parties.
6. In terms of the matters before me today, I considered that there were three applications. The Claimant objected to my considering the application for the removal of the individual Respondents from the proceedings as this was not contained within the notice of hearing. However, it was clearly contained within the previous case management order for determination at the hearing today and I considered that the Claimant did have fair notice of the point. This was further reinforced by the fact that both parties had produced written submissions/skeleton arguments for today and had addressed this part of the application in those submissions.
7. Following preliminary discussions regarding documents and the matters before me, the Respondent proceeded to make their applications and the Claimant then responded.
8. I did not require the Claimant to address me in respect of the application to dismiss the claims against the named individual Respondent's. I considered that the position in law was clear and that the Respondent's application must fail as a matter of law.
9. I also did not require the Claimant to address me in respect of her application for reconsideration to permit her claim to proceed against the first Respondent. The Respondent did not oppose the application in its skeleton argument.
10. I indicated to the parties that I wished to reserve judgment on the Respondent's application. I therefore suggested that we proceed to case management as the first claim would be proceeding irrespective of the outcome of the applications today. That case management exercise is recorded in a separate document.

The Applications

11. The Claimant's application for reconsideration is dated 5th October 2024. In it she seeks reconsideration of the decision on 1st October 2024 to reject the claim against the First Respondent to the second claim on the basis that the claim form did not contain a valid Early Conciliation number.
12. The Claimant accepts that she made an error. She states that she typed R205754/24/06 instead of R205754/24/26
13. The second application is by the second and third Respondents to the second claim. These are individual Respondents. The basis for the application is set out in the application itself and also the skeleton argument provided on behalf of the Respondents. It is submitted by the Second and Third Respondents that the factors cited mean that it is in accordance with the overriding objective and the interests of justice to strike the claims out against the individual Respondent's.
14. The third and key application before me today is on behalf of all three named Respondent's in the second claim. The application is made under Rule 38. By way of summary, the application seeks to:
 - a. Strike out the second claim (6011580/2024) on the basis that it is an abuse of process within the meaning of Henderson v Henderson (1843) 3 Hare 100 and therefore is scandalous or vexatious within the meaning of Rule 38(1) of the Employment Tribunal Procedure Rules 2024.
 - b. Strike out the second claim (6011580/2024) on the basis that it has no reasonable prospects of success within the meaning of Rule 38(1) of the Employment Tribunal Procedure Rules 2024. Whilst this point is made generally, the submissions focus on the allegations of harassment at para 73 of the Particulars of Complaint.
15. By way of summary, the first claim relates to the protected characteristic of disability. The factual matrix relates to a recruitment process within the Respondent. The second claim relates to the protected characteristics of race and disability and in relation to the alleged treatment of the Claimant within the workplace. The majority of events in the second claim pre-date the date of submission of the first claim.
16. The relevant dates in relation to the first claim 6006836/2024 are as follows:
 - a. Date A: 16th May 2024;
 - b. Date B: 27th June 2024;
 - c. ET 1: 26th July 2024.
17. The first claim was made against the first Respondent only.
18. The relevant dates in relation to the Second claim 6011580/2024 are as follows:

- a. Date A: 3rd July 2024;
 - b. Date B: 14th August 2024;
 - c. ET 1: 13th September 2024.
19. The second claim was made against three named Respondents. Namely:
- a. First Respondent: NHS North East London Integrated Care Board;
 - b. Second Respondent: Simon Midlane;
 - c. Third Respondent: Jamie Sheldrake.
20. In the December 2024 CMO both case numbers were consolidated by consent.

The Law

21. Rule 38 of the Employment Tribunal Procedure Rules 2024 states:
- 38.—(1)** The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply 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, response or reply (or the part to be struck out).
- (2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
- (3) Where a response is struck out, the effect is as if no response had been presented, as set out in rule 22 (effect of non-presentation or rejection of response, or case not contested).
- (4) Where a reply is struck out, the effect is as if no reply had been presented, as set out in rule 22, as modified by rule 26(2) (replying to an employer’s contract claim).

22. Henderson v Henderson (1843) 3 Hare 100 is the longstanding starting point. It was held:

"... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. A plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

23. Although res judicata is cited in Henderson, it is right to acknowledge that over time the rule in Henderson v Henderson has been seen to be separate and distinct from both cause of action estoppel and issue estoppel. (c.f. Johnson v Gore Wood & Co (a firm) [2002] 1 AC 1 per Lord Bingham at para 90).

24. The Respondent cited Johnson and relied upon the following speech of Lord Bingham:

"i. whether in all the circumstances the bringing of proceedings is an abuse of process; ii. the circumstances will include whether the proceedings are brought against the same defendant or respondent; whether the issue could, with reasonable diligence, have been discovered and raised in the previous proceedings; and whether the later action involves unjust harassment or oppression of the party sued."

25. The Respondent also relies upon the following from Johnson:

"The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all".

26. Focusing on the first part of this paragraph, the underlying public interest is referred to with two considerations. A) finality in litigation and B) that a party should not be twice vexed in the same matter.

27. I note the points above as the principle of finality in litigation attaches to a determination of the proceedings, hence finality. I also note the reference to 'earlier proceedings' which in the context of Johnson is past tense.

28. Furthermore, in Johnson both Lord Bingham and Lord Millet both had to address the question of whether there was for these purposes a distinction between a settlement and a Judgment.
29. When addressing Henderson v Henderson Lord Millet noted:
- “In one respect, however, the principle goes further than the strict doctrine of *res judicata* or the formulation adopted by Sir James Wigram V.-C., for I agree that it is capable of applying even where the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding.”
30. Lord Millet was treating the conclusion of the first proceedings as a necessary part of the Henderson v Henderson principle.
31. He also goes on to hold:
- “The rule in Henderson v Henderson cannot sensibly be extended to the case where the defendants are different. There is then no question of double vexation. It may be reasonable and sensible for a plaintiff to proceed against A first, if that is a relatively simple claim, in order to use the proceeds to finance a more complex claim against B. On the other hand, it would I think normally be regarded as oppressive or an abuse of process for a plaintiff to pursue his claims against a single defendant separately in order to use the proceeds of the first action to finance the second, at least where the issues largely overlap so as to form, in Sir James Wigram’s words, “the same subject of litigation”.*
32. London Borough of Haringey v O’Brien (2016) UKEAT/0004/16/LA is authority for the proposition that matters that could have been raised, including by way of amendment prior to the determination of the first case are capable of falling within the principle.
33. It is clear that the application of Henderson v Henderson is not a matter of discretion. Rather, it is the application of the relevant factors and the reaching of a Judgment on the point. C.f. Agbenowossi-Koffi v Donvand Ltd (t/a Gullivers Travel Associates) [2014] EWCA Civ 855 per Lord Dyson MR at para 22.
34. In terms of striking out due to a claim having no reasonable prospects of success, this has been subject to consideration by the superior Courts, repeatedly emphasizing the high bar for strike out and the need to take the Claimant’s pleaded case at its highest.
35. In Anyanwu v South Bank University [2001] IRLR 305, the House of Lords emphasised that the power to strike out claims should only be used in discrimination cases in the plainest and most obvious of cases. Discrimination cases are fact sensitive and it would generally not be appropriate to strike out discrimination cases. See also: Ezsias v North Glamorgan NHS Trust [2007] ICR 1126.

Conclusions

36. First of all, I allow the Claimant's application to reconsider the rejection of her ET 1 due to having an incorrect ACAS Conciliation number. This application was not opposed by the Respondents. This was a minor typographical error. The error was administrative in nature. The Claimant did complete Early Conciliation and the error was in typing out the certificate number. The defect is capable of being rectified. There is no prejudice to the First Respondent in granting the application.
37. Secondly, I reject the application by the Second and Third Respondent to be removed from the proceedings. The First Respondent accepts it would be vicariously liable. The application cites a number of factors as to why it is not sensible or advisable to proceed against the individual Respondents.
38. The reality is that this is a strategic decision for the Claimant. That is not to say that the Tribunal is supportive of that decision. The general points made by the Respondents have a grounding in logic. However, none of the grounds for strike out in Rule 38 apply. The application references the overriding objective, which assists in the interpretation of the Rules but is not a stand-alone basis for strike out. The phrase 'interests of justice' is cited, which again is not a basis for strike out. Rule 38 contains the grounds on which a claim may be struck out. There was no submission to the contrary and it is difficult to see how there could have been one. Therefore, the application must be dismissed.
39. I turn now to the substance of the hearing today, which is the application for strike out of claim number 6011580/2024 under Rule 38 of the Employment Tribunal Rules 2024. I heard from both sides on this point.
40. Having taken time to analyse the case law, it is apparent that the present case does not fall within the ambit of the Henderson v Henderson principle. It is part of the Henderson v Henderson principle that the underlying principle of finality is tied to a decision which concludes the proceedings, i.e. a Judgment or similar. In each of the decisions cited by the Respondent, the application of Henderson v Henderson has been in relation to a first claim that had been concluded – hence finality. None of the cases cited deal with a situation as in the present case where a second ET 1 is roughly a month and a half after the first one and contains matters that could have been included in the first ET1.
41. I suspect that the reason this application has arisen is that the Respondents have observed the case law referencing the need to bring your case forward at the first opportunity, but then failed to appreciate the wider context of the need for a determination of the first set of proceedings.
42. Additional underlying reasoning is available. For example, in the passages that I have cited from Johnson above, there would not have been a need to resolve the meaning of and effect of a settlement for these purposes in order to apply Henderson v Henderson.

43. Also, given that the Haringey case was proposition for the authority that in applying the rule whether the first claim was capable of amendment prior to the final hearing is further supportive of the point. In the present case, the first case has not been adjudicated on. It would be paradoxical if the proposition in Haringey was good law, but that a second claim was to be struck out as an abuse of the Tribunal process when the ability to amend as envisaged in Haringey was still possible.
44. I also note that in the second claim, there are two individual Respondents. These individuals were not named in the first claim. The acts of discrimination in the first claim are not alleged against these individuals. The acts of discrimination in the second claim are alleged against these individuals. Therefore, there are additional reasons as to why the Henderson v Henderson principle could not apply against the Second and Third Respondents.
45. In the alternative, if I am wrong on that then applying the 'broad merits based approach' envisaged in Johnson I would not strike out the claim as an abuse of process. Firstly, I must identify the Claimant's stated reason for the second claim. The Claimant's stated reason for not bringing the proceedings was the different subject matter between the two claims. The first claim focusing on recruitment and the second claim focusing on her treatment within the First Respondent. This was an assumption on the Claimant's part. I asked for the basis for the assumption and she was able to cite her belief that was the case but not able to cite any particular source. However, applying a broad merits based assessment, there is effectively one month and a half between the two ET 1's. I struggle with identifying the abuse that arises from this. This is not an unusual situation to arise in the Employment Tribunal. If there is mischief to the Respondent, that is dealt with through the application of the law relating to time limits. The Respondent cites the fact that an amendment to the first claim would be unlikely, though I note that the Claimant's explanation for why the second claim was brought did not relate to an attempt to circumvent the law relating to amendment.
46. If there are time limit problems with the second claim, then this can be dealt with through the application of the law in the normal way. The Preliminary Hearing today was not listed to substantively consider time.
47. Separately, to all of the above, I decline to strike out the second claim on the grounds that it has no reasonable prospects of success within the meaning of Rule 38. As a general point, the facts are clearly in dispute between the parties and the well-known observations in Anyanwu v South Bank University [2001] IRLR 305 apply. The Respondent's prospects point focused on two elements of the case which post date the first ET 1. Whilst no wider submissions were made on prospects, I nonetheless make clear that I am declining to strike out whether in respect of the points that I was addressed on or in respect of the wider case generally.
48. In so far as there has been a focus on para 73 of the Particulars in relation to the second claim, I do not regard this as having no reasonable prospect of success. The Claimant is alleging that she was being criticised unfairly, despite her explanations. As to whether this falls within s.26 Equality Act 2010 or is part of a wider pattern of behaviour based on the earlier particulars is a question of

evidence and fact. Taking the case at its highest, there is not a basis for strike out.

49. There was also discussion of the reference to the 4th September 2024 at para 52 of the particulars of claim of the second claim. Paras 52,53 and 54 need to be read together. Within these paragraphs, the Claimant is complaining that previous recommendations had not been implemented. I am not asked to determine time limits. I draw the parties' attention to Matuszowicz v Kingston upon Hull City Council [2009] ICR 45 in terms of the approach to time limits in reasonable adjustments cases. This is inevitably fact sensitive and evidence needs to be heard.
50. Of my own volition, I raised the issue of deposit orders as opposed to strike out. I accept that a reading of Rule 40 permits this to be done at a 'Preliminary Hearing'. However, the Claimant had no prior warning of the point either in terms of research or being able to advance evidence regarding her means. Therefore, any consideration of Rule 40 does not form part of this Judgment. In this case, if a party wishes to raise Rule 40 then I leave it for them to raise, with sufficient detail and notice.
51. Therefore, I conclude:
 - a. The Claimant's application for reconsideration of the refusal to accept her ET 1 against the First Respondent is granted.
 - b. The Second and Third Respondent's application to strike out the case against the individual Respondent's is refused.
 - c. The First, Second and Third Respondent's application to strike out the Claimant's second claim is refused.
52. I would note for the benefit of all parties, but in particular the Claimant as she is representing herself, that I have simply dealt with the applications that were before me. The Claimant should not infer, one way or another that I have endorsed her general case or suggested that it has good prospects of succeeding.
53. I have made case management decisions and orders. These are contained within a separate document.

Employment Judge J Anderson
Date: 25th February 2025

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