EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr A Kuznetsov	**AND**	1. Manulife Asset Management (US) LLC 2. Manulife Asset Management (Europe) Limited

JUDGMENT

The Claimant's claim is struck out under rule 27 ET Rules of Procedure 2013, because the Tribunal has no jurisdiction to consider it and it has no reasonable prospects of success.

REASONS

1. At a Preliminary hearing on 26 May 2021, I ordered that the Claimant had permission, by 10 June 2021, to serve and file any further written argument in relation to the issue of whether case number 2205144/2019 Mr A Kuznetsov v Manulife Asset Management (US) LLC & Manulife Asset Management (Europe) Limited should be permitted to proceed, or whether it should be struck out, under rule 27 ET Rules of Procedure 2013.

2. I ordered that the issue of whether case number 2205144/2019 Mr A Kuznetsov v Manulife Asset Management (US) LLC & Manulife Asset Management (Europe) Limited should be permitted to proceed, or whether it should be struck out, under rule 27 ET Rules of Procedure 2013, would then be determined, in writing, on the parties' written submissions, by me, after 10 June 2021.

3. I gave detailed reasons for that order at the time.

4. I noted that that the Claimant had already submitted very detailed written submissions on 30 September 2020 (at pp 1 – 63 of the bundle prepared for the 26 May 2021 hearing,) as well as a witness statement on 18 October 2020 (pp95 – 107). The witness statement had followed the Respondent's written submissions dated 13 October 2020 (pp 64 – 94). In permitting the Claimant to send any further written submissions to the Respondent and the Tribunal by 10 June 2021, I was confident that the Claimant would be able to comply within the time given. There had been no suggestion from any of the many recent medical reports which the Claimant had submitted that he was unable to engage in correspondence. Indeed, the extensive correspondence received from Valery

Kuznetsov, who was acting on the Claimants instructions, showed that the Claimant was able to engage with these proceedings.

5. Since then the Claimant has produced a medical report dated 8 June 2021, from a doctor based in Moscow. I have previously indicated that that doctor is not the Claimant's treating doctor. The medical report says that the Claimant is unable to prepare documents until 26 June 2021. I do not find that medical report of any assistance. I have grave doubts about its provenance and accuracy. The Claimant has a GP in London. The Claimant appears to be resident in London (he was due to attend a clinic at the Royal Free Hospital in May 2021). The Moscow doctor does not say that they have examined the Claimant. I do not accept that a doctor in Moscow, who has not examined the Claimant, is in any position to give a true account of the Claimant's symptoms or capabilities.

6. I decided that the Claimant had had a fair opportunity to address the issue of whether his claim should be struck out. I therefore determined the issue on the papers, taking into account the Claimant's submissions and witness statement and the Respondents' submissions.

Previous Claim – Claim One

7. By a claim form presented on 3 March 2017, the Claimant brought complaints of automatic unfair dismissal for making protected disclosures, protected disclosure detriment, and holiday pay, against Manulife Asset Management (Europe) Limited under case number 2200417/2017 ("Claim One").

8. By a decision promulgated on 2 March 2018, the Tribunal dismissed Claim One.

9. In its decision, the Tribunal decided that the principal reason for the Claimant's dismissal was misconduct, in the Claimant having sent an email on 15 June 2016, in which he had dishonestly misrepresented to the London Borough of Camden that he was acting on behalf of Manulife in expressing an interest to purchase residential real estate. It decided that the Claimant's dismissal and the alleged detriments in the claim had nothing to do him having raised protected disclosures, para [114] of its judgment.

10. The Tribunal made findings of fact which were relevant to its decision:

11. Para [101]: That the Claimant had doctored his signature block by removing the words "(Europe) Limited", in order for it to appear that he was acting for a US entity, the property portfolio of which he described in detail in the 15 June 2016 email. Manulife genuinely and reasonably considered that the email was deliberately misleading and that the Claimant was seeking to portray himself as acting on behalf of Manulife when he was not… "This was contrary to the Respondent's policies and was, as the Claimant conceded in his evidence, improper."

12. Para [104]: The Claimant was well aware that the 15 June 2016 email he had sent to LB Camden was deliberately designed to make it appear that he was acting on behalf of Manulife.

13. Para [114]: " The Respondent genuinely and reasonably believed that the Claimant was seeking to portray himself as acting on behalf of Manulife and deliberately sought to create the impression that Manulife might be interested in purchasing the Bacton estate [*the residential real estate in question*]. He doctored his email signature block to make it look as though he was acting for the US entity and that he was a statutory director. His misconduct fully justified the decision to dismiss him. The dismissal and alleged detriments had nothing whatsoever to do with any disclosures he made."

14. Para [115]: ".. disclosure 1 did not occur and … disclosures 2 to 7 were not protected. That is also fatal to the Claimant's claims."

15. Para [116] : The claim for holiday pay failed. The Claimant did not have a right to paid holiday to attend the public enquiry into the compulsory purchase of the Bacton Estate and Manulife had not failed to give back to the Claimant any days of holiday which he had booked but not in fact taken.

16. The Claimant appealed the ET liability decision. An EAT Rule 3(10) hearing took place on 9 January 2019 and the transcript of the proceedings was promulgated on 22 February 2019. In refusing permission to appeal the EAT (HHJ Richardson) held, amongst other things, that:
    16.1. The Tribunal had applied the law correctly and reached tenable conclusions on all points. It had not fallen into error in any of the respects alleged by the Claimant, para [31].
    16.2. The Tribunal's criticisms of the Claimant's conduct in sending the 15 June 2016 email, which constituted the principal reason for his dismissal, were well-founded, para [42].

17. The Claimant appealed to the Court of Appeal. That application was dismissed by order of Underhill LJ promulgated on 12 November 2019, who observed that:

    17.1. The reasons in the ET Liability Decision were "full and clear" para [4].
    17.2. The question as to whether the dismissal and the detriments were because of the disclosures was a pure question of fact "and not, on the evidence, a difficult one. It was patently reasonable of the Respondent to regard the sending of the email of 15 June 2016 as a serious act of misconduct." That being so, it was the obvious explanation for the Claimant's dismissal: there was no reason to suppose that the disclosures made by him, which were about matters of no great significance, played any part in the Respondent's thinking. Likewise the various detriments all had obvious explanations, mostly concerned with the investigation of the email or the other conduct referred to above. The ET was entitled to make such a finding. Para [5].
    17.3. Whether the alleged disclosures were "protected" disclosures were "equally issues of fact on which the ET reached legitimate, and in my view also obviously correct, findings". Para [6]

17.4. In his grounds of appeal to the EAT and CA, the Claimant had "contrived to complicate this comparatively straightforward analysis in an unhelpful manner. His written materials are both unnecessarily long and opaquely structured, with a mass of repetition and irrelevant detail. Although they purport to raise points of law, with abundant reference to the statutory provisions and the case law, those points often bear little relation to the actual reasoning of the ET on the dispositive issues". Para [7].

17.5. The ET's decision that neither the dismissal nor the detriments had anything to do with the disclosures made by the Claimant was "unimpeachable in law" para [21].

18. By an order promulgated on 22 January 2020, the Court of Appeal also refused the Claimant's later application for permission to appeal HHJ Richardson's refusal to review his r.3(10) decision. On this occasion, Underhill LJ observed that:

18.1. HHJ Richardson had been "unarguably right to hold that the proposed appeal was hopeless" para [1].

18.2. But for the fact that the Claimant's application had pre-dated the Court of Appeal's order of 12 November 2019 by a few days, Underhill LJ would have been minded to have certified the Claimant's application as being totally without merit and to have made a civil restraint order against the Claimant, para [8].

19. In a Costs Judgment promulgated on 24 January 2019, the Tribunal held that the Claimant's claims in Claim One had had no reasonable prospect of success. It exercised its discretion to make a costs order against the Claimant in the sum of £20,000.

This Claim – Claim Two

20. On 18 November 2019 the Claimant presented the current claim, ("Claim Two"), against the Respondents.

21. The Second Respondent is the same entity, under a new name, which was the respondent to Claim One.

22. At box 8.1 of his ET1 in Claim Two, the Claimant ticked exactly the same boxes as he had ticked in the ET1 in Claim One, specifying that his claim was for unfair dismissal and that he was claiming a redundancy payment, notice pay, holiday pay, arrears of pay and other payments.

23. Also as he done had in Claim One, the Claimant stated that he was making "another type of claim which the Tribunal can deal with", and he copied, word for word, into the ET1 of Claim Two, the same narrative as he had included in the equivalent box in Claim One. This alleged, amongst other things, that he was dismissed because he had made protected disclosures.

24. In his Claim Two particulars of claim, he advanced the same allegations on which he relied in Claim One:

24.1. First Protected Disclosure: Allegation of the Respondent's failure to register the Claimant with the FCA – Grounds of Claim, paras 47-51. This allegation formed the subject of an application to amend Claim One on the second day of the final hearing, which the Tribunal refused as set out in its Liability Judgment at , paras 6-8.

24.2. Second Protected Disclosure: Allegation of lack of insurance certificates – Grounds of Claim, para 52-62. This same allegation formed part of Claim One (Claim One Grounds of Claim , paras 6-8) and was rejected in the ET Liability Judgment at paras 65 and 115.

24.3. Third Protected Disclosure: Allegation of a failure to provide the Claimant with the Compliance Manual – Grounds of Claim, paras 84-90. This same allegation appeared in Claim One (Claim One Grounds of Claim paras 18-20) and was rejected by the Tribunal in its Liability Judgment at paras 48 & 76-79; 115.

24.4. Fourth Protected Disclosure: Allegation that EU Compliance Team was unfamiliar with the Compliance Manual or unable to interpret it – Grounds of Claim, paras 91-98. This allegation formed part of Claim One (Claim One Grounds of Claim, paras 22-25) and was rejected by the Tribunal in its Judgment at paras 80-81; 115.

24.5. Fifth Protected Disclosure: Allegation of reporting that the Personal Interest Reporting System was inadequate – Grounds of Claim, paras 99-105. This identical allegation formed part of Claim One (Claim One Grounds of Claim, paras 26-29) and was rejected by the Tribunal in its Liability Judgment at paras 82-3; 115.

24.6. Sixth Protected Disclosure: Allegation of disclosure to William Corson and senior members of the EU compliance team that the Claimant was not informed about the existence of the PTCC system upon joining the firm nor at any other point until August 2016 – Grounds of Claim, paras 106-110. This allegation formed part of Claim One (Claim One Grounds of Claim, paras 30-32) and was rejected by the Tribunal (ET Liability Judgment, paras 84-5; 115).

24.7. Seventh Protected Disclosure: Allegation of disclosure of information to Camden Council (Grounds of Claim, paras 111-2); the Planning Inspectorate (Grounds of Claim, para 112); the Secretary of State for Communities and Local Government (Grounds of Claim, para 112); the Rolton Group (Grounds of Claim, paras 122-5); Manulife (paras 180-182) and/or other third parties regarding alleged malpractice, wrongdoing and failure to comply with legal obligations relating to the proposed redevelopment of the Bacton Estate. This identical allegation formed part of Claim One (Claim One Grounds of Claim, paras 33, 41, 73-5) and was rejected by the Tribunal in its Liability Decision, para 70; 115.

24.8. Eighth Protected Disclosure: Allegation of unfair treatment and prejudice to employees by Manulife's management team in London (Grounds of Claim, paras 180; 183). This identical allegation formed part of Claim One (Claim One Grounds of Claim, para 73; 76) and was rejected by the Tribunal in its Liability Decision, paras 104; 115.

25. The Respondents produced an analysis of the Second Claim Grounds of Claim, showing that the Claimant's lengthy narrative grounds of complaint in Claim Two

are a word-for-word "cut and paste" amalgamation of his particulars of claim and his witness statement in Claim One.

26. I noted that the basis upon which the Claimant contends that Claim Two should be permitted to proceed is, in summary:
    26.1. That on 18 January 2019 the Claimant came into possession of "new evidence" which the Respondent had "fraudulently" "suppressed" and which was "crucial for the fair determination of the claim" (Claim Two Grounds of Claim, para 1-8).
    26.2. That Manulife has, since the determination of Claim One, changed its name without reporting an "impairment charge" which "eliminates the very basis for the Respondent's dismissal decision" (Claim Two Grounds of Claim, para 9).
    26.3. That, since the ET Liability Decision was promulgated, there has been a material change in the relevant law following the Supreme Court's decisions in *Takhar*, *Gilham*, and *Jhuti* (Claim Two Grounds of Claim, para 11).
    26.4. That the Claimant was in fact "for all practical purposes" employed by the First Respondent and not Manulife Asset Management (Europe) Ltd (the former name of the Second Respondent) (Grounds of Claim, para 32).

Relevant Law

Res Judicata and Abuse of Process

27. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] 4 All ER 715, the Supreme Court summarised the law relating to res judicata and abuse of process at paragraphs [17]-[19].

28. At [17] Lord Sumption, giving the judgment of the Court, said,

"Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins.…

The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336, [1928] All ER Rep 120. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment.…….Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355, [1775–1802] All

ER Rep 623. 'Issue estoppel' was the expression devised to describe this principle by Higgins J in Hoystead v Taxation Comr (1921) 29 CLR 537 at 561 and adopted by Diplock LJ in Thoday v Thoday [1964] 1 All ER 341 at 352, [1964] P 181 at 197–198. Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100 at 115, [1843–60] All ER Rep 378 at 381–382, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

29. In *Mulkerrins v Pricewaterhouse Coopers (a firm)* [2003] 1 WLR 1937 Lord Millett said at para 10: "res judicata…is a form of estoppel which gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to re-litigate the same question, even though the decision may be wrong. If it is wrong, it must be challenged by appeal or not at all. As between themselves, the parties are bound by the decision, and may neither re-litigate the same cause of action nor reopen any issue which was an essential part of the decision. The doctrine comes into its own only when the decision is wrong; if it is right it merely serves to save time and costs."

30. Lord Bingham observed in *HM Attorney-General v Barker* [2000] 1 FLR 759, "… the court has become familiar with the hallmark of persistent and habitual litigious activity. The hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of resisting claim after claim; that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who if they were to be sued at all should have been joined in the same action; that the claimant automatically challenges every adverse decision on appeal; and that the claimant refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop."

Discussion and Decision

31. I decided that Claim Two is estopped by res judicata – specifically, cause of action estoppel - so that the Tribunal has no jurisdiction to hear it.

32. I accept the Respondents' submission that Claim Two is a materially identical duplication of Claim One, which has already been heard and dismissed by the Tribunal. The allegations advanced are identical. The narrative particulars of claim are materially the same, consisting of a "cut and paste" amalgamation of the particulars of claim and the Claimant's witness statement in Claim One. The Respondents have performed a paragraph by paragraph analysis which shows this.

33. I agree with the Respondents that the four grounds upon which the Claimant contends that the doctrine of res judicata does not apply are misconceived.

New evidence

34. The “new evidence” on which the Claimant relies consists of two email chains which were disclosed to him on 18 January 2019 in response to a data subject access request.

First Email:
From: John Addeo
To: Peter Warnes
Subject: RE: Lunch.
Date: Wednesday, June 15, 2016 9:04:18 PM

Alex Kuznetsov.

-----Original Message-----
From: Peter Warnes
Sent: Wednesday, June 15, 2016 3:41 PM
To: John Addeo <JAddeo@manulifeam.com>
Subject: Re: Lunch.

John

Thanks again for lunch. Please can you let me know the name of the guy you mentioned re the London property issue?

Thanks
Peter

Second Email:

From: Frank Saeli
To: Wilson Berglund
CC: Jeffrey R Santerre
Subject: RE: CONFIDENTIAL: Departure of Alex Kuznetsov
Date: Tuesday, November 15, 2016 10:38:04 PM

Ouch!

On Nov 15, 2016, at 5:25 PM, Wilson Berglund <WBerglund@manulifeam.com> wrote:

I'm with Roberto at Logan for 6:15 flight to MSP. Short answer is compliance violations, personal trading disclosure. Not a single incident and he didn't help himself in dealing with initial compliance inquiry.
This decision was made today, I just learned of situation on drive to airport.

Sent from my iPhone

Wilson S. Berglund, CFA I Managing Director, Fixed Income Portfolio Specialist I Manulife Asset Management

On Nov 15, 2016, at 3:50 PM, Frank Saeli <FSaeli@manulifeam.com> wrote:

Hello Will- what is the deal on this?

Frank Saeli I Head of Distribution, U.S. & Latin America I Manulife Asset Management
197 Clarendon Street I Boston, MA 02116 I Bus: +1 617 375-1616 I

From: Debbie Gonsalves
Sent: Tuesday, November 15, 2016 3:34 PM
To: [various recipients]
Subject: RE: CONFIDENTIAL: Departure of Alex Kuznetsov

Hello, This is to let you know that Alex Kuznetsov, Senior Investment Analyst will be leaving the Emerging Market Debt team and tomorrow (Tuesday) is currently projected to be his last day.

I will be calling a meeting to discuss the communications approach for tomorrow. I would appreciate it if you could try to accommodate it in your schedule.

Please keep this confidential. Thank you.

Debbie

Debbie Gonsalves | Director, Communications, Manulife Asset Management
200 Bloor Street East | Toronto, Ontario | NT5 C10 | T. 416 852-9161

35. The Claimant alleges that the First Email "confirms that the Respondent's management was not only aware of but also interested in exploring the property investment opportunity" (Grounds of Claim, para13).

36. I agree with the Respondents' submission that the email palpably does not show this.

37. The ET Liability Decision in the First Claim at para 91 recorded that the Second Respondent was aware that the Claimant was in dispute with Camden Council about the compulsory purchase of his property and was supportive of his plight. This email does not alter the facts known to the Tribunal hearing the First Claim.

38. At the time when Peter Warnes sent the First Email, on 15 June 2016, the same day as the Claimant's 15 June email 2016 to LB Camden, the Respondents were unaware of the Claimant's representations to LB Camden. His 15 June email to Camden was not discovered until 10 November 2016, during an investigative search of the Claimant's Manulife email account (ET Liability Judgment, para 90).

39. In any event, it appears that the First Email formed part of the Claimant's application for permission to appeal the ET Liability Judgment, which was refused by both the Employment Appeal Tribunal and the Court of Appeal.

40. HHJ Richardson in the EAT observed that the Claimant's application to adduce fresh evidence was "without merit". He said that the First Email "does not suggest that he had any authority to behave in this way, nor does it suggest that the Respondent knew of his email to Camden Council". HHJ Richardson decided that the email provided "no basis for an application for review" (EAT Order dated 16 October 2019 at paras 18-19).

41. Moreover, in the Court of Appeal, Underhill LJ observed: "I agree with Judge Richardson that an application to rely on those documents ought to have been made on an application to the ET for a reconsideration (see para. 17 of his decision). But I also agree, for the reasons that he gives (see para. 18), that any such applications would be hopeless because the documents could have no material bearing on the ET's decision". Court of Appeal Order dated 12 November 2019 at para 12.

42. Regarding the Second Email, the Claimant does not rely on it in either his Claim Two Grounds of Complaint or in his written submissions in the current application. Part of the Second Email chain (the Debbie Gonsalves email of 15 November 2016 at 15:34) appeared in the hearing bundle in Claim One. It is not at all clear how the email chain is relevant to the allegations upon which the Claimant relied in Claim One, and repeats in Claim Two.

43. This new evidence is therefore not "new".

44. An application to adduce the First Email as fresh evidence has already been refused by the EAT, which refusal was upheld by the CA. The proper course was for the Claimant to appeal on the basis of new evidence - which he did. The appeal was rejected. This Tribunal cannot overturn those appeal decisions by itself allowing the same claim to be relitigated on the basis of this "new" evidence.

45. I agree with the Respondents that the First Email is, in any event, irrelevant. So too is the Second Email. Neither displace the doctrine of res judicata.

Second Respondent Change of Name and Failure to Report "impairment charge"

46. The Claimant says that the Second Respondent has changed its name and that no "impairment charge" was reported from the name change (Claim Two, Grounds of Complaint, para 9).

47. It seems that the Claimant contends that, because the Second Respondent changed its name and did not write down the value of its name on its accounts, the reason for dismissal, which was based on the alleged misuse of the Second Respondent's name to further the Claimant's own personal interest, is not sustainable.

48. The Respondents told me that the Claimant sought to raise a similar argument in his internal appeal against dismissal, in which he contended that there could not have been any misuse of Manulife's name because it did not appear that its reputation was damaged or that it had suffered any direct financial loss by his conduct. The appeal chair, Mr Conkey, found this to show a disregard for the risk to which the Claimant's behaviour had exposed the Second Respondent. In the appeal decision letter dated 4 January 2017, Mr Conkey concluded that the 15 June Email and the Claimant's "subsequent disregard for the risks it presented in both disciplinary meetings constitute a failure to uphold, recognise and understand Manulife's expected standards of propriety, honesty and integrity", irrespective of any actual reputational or financial loss that was, or could have been, caused.

49. The same argument – that the Claimant's conduct was not capable of causing (and/or did not cause) damage to Manulife's reputation and was therefore insufficiently serious to warrant dismissal – was advanced in Claim One (Claim One, Grounds of Claim para 104; and the Claimant's witness statement, paras176-8; 256) and was not upheld.

50. I agreed with the Respondent that this argument is hopeless and irrelevant. Alternatively, it was and/or could have been advanced in the First Claim. It is therefore subject to a number of the res judicata principles.

Material change in Relevant Law

51. The Claimant contends that there has been a material change in the relevant law following the Supreme Court's decisions in *Takhar v Gracefield Developments Ltd & Ors* [2019] UKSC 13; *Gilham v Ministry of Justice* [2019] UKSC 44; and *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55 (Grounds of Claim, para 10-11).

52. I agree with the Respondents' contention, however, that *Takhar* is a case about fraud. The Supreme Court held that, where it can be shown that a judgment has been obtained by fraud, and where no allegation of fraud was raised at the original trial, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment on the basis that it was fraudulently procured.

53. I cannot see that *Takhar* has any bearing on, or relevance to, Claim Two.

54. I also agree with the Respondents that *Gilham* is a case about the employment status of judicial office holders. No issue of employment status arose in Claim One, nor does it arise in Claim Two. It is irrelevant to these proceedings.

55. Furthermore, I agree with the Respondents' contention that *Jhuti* reaffirms that the task of the court in a claim for protected disclosure dismissal, mandated by *s.103A ERA*, is properly to identify and determine the reason for an employee's dismissal, such that on the particular ("exceptional") facts of that case, the court was entitled to penetrate through an invented reason for dismissal which had misled the (innocent) decision maker, rather than to allow it also to infect the court's own determination.

56. The essence of the Claimant's case in Claim One was that Ms Alexandra Cornforth was the "brains" behind his dismissal (Claimant's witness statement paras 76-78; 94; 100-1; 118; 124-6; 151; 158-62; 235-9; 276).

57. On the facts, the Tribunal rejected this contention, holding that it was Mr Mennie who had made the decision to dismiss, that he himself had formed a genuine and reasonable belief in the Claimant's misconduct in sending the 15 June email, that he had good grounds for that belief, and that this was the principal reason for the Claimant's fair dismissal; ET Liability Judgment, para 101 and 114.

58. In dismissing the Claimant's application for permission to appeal, both HHJ Richardson in the EAT (EAT Order of 22 February 2019 at para 31) and Underhill LJ in the CA (CA Order of 12 November 2019 at para 21) confirmed that the ET had applied the law correctly to the facts in this case.

59. Underhill LJ specifically addressed the relevance of *Jhuti* , observing that it was "irrelevant to the ET's reasoning on the causation point because its finding that there was no connection between the disclosures and the dismissal/detriments plainly applies equally whichever individual's motivation is in play", CA Order of 12 November 2019 at 2017).

60. In conclusion, *Takhar v Gracefield Developments Ltd & Ors* [2019] UKSC 13; *Gilham v Ministry of Justice* [2019] UKSC 44 do not represent material changes in the relevant law. The Court of Appeal in Claim One has already decided that *Jhuti* is irrelevant to the ET liability decision. None of these cases can therefore be used to reopen claims that have already been dismissed in Claim One.

Claim that the Claimant was employed by R1

61. The Claimant contends that he was "for all practical purposes" employed by the First Respondent, and not Manulife Asset Management (Europe) Ltd (the former name of the Second Respondent), Grounds of Compliant, para 32.

62. The Respondents say that this is wrong in both fact and law.

63. They say that the basis upon which the Claimant now asserts that the First Respondent was his actual employer is exactly the same as that on which he relied in an attempt to join a different US-based respondent (Manulife Financial Corporation) to Claim One. In fact, paras 33-40 of the Grounds of Claim in Claim Two are a word-for-word reproduction of paras 1-6 and 9-10 of the joinder application he made before EJ Lewzey in Claim One, dated on 25 May 2017.

64. In refusing that application at a Preliminary Hearing on 15 June 2017, with reasons promulgated on 22 June 2017, EJ Lewzey observed that "[Manulife Asset Management (Europe) Limited] is the employer, on the evidence I have. The contract of employment names [Manulife Asset Management (Europe) Limited] and [Manulife Asset Management (Europe) Limited] accepts that they are the correct Respondent" (at para 11).

65. The Claimant unsuccessfully attempted to appeal EJ Lewzey's refusal to join Manulife Financial Corporation to Claim One. That application was refused on the r.3(7) sift (on 22 August 2017) at a r.3(10) hearing (judgment promulgated on 29/03/18), upon reconsideration by the EAT on 15 February 2018; and by the Court of Appeal on 17 July 2018).

66. Claim One therefore proceeded on the basis that the Claimant was employed by Manulife Asset Management (Europe) Ltd (ET Liability Judgment, para 41), which is the previous corporate name of the Second Respondent to Claim Two.

67. I decided that an appeal regarding the proper Respondent to the Claim One has already been rejected. The Claimant's claims, relying on identical facts, have already been rejected against a Respondent. They are therefore subject to issue estoppel. The Claimant's attempt to reopen the identity of the Respondent in Claim Two offends a number of the res judicata principles.

Abuse of Process

68. I agree with the Respondents that Claim Two is also an abuse of process, as it simply duplicates Claim One.

69. The matters complained of in Claim Two are therefore res judicata, so the claim is estopped from proceeding as a matter of jurisdiction. The claim is also, separately, an abuse of process, which cannot be permitted to proceed. Claim Two must therefore be dismissed under *r.27 ET Rules of Procedure 2013.*

70. I agree with the Respondents that, in all the circumstances, including the Claimant's attempts to relitigate matters already rejected on appeal, and Claim Two being res judicata as a matter of jurisdiction, and an abuse of process, Claim Two had no reasonable prospects of success. It is correct to say that it is "totally without merit".

Employment Judge Brown
23 July 2021

Judgment sent to the parties on:

23/07/2021

For the Tribunal Office: