Case No: 6021437/2024

EMPLOYMENT TRIBUNALS

Claimant: **Mr O Hall**

Respondent: **NHS Blood and Transplant**

Heard at: **Bristol (by video – CVP)** **On:** **23 July 2025**

Before: **Employment Judge Livesey**

Representation
Claimant: Ms Shah, counsel
Respondent: Mr Crammond, counsel

JUDGMENT

The claim is dismissed as it is an abuse of the process and/or under rule 38 (1)(a) of the Employment Tribunal Procedure Rules.

REASONS

1. Background

1.1 An agreed hearing bundle was supplied for the purposes of determining the issue at the hearing and pages to it have been referred to below in square brackets. Both counsels also produced written skeleton arguments.

1.2 By a claim dated 10 December 2024, the Claimant brought complaints of unfair dismissal and discrimination on the grounds of disability. The Claimant had commenced employment with the Respondent on 27 December 2000 as a Donor Carer (Band 3) and his dismissal took effect on 30 September 2024 [4-20].

1.3 In the Grounds of Claim, it was asserted that he suffered from Long Covid which had caused him to be off sick from 20 November 2020. He never returned to work.

1.4 On 27 November 2022, he applied for the role of Business Support Officer (Band 4), but he was not successful. On 16 May 2024, he was invited to attend an absence review meeting and, a few days later, on the 22nd, he was informed of his dismissal on the grounds of continuing ill-health capability [65-71]. He was provided with 12 weeks' notice and it was

intended that his employment would have ended on 7 August, although that was extended until 30 September 2024 at the request of his union representative [82-4]. The Claim Form advanced complaints of unfair dismissal under s. 98 of the Employment Rights Act and discrimination under s.15 of the Equality Act relating to the dismissal.

1.5 The Claimant had, in June 2023, brought a complaint to the Employment Tribunal in respect of the Respondent's failure to have appointed him to the position of Business Support Officer following his November 2022 application (No. 6000958/2023 [50-63]), a complaint under s. 20 of the Equality Act. That claim was determined in his favour at a liability hearing before Employment Judge Ferguson and members which took place was also between 2 and 4 July 2024 [80-1]. A remedy hearing subsequently convened on 22 November, with a written judgment sent to the parties on 6 December 2024 [91-2].

1.6 In the Response to this claim which was filed in February 2025, the Respondent raised arguments of estoppel and abuse of process [24-47]. In short, it was argued that he could and should have raised these matters in his previous litigation and it was an abuse now to do so in separate proceedings (paragraph 13 of the Response [35]);

> "*The Claimant and his representatives were aware, or could with reasonable diligence been aware* [sic.]*, that he had a cause of action against the Respondent in relation to the decision to dismiss him at the preliminary hearing on 30 May 2024, the liability hearing between 2 – 4 July 2024 and at the remedy hearing on 22 November 2024.*"

1.7 This hearing was listed to determine the Respondent's application to strike the claim out on that basis.

2. Relevant legal principles

2.1 The principle of *res judicata* created an abuse of the Tribunal's process which to its jurisdiction. If found to have been present, the Tribunal could not entertain the claim further. Alternatively, it might choose to dismiss it under its rules. Rule 38 permitted a Tribunal to strike out all or part of the claim if it was "*scandalous or vexatious or has no reasonable prospect of success*" (rule 37 (1)(a)).

2.2 It was an abuse of the process to attempt to re-litigate matters which had already been decided by a tribunal or another court of competent jurisdiction. Although that was one example of the application of the principle of estoppel (or *res judicata*), it was not the only one.

2.3 The categories of abuse or *res judicata* had been described in different ways in the case law. Lord Sumption referred to the Latin phrase having been used as a 'portmanteau term' and/or a 'label which distracted attention from the contents of the bottle'. The lines between the categories and their descriptions had not always remained consistent. A useful discussion of them could be found in the IDS Handbook on *Practice and Procedure I: Employment Tribunals* (Volume 10) within paragraph 2.

2.4 Cause of action estoppel prevented the re-litigation of a claim between the same parties which had already been determined. It was based upon the

existence of a decision in the first action/issue; something which had been the subject of a judgment or decision. The principle was described by Lord Keith in *Arnold-v-National Westminster Bank plc* [1991] 2 A.C. 93 at 104D-E as follows;

> "*Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened.*"

2.5 Although cause of action estoppel prevented a person from bringing a claim that raised a cause of action that was identical to that which has been previously determined, it did not, however, require that the evidence relied upon to advance the claims was identical. New evidence may have come to light, or there may have been a material change of circumstances, notwithstanding which the party could not re-litigate the same cause of action. As Lord Sumption held in *Virgin Atlantic-v-Zodiac Seats Ltd* [2014] AC 160, at paragraph 26;

> "*Where the existence or nonexistence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."*

2.6 As Lord Sumption pointed out in *Virgin Atlantic,* the case of *Arnold* was also authority for the proposition that cause of action estoppel barred "*the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.*" (paragraph 22).

2.7 Issue estoppel generally acted to prevent a party from seeking to pursue a claim which was dependent upon the same facts which had been the subject of earlier litigation between those same parties or from reopening an issue which had been decided in earlier proceedings. For the earlier determination to bind the subsequent tribunal, it ought to have been a necessary ingredient of the cause of action in the previous proceedings (*Arnold-v-Nat West Bank* [1991] 2 AC 93, HL, following *Thoday-v-Thoday* [1964] P 181, CA), although that has had a fairly liberal interpretation in some of the subsequent decisions.

2.8 As Lord Sumption further described the principle in *Virgin Atlantic* (paragraph 22 again), issue estoppel included the situation where "*points which were not raised in the earlier proceedings*" and could have been *"with reasonable diligence and should* [have been] *in all the circumstances.* In such circumstances, "*the bar will usually be absolute…except in special circumstances where this would cause injustice*".

2.9 Thirdly, there was a wider form of issue estoppel (sometimes referred to as the rule in *Henderson-v-Henderson* (1843) 3 Hare 100 as explained in *Johnson-v-Gore Wood* [2002] 2 AC 1), which laid down the general

principle that parties ought to bring forward their whole case, except in special circumstances, and would not ordinarily have been permitted to bring fresh proceedings in respect of issues which could and should have been included in an earlier action. The concept was best described by Lord Bingham in his judgment in *Johnson* as follows;

"*Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.*"

2.10 When determining questions of this nature, a broad merits based approach had to be taken and the test in *Moorjani & Ors-v-Durban Estates Ltd* [2019] EWHC 1229 (TCC) was instructive, at paragraph 17.4:

"*17.4 Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in Henderson v. Henderson where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:*

a) The onus is upon the applicant to establish abuse.

b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.

c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.

d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

e) The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant."

3. Discussion and conclusions

3.1 The Claimant had started his first proceedings acting as a litigant in person. Solicitors were instructed on his behalf through his union, Unite, and came on record from 7 September 2023 [64]. At a Preliminary Hearing which took place before Employment Judge Self on 30 May 2024, he was represented by counsel [72]. No application was made to apply to amend the proceedings to include events relating to his dismissal at that point, although he would then have received his dismissal letter dated 22 May. No fresh action was issued either. Further, no application was made at any time before the final hearing and before judgment was entered, although it was clear to everyone that the Claimant had been dismissed (e.g. [74], paragraph 63 of his witness statement [78-9] and paragraphs 62 and 95 of the Reasons [86 & 87]). Yet further, no application to amend or issue the new claim was made before the remedy hearing in November, albeit that he had approached ACAS in August and had obtained his early conciliation certificate in October [3].

3.2 The Claimant did, however, pursue losses arising out his dismissal at that remedy hearing; his loss of earnings following his dismissal and an injury to feelings award to reflect it. Ms Shah did not dispute the accuracy of paragraph 5.1 of the Judgment in which the Tribunal reflected the dismissal within the award that was made for injury to feelings [102] (see, also, counsel's note of the Judgment [95-6].

3.3 The Respondent argued that this claim was therefore an abuse of process because the Claimant ought to have made an application to amend his claim at the point that he had been notified of his dismissal. Alternatively, Mr Crammond suggested that he ought to have issued a second claim at that point. Had he done so, even if the case management timetable in the first claim had to have been rejigged, all matters could have been considered together at one final hearing. Had a new claim been issued, it is highly likely that it would have been consolidated with the first. Even if the claim had been issued before the remedy hearing in November, that hearing could have taken place when all matters could have been considered together. The Claimant ought not to have waited until after the liability and remedy hearings before doing so (paragraph 18 of his skeleton argument).

3.4 Mr Crammond argued that, in the new claim, the Claimant had relied upon findings made by the Tribunal in the first claim, specifically in paragraphs 9 and 10 in which he asserted that the findings in respect of the Respondent's failure to adequately address the issue of redeployment supported the new claim of unfair dismissal [19]. Further, as stated above, the effect of the Claimant's dismissal was taken into account in the assessment of the injury to feelings award at the remedy hearing.

3.5 The Claimant argued that, in relation to the complaint of unfair dismissal, his dismissal did not take effect until after the final hearing in the first claim and that it would have been a 'risky endeavour' for him to have applied to amend his claim partway through the preparations for the final hearing in the first action (paragraph 20 of Ms Shah's Skeleton argument). An appeal against the decision followed after the final hearing. Further, since no s. 15 claim had been brought in the first claim, there was no abuse of process and/or issue or cause of action estoppel at play.

3.6 In my judgment, this was a case in which cause of action estoppel was present. Although the Claimant was not seeking to challenge or re-litigate an issue which had been determined in previous proceedings, as stated in *Arnold* and *Virgin Atlantic,* he was seeking to raise *'*points essential to the existence or non-existence of a cause of action' (unfair dismissal and discrimination under s. 15) which were not decided because they were not raised in the earlier proceedings, yet they could have been by reasonable diligence and should, in my judgment, have been. Taken in its simplest form, in the new proceedings, the Claimant was alleging that he ought not to have been dismissed. The Tribunal agreed with him in the first proceedings by awarding him losses associated with that dismissal. He cannot claim in respect of it again.

3.7 Further and in any event, the new proceedings were an abuse based upon the issue estoppel principle described in *Virgin Atlantic* (see paragraph 2.8 above) and/or under the broader principle in *Henderson-v-Henderson.*

3.8 In relation to the former, the Claimant was seeking to raise 'points' which could and ought to have been raised in the earlier proceedings by reasonable diligence, by amendment or consolidation. Ms Shah did not seek to allege that any 'special circumstances' existed. In essence, the Claimant was seeking to piggyback upon aspects of the liability and remedy judgment achieved in the first proceedings to launch a fresh claim on matters which had come to light before that claim had been determined but which he had not sought to include sooner.

3.9 Under the broader merits-based approach required under *Henderson-v-Henderson,* the Claimant ought to have been aware of his right to bring a claim in respect of his dismissal well before the final hearing (or, at the latest, the remedy hearing) in the first action through 'reasonable diligence'. Had he amended the claim or issued fresh proceedings, it is likely that all matters would have been dealt with together. Indeed, at the remedy stage, he relied upon the fact of his dismissal to for the purposes of the assessment of the award for injury to feelings and in respect of the loss of earnings which flowed it.

3.10 One point to consider was the respective prejudice that the parties would have been expected to experience if the new claim was to have proceeded or been struck out. If it proceeded, the Respondent would have had to face a second claim in a jurisdiction in which it would ordinarily not have recovered its legal costs. There was additional management time and losses associated with the witnesses' involvement. From the Claimant's perspective, however, he had already succeeded in demonstrating that he had been the victim of discrimination and had recovered losses associated with his dismissal. Beyond the possibility of a basic award, Ms Shah confirmed that the only benefit which he might have gained were additional declarations of discrimination and unfair dismissal if his claim succeeded. The Respondent alleged that he would have had the ability to pursue his solicitors for those losses given the fact that he had been represented in his first claim since September 2023 and arguably ought to have been advised to have issued that claim earlier.

3.11 The points made in paragraph 3.5 above were not strong; although the Claimant's dismissal did not take effect until 20 September, he was well aware that the decision had been take in May and the delayed notice period was at his request and for his benefit. An application to amend would not, in my judgment, have been a 'risky endeavour'. He would not have been precluded from having issued a second claim then in the alternative. The effect was likely to have been the same. He could have issued his claim during his notice period, both for unfair dismissal (s. 111 (3)) and for the act of discrimination, which had then accrued. No separate or discrete allegations had been made in respect of the later appeal and/or appeal process.

3.12 As to the s. 15 claim, Ms Shah stated that the Claimant did not seek to reopen or relitigate the previous issues but, rather, to rely upon the findings of the previous Tribunal (paragraph 22 of her skeleton). That rather supported the Respondent's case; that Claimant ought not to have been able to bring forward other claims about which he was aware, riding on the back of a successful first claim in which findings were made which ought not to make a second claim easier.

3.13 Under *Henderson-v-Henderson,* as considered in *Moorjani* (above), I reminded myself that the onus was on the applicant to establish abuse and the mere fact that the Claimant could with reasonable diligence have taken the new point in the first action did not necessarily mean that the second action was abusive. But that was not what was happening here. He was doing it the other way round; having previously been awarded compensation to reflect his dismissal, he was now seeking to issue fresh proceedings in respect of it.

3.14 The broad, merits-based assessment that had to be undertaken fell in the Respondent's favour here. In all of the circumstances, the Claimant was misusing the Tribunal's process by seeking to raise the *rest* of an issue which could have been raised before. The effect would have been to have unfairly taxed ('unjustly harassed') the Respondent with a second set of proceedings which would have provided the Claimant with less if successful than the prejudice that it would have caused to the Respondent in terms of cost and time. There was a public interest in there being finality in litigation and in a proportionate and reasonable use of the Tribunal's resources.

Employment Judge Livesey

Date: 23 July 2025

JUDGMENT AND REASONS SENT TO THE PARTIES ON: 8 August 2025

Jade Lobb
FOR THE TRIBUNAL OFFICE

Notes

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