

Neutral Citation Number: [2026] EAT 48

Case No: EA-2023-001427-TH

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 8 April 2026

**Before:**

**SARAH CROWTHER KC**  
**DEPUTY JUDGE OF THE HIGH COURT**

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**Between:**

**WIRRAL UNIVERSITY TEACHING HOSPITALS NHS FOUNDATION TRUST**

**Appellant**

**- and -**

**MS MORIARTY**

**Respondent**

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**JUDGMENT**  
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Hearing date: 25 March 2026

**Mr James Boyd** (instructed by Weightmans) for the **Appellant**  
**Ms Emma Darlow Stearn** (instructed by via Free Representation Unit) for the **Respondent**

## **SUMMARY**

### **Practice and Procedure, Jurisdictional**

The Tribunal was right to find that it was not an abuse of its process within the principle established in **Henderson v Henderson** (1843) 3 Hare 100 for the Claimant to raise factual allegations in respect of events which took place prior to a previous claim which had been dismissed following withdrawal. It had not misunderstood the Respondent's arguments, had correctly applied the relevant principles of law and there was no internal inconsistency in the reasons.

## **SARAH CROWTHER KC, DEPUTY JUDGE OF THE HIGH COURT:**

### **INTRODUCTION**

1. I will refer in this judgement to the parties as they were below. The issue on this appeal is whether the employment tribunal was right to refuse the Respondent's application to strike out four factual allegations made by the Claimant as particulars of her claim for constructive unfair dismissal on grounds that they amounted to an abuse of the process in accordance with the principle established in **Henderson v Henderson** (1843) 3 Hare 100.

### **FACTUAL BACKGROUND**

2. The Claimant was employed by the Respondent as a nurse at its hospital at Arrowe Park. On 15 October 2016, she sustained injury as a result of an incident during the course of her work for the Respondent in which she sustained a significant electric shock when using work equipment. Her case is that the events in question were not properly reported, recorded or investigated and that her efforts since that time to address the incident have led to a course of conduct of harassment and victimisation of her by the Respondent.

3. On 8 December 2020, she brought a claim before the employment tribunal. She acted in person, with assistance from her husband. Neither the Claimant nor her husband are legally qualified. In the ET1 form she ticked the boxes indicating claims of age and disability discrimination. Attached to the ET1 was a narrative document over 4 pages which was addressed to 'Your Honour' and took the form of a letter cum witness statement, giving a detailed narrative history of events which she said had taken place in the course of her work for the Respondent. That narrative refers to the Claimant's complaint that she had been victimised by the Respondent as a result of her personal injury accident and her attempts to have the incident investigated.

4. The Respondent responded to the claim as follows by stating that the 'following initial issues' arise:

“Whilst the Claimant has provided a great deal of narrative in her Claim Form and the annexed document addressed to “Your Honour” the narrative therein is confused and confusing. The Claimant does not clearly state what legal claims she seeks to pursue. It is not possible to discern whether there are any potential viable (or arguable) claims against the Respondent, whether they have any reasonable prospect of success, or whether they are arguably in time, or otherwise within the jurisdiction of the Tribunal.”

5. The Respondent therefore invited the Claimant to particularise her allegations and the tribunal to give it permission to plead a substantive response once particularisation had taken place.

6. The tribunal listed the claim for a case management hearing, but before that could take place, the Claimant withdrew her claim on 21 June 2021, and it was subsequently dismissed by the tribunal.

7. On 29 January 2022, the Claimant resigned from her employment with the Respondent.

8. On 4 June 2022, she lodged a second claim with the tribunal in which she brought a claim for unfair dismissal under section 95 Employment Rights Act 1996. Although she also ticked the ET1 form boxes for ‘arrears of pay’ and ‘other payments’ she clarified that her sole claim was that she had been constructively unfairly dismissed and that she relied on events since 15 October 2016, saying she had been forced to resign “*due to the Trust failing to address my claims about my unsafe place of work*”.

9. The Respondent once again complained in materially similar terms to its objections set out in response to the first claim, that the Claimant’s case was one which it was unable to meet due to lack of particularity and it being ‘confused and confusing’.

10. A preliminary hearing took place on 3 January 2023 before Employment Judge Platt by telephone at which the following was said in the case summary:

“44. The Claimant confirmed that her claim was not about health and safety but about how the employment relationship had broken down following her accident at work. She felt negative behaviours had been displayed towards her and that the Respondent consistently failed to follow through on recommendations that that had been made as a result of the Claimant’s accident. The Claimant feels that she had never received an apology or explanation and that the Respondent behaved in a way that was calculated to bring her employment to an end.

45. The Claimant asserts that the implied duty of mutual trust and confidence has been fundamentally breached by the Respondent and that during the last 18 months of her employment the Respondent would not decide what was going to happen to her which left her fearful of being dismissed.”

11. A list of issues was then set out. A list of particulars of alleged conduct on the part of the Respondent said by the Claimant to have breached the implied duty of trust and confidence was set

out, numbered 1.1.1.1 to 1.1.1.13. (I am going to refer to this list simply by reference to the final numbers in order to make the judgement easier to read: so, for example, ‘1.1.1.1’ will become ‘1’).

12. Following the preliminary hearing, the Respondent filed Amended Grounds of Resistance in which it stated that the tribunal lacked jurisdiction to consider particulars 1 to 10 on the basis of what was then Rule 52 of the Employment Tribunal Rules of Procedure 2013.

13. It followed that the issues at 11, 12 and 13 would proceed to a trial in any event.

## **THE HEARING BEFORE THE TRIBUNAL**

14. At the sift of the appeal, HHJ Auerbach indicated to the Respondent that it might wish to place before the EAT evidence of what had been in evidence and submissions before the tribunal at the preliminary hearing. In the event no such materials were provided and therefore this summary of what took place is derived from the judgement of Employment Judge Harding.

15. The hearing took place in person, and the Respondent was represented by a solicitor, Mr Singh. The Claimant was assisted by her husband, Mr Nickless, who acted as a McKenzie Friend. Judge Harding recorded that the Respondent’s position with respect to its application at the hearing was different to that which it had taken originally and set out how the case developed over the course of the hearing.

16. The strike out application had at first been made on the basis that all of particulars 1 to 10 were subject of an issue estoppel. It was only at the hearing, after the Judge pointed out that some of the allegations in the second claim did not feature in the first claim, that the Respondent accepted that in fact particulars 2, 7, 8 and 10 did not attract issue estoppel.

17. The Respondent, however, changed tack and submitted that it was an abuse of the process for the matters to be raised in the second claim, and they should be struck out as an abuse in line with the decision in **Henderson**. Even though they had never been litigated before, they were facts and matters of which the Claimant was, at least in part, if not wholly, aware at the time of the first claim and it was abusive to raise matters now which ought to have been litigated as part and parcel of the first claim.

18. The particulars 2, 7, 8 and 10 are:

‘Did the Respondent do the following things:

2. Make a number of abusive phone calls through its HR function (alleged to have been made by Adriana Roscoe) to the Claimant after she sustained her injury between October 2016 and November 2017.

7. Recommend (during 2019) that the Claimant be offered job roles that she would have to refuse as a result of her injuries.

8. Fail to deal appropriately with the Claimant’s complaint of bullying and harassment by the Director of Workforce to her safeguarding line manager in June 2020 who it is alleged told her to drop the complaint.

10. Fail to deal appropriately with matters causing stress and anxiety to the Claimant which caused her to commence sick leave in July 2020.’

19. Judge Harding set out in her reasons the efforts which had been made during the course of the preliminary hearing by the Judge to establish with the Claimant and her husband which cause of action she considered each of the particulars under challenge to have been linked to in the first claim. I understand the Judge to have been seeking to elicit from the Claimant whether particulars 2, 7, or 10 were said to be acts of discrimination. This exercise was not fruitful. The Judge records,

“I was told repeatedly by the claimant’s husband that they did not know which matters fell under which type of head of claim and he said several times that they had hoped the Judge would assist them with this when they submitted their claim. At various points the claimant mentioned breaches of policy, breaches of duty of care, a failure to provide a safe place to work, and that the incidents ‘formed part of the whole story’.”

20. In my judgement, it is clear from the fact of this exchange and the manner in which the Judge recorded it that he appreciated that insofar as the first claim had alleged victimisation, particulars 2, 7, 8 or 10 would have formed part of the same course of conduct which was complained about in the first claim.

21. Mr Singh, who it appears had not appreciated that not all of the allegations raised in the second claim had not previously been litigated, applied for a postponement of the application hearing in order to prepare further submissions in respect of his **Henderson** abuse argument. The Judge

refused on the basis that the Respondent could and should have identified for itself which of the issues were in fact covered in the first tribunal claim and therefore potentially subject of issue estoppel. No appeal has been made of that case management decision.

22. The Judge then recorded Mr Singh's submission in respect of the **Henderson** abuse argument. After referring to the law to which he had been taken the Judge said:

“21. [Mr Singh] submitted that those claims which were not contained within the first claim could have been included in it and it would have been reasonable for the claimant to have had them in her contemplation as giving rise to matters which she was seeking to pursue. He submitted that the claimant's withdrawal of her first claim was without qualification and caveat and he pointed out that the claimant had the benefit of legal advice at the time. He submitted that if she now sought to criticise her legal advisers then her recourse was against them...

23. He acknowledged that it would be the wrong approach to hold that because the matters could have been raised in the first claim form they should have been and he acknowledged that more than this was required. He stated that whether permitting the claimant to bring these matters forward now amounted to abuse of process was for me to decide in all the circumstances weighing up the private and public interests... He submitted that the complaints set out at paragraphs 2, 7, 8 and 10 should have been in the first claim form and should be barred.”

23. The Judge acceded to the Respondent's application in respect of particulars 1, 3, 4, 5, 6 and 9, that the Claimant was estopped on those issues by reason of the dismissal of the first claim.

24. However, he refused the Respondent's application in respect of particulars 2, 7, 8 and 10 and held that it was not an abuse of process in the **Henderson** sense for the Claimant to assert those facts and matters in support of her claim for unfair dismissal.

## THE LAW

25. The relevant legal principles were not disputed, and I shall therefore set them out only in brief. The rule in **Henderson** (at pg. 319) is as follows:

“... 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.”

26. Lord Sumption JSC in **Virgin Atlantic Ltd v Zodiac Seats UK Ltd** [2014] AC 160 referred with approval to the judgment of Lord Bingham of Cornhill **Johnson v Gore-Wood & Co.** [2002] 2 AC 1 in which the latter explained that the principle in **Henderson’s case** was both a rule of public policy and an application of the law of res judicata, and expressed his view that:

“*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 interest 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. ... 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.”

27. It is common ground between the parties on this appeal that Judge Harding properly stated the relevant legal principles in the reasons.

## **GROUND 1**

28. Mr Boyd, who appeared before me on behalf of the Respondent, submitted that the tribunal had fallen into error when applying the **Henderson** principle to the facts of this case, because the Judge had had regard to an irrelevant consideration, namely whether striking out particulars 2, 7, 8 and 10 would adversely affect the Claimant’s prospects of success in her constructive unfair dismissal claim.

29. At paragraph 48 of the Judgment, (unfortunately due to an automatic numbering error there are two paragraphs numbered 48, the relevant one is the second one, so I shall refer to it as 48b), the Judge said,

“48. Additionally, as the claimant herself pointed out if these matters were to be struck out her constructive unfair dismissal claim would go forward based on a very small number of complaints indeed. All that the claimant would be left with was that the respondent breached the implied term of trust and confidence because

11. In September 2021 HR mistakenly said the claimant had not been attending meetings.

12. On 4 January 2022 incorrect wrote to the claimant that she had failed to attend an occupational health appointment, and

13. Failed to respond to a letter that the claimant wrote on 7 January 2022 in a reasonable timeframe.

49. In such circumstances denying the claimant the opportunity to litigate for the first time issues which have not previously been adjudicated upon takes on some significance.”

30. Mr Boyd submitted that the reasonable inference to be drawn from the use of the words “very small...indeed” and “all that...would be left with” was that the Judge was improperly influenced by the prospect of adversely affecting the Claimant’s prospects of succeeding at the trial of the unfair dismissal claim.

31. I remind myself, in light of the guidance of the Court of Appeal in **DPP v Greenberg** [2021] *EWCA Civ 672* that where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal should be very slow to conclude that it has not applied those principles and I should generally only do so where it is clear from the language used that a different principle has been applied to the facts found.

32. The criticisms of Mr Boyd of the Judge’s reasons fall well short of meeting the requirement for clear language of misapplication in my judgement. To start with, I am not persuaded that Mr Boyd’s reading is entirely fair to the Judge. In paragraph 48b the Judge, it seems to me, is setting out submissions made by Mr Nickless, which are also recorded at paragraph 25 of the judgment where Mr Nickless is said to have commented on there being very little left of the case and that further strike out (beyond the estopped issues) would lead to a “non-trial”.

33. Paragraph 48b needs, to my mind, to be read together with paragraph 49b, which contains the reasons for the Judge’s decision. It can be seen the tribunal rests its conclusion on the bases that (i) issues 2, 7, 8 and 10 have not been litigated before and that (ii) there will need to be a trial of issues 11, 12, and 13 which go to the same cause of action in any event. Both those considerations are part material to the broad-based merits assessment in **Henderson** abuse applications, and do not raise any error of law, indeed, reference to them suggests to me that the Judge applied the test properly. Moreover, there is no mention in paragraph 49b of the prospects of success of the Claimant’s claim either way. It would require clear language for me to be able to conclude that the Judge was concerned about the Claimant’s prospects of success at trial when forming her decision. No such language exists. It seems to me that what was in the Judge’s mind was that she was being invited to exclude particulars of breach of the implied term of trust and confidence in circumstances where those particulars had

never been the subject of any previous litigation and where the current litigation would in any event need to address whether the implied term had been breached. Against that background, it is hardly surprising that the Judge considered it material to the question of whether on a broad-based merits assessment it amounts to an abuse of process to litigate those particulars of breach.

34. I am further supported in this conclusion by the fact that the Judge had self-directed by reference to the guidance of the Court of Appeal in **Foster v Bon Groundwork** [2012] EWCA Civ 252 and the EAT case **Thomas v Devon CC** UKEAT/0513/07 which are both referred to in paragraph 36 of the reasons and clearly had those cases well in mind. In each of those cases, it was reinforced that **Henderson** abuse concerns the striking out of allegations of fact which have never previously been subject of litigated proceedings, so that particular care is required when carrying out the broad-based merits assessment to identify that an abuse of process does exist.

35. In my judgement, the Judge was entirely right, therefore, to have regard to the fact that particulars 2, 7, 8 and 10 were not any part of the first claim and that to exclude the Claimant from proceeding with them would have the effect of denying her the right of ever litigating those complaints. It was also entirely appropriate to take into account the fact that there would in any event need to be a trial of whether there was breach of the implied term of trust and confidence and that the additional of four particulars not previously litigated were therefore less likely to amount to an abuse of the process of the court.

## **GROUND 2**

36. This ground alleges that the Judge misunderstood the Respondent's submissions as being limited to a suggestion that because the facts and matters alleged in particulars 2, 7, 8 and 10 took place (at least in part) before the issued the claim form in the first claim, they 'could' have been raised in that claim, whereas in fact what the Respondent had submitted was that they 'should' have been included by the Claimant given that her approach to pleading in the first claim was to set out the 'whole story' in the hope that the tribunal would help her identify which facts amounted to potential claims in law.

37. There was lengthy discussion in the submissions before me as to what exactly had been argued by Mr Singh before the Judge. However, Mr Singh was not present in court, and no evidence had been adduced by the Respondent on that topic. As to whether the 'whole story' approach was a new argument on appeal, as Ms Darlow Stearn, who appeared on behalf of the Claimant before me,

but also was not instructed below, submitted, this was also unclear. In the end, the only material available to me is the tribunal's reasons.

38. As I set out above, it is clear from a reading of the whole reasons, including especially paragraph 46, that the Judge was alive to the Respondent's point that the Claimant's case had at all times – including in the first claim - been that there had been a 'continuum of behaviour' from October 2016 until the date of her resignation in January 2022, that the facts and matters of which she now complained were ones which were within her knowledge at the relevant time, and were not concealed or otherwise unknown to her. The Judge was also aware that the Respondent's argument was that she should therefore have taken care to include everything of which complaint was made, whether or not she regarded those facts or matters as incidents of, say, less favourable treatment or other forms of impermissible discrimination or victimisation or just background facts (see paragraph 23 final sentence of the reasons).

39. The Judge concluded that those features of the case were relevant to the assessment and, in favour of the Respondent, found that they weighed in favour of a finding that **Henderson** abuse did exist:

“These, I considered, were points in favour of a conclusion that it was an abuse to allow these matters to proceed now. Likewise, it is relevant that there is significant public interest in finality of litigation and, particularly in these financially constrained times, significant public interest in ensuring that litigation is conducted efficiently and without placing undue pressure on public funds.”

40. It is, therefore, simply not correct for the Respondent to suggest that the Judge misunderstood either party's case or failed to consider its argument that the Claimant was under an obligation to present her 'whole story' in the first claim because she was inviting the tribunal to identify her legal bases of claim for her. The Judge expressly took this into account but did not attach the same weight to it as the Respondent would have preferred. This does not come close to establishing an error of law on the part of the Judge and I would dismiss the appeal on this ground.

#### **GROUND 4**

41. By this ground, the Respondent contends that there is an inconsistency between the finding at paragraph 46 that the particulars 2, 7, 8 and 10 could have formed part of the 'whole story' basis upon which the first claim was presented by the Claimant to the tribunal and the later finding at paragraph 49a that it could not,

‘Be said that something should have been raised in the first claim when there is no real clarity as to what that first claim comprised.’

42. I prefer the submission of Ms Darlow Stearn that, on a fair reading of the reasons, there is no inconsistency between these two paragraphs, but the observations in fact address two different aspects of the situation before the Judge.

43. It was common ground both below and before me that where events preceded the issue of the first claim form that it was possible for them to have been mentioned by the Claimant in the first proceedings. Moreover, as I have already set out, the Judge agreed that this was a feature which pointed in favour of a finding of **Henderson** abuse. What the Judge was, in my judgement, referring to in her comments in paragraph 49a was something entirely different, namely the fact that the first claim had been withdrawn at an extremely early stage. Due to the early withdrawal of the first claim, it was never case managed and it was not possible to discern (as the Respondent itself had complained at the time and as the Judge had valiantly attempted to do during the course of the preliminary hearing as I have set out above) which facts and matters which had actually been included by the Claimant were said to be relevant to a cause of action and, if so, which.

44. I further find that, the explanation given by the Judge in paragraphs 48a and 49a amounts to an attempt to set out in more detail the particular way in which the fact that the Claimant was acting in person meant that the court was less likely to assess the second claim as giving rise to an abuse of the process. As was held in **Foster v Bon Groundwork**, the fact that the Claimant is acting in person is something which should properly be considered in assessing whether the raising of allegations in a second set of proceedings amounts to an abuse. The Judge was correct in my judgment to conclude that on the facts of this case, the Claimant was not abusing the process.

45. I would add that it was entirely right for the Judge to observe that the Claimant’s genuine and obvious confusion about how to present her case made the Respondent’s task of establishing that she was abusing the court’s process in her second claim harder. At the time the first claim was dismissed on withdrawal, it was essentially impossible to say what issues for determination the first claim may in due course have given rise to. Had the Claimant committed to a list of issues it may well have been easier for the Respondent to establish that she was, by bringing this claim, behaving in a way which was abusive of the process. Say, for example, if the Claimant had withdrawn the first claim following a case management hearing at which a list of issues had been agreed, if a specific issue was one to which the new factual allegations were potentially relevant, at least then it would have been possible for the tribunal to assess the extent to which the Respondent was likely to have

been ‘twice vexed’ and similarly the degree of unreasonableness which attached to the Claimant in leaving them out of account the first time around. However, the tribunal was effectively deprived of any opportunity of making that kind of assessment. In circumstances where the Claimant was acting in person, the only reasonable response for the tribunal was to act with caution before reaching any conclusion that this was an abuse of its process.

## **CONCLUSION**

46. Ground 3 was withdrawn by Mr Boyd during the course of the hearing and therefore I do not need to determine it.

47. For the reasons set out above, this appeal shall be dismissed.