Neutral Citation Number: [2025] EAT 110

Case No: EA-2023-000770-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 August 2025

Before :

JUDGE STOUT

- -

Between :

MR ANDRAS SZUCS

Appellant

- and –

GREENSQUAREACCORD LTD

Respondent

- -
- -

MR ANDRAS SZUCS appeared as a LITIGANT IN PERSON
MR RUARAIDH FITZPATRICK, (Counsel) (instructed by **Trowers & Hamlins LLP**) for the **Respondent**

Hearing date: 17 July 2025

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The Employment Tribunal did not err in law in striking out the claimant's second claim as an abuse of process on the *Henderson v Henderson* principle where the claimant had known about the second claim two months prior to the final hearing of the first claim. It was open to the Employment Tribunal to conclude that the second claim was an abuse of process because the claimant could and should have made an application to amend the first claim to include the second claim. That was so even though an amendment application might have been refused so that the claimant would then have had to bring the second claim separately.

JUDGE STOUT:

Introduction

1. I will refer to the parties as they were in the proceedings below. The claimant was employed by the respondent from May 2018 until April 2020 when he was dismissed. He has brought two claims to the Employment Tribunal. The First Claim, commenced in August 2020, concerned his dismissal and was determined at a final hearing in July 2022. The Second Claim, commenced in September 2022, concerned job applications that he made to the respondent that he learned in May 2022 had been unsuccessful. The Second Claim was struck out by the Bristol Employment Tribunal (Employment Judge Midgley) by a reserved judgment sent to the parties on 8 June 2023 following a hearing on 27 April 2023. It was struck out on the basis that the claim was an abuse of process, applying the rule in *Henderson v Henderson* because, in the judgment of the Employment Tribunal, the Second Claim could and should have been brought forward as an application to amend the First Claim.

2. In advance of the hearing of this appeal, the claimant applied to postpone the hearing on medical grounds. I refused that application. The application was renewed orally at the start of the hearing. I refused that application for reasons given orally at the hearing. I decided that the hearing should proceed, but with adjustments for the claimant, that included the respondent's counsel making his submissions first, and the claimant then having a long lunch break to prepare his response. English is not the claimant's first language, and he struggles a little to organise his thoughts, but the claimant was allowed the time he needed to make submissions, with the hearing taking all day to 4.30pm, including regular breaks. Although the respondent went first, the claimant was afforded 'the last word'. Notwithstanding his difficulties, the claimant demonstrated a high degree of competence in making his submissions and, despite his reservations at the start of the hearing about his state of mind, he advanced his case very well.

The grounds of appeal

3. HHJ Auerbach granted permission to appeal at a rule 3(10) hearing on the following grounds:-

> The employment tribunal erred in striking out the Appellant's claims as a *Henderson v Henderson* abuse (as confirmed in the decision on the reconsideration application), having regard to some or all of the following:
> (a) At the time when the matters complained of occurred, the full merits hearing in the first claim was about two months away;
> (b) Accordingly, any application to amend the first claim to introduce those claims would have to have been made well before the time limit for advancing those claims as new claims expired, thereby cutting in to the time that Parliament had allowed for such claims to be advanced;
> (c) The tribunal (although in the reconsideration decision it accepted to a degree the claimant's point that it had mis-stated in the original decision the factual overlap in terms of which managers were involved) took insufficient account of the contention that there would have been insufficient time to accommodate the new claims into the first claim without disturbing and extending the listing of the hearing of the first claim;
> (d) These were fact-sensitive discrimination claims and the effect of a Henderson v Henderson strike-out is to deprive a claimant of the opportunity to have adjudicated on their merits, claims that have not so far been adjudicated at all.

Background

4. The claimant was employed by the respondent from May 2018 until April 2020 when he was dismissed. The claimant has diagnoses of Asperger's Syndrome, Anxiety Disorder and Depressive Disorder, which he contends constitute a disability for the purposes of the EA 2010.

5. Prior to his dismissal, the claimant had done various things that constituted protected acts for the purposes of the EA 2010. In his First Claim, commenced on 5 August 2020, he alleged that his dismissal was an act of victimisation contrary to sections 26 and 39 of the EA 2010.

6. The history of that claim is dealt with at [11]-[17] of the Employment Tribunal's judgment under appeal.

7. Significantly, the First Claim was due to have a final hearing in September 2021, but in August 2021 the claimant's original solicitors came off the record and the claimant wrote to the Tribunal asserting he was not ready for the hearing in September and alleging that his solicitors had not advanced his full claim.

8. In consequence, the final hearing was postponed and on 7 September 2021 at a case management hearing the claimant's application was considered as an application to amend the First Claim, but rejected on the basis that (among other things) "the claimant and his advisors had made a deliberate choice not to bring [those] claims originally".

9. The final hearing in the First Claim was re-listed for 25-27 July 2022. In advance of that hearing, the claimant was still having difficulties preparing for the hearing and failed to comply with orders to agree a bundle and exchange witness statements. On 15 July 2022 the claimant applied for the final hearing to be postponed again. This was refused on 21 July for reasons that are worth setting out in full:

> The Employment Judge has reviewed the file and the Claimant's application for a postponement, set out in his emails of 15 and 18 July. He notes that;
> - The file is disproportionately large, mainly as a result of the Tribunal having to become involved in several breaches of its orders by him;
> - The Claimant is in breach of another unless order in respect of his witness statement and is currently prevented from relying on one at the final hearing without a judge's permission.
> - He has claimed that he suffers both physical and mental difficulties which are hampering his engagement with the litigation, but the Judge notes that no contemporaneous medical evidence is available which supports his assertions and that he seems to be able to write lengthy, detailed, and persuasive correspondence. His inability to provide a witness statement is, therefore, not understood.
> - He asserts that the difficulties that he faces are primarily related to referencing documents within his statement, but he significantly contributed to the delay in the bundle's provision (as a result of his failure to agree its contents) and he has now

> had the bundle for a sufficient period to be able to write his statement.
>
> The hearing is not postponed. It is in everyone's interest for this case to be concluded. The Tribunal's resources are being disproportionately drained by this case. It now needs to be heard.
>
> The case remains listed for hearing on 25th July 2022.

10. On 21 July 2022 the claimant did manage to provide a witness statement, and although he made a further application in writing to postpone the hearing, that was not dealt with in advance of the hearing, and he duly attended the hearing without renewing his application for a postponement.

11. His claims were dismissed in a judgment given orally at the end of the hearing. Written reasons followed in August 2022. The judgment on the Second Claim now under appeal records the following that is relevant to the matters that were considered by the Employment Tribunal in relation to the First Claim:

> 21. In November 2019, the claimant unsuccessfully applied for an internal post of Neighbourhood Project Manager. The reasons in the First Claim record the significant concerns that were held by the respondent in relation to the claimant's performance in his role (see paragraphs 6.25 and 6.40). The dismissal letter detailed that the claimant had been dismissed because of issues relating to his attitude, performance, and attendance.

12. On 30 September 2022 the claimant commenced the Second Claim. The ACAS certificate in the bundle shows that he had contacted Acas regarding the Second Claim on 15 June 2022 and Acas issued the certificate on 27 July 2022 (i.e. after the start of the hearing of the First Claim).

13. The Second Claim concerned three unsuccessful job applications that the claimant had made to the respondent. There has been some confusion as to the dates of one of those applications, with

the respondent providing a note shortly before this hearing suggesting that the Tribunal had got the dates of one of the applications wrong in its judgment. However, the claimant confirmed at the hearing that there was no material error in the Employment Tribunal's judgment as regards the dates of the applications. In short, he agrees that he was informed in May 2022 that he had been unsuccessful in each of the applications about which he sought to complain in the Second Claim.

14. The agreed chronology for this hearing also states that on 8 June 2022:

> Appellant falls down the stairs, taken to A&E, requiring further treatment, put on painkillers. Further surgery and medical appointments on 16 June, 22 June, 8 July, 15 July, 21 July, with further complaints of poor concentration, poor sleep and unable to complete documents. Referred to Mental Health Team, counselling and a wellbeing coordinator.

15. It is apparent, however, that this entry in the chronology is the claimant's account now, not part of any chronology that was agreed at the time of the hearing before Employment Judge Midgley.

16. The respondent applied on 13 January 2023 to strike the Second Claim out on the basis that it was "scandalous, vexatious, has no reasonable prospects of success and is an abuse of process". As set out in writing, that application focused on the merits of the claims. The respondent submitted that the claimant's job applications had been vexatious and designed to manufacture a situation where he could submit further claims against the respondents, and that they stood no prospect of success in the light of the conclusions of the Tribunal on the First Claim which included that all trust and confidence between the parties had broken down.

17. The respondent also relied on the rule in *Henderson v Henderson* (1843) 3 Hare 100, Ch D to argue that aspects of the claimant relating to matters that occurred in 2019 and 2020 should be dismissed as an abuse of process. The written strike-out application did not argue that the claims relating to the 2022 job applications should be struck out under the *Henderson v Henderson* rule. This

argument appears to have been raised for the first time in a skeleton argument provided the day before the hearing before Employment Judge Midgley.

The Tribunal's decision

18. The respondent's strike-out application was heard by Employment Judge Midgley at a preliminary hearing on 27 April 2023 at which the claimant was represented by counsel, Mr Downey. The respondent was also represented by counsel. Judgment was reserved and sent to the parties, with written reasons, on 8 June 2023.

19. The claimant subsequently applied for reconsideration of that judgment, which application was refused by judgment sent to the parties on 31 October 2023. Although it is not always appropriate to have regard to an Employment Tribunal's reconsideration decision as supplementing the reasons in its original judgment, in this case there are two points in that reconsideration judgment that it is in my judgment proper to take into account when reading the original judgment: (i) the clarification that the basis for the strike out was that the judge considered the Second Claim to fall within the *Henderson v Henderson* abuse rule, not any other form of estoppel; and (ii) that the claimant's counsel Mr Downey had at the hearing said that it was not part of the claimant's argument against strike-out that the reason he had not sought to apply to amend the First Claim was because he wished to conciliate matters within the Second Claim.

20. In its original reserved judgment, the Employment Tribunal directed itself to the law on res judicata and cause of action estoppel, beginning with *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)* [2013] UKSC 46, [2014] AC 160 at [17]. That paragraph lists out the theoretical forms that estoppel or abuse of process may take. As clarified by the reconsideration judgment, the form that the Tribunal relied on in this case is that captured in Lord Sumption's fifth principle, but I set them all out as the Tribunal in its reasons also makes reference to

the fourth principle and it is instructive to have the full context:

> [1] 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.
>
> [2] 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: see *Conquer v Boot* [1928] 2 KB 336.
>
> [3] Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494 , 504 (Parke B).
>
> [4] 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: Duchess of *Kingston's Case* (1776) 20 State Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197–198.
>
> [5] Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the

earlier ones.

21. The judge in this case went on to direct himself as follows in relation to *Henderson v Henderson* at [30]-[38]*:*

> 30. *Henderson v Henderson* 1843 3 Hare 100 established the rule that parties to litigation must bring forward their whole case. They will not be permitted to bring fresh proceedings about a matter which could and should have been litigated in earlier proceedings, but was omitted through negligence, inadvertence or even accident.
>
> 31. The plea of *res judicata* applies, except in special cases, not only to points which the court was actually required to decide, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.
>
> 32. The relevant principles were reviewed and restated by the House of Lords in *Johnson v Gore Wood* 2002 2 AC 1, HL, where Lord Bingham said (at paragraph 31) that the court or tribunal must consider:
>
> a. whether in all the circumstances the bringing of proceedings is an abuse of process; and
>
> b. that 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.
>
> 33. Applying *Henderson v Henderson*, the House of Lords said in *Johnson v Gore Wood*, p. 30:
>
> "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."

34. The 'crucial question' is whether the claimant is, in all the circumstances, 'misusing or abusing the process of the court by seeking to raise before it [an] issue which could have been raised before', see *Johnson v Gore Wood* at p. 31D; i.e., such conduct will ordinarily in itself amount to an abuse.

35. In determining whether a second claim is a misuse or abusive, the Tribunal must examine the claimant's reason for not bringing the claim earlier, see *James v Public Health Wales NHS Trust* (EAT/0170/14), per Langstaff P at [25-26].

36. The burden of proving an abuse of process is on the employer: *Agbenowossi-Koffi v Donvand Ltd* [2014] ICR D27.

Amendment

37. The rule in *Henderson v Henderson* likewise applies where a matter arises post-issue which could have been, but was not, amended into the existing claim.

38. In *London Borough of Haringey v O'Brien* EAT/0004/16 the EAT held that the Tribunal should consider not just the events occurring prior to the presentation of a claim but also those occurring after that date but prior to the hearing of that claim (per HHJ Eady at judgment paragraph 60). The EAT said that if the Employment Tribunal was entitled to find that it was a *Henderson* abuse of process to pursues complaints in a second set of proceedings regarding matters occurring prior to the presentation of the first claim, the same reasoning would apply to events occurring thereafter and prior to the full merits hearing, or at least sufficiently prior to it to have allowed for an amendment to the claim.

22. Having set out the arguments of the parties, the judge captures at [44]-[45] of the judgment a number of matters that are not in dispute, identifying that the issue for the Tribunal is not whether the claimant "could" have sought to amend the First Claim to include the Second, but whether the claimant "should" have done. Paragraphs [44]-[45] hold as follows:

> 44. There is no dispute in this case that the claimant could have applied to amend the First claim to include the allegations that formed the subject of the Second Claim (in the sense that there was time to do so, he knew how to do so, and he was physically capable of doing so). The claimant's argument is whether he should have; in a sense which is closer to whether it was physically feasible for him to do so and the interests of justice for him to have taken that step.
>
> 45. The following matters, which are relevant to that issue, do not appear to be in dispute:
>
> 45.1. First, the claimant knew of the events about which he wished to complain; this was not a case where any diligence was required to establish the facts which found the claims;
>
> 45.2. Secondly, the claimant knew of appropriate method to amend his claim (by application to the Tribunal);
>
> 45.3. Thirdly, the claimant knew the legal claim which he wished to pursue in respect of the factual events, which he needed to have applied to amend to include, as he drafted the claim form in the Second Claim himself.

23. At [46] the judge identifies the claimant's key arguments as being that: (i) an application to amend would not have been successful in the circumstances of the First Claim and the impending final hearing; and, (ii) his ill health that meant his energies needed to be directed towards preparing the First Claim and not towards applying to amend to include the allegations that form the subject of the Second Claim. An argument was raised by the claimant's counsel regarding the claimant's wish

to conciliate the Second Claim, but at [42.1.6] the judge records that:

> … When I pressed Mr Downey as to whether he had specific instructions from the claimant in support of that argument, given that the claimant looked startled and highly worried by the fact that it was being advance, he eventually conceded that he did not. I was surprised, therefore, that he had considered it appropriate to raise such an argument and then to advise me that it was instructions, given that Mr Downey is a very experienced member of the bar and knows the Bar Code of Conduct well;

24. The core part of the Tribunal's reasoning is at [50]-[57] as follows:-

> 50. The fact that an application may not succeed does not provide good grounds not to make the application at all; it could have been made. Had the application been made and refused, the claimant would have been on stronger grounds in relation to this application.
>
> 51. Moreover, I observe as an aside, that the claimant's argument is speculative and weak at best in terms of the potential outcome: in circumstances where there were real concerns as to whether the First Claim would be ready for the final hearing because of the issues with the bundle and the claimant's failure to produce a witness statement and, in the context of the overriding objective, allowing for the fact that there was considerable overlap in the witnesses who would be called to address the allegations in the First and Second claims, there were good grounds for allowing the amendment and vacating and relisting the hearing. That may well have been a persuasive factor in support of the application itself. Even if it were not, the need for finality in litigation by addressing matters in a single hearing, rather than allowing separate claims requiring additional time, use of resource, and cost, may well have the effect that the application would have been granted, albeit with reservations about the claimant's previous failures to comply with case management orders.
>
> 52. Secondly, there was simply no evidence before me to demonstrate either that any of the conditions the claimant relies upon as disabilities were affecting him

materially at the relevant time, or that those conditions had the effect that the claimant argued for, i.e. that he only had sufficient energy to focus on one claim. There was no witness statement from the claimant describing why he had chosen to take the approach that he had, and no medical evidence, whether in the form of GP notes or a letter from any treating clinician addressing his conditions and their effect at the material time. Consequently, I reject the argument that the claimant's conditions prevented him from making an application to amend.

53. Finally, looking at matters in the round, it seems to me there is force in the respondent's argument that there is a real danger in this case of matters that were found as facts by the Tribunal and were therefore determined in the First Claim, being reopened and/or reconsidered by a differently constituted Tribunal in relation to the Second Claim. In particular, the suggestion that the claimant's poor performance in his role during his employment was attributable to matters arising from the alleged disabilities and/or that the respondent's employees knew or ought reasonably to have known that (which was an argument the claimant sought to deploy so as to challenge the respondent's case as to the principal reason for the rejection of his applications) was not a matter that was argued in the First Claim, but would necessarily require reconsideration of the evidence that had been given in that claim in relation to the period prior to the claimant's dismissal.

54. That is precisely the sort of scenario which the res judicata rules were intended to prevent. It falls squarely into the category of the fourth principle identified in Virgin Atlantic Airways, it is "an issue which would be common to both claims," namely whether the claimant had performed poorly, and the reasons for it.

55. Weighing all those matters in the round, I have concluded that the claimant should have applied to amend the First Claim to include the allegations which he now seeks to pursue in the Second Claim. He is therefore caught by the

> res judicata rule, and all the rule in Henderson v Henderson.
>
> 56. Consequently, I am satisfied that the claimant's actions in issuing the Second Claim to pursue allegations which he could and should have included in the First Claim by amendment amounts to an abuse of the Tribunal's process and the claim is struck out.
>
> 57. It is therefore unnecessary to determine whether the claims have little or no reasonable prospect of success or are out of time.

The law

25. The parties are in agreement that the judge properly directed himself to the legal principles and that I too can take those principles as my starting point as constituting a correct statement of the law.

26. To those principles, I need to add the following points, which are also not in dispute:-

27. First, as a matter of principle, the *Henderson v Henderson* rule can be relied on in relation to any matter that could and should have been brought as part of the First Claim up to the date of the hearing in that claim. In *LB of Haringey v Mrs C A O'Brien* [2016] UKEAT/00004/16/LA HHJ Eady (as she then was) held that a Tribunal had erred in law in confining its consideration of the *Henderson* point to what the claimant could and should have included in the claim form at the outset of the first set of proceedings: see [59]-[60].

28. Secondly, caution is required before striking out a claim on the *Henderson v Henderson* basis as it inevitably involves striking out a claim that has not been heard. As Lord Bingham put it in *Johnson v Gore Wood and Co* [2002] 2 AC at 22C-F:

> The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances

to be denied the right to bring a genuine subject of litigation before the court: *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, 590 per Lord Kilbrandon, giving the advice of the Judicial Committee; *Brisbane c City Council v Attorney General for Queensland* [1979] AC 411, 425 per D Lord Wilberforce, giving the advice of the Judicial Committee). This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536, an "inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

29. And at 31B-F:

I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later

proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise

> before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is
>
> excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

30. Thirdly, in reviewing the decision of the Tribunal, the Employment Appeal Tribunal is to take the approach described in *Aldi Stores Ltd v WSP Group Plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748 per Thomas LJ at [16]:

> In considering the approach to be taken by this court to the decision of the judge, it was rightly accepted by Aspinwall that the decision to be made is not the exercise of a discretion; WSP were wrong in contending otherwise. It was a decision involving the assessment of a large number of factors to which there can, in such a case, only be one correct answer to whether there is or is not an abuse of process. None the less an appellate court will be reluctant to interfere with the decision of the judge where the decision rests upon balancing such a number of factors; see the discussion in *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577 and the cases cited in that decision and *Mersey Care NHS Trust v Ackroyd (No 2)* [2007] HRLR 580, para 35. The types of case where a judge has to balance factors are very varied and the judgments of the courts as to the tests to be applied are expressed in different terms. However, it is sufficient for the purposes of this appeal to state that an appellate court will be reluctant to interfere with the decision of the judge in the

> judgment he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him. In this case, I consider that the judge, despite the weight that must be accorded his view given his great experience in this type of litigation and the conspicuous success with which he has managed the TCC, reached a decision which was impermissible by taking into account factors which he should not have done and omitting factors which he should have taken into account.

31. Fourthly, the respondent also refers to *O'Kelly v Trusthouse Forte Plc* [1983] ICR 728 and points made by Sir John Donaldson MR there about weight being a matter for the First-tier Tribunal even though we are concerned with whether or not the Second Claim was in law an abuse of process:

> This is the point of temptation for the appellate court. It may well have a shrewd suspicion, or gut reaction, that it would have reached a different decision, but it must never forget that this may be because it thinks that it would have found or weighed the facts differently…it must be satisfied that there must have been a misdirection on a question of law before it can intervene. Unless the direction on law has been expressed it can only be so satisfied if, in its opinion, no reasonable tribunal, properly directing itself on the relevant questions of law, could have reached the conclusion under appeal … It is only if the weight given to a particular factor shows a self-misdirection in law that an appellate court with a limited jurisdiction can interfere. It is difficult to demonstrate such a misdirection and, to the extent that it is not done, the issue is one of fact.

32. Finally, I remind myself that, in scrutinising the judgment of the Employment Tribunal, the Employment Appeal Tribunal is required to read the judgment fairly and as a whole, remembering that the Employment Tribunal is not required to express every step of its reasoning but only to set out sufficient reasons to enable the parties to see why they have lost or won and that no error of law has been made: cf *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672 at [57]. That case also makes the point (at [58]) that where the Employment Tribunal has correctly stated the law, the Employment Appeal Tribunal should be slow to conclude that it has misapplied it. Per *Greenberg*, [57(3)], any

doubt in this regard ought to be assumed in the Employment Tribunal's favour. It is the duty of this court to "assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not".

Analysis and Conclusions

33. The scope of the appeal is limited by the grounds of appeal that were permitted by HHJ Auerbach to proceed to a full hearing. The claimant in his submissions ranged more widely than the scope of the grant of permission, but I will deal with the principal additional points that he made so that he can understand why they do not assist him:-

a. The claimant argues that he was in no position to submit the Second Claim before the hearing of the First Claim, or to make an application to amend to include the Second Claim in the First Claim because of his state of health at the time. In the light of the medical evidence he has now put before me in respect of that period, I am sympathetic to the claimant's difficulties in this respect. It is evident that his health conditions make it very difficult for him to manage his life. However, he had the opportunity to make that argument, and to put the evidence in support of it, before the Employment Tribunal. The judge considered it, but explained at [52] of the judgment that the claimant had not put before him the supporting medical evidence. HHJ Auerbach refused permission on this argument (see [33] of HHJ Auerbach's judgment) and the claimant cannot resurrect that argument now;

b. The claimant also argues that the judge failed to take into account that he was seeking to conciliate the Second Claim and that the Acas Early Conciliation period had in fact been extended until after the start of the trial of the First Claim. Again, I have considerable sympathy for the claimant in relation to this argument, because it seems to me that the judge may have overlooked the dates of Acas conciliation. However,

the difficulty is that the claimant was represented by counsel below and the judge could only decide the case on the basis of the arguments put forward on the claimant's behalf by his counsel. That was why HHJ Auerbach refused the claimant permission to run this argument on appeal (see [32] of HHJ Auerbach's judgment at the rule 3(10) hearing) and again the claimant cannot resurrect this argument now;

c. The claimant further argues that the tribunal was wrong to find that he was aware that he could have applied to the Tribunal to amend the First Claim to include the Second. He says that he was not aware he could do this. Yet again, I have sympathy for the claimant on this issue. It would in my judgment have furthered the overriding objective for the Tribunal to hear evidence from the claimant as to the reasons why he did not apply to amend the First Claim, rather than determining the application on the basis of submissions by counsel. Had the Tribunal done so, it might have formed a different picture of the claimant's reasons for not applying to amend the First Claim. However, this is not an argument that has been advanced by the claimant, and it is not one of the grounds of appeal. Employment Judge Midgley at the hearing, without dissent from either party (both of whom were represented by counsel), proceeded on the basis of submissions only. In my judgment, it was reasonable for the judge, on the basis of those submissions, to conclude that the claimant must have known he could have applied to amend because he had amended the First Claim previously.

34. I now deal with the grounds of appeal on which permission was granted. I approach the case on the basis of the legal principles I have set out above. As the judge gave himself proper directions as to the law he had to apply, I must be slow to conclude that he erred in the application of those principles. Further, although the question of whether the Second Claim is an abuse of process is a question to which there is in theory only one right answer, I must not find that the judge has erred in law simply because I might myself have given different weight to the relevant factors. If he has taken

into account the material relevant factors, and left out of account irrelevant factors, and not reached a conclusion that is perverse, I should not interfere.

35. In granting permission to appeal, HHJ Auerbach identified four factors as a result of which he considered, individually or cumulatively, it was arguable the judge had reached an impermissible conclusion in this particular case.

36. The first is that "(a) At the time when the matters complained of occurred, the full merits hearing in the first claim was about two months away". This was a factor of which the judge was plainly aware. He has not left it out of account. The mere fact that the hearing was only about two months away does not greatly assist one way or another with the question as to whether the Second Claim was an abuse of process. I do not read HHJ Auerbach's grant of permission as intending this factor to be dealt with separately to the others.

37. The second is that "(b) Accordingly, any application to amend the first claim to introduce those claims would have to have been made well before the time limit for advancing those claims as new claims expired, thereby cutting in to the time that Parliament had allowed for such claims to be advanced". I understand why HHJ Auerbach at the permission stage considered there was force in this point, but on full analysis I do not consider that the judge erred in failing to make specific reference to the time limit. A claimant who wishes to bring forward a claim must do so within the time limits. In particular where the claimant has other proceedings already 'on foot', he will have no prospect of getting an extension of the primary time limit. He must therefore act within the time limit, and thus in a claim under the EA 2010 within the period of three months plus extension for Acas conciliation. It cannot therefore be an error of law for a judge to hold that a claim is an abuse of process because it has not been advanced as an application to amend during the primary time limit. Once the time limit has expired, it will probably not be possible to bring the claim at all. To put

special weight on the time limits in the context of an abuse of process argument such as this would therefore be almost to collapse the concept of time limits and abuse of process into one another, with a claim not capable of being an abuse of process unless it has been brought out of time or (at most) within a day or so of the end of the time limit. In short, it seems to me that referencing the time limit itself adds nothing of significance, save that it is, of course, the period that Parliament has allowed for conciliation. Conciliation is in my judgment an important factor for a Tribunal to take into account as the public interest in promoting conciliation should mean that it is only very rarely that a second claim will be found to be an abuse of process as a result of it not being brought while genuine conciliation is ongoing. However, for the reasons set out above, the claimant's argument in this case about conciliation is not part of this appeal and would not be successful if it was because of the way that his case was advanced on his behalf by his counsel before the Employment Tribunal.

38. The third is "(c) The tribunal (although in the reconsideration decision it accepted to a degree the claimant's point that it had mis-stated in the original decision the factual overlap in terms of which managers were involved) took insufficient account of the contention that there would have been insufficient time to accommodate the new claims into the first claim without disturbing and extending the listing of the hearing of the first claim". I again have considerable sympathy with the claimant in relation to this point. When one reads the terms in which the Tribunal refused his application for postponement of the final hearing of the First Claim (set out in full above), it is easy to understand why it would not have occurred to him that he could apply to amend the First Claim to include the Second Claim, thus derailing the long-awaited hearing of the First Claim. It is very easy to imagine that if such an application to amend had come before me, I would have refused it and directed the claimant to start the Second Claim in fresh proceedings. However, Employment Judge Midgley did not leave that possibility out of account. He expressly recognised that, if the claimant had applied to amend the First Claim to include the Second Claim, that application may have been refused and the claimant would then have been left to bring the Second Claim as a fresh claim. The judge weighed

these factors up and concluded, in substance, that the claimant not only could, but should have, made the amendment application so that the decision as to what should happen with the Second Claim could be made by the Tribunal, with the benefit of submissions from the respondent too. I cannot say that the judge erred in law in thus balancing the factors. Indeed, it seems to me that there is much to commend his approach: the abuse of process in this case is that the claimant deprived the Employment Tribunal of the opportunity of deciding (and the respondent of the opportunity to make representations about) how best to allot time and resources to dealing with the claimant's two claims. The claimant did so in circumstances where he himself applied to postpone the final hearing of the First Claim only a week before it was due to start, at a point when he had known for two months about the facts that gave rise to the Second Claim, and even though he was himself seeking a postponement of the final hearing of the First Claim which he might have been more likely to obtain if he had raised the Second Claim. In those circumstances, I do not consider that the judge erred in law in deciding that the Second Claim was an abuse of process.

39. The judge was also in my judgment right to note that it would have been relevant to the question of whether the amendment should be allowed that there would be some overlap in the issues between the First Claim and the Second Claim. I do, however, add by way of a note of caution that care needs to be taken in referring to the concept of issue estoppel (i.e. Lord Sumption's fourth principle) as an additional reason for striking out a claim on the *Henderson v Henderson* basis. Issue estoppel relates only to particular issue(s) in a case, not to causes of action. It is not therefore a reason for preventing a claim from being advanced at all, but merely a rule by which any claim so advanced will have to be determined on the basis of the estoppel on that issue and without relitigating that particular point.

40. The fourth and final point that HHJ Auerbach identified when granting permission was "(d) These were fact-sensitive discrimination claims and the effect of a *Henderson v Henderson* strike-out

is to deprive a claimant of the opportunity to have adjudicated on their merits, claims that have not so far been adjudicated at all". Employment Judge Midgley did not in his judgment refer to this point in terms, or avert to the passage from *Johnson v Gore Wood* that I have set out above that emphasises that the *Henderson v Henderson* principle, where it applies, prevents litigation of a claim that has not otherwise been determined. However, it seems to me that (applying the approach in *Greenwood*) I must proceed on the basis that the judge understood that that was the consequence of his finding that the Second Claim was an abuse of process. I cannot see how he can fail to have had that obvious point well in mind.

41. I also see no reason why the rule in *Henderson v Henderson* should not apply to 'fact-sensitive discrimination' claims as it applies to other cases. The reason why caution is required before striking out fact-sensitive discrimination claims on a 'no reasonable prospects of success' basis is because such a case may look unpromising on paper but take on quite a different complexion once the full evidence has been heard. The rule in *Henderson v Henderson* is not, however, concerned with the merits of a case at all. It can be as much of an abuse to hold back a meritorious claim that should have been brought with a previous claim as it is to hold back an unmeritorious claim. It is clear from the authorities to which the judge directed himself, including *Gore Wood*, and also *Zodiac* at [24] and *Agbenowossi-Koffi* at [23], that bringing a second claim can by itself constitute oppression and abuse of process without more. It is also clear that the *Henderson v Henderson* principle has been applied in EA 2010 claims in the same way as in other cases: see *O'Brien*, *Agbenowossi-Koffi* and *Apelogun-Gabriels v Lambeth LBC* [2002] ICR 713.

42. Finally, I have stood back from the four specific points identified by HHJ Auerbach in the grant of permission and asked myself whether, notwithstanding that each point by itself has failed to persuade me that the judge erred in law, taken cumulatively the judge has nonetheless erred in his judgment. I do not consider that he has. While I would not necessarily have reached the same

conclusion myself, I am satisfied that there is no error of law in the judge's decision. The claimant's appeal must therefore be dismissed.