EMPLOYMENT TRIBUNALS

Claimant: Mr K Khan

Respondent: The Cabinet Office

Heard at: London Central Employment Tribunal (in person)

On: 14 April 2022

Before: Employment Judge E Burns (sitting alone)

Representation

Claimant: In person
Respondent: Mr T Kirk, counsel

RESERVED JUDGMENT

All of the claimant's claims are struck out.

REASONS

THIS PRELIMINARY HEARING

1. The preliminary hearing was ordered by Employment Judge Davidson following the remote case management hearing on 28 February 2022.

2. There was considerable confusion at the start and subsequently during the course of the hearing as to the papers that should have been before me which took a significant time to resolve. It was not helped by the fact that both parties had produced their own bundles, which contained duplicate material. I am satisfied that I did receive all the relevant bundles and schedules that the parties intended me to receive.

3. I apologise to the parties for the length of time it has taken to issue this reserved judgment.

4. The purpose of the hearing was to:

3.1 determine the respondent's application for a strike out/deposit order contained in its Grounds of Resistance – which was largely based on the fact that the claimant had brought an earlier tribunal claim (2201183/2020)

3.2 determine the claimant's applications for amendment contained in two emails dated 10 August 2021 (133R) and 25 October 2022 (218C); and

3.3 make case management orders as appropriate.

5. Following the hearing being listed, the Claimant had sent in an application to have the Response struck out. I said at the start of the hearing that I would consider it if there was time. That proved not to be the case.

6. In relation to the claimant's amendment application, I note that one amendment sought was to pursue a claim under section 14 of the Equality Act 2010. When I explained to the claimant that this section as not in force, he withdrew the application. He also withdrew the application to add the email he sent to John Connolly on 25 September 2019 as a protected act. This was because the tribunal had decided that the particular email was not a protected act when determining the earlier claim (2201183/2020). This left just one remaining amendment, which was to add as a protected act the sending of a letter to the respondent's public correspondence team in March 2021, which the respondent was opposing.

LIST OF ISSUES

7. Prior to hearing an application for a strike out / deposit order, it is essential to have correctly identified the issues in the case. I began the hearing by doing this. Following discussion and clarification with the parties, we agreed that the list of issues so far as liability was concerned and subject to the amendment application being heard as set out below, was as follows:

Equality Act 2010, section 13, section 39: direct discrimination because of race

7.1 The claimant defines his race as Asian/Bangladeshi.

7.2 Has the respondent subjected the claimant to the following treatment:

(a) On 27.09.2019, Lyn McDonald misled James Waller into filing a false police report about the claimant

(b) On 27.09.2019, James Waller filed a false report against the claimant to the Police.

(c) On 13.11.2019 Lyn McDonald and David Whitehouse-Hayes misled James Waller into filing a false report to SO15 or Counter Terrorism Police. (This is according to Mr Waller)

(d) On 14.11.2019 - the respondent filed a further false report against the claimant to S015.

(e) On or around 21 November 2019, The Respondent's security team filed or was misled into filing false reports against the claimant on an internal report (GSCO Briefing Note – Insider Threat)

7.3 Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

7.4 If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

Equality Act, section 27: victimisation

7.5 Did the claimant do a protected act? The claimant relies upon the following:

(a) Letter sent to the Respondent's Public Correspondence Team on or around 6 March 2021 in which he informed them that he intended to file a police report for the false reports filed to the Counter Terrorism Police - inclusion of this relied on a successful amendment application

(b) The complaint dated 26 November 2019 - admitted

(c) His tribunal claim filed with the ET on 20 February 2021 - admitted

(d) His communications with ACAS dated 14 February 2020 and 24 April 2021 – not admitted, because they were said by the respondent to be without prejudice

7.6 Did the respondent subject the claimant to any detriments as follows:

(a) On 25.03.21, the Respondent failed to investigate why Mr Waller filed the false report and the real cause of the false report

(b) On 25.03.21, the Respondents failed to provide a letter of apology for the false report filed

(c) On 25.03.21, the Respondents failed to send a letter to S015 notifying a false report was filed.

(d) On 25.03.21, the Respondent refused to specify the exact parts of the reports that were false

(e) On 25.03.21, the Respondent failed to share the policies in reference to which my USB is/was being handled.

(f) On 25.03.21 the Respondent failed to identify the steps the Cabinet Office intended to take to hold Mr Waller and possibly others accountable and the steps the Cabinet Office would take to prevent a recurrence of such an act.

(g) On 12.05.21, the Respondent did not return the Claimant's USB.

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

Jurisdiction issues

7.7 Were all of the claimant's complaints of discrimination and victimisation presented within the normal 3 month time limit in section 123(1)(a) of the Equality Act 2010 ("EQA"), as adjusted for the early conciliation process?

7.8 If no, does section 123(3)(a) which says that conduct extending over a period is to be treated as done at the end of the period apply?

7.9 If not, were the complaints presented within such other period as the tribunal thinks just and equitable pursuant to section 123(1) (b) of the Equality Act 2020?

7.10 To the extent that any of the allegations relied on by the Claimant post-date the Claimant's relationship with the Respondent (which ended on 12 November 2019), does the claim fall within section 108 Equality Act?

7.11 If not, does the Tribunal have jurisdiction to hear the claim in respect of that allegation(s), and if so on what basis?

RESPONDENT'S STRIKE OUT APPLICATION

8. The Respondent's application was put as follows:

8.1 The Claimant's claim is vexatious and an abuse of process. The Respondent will aver that the claim amounts to a near wholesale repetition of a previous claim for direct race discrimination and victimisation brought under case no. 2201183/2020, a claim which was dismissed in its entirety following a Full Merits Hearing before Employment Judge Stout and members and by a Judgment with Reasons dated 25 November 2020. As such, the Claimant should be debarred from re-litigating matters which were raised that claim and adjudicated upon in those previous proceedings in accordance with the doctrine of res judicata.

8.2 Insofar as the Claimant can be said to complain of new matters which were not raised previously, these matters could and should have been raised as part of case no 2201183/2020. In accordance with the rule in Henderson v

Henderson, it is vexatious and an abuse of process for the Claimant to raise those matters now.

8.3 The Claimant's victimisation claim is misconceived as a matter of law because it complains of matters which simply cannot amount to detriments within the meaning of s. 27 EA 2010. As such, the claim has no reasonable prospects of success.

8.4 The Claimant's claim, or parts of it, has been presented outside the 3 month time limit under s.123 EA 2010 and it is not just and equitable to extend time to hear the same. The Tribunal should therefore either strike the claim out because it has no reasonable prospects of success or decline jurisdiction to hear the same.

8.5 Alternatively, for the same reasons set out above, the Claimant's claims should be made the subject of a Deposit Order pursuant to rule 39 on the basis that they have little reasonable prospects of success.

RELEVANT LAW

Res Judicata and Abuse of Process

9. Where a cause of action or issue has already come before a court or tribunal and has been decided, a party who seeks to reopen or raise the same issue in subsequent proceedings before a different court or tribunal is barred from doing so because of the '*res judicata'* doctrine. The underlying reason for this is to ensure finality in litigation and prevent abusive and duplicative litigation.

10. The leading case summarising the relevant legal principles is *Virgin Atlantic Airways Ltd v Zodia Seats UK Ltd (formerly known as Contour Aerospace Ltd*) [2014] AC 160, SC. In his judgment, Lord Sumption JSC explained that the term *res judicata* is an umbrella term capturing a number of different legal principles. It encompasses the following:

- cause of action estoppel, which is a rule which precludes a party from challenging the same cause of action in subsequent proceedings;

- issue estoppel which arises where the cause of action is not the same in the later action as it was in the earlier one, but where there is an issue common to both which was decided on the earlier occasion and is binding on the parties. This could be a decision in relation to a particular allegation, but might also arise in relation to findings of disputed fact; and

- the rule from *Henderson v Henderson* 1843 3 Hare 100, ChD which prevents a party from raising a cause of action or issue that could and should have been dealt with in earlier proceedings to which they were also a party.

11. Where cause of action or issue estopple arise, there is an absolute bar on proceedings. The relevant circumstances, however, must be sufficiently

similar for it to apply. In contrast, when applying the rule of *Henderson v Henderson*, the tribunal is engaged in exercising its discretion. It is required to strike a balance between a claimant's right to bring genuine and legitimate claims before a tribunal and a respondent's right to be protected against multiple proceedings that should have been brought as a single case.

Strike Out under Rule 37

12. The tribunal's power to strike out claims and responses is found in Rule 37(1) of the Tribunal Rules. The relevant parts of Rule 37(1) for the purpose of this hearing say the following:

"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;

13. The overriding objective in Rule 2 of the Tribunal Rules is also relevant at all times when considering applications of this nature. It says:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
(c) avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) avoiding delay, so far as compatible with proper consideration of the issues; and
(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

14. A 'scandalous' or 'vexatious' claim or defence has been described as one that is not pursued with the expectation of success, but to harass the other side or out of some improper motive (*ET Marler Ltd v Robertson* [1974] ICR 72).

15. In *Attorney General v Barker* [2000] 1 FLR 759, QBD (DivCt), it was said that the hallmark of a vexatious claim is that it has '*little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to*

the claimant; and that it involves an abuse of the process of the court, meaning by that 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'.

16. In *Ashmore v British Coal Corporation* [1990] ICR 485, CA, the Court of Appeal approved the striking out of a claim on the ground that it was 'vexatious' as it was bound to fail in the light of an earlier decision against the same employer. The Court of Appeal said that the categories of conduct rendering a claim vexatious or an abuse of process were not closed, but depended on all the relevant circumstances of the particular case with public policy and the interests of justice being very material considerations.

17. The courts have repeatedly warned of the dangers of striking out discrimination claims on the grounds that they lack prospects of success, where the central facts are in dispute. e.g. in *Anyanwu v. South Bank Student Union* [2001] ICR 391 at [24] and [37] and *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126 at [29].

18. However, while exercise of the power to strike out should be sparing and cautious in discrimination claims, there is no blanket ban on such practice.

19. The question of striking out discrimination claims was considered by the Court of Appeal in *Ahir v. British Airways Plc [2017] EWCA Civ 1392*, where Underhill LJ stated at [16]: "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment."

20. In cases such as this it is helpful to consider the Claimant's case at its highest. This means examining the pleaded facts and for the purposes of the strike-out consideration assuming (unless there is a compelling reason not to) that the Claimant's version of any key disputed facts is correct.

Deposit Orders under Rule 39

21. Rule 39 of the Tribunal Rules says:

> *"(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."*

22. There is no specific notice requirement for an application for a deposit order contained in the rules.

23. The purpose of a deposit order is to identify at an early stage claims with little prospect of success so as to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claim failed. The purpose is not to make it difficult to access justice or to effect a strike-out by another route (*Hemdan v Ishmail and anor* 2017 ICR 486, EAT).

24. When considering a deposit order in a discrimination claim, caution should always be exercised by an employment judge. Such cases are often fact-sensitive and require a full examination of the evidence to reach a proper determination (Sharma v New College Nottingham EAT 0287/11 applying *Anyanwu and anor v South Bank Student Union and anor* 2001 ICR 391, HL). Discrimination is rarely overt or admitted and so tribunals need to be mindful that it might have taken place unconsciously or that the guilty party might be covering it up.

25. The test of 'little reasonable prospect of success' under rule 39 is not as rigorous as the test of 'no reasonable prospect of success' under rule 37, and the consequences of a deposit order are not as severe as a strike out order. It therefore follows that a tribunal has greater leeway when considering whether to order a deposit.

26. In particular, although not entitled to make findings of fact, tribunals are entitled to have regard to the likelihood of a party being able to establish the facts essential to his or her case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward (*Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07; *Wright v Nipponka Insurance (Europe) Limited* UKEAT/0113/14/14; *Spring v First Capital East Limited* UKEAT/0567/11). There will also often be undisputed facts that can be taken into account.

27. In a discrimination case, the tribunal needs to be satisfied that there be some evidential basis on which we can infer that the Claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

28. Section 136 of the Equality Act 2010 sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.

29. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the Claimant's race. The respondent does not have to show that its conduct was reasonable or sensible for this

purpose, merely that its explanation for acting the way that it did was non-discriminatory.

30. An order should be for payment of an amount that the paying party is capable of paying within the period set (*Hemdan v Ishmail* [2017] IRLR 228, EAT) taking into account his or her net income and any savings. The employment tribunal must give its reasons for setting the deposit at a particular amount (*Adams v Kingdom Services Group Ltd* UKEAT/0235/18).

31. When considering whether or not to make a deposit order, regard should be given to the overriding objective in rule 2 of the Rules.

ANALYSIS AND CONCLUSION

Introduction

32. The claimant commenced employment with the respondent on 23 September 2019. He was suspended on 26 September 2019 and summarily dismissed on 12 November 2019. He appealed that decision and his appeal was dismissed on 30 March 2020.

33. The claimant's first claim (case no. 2201183/2020) was issued on 20 March 2020. All of the claims brought were dismissed following a Final Hearing that took place between 16 and 20 November 2020. The reserved judgment (the "Judgment) was issued on 27 November 2020.

34. As is common in employment tribunal proceedings, the claimant's claims evolved during the course of the litigation. Despite being a litigant in person, the claimant was aware that he had a right to amend his claim and the Judgment records that he made an amendment application at the hearing (paragraphs 7- 9).

35. The Judgment contains a list of issues showing all the claims that the tribunal considered and decided (paragraph 5).

36. The claimant's second claim was issued on 24 May 2021, following a period of early conciliation between 24 April and 18 May 2021.

37. The claimant admits that there is an overlap between the claims.

38. In essence the subject matter of the second claim concerns three matters:

    35.1 Two reports that were written about the Claimant during his employment by James Waller, the Respondent's Head of Security and an internal security briefing note written by Timothy Rogers and how they came to be written (the detriments listed at paragraph 7.2 of the list of issues above); and

    35.2 A subsequent complaint the Claimant made to the Respondent's Public Correspondence Team on or around 6 March 2021 about the reports and the USB stick which he says was not properly considered

(the detriments listed at paragraphs 7.6 (a), (b), (c), (d), (e) and (f) above); and

35.3 The Respondent's failure to return a USB stick to him (the detriments listed at paragraphs 7.6 (g) above).

Reports

39. I deal first with the reports and briefing note.

40. The two reports were made by the Respondent about the Claimant to the counter terrorism unit of the Metropolitan Police (SO15). These were:

(a) an initial report in the form of an email dated 27 September 2019 written by James Waller, the Respondent's Head of Security. This is the report referred to in paragraph 7.2 (b) of the list of issues above; and

(b) an updated report in the form of an email dated 14 November 2019. This was again authored by James Waller and is the report referred to in paragraph 7.2(d) of the list of issues above.

41. In addition, details about the claimant's case were included in an internal briefing note. The person responsible for preparing this was called Timothy Rogers. It was created on or around 21 November 2021. Although strictly speaking not a report as such, I refer to it as a report in this judgment for the sake of simplicity.

42. The claimant became aware of the existence of the reports and the briefing note as a result of his first employment tribunal claim. All three documents were disclosed to the Claimant during the course of the litigation. The two reports authored by Mr Waller were disclosed after the deadline for disclosure, but before the start of the hearing and were included in the bundle used at the hearing. The briefing note was disclosed during the course of the hearing.

43. The Claimant told me that he was 'ambushed' by the late disclosure of these key documents and did not realise their significance at the time.

44. In the first claim, the tribunal considered allegations of direct race discrimination against the claimant by Ms McDonald and Mr Whitehouse-Hayes, but not Mr Waller. Specific allegations concerning the creation and contents of the reports and briefing note were not considered as part of the first claim, but the two reports made to SO15 featured prominently in the litigation.

45. Lyn Macdonald, David Whitehouse-Hayes and Mr Waller gave evidence at the hearing. The claimant cross examined each of them about the creation of the two reports authored by Mr Waller and their contents.

46. At paragraph 72, the Judgment records findings of fact about how the first report, the email of 27 September 2019 came to be written. In my judgment, the Tribunal's findings at paragraph 72 mean that the new allegations set

out in the list of issues at 7.2(a) and 7.2(b) have received judicial consideration such that it would be an abuse of process to enable them to proceed. This is an issue estopple scenario.

47. The reason I say this is because the tribunal records in paragraph 72 how the report of 27 September 2019 came to be made. No criticism is made of the process or the contents of the report in that paragraph. I consider that if the tribunal had had any concerns about the email of 27 September 2019 it would have noted these concerns. I say this because where the tribunal had concerns about the contents of Mr Waller's subsequent email of 14 November 2019 it ensured it recorded these in paragraph 73 of the Judgment.

48. I interpret the absence of any mention of any concerns about the earlier email as confirmation that the Tribunal was satisfied that Mr Waller and Ms McDonald were acting properly in connection with the 27 September 2019 report. This interpretation is further reinforced when the paragraph is considered in the context of the Judgment as a whole, where no adverse findings were made against Ms McDonald.

49. I have reached the same conclusion in relation to the new allegation numbered 7.2(c) which concerns Mr Whitehouse-Hayes role in relation to the creation of the subsequent report dated 14 November 2019.

50. At paragraph 73 in the Judgment, there is an express finding that that any issues with inaccuracy in the report dated 14 November 2019 were to be laid at the door of Mr Waller and that neither Mr Whitehouse-Hayes nor Ms McDonald were responsible for them. In my judgment, new allegation 7.2(c) to has therefore been previously decided and cannot proceed,

51. The same is not true of allegation 7.2(d). The tribunal expressly acknowledges in paragraph 73 that it was not required to decide a specific discrimination allegation against Mr Waller with regard to the report. This is the precise allegation that the claimant now wishes to pursue.

52. My decision, however, is that the allegation should not be permitted to proceed, but is an abuse of process. I have reached this conclusion for the following reasons.

53. I consider that the claimant did appreciate the significance of the report during the course of the hearing. I say this because he spent time cross-examining the relevant witnesses as to their motivations in relation to the reports. He did not however, seek to amend his claim to add any new allegations relating to the report.

54. The claimant was aware that he could amend his claim, notwithstanding that he was a litigant in person. He had already made several amendments to his original claim and sought to make further ones at the start of the final hearing. It was open to the claimant to do this, but he did not do so. Instead, he sought to rely on what had happened in relation to the reports as part of the general context from which the tribunal might infer discrimination.

55. The tribunal did indeed take the reports into account when considering whether there was any evidence that conduct or any of its employees was motivated in anyway by the claimant's race. It rejected this contention

56. Applying the rule in *Henderson v Henderson,* my decision is that the claimant could and should have brought the race claim relation to the 14 November 2019 report as part of the initial claim.

57. With regard to the balancing exercise required when applying the rule in *Henderson v Henderson,* I have given careful consideration to the seriousness of the legitimate complaint the claimant has about the false report. My decision that he should not be permitted to proceed to pursue a claim of direct race discrimination (or victimisation – see below) in connection with the report does not mean that I have decide that he cannot pursue any claims in connection with the report at all. I believe he is entitled to seek to have the report corrected and to ensure that SO15 either do not hold inaccurate information about him or at the very least hold a record of his concerns about the report with it. There are other forums and means though which he can seek to do this and I suggest he takes legal advice in connection with this.

58. In addition, or in the alternative, I consider this claim should be struck out by the employment tribunal under rule 37(1)(a) on the basis that the claimant has no reasonable prospects of success of a tribunal finding the claim has been brought in time.

59. The claimant found out about the existence of the emails authored by Mr Waller in the first half of October 2020. He waited, however, until 24 April 2021 to contact ACAS to initiate the early conciliation process in connection with the new claims. This was some six months later. The early conciliation process ended on 18 May 2021 and his claim was submitted a few days later on 24 May 2021.

60. Although I asked the Claimant whether he could explain this delay as it is not justified by the explanation that he was waiting for the judgment in the first tribunal hearing to be issued before taking further steps. It was sent to him on 26 November 2020 shortly after the hearing took place.

61. He did not offer any reason why he did not bring his new claim sooner. Instead, he argued that because he had sent a further complaint to the Respondent about the report in 6 March 2021 this created a continuing act under section 123(3)(a) of the Equality Act. In my view, there are no reasonable prospects of him succeeding with this argument. In addition, absent an explanation for the delay in presenting his claim earlier, I conclude that there are no reasonable prospects that a tribunal would extend time on a just and equitable basis to allow the claim to proceed.

62. I add that if the conclusions I have reached about the allegations numbered 7.2 (a) to (c) being covered by issue estopple, I would also strike them out under rule 37(1)(a) for the same reasons related to them being out of time.

63. I turn finally to the briefing note which is the subject of the new allegation numbered 7.2(e). I have not been provided with a copy of the briefing note. I understand from what the parties told me that it is an internal newsletter for security staff at the respondent which included a summary of the actions taken in connection with the security concerns that the claimant's disciplinary investigation raised. Although not written by Mr Waller, it was based on information provided by Mr Waller. I was told it identifies the actions taken by Mr Waller.

64. Unlike the two reports made to SO15 there is no mention of the briefing note in the judgment. In addition, unlike the two reports made to SO15, where the author Mr Waller was present at the hearing, Mr Roberts, the author of the briefing note was not present at the hearing. The claimant did have the opportunity to cross examine Mr Waller about it and did so.

65. Although the circumstances concerning the briefing note are slightly different to the reports, I do not consider these differences lead to a different conclusion. The tribunal had the briefing note adduced in evidence before it and heard evidence about how it. In my judgment, the most likely explanation as to why the judgment did not mention it was because the tribunal considered it to be irrelevant. I conclude this was because they had examined and were able to make findings about Mr Waller's actions themselves and did not therefore need to be concerned with any internal summary of those actions. Had the tribunal considered that the report was important for context, I am confident it would have said so.

66. My decision in relation to the allegation numbered 7.2(e) is therefore the same as for the other allegations concerning the report. It should not be permitted to proceed because it is an abuse of process. In this case, the reason is not because it was previously considered and so is covered by issue estopple. Instead, I consider it is covered by the rule in *Henderson v Henderson*.

67. This allegation is also out of time. Although it is a month less out of time when compared to the other allegations because the report was only disclosed during the course of the hearing, I do not think this makes a difference when the claimant has not provided any explanation for why the claim is out of time.

Complaint to the Respondent's Public

68. The set of allegations pursued as claims of victimisation concern more recent events and I now turn to these.

69. The claimant emailed a letter of complaint to the Respondent's Public Correspondence Team on or around 6 March 2021. In that letter, which was contained in the Claimant's bundle at pages 159 – 164, he complained about the conduct of Mr Whitehouse-Hayes, Ms Macdonald and Mr Waller. He then specified the following requests:

"My request to the Cabinet Office.

a. *CO investigates to determine why Mr Waller filed the false report and the real cause of the false report.*

b. *Provide a letter of apology for the false report filed - specifying the exact parts of the reports that are false.*

c. *Send an agreed letter to S015 specifying that a false report was filed by Mr Waller against me and specify the parts of the report that was false.*

d. *Remove my USB from Mr Waller possession and make an immediate handover of the USB to the police. I feel extremely apprehensive with the USB being left at Mr Waller's disposal or at the disposal of anyone who is in any way connected to Mr Waller or with my ongoing claim. As stated earlier, they undertook a search of my IT and desktop and found "nothing of concern". At one point they also decided they were done with the USB and that it was time to return it (which they did but they returned the wrong USB,) but after I filed a claim with the ACAS and the Employment Tribunal, they decided it is now necessary to retain the USB and undertake a search of the USB. This is very suspicious. In light of the false report by Mr Waller, I do not trust Mr Waller and anyone connected to him to undertake "exploitation" of the USB. Any search necessary can be undertaken by the police.*

e. *Share the policies in reference to which my USB is/was being handled.*

f. *Identify the steps the Cabinet Office intends to take hold Mr Waller and possibly others accountable and the steps CO will take to prevent a recurrence of such an act.* (C162-163)

70. The Respondent did not respond to the letter. It says that due to the absence of a member of staff on maternity leave, the letter was missed.

71. The Claimant's allegations at paragraphs 7.6 (a) to (f) in the list of issues derive directly from the requests he made. He says that under the Respondent's Policy for Handling Correspondence (C153-154) he should have received an acknowledgement of the letter within 5 working days and a full reply within 20 working days. He has therefore treated the Respondent's failure to acknowledge his letter as a failure to carry out his requests within the letter. He has identified the date of the alleged failures as 25 March 2021. He says he worked this out based on the response times in the Policy, although he accepted that he has made a mistake with his maths.

72. My decision in relation to the allegations numbered 7.6 (a) to (d) and (f) is that they also should also not be permitted to proceed. The reason is that these are not new claims. Although they are presented slightly differently to the allegations at paragraphs 7.2 (a) – (e) they essentially concern the same subject matter, namely his concerns about the reports authored by Mr Waller. The claimant has simply attempted to create a number of new allegations, that are in time, by raising a fresh complaint.

73. My reasoning in relation to the progression of allegations 7.2(a) – (e) applies equally to these allegations, even though allegations 7.6(a) to (f) are presented as allegations of victimisation and not direct race discrimination. This is because I am satisfied that the appropriate time to address any concerns about the motives of Mr Waller in connection with creating the misleading report of 14 November 2020 was as part of the original tribunal hearing.

USB Stick

74. I turn now to deal with the USB stick. The allegations in relation to the USB stick are numbered 7.6 (e) and (g).

75. It is not disputed that allegations about the same USB stick were considered as part of the first claim. The Respondent had confiscated a USB stick owned by the claimant which it had not returned it to him by the time of the final hearing in the first claim. The claimant alleged that the respondent directly discriminated against him because of his race pursuant to section 13 of the Equality Act 2010 by withholding information about the whereabouts of the USB stick and/or victimised him pursuant to section 27 of the Equality Act 2010 by losing the USB stick.

76. The Tribunal heard evidence and made findings in the Judgment at paragraphs 72 – 79. It made a finding of fact, based on the evidence of Mr Waller, that the USB stick was not lost, but remained in a secure place in the possession of a member of the Respondent's IT team and had not yet been able to be recovered because of the impact of Covid pandemic.

77. The Tribunal held that the Respondent's retention of the USB stick and communication about it had nothing whatsoever to do with the Claimant's race or protected acts (paragraphs 134 and 136). I note the Judgment says: "*In any event, we find it not credible that anyone at the Respondent vindictively sought to retain the Claimant's USB stick"* (paragraph 77).

78. Following the conclusion of the hearing, but on his own evidence not until 5 March 2021 (C162), the Claimant wrote to Mr Waller about the missing USB stick. He also submitted a complaint to the Respondent's Public Correspondence Team on or around 6 March 2021, as set out above.

79. It transpired that the Respondent could not locate the USB stick. The Respondent, via its in-house lawyer, communicated to the Claimant that the Respondent "*had lost the Claimant's stick as a result of members of staff leaving and office moves*" and offered to send the Claimant a new like for like /similar specification stick (C165 and C 169). Although the Claimant did not agree, the Respondent sent him a new USB stick on 15 June 2021 (C191). The Claimant returned it as he had not agreed this course of action.

80. It is not in dispute that the missing USB stick is blank. The claimant told me at the preliminary hearing that a blank USB stick can be used as a lock and key mechanism. He said he has a crypto currency account which he cannot access and he believes that recovering the missing USB stick may enable him to obtain access to the account. I note that the Claimant has not

previously explained this is the reason why he wants the lost USB stick back, whether at any point during the first claim, in his communications with the Respondent about the USB stick subsequently or in the particulars of claim for the second claim.

81. I have decided that these allegations claim should also not be allowed to proceed. I consider them to be covered by the *res judicata* doctrine even though the finding made by the tribunal, that the USB stick was lost, transpired to be incorrect and the tribunal did not making any findings about the policies under which it was kept. I say this because that factual finding (that the stick was not lost) and anything in relation to the policies were not the most important parts of the tribunal's judgment about the USB stick. The most important part was its conclusion about the respondent's motives for its actions regarding the USB stick.

82. Having thoroughly examined all the evidence available to it, the tribunal reached a robust conclusion on this point. I interpret its conclusion as saying that the tribunal was entirely satisfied that the respondent's actions towards the USB stick were not motivated by the claimant's race or his protected acts and that it had provided a non-discriminatory explanation for what it did with the USB stick. Had the evidence that the stick was in fact lost been available to the tribunal, I am confident that this would not have altered the robust conclusion that it reached. The allegations are therefore examples of *issue estopple.*

83. Before leaving the USB stick, I note that the respondent invited me to strike the new allegation 7.6(g) out under section 37(1)(a) for having no reasonable prospects of success and/or for being vexatious. Its argument was that the loss of a blank USB stick that the respondent had sought to replace did not meet the threshold required to meet the definition of a detriment. I found this to be a very compelling argument. Had I not decided the allegation was covered by issue estopple, I may well have struck the allegation out on these grounds. Although the claimant proffered a reason why the original USB held value to him, he had never mentioned this previously. Had I heard evidence on this point, I think it is likely I would have concluded that he was being opportunistic and disingenuous. At the very least I would have ordered him to pay a deposit to be able to continue.

Amendment Application

84. Having decided that none of the claims can proceed, it is not necessary for me to decide the claimant's amendment application and I have not done so.

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Employment Judge E Burns

22 September 2022

SENT TO THE PARTIES ON: 22/09/2022