



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R. Edwardson

**Respondent:** Cheshire East Borough Council

**Heard at:** Birmingham

**On:** 21 December 2017 and  
in chambers on 05 January 2018

**Before:** Employment Judge Kelly

## Representation

Claimant: In person

Respondent: Mr C Breen of counsel

# JUDGMENT

## The Judgment of the Employment Tribunal is that:

The claimant's claim for equal pay in respect of the period up to and including 13 December 2016 is struck out.

## REASONS

1. This was a preliminary hearing to consider whether some of the claimant's claims are unable to be pursued because they either were or ought to have been, brought under his previous claim 1304668/2015 (the First Claim and its claim form is referred to as the First Claim Form). We refer to the claim form in the claim under consideration today as the Second Claim Form.
2. The First Claim Form was presented on 9 December 2015, and the Second Claim Form on 12 August 2017.
3. At the start of the hearing, the claimant complained that he had not received a bundle of documents from the respondent until 20 December 2017. However, the claimant confirmed that he had had adequate time to review it and did not require an adjournment to do so.
4. Further, the claimant made an application to amend his claim form which application was first shown to the respondent just before the start of the hearing. The respondent objected on the grounds that it could not take

instructions to deal with the application. We declined to deal with the application at the hearing on the grounds that the respondent had not had chance to take instructions to put it in a position to deal with factors relevant to the application as identified in *Selkent Bus Company v Moore* 1996 ICR 836.

5. The respondent identified that it had two grounds of argument that the claimant should not be able to bring all his claims.
  - 5.1. The first ground was that certain claims were settled by a COT3 settlement document entered into in respect of the First Claim on 13 Dec 2016.
  - 5.2. The second ground was that it would be an abuse of process for the claimant to pursue certain of his claims on the principles established in *Henderson v Henderson (1843) 3 Hare 100* because the claimant could or should have raised the claims in the First Claim.
6. Neither party produced any authorities. The tribunal produced to the parties an extract from Harvey on Industrial Relations and Employment Law headed "the rule in *Henderson v Henderson: abuse of process*" at section [1030] to [1043.02].
7. Page numbers below refer to page numbers in the respondent's bundle. Paragraph numbers refer to paragraphs in the Second Claim Form, unless stated otherwise.

### **Argument that certain claims should not proceed as settled by COT3**

8. The claimant confirmed he was ready to deal with this argument.
9. The respondent argued that the following claims should not proceed as they were settled by the COT3 of 13 Dec 2016:
  - 9.1. A claim under para 32, which the claimant clarified was (1) for equal pay in the sum of approximately £17,000.00, and also (2) for direct and indirect discrimination in relation to the handling of a grievance which was submitted on 29 June 2016. The equal pay claim related to the period from the start of the claimant's employment (10 Oct 2011) until the end of his employment (10 Oct 2017).
  - 9.2. A claim under para 59, which the claimant clarified was for unlawful deduction from wages and pension benefits in respect of contractual entitlements to 6 months full sick pay in the period starting from 21 Dec 2015.
10. The respondent relied on the terms of the COT3 which provided that the claimant accepted the settlement of all claims in the First Claim "and all and any claims about the facts and matters set out in his claim form".
11. The respondent said that the First Claim form set out facts and matters in relation to the claim for equal pay, in particular referring to its first page where the claimant complained that he was paid less than the pay offered to him when the role was explained to him. In the First Claim Form, the claimant

said that he understood he would be paid on a senior grade 10 scale point. However, he started on a grade 9 pay level and was subsequently moved to the bottom of the grade 10 scale. This claim amounted to £14,646.00. He also complained that he acted up on an interim basis without a consequent pay increment, which he calculated to be worth £310.00. On the second page of the First Claim form, the claimant also claimed a relocation allowance of £3500.00.

12. The respondent submitted that any matters relevant to pay were generally compromised by the COT3.
13. The claimant resisted these arguments. With regard to the equal pay and discrimination claims in the Second Claim, he wished to refer to discussions in the judicial mediation over the extent of the settlement. We cannot take discussions in a judicial mediation into account.
14. There is no reference to an equal pay claim in the First Claim. The claimant asserted in the hearing that he did not become aware of the pay of his comparator and, therefore, that he may have an equal pay claim, until September or October of 2016. (We note that the claimant appears mistaken on this as to this date as he pleaded in the Second Claim that he submitted an equal pay grievance on 29 June 2016).
15. We consider that the COT3 settled all claims relating to the claimant's pay grade and his point on the pay grade scale IE how much he was paid because these are facts and matters set out in the First Claim form as described above. The equal pay claim must refer to the claimant's pay grade and his point on the pay scale IE how much he was paid. Therefore, we consider that the COT3 settled the equal pay claim to the date of the COT3.
16. With regard to the submission that the COT3 settled the claim for direct and indirect discrimination in relation to the handling of a grievance which was submitted on 29 June 2016, we do not see how this can possibly be referred to in the First Claim form, because the First Claim form was presented before this on 9 Dec 2015. When the First Claim form was submitted, the grievance had not been submitted. Therefore, details about the handling of that grievance could not be and were not referred to in the First Claim form. (The First Claim form did contain details of a grievance presented on 24 July 2014 which is not the same grievance.) Accordingly, this claim is not settled by the COT3.
17. With regard to the claim for unlawful deduction from wages and pension benefits in respect of contractual entitlements to 6 months full sick pay in the period from 21 Dec 2015, again the facts and matters surrounding this claim post date the presentation of the First Claim form on 9 December 2015. Therefore, details about the claim for sick pay could not be and were not referred to in the First Claim form. Accordingly, this claim is not settled by the COT3.

### **Argument that claims should not proceed as abuse of process**

18. In the First Claim Form, the claimant claimed arrears of pay and other payments. The pleadings stated that the claim related to matters within a grievance of 24 July 2014. He referred to a separate civil case which he was

now pursuing in respect of bullying and harassment by his former line manager (first para page 10). Neither party referred to such a civil case in the hearing and we assume that no claim was in fact instituted. The claimant complained of his pay grade, a failure to pay additional sums for acting up and a failure to pay a relocation allowance. He said that he was bringing an unlawful deduction from wages claim or a breach of contract claim in respect of the substantive salary and acting up increment and breach of contract in respect of the relocation allowance.

19. In the Second Claim Form, the Claimant claimed age discrimination, disability discrimination, sex discrimination, equal pay, notice pay, unfair dismissal, arrears of pay, other payments, detriment for a protected disclosure, breach of statutory rights, and breach of contract. It is not clear from the Second Claim Form which of these claim or claims the allegations of harassment and victimisation contained in the Second Claim Form refer to. For the purposes of this Judgment, we are working on the assumption that they could refer to claims of age discrimination, disability discrimination and detriment for making a public interest disclosure.
20. The facts relied on in the Second Claim form are different from the facts relied on in the First Claim form, other than the fact of alleged underpayment in the equal pay claim.
21. The respondent asserted that it was an abuse of process for the claimant to bring certain claims as these could or should have been brought in the First Claim Form. The respondent did not clearly state which claims it considered were a breach of process, but referred in submissions to complaints of harassment, discrimination, disability discrimination, failure to make adjustments, qualifying disclosures, and equal pay. Therefore, we understand that the claims which the respondent contends are an abuse of process are those for disability discrimination (including failure to make reasonable adjustments), age discrimination, sex discrimination, detriment for public interest disclosure and unequal pay. We will proceed on that basis.
22. In the Second Claim Form, the claimant complained of:
  - 22.1. disability discrimination and failure to make reasonable adjustments in the period from 3 July 2014 to the end of his employment;
  - 22.2. bullying, harassment, discrimination, and victimisation (para 1). In the hearing, the claimant said that this related to the period from October 2013. The Second Claim Form para 1 specified that this alleged treatment ended on the termination of the claimant's employment; and bullying harassment and victimisation by his line manager for the period from approximately February 2014 until March 2015 (para 10);
  - 22.3. detriment for making a protected disclosure. In the hearing, the claimant stated that the first detriment suffered was in July 2013 as referred to in para 11 of the First Claim Form. Subsequent detriments are described at paras 13 and 14. The claimant could not give a date for them, but in the chronology of the Second Claim Form they come prior to July 2014. The claimant confirmed that the detriments continued to the termination of his employment and beyond.

- 22.4. unequal pay at para 32 which states that the claimant first submitted an equal pay grievance on 29 June 2016. The equal pay claim related to the period from the start the claimant's employment (10 Oct 2011) until the end of his employment (10 Oct 2017). The claimant asserted in the hearing that he did not become aware of the pay of his comparator and, therefore, that he may have an equal pay claim, until September or October of 2016. (We note that the claimant appears mistaken on this as to this date as he pleaded in the Second Claim that he submitted an equal pay grievance on 29 June 2016).
23. The respondent said that it was unfair, prejudicial and abusive for it to now have to deal with matters which could and should have been dealt with in the First Claim Form. The respondent did not cite any particular prejudice it would suffer over and above having to address more complaints than it would otherwise be required to address. It relied on knowledge of potential claims which it said the claimant had when bringing the First Claim.
24. The claimant said that the claims in the First Claim were discrete relating to wages claims. He said that, when he made the First Claim, he was hoping harassment issues would cease, but that they continued. He said that the tribunal should take into account, when considering whether he had acted with reasonable diligence, the fact that he was being bullied by his manager when he presented the First Claim. He asserted that the issue of costs and the culture of the respondent meant it was not reasonably practical for him to have made all claims with the First Claim. He said that he was concerned that, if he had raised issues of disability and other issues, his employment would have been terminated, based on a culture of reprisals from which he said he suffered. He said that if he had tried to bring these additional claims earlier, he would have faced arguments from the respondent about amendments, costs and deposit orders. He said that if he had litigated, he would have had to pay tribunal fees and he did not have the funds to litigate every issue. He said that it was not practicable for him to raise issues of disability discrimination and public interest disclosure prior to a forthcoming restructure.

## **Law**

25. The case of *Henderson v Henderson* stated that, "where a given matter becomes the subject of litigation..., the court requires the parties ... 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 context, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case."
26. In *Johnson v Gore Wood [2002] 2 AC 1*, Lord Bingham confirmed that the onus on showing abuse of process is on the party alleging the abuse. He also stated that there is no requirement to show collateral attack on a previous decision or dishonesty. However, he said that it would be "wrong to hold that, because a matter could have been raised in earlier proceedings, it should have been". Instead, he advocated "a broad, merits-based judgment which takes account of the public and private interests involved and 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.” His opinion was that the court should ask whether in all the circumstances there was an abuse of process rather than whether the conduct was an abuse and, if it was, whether there were special circumstances excusing it.

27. *Harvey* gives examples of the *Henderson v Henderson* rule. In *Barber v Staffordshire County Council CA*, it was held that the dismissal of a claim for a redundancy payment barred the claimant from a subsequent claim for unfair dismissal: “the qualifying conditions for her claim for a redundancy payment were the same as those for a claim for compensation for unfair dismissal”. In *Hancocks v Doncaster Metropolitan Borough Council [1998] ICR 900*, the EAT said that a claim for unlawful deduction of wages precluded a subsequent claim that pay was protected under the employer’s salary protection policy. In *Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481 CA*, a claimant could not, following the compromise of his claim for race discrimination, bring a claim for personal injury where the injuries were virtually the same as those alleged in the discrimination claim and arose from the same cause of racial harassment.
28. However, in *University of London v Tariqz-Zaman [2010] EWHC 908 (QB)*, a claimant could proceed with a claim for breach of contract after an earlier claim of discrimination, arising from the same set of facts. In *Dattani v Trio Supermarkets Ltd [1998] IRLR 240, CA*, the court allowed the claimant to bring a claim for unpaid wages after the settlement of his unfair dismissal claim, despite the fact that the wages claim could have been brought previously. In *Foster v Bon Groundwork Ltd [2011] IRLR 645*, the EAT allowed a subsequent claim of unfair dismissal after a preceding claim for a redundancy payment, looking at the broad merits of the case. In that case, there was no evidence of the respondent suffering harassment other than having to face two sets of proceedings, which was not enough. The Court of Appeal subsequently commented that factors indicating it was not an abuse of process were that the claimant was a litigant in person, certain claims had to be considered in any event, and there would have been real injustice to the claimant if he were not permitted to pursue the unfair dismissal claims.
29. In *Parker v Northumbrian Water [2011] IRLR 652*, the EAT emphasised that whilst the determination that a claim could have been put forward in earlier proceedings may be the beginning of a consideration of abuse of process, it is not the end of it. There needed to be a discussion as to why it should have been raised at the earlier stage.
30. The decision of Judge Eady in *London Borough of Haringey v O’Brien UKEAT/0004/16* is to the effect that, in considering whether a claim could and should have been brought in earlier proceedings, it is not just claims that accrued prior to presentation of the earlier claim that are liable to be dismissed as being an abuse of process, but also those that accrued up to the date of the full merits hearing of the claim, as the claimant could apply to amend until the full merits hearing.

## **Conclusion**

31. We put it to the parties that, by analogy with *O’Brien*, the claimant’s claims liable to dismissal were those accruing until the judicial mediation at which the

COT3 settlement was signed in the First Claim, on 13 Dec 2016, and not merely those accruing until the presentation of the First Claim on 9 Dec 2015. Neither party disagreed with this principle, although the claimant put forward special circumstances as to why claims accruing before December 2015 should not be dismissed, and we will deal with that below. Otherwise, we will proceed on the basis that it is claims accruing to 13 Dec 2016 which are liable to be dismissed.

32. We conclude from the cases that the fact that the claimant could have raised various other complaints in the First Claim is not enough for there to be an abuse of process in the Second Claim. Rather, the onus is on the respondent to show that the claimant should have raised the various other complaints in the First Claim. Therefore, we do not consider that fact that the claimant knew of potential claims when bringing the First Claim is the issue.
33. We do not consider that the following are relevant factors, as contended by the claimant:
- 33.1. when he made the First Claim, he was hoping harassment issues would cease. Had he wished to litigate the issue, he should have done so;
  - 33.2. the allegation that he was being bullied by his manager when he presented the First Claim. We had no medical evidence that the claimant was too stressed to bring discrimination claims, when he was able to bring wages claims;
  - 33.3. the issue of costs and a fear of deposit orders. These are matters which litigants must face;
  - 33.4. fear of reprisals by the claimant when he was still employed. This is also an issue which litigants must face, and the claimant was willing to commence a tribunal claim for underpayment which presumably would also have risked reprisals. If this were taken as a relevant factor, it would (subject to time issues) allow claimants to continuously hold off on bringing all claims while still employed and embark on litigating them after the end of the employment which would not be in the public interest of finality of litigation.
34. We consider that relevant factors in our decision are as follows:
- 34.1. that the First Claim was restricted to a claim for alleged financial underpayments, while, in the Second Claim, other than the equal pay claim, the claims are for discrimination and detriment;
  - 34.2. that the facts relied on in the Second Claim are not the same facts as relied on in the First Claim, except for the allegation of underpayment in the equal pay claim;
  - 34.3. that even if parts of the claim were struck out as an abuse, there would still be a need for a hearing;
  - 34.4. that if part of the claim were struck out, the claimant would still have the chance of a remedy in relation to later matters;

- 34.5. that the respondent has not put forward any particular harassment or prejudice from allowing the disputed claims, other than the fact of having to deal with the claims;
- 34.6. that the claimant is a litigant in person.
35. On the balance of these factors, we consider that it is not an abuse of process for the claimant to bring any claims, other than the claim for equal pay.
36. With regard to the non equal pay claims: they relate to claims of discrimination and detriment, rather than incorrect payments and they do not rely on the same facts as the First Claim. The respondent failed to put forward any cogent argument as to why the claimant should have brought all the claims together, as opposed to relying on the fact that he could have brought further claims, as he knew about them. As above, this is not enough. Nor has the respondent asserted any harassment or prejudice over and above having to deal with the claims. We consider that the foregoing are the most influential factors. More minor factors assisting the claimant are that there would have to be a hearing in any event and he is a litigant in person. We do not consider that all of these points are outweighed by the fact that the claimant would still be able to claim compensation if claims were struck out as an abuse.
37. However, we consider that it is an abuse of process for the claimant to bring a claim for equal pay for the period pre dating the COT3 because this is essentially the same issue as he litigated in the First Claim IE the level of his pay; it is merely a different legal basis for making an argument that he should be paid more, which was his argument in the First Claim.

Employment Judge Kelly  
5 January 2018

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.