Neutral Citation Number: [2022] EAT 94

Case No: EA-[2020]-000184-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 06 July 2022

Before :

HIS HONOUR JUDGE WAYNE BEARD

- -

Between :

MS S EDEY	**Appellant**
- and -	
(1) LONDON BOROUGH OF LAMBETH	
(2) MR K McMAHON	**Respondents**

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- -

Mr G Powell (instructed under the auspices of Advocate) for the **Appellant**
Mr J Arnold (instructed by London Borough of Lambeth Legal Department) for the **Respondents**

Hearing date: 03 March 2022

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JUDGMENT

SUMMARY

PRACTICE & PROCEDURE

Estoppel, Abuse of Process, Strike Out

Dismissing the first ground of appeal. The ET was considering whether to strike out a claim. It took account of conclusions reached in a previous ET judgment (in a case between the Claimant and one of the Respondents) on retention of a laptop by the Claimant. It was an error for the ET to consider that the earlier ET finding created an issue estoppel because it was not necessary finding for the claims before the earlier tribunal. However, the decision to strike out was made under rule 37 ET rules as to reasonable prospects of success and abuse of process was also considered by the ET. Approaching the ET judgment with the required benevolent reading the ET's conclusions should be upheld. The ET finding of a "scattergun approach" and "deflection tactic(s)" by the Claimant amounted to conduct which would impact on the time and expense in defending claims, in time and resources of the ET service and cases brought by others. Applying **Johnson v Gore Wood** [2002] 2 AC per Lord Bingham, private and public interest is engaged. That along with facts found as arising from a rejection of the Claimant's credibility are elements which could establish an abuse of process, leading to there being no reasonable prospect of success. This is sufficient to overcome any concerns as to the hearing of claims in **Anyanwu v South Bank Students' Union and South Bank University** [2001] IRLR 305, HL The second Respondent, as a representative of the first Respondent, shows a clear identity between the first and second Respondents (applying **Gleeson v. J. Wippell & Co. Ltd.** [1977] 1 W.L.R. 510 per Sir Robert Megarry V.C.) strike out of the claim against the Second Respondent is equally justified.

Allowing the second ground of appeal. The ET recognised that there had been a later report to the police, however, it considered strike out was appropriate even thought this second report was not addressed in the earlier judgment. Issue estoppel could not apply as none of the matters

raised by the Claimant (and permitted to proceed to appeal) had been dealt with in the earlier tribunal judgment. In terms of the abuse of process element therefore there had been no credibility findings on point at all. As such, although the other matters set out for ground 1 apply equally to this ground the importance of factual matters set out in **Anyanwu** is of significantly greater application.

Dismissing the third ground of appeal. The ET was entitled to consider that complaints made were limited to specific forms of discrimination. The initial complaints were set out in a structured document which referred to specific sections within the Equality Act 2010 and the further particulars applied them to other sections in that Act. The Judge was entitled to conclude that these were not complaints intended to be raised in the original particulars of claim.

HIS HONOUR JUDGE WAYNE BEARD:

Introduction

1. I shall refer to the parties, as they were referred to below, as Claimant and First and Second Respondents. The Claimant was represented by Mr Powell acting, *pro bono*, through the ELAAS scheme. Mr Arnold represented both Respondents as he had in the Employment Tribunal Hearing. I am most grateful to both counsel for their helpful written and oral submissions and particularly to Mr Powell as without such assistance as provided voluntarily through ELAAS the appeal tribunal's task would be considerably more onerous.

2. The claims subject to appeal are of direct discrimination, discrimination arising from disability and victimisation. These claims set out in an ET1 which has been labelled claim 8 (see below). At the initial sift stage the Claimant's claims were rejected as having no reasonable prospects of succeeding. The Claimant advanced four amended Grounds of Appeal at a rule 3(10) hearing; of the four grounds advanced HHJ Auerbach considered that the following were arguable:

   a. That it was an error to conclude that a previous Tribunal finding that the Claimant deliberately withheld her laptop was binding in the later claim.

   b. That it was an error to strike out the claim (identified in further particulars as D12) on the basis a police report was dealt with in a previous Tribunal Judgment because there was a separate and later report to the police.

   c. That it was error to consider that complaints in the further particulars (identified as B2 and B3) were not raised in the original particulars of claim.

3. The Claimant was employed as a personal assistant to the Head Teacher of a special needs school in the first Respondent's Borough from July 2012. The Claimant became disabled,

within the statutory definition, from September of 2014. Additionally the First Respondent had or ought to have had knowledge of the Claimant's disability by January 2016. The First Respondent, from 2015 onwards, began to follow a capability procedure in respect of the Claimant's sickness absences. However this was later overtaken by a disciplinary process following allegations that the Claimant had sent anonymous and malicious emails. This resulted in the Claimant's suspension from her employment on 17 April 2018. Investigations and a disciplinary and appeal process then followed resulting in the Claimant being dismissed on 18 March 2018. Dismissal was confirmed on appeal on 10 May 2018.

4. In the period between 2016 and 2018 the Claimant brought eight claims against the Respondents, they are identified as claims 1 to 8 representing the chronological order of presentation; claim 5 was withdrawn by the Claimant prior to hearing. All claims from 1 to 7 were solely against the First Respondent, however, claim 8 was also brought against Mr McMahon the Second Respondent, who handled issues on behalf of the First Respondent. A case management order separated the claims. The remaining claims from 1 to 7 were heard together, these dealt with events during the course of employment and the appeal against dismissal. Claim 8 was ordered to be heard at later stage; it dealt with post termination matters (excluding the appeal). There is no appeal against the order separating the hearings. The six claims relating to pre-termination matters and the appeal against dismissal were heard by Employment Judge Martin and Members (the Martin Judgment). These involved claims, of race and disability discrimination, victimisation, unfair dismissal and wrongful dismissal and were heard over fifteen days. In a Judgment with Reasons, sent to the parties on 18 September 2019, the Martin Judgment dismissed all of the claims. The reasons demonstrate that the Martin Judgment (founded on credibility) preferred the evidence of the Respondents' witnesses over that of the Claimant and her witnesses.

5. Claim 8 has not been dealt with on the merits; it was heard before Employment Judge Ross (the Ross Judgment) at a preliminary hearing on 4 November 2019; it is his Judgment that is the subject of this appeal, however, given the grounds of appeal it is also necessary to consider the Martin Judgment in some detail.

6. During the course of proceedings the Claimant provided further particulars to claim 8. The relevant elements of the original claim and particulars dealt with by the Ross Judgment are identified as A2 (a complaint under section 13 Equality Act 2010), B4 (section 15 EA 2010), D7 (section 27 Equality EA 2010) and the fourth, fifth and eleventh paragraph of the original claim. A2, B4 and D7 contained complaints that there had been false accusations by the Second Respondent (and vicariously involving the First Respondent) that the Claimant had deliberately withheld a laptop. The further particulars refer to various items of correspondence, some addressed to the Tribunal and some to the Claimant. This correspondence was sent between 2nd July 2018 and 1st August 2018, giving information on various matters and warning the Claimant of the prospect of the Respondent bringing civil proceedings against her. The substance of the complaint, in respect of each of the three statutory torts relied upon, was the same conduct and related to the content of this correspondence.

Employment Tribunal Conclusions

7. The Ross Judgment deals with the issue of the Claimant retaining a laptop belonging to the Respondent and her reasons for doing so by referring to paragraph 160 of the Martin Judgment which reads:

> **"The Claimant had taken her work computer home with her when she went on sick leave and this is the computer, she says she sent the documents from. The Claimant was unable to give the computer back to the Respondent (despite it being the Respondent's property) as she said that she had misplaced it in her house and could not find it. An analysis of this computer would have revealed whether the Claimant had sent the anonymous emails from that computer and it seems to the Tribunal that the Claimant**

> **deliberately withheld the computer so that this analysis could not take place. The Claimant says it is in her house and therefore had the Claimant looked for it, it would surely have been found. There is no suggestion that had been stolen, or that she had lost it outside her home."**

This finding was made in respect of claims 6 and 7 and was included under the heading "inconsistent treatment" in the Martin Judgment. The issues identified for the Martin Judgment under claims 6 and 7 cover the unfair dismissal claim and discrimination claims related to the dismissal. In addition, in respect of a victimisation claim under 6 and 7, in the list of issues, at paragraph 50, the Claimant contended that her previous claims were protected acts and the dismissal was the detrimental treatment. The Respondent contended that the prior claims were bad faith allegations. Paragraphs 138, 161 and 164 of the Martin Judgment sets out the basis for the Claimant's suspension and eventual dismissal was the Claimant's "*authorship or involvement*" in the sending of the malicious emails, the retention of the laptop was not part of the reasons, in particular the Martin Judgment finds that the properties of the emails were not explored. The Martin Judgment finds that there was not an appropriate comparison with the Claimant's chosen comparator (who was not dismissed), that despite, in both cases, the police taking no further action against the Claimant and the comparator, in the Claimant's case there was further evidence for consideration in the investigation.

The Ross Judgment sets out at paragraphs 47 and 48:

> **"47. In respect of the lap top issue, the Claimant makes various allegations in respect of this issue in the table. However, core facts have already been determined against the Claimant in the Decision. The Decision precludes rehearing these factual issues determined against the Claimant. The Claim includes the following at the third and fourth [1]paragraphs of the grounds of claim**
> **(p.17):**
>
> > **'Mr. McMahon has wrongly accused the Claimant of not giving back the**
> > **laptop due to the Respondents conducting forensic analysis on it. However,**
> > **the Claimant was not aware that the Respondents were planning to conduct forensic analysis.**

[1] Both parties accept that this is a mistaken reference by the Judge and should read the fourth and fifth paragraphs.

> **The Respondents have (for a second time) reported the Claimant to the**
> **Police over a laptop, even though the Claimant was honest to admit that she left work (unwell) with the laptop 3 years ago …The Claimant was unable to find the laptop after searching for it…'**

> **48. The findings of fact within the Decision, at paragraph 160, show that R2, if he did make that accusation, did not do so wrongfully, because the first Tribunal concluded in the Decision that the Claimant deliberately withheld the laptop in an attempt to avoid analysis of it. The third paragraph of the grounds of claim has no reasonable prospect of success."**

In addition at paragraph 49 this is set out:

> **"The findings of fact in the Decision at paragraph 160 also contain a finding that the Claimant could find the laptop, had she looked for it, because there was no suggestion that it had been stolen or lost outside her home. Therefore, the complaint that reporting her to the police was in some way discrimination has no reasonable prospect of success. This allegation does suggest the type of deflection tactic that Mr. Arnold identified in submissions."**

8. The Claimant's second ground relates to the issue of a report made to the police by the Respondent. Paragraphs 86 to 90 of the judgment of the Ross Judgment considers this issue, the Martin Judgment at paragraphs 135 is referred to directly and paragraph 160 (above) is also used in support of the conclusions reached by Employment Judge Ross. Paragraph 135 of the Martin Judgment states:

> **"The Tribunal find that there is no evidence whatsoever of any collusion as the Claimant alleges. Ms Osborn received a phone call from the police, she did not initiate that discussion. The information was proffered by the Police. There is nothing to suggest that Ms Osborn told the police that this was what she expected to happen. Her question to her colleagues is legitimate and reasonable given that there were ongoing issues with the Claimant and her sickness absence for example, needed to be managed. The fact that the Claimant was initially issued with a harassment order which was later retracted after she complained to the police is not evidence of any collusion. The Claimant alleges that she was treated this way because she is black and disabled. There is no evidence of collusion and no evidence that the reason for the involvement of the police was because of her race or disability. This part of the Claimant's claim is dismissed."**

This finding was under the heading "collusion with police by email" and the list of issues shows that the Martin Judgment was dealing with Claims 4, 6 and 7 and complaints of breach of data

protection law in order to discriminate. In respect of Claim 4 the claim of collusion is pursued as harassment and direct discrimination because of race and/or because of disability, it was claimed to be an act of discrimination arising from disability and/or of victimisation. Paragraphs 86 to 90 of the Ross Judgment are as follows:

> **"86. As set out in the table of allegations, D12 alleges that the email sent by R2 on 19 July 2018 caused the alleged detriment of violation of the Claimant's dignity and caused an offensive, degrading and humiliating environment. D12, in the body of the allegation, complains about the contents of this email, particularly that it denied the alleged collusion between Sue Osbourn and the police, that R2 had wrongly accused the Claimant of stating that the laptop was stolen and that she appeared nervous of being reported to the police (even though the laptop, not the Claimant, had been reported to the police by the Respondents).**
>
> **87. The Response of R1 relies on the findings of fact in the Decision, because the allegation of collusion was part of Claims 1-4 and 6-7. Case Number: 2302689/2018 88.**
>
> **88. Paragraph 135 of the Decision sets out the finding of fact that there was no collusion whatsoever between Ms. Osbourn and the police. Ms. Osbourn's evidence was accepted.**
>
> **89. In the Decision, as explained above, the first Tribunal found that the Claimant deliberately withheld the laptop from her employer.**
>
> **90. Consequently, given those findings of fact, the allegations within D12 have no reasonable prospect of success, because R2 was justified in sending this email to the Tribunal, in the terms alleged by the Claimant."**

9. It is relevant to Ground 3 that a case management order dated 8 January 2019 ordered the Claimant to provide further and better particulars. In submissions on Ground 3 the Claimant considers the relevant complaint is contained within the original claim on the ET1 as "*Mr McMahon has continued to bombard the Claimant with emails, make numerous false accusations against her and her family members and manipulate the correspondence the Claimant sends*." The Ross Judgment concluded that the relevant paragraph of the ET1 as "(*t)he Claimant has a disability and was unable to conduct a thorough search. The Respondents have continued to pressure the Claimant for a device that she has misplaced from 3 years ago. The Respondents have called the police on the Claimant*." The further and better particulars (section

B dealing with section 15 complaints, discrimination arising from a disability) set out at B2 were:

> **"---the Second Respondent made a complaint to the Court on 16th July 2018, which would have a negative effect on the Tribunal case and tarnish the Claimant's character. The Second Respondent wrongly stated that the Claimant refused to engage with the School. This conduct was also repeated when he complained to the Court that the Claimant did not respond to his email in a timely fashion in his email 18th July 2018 where he failed to consider the Claimant's disability was the reason she was slow to respond" and at B3:**
> **"The Claimant was unable to email a response to the Second Respondent before 16th July 2018 due to her disability"**
> **In both cases the unfavourable treatment complained of was of complaints made to the Tribunal about the length of time it took the Claimant to respond. In dealing with those matters the following is set out at paragraph 45 of the Ross Judgment:**
> **"Moreover, where the Claimant is attempting to add complaints to the Claim by serving the table of further allegations, yet without any application to amend being either made or granted, those complaints cannot proceed to trial at all."**

In the Conclusions at paragraph 107 he holds that paragraphs B2 and B3 "*are not part of the Claim*"

10. Some general points made in the Ross Judgment are relevant to the Respondents' arguments in this appeal. These relate to findings about the potential for factual findings to be made against the Claimant:

> **40. Certain allegations in this Claim turn on factual disputes. The first Tribunal found that the Claimant's evidence was contradictory and in parts not credible. Examples of where her evidence was found not credible are highlighted in the application to strike out (p.154) and the Respondents' oral submissions and Skeleton Argument (paragraph 15). Some of these examples can fairly be described as very grave findings that the Claimant did not give honest evidence. In particular:**
>
> > **40.1. One example indicates that the Claimant attempted to abuse the court**
> > **process for her own benefit; the first Tribunal found that the Claimant wanted to hide the fact that she had fibromyalgia because she was pursuing a personal injury claim against the school in respect of an incident involving a child: see paragraph 45 of the Decision. This is a strong finding against the Claimant's credibility.**

> **40.2. A further example is the finding relating to the deliberate withholding of the school lap-top set out at paragraphs 171-172 of the Decision. Moreover, at paragraph 172, the first Tribunal noted that the emails stopped when the Claimant was interviewed by the police, leading to the inference that she had a hand in sending them.**
>
> **41. In the present case, serious factual allegations are made against a locum lawyer, a paralegal with 20 years of experience. Certain facts about R2 as a witness cannot realistically be disputed by the Claimant:**
>
> **41.1. He only worked for R1 for 3 months.**
> **41.2. He is very experienced in the employment law field.**
> **41.3. The nature of the allegations against R2 are so serious that such acts,**
> **if found proved, could well have a negative effect on his career as a locum lawyer. (He alleges that being named as a party has already had a negative effect on his job prospects because he has generally worked for firms or organisations representing Claimants).**
>
> **42. The matters in the Respondents' submissions and in the above four paragraphs all point to the Tribunal at the full merits hearing of this Claim being less likely to determine factual disputes in the Claimant's favour.**

11. It is important to recognise that the Claimant did not attend this hearing and, whilst the Respondent attended through Counsel, in giving the Ross Judgment the Judge only had written submissions in support of the Claimant's position. The Ross Judgment concluded that there was no basis to consider that the Claimant was vexatious in bringing claim 8 and further was cognisant that a mini trial should not be launched to resolve disputed facts. In addition to this, in reminding himself of the approach in law, reference was made to **Gore Wood** (below) and the judgment records:

> **"one form of abuse would be the re-opening of a matter already decided in proceedings between the same parties, as where a party is estopped from seeking to re-litigate a cause of action or an issue already decided in earlier proceedings."**

On that basis, the Judgment set out that the decisions to strike out were made because:

> **"there is no reasonable prospect of success for those complaints where, in particular, there is an issue estoppel (and/or abuse of process) arising from the findings of fact made against the Claimant in the (*Martin Judgment*) Decision. Moreover, where the Claimant is attempting to add complaints to the Claim by serving the table of further allegations, yet without any**

> **application to amend being either made or granted, those complaints cannot proceed to trial at all."**

Submissions

12. Mr Powell, for the Claimant, in respect of the Second Respondent, contended that, whatever the position in respect of the First Respondent, there had never been any litigated claims between the Claimant and the Second Respondent for the issue of previous proceedings to have any relevance; there could be no issue estoppel as between those two parties. Nothing in the judgment explained how issue estoppel (if established) in respect of the First Respondent, impacted on the issues between the Claimant and the Second Respondent. As a further general point he indicated that any findings on credibility by the Martin Judgment would not be a necessary ingredient to a cause of action, but instead a collateral issue (Phipson on Evidence 20th Ed, Chapter 45 see below), and as such should not be considered in respect of issue estoppel.

13. Further, Mr Powell contended that it was not clear from the Ross Judgment which principles of law were being applied. Conclusions that issue estoppel applied or there had been an abuse of the tribunal's processes required identification of the specific relationship between the facts found and the reason for strike out. In particular the question of whether the specific facts relied upon for striking out were "necessary" to make findings in the Martin Judgment should be answered for issue estoppel to be applied.

14. Mr Powell argued in respect of Ground 1 that the Ross Judgment had wrongly concluded that the relevant facts concerning the laptop had already been determined in the Martin Judgment. This conclusion was wrong, he argued, because the Martin Judgment related to claims 6 and 7 which alleged race and disability discrimination, unfair/wrongful dismissal and inconsistent treatment towards the Claimant in the conduct of the disciplinary hearing and

resulting dismissal and further whether the Claimant was dismissed because of protected acts. Mr Powell argued that self-evidently issue estoppel could have no application in respect of these claims as the complaints related to events which occurred later in time than the matters dealt with by the Martin Judgment. Mr Powell argued that the finding by the Martin Judgment about the laptop was not necessary to its decision as to those matters, it was peripheral and could only relate to credibility.

15. Additionally Mr Powell argued that, in any event, although the Respondent was able to rely on earlier matters as related, perhaps, to explanations of treatment of the Claimant in respect of claims of discrimination and victimisation as being lawful, that did not necessarily mean that later conduct was also lawful, that would be a matter for the tribunal to consider in respect of the later conduct relied upon for claim 8. I was reminded by Mr Powell (albeit only in regard to the second ground of appeal) that among the issues in claim 8 would be the reason why the Respondents had sent the correspondence. It is obvious that just because there was a lawful reason for previous treatment by the first Respondent which precluded the Claimant's race, disability and protected acts as a reason for that treatment, does not mean that the later correspondence was sent by the second Respondent (vicariously involving the first Respondent) for a prohibited reason.

16. In respect of ground 2 Mr Powell's contentions are straightforward. There had been two reports to the police one on 2016 and one in 2018. The Martin Judgment related to the 2016 report, its findings of fact were about that report. claim 8 related to the 2018 report, there had been no findings in respect of that in the Martin Judgment.

17. As a more general point Mr Arnold took me to paragraphs 39 through to 40.2 of the Ross Judgment, where the Judge makes reference to his conclusion that the Martin Judgment

had examples which could "*fairly be described as very grave findings that the Claimant did not give honest evidence*". With regard to the second Respondent his argument was that there were findings by the Ross tribunal at paragraphs 41 that these were serious allegations against a paralegal of 20 years standing, experienced in employment law who only worked for the first Respondent for three months as a locum who would suffer, and had already suffered. Mr Arnold argued that the conclusion in paragraph 42, although not directly expressed in those terms, shows that the Judge had serious concerns which read broadly indicates that the Claimant had no reasonable prospect of success on the facts.

18. Mr Arnold raises the general argument that the correspondence which underlies the complaints was sent in furtherance of litigation. The Respondent contends that this covers Ground 1, allegation D12 in respect of ground 2 and allegations B2-B3 in respect of ground 3. On that basis the Respondent wishes to rely on judicial proceedings immunity. It is, however, conceded that a decision was made in January 2019 by Employment Judge Baron refusing an application for strike out on that basis, a decision which has not been appealed.

19. Mr Arnold argued in respect of ground 1 that the laptop issue related to 2 matters (1) the reason for dismissal and (2) the credibility of the Claimant. He contended that what happened to the laptop was intrinsically linked to the issue of dismissal because of the laptop's connection to anonymous emails. The Martin Judgment's conclusions that the first Respondent wanted the laptop back but it had been deliberately withheld by the Claimant, supported the Respondent's belief that the Claimant was involved with the anonymous emails and hence the reason for dismissal. Mr Arnold argued that on that basis that the finding was a necessary finding and not background or peripheral. He contended that in claim 8 the Claimant relies on the second Respondent having "wrongly" made an accusation of retention of the laptop. Although the accusation takes place in correspondence post-dating the issues dealt with in the

Martin Judgment's judgment, it deals with a fact which the Claimant is estopped from asserting that she deliberately withheld the computer and that the first Respondent wanted its return to conduct forensic analysis. On that basis she could not prove that the accusation was made "wrongly" hence there would be no prospect of proving her claim.

20. In dealing with ground 2 Mr Arnold, whilst accepting that there were two reports to the police, contends that the strike out was nonetheless correct. The claim of victimisation is in respect of the contents of an email from the second Respondent with elements that relate to the 2016 report and the 2018 report. The Ross Judgment separates those elements and the strike out in respect of the element of collusion in 2016 remains struck out (on the basis of HHJ Auerbach's rule 3:10 judgment). What is left, relating to the 2018 report to police, was justifiably struck out because the judge was assisted by the conclusions he had made on the laptop issue earlier in his judgment, the collusion allegation also supporting this.

21. Mr Arnold contended that in respect of ground 3 the amended grounds, as permitted by HHJ Auerbach, relate to response times. It is contended that the paragraph relied upon by the Claimant does not readily equate to a section 15 claim which refers to response times. He contends that the relationship in the original claim between the phrase *"Mr McMahon has continued to bombard the Claimant with emails, make numerous false accusations against her"* and the complaint under the heading section 15 "*the Claimant has a disability and was unable to conduct a thorough search. The Respondents have continued to pressure the Claimant for a device that she has misplaced from 3 years ago. The Respondents have called the police on the Claimant"* is not readily apparent. In particular, he argues the Claimant's experience in preparing seven previous claims is relevant, in that she would be more aware of the information required for different types of complaint. On that basis the Judge was entitled to say that these were new claims.

The Law

22. The power to strike out a claim is given to a tribunal pursuant to rule 37 of the Employment Tribunal Rules 2013 which provides, so far as is relevant:

> **(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**
> **(a) that it ------ has no reasonable prospect of success;**

Claims, particularly those involving discrimination, should not generally be struck out save in obvious and clear cases, see **North Glamorgan NHS Trust v Ezsias** [2007] ICR 1126 where Maurice Kay LJ set out:

> **"(T)hat what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success"**

In **Anyanwu v South Bank Students' Union** [2001] IRLR 305, HL, Lord Steyn referred to "*such vagaries in discrimination jurisprudence*" as making it of importance to not strike out claims for abuse of process because of their fact-sensitive nature indicating the high public interest in such cases being properly aired. The test applied, where there is no reasonable prospect of success, means that there is a very substantial hurdle before a strike out is appropriate. Such a decision deprives an individual of an opportunity to present a case in full and, therefore it the most severe step that can be taken in respect of a claim prior to a trial. The prospects of success of a claim or response must be not in accordance with sense or logic to surpass this hurdle. Additionally, evidence such as clear contemporary documentation which contradicts a case may be sufficient to permit a strike out where there is a factual dispute. However, the situation is less a matter of fine judgment where the reason is the application of the law to a set of facts. In such circumstances, a party's case, taken at the highest, can be laid against the template of the law. In those latter circumstances if, for instance, an essential factual element of a claim in law is absent then a strike out can be justified. The common factor is that

the gateway through which the claim could advance, either factually or legally, is so narrow as to be practically impassable.

23. The issue in respect of Grounds 1 and 2 relates to *Res Judicata* and/or abuse of process. I have been referred to **Johnson v Gore Wood** [2002] 2 AC. In his Judgement Employment Judge Ross set out that the circumstances in which abuse of process can arise are very varied and went on to say that one form of abuse would be the re-opening of a matter already decided in proceedings between the same parties. In the Opinions within the **Gore-Wood** Judgment there is agreement that cause of action estoppel and issue estoppel act as an absolute bar to further proceedings between the same parties. Although dealing specifically with the rule in **Henderson v Henderson** (failure to bring a claim in earlier proceedings) Lord Bingham also made the following observation:

> **"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."**
> **And**
> **"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."**
> **In approaching the question as to what might amount to abuse of process Lord Bingham said:**
> **"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."**
> **And:**
> **"(There) should ----- 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"**
> **It appears to me that a proper reading of those aspects of Lord Bingham's opinion are that abuse of process whilst having commonalities with the two forms of estoppel is nonetheless distinct from them. Further when considering abuse of process, it is the conduct of a party in bringing or defending the proceedings which is to be examined."**

24. Within the **Gore Wood** judgment reference is made to **Gleeson v. J. Wippell & Co. Ltd.** [1977] 1 W.L.R. 510 at 515 where Sir Robert Megarry V.C. said:

> **"Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful Respondent to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful Respondent and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest . . . ."**

25. In **Bon Groundwork Ltd v Foster** [2012] IRLR 517 Elias LJ summarised *res judicata* as:

> **"where an issue has been litigated before a judicial body and determined as between the parties it cannot be reopened. It is binding as between them, and the parties are estopped from reopening it. The issue may be one of fact or of law. However, the parties are only bound by an issue which it was necessary for the court to determine in the earlier claim"**

26. In **Aston v Martlett Group Ltd** UKEAT/0274/18/BA His Honour Judge Auerbach makes it clear that the fact that witnesses refer to matters in evidence, or are asked about matters does not mean a matter is material to the issues being adjudicated upon. A tribunal must decide what is relevant when managing a hearing and in recording its decision.

27. Mr Powell referred me to **Arnold v. NatWest Bank PLC** [1991] 2 A.C. 93. This case establishes that in respect of issue estoppel (also *obiter* in respect of abuse of process) that special circumstances might be considered an exception which disapplied the doctrine. Special circumstances could be where further material became available which was relevant to the correct determination of a point involved in earlier proceedings but could not, by reasonable diligence, have been brought forward in those proceedings.

28. From those authorities, where three forms of exclusion are under consideration, the principles that emerge are:

a. Cause of action estoppel applies where an identical cause of action, between the same parties, is pursued in later proceedings to that pursued in previous proceedings. There is an absolute bar to relitigating all points decided (in the absence of fraud or Collusion). This is not applicable to the facts of this case.

b. Issue estoppel is more nuanced; consideration must extend beyond asking whether a matter was raised and, even, was it a matter dealt with in a judgment. What must be asked, excluding issues of credibility, is whether the matter was raised as a necessary ingredient to establishing or defeating the cause of action or in establishing or defeating any defence to it. In other words it is a matter over which the body making the first decision has jurisdiction, because it is necessary for it to be resolved in order to decide whether a claim succeeds. To this might be added the question, are there special circumstances which disapply the doctrine?

c. As to abuse of process, as it relates to previously aired questions, this has attributes akin to the strict estoppel approach. However, it goes beyond that to explore the conduct of parties. Conduct in this sense can work in both directions allowing a party to pursue a matter or to prevent its pursuit. The essence of the prohibited conduct is that it involves a misuse of the courts processes. Whilst this is not a discretionary issue (either it is an abuse or not) it nonetheless involves a balancing of public and private interests whilst taking account of all the facts which could include, depending on the detail, previously decided credibility issues. On the basis of Lord Bingham's approach in **Gore Wood** any special circumstances would be bound up in the question of whether it was an abuse at all.

29. Denying a party an opportunity to have a complaint decided at a trial, where evidence can be properly tested and witnesses assessed, is a step which removes one of the most important rights available to the citizen in our democracy. Any Judgment which prevents a matter being adjudicated upon at a trial should clearly detail the reasons why that step has been taken. The legal test to be applied for any strike out (within the 2013 rules) is whether there is "no reasonable prospect of success". A tribunal judgment should be read benevolently and in the round and not subjected to a line by line examination, however where it is striking out a case it should contain the material elements of its reasoning. In identifying why there are no prospects for success it should be made clear whether this is because of deficiencies in law or in facts or both. Therefore, the reasons should demonstrate whether an estoppel is being applied and if so why. If abuse of process is being considered the judgment should illuminate the conduct at the root of the decision. If a more general view on prospects of success is being applied because of factual issues the facts and what undermines them should be fully apparent. It is necessary therefore to identify the reasons, whether based on law or fact, underpinning such lack of prospects.

Discussion

30. In this case the Ross Judgment identifies the lack of credibility of the Claimant in earlier hearings and the relationship between specific facts alleged in claim 8 and that credibility issue in respect of earlier claims. It is possible, therefore, that along with matters of issue estoppel and abuse of process that the Judge considered that the previous credibility issue (e.g. based on his conclusion that such issues are raised as "deflection") was sufficient to conclude that there was no reasonable prospect of success. However, from the matters I refer to in found in paragraphs 47 to 49 of the Ross Judgment I have concluded that, in respect of the strike out decisions subject to appeal in Grounds 1 and 2, the Ross Judgment was not addressing any general question of "no reasonable prospects of success" but deciding that the facts fell into

one, other or both of the two categories of issue estoppel and abuse of process. Whilst I appreciate the point made by Mr Arnold in respect of paragraph 42 of the Ross Judgment, the reference is to a decision on the facts being "less likely". I consider it would be reading too much into that paragraph, given that tentative wording, that it is an expression that there are no reasonable prospects of success on those facts. In comparison there are significantly more assertive conclusions drawn in paragraphs 47 and 48.

31. As Mr Powell contended, there was no basis for the Judge to have drawn conclusions on cause of action estoppel, but he criticises the Judge for lack of clarity as to legal reasoning around his expression of the **Gore Wood** principles. However, there is nothing in the Ross Judgment to indicate that the Judge considered cause of action estoppel or of it having any impact on the Judge's decision; the decision is clear, the Judge refers to there being "*an issue estoppel (and/or abuse of process)"* and nothing more. In respect of grounds 1 and 2 of the appeal this is the reason given for the strike out.

Ground 1

32. The decision to strike out on the basis of issue estoppel/abuse of process in relation to the laptop requires careful analysis. The Martin Judgment sets out conclusions as to what happened to the laptop: were those conclusions necessary to the various decisions the Martin Tribunal was required to make? If the conclusions were necessary to the decision how do they impact on complaints about actions of the second Respondent (in his own capacity and vicariously for the Respondent) which occur after the events upon which decisions have been made? Does the Ross Judgment, in the round, identify the necessary findings to support a conclusion as to issue estoppel and/or one of abuse of process? The Martin Judgment related the issues on the laptop to inconsistent treatment. The inconsistent treatment was, in turn,

connected to a question as to whether the Claimant was involved in sending the anonymous emails.

33. In a very simplified analysis, in deciding whether an employee was unfairly dismissed, the tribunal examines the reasons for dismissal based on the state of mind of an employer. It is not necessary that the employer should be factually correct in a particular conclusion, only that the conclusion reached was reasonable in the light of evidence. A tribunal, therefore, is required to consider the evidence before an employer at the time the decision is made and whether a conclusion drawn was within the margin of reasonableness. The necessary ingredient is, therefore, the evidence upon which the employer has reached a factual conclusion. The factual conclusion in this case was that the Claimant had authored and been involved in sending the malicious emails. The evidence that the employer based its decision upon did not include any properties of the emails which would identify a particular computer as the source of the emails. It was not, therefore, a necessary ingredient to the tribunal's decision on the Respondent's state of mind, to draw any conclusion about the use of the laptop computer. The Claimant's retention of the laptop or her reasons for doing so were not part of the Respondent's decision making process to dismiss the Claimant and therefore the tribunal did not need to decide anything about those issues to reach its conclusions.

34. In the Martin Judgment there is also a finding that there was no wrongful dismissal of the Claimant. Such a decision requires the tribunal to consider whether the Claimant had breached a fundamental term of her contract, amounting to gross misconduct, in order to conclude she was not entitled to notice pay. The Martin Judgment is not subject of this appeal, however, Mr Powell contends, with some justification, that it does not engage significantly with the issue of wrongful dismissal. The Martin Judgment does not identify any specific gross misconduct in its decision. Given the breadth of the claims and facts before the tribunal this

oversight in the Martin Judgment was, perhaps, understandable. However, it does mean that It would be difficult, for the purposes of any subsequent case, to identify any particular conduct found as a fact in the Martin Judgment amounted to the specific gross misconduct which justified the finding on wrongful dismissal. As such, it is difficult to see the basis upon which it could be said that the laptop finding was necessary to the wrongful dismissal claim.

35. The Martin Judgment considers less favourable treatment, as it relates to the disciplinary process and dismissal, in respect of discrimination and victimisation. The Martin Tribunal did not, apparently, consider bad faith under section 27(3) EA 2010. Under paragraphs 173 to 176 it concluded there was no link to the previous claims and the dismissal and did not go further in its analysis. It is, therefore, safe to assume that the paragraphs under the heading inconsistent treatment are confined to analysing treatment of a comparator to the treatment of the Claimant. The Martin Judgment dismisses any comparison with the chosen comparator, and then sets out the "other evidence". The tribunal did not explore the characteristics of a hypothetical comparator and the additional information is not set out to explore such a comparison. Having dismissed the comparison, the issue of less favourable treatment was effectively resolved. As the other findings are not used in that way, they appear to have no purpose in respect of considering direct discrimination and victimisation claims. On that basis the findings on the retention of and reasons for retaining the laptop were not a necessary ingredient to the judgment. In terms, therefore, it was an error of law for Employment Judge Ross to strike out those aspects of the claim on the basis of issue estoppel as against both the First and Second Respondents.

36. Next the question of abuse of process needs to be considered. This requires a broader approach considering the conduct of the Claimant along with public and private interests whilst taking account of all the facts. The Ross Judgment refers to the "scattergun approach" and "deflection tactic(s)" of the Claimant in her method of pursuing claims, this can properly be

considered to fall within the definition of conduct. That approach, as adopted by the Claimant, expands substantially the time and expense in defending claims by Respondents (private interest) it also takes up considerable tribunal time which impacts on the resources of the Employment Tribunal service and cases brought by others (public interest). Facts which have already been established based on a view of the Claimant's credibility, which necessarily involved a full hearing of the Claimant and her evidence, also form part of the facts under consideration. It seems to me that such material could establish that there was an abuse of process which, along with the matters I have referred to as "general" above meant that a claim could be considered to have no reasonable prospect of success. This has more impact in circumstances where the Claimant has already had one fair opportunity to establish a fact in a trial than a case where this had not previously been dealt with. This relates to the case of the second Respondent also, he was a representative acting on behalf of the first Respondent in proceedings involving the first Respondent. It seems to me that the approach of Sir Robert Megarry V.C. in **Gleeson** applies here, there is a clear identity between the first and second Respondents in the circumstances.

37. A benevolent reading of the Ross Judgment indicates that those were all matters in the mind of the Employment Judge. It is unfortunate that in dealing with the application to strike out there was no separation of the issue estoppel and abuse of process questions, as this makes it more difficult to understand what underpinned his decision. This is particularly important in respect of the second Respondent, who was not a party to previous proceedings. However, despite that, it seems to me there is sufficient clarity in the Ross Judgment for the strike out to stand. The general indications summed up by paragraph 42 tie in to the later conclusions at paragraph 47 to 48. This also applies in the case of the second Respondent because reference is made to particular facts found by the Martin Tribunal. Those findings contradicted an essential element of the Claimant's complaint that the second Respondent had "wrongly" communicated

matters in the correspondence. The Ross Judgment considers this to fatally undermine the Claimant's prospects of, factually, establishing those matters. In addition, the reference to the second Respondent's short association and professionalism are in counterpoint to the submissions made by Mr Powell on lawful reasons.

38. In short Employment Judge Ross had considered and referred to the following: the Claimant's conduct in her approach to litigation; the private and public interests in the control of litigation; the credibility findings on matters relevant to the issues in claim 8; the credibility factors in favour of the second Respondent and the close identity between the Respondents. Taking account of that, these are matters entitling the Judge to decide that the tribunal's processes were being misused and that there were "no reasonable prospects of success" even when the strictures in ***Anyanwu*** are considered.

Ground 2

39. Judge Ross clearly had in mind that there had been a second report to the police. The complaint is about an email sent to the tribunal and the Claimant complained about four matters contained within the email, a denial of collusion, that the Claimant had said the laptop was stolen, that the Claimant was nervous of being reported to the police and that the Claimant did not report the laptop missing. Of those only the first has any specific relationship to the Martin Judgment, and it was not permitted to proceed to appeal by HHJ Auerbach. The remainder cannot be said to engage issue estoppel in a conventional sense. Firstly, there has been no specific finding of fact in the Martin Judgment which relates to a report to the police in 2018. Secondly, in the Ross Judgment reasoning, there are only tangential connections to the Martin Judgment conclusions on the laptop. Therefore the only applicable approach to considering this decision to strike out the complaint at D12 would relate to an abuse of process. Here, however the Claimant's complaints relate specifically to allegations that the second Respondent had

misrepresented the Claimant's words and her reactions. The findings about the laptop by the Martin Tribunal are about the Claimant retaining the laptop and her reasons for doing so, they do not address what reasons the Claimant gave to the Respondents about the laptop nor any reactions about reports to the police. Further, there is no indication about the Claimant's reactions to reports being made to the police. These are not matters addressed, at all, in the Martin Judgment. On that basis there is a fundamental difference between my findings in respect of ground 1 above and the basis of this ground.

40. The other aspects considered in the Ross Judgment and that I have outlined (paragraph 37 above), however, remain the same. Nevertheless, those aspects are insufficient to displace the concerns about fact finding set out in ***Anyanwu***. The relationship between the Martin Judgment findings on the laptop issue and those that would be necessary in claim 8 are starkly different. In claim 8 the tribunal would need to find what specifically was said by the Claimant; what the Claimant's reaction to being told of a report to the police was, and why the information about that had been contained in an email to the tribunal. None of these issues is informed by the Martin Judgment facts. The credibility of the Claimant on these matters has not been explored to any extent. There has not been an airing of the issues at a previous tribunal. With that specific credibility aspect missing, it appears to me the abuse of process reasoning for saying there was no reasonable prospect of success is absent. I would allow the appeal on this ground.

Ground 3

41. It is clear the Ross Judgment concluded that the matters set out in the further particulars were not additional information supplementing existing complaints but an attempt to add complaints without amendment. His conclusion was that these did not form part of the claim. A litigant in person should not be expected to provide an initial claim which has the structure

and clarity that would be expected to be provided by a professional representative. However, that does not mean, even in the case of litigants in person, that unambiguous elements of a claim should be given meanings which the writer, obviously, did not intend. The Judge was dealing with further particulars that related specifically to section 15 claims. The initial ET1 setting out of the claim is in two distinct parts, the first relating the addition of the second Respondent and a number of facts, the second referring to particular sections under which complaints are made. Under section 15 in the second part the Claimant refers to the Claimant being unable to conduct a search. It is clear that this search is related to the laptop given the information set out under the heading. It is instructive that elsewhere in the second part under the heading "*section 26 – Harassment*" the Claimant refers to "*unwanted conduct – as outlined above*". This clearly tied facts set out in the first part to the complaint of harassment. Mr Arnold's submission that Claimant was, by the stage this claim was made, far more experienced than a first time Claimant in the process of tribunal litigation has some force in this regard. It seems to me that this is not an unstructured recital of a claim but one that relates specific events to specific types of claim. On that basis I do not conclude that Judge Ross was wrong to consider that the further particulars were additions to the section 15 claim, the decision was certainly not perverse. I dismiss this ground of appeal.

42. The final aspect I need to consider is that of judicial proceedings immunity, which HHJ Auerbach thought might have some application. There has been a decision not to strike out on that basis, that is not a decision that there is or there isn't such immunity, simply that the issue remains arguable. It is not, therefore, a matter that has been judicially considered to a conclusion at first instance. That being the case, in my judgment, there is no basis upon which I should usurp the Employment Tribunal's jurisdiction at this stage.

43. I order that in respect of Grounds 1 and 3 Employment Judge Ross' judgment is upheld. In respect of Ground 2 Employment Judge Ross' order striking out D12 victimisation complaint is revoked.