EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms J Parmar **v** **The Royal National Orthopaedic Hospitals NHS Trust**

Heard at: Watford **On**: 25 October 2022
Before: Employment Judge Andrew Clarke KC

Appearances
For the Claimant: Mr Ian Wright, Counsel
For the Respondent: Mr Conor Kennedy, Counsel

JUDGMENT

1. All of the claims contained within the claim form numbered 3323525/2021 are struck out for the reasons given below.

2. The issues in claim 3300308/2021 remain listed for a full merits hearing to be heard over five days from 14 to 18 November 2022. Having regard to the claimant's alleged disability a separate waiting room will, if at all possible, be provided for the use of the claimant.

REASONS

1. The claimant commenced two claims against the respondent. This preliminary hearing has been concerned with their inter-relationship and with the respondent's application to strikeout the entirety of the second claim.

2. The first claim was commenced in January 2021 with further and better particulars being given in August 2021 which substantially fleshed out the claim. The claimant then indicated that she wished to make significant amendments to the claim and, once formulated, these were heard on 27 October 2021.

3. Employment Judge Tynan permitted some, but by no means all, of the amendments to be made. In short, he allowed amendments which amounted to re-labelling of claims already made and those which were closely related to existing complaints, but not others, including various harassment claims. As a consequence, the respondent produced an amended ET3.

4. The full merits hearing was listed by Employment Judge Tynan to be heard at Watford over five days commencing on 14 November 2022. The parties have worked towards that hearing date and are ready to proceed.

5. In December 2021 the claimant commenced her second claim. It is not disputed that it covers much of the territory covered by the first claim as particularised and many matters in it repeated allegations and claims the subject of the failed parts of the amendment application. Other matters were clearly ones which could and should have been included in the first claim or, at least, in the application to amend that claim.

6. Whilst not conceding that this meant that much of the second claim could not survive a strike out application Mr Wright made no submissions to the contrary. I have read the claims, the particulars and the responses in both claims and have had the benefit of a detailed skeleton argument from Mr Kennedy on behalf of the respondent.

7. I am satisfied that so far as all of the allegations in the second claim (as set out in a list of issues helpfully derived from that claim form) save for four issues, Mr Kennedy's submissions are correct. Those claims either duplicate matters in the first claim, or are matters which the claimant tried (but failed) to add to the first claim, or are matters that should have been dealt with in that first claim.

8. Applying the principles found the well known passage from Sir James Wigram VC in Henderson v Henderson [1943] 3 Hare 100, and the doctrine of res judicata, I am satisfied that those parts of the second claim must be struck out. As the Vice Chancellor said in Henderson:

> "Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

9. Further, it is trite (and uncontested) law that a party cannot generally seek to go behind a decision not to allow an amendment to add a cause of action by commencing a new claim which advances that same cause of action. The proper course, in those circumstances, is to appeal. There was no appeal against the order of Employment Judge Tynan. There are exceptional circumstances, but they do not apply in this case. For example, an application to amend part of a claim may fail because of a want of jurisdiction in the tribunal or court in question and the claim might properly then be brought in the appropriate court or tribunal. That is not the case here. The tribunal had the jurisdiction to consider the claims advanced by way of amendment.

10. Given Mr Wright's sensible approach to those matters I need say no more about the strike out application in respect of claim 2 save as regards the four issues already referred to. These can conveniently be looked at as being those found in paragraph 16 sub paragraphs (f) to (i) of the list of issues arising in the second claim. It is accepted that these four issues

were not dealt with either in the first claim or in the application to amend. However, it remains the respondent's case that they should be struck out given that either they could have been the subject of the first claim or should have been the subject of the application to amend that claim.

11. The claims in paragraph 16(f) and (g) arose prior to the commencement of the first claim in January 2021. Having considered the matter further, Mr Wright conceded that those were bound to be struck out in accordance with the principles set out in Henderson.

12. Therefore, at the end of the day, I was concerned only with the claims set out in paragraph 16(h) and (i).

13. Those claims relate to events said to have taken place in September 2021, that is after the first claim was presented, but some weeks before the application to amend the first claim was made and then heard in October 2021.

14. The second claim, which relies upon the same Acas early certification certificate as the first, was commenced in December 2021 and therefore within the three month primary limitation period measured from those two events said to have taken place in September.

15. I am satisfied that the principles underlying the decision in Henderson v Henderson apply to such an application to amend as was made here in respect of the first claim just as they do to the initial claim form. The claimant should have brought all related potential amendments at the same time in one application to amend, rather than bringing some of them later in a separate claim. To do otherwise risks a proliferation of litigation on related matters involving multiple hearings with the obvious waste of time and costs and the delays to other litigants and the risk of inconsistent findings. There is no dispute here that the claims in issue could have formed part of that amendment.

16. I am confirmed in that view of the law by an unreported decision of the Employment Appeal Tribunal located during the course of submissions in this case: London Borough of Haringey v O'Brien [2016] EAT 004/2016. There the Henderson v Henderson principles were said to apply even where there had been no application to amend, but where there could have been one to add the causes of action brought in the second claim.

17. The matters the subject of sub paragraphs (h) and (i) are clearly closely related to the claims already advance in the first claim form. That is clear from a reading of the lists of issues in the cases and the pleadings in both cases. That also follows from the use of the same early conciliation certificate as regards both claims. I note in passing that they also seem to me to be relatively minor allegations judged against the background of central allegations in this case. I doubt that they are fundamental to the claimant's overall case and the lack of evidence in respect of them or a conclusion in respect of them seems to me unlikely to be influential in the overall decision in the matters which are going forward to a hearing in November.

18. That the second claim form was presented in time as regards those causes of action seems to me to be irrelevant. It cannot be a limitation on the application of the principles in Henderson that the second claim was made within the primary limitation period (or a secondary one). That would severely limit the application of the principle and would not serve the interests of justice. This is a point which is starkly obvious where a six year limitation period is concerned, but in my view is equally applicable in the employment tribunal where limitation periods are much shorter.

19. Indeed, this case illustrates the risk of injustice which could result. I am told that if the second claim was to go ahead even on those two issues alone, the preparation required would mean that the November hearing would need to be adjourned. This is because the addition of these claims to the case would require further discovery, further witness evidence and a revised bundle. Any adjournment would lead to a delay of some six months to a year.

20. In my view these claims could and should have been part of the application to amend made in October 2021. No explanation has been provided as to why they were not. In any event, barring something exceptional, any explanation would be irrelevant as the Vice Chancellor made clear in Henderson. Doubtless that is why no explanation has been advanced in this case.

21. I am satisfied that here the interests of justice align precisely with the application of the principles set out in Henderson. This is a case ready to proceed to trial in November; these claims should not in my view be allowed to be added to it. They could and should have been the subject of the amendment application and since they were not, they cannot in effect be added now by the bringing of a second claim which would inevitably have to be consolidated with the first. They, like the remainder of the second claim which I have already dealt with, must be struck out.

22. I turn finally to the arrangements for the hearing which is to take place as scheduled in mid-November 2022. Having regard to what the claimant says concerning one of her alleged disabilities, I am satisfied that it would be sensible for the tribunal, by way of a reasonable adjustment, to provide her with a separate waiting room where she and those representing her can discuss matters without the risk that there will be devices using Wi-Fi in the immediate vicinity. Therefore, I direct that all appropriate efforts should be made to provide such a waiting and retiring room for her use for the duration of the case.

23. At the conclusion of this hearing I examined with the parties whether there was a need for any further orders (or the amendment of any existing orders) to ensure the matter was ready for hearing commencing on 14 November. The following matters were agreed:

    23.1 The claimant intended to make disclosure of some further documents in accordance with her continuing duty of disclosure. No further orders were needed.

    23.2 The respondent has, on several occasion, asked the tribunal for permission to amend its response so as to make clear its defence to

the s.15 claim (all relevant documents for which have been disclosed). The tribunal had failed to deal with that application. It was agreed that the respondent could have until **4pm, Monday 31 October** to amend its response in that limited respect.

23.3 The time for the exchange of witness statements was agreed between the parties to be no later than **4pm, 4 November 2022.**

23.4 Each party may (if so advised) provide to the tribunal on the morning of the first hearing day a short, concise skeleton opening indicating what are said to be the key issues (of law and fact) in the case and suggesting a few key documents which it would be helpful for the tribunal to have pre-read. The intention of the document is to provide the tribunal with a useful guide to show the likely progress of the case and the matters likely to be concentrated upon. In so far as either party intends to serve such a document on the tribunal, a copy must be served on the other side on or before **11 November 2022.**

23.5 The case management of the hearing will be a matter for the tribunal hearing the case. In the absence of the parties having agreed a timetable, that tribunal may impose one. After discussion it was provisionally agreed that the hearing of the first witness would be likely to commence at 12 noon after a period of reading in on the part of the tribunal.

23.6 The claimant is concerned to have no Wi-Fi active in the hearing room. Whilst she does not seek the turning off of any Wi-Fi within the building, she does ask that those attending the hearing should turn off the Wi-Fi on any relevant devices. I declined to make an order in that regard. I am conscious that the circumstances of particular participants may mean that they would equally wish to have their Wi-Fi turned on for good reason. I considered that this is a matter best dealt with by the tribunal hearing the case. Both parties are well aware of the claimant's position and I am satisfied they will do all that they can to accommodate her request and where they consider that the request cannot be fully accommodated will have addressed themselves to how best to deal with this and be ready to make appropriate submissions to the tribunal.

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Employment Judge Andrew Clarke KC

Date: 7 November 2022

Sent to the parties on: 8 November 2022

For the Tribunal Office