EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Ms D Baker**

Respondent: **Bar Standards Board**

Heard at: **Birmingham (Midlands West) Employment Tribunal**

by Video in private and then in public

On: 9 September 2024

Before: Employment Judge Smart

Appearances
For the Claimant: For herself

For the Respondent: Mr. C Adjei (Counsel)

RESERVED JUDGMENT

On hearing for the Claimant in person and Mr Adeji (Counsel) for the Respondent:

1. All claims of harassment are struck out because the Tribunal does not have jurisdiction to hear them under section 53 (3) of the Equality Act 2010.

2. Allegation 5.1.1 is estopped from being brought by issue estoppel and is res judicata because of the rule in Henderson v Henderson. It is therefore struck out.

3. The Claimant will be sent a strike out warning about allegation 5.1.9 in the current list of issues.

4. All other applications to strike out various claims are refused.

5. The application for a deposit order is refused.

REASONS

The issues to be decided

1. The issues were agreed at the start of the hearing and are annexed to this

judgment as annex 1.

2. This judgment must be read in conjunction with the outcome of hearing document annexed to this judgment as annex 2.

3. There has been a delay in writing and promulgating this judgment because the day ordered to be set aside for me to consider the evidence, submissions and applications was double booked in error with another hearing. This meant that the window of opportunity to deliver this judgment unfortunately passed by.

4. The Tribunal apologises for the double booking and the time it has taken to issue this Judgment as a result.

Findings of fact

5. At all material times the Claimant is and was a qualified barrister with a practising certificate conferred upon her by the Respondent and it was not in dispute that the Respondent was a qualifications body within the meaning of the Equality Act 2010.

6. The Rules about disciplinary charges being prosecuted by the respondent were contained within the 2018 version of the Respondent's conduct handbook to which I was taken in the bundle during the hearing.

7. Having been taken to the procedure in place for complaints at part 5 of the Respondent's Handbook, if complaints are made that result in formal charges, the Respondent recommends prosecution of those charges to a disciplinary tribunal organised in accordance with the Respondent's regulations. If the barrister who is defending the charges is then sanctioned in some way, they have the statutory right to appeal to the High Court as the Claimant did in this case.

Backdrop

8. The backdrop to the situation is about a housing management company and its management of residential apartments within one of which the Claimant resided.

9. The leadership of the management company also resided in the various apartments as is often the situation where blocks of apartments are concerned.

10. What appears to be a protracted, highly personal and entrenched dispute then arose, initially outside of court, where various lengthy and personal email exchanges took place between the Claimant and her neighbours.

11. This resulted in various documents being drafted both inside and outside of court and, to cut a long story short, the Claimant was accused of signing a document in her capacity as a barrister, which contained a statement of truth, when at the time she signed it, she had allegedly not been given the status of "litigator" by the Bar Council.

12. This resulted in a number of the residents complaining to the Respondent about the Claimant, opposing solicitors complaining about the Claimant and professional misconduct proceedings were then subsequently organised. The first complaint was submitted on 28 September 2009.

13. The Claimant was convicted of 5 counts of misconduct following a disciplinary tribunal.

14. The convictions of professional misconduct (albeit they were later deemed by the High Court as clearly erroneous and should not have been prosecuted in the first place) were published at a time when the Claimant was a high profile practitioner because she had become a barrister partner in a law firm, which was said to have made legal history at the time.

15. The allegations that were upheld against the Claimant were reported publicly.

16. This report triggered complaints of further misconduct from two solicitors who had been on the opposing side to the Claimant in both past and then current litigation.

17. One complaint was novel in that it alleged the Claiamnt had practiced as a barrister without a practising certificate, the other made a series of complaints that were similar if not identical to those previously made about which the Claimant was (erroneously) convicted.

18. Both those complaints were subsequently dismissed.

High Court appeal against Disciplinary Tribunal findings in 2012

19. I have been assisted by those findings of fact already made by the High Court in the Approved Judgment of Sir Andrew Collins in **Daphne Portia O'Connor v The Bar Standards Board** at pages 649 – 658 in the bundle.

20. The Claimant was prosecuted by the Respondent for breaches of the rules and the complaint against her was recommended to go to prosecution by Mrs Ellenbogen QC.

21. There were six allegations or "charges" in total. At the professional conduct hearing, five of the allegations were upheld and one was not.

22. In respect of the charges and recommended prosecution in the Disciplinary Tribunal, the Claimant argued as follows:

    22.1. The defendant prosecuted her for breach of the rules because she was black;

    22.2. The most serious charges were brought against her when the allegations could only be considered to be lesser charges and that was because she was black;

22.3. That she was charged for breaches that were not breaches of the rules because she was black;

22.4. That she was charged with breaching the public access rules when the Claimant was not acting via public access and that charge was brought because she was black;

22.5. That a recommendation for prosecution was made under repealed legislation because the Claimant was black;

22.6. That an appropriate recommendation by committee recommendation was not made and that was because she was black;

22.7. That a further two complaints were accepted out of time by the respondent and that was done because she was black.

23. It is important to note that for the high court proceedings, the cause of action was a statutory appeals process provided for by statute against the decision of the Disciplinary Tribunal because the Claimant argued the decision to uphold any of the 5 charges found proven was flawed because of applying the wrong law and/or because of an unfair procedure. This was not a discrimination claim. It was an appeal.

24. Another argument made against the Disciplinary Tribunal was that it did not allow the Claimant to comment about the evidence at that hearing or make final submissions and was therefore procedurally unfair.

25. Further, the Claimant alleged that the reasons given by the Disciplinary Tribunal were flawed because none of the conduct was conduct that was in breach of any rules and, even if it was, it could not be regarded as discreditable conduct in any event. I note the standard of proof in the Disciplinary Tribunal was the criminal standard of beyond reasonable doubt.

26. The High Court had no difficulty at all in allowing the appeal on all grounds and found it strange that the prosecution of the charges happened in the first place when the Claimant's behaviour was clearly in line with the Respondent's own guidance and indeed the law.

High Court proceedings ongoing until 2021

27. As a result of the findings of the High court on appeal, the Claimant issued proceedings in the high court.

28. Those proceedings contained the following causes of action by the end of them, after various appeals ending in a Supreme Court Judgment:

28.1. She was prosecuted by the D because she is black and that if the BSB rules were followed she would not have been investigated or charged at all.

28.2. That she faced the most serious charges for a matter which was not a breach and, even if it were, it would fall into the category of the least serious breach, because she is black.

28.3. That she faced charges for breaching the public access rules on a matter where she was not acting via public access, and that this would not have happen if she was not a black Barrister.

28.4. That she was recommended for prosecution, even though at the time of the recommendation, the legislation that she was relying on was repealed and she noted this. The Claimant believed that she would not have ben recommended for prosecution if she was not a black Barrister.

28.5. The rules provided that a Barrister cannot be prosecuted without committee recommendation. The minutes from the committee meeting shows that the defendant made the recommendation when the committee did not recommend prosecution, a different or indifferent approach was taken because she was black.

28.6. After publication of the disciplinary findings there were two further complaints, both from previous opponent Solicitors and both made approximately 3 years out of time. The complaints were accepted 3 years out of time. The Claimant's alleged she was treated less favourably because she was black. Further, that the Defendant's own statistics showed that black Barristers were overrepresented in the Defendant's complaint process and the Defendant's own report shows that they had insufficient processes in place to prevent discrimination based on race.

28.7. The Claimant's case was that the prosecution had affected her health, reputation, and finances. There were separate proceedings before the Employment Tribunal regarding the ongoing effect of the Defendant's publication of the result of the prosecution and the subsequent appeal of the Disciplinary Tribunal's findings.

28.8. The Claimant argued that her human rights had been breached because of the race discrimination and that she had been the subject of criminal harassment.

29. In 2014, Deputy Master Eyre struck out the Claimant's case because some of the claims were for the exclusive jurisdiction of the Employment Tribunal, there was a failure by the Claimant to support some of the causes of action alleged and the allegations that could only be brought before the Employment Tribunal were, in any case, out of time.

30. This decision was appealed to Warby J and was partially successful in resurrecting the Article 14 ECHR claim.

31. This was eventually appealed to the Supreme Court, which found that there was an arguable case for breach of the Human Rights Act, which was

actionable in an appropriate court or Tribunal and had a real prospect of success based upon a previous inclusion and diversity report which found, as per the Claimant's pleaded case, that amongst other things, Black barristers were overrepresented in the complaints system at the Respondent and were more likely to have complaints upheld against them.

The former tribunal proceedings presented on 10 December 2018

32. The Claimant presented an ET1 claim form on 10 December 2018. It was given claim number 1305902/2018.

33. The Claimant ticked the box for race discrimination only and attached a separate Basis of the Claim document which goes into he detail of the pleadings.

34. The following causes of action are pleaded in the Basis of the Claim:

    34.1. That on or around 18 August 2012, the Respondent did not respond to her request to and/or failed to remove published reference to the Claimant being a disreputable barrister at paragraph 13;

    34.2. That the bringing of the charges against the Claimant, the prosecution of the charges and the flaws in the process upheld by the High Court to overturn the convictions were acts of race discrimination as part of a continuing act of discrimination at paragraphs 23, 27 – 28 and 34;

    34.3. The Respondent has failed to act in accordance with its own code of conduct governing complaints, investigations and prosecution in three complaints made against her at paragraph 23;

    34.4. That the respondent had failed to uphold a complaint the Claimant made against her head of chambers paragraph 25;

    34.5. That the sponsor for the prosecution against the Claimant has received no disciplinary sanction in light of the High Court's finding that the charges should never have been brought in the first place, in fact they had been promoted at paragraph 26;

    34.6. That the charges were not placed before a committee or had not been approved by a committee at paragraph 29;

    34.7. That the application of the code of conduct in force at the material times was disadvantageous to Black barristers and/or would not have been applied the same way to black barristers at paragraph 33;

    34.8. That the Respondent did not apply the procedures of the code of conduct to complaints made by two other complainants at paragraphs 35 and 36.

35. The broad heads of claim were labelled by the Claiamnt as being direct race discrimination and indirect race discrimination. She also claimed personal injury

as a result of the alleged discrimination.

36. I need not go into the detail of the defence of the respondent or any procedural matter until the disposal of those proceedings occurred.

37. On 26 August 2020, EJ Broughton dismissed the entirety of the proceedings brought by the Claimant because all of the claims of race discrimination were presented out of time and he decided it was not just and equitable to extend time.

38. Those claims were considered at a two day preliminary hearing before being dismissed.

39. EJ Broughton made the following findings of fact relevant to the proceedings before me in reasons provided with his judgment:

"Background, facts and the claims

6. I had the opportunity of a reading day due to the extensive documentation in this case going back many years to at least 2010.

7. This history included tracking court proceedings that commenced in the High Court in 2013 which I needed to review thoroughly again after hearing the evidence and submissions.

8. Those proceedings included claims of race discrimination under the Race Relations Act 1976 and the Equality Act 2010 akin to those before me today. These elements of the High Court claims were struck out for want of jurisdiction.

9. At the time, the claimant had the benefit of advice from leading counsel and the jurisdiction point was not appealed. The claimant was aware, therefore, that the employment tribunal has exclusive jurisdiction for such claims.

10. The High Court claims, however, also included claims of race discrimination under the Human Rights Act 1998. Part of that claim was deemed arguable but, initially, was held to be time barred.

11. That issue culminated in a decision of the Supreme Court in October 2017 [UKSC 78]. The claimant was successful on the limitation point. The matter was remitted to the High Court and those proceedings are ongoing."

40. In essence, these claims were dismissed because the Claimant could not fully explain the reasons for the delay in presenting the ET1 and there were still live High Court proceedings through which the Claimant could still achieve a remedy.

The settlement agreement in October 2021

41. On 20 October 2021, the parties entered into and signed a settlement

agreement.

42. In that agreement, the Claimant agreed to withdraw the Employment Appeal Tribunal application she had made presumably against EJ Broughton's judgment and the still continuing high court proceedings.

43. The relevant clauses stated:

"1. This agreement is entered into by Ms O'Connor and the BSB with the intention that its terms shall constitute a full and final settlement of any claim or complaint which either has or may have against the other, including, arising from or otherwise connected with, Ms O'Connor's High Court claim, QB-2013-000350 ("the High Court Claim") and her Employment Tribunal claim, 1305902/2018 ("the ET Claim"), Including all claims or liabilities for costs and interests.

2. The ET Claim includes Ms O'Connor's application in the Employment Appeal tribunal, UKEAT/0128/21/RN."

*"**The High Court Claim***

6. Ms O'Connor will file and serve a notice of discontinuance in the High Court Claim in accordance with part 38.3 of the Civil Procedural Rules by 4:00 PM on 26th October 2021. For the avoidance of doubt, by this agreement the BSB waives any entitlement costs which would otherwise arise upon the discontinuance of the High Court Claim.

The ET Claim

7. Miss O'Connor will notify the EAT of the withdrawal of any application she is made to it, in particular UKEAT/0128/21/RN, by 4:00 PM on 26 October 2021, in accordance with paragraph 17.1 of Practice Direction (Employment Appeal Tribunal - Procedure) 2018, And at the same time provide a copy of her correspondence with the E 80 to the BSB solicitors…"

44. Consequently, the 2013 High Court proceedings were settled under this settlement agreement along with any appeals against the judgement of EJ Broughton.

45. It is noteworthy to say that the settlement agreement does not purport to settle any future claims the claimant my have against the respondent.

The proceedings before me

46. On 2 August 2023, the Claimant presented her current claim to the Employment Tribunal.

47. The Claimant makes claims of direct race discrimination, indirect race discrimination, race related harassment and victimisation.

48. The list of issues was considered and clarified at a preliminary hearing before EJ Childe and then later amended by Judge Connolly at a further preliminary hearing.

49. The list of issues for this claim is attached to this judgment as Annex 3.

50. The broad heads of claim are direct and indirect race discrimination, race related harassment and victimisation. They are said to be brought in accordance with the provisions in Part 5 of the Equality Act 2010 namely s53 – Qualification Bodies.

51. Claim 5.1.1 at the very least relies on facts that were the subject of the claim before Judge Broughton back in 2019.

52. At least one claim straddles the settlement agreement effective from October 2021, because it relates to a request made for copies of complaints submitted to the Respondent that the Claimant alleges were provided some years later on 16 May 2023 (at paragraph 5.1.3).

53. The remainder of the allegations of harassment all stem from 16 May 2023 with the exception of one allegation from June 2023.

54. The Claimant pleads the High Court Claim and the ET Claim from the settlement agreement as being protected acts to found a case for victimisation.

55. Clearly, for the purposes of this hearing, I must proceed assuming they are valid Protected Acts taking the Claimant's case at its highest.

56. The allegations of victimisation are the same as those of harassment, but also include allegations at paragraphs 6.2.2 – 6.2.6 of the list of issues.

57. All the harassment and victimisation complaints are also alleged to be acts of direct race discrimination.

58. It is clear, that the only allegation that is obviously a copy allegation from any previous proceedings is at paragraphs 5.1.1 of the list of issues.

The Law

The Jurisdiction of the Tribunal

59. Section 120 provides the jurisdiction of this tribunal as follows where relevant to this case:

> ***"120 Jurisdiction***
>
> *(1)An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—*
>
> *(a)a contravention of Part 5 (work);*

(b)a contravention of section 108, 111 or 112 that relates to Part 5.

(2)…

(3)…

(4)…

(5)…

(6)…

(7)Subsection (1)(a) does not apply to a contravention of section 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal."

60. Section 53 of the Equality Act 2010 ("EQA") makes prohibited conduct under the EQA unlawful and actionable in the Employment tribunal in defined circumstances.

61. That section says:

53 Qualifications bodies

(1) A qualifications body (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;

(b) as to the terms on which it is prepared to confer a relevant qualification on B;

(c) by not conferring a relevant qualification on B.

(2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification—

(a) by withdrawing the qualification from B;

(b) by varying the terms on which B holds the qualification;

(c) by subjecting B to any other detriment.

(3) A qualifications body must not, in relation to conferment by it of a relevant qualification, harass—

(a) a person who holds the qualification, or

(b) a person who applies for it.

(4) A qualifications body (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;

(b) as to the terms on which it is prepared to confer a relevant qualification on B;

(c) by not conferring a relevant qualification on B.

(5) A qualifications body (A) must not victimise a person (B) upon whom A has conferred a relevant qualification—

(a) by withdrawing the qualification from B;

(b) by varying the terms on which B holds the qualification;

(c) by subjecting B to any other detriment.

(6) A duty to make reasonable adjustments applies to a qualifications body.

(7)The application by a qualifications body of a competence standard to a disabled person is not disability discrimination unless it is discrimination by virtue of section 19."

62. Section 54 deals with interpretation of section 53 and states as follows where relevant:

*"**54 Interpretation***

(1) This section applies for the purposes of section 53.

(2) A qualifications body is an authority or body which can confer a relevant qualification.

(3) A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.

(4)…

(5) A reference to conferring a relevant qualification includes a reference to renewing or extending the conferment of a relevant qualification.

(6)…"

63. Direct Discrimination is defined by section 13 EQA, which says where relevant:

*"**13 Direct discrimination***

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

64. 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."*

65. In this case, it is significant to note that harassment and victimisation are not listed under the heading "Discrimination" in part 2, but under the heading "Other Prohibited Conduct".

66. Harassment is defined by section 26 EQA, which states where relevant:

> ***"26Harassment***
>
> *(1) A person (A) harasses another (B) if—*
>
> > *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> >
> > *(b) the conduct has the purpose or effect of—*
> >
> > > *(i) violating B's dignity, or*
> > >
> > > *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(2)…*
>
> *(3) …*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

67. Race is a relevant protected characteristic under section 26.

68. Victimisation is defined by section 27 EQA, which states where relevant:

*"**27 Victimisation***

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2)Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this Act;

(c)doing any other thing for the purposes of or in connection with this Act;

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

69. In Schedule 28 of the Equality Act 2010 it is important to note the following "Defined Expressions" and where the definition is located in the Act:

"Discrimination	*Sections 13 – 19A, 21 and 108.*
…	
Harassment	*Section 26 (1)*
…	
Victimisation	*Section 27 (1)"*

70. Sections 13 – 19A deal with direct and indirect discrimination including discrimination arise because of something in consequence of disability. Section 21 is about failing to make adjustments and section 108 is about relationships that have come to an end.

71. The only sections relevant to the Claimant's claims are therefore sections 13, 19, 26 and 27. Section 21 is irrelevant to the Claimant's pleaded case and section 108 does not apply because the relationship between the Claiamnt and the Respondent is still live with her having an active and current practising certificate.

72. Significantly, given these defined expressions, harassment and victimisation do not form part of the definition of discrimination in the Equality Act 2010. They are treated separately.

73. It is also noteworthy that s212 (1) of the Act states that detriment does not include harassment. Therefore claims under s53 *"by subjecting B to any other detriment"* cannot include harassment as a detriment.

Issue estoppel

74. Issue estoppel may arise where decisions about disputed facts are made by a Judge when determining an application for an extension of time, preventing the parties reopening the same issue in future proceedings between them **Hutchison 3G UK Ltd v Francois [2009] ICR 1323, EAT,** at para 29.

Cause of action estoppel

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

76. In **Virgin Atlantic Airways Ltd v Zodiac Seats Limited [2014] AC 160** at paragraph 26 Lord Sumpton held:

> *"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."*

77. 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."*

78. The phrase includes 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 after **Cooke v Gill (1873) LR 8 CP 107, 116,** per Brett J.

79. The law of whether further proceedings can be brought is that of res judicata, including cause of action estoppel.

80. For a cause of action estoppel to arise there has to have been a consideration of the merits of the cause and a judgment made based on those, or a dismissal upon withdrawal.

81. The situation is different where there has been simply a decision about time limits and an application to extend time refused see **Nayif v High Commission of Brunei Darussalam [2014] EWCA Civ 1521.**

Henderson v Henderson

82. Then there is the rule in **Henderson v Henderson (1843) 3 Hare 100**. The **Henderson** rule is very old and is largely but not entirely based on public policy.

83. Lord Bingham described this rule 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."

84. This rule has most recently been revisited in the Employment Tribunal in **Home Office v Oxley [2024] EAT 44.** In that case HHJ Tayler helpful summarised the applicable authorities and tests. I repeat some of those relevant to this case and more generally below.

85. 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."

86. 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."

87. In **Oxley,** HHJ Tayler then considered the following questions as necessary to answer before coming to a decision about either cause of action estoppel or **Henderson**, at paragraph 29, which in my judgment are equally valid here. These were (with added words to provide the principles rather than specifics of that particular case):

87.1. Identify the relevant cause of action in the previous claim or claims;

87.2. Identify the relevant cause of action in the claim or claims that is/are said

to vex the applicant;

87.3. Identify whether the two causes of actions were the same so that cause of action estoppel applied to the new claim(s);

87.4. if not, identify whether the new claim(s) could and should have been brought in the previous claim(s) so that bringing it was an abuse of process.

88. Consequently, before a decision can be made about whether the rule in **Henderson** was engaged, there must first be an analysis of the facts in answer to questions 1-3 above. Only then can a safe decision be made.

89. An abuse of process is "*a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*" after **Attorney General v Barker [2001] 1 FLR 759**.

Strike out

79. In all decision made in accordance with the Employment Tribunal Rules, I must bear in mind the overriding objective in rule 2 and any relevant presidential guidance.

80. The Tribunal rules allow me to strike out a claim if it has no reasonable prospect of success under rule 37:

"Striking out

37.— (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 is scandalous or vexatious or has no reasonable prospect of success;
(b) …
(c) …
(d) …
(e) …

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

81. In **Ezsias v North Glamorgan NHS Trust [2007] 4 All ER 940** that case stated that it is only fanciful cases that will pass the very high threshold required to strike out a case.

82. In **Cox v Adecco UKEAT/0339/29 [2021] ICR 1307** at [28] HHJ Taylor held as follows when describing the general approach to strike out:

"28 From these cases a number of general propositions emerge, some generally well understood, some not so much.

(1) No one gains by truly hopeless cases being pursued to a hearing.

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.

(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.

(4) The claimant's case must ordinarily be taken at its highest.

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."

Deposit orders

81. This is covered by rule 39 of the Employment Tribunal rules of procedure 2013 which states where relevant:

"Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers

that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) …

(6) …"

82. The guidance in **Cox** above applies equally to the analysis of the claims at a preliminary stage as it does to strike out, apart from the test as to the strength of the case or argument put forward in (1) and (2) from the quoted passage above following **Amber v West Yorkshire Fire and Ambulance Service [2024] EAT 146.**

83. Paragraph 28 in **Amber** sums up the current position as follows:

*"28. Such a hearing should not generally, as can be seen from the authorities, deal with significant disputed matters of fact. To do so would not be in keeping with the interlocutory nature of the procedure. Further, as has been pointed out in **Hemdan v Ishmail,** the preliminary process should deal with issues that can be resolved within a limited use of tribunal time. What such a process is to explore is whether a pleaded case cannot (strike out), or can only weakly (deposit), demonstrate a statutory requirement or a legal defence. This is not limited to legal issues, factual matters can be considered, but only in exceptional circumstances. Generally, this is a procedure that should not hear evidence from witnesses. However, contemporaneous documentary evidence can be considered in appropriate circumstances. A case advanced should be taken at its highest. That is a phrase regularly in use in courts and tribunals, but it does not mean, naively accepting the case advanced. At its highest requires the judge to test the factual account. This would include for example examining the case against basic logic, internal inconsistency or any contradiction by contemporaneous documentary evidence. Therefore, a claim or a part of a claim is not taken at its highest within its own terms, but is examined through the prism of reality. Thus a fanciful case is subject to strike out or if not quite so fanciful to a deposit being ordered. But it is important for me to remember in dealing with this that "realistic", as it was set out by Maurice Kay LJ, simply*

means "it could be the case"; it is not a substantial hurdle to cross."

Discussion and conclusions

Henderson v Henderson and cause of action estoppel

84. The allegation made at paragraph 5.1.1 of the list of issues, is clearly a factual allegation that has been adjudicated upon previously before the Employment Tribunal.

85. EJ Broughton dismissed that complaint as being out of time.

86. The Claimant was aware of the Jones complaint because she pleaded facts about it at for example paragraph 16 of the Basis of Claim in 2018.

87. This claim was pleaded as an act of direct discrimination previously, namely that the Jones complaint was a result of the Respondent failing to remove the statement of upheld charges from its website following the High Court's decision to overturn those allegations.

88. It was not pleaded as harassment or victimisation and the Claimant did not specifically state, in that previous claim, that the fact the Jones complaint had been considered by the respondent as part of its complaints procedure was discrimination. It raised other points about the handling of that complaint.

89. Applying **Cure** the relevant factual circumstance, namely, the fact the Respondent decided to look into the Jones complaint, was known to the Claimant and was a cause of action in the earlier Tribunal proceedings.

90. Looking at **Arnold,** the factual cause of action needs to be identical in the earlier proceedings as it does in the latter proceedings for the cause of action estoppel to arise. The earlier proceedings also need to be between the same parties.

91. I find that the cause of action in 5.1.1 is factually identical in the earlier proceedings as it is in this case. Yes, the legal label to that claim is different and it has been explained in both claims in a different way, but that factual circumstance is the same regardless.

92. However, the proceedings in the earlier ET Claim were dismissed because of time limits and time limits alone. Therefore, after **Nayif,** a cause of action estoppel has not arisen because the merits of the claims were not considered.

93. I now need to consider question 4 in **Oxley.** In my judgment, when considering allegation 5.1.1 in the list of issues, the fact the Respondent considered the Jones complaint could and should have been brought in the earlier 2018 Tribunal proceedings.

94. The facts of that situation were known to the Claimant, she is a barrister with

good knowledge of employment law and no good reason has been put forward to explain why that set of circumstances was not argued as being discrimination, harassment and/or victimisation at the time.

95. When considering victimisation, the Claimant also knew of one Protected Act she relies upon, namely the issuing of the High Court proceedings in 2013.

96. In addition, bearing in mind that cause of action estoppel and the **Henderson** rule are different, in my view, the fact the out of time arguments and extension of time points have already been considered resulting in the earlier Tribunal proceedings dismissed, make the claim in 5.1.1 hopeless. The time limit points for 5.1.1 cannot be any different now compared to what was argued then.

97. Whilst the parties haven't argued issue estoppel before me, I cannot ignore the fact that it is impermissible for the factual findings of Judge Broughton about why the extension of time was not granted in the earlier proceedings to be revisited afresh about allegation 5.1.1, because those arguments are estopped by issue estoppel as envisaged in **Hutchinson**.

98. In my judgment, issue estoppel is also relevant to the abuse question in **Henderson.**

99. Applying **Barker,** to argue a point that is clearly estopped from being argued again, is an abuse of process and not an ordinary and proper use of the Tribunal.

100. Consequently, there can be no extension of time argued to bring the claim at paragraph 5.1.1 into the jurisdiction of the tribunal because it is estopped and, in any case, it is also claim that could and should have been brought in the earlier proceedings. It is also abusive by vexing the respondent twice with an issue already decided and is therefore res judicata by virtue of issue estoppel and/or the rule in **Henderson.**

101. <u>The claim at paragraph 5.1.1 is therefore struck out as being an abuse of process and having no reasonable prospect of success under rule 37.</u>

102. The same cannot be said for allegation 5.1.2, however. That cause of action dates from 16 May 2023 and could not have been raised and considered in any of the earlier proceedings in this case because it post dates them. The claim is essentially that the decision to provide the requested documents on 16 May 2023 some years after the initial requests was an act of either harassment, victimisation or direct discrimination.

103. The Respondent has accepted that allegation 5.1.3 is not caught by the **Henderson** rule, and 5.1.3 is essentially the same as the claim in 5.1.2 it is simply that the request to be provided with the copy of the Jones complaint happened in both 2018 and 2021, with the request to be provided with the McMichael and Wilding complaints being made in 2021 alone. I can therefore see no significant difference between the two. All the complaints requested by the Claimant were provided on 16 May 2023 on the Claimant's case and that

date, it appears to me, is when the cause of action the Claimant relies upon crystallised. This post dates all previous claims.

104. Allegation 5.1.2 therefore survives the res judicata arguments.

Section 53 of the Equality Act 2010

105. The Respondent argues that the harassment complaints in their entirety cannot be brought against it because, even if they fit the definition of harassment, they are not harassment in relation to the conferment of a qualification.

106. In this case, conferment is simply the provision or award of the Claimant's practicing certificate or any decision to extend the period of the practicing certificate or renewing it.

107. Looking at the wording of s53 (3) and given the separate nature of harassment from the expression "discrimination" in the Equality Act, harassment can only be actioned against qualification bodies under s53 (3).

108. Section 53 (1) says that a qualifications body must not discriminate against B in three specific ways. However, harassment is not interpreted in the Act as being discrimination so s53 (1) doesn't apply.

109. Section 53 (2) again prohibits "discrimination" so doesn't apply for the same reason. Harassment is not deemed to be discrimination in accordance with schedule 28.

110. Sections 53 (4) and (5) refer to a prohibition on victimisation not harassment. In addition, the definition of victimisation in s27 refers to subjecting a person to a detriment. We know from s212 that harassment is excluded from being a detriment. Consequently, for the Claiamnt's claim, s53 (4) and (5) also cannot be relied upon by her.

111. Looking in more detail at sub-section (3), and when considering the harassment allegations at paragraphs 5.1.1 – 5.1.12 in the list of issues, in this case, none of those allegations are about the conferment of the practicing certificate, its renewal or extension directly. By the time all those allegations crystalised on the Claimant's case, all the complaints had decided in the Claimant's favour and could therefore had no bearing on the conferment, renewal or extension of her practicing certificate. No case has been put forward by the Claimant that a practicing certificate application has ever been refused.

112. Consequently, the Tribunal has no jurisdiction to hear any of the harassment allegations against the Respondent at all. They cannot be brought in these circumstances under s53 and are therefore struck out under rule 37 as having no reasonable prospect of success.

113. The factual allegations can, however, be brought under s53 (2) (c) as direct discrimination complaints, because direct discrimination is within the ambit of the definition of the expression "discrimination" in schedule 28.

114. Similarly, there is jurisdiction to hear the victimisation and indirect discrimination complaints under sections 53 (2) (c) for indirect discrimination and s53 (5) (c) for victimisation.

The strike out application for allegations of direct discrimination and victimisation in paragraphs 5.1.2 – 5.1.12 and 6.2.2 – 6.2.6 in the list of issues

115. Looking at the guidance in **Cox,** assuming that the protected act of the High Court claim in 2013 and the Tribunal Claim in 2018 are protected acts, when taking the Claimant's case at its highest, I am not persuaded that striking out those claims is appropriate, with the exception of the claims made about paragraph 5.1.9.

116. The claims are very fact sensitive and they are discrimination allegations. Time limit arguments have not been heard in the context of these claims previously.

117. The witness statement evidence of Mrs Jagger was not tested in cross examination.

118. The statement of the Claimant, whilst sworn by her, was also not tested in cross examination.

119. I briefly refer to each of the allegations where strike out was requested.

120. **5.1.2:** The Respondent complains that some dates have not been provided and that a copy of the complaint form was enclosed. In my judgment, the dates are easily remedied by further particulars not by a strike out. In addition, although the unsigned letter in the bundle suggests the another document was enclosed that the respondent argues was a complaints form, I have heard no evidence about what was received and many of the other complaints in the bundle are not only in the format of a complaints form but also hand written letters and other documents sent in support. It therefore remains to be proven in evidence what actually happened.

121. **5.1.3:** For the same reasons and given that Mrs Jagger's statement was unsworn and untested, I am not persuaded that the factual matrix here is certain meaning that the Claimant's case on this point is bound to fail.

122. **5.1.4:** Whilst I understand the Respondent's argument here that the decision makers in the Jones complaint etc. were simply following due process, the Claimant argues that they were motivated at least in part because of her race or the fact she did protected acts. To determine those issues, the tribunal needs to analyse the mental processes of those involved. That can only safely be done in evidence.

123. **5.1.5:** No submissions were included in the skeleton argument about this allegation in the context of direct discrimination or victimisation. The strike out application for this allegation was withdrawn during the respondent's oral submissions.

124. **5.1.6:** It was said in oral submissions that the redactions were performed by Ms Matse Orere, yet Mrs Jagger's statement was submitted to support the strike out application. The Respondent argued that some redactions were mistakenly included. To be blunt, I have no idea if that is correct or not. It appears to me that the only person who can explain what happened and why with direct evidence, when looking at the mental processes involved, is Ms Matse Orere unless the Respondent is relying on hearsay or simply documentary evidence. Either way, this needs to be tested properly in evidence at a final hearing.

125. **5.1.7:** The Respondent argues that the Claimant has not provided any evidence to support this allegation. However, the evidence provided by the respondent in support of the application was again unsworn and untested.

126. **5.1.8:** Again, it strikes me that given the respondent has admitted that Mr. Pretty stated the Claimant had not requested copies of complaints and that was alleged by it to be an error, I do not know that without hearing evidence. This allegation may not look inherently related to race and the harassment claims have been struck out. However, this is also pleaded as direct discrimination where mental processes need to be looked into and victimisation where again mental processes need to be looked into. I have heard no evidence from Mr. Pretty. This is a factual situation that requires hearing properly.

127. **5.1.9:** This claim appears to be hopeless. It has no date for the cause or causes of action, the Claimant has not specified any alleged perpetrators, it cites employees or agents, but the Respondent does not know who they are or what the basis for alleging an agency relationship is. This claim was clarified by Judge Connolly at a Case Management hearing and it is still vague. It is speculatory. It is likely to cause fishing expeditions for disclosure in my judgment unless the Claimant knows of specific perpetrators or dates. Consequently, the Claimant has 14 days to fully particularise the facts of this claim including the name(s) of those involved, the date(s) involved and the grounds the Claimant relies upon including what was improperly accessed by whom and if anyone named is alleged to be an agent, the precise grounds the Claimant relies upon as the basis for alleging an agency relationship or it is likely to be struck out as having no reasonable prospect of success. This is the Claimant's final chance to properly particularise this complaint.

128. **5.1.10:** Again, without hearing any evidence, I have no idea what was said or done about this allegation and cannot determine summarily whether a misrepresentation took place or not.

129. **5.1.11:** Whilst the Claimant does need to provide further information here about when this allegation took place and who allegedly said this to her, it strikes me that the allegation is sufficiently clear but for those items that striking it out would currently be premature.

130. **5.1.12:** Whilst I have taken the Respondent's position into account, namely, that it did respond to the question posed, the allegations is about repeated refusals and the fact the respondent answered once, doesn't necessarily mean

that there weren't previous refusals to answer. This again will depend on the evidence.

131. **6.2.2:** I am not persuaded that this allegation is clear. There is confusion about the dates. Were these allegations from 2018-2019 or in 2023 as per the list of issues? The Claimant needs to provide further information to clarify this claim but in circumstances where I don't fully understand the facts of it, it is premature to strike it out.

132. **6.2.3:** This is another vague allegation. It does not set out who was alleged to have been communicating with complainant Jones in a way the Claimant alleges was victimisation and/or direct discrimination. It does not explain what communications are relied upon, when they happened or why the Claiamnt alleges they were done because of race or the protected acts she relies upon. In her witness statement, the Claimant clarifies what she took exception to and when. If the Claimant confirms that paragraphs 16 – 18 in her statement contain her case, then subject to that confirmation and any other relevant circumstances, it appears premature to strike out that claim until evidence is heard.

133. **6.2.4 – 6.2.6:** It strikes me that a detailed factual analysis will be required to first understand the circumstances in which these claims are argued and then to consider whether the Respondent had a duty to disclose and either way, what the real reason why it behaved as it did was. It is therefore not appropriate to strike out these claims.

134. Consequently, all the above claims survive the strike out application on the merits with the exception of allegation 5.1.9, which whilst not immediately struck out, is likely to be struck out unless the Claimant provides sufficient information to address how vague it is.

Deposit application

135. I have considered the above claims in light of the lower threshold needed of little reasonable prospect of success for the purpose of ordering a deposit to be paid.

136. For the same reasons as above, albeit in light of the little reasonable prospect test, I am not minded to make a deposit order about any of the allegations. Much will depend on the evidence in the case and, on a summary view, the respondent has failed to show that the Claimant's allegations have little reasonable prospect of success, with the exception of allegation 5.1.9, which will be dealt with in a different way.

137. Consequently, the deposit application is refused.

Case management Orders

138. **On or before 14 days from the date this Judgment is sent to the parties,** the Claimant must provide full particulars with reference to the factual

background pleaded in the Basis or Claim document, where applicable, providing all missing information about who did what, where, when, how and why that is said to be discrimination or victimisation to the Respondent for allegations 5.1.2, 5.1.11, 5.1.12, 6.2.2 and 6.2.3.

139. **By the same date as the further information order** above, the Claimant must update the list of issues as a separate word document, to take into account the claims that have been struck out and the further information she has provided.

140. The case will then be listed for a case management preliminary hearing to permanently fix the list of issues, list the case for final hearing and undertake any further case management.

EMPLOYMENT JUDGE SMART
6 December 2024

ANNEX 1 – PRELIMINARY HEARING AGREED LIST OF ISSUES

"Purpose of the hearing

2. At this hearing the tribunal will determine:

2.1 Under rule 37:

2.1.1 Whether the claim for harassment in paragraph 5 of the case summary below should be struck out, on the basis it has no reasonable prospects of success as the claimant's claim does not fall within the parameters of harassment set out in section 53 (3) Equality Act 2010.

[2.1.2 was not pursued].

2.1.3 Whether the allegations in paragraphs 5.1.1 and 5.1.2 of the case summary below should be struck out, on the basis they have no reasonable prospects of success as, under the rule in Henderson v Henderson, they were complaints which have already been brought in the Employment Tribunal or which might have been brought in the Employment Tribunal.

2.1.4 Whether the allegations in paragraphs 5.1.1, 5.1.2, 5.1.3, 5.1.4, 5.1.6, 5.1.7, 5.1.8, 5.1.9, 5.1.10, 5.1.11, 5.1.12, 6.2.2, 6.2.3, 6.2.4, 6.2.5 or 6.2.6 should be struck out on the basis they have no reasonable prospects of success on their merits.

2.2 Under rule 39, whether the tribunal considers that any specific allegation or argument in the claimant's claim has little reasonable prospect of success. If so, whether the claimant should pay a deposit as a condition of continuing to advance that allegation or argument.

2.3 Dependent upon the outcome of the applications at paragraphs 2.1 and 2.3, to set the case down for a final merits hearing and to issue appropriate case management directions.

3. The employment judge dealing with the preliminary hearing may choose to not deal with all or any of the issues in paragraph 2. If the employment judge chooses to deal with those allegations, they may do so in any order that they see fit."

END

ANNEX 2 – OUTCOME OF HEARING

OUTCOME OF HEARING AND CASE MANAGEMENT ORDERS

1. The parties were reminded of the rule about written reasons under rule 62 during the hearing, namely, that written reasons for decision would not be generated automatically, but they could be provided by application of a party at the hearing or within 14 days of the date the written document confirming the decision was sent to the parties.

2. This case came before me as a public preliminary hearing to determine a number of issues for strike out and in the alternative whether a deposit order should be made. The Claimant stated no adjustments were needed when asked.

3. The application was originally made before Judge Childe at a case management hearing on 10 July 2024.

4. On 16 August 2024, the Respondent sought to limit the scope of the application and also to change the basis of its submission under the rule in Henderson v Henderson res Judicata principles.

5. In addition, an unopposed application had been made under Rule 50 to anonymise reference to a member of the Claimant's family because they are a minor and they're identity is not relevant to the proceedings other than their name or relationship with the Claimant being made in correspondence/evidence.

6. It struck me that the Rule 50 needed to be considered first and, if an order was to be granted, it needed to be discussed in private before any public hearing could commence.

7. By consent, the hearing commenced in private, and one member of the public gallery was required to leave the hearing. There was concern by the Claimant that a paralegal from the Respondent's instructing solicitors was present and should also be excluded. However, I decided that they were subject to professional conduct rules of a regulated solicitors firm and the anonymity order would bind them as much as anyone else if made. I therefore allowed them to remain for professional development purposes.

8. The parties had helpfully provided a draft order with tracked changes. We discussed these and any arguments about the amendments and length of time the anonymity order, if granted should remain in place.

9. **Outcome:** The Claimant's family member will be anonymised because they are a minor and the interests of justice and safeguarding requirements placed on the tribunal outweigh any other arguments. The length of the anonymity order would remain in place until the family member had attained the age of 18 years of age after which it would only be renewed upon application of a party within 28 days of 23 August 2024.

10. **On or before 23 September 2024**, the Respondent shall send an updated draft anonymity order to the Claimant including the amendments discussed and the new wording for paragraphs 5 and 6 as follows:

"(5) This order shall remain in force until such time as the Claimant's child has reached 18 years of age and will therefore remain in force until 23 August 2030.

(6) Either party may apply to extend the duration of the anonymity order, so long as such application is received within 28 days following 23 August 2030."

11. **On or before 7 October 2024,** the Claimant will confirm that the amendments are agreed and reflect her understanding of the discussions at the hearing and send the final draft to Employment Judge Smart for final approval, placing into the Tribunal's Order template and issuing.

The strike out and deposit application heard in public

12. The parties helpfully agreed the preliminary hearing list of issues as below, following the Respondent's amendment to its previous application, by reference to the case management order for Judge Childe:

"Purpose of the hearing

2. At this hearing the tribunal will determine:
2.1 Under rule 37:
2.1.1 Whether the claim for harassment in paragraph 5 of the case summary below should be struck out, on the basis it has no reasonable prospects of success as the claimant's claim does not fall within the parameters of harassment set out in section 53 (3) Equality Act 2010.
[2.1.2 was not pursued].
2.1.3 Whether the allegations in paragraphs 5.1.1 and 5.1.2 of the case summary below should be struck out, on the basis they have no reasonable prospects of success as, under the rule in Henderson v Henderson, they were complaints which have already been brought in the Employment Tribunal or which might have been brought in the Employment Tribunal.
2.1.4 Whether the allegations in paragraphs 5.1.1, 5.1.2, 5.1.3, 5.1.4, 5.1.6, 5.1.7, 5.1.8, 5.1.9, 5.1.10, 5.1.11, 5.1.12, 6.2.2, 6.2.3, 6.2.4, 6.2.5 or 6.2.6 should be struck out on the basis they have no reasonable prospects of success on their merits.
2.2 Under rule 39, whether the tribunal considers that any specific allegation or argument in the claimant's claim has little reasonable prospect of success. If so, whether the claimant should pay a deposit as a condition of continuing to advance that allegation or argument.
2.3 Dependent upon the outcome of the applications at paragraphs 2.1 and 2.3, to set the case down for a final merits hearing and to issue appropriate case management directions.
3. The employment judge dealing with the preliminary hearing may choose to not deal with all or any of the issues in paragraph 2. If the employment judge chooses to deal with those allegations, they may do so in any order that they see fit."

13. I therefore proceeded to hear the application in accordance with those issues.

14. A preliminary point was raised by the Claimant, namely that because of her mental health and childcare commitments, she had not had sufficient time to

prepare for the Respondent's change in stance about its application under the res judicata principles of Henderson v Henderson.

15. I decided that the Claimant would have a further 14 days from the date of the hearing to make any submissions about the sole point of the res judicata principles above being made under the ambit of a former Employment Tribunal claim dismissed by Judge Broughton rather than the previous High Court case arguments that were now withdrawn by the Respondent. The Respondent would then have 14 days to make any additional representations it wished to make. Reasons were given in more detail at the hearing, but they will not be repeated here. The Claimant agreed 14 days would be sufficient time before this order was made.

Evidence and documents

16. I had before me the following, which the parties agreed they also had:

    16.1 A bundle of 1373 pages in length indexed and paginated;
    16.2 Witness statement of Mrs Jagger;
    16.3 Witness statement of the Claimant;
    16.4 Respondent's skeleton argument;
    16.5 Claimant's skeleton argument;
    16.6 Claimant's Henderson skeleton argument;
    16.7 Bar Standards Board handbook 3rd Edition - May 2018.

17. The Claimant's evidence was sworn on oath and Counsel for the Respondent asked the Claimant no questions.

18. Mrs Jagger was not in attendance and her statement was unsworn. The Claimant was not able to cross examine her.

Disposal

19. I heard submissions from both sides and these finished at approximately 15.40.

20. By 15.20 the Claimant was visibly starting to struggle with the hearing due to its length. She could not locate the page reference for one document, so to relive the pressure of her continuing to look for it, I allowed the Claimant to write to the Tribunal confirming the document when she submits her additional representations about the Henderson arguments and the Respondent was allowed to write back about that document when it submitted its representations about the Henderson arguments in response.

21. **On or before 23 September 2024,** the Claimant may write to the tribunal to provide additional submissions about the Henderson v Henderson res judicata argument and to provide the page reference of the document she wanted to refer to only.

22. **On or before 7 October 2024,** the Respondent shall have the opportunity to respond to the additional submissions and the document the Claimant identifies.

23. Neither side is permitted to supply any further submissions about any other points and if any other submissions are received, they shall be ignored and not taken into account.

24. The above furthers the overriding objective by ensuring fairness to both sides.

25. There will be a deliberation day for me on **22 October 2024**. The parties should not attend. Reserved Judgment will then be sent out as soon as possible after that date.

26. When judgment is sent out, as the strike out application does not apply to all the claim, there will need to be a further preliminary hearing for case management to list the case for final hearing and any other directions needed.

About these orders

27. These orders must be complied with even if this document is received after the orders were discussed at a hearing and the date for compliance has now passed.

28. If any of these orders are not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules.

29. Anyone affected by any of these orders may apply for them to be varied, suspended or set aside.

Useful information

30. All judgments and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the Claimants and Respondents.

31. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here: *https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions*

32. The Employment Tribunals Rules of Procedure are here: *https://www.gov.uk/government/publications/employment-tribunal-procedure-rules*

33. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here:

https://www.gov.uk/appeal-employment-appeal-tribunal

Recording and Transcription

34. Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

END

ANNEX 3 – LIST OF ISSUES AFTER THE PRELIMINARY HEARING WITH EJ CONNOLLY

1. **Jurisdiction**

1.1 Which part(s) of section 53 of the Equality Act 2010 can the claimant rely on to advance her claims of unlawful discrimination against the respondent?

2. Time limits

2.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 9 March 2023 may not have been brought in time.

2.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

2.2.2 not, was there conduct extending over a period?

2.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

2.2.5 Why were the complaints not made to the Tribunal in time?

2.2.6 In any event, is it just and equitable in all the circumstances to extend time?

3. Direct race discrimination (Equality Act 2010 section 13)

3.1 The claimant describes her race as black.

3.2 Did the respondent do the following things:

3.2.1 The matters identified in paragraph 6.2 below.

3.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the

claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant has not named anyone in particular who they say was treated better than they were.

3.4 If so, was it because of race?

3.5 Did the respondent's treatment amount to a detriment?

4. Indirect discrimination (Equality Act 2010 section 19)

4.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

4.1.1 The application of part 5 of the bar standard board (BSB) handbook which deals with how complaints received by the respondent are to be handled.

4.1.2 The respondent's application of the Nolan principles, which the claimant says are the principles of fairness and openness and honesty as set out on the respondent's website.

4.2 Did the respondent apply the PCP to the claimant?

4.3 Did the respondent apply the PCP to white members of the bar, or would it have done so?

4.4 Did the PCP put black members of the bar at a particular disadvantage when compared with white members of the bar, in that black members of the bar are more likely to be the subject of complaints and the subject of harassment?

4.5 Did the PCP put the claimant at that disadvantage?

4.6 Was the PCP a proportionate means of achieving a legitimate aim? The legitimate aim upon which the respondent relies is the regulation of the Bar of England and Wales in accordance with its statutory duties, including the enforcement of the standards that regulated persons are required to meet and the rules with which they are required to comply.

4.7 The Tribunal will decide in particular:

4.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

4.7.2 could something less discriminatory have been done instead;

4.7.3 how should the needs of the claimant and the respondent be balanced?

5. Harassment related to race (Equality Act 2010 section 26)

5.1 Did the respondent do the following things:

5.1.1 In 2018 the respondent accepted and made the claimant aware of the Jones complaint. The respondent did not follow their procedure in respect of this complaint.

5.1.2 In 2018, and 2021 during the high court litigation, the claimant requested copies of the Jones complaint and it was not provided until 16 May 2023.

5.1.3 In 2021 the claimant requested copies of the McMichael and Wilding Greene complaints and they were not provided until 16 May 2023.

5.1.4 On 16 May 2023 the claimant received damaging and offensive material and a description of the claimant and the claimant's family, the claimant's finances, and the claimant's general conduct as a person following a subject access request.

5.1.5 The respondent kept four complaints (being the Jones, McMichael and Wilding Green and Lochran) as part of the claimant's record with the respondent even though they were dismissed or treated as without merit. The contents of the complaints were false, racist, abusive, insulting and personally and professionally damaging information that was sent to them as part of a wholly malicious complaint. The claimant says the complaints were made available to everybody who works at the respondent.

5.1.6 On 16 May 2023 the respondent partially disclosed, in redacted form, the material set out in paragraph 5.1.5, after multiple requests for this material from the claimant.

5.1.7 On 16 May 2023 the claimant had it confirmed that the respondent had engaged in improper and

damaging communication with the claimant's neighbours. Further, it was confirmed that the respondent encouraged and assisted the claimant's neighbours in making complaints against the claimant.

5.1.8 Paul Pretty, in approximately June 2023, said that the claimant had never requested the documents set out in paragraph 5.1.5 above.

5.1.9 **On unknown dates between April 2018 and August 2023, did unknown individuals acting as employees or agents of the BSB access the complaints material which the respondent had retained**

5.1.10 **Between June 2018 and October 2021, in response to questions from the claimant whether there were any other complaints in addition to the those provided by way of disclosure in the High Court claim, did the respondent misrepresent to the claimant that there were no more complaints from Jones (i.e. other than the disclosed complaint form and covering letter) and fail to inform the claimant of the existence of complaints from Wilding Green, McMichael or any client complaints**

5.1.11 **On an unidentified date or dates, did the respondent place the claimant under duress by telling her it had a witness statement from Ellenbogen J in the High Court claim and no Judge would take the claimant's word over hers**

5.1.12 **From May 2023 to 2 August 2023, did the respondent repeatedly refuse to answer the claimant's question as to who had access to the complaints material which the respondent had retained?**

5.2 If so, was that unwanted conduct?

5.3 Did it relate to race?

5.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other

circumstances of the case and whether it is reasonable for the conduct to have that effect.

6. **Victimisation (Equality Act 2010 section 27)**

6.1 Did the claimant do a protected act as follows:

6.1.1 The claims for discrimination against the respondent:

6.1.1.1 Brought in the High Court in 2013, which resulted in the Supreme Court decision in 2017.

6.1.1.2 The employment tribunal claim brought against the respondent in the West Midlands employment tribunal in 2018.

6.2 Did the respondent do the following things:

6.2.1 All of the matters referred to in paragraph 5.1.

6.2.2 Telling complainant Jones that he could provide information about the claimant but that the claimant would never be told about it during 2018 and 2019.

6.2.3 Communicating with complainant Jones and sending him documents during 2018 and 2019.

6.2.4 **From April 2018, did the respondent fail to disclose to the police information in its possession which showed that the complainant Jones had**

6.2.4.1 **Accessed the claimant's data in breach of the Data Protection Act 2018**

6.2.4.2 **Committed the offence of harassment in breach of the**
Harassment Act 1997

6.2.4.3 **Committed the offence of racially aggravated harassment in breach of s.1 of the Crime and Disorder Act 1988**

6.2.5 On or after April 2018 did the respondent failed to disclose to the claimant or the police that Jones had made numerous references to an alleged connection between himself and the claimant's family which showed that he was a risk to the claimant's family

6.2.6 In approximately June 2018 the respondent should have corrected a false statement by Jones to the police to the effect that they open brackets the respondent close brackets had to asked Jones to complete documents to commence a disciplinary against the claimant.

6.3 By doing so, did it subject the claimant to detriment?

6.4 If so, was it because the claimant did a protected act?

6.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

7. Remedy for discrimination or victimisation

7.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

7.2 What financial losses has the discrimination caused the claimant?

7.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.4 If not, for what period of loss should the claimant be compensated?

7.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

7.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

7.7 Should interest be awarded? How much?

END