Neutral Citation Number: [2024] EAT 44

Case No: EA-2022-001144-NU

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 April 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

THE HOME OFFICE **Appellant**

- and –

MR J OXLEY **Respondent**

- -
- -

BENJAMIN GRAY (instructed by Mills & Reeve LLP) for the **Appellant**
GUS BAKER (instructed by Anthony Gold Solicitors LLP) for the **Respondent**

Hearing date: 18 January 2024

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JUDGMENT

SUMMARY

Practice and Procedure

The Employment Tribunal erred in law in assessing whether a claim bought in 2021 was subject to cause of action estoppel, was precluded by operation of rule 52 ET Rules or was an abuse of process on **Henderson v Henderson** grounds. The matter was remitted.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against a judgment of the Employment Tribunal, Employment Judge Brewer, made after a hearing held on 23 September 2022. The judgment and reasons were sent to the parties on 30 September 2022.

2. By a claim form submitted on 28 September 2021, the claimant brought a claim which included a complaint in respect of annualised hours ("the 2021 claim"). The respondent contended that the complaint could not be pursued because it was subject to cause of action estoppel, was precluded by operation of rule 52 of the **Employment Tribunal Rules 2013** ("**ET Rules**") or was an abuse of process on **Henderson v Henderson** grounds, because the claimant had made the same complaint in a claim brought in 2017 ("the 2017 claim") or should have done so.

3. Employment Judge Brewer rejected the respondent's contentions and held that the claimant could pursue a complaint in respect of annualised hours working in the 2021 claim.

Outline Facts

4. The claimant commenced employment with the respondent on 18 January 2001. He was a Border Force Officer based at London City Airport.

5. The respondent operated an annualised hours scheme, the provisions of which are set out in an Annualised Hours Working Policy under which employees receive basic salary plus an allowance depending on matters such as flexibility; unpredictability of working hours; and the level of night, on call, weekend and public holiday working. The allowance is pro-rated for part-time workers. In the response to the claim, the respondent stated that a contractual agreement is put in place from 1 April each year, confirming the agreed levels of flexibility and allowances.

6. A preliminary hearing for case management in the 2021 claim was conducted by Employment Judge Housego on 11 April 2022. The annualised hours claim was recorded as being one of indirect disability discrimination.

7. The real issues before Employment Judge Brewer were whether the annualised hours

complaint in the 2021 claim:

7.1. raised the same cause of action as that in the claim brought in 2017 claim, which was withdrawn and dismissed by a judgement sent to the parties on 14 March 2018; and

7.2. if the complaints were different, whether the annualised hours complaint raised in the 2021 claim could and should have been raised in the 2017 claim so that the principal in **Henderson v Henderson** made the continuance of the 2021 claim an abuse of process.

The 2017 claim

8. When the claimant submitted the 2017 claim he was acting in person. The claim form in the bundle does not state the date on which it was received by the Employment Tribunal.

9. At section 2.4 it is recorded that the claimant was working at London City Airport. A second respondent was referred to at section 2.5, although the person named is a colleague of the claimant whom he wished to be a fellow claimant. At section 8 the claimant put a mark in the box "I was discriminated against on the grounds of:" and then a mark in the disability box. No other boxes were ticked including the box for "I am making another type of claim that the Employment Tribunal can deal with". At section 8.2 the claimant wrote "Please see attached summary and supporting docs". At section 9.2 in answer to the question what compensation or remedy are you seeking?" the claimant wrote "disability matters – the court to decide". At section 12.1 the claimant ticked the box yes to the question "do you have a disability". The disability was stated to be bipolar disorder.

10. The claimant attached a number of documents to the claim form. In one document that appears to be correspondence with ACAS he stated that he had bipolar type II disorder and bruxism. The claimant said that his fellow employee had OCD.

11. Under a heading "Accident work/Industrial Injury" There was a passage in which the claimant stated:

> I have told management I am struggling. Management told me that under my new (AHW) contract I would be required to stay beyond the end of my shift and that I would be accommodated in the short term, and that that I was contractually obliged and that has been treated no differently to anyone else. This is to completely misunderstand disability. I can be treated differently to others to in terms of the adjustments I enjoy in order to enable me to function

equally well"

12. In a section headed "Pay" the claimant wrote:

> As part-time, compressed hours, disabled members of staff we receive in an AHW rate lower than our colleagues (in common with a third member of staff in the same category but we understand he is happy with his rate)

13. The 2017 claim was withdrawn. I was not provided with a copy of the email or letter withdrawing the claim. The claim was dismissed by a judgment sent to the parties on 14 March 2018, in the following terms:

> The proceedings are dismissed following the withdrawal of the claim by the claimant

14. There is nothing to suggest that the claimant sought to reserve the right to bring similar proceedings again.

15. Only limited material was put before Employment Judge Brewer at the hearing he conducted on 23 September 2022. He did not have the Annualised Hours Working Policy, the claimant's contract of employment or any of the annual agreements setting out agreed levels of flexibility and allowances. There was no evidence from the claimant as to the claim he thought he was bringing in 2017 or from the respondent as to any work that was undertaken in response to the 2017 claim and any specific prejudice that might make the pursuit of the 2021 claim an abuse of process. The claimant gave no evidence as to any change of duties between 2017 and 2021. While it was for the respondent to establish that cause of action estoppel applied and/or the 2021 claim in respect of annualised hours working was an abuse of process, both parties should have ensured that the Employment Tribunal had the relevant material on which to make those determinations.

The decision of the Employment Tribunal

16. The Employment Judge held that:

> 1. The claimant is not estopped from bringing his claim in relation to annualised hours working;
>
> 2. The claimant is not prevented by Rule 52 of the 2013 Tribunal Rules from bringing his claim in relation to annualised hours working;
>
> 3. The claimant has not abused the process by bringing his claim in relation

to annualised hours working;

The Law

17. Section 39 of the Equality Act 2010 ("EQA") renders detrimental discriminatory treatment unlawful:

> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment.

18. Indirect discrimination is defined by section 19 **EQA**:

> 19 Indirect discrimination
>
> (1) A person (A) discriminates against another (B) if A **applies** to B a **provision, criterion or practice** which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A **applies**, or would apply, it **to persons with whom B does not share the characteristic**,
>
> (b) it **puts, or would put**, **persons with whom B shares the characteristic** at a **particular disadvantage** when compared with persons with whom B does not share it,
>
> (c) it **puts**, or would put, **B at that disadvantage**, and
>
> (d) **A cannot show** it to be a **proportionate means of achieving** a **legitimate aim**.

19. There are a number of elements in a complaint of indirect discrimination. In broad terms, so far as is relevant to this appeal, they are:

1.1. general application of a PCP – ss 19(1) and 19(2)(a)

1.2. particular disadvantage to the group that shares the claimant's protected characteristic – s 19(2)(b)

1.3. disadvantage to the claimant – s 19(2)(c)

1.4. detriment to the claimant – s 39(2)(d)

1.5. legitimate aim - s 19(2)(d)

1.6. proportionate means- s 19(2)(d)

20. A claim form must be objectively assessed to determine whether it contains a complaint. A litigant in person may not be able to identify the legal provisions relied on or use formal language, but the required elements of the complaint must be identified: see **Pranczk v Hampshire CC** UKEAT027219VP and **King v Thales DIS UK Ltd** [2024] EAT 34.

21. Cause of action estoppel was described by Lord Keith in **Arnold v National Westminster Bank plc** [1991] 2 A.C. 93 at 104D-E:

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

22. Lord Sumption held in **Virgin Atlantic Airways Ltd v Zodiac Seats Limited** [2014] AC 160 at paragraph 26:

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

23. In **Cure v Coutts & Co Plc** [2005] I.C.R. 1098 HHJ McMullen described a cause of action at paragraph 21:

> A cause of action was defined in *Letang v Cooper* [1965] 1 QB 232, 242g, per Diplock LJ as: "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person." The phrase has been held from early times to

> include every fact which is material to be proved to entitle the claimant to succeed, and every fact which the defendant would have a right to challenge: *Cooke v Gill* (1873) LR 8 CP 107, 116, per Brett J .

24. Rule 52 of **ET Rules** provides that:

> Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—
>
> (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
>
> (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

25. In **Biktasheva v University of Liverpool** [2020] UKEAT/0253/19 I suggested that the rule covers the same ground as the common law principle of res judicata at paragraph 15:

> I consider, upon a proper reading of Rule 52, that the words in parenthesis are designed to be explanatory, explaining to parties the gist of the common law, that where a judgment on withdrawal has been issued they will be prevented from raising a further similar claim. The law that underlines the determination of whether further proceedings can be brought is that of res judicata, including cause of action estoppel.

26. Lord Bingham described the rule in **Henderson v Henderson** in **Johnson v Gore-Wood & Co** [2002] 2 AC 1 at 31 A-E:

> Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will

> rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.

27. In **Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners** [2022] AC 1 Lord Hodge held:

> 76. From these authorities it is clear that for the court to uphold a plea of abuse of process as a bar to a claim or a defence it **must be satisfied that the party in question is misusing or abusing the process of the court by oppressing the other party** by repeated challenges relating to the same subject matter. **It is not sufficient** to establish abuse of process for a party **to show that a challenge could have been raised in a prior litigation** or at an earlier stage in the same proceedings. **It must be shown both that the challenge should have been raised on that earlier occasion and that the later raising of the challenge is abusive.** [emphasis added]

28. In **Moorjani & Ors v Durban Estates Ltd** [2019] EWHC 1229 (TCC), Mr Justice Pepperall summarised the situation at paragraph 17.4:

> 17.4 Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in *Henderson v. Henderson* where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:
>
> > a) The onus is upon the applicant to establish abuse.
> >
> > b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.
> >
> > c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.
> >
> > d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process

> of the court by seeking to raise before it the issue which could have been raised before.
>
> e) The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant.

Analysis

29. In this case it was necessary for the Employment Judge to ascertain:

29.1. the relevant cause of action in the 2017 claim

29.2. the relevant cause of action in the 2021 claim

29.3. whether the two causes of actions were the same so that cause of action estoppel applied to the 2021 claim

29.4. if not, whether the claim asserted in the 2021 claim could and should have been brought in the 2017 claim so that bringing it was an abuse of process

The appeal

30. It is asserted by grounds 1-3 that the Employment Judge erred in law in deciding that cause of action estoppel, Rule 52 and the principle in **Henderson v Henderson** did not prevent the claimant pursuing the 2021 claim. Grounds 4-6 challenge the analysis of the Employment Tribunal in greater detail asserting it was based on errors of law and/or was perverse. The grounds are, as HHJ Auerbach noted at the sift stage, over-elaborate.

The analysis of the Employment Tribunal

31. The Employment Judge stated:

> 24. It is first necessary to consider what the cause of action is in each case. Given that both claims were drafted by the claimant, who is not legally qualified, this is not necessarily a simple matter.

32. The Employment Judge appreciated the task he had to undertake and legitimately noted that it was not necessarily an easy one.

33. The Employment Judge considered the 2021 claim at a number of points in his analysis

> 29. In 2021 the claim is **put fairly and squarely as equal pay for the disabled** and the central element of the claim is an allegation that the respondent is using the term 'allowance' instead of 'pay' in order to justify paying disabled staff less. …

> 35. In the 2021 claim form **there is no box to tick for equal pay and the claimant has ticked the box stating that he is making another type of claim and in the box underneath that he refers to equal pay for the disabled** [8].
>
> 36. So, in 2021 the claimant's claim is rooted in the question of disability discrimination.
>
> 37 … Even if it was possible to find a claim for section 15 discrimination or a failure to make reasonable adjustments in 2017, **the claim in 2021 as currently put appears to be a claim for direct discrimination** which is significantly different from indirect discrimination or indeed section 15 discrimination.

34. The Employment Judge considered the cause of action in the 2017 claim in slightly different terms when considering cause of action estoppel and Rule 52 **ET Rules**:

> 25. In 2017 the claimant stated that as a part-time disabled worker, working compressed hours the rate of pay he and his colleague received was "lower than our colleagues".
>
> 26. **It is difficult, but not impossible to tell from the 2017 claim form what precisely was being alleged**. The relevant section which I have quoted above from the case summary could be read as a claim for unlawful deductions from wages, a claim related to part time workers' detriment and/or some form of disability discrimination.
>
> 27. **It seems to me that the thrust of the 2017 claim was the fact that workers working part time, compressed hours received a lower rate of pay than colleagues not working part time, compressed hours. It seems incidental to that claim that the two claimants were alleged to be disabled.** I reach this conclusion in particular by reference to the fact that the claimant requested to work compressed hours which was the subject of much discussion between the claimant and the respondent (see for example [99]). There is nothing in the claim form and the attached documentation to suggest that only disabled staff work part time, compressed hours and **it would seem that the claimant was referring to his disability as evidencing his need to work less than full time rather than as an essential element of the claim per se**. In other words the difference in pay applied to those working part time, compressed hours irrespective of the reason they had to work or indeed wished to work those hours.
>
> 28. Putting it succinctly, what the claimant appeared to be saying in 2017 was that because he is disabled and can no longer work full time, he wished to work part time, compressed hours as a result of which he was receiving a lower rate of pay and thus **the connection was between the part time work and the rate of pay, not the**

> **disability and the rate of pay**. …
>
> 30. On behalf of the respondent Mr Gray argued that both cases are about the respondent's annualised working hours policy. The difficulty I have with that argument is that **the claimant's reference to annualised hours does not appear in the section of the 2017 claim dealing with the differential pay, rather it appears under the section headed "Accident at work/Industrial injury"** and all that the claimant says about that is
>
>> "Management told me that under my knew (AHW) contract I would be required to stay beyond the end of my shift and that I would be accommodated in the short term, that I was contractually obliged and that I was being treated differently to anyone else."
>
> 31. I accept that he goes on to say
>
>> "This is to completely misunderstand disability. I can be treated differently to others in terms of the adjustments I enjoy in order to enable me to function equally well"
>
> 32. But that seems to me to be a reference back to the question of the requirement to stay beyond the end of his shift and it is not related to the issue of pay for those working part time, compressed hours which the 2021 claim is focused upon. …
>
> 36. I have found above, **the claim in 2017 insofar as it relates to pay and the question of annualised hours working, that is very much pleaded as a claim by part time, compressed hours employees who happened to be disabled** and, as I have found, it seems to me that **the reference to disability in those cases is simply a reference to the cause of the individual need to work part time, compressed hours which is not the same as saying that the disability is <u>directly</u> the cause of the differential pay**.
>
> 37. It may be possible, with some assumptions, to tease out potential claims for indirect discrimination or possibly even discrimination arising from disability, but to be sure, that would seem to me to require further elucidation and the claims I have to compare are those set out in the claims as pleaded in the two claim forms. **In the 2017 claim there is no pleading as to group disadvantage because comment as I say, the reference to being disabled is the cause of the need to work part time not the cause or part of the cause for the difference in pay. There is not even a reference to a provision, criterion or practise** although again one could make some assumptions but that seems to me to be a dangerous path to tread in this case. [emphasis added]

35. The Employment Judge stated of the **Henderson v Henderson** argument that:

> 39. In relation to Henderson v Henderson, that is really to do with

> an abuse of process that is not covered either by res judicata or rule 52. all the information I have I cannot possibly say whether the claimant's claim is in 2021 is a claim which could have been brought in 2017, there is simply insufficient information to make such a finding and for those reasons I do not consider that the claimant has abused the process by producing the claim form he produced in 2021.

Determination of the appeal

36. Regrettably, I have concluded that the Employment Tribunal failed properly to identify the complaints in the 2017 and 2021 claims and reached perverse conclusions with the consequence that the decision must be set aside.

37. There is no dispute between the parties that the 2021 claim includes a complaint of indirect disability discrimination. However, that does not appear to have been properly appreciated by the Employment Judge:

37.1. the Employment Judge appears to have thought that there was a species of equal pay that applies where there is a disparity in pay between those who are disabled and those who are not, but there was no box that could be ticked to make that complaint in the 2021 claim

37.2. the Employment Judge considered that the 2021 complaint was one of direct disability discrimination, whereas it was common ground that it was being brought as a complaint of indirect disability discrimination and it had been identified as such at a prior case management hearing

38. I also consider that there were substantive errors in the assessment of the 2017 claim:

38.1. the Employment Judge considered that "It seems incidental to that claim that the two claimants were alleged to be disabled". On a fair reading of the 2017 claim form disability appears to be a central feature of the claim. The claimant asserted that "As part time, compressed hours, disabled members of staff we receive an AHW rate lower than our colleagues (in common with a third member of staff in the same category but we understand he is happy with his rate)."

38.2. to hold that disability was incidental to the claim was contrary to the fact that the only box at section 8.1 that was ticked was that for disability discrimination and the reference at section 9.2 to "disability matters"

38.3. the Employment Judge stated "The Claimant's reference to annualised hours does not appear in the section of the 2017 claim dealing with the differential pay, rather it appears under the section headed "Accident at work/Industrial Injury". While there was some reference to annualised hours in that section the main allegation set out above was under the heading "pay".

38.4. the Employment Judge appears to have considered that it would be necessary for the claimant to establish that "only disabled staff work part time, compressed hours" and that a disability discrimination claim was incompatible with the fact that "the difference in pay applied to those working part time, compressed hours irrespective of the reason they had to work or indeed wished to work those hours". These matters were not incompatible with a claim of indirect disability discrimination.

38.5. the Employment Judge considered the fact that "the connection was between the part time work and the rate of pay, not the disability and the rate of pay" was inconsistent with a claim of disability discrimination whereas it would be an ordinary feature of indirect discrimination as there must be a PCP that applies to all employees irrespective of disability and there is no requirement to establish the mechanism the PCP which it disadvantages disabled employees

38.6. the Employment Judge concluded that the 2017 claim included no assertion of group disadvantage, which took no account of the fact that the claimant pleaded that "As part time, compressed hours, disabled members of staff we receive an AHW rate lower than our colleagues (in common with a third member of staff in the same category but we understand he is happy with his rate)."

38.7. the Employment Judge stated that "there is not even a reference to a provision,

criterion or practise" whereas the first page of the narrative section referred to "Less pay under new AHW contract" which suggests it is the AHW scheme that includes the relevant PCP

39. I consider that the failure to properly analyse the 2017 and 2021 claim forms was such that the Employment Judge could not, and did not, properly analyse whether a complaint of indirect discrimination was; or could and should have been included in the 2017 claim (so that to raise it again in the 2021 claim was an abuse of process).

40. I allow the appeal on grounds 1-3, 5 and 6. I do not allow ground 4 because the question of whether a complaint is included in a claim form is a matter of construction of the claim form. The complaint is either included or it is not. If it is not included it cannot be introduced merely because it is included in a list of issues. It was common ground, and was accepted in the Case Management Order of Employment Judge Housego dated 11 April 2022, sent to the parties on 27 April 2022, that the 2021 claim includes a complaint of indirect disability discrimination.

41. I am not persuaded that there can be only one answer to the question of whether the 2017 claim precludes the bringing of the 2021 claim. That matter will have to be remitted to a different Employment Tribunal for redetermination. I consider that the errors made were fundamental and as the matter will have to be determines again there is no advantage in remitting to the same Employment Tribunal.

42. Case management will be for the Employment Tribunal on remission. The Employment Tribunal is likely to need:

42.1. the claimant's contract of employment

42.2. the relevant Annualised Hours Working Policy or policies if it varied

42.3. the annual agreements setting out agreed levels of flexibility and allowances

42.4. evidence from the claimant as to the claim he thought he was bringing in 2017 – likely to be of relevance to the abuse of process argument

42.5. evidence about any relevant change in circumstances, such as duties, between bringing

the 2017 and 2021 claims

42.6. evidence about any specific prejudice the respondent would suffer as a result of the 2021 claim being bought including of any work done in response to the 2017 claim before it was withdrawn

43. The Employment Tribunal will have to consider:

43.1. on an objective reading of the 2017 claim form, did it include a complaint of indirect disability discrimination, taking into account the fact it was pleaded by a litigant in person and so would not be expected necessarily to make reference to specific statutory provisions or use formal language

43.2. if so, is the indirect disability discrimination complaint in the 2021 claim form the same cause of action as that in the 2017, having regard to any relevant changes in circumstances between 2017 and 2021, so that it is precluded by cause of action estoppel and/or Rule 52 **ET Rules**

43.3. if the 2021 claim is not precluded by cause of action estoppel and/or Rule 52 **ET Rules**, could and should the indirect discrimination claim have been brought in 2017, having regard to whether the cause of action brought in 2021 existed in 2017 and the factors relevant to abuse of process summarised in **Moorjani**