



EMPLOYMENT TRIBUNALS

Claimant: Mr Peter Ennis
Respondent: DPD Group UK Limited

PRELIMINARY HEARING

Heard at: Nottingham (in public)
On: 7 (reading day), 8 & (decision-making & writing day) 9 November 2022
Before: Employment Judge Camp

Appearances

For the claimant: in person
For the respondent: Mr P Bownes, solicitor

RESERVED JUDGMENT

- (1) All complaints of disability discrimination are struck out as having no reasonable prospects of success because they are res judicata or the principle from Henderson v Henderson applies to them.
- (2) The respondent's application to strike out the complaint of unfair dismissal under rules 37(1)(a) & (b) is refused.

REASONS

Introduction & background

1. The claimant was employed by the respondent as a Collection and Delivery Driver from 9 January 2017 until his dismissal on 30 June 2020. Having gone through early conciliation from 25 July to 25 August 2020, he presented his claim form in this case – case number 2603188/2020, which I shall refer to as the “third claim” – on 26 August 2020.
2. The third claim is for unfair dismissal and disability discrimination. It is the “third” claim because the claimant had previously presented two other claims: case number 2601523/2019, presented on 17 May 2019 and dismissed by Employment Judge Hutchinson at a preliminary hearing on 11 June 2020 (the “first claim”); case number 2601988/2020, presented on 17 June 2020 and dismissed following a final hearing

before Employment Judge M Butler and Members in January and February 2022, by a reserved judgment sent to the parties on 23 June 2022 (the “second claim”).

3. There is no obvious overlap between the second claim and the third claim that is relevant to my decision. The judgment dismissing the second claim is subject to an appeal¹ and I [Employment Judge Camp] have no powers in relation to that claim.
4. By way of background, see the written record of the preliminary hearing that took place by telephone before Regional Employment Judge Swann on 3 August 2022.
5. This is a decision on the respondent’s applications of 15 July 2022 to strike out the third claim, or the disability discrimination element of it, on three bases (as set out by REJ Swann, who adopted the respondent’s solicitors’ wording from their application email):
 - 5.1 to strike out the disability discrimination element of the claim on the basis of res judicata / issue estoppel in terms of the issue of whether the claimant was disabled; *and/or*
 - 5.2 to strike out the disability discrimination element of the claim on the basis of Henderson v Henderson abuse of process in terms of the claimant seeking to re-argue the disability point on what he says is a new different basis that he could and should have argued in a previous claim; *and/or*
 - 5.3 to strike out the whole of the third claim as scandalous or vexatious, and/or on the basis of scandalous, unreasonable or vexatious conduct, on the basis of the final paragraph of the claimant’s email of 12 July 2022 in which he states that he will use these proceedings to mount collateral attacks on previous judicial decisions which he has unsuccessfully challenged on both reconsideration and appeal, as well as mounting such attacks on other parties in the claim rather than addressing the claim itself. This is “application 3”.
6. As discussed near the start of this hearing, my understanding and interpretation of what REJ Swann directed in relation to the first two of these three applications (“applications 1 & 2”) is that:
 - 6.1 I am to make a final, definitive decision as to whether res judicata, issue estoppel and/or Henderson v Henderson abuse of process applies to the disability discrimination complaints;
 - 6.2 if my decision on that is in the respondent’s favour, I would then have to decide whether or not, in light of that decision, to strike out those complaints under rule 37 on the grounds that they have no reasonable prospects of success;
 - 6.3 doing this is technically distinct from assessing the claimant’s prospects of success on res judicata, issue estoppel and Henderson v Henderson abuse of

¹ On 8 November 2022, the EAT wrote confirming that HH Judge Wayne Beard had decided EAT rule 3(7) applied to the appeal.

process at any final hearing. In practice in this case it is almost certainly a distinction without a difference.

7. Applications 1 & 2 rely on the fact that at the hearing on 11 June 2020, Employment Judge Hutchinson decided that the claimant was not disabled in accordance with the Equality Act 2010 (“EQA”). The basis upon which the claimant opposes those applications includes an assertion that the Employment Judge made that decision only in relation to one condition – an umbilical hernia – and that the disability discrimination complaints in the third claim rely on another condition – divarication of the recti – as well or instead.

Facts relevant to applications 1 & 2

8. The history is relatively complicated and it is regrettably necessary to set it out in detail and at length.
9. The first claim was presented on 17 May 2019. It was, or at least became, a claim for disability discrimination only. At the time he presented his claim form the claimant had been off sick from work since 27 January 2019. The problem – and seemingly the main reason a claim was presented at that time – was the claimant’s assertion that he could not return to work unless and until various adjustments were made or reinstated. The adjustment sought were mainly restrictions on heavy lifting and other manual handling tasks and allowing him to drive a smaller van. In May 2019, the respondent agreed to make some adjustments. Its position was that it did not concede and had not conceded that the claimant was disabled, but that it was making the adjustments even so, to facilitate a return to work. The claimant returned to work on 28 May 2019.
10. There was a routine preliminary hearing for case management by telephone on 23 October 2019. In his written record of that preliminary hearing, Employment Judge Adkinson identified the relevant disability as a “*small umbilical hernia*”.
11. By “*the relevant disability*”, what I mean is the “*physical or mental impairment*” said to have, and to have had, a long-term adverse effect on the claimant’s ability to carry out day-to-day activities, in accordance with EQA section 6, that was relied on by the claimant in his claim. I note two things about this:
 - 11.1 EQA section 6 is not concerned with the cause of the “*impairment*”;
 - 11.2 a claimant may have multiple “*impairments*” constituting disabilities under the EQA, not all of which are relevant to their claim. It is for the claimant to identify which of them, if any, is or are relevant.
12. Employment Judge Adkinson also set out the complaints and issues. These included complaints about things that began and/or continued after the presentation of the claim, e.g. reasonable adjustments complaints about [allegedly], “*Requiring the claimant to use the large van from about May 2019 onwards on every shift*” and “*Compelling him to deliver the large or heavy parcels from about May 2019 onwards on every shift*”.

13. The claimant told me at his hearing that at least some of the allegations of discrimination he was making in the first claim related to things he was arguing continued up to June 2020. Whether this is right or not, the point of potential relevance to applications 1 & 2 is that in the first claim, in relation to the issue of whether the claimant was a disabled person under the EQA at all relevant times (the “disability issue”), all relevant times covered the period from early 2019 (if not before) up to and including 11 June 2020, when the decision on that issue was made.
14. In addition, although in the first claim the claimant alleged that working for the respondent had exacerbated his condition, it was no part of his case that the problems he had that he believed made him a disabled person under the EQA were materially worse or better in June 2020 than they had been in early 2019.
15. The claimant and respondent were ordered to inform the Tribunal and each other within 14 days if what was written about the claim in that written record of the preliminary hearing was inaccurate or incomplete in any important way. The claimant did not write-in pursuant to that order. In particular, he did not write suggesting Employment Judge Adkinson had misidentified or incompletely identified the relevant disability.
16. What the claimant did do, pursuant to other orders Employment Judge Adkinson made (including an order to provide all evidence relevant to the disability issue), was to prepare and serve a disability impact statement and disclose some medical information. The disability impact statement, prepared in or around December 2019, on the face of it put forward “*a small umbilical hernia*” as the alleged disability. The claimant identified the cause of it as being “*a congenital defect in the abdominal wall due to premature birth*”. He also referred in the impact statement to having had an ultrasound scan in 2017.
17. The medical evidence the claimant provided, also in or around December 2019, included the report on that ultrasound scan, which took place on 3 March 2017. The report appears to have been an investigation of what is described as a “*Midline budge. ? hernia*”, “*budge*” presumably being a typographical error for “*bulge*”. The report included, “*Divarication of the rectus abdominus muscles are identified. A tiny umbilical hernia is seen*”. Under the heading “*Conclusion*” the only thing written was, “*Divarication of the rectus abdominus*”.
18. The rectus abdominus (a.k.a. rectus abdominis) are two paired and parallel muscles that run vertically from the pubic bone to the sternum. They form the “*abdominals*” or “*abs*”. A divarication of them means a separation or gap between them.
19. In short, what the report said was that the bulge in the claimant’s midline under investigation was an umbilical hernia, as had been suspected, and that its underlying cause was divarication or separation of the abdominal muscles. From here onwards, I shall refer to this as the “*divarication*”.
20. When the claimant referred in his impact statement to “*a congenital defect in the abdominal wall*” he meant the divarication. In paragraph 7 of the impact statement, he referred to it as “*Diastasis*”, which he was clearly using as a shorthand for diastasis

recti or rectus abdominis diastasis, which is the same thing as divarication of the rectus abdominis.

21. It is reasonably clear that in December 2019 the claimant's case was that his disability was the hernia and that there was a causal link between the hernia and the divarication.
22. He confirmed this first in his impact statement, as above and in its paragraph 7, where he wrote that, "*Diastasis [i.e. the divarication] ... is the result of a hernia forcing the abdominal muscles to separate*".
23. He also confirmed this in his written response, emailed on 22 December 2019, to the respondent's application for a preliminary hearing to decide the disability issue, which began: "*The claimant takes issue with the respondent's request for a 2nd Preliminary Hearing [on] the basis that the claimant's small umbilical's hernia (causation divarication of recti) abdominal separation ... [does] not qualify the claimant as a disabled person ... [insofar] as the respondent does not accept that the claimant's condition has a substantial adverse effect on his day to day activities.*"
24. This response of 22 December 2019 continued:

The claimant sent the respondent an impact statement outlining the following:
a) the likelihood ... that the claimant's abdominal mid line had failed to properly unite due to premature birth resulting in weakness of the abdominal wall,
*b) In adult males particularly those over 50 the avoidance of exercise involving heavy weighted squats, dead lifts or lunges outside of a controlled environment unless otherwise instructed under the supervision of a therapist. Such movements also transcend in to **everyday** life hence the avoidance of picking up and or carrying heavy parcels, since these can further [damage] the abdominal muscles. [original emphasis]*
25. The medical records the claimant provided to the Tribunal and the respondent in December 2019 included, in addition to the report on the ultrasound scan:
 - 25.1 a report dated 21 March 2019 from a Consultant Occupational Health Physician which the claimant referred to in his claim form in the first claim and which, amongst other things, considered whether or not he was disabled in accordance with the EQA. Its focus is the umbilical hernia, it referred to adjustments that had been made for the claimant as "*hernia adjustments*" and it did not mention the divarication;
 - 25.2 an occupational health report dated 11 April 2019 and an occupational health referral form dated as having been sent on 13 June 2019.
26. I mention these at this stage because during this hearing the claimant suggested that possibly both of these, and certainly the former, had not been provided to him by the respondent before they were included in the file or 'bundle' of documents, on 6 May 2020, for the preliminary hearing on 11 June 2020. In fact, he himself evidently had

them by December 2019, if not before, because he provided them then. Copies were also provided to him and to the Tribunal by the respondent on 2 April 2020.

27. On 20 February 2020, a preliminary hearing was listed to take place on 22 April 2020. Although the notice of hearing did not say so, the intention was that the disability issue would be dealt with at that hearing. Both sides expected it to be. Unfortunately, Covid intervened. A telephone case management hearing took place on 22 April 2020. In his written record of that hearing, Employment Judge Clark recorded that the claimant “*was keen to have the matter [i.e. the disability issue] determined today*”. In other words, the claimant did not say he felt insufficiently prepared, or lacked the evidence, to deal with the disability issue. There is nothing to suggest he said anything along those lines before or at the hearing on 11 June 2020 either – quite the contrary: in his decision, Employment Judge Hutchinson recorded that, because of concerns about the claimant not being able to use the video part of the CVP system, he had asked the claimant whether he was sure he wanted to proceed and the claimant confirmed he did.
28. A preliminary hearing “*To determine the claimant’s disability status at the material time*” was listed at Employment Judge Clark’s direction. As best I can tell from looking at the Tribunal file, when Judge Clark issued that direction – 22 April 2020 – the claimant had not written anything to the Tribunal altering his position in relation to the disability issue from that he had been adopting in December 2019, namely:
 - 28.1 the relevant impairment was his umbilical hernia;
 - 28.2 the hernia was caused by, or was the cause of, the divarication, and this was part of the disability issue, albeit the divarication was not being put forward as an impairment under EQA section 6 in its own right.
29. The divarication was also mentioned in reports from the respondent’s occupational health provider, in particular in a report dated 30 January 2020, provided to the Tribunal and the claimant on 2 April 2020, if not (to the claimant) before.
30. The preliminary hearing to decide the disability issue on 11 June 2020 was via CVP and telephone. Given when it took place it is likely that the Judge conducted it from his home and did not have access to the Tribunal file. This means he would have had before him only the documents in the electronic file / ‘bundle’ prepared for the hearing by the respondent’s solicitors, together with the parties’ written submissions. The only thing I am aware of that was not in that bundle that might reasonably have been included was the claimant’s response document of 22 December 2019. (I am not saying it was unreasonable to have omitted it from the bundle).
31. In the run up to that hearing, on 3 June 2020, the claimant emailed the respondent’s solicitor. His email, which was in the hearing bundle, included this: “*I know you are holding out for a decision as to [whether] my hernia / under lying causation divarication of the recti constitutes a disability ... The single question remains [whether] or not said hernia resulting as consequence of [weakened] / underdeveloped core muscles (divarication of the recti) ... [has] a substantial detrimental impact on my day to day activities ... such activities can be transposed into working life...*”.

32. Both sides prepared written submissions for the hearing.
33. Respondent's counsel's written submissions, sent to the claimant and the Tribunal on 9 June 2020², stated in paragraph 1, in their "Introduction" section, "... the Claimant presented a claim of disability discrimination ... Employment Judge Clark listed today's hearing to determine 'the Claimant's disability status at the material time'. The Claimant suffers from a small umbilical hernia which he asserts amounts to a disability". They also quoted from the ultrasound scan report of March 2017 and the occupational health report of 20 January 2020 and in so doing referred to the divarication.
34. The claimant's written submissions of 10 June 2020 stated in terms that they were a response to the respondent's written submissions. They commented on those submissions paragraph by paragraph. They began, "Paragraph 1 is not disputed". Whatever he intended, that concession by the claimant objectively communicated that he was relying on the hernia as the impairment / disability for the purposes of his claim and that the preliminary hearing was to decide whether his hernia, and not something else, was a disability in accordance with the EQA at all relevant times.
35. Nowhere in his written submissions did the claimant write anything along these lines, at least not with any clarity: the condition relied on as his impairment / disability for the purposes of his claim was not just his hernia but the divarication as well or instead. The closest he came to doing so is in paragraphs 8 and 9 of his written submissions.
36. What he wrote in paragraph 8 to an extent echoed what he had written in his response document of December 2019:

Paragraphs 14 to 15 [of the respondent's written submissions] refer to symptoms associated with divarication of the recti in men and particularly those over 50. A hernia results as a consequence of a complete separation of the abdominus recti ... And whilst I have suffered all of my life without undue discomfort or [hindrance, working] at DPD ... placed [a] substantial strain on my core muscles which are already weak not due to lack of physical robustness but that condition previously identified back in 2018

37. Paragraph 9 continues with:

the respondent goes on to continue to undermine the serious nature of my condition and its effect on my ability to carry out day to day ... activities ... the respondent refers to new conditions, these aren't new like my hernia they arise as a consequence of divarication of the recti.

... throughout the later part of 2018 I referenced specifically my divarication of the recti and other associated issues ... although I did not refer to the medical

² In his appeal to the EAT, the claimant argued that it was a breach of rule 42 to provide written submissions less than 7 days before a hearing. He misunderstands that rule – rule 42 sets no time limit on the provision of written submissions. Instead it is about what written representations the Tribunal must take into account, particularly where someone chooses not to attend a hearing. Written submissions from parties attending Tribunal hearings, if provided at all, are usually provided less than 24 hours beforehand, and often on the day.

name because I did not know it at the time. My hernia is the result of a hole or defect in the fascia ... this was exacerbated after joining DPD ...

38. That was, to the best of my knowledge and understanding, all of the written material the Tribunal and Employment Judge Hutchinson had at the hearing on 11 June 2020 that was relevant to the question of what impairment or impairments the claimant was relying on as his relevant disability. There was some ambiguity in it. However:
- 38.1 both the Tribunal and the respondent were openly working on the basis that the relevant impairment was the hernia and the claimant did not before the hearing write anything saying they were wrong and he appeared at times to confirm they were right;
- 38.2 the claimant evidently was relying on the divarication as relevant to the disability issue, and the respondent was not suggesting it was irrelevant and in fact itself referred to the divarication;
- 38.3 the ambiguity in the claimant's case on paper was as to precisely how the divarication was said to be relevant to the disability issue. It may be that the claimant himself was confused about this;
- 38.4 mentioning the divarication any number of times is not the same as arguing that it was a disability under the EQA;
- 38.5 looking at all the claimant wrote, and particularly at his email to the respondent's solicitor of 3 June 2020, the position the claimant seems to have been presenting to Employment Judge Hutchinson coming into the hearing was that the relevant impairment and disability was the hernia and that the divarication's relevance was as an underlying cause of the hernia.
39. Employment Judge Hutchison gave his decision against the claimant on 11 June 2020 itself. The written Judgment and Reasons were sent to the parties on 24 August 2020. I shall now go through the relevant parts of it.
40. The purpose of my doing so is not so that I can decide whether I think Employment Judge Hutchinson got it right or wrong. As I have repeatedly tried to explain to the claimant during this hearing, the correctness of his decision is even in theory³ almost entirely irrelevant to anything I might have to decide; and even if I thought he had made a mistake, I have no power to overturn another Employment Judge's judgment.
41. The reason I am examining the Judgment and Reasons is to determine, as best I can, precisely what Employment Judge Hutchinson decided on all of the subsidiary issues that formed necessary ingredients of his overall decision. In particular, I am looking at what, if anything, he decided in relation to the divarication, whether taken together with the umbilical hernia or treated as a potential disability in its own right.
42. The Judgment stated: "*The Claimant does not have a disability as defined in Section 6 Equality Act 2010 and his claim of disability discrimination fails and is dismissed.*"

³ In practice it is completely irrelevant.

43. The Reasons included the following:

7. ... the purpose of the hearing today was for me to determine whether at the relevant time the Claimant suffered from a disability as defined in Section 6 of the Equality Act 2010. In this case he relied on the impairment of the umbilical hernia that was referred to by Employment Judge Adkinson.

8. I had to determine whether this amounted to a physical impairment and whether that impairment had a substantial and long term adverse effect on his ability to undertake normal day to day activities.

.....

10. I repeat that the only physical impairment identified was the umbilical hernia.

44. Employment Judge Hutchinson quoted from:

44.1 a report from a Dr Brennan, from the respondent's occupational health provider, of 10 September 2018 in which, after referring to the umbilical hernia, Dr Brennan stated: "*Whilst he does have some underlying health conditions, they would seem not to be particularly serious and the problem is more linked to his physical robustness and an underlying health problem.*" I think the word "and" in that sentence from Dr Brennan's report is a typographical error and should be "*than*". I cannot be sure that Employment Judge Hutchinson took the same view, but given his conclusions (see below) this seems likely;

44.2 a further report from Dr Brennan dated 20 January 2020 in which Dr Brennan quoted from a report dated 20 September 2019 that had apparently been received from the claimant's GP. The quotation from the GP's report that Employment Judge Hutchinson set out in the Reasons included this: "*He [the claimant] was last seen in May. There was mention of a tiny umbilical hernia and [divarication] of recti muscles on a past scan.*" This is the only express reference to the divarication in the Reasons.

45. Employment Judge Hutchinson's conclusions included this: "*Mr Ennis has other conditions ... some of which are related to his general level of fitness. The medical evidence indicates that that is likely to account for any restrictions that he has told his medical advisers that he has. It is his case that it is the hernia [that] amounts to the physical impairment and I am not satisfied that it does amount to any physical impairment or that it has any effect at all on his normal day-to-day activities.*" I think the second "*that*" in the second sentence refers back to "*his general level of fitness*" in the first sentence.

46. On my reading of Employment Judge Hutchinson's decision, it was to the following effect:

46.1 at the hearing, the only condition relied on as a relevant impairment was the umbilical hernia;

46.2 the claimant had other conditions, but on the evidence the cause of any adverse effects on his ability to carry out day-to-day activities was probably his general level of fitness.

47. Almost immediately after the hearing, at 17:15 hrs on 11 June 2020, the claimant emailed the respondent. The email was not copied to the Tribunal. The “*Subject*” of the email was “*Preliminary Hearing Judgement 11/06/2020 (Appeal Notice)*”. The email included the following:

... the employment judge erred in his overall assessment of my condition and that overall negative impact on my core ... My argument that [divarication] of the recti is not directly connected and its subsequent rejection was also made in [error]. ...

... The respondent [has] been aware of both conditions namely divarication of the recti and the resulting umbilical hernia. Yet no consideration was given to the former causation in relation as identified in my impact statement

... Donelien v Liberata Uk Ltd ... was submitted ... Yet ignored because the employment judge failed to identify a more than casual link between the both ailments and my day to day activities ...

To be clear a umbilical hernia is a “side effect” diastasis recti ... this is how umbilical hernias appear. Without divarication of the recti there is no hernia or for that matter bulging, lower back pain or any other associated condition referred to in my impact statement or elsewhere in the claim. ...

48. That email was the closest the claimant had come up to that point to stating in writing that he was arguing he was disabled in accordance with the EQA because of two ‘impairments’ / conditions: the hernia and the divarication. Mr Bownes for the respondent (who I understand was not the involved in defending the claimant’s claims in 2020 and has no personal knowledge of what was said during the hearing on 11 June 2020) submitted to me that because of how soon after the hearing the email was sent, I should assume that the claimant’s oral submissions were similar to the email’s contents. He relied on the email as evidence in particular that the claimant must at the hearing have been putting forward both conditions as the relevant disability or disabilities.
49. I disagree. If the claimant said to Employment Judge Hutchinson what he wrote in the email, the Employment Judge would surely not have put in the Reasons, at least not without qualification, “*It is his case that it is the hernia [that] amounts to the physical impairment*”. Although an email of that kind, sent shortly after a hearing where a decision has gone against the author of the email, may well accurately reflect what was said at the hearing, it may equally well contain what the author would like, with the benefit of hindsight, to have said (and perhaps has persuaded themselves that they did say), but which they did not, in fact, say.
50. I do, however, accept that Employment Judge Hutchinson must have been aware that the claimant, on paper at least, considered divarication to be relevant to the disability issue. This is because the claimant mentioned it in his impact statement and written submissions, which the Employment Judge had definitely read, as well

as in his email of 3 June 2020, which the Employment Judge had probably read. I also repeat paragraphs 38 and 44 above.

51. At least for the most part, though, it is impossible to reach firm conclusions as to precisely what Employment Judge Hutchinson had in mind that is not explicit on the face of his decision. For example, the divarication may – or may not – have been one of the things he was thinking about when he quoted Dr Brennan’s discussion of “*underlying health conditions*” (see paragraph 44.1 above) and referred to “*other conditions*” in his conclusions (see paragraph 45 above). As well or instead, he may – or, again, may not – have considered the divarication to be legally unimportant, because of an understanding that the claimant was relying on it simply as the cause of the relevant disability (see paragraph 11.1 above). Speculation about those kinds of things is idle.
52. In emails to the Tribunal (not copied to the respondent) of 18 June, 5 July and 6 August 2020, the claimant referred to the divarication, suggesting – most clearly in the email of 18 June 2020 (“*Conclusion – Divarication of the Recti ... is ... a substantial physical impairment as defined under the Equality Act 2010 and therefore a disability*”) – that it was a disability in its own right.
53. As already mentioned, the claimant was dismissed for incapability with effect on 30 June 2020, the written Judgment and Reasons was sent to the parties on 24 August 2020, and on 26 August 2020 the claim form in the third claim was presented.
54. The details of the claim provided in the third claim form included:
 1. *The claimant suffers with divarication of the recti which resulted in herniation of the umbilicus at birth, both conditions are therefore congenital.*
 -
 3. *A occupational health report identified a small umbilical swelling and what was referred to as other “underlying health conditions ...” ... That other underlying health condition is ‘divarication of the recti’ it is neither minor or trivial ...*
 4. *Following on reasonable adjustments albeit in part were put in place albeit denied by the respondent who refused to accept I had disability.*
 5. *Subsequently a claim for discrimination arising from disability was lodged claim 2601523/2019. At a preliminary hearing on the 11 June 2020 employment Judge Hutchinson failed to acknowledge that other under lying condition or the negative impact it [had]. ... Consequently I have asked for the judgement to be reconsidered.*
 6. *... Following the judgement on the 11 June 2020 I was invited to return to my substantive role which I was physically unable to do. I requested that they again seek further clarification about my condition and await the outcome of the reconsideration they refused.*
 7. *The outcome ... was my dismissal on capability grounds ...*
 8. *... [There were two unsuccessful internal appeals against dismissal. The appeal decision-makers] both [cited] the earlier opinion of Dr John W Brennan*

and the judgement hand down on the 11 June 2020 by employment Judge Hutchinson even though both failed to consider as did my employer whether divarication of the recti was in fact having profound impact on my ability to bend, lift, carry out my substantial role as required or expected by the respondent. ...

55. Also on 26 August 2020, the claimant made a reconsideration application.⁴ For present purposes, the following are the most relevant parts of it:

... umbilical hernia can result in lower back pain. There is a direct correlation between a hernia breach of the transverse abdominis, divarication of the recti separation of the abdominal interior wall. ...

... the recurrence rate [following surgical repair] for umbilical hernias which coexist alongside divarication of the recti as in this instance is as high as 61% ... It is pointless repairing a abdominal hernia umbilical or otherwise if the underlying condition responsible [for] weakness in the abdominal wall responsible for the protrusion (hernia) is not corrected ...

... on the 30 June 2020 ... I was sacked because I was unable owing to significant functional impairment brought on by both hernia and divarication of the recti.

....a further claim ... [has] been lodged I fully anticipate ... that that contested judgement [Employment Judge Hutchinson's decision] is revoked and substituted with a decision compatible with section 6 of the Equality Act in respect of both hernia and divarication of the recti ...

56. On 4 September 2020, Employment Judge Hutchinson's decision refusing the reconsideration application under rule 72(1) was emailed to the parties. It included this:

The matters that the claimant has referred to were all considered by the judge at the hearing ... The claimant's application for reconsideration seeks to provide further evidence to him [Employment Judge Hutchinson] which does not change his view at all about whether Mr Ennis suffered from a disability at the relevant time. He was satisfied ... that there was no evidence that the umbilical hernia had caused him to suffer any impairment and that is why he was satisfied that he did not suffer from a disability ...

57. The respondent, through Mr Bownes, submits that by that decision, Employment Judge Hutchinson confirmed that at the 11 June 2020 hearing he had considered and rejected arguments from the claimant to the effect that the divarication was a relevant disability in its own right and/or was one when taken together with the umbilical hernia. I reject that submission.

57.1 In context, "*The matters that the claimant has referred to were all considered by the judge at the hearing*" does not mean that every single fact set out in, and allegation made in, the reconsideration application was raised and considered at the hearing. Apart from anything else, the reconsideration application

⁴ There were at least two versions of this. The relevant version – the one the claimant relied on – appears in the file / bundle for this hearing at pp 193-196.

referred to things post-dating the hearing, such as dismissal. In addition, the reconsideration decision mentioned “*further evidence*”, which must mean evidence that was not before Employment Judge Hutchinson at the hearing.

57.2 What I think Employment Judge Hutchinson meant was that he had at the hearing considered everything in the reconsideration application of relevance and potential significance to his decision on the disability issue.

57.3 See paragraphs 48 and 49 above.

57.4 In the reconsideration decision, the divarication was not referred to and “*the umbilical hernia*” was identified as the “*impairment*”.

57.5 Whatever may have been reasonably obvious from other documents the claimant produced – e.g. his email to the Tribunal of 18 June 2020 and his claim form in the third claim – in the reconsideration application itself he did not state with any clarity that his case was that he was disabled because of two impairments (the hernia and the divarication), that he had argued this at the hearing on 11 June 2020, and that this was the basis, or a substantial part of the basis, of the reconsideration application. The application does no more than give hints in this respect. And what Employment Judge Hutchinson was dealing with in his reconsideration decision of 4 September 2020 was the reconsideration application, no more and no less.

58. The claimant subsequently, without success, made a complaint about Employment Judge Hutchinson, again sought reconsideration of this decision, and appealed to the EAT. To the best of my knowledge, he has now exhausted his appeal options.

59. The appeal to the EAT was based on similar arguments to those advanced by the claimant before me in relation to applications 1 & 2. It was dismissed on 5 July 2022 because of EAT time limits, following a hearing before HH Judge Auerbach on that date where both parties appeared. Although the claimant sought to argue the appeal on its merits, the only decision the Judge made on that was that the merits were not so strong that they provided an exceptional reason for permitting time to appeal to be extended.

The law – *res judicata*, issue estoppel & Henderson v Henderson abuse of process

60. The respondent’s written submissions contain seven pages devoted to the law in this area. There are seventeen related authorities in the bundle of authorities. What has been provided to me comprehensively and accurately covers the relevant ground and I refer to it.

61. In this decision, the law I am applying is as summarised by Lord Sumption JSC in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160 at paragraphs 17 to 26, which includes, at paragraph 22, the following propositions, for which Arnold v National Westminster Bank plc [1991] 2 AC 93 is cited as authority:

(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.

(2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.

(3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.

62. Circumstances where a decision that would normally give rise to an estoppel of these kinds can be revisited (other than by appeal or reconsideration) include where a party seeks to have a judgment set aside on grounds that it was fraudulently obtained (as in Takhar v Gracefield Developments Limited & others [2019] UKSC 13) or where new facts come to light that fundamentally change the complexion of the case – see paragraph 25 of Allsop v (1) Banner Jones Limited (2) Cohen [2021] EWCA Civ 7.
63. These exceptions to the general rules are, however, of limited scope:
- 63.1 I, an Employment Judge, have no power to set aside or ignore a judgment of a fellow Employment Judge, even one obtained by fraud. Employment Judges (unless dealing with a reconsideration application pursuant to rule 72(3)) are required to treat as valid and correct judgments of other Employment Judges, unless and until they are set aside by a Court or Tribunal that has the power to do so;⁵
- 63.2 accordingly, if in the Employment Tribunals new evidence emerges which suggests a judgment is wrong, the party wanting to challenge the judgment will need to appeal or apply for reconsideration out of time. An out of time appeal or reconsideration application based on new evidence will not get off the ground unless the party applying is able to show that they could not with reasonable diligence have obtained the evidence at the time the judgment. In the present case, the claimant did not base his appeal to the EAT on new evidence to any substantial extent;
- 63.3 specifically in relation to new evidence in the context of the disability issue, if a Tribunal has decided that the claimant was not a disabled person because of a particular impairment at a particular point in time, they will not normally be permitted to bring another claim based on allegations that new evidence retrospectively shows that decision to have been incorrect: *“it can be difficult for litigants in person to pay for relevant reports and so forth, but that is a problem that many litigants face. It is for the claimant to establish his disability to the requisite standard”* (Mr XX v UKBA, from a judgment of Elias LJ dismissing an appeal in proceedings started in 2007, set out in the EAT’s

⁵ I should make clear that if I thought Employment Judge Hutchinson’s decision had been obtained by fraud – and I categorically do not, for reasons explained below – I would not ignore this. Almost certainly, I would stay these proceedings and invite Employment Judge Hutchinson to reconsider the decision on his own initiative under rule 73.

decision – [2012] UKEAT 0546_11_3007 – in proceedings between the same parties started in 2010).

64. During the present hearing, we discussed the status of Employment Judge Hutchinson's decision and of the claimant's arguments that it was wrong. In particular, I wondered aloud whether it made a difference that the appeal had been dismissed for procedural reasons rather than on its merits.
65. My considered view is that it makes no difference at all in principle. Of course, if the appeal had been dismissed on its merits, my decision-making would in practice be considerably easier. But Employment Judge Hutchinson's decision is no less valid, and no more susceptible to challenge before me, than any other judgment of another Judge that has not been overturned on appeal or through reconsideration.
66. Finally on the law, the claimant repeatedly referred in his written and oral submissions to Cox v Adecco & Others [2021] UKEAT 0339_19_0904. He appears to think the decision means that, because he was a litigant in person: Employment Judge Hutchinson had an inquisitorial role; there was no onus on him to put forward his own case at the hearing on 11 June 2020; the onus was on Employment Judge Hutchinson and the respondent to make his case for him.
67. If that is what the claimant thinks, he is mistaken. Cox v Adecco is about how Tribunals should approach strike out and deposit order applications made against unrepresented claimants where the claims and issues are difficult to identify. The main point decided is (paragraphs 30 to 31 of the decision): "*There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. ... Respondents ... need to assist the employment tribunal in identifying what ... the claims and issues are*". That point has no significant bearing on the present case. The hearing on 11 June 2020 was not to decide an application to strike out or make a deposit order; it was a hearing to decide the disability issue. The claims and issues had been identified at the preliminary hearing before Employment Judge Adkinson in October 2019.
68. Cox v Adecco does not change the law from the following:
 - 68.1 it is for the claimant to set out and prove their case;
 - 68.2 in a disability discrimination claim, "*it would [not] be helpful to describe the role [of] the Employment Tribunal as "inquisitorial" or as "pro-active."* Its role is to adjudicate on disputes between the parties on issues of fact and law. ... The onus is on the applicant to prove the impairment on the conventional balance of probabilities. ... If there is an issue on impairment, evidence will be needed to prove impairment. ... It is not, however, the duty of the tribunal to obtain evidence or to ensure that adequate medical evidence is obtained by the parties. That is a matter for the parties and their advisers" (McNicol v Balfour Beatty Rail Maintenance Ltd [2002] EWCA Civ 1074 at [26]);
 - 68.3 in relation to any claim, "*it is not for a tribunal to make a case for a litigant. However much a tribunal feels that a litigant is not making the best case that litigant could, given the facts as they appear to the tribunal, it cannot step into the shoes of the litigant and make for itself any case which it appears could*

have been advanced successfully in the light of that material (Dundee City Council v Malcolm UKEATS/0019/15 (9 February 2016, unreported), at [18]).

Decision on applications 1 & 2

69. The disability discrimination part of the third claim is plainly “*abusive and duplicative litigation*” (Virgin Atlantic [2014] AC 160 at 185G) of the kind that the law of res judicata / issue estoppel and the principle in Henderson v Henderson have the purpose of limiting.
70. It is part of the third claim as set out in the claim form that “*herniation of the umbilicus*” was at all relevant times, going back to 2018, an impairment constituting a disability in accordance with the EQA. Employment Judge Hutchinson decided it was not, over a virtually identical time period⁶, and his decision has not been set aside. On any sensible view, that issue is res judicata.
71. So far as concerns the divarication, I have found (above) that the claimant did not argue at the hearing on 11 June 2020 that it, whether by itself or in combination with the umbilical hernia, was a relevant impairment and disability under the EQA. Accordingly res judicata and issue estoppel do not apply. However, the principle in Henderson v Henderson does. Manifestly, it could have been argued:
- 71.1 it was raised a week after the hearing (if not before) in the claimant’s email to the Tribunal of 18 June 2020;
- 71.2 the claimant’s case seems to be that he did raise it – or at least (paragraph 60 of his written submissions for this hearing) that the divarication was “*mentioned countless times so it cannot be Henderson abuse simply because Employment Judge Hutchinson ... chose to ignore it*”;
- 71.3 the claimant has at times suggested that he was by Employment Judge Hutchinson’s conduct in some way prevented or inhibited at the hearing on 11 June 2020 from raising it orally. Even if that were so – and it is not, I note, an allegation he made to the EAT, nor an inherently plausible one – he has sent many long and detailed documents to the Tribunal and appears to have no particular difficulties expressing himself in writing. There was nothing stopping him including it –
- 71.3.1 in his written submissions of 10 June 2020. These were four pages long. He could have made the point adequately by adding one or two sentences;
- 71.3.2 in an email to the Tribunal in accordance with Employment Judge Adkinson’s order referred to in paragraph 15 above;
- 71.3.3 in the first paragraph of his impact statement, in which he mentioned the hernia only.

⁶ The only discernible difference is that the third claim covered the period from 11 to 30 June 2020. Paragraphs 13 and 14 above are also relevant here.

72. Whether the claimant should have raised the point at the hearing on 11 June 2020 and whether it would be an abuse of process for him to raise it in relation to the third claim are two sides of the same coin. My answer to both is “yes”.
- 72.1 The third claim overlaps considerably with the first claim; it seems essentially to be the first claim with events from 11 June 2020 onwards added on to it. This is therefore a case where if the third claim were allowed to proceed, the respondent would face having to defend a second set of disability discrimination proceedings about events from early 2019 up to early June 2020 when there could and should have been only one.
- 72.2 Permitting the claimant, having lost on the disability issue in relation to one impairment, to make only a couple of months later many of the same, or similar, complaints, but relying on a different impairment, would be a recipe for never-ending litigation.
- 72.3 It is the claimant’s case, and it seems to be a physiological fact, that the hernia and the divarication are closely connected. Given that the claimant may not in any event rely on the hernia by itself as a disability (because of *res judicata*), there would potentially be considerable technical and practical difficulties in deciding the disability issue and other related issues in the third claim.
- 72.4 Following on from the previous point, keeping any disability discrimination claim that was permitted to continue within its proper bounds – i.e. stopping it from infringing the law of *res judicata* – would be particularly hard in the present case because of the claimant’s evident wish to mount a collateral attack on Employment Judge Hutchinson’s decision (see from paragraph 76 below).
73. Alternatively, if it were the case (and I have found that it wasn’t) that the claimant did argue before Employment Judge Hutchinson that the divarication was a relevant impairment / disability, the respondent’s position would be even stronger. Employment Judge Hutchinson’s decision that “*The Claimant does not have a disability*” would in those circumstances necessarily include a decision that the divarication was not a disability, meaning that too was *res judicata*. I use the word “*necessarily*” because if divarication was put forward as a disability, Employment Judge Hutchinson could not properly have issued the judgment he issued without covering it. The claimant could not argue before me that such a decision was wrong or inadequately supported by the written Reasons because those kinds of arguments can only be raised in the context of an appeal or reconsideration application and the claimant is out of options in that respect. As Employment Judge Hutchinson’s judgment has not been set aside, I have to treat it as valid and correct.
74. I shall now deal with particular arguments the claimant has put forward in opposition to applications 1 & 2.
75. The main argument put forward in the claimant’s written submissions for the present hearing is to the effect that Employment Judge Hutchinson’s decision was wrong. As I did explain a number of times to the claimant during the hearing, and as explained above, even if he persuaded me that it was (and I should make clear that he has not

done so), that would not help him, because I have no power to set aside another Employment Judge's decision.⁷

76. The claimant also relies on the principle that fraud unravels all. That is not an unqualified principle and – see paragraph 63.1 above – it does not give me the power to set aside other judges' decisions. Further, if I did have that power, I would only exercise it if I thought Employment Judge Hutchinson's decision had been procured by fraud, i.e. if there were a causal link between the fraud and that decision. In any event, what the claimant calls fraud – and I questioned him closely about this during his oral submissions – is not so; far from it.
77. The first thing the claimant labels as fraud is the contents of the response form in the first claim. This is on the basis that he believes it contains "*lies*". In his written submissions for the present hearing, he attributes these supposed lies not so much to the respondent as to the individual solicitor then conducting the case for the respondent. Before me, he made a suggestion along the lines that solicitors have a duty to check if their clients are lying or telling the truth and to refuse to act if they are lying. He has also suggested that the respondents' solicitors' professional duties extended to prohibiting them from making applications 1 & 2, because of the alleged fraud.
78. The claimant is wrong about virtually all of this.
- 78.1 This is not the place for a detailed explanation of legal professionals' conduct rules. Suffice it to say that: solicitors act on their clients' instructions and are under no duty to ensure that their clients are telling them the truth, let alone to refuse to act if they think their clients may not be telling them the truth; even if the claimant's fraud arguments had some merit, there would be nothing improper about the respondent's solicitors making applications 1 & 2.
- 78.2 The fact that the claimant disagrees with the version of events set out in the response does not mean there have been lies, still less fraud. Almost all Tribunal claims involve disputes of fact. At any final hearing, the Tribunal will resolve the relevant ones. When it does so, more often than not it does not decide that one side is lying and the other side is telling the truth. Instead, it takes into account the imperfections in human memory, and the impossibility in almost all cases of knowing for certain what occurred, and makes a decision that one side's evidence is more likely to be true than the other side's and/or that on the balance of probabilities one side's witnesses have remembered things accurately and the other side's witnesses have misremembered them.
- 78.3 Although I have not looked at this in detail, what the claimant has put forward to prove there are significant inaccuracies in the response [in the first claim] does not self-evidently do so.
- 78.4 It is highly unlikely that any inaccuracies in the response had any impact at all on Employment Judge Hutchinson's decision; and I am not satisfied that they

⁷ Except when appointed to deal with a reconsideration by the President, Vice President or a Regional Employment Judge pursuant to rule 72(3), which is not applicable here.

did. His decision was based on the medical evidence and the claimant's impact statement and oral evidence, not on allegations of fact made in the response.

79. The second and final thing labelled fraud is the contents of respondent's counsel's written submissions for the 11 June 2020 hearing. The gist of the claimant's argument is that they selectively quote from a document in the bundle and that what counsel should have done was to highlight other parts of that document and a part of another document (also in the bundle) that he believes helped his case. He confirmed in his oral submissions that he was making this allegation in relation to the following parts of counsel's submissions only:

79.1 in paragraph 9 of those submissions, counsel did not quote the sentence beginning "*I explained to Mr Ennis*" and ending "*or to treat it*" and the paragraph beginning "*In the meantime, Mr Ennis*", both from the third page of the occupational health report dated 11 April 2019, from Dr Brennan;

79.2 counsel did not highlight anywhere in his submissions the following, from an occupational health referral form (not a medical report) sent on 13 June 2019: "*In the last medical report, we were advised that Peter's hernia could become strangulated, which is very dangerous*". It is unclear whether the claimant alleges that the sentence coming immediately after that – "*Peter has advised this is not the case*" – should also have been highlighted.

80. The argument is misconceived and the claimant's reliance on it is misplaced. This would be so even if I thought there was anything untoward in counsel's submissions, which I don't.

80.1 If counsel had attempted to pull the wool over Employment Judge Hutchinson's eyes to obtain an advantage for the respondent, as is alleged, this would at worst be a breach of rule 2 and potentially professional misconduct; it would not be fraud.

80.2 Employment Judge Hutchinson and counsel could reasonably have expected the claimant to have highlighted in his own written and oral submissions, and potentially in his impact statement, the particular parts of the evidence he relied on (which, so far as concerns the two documents this argument relates to, the claimant had had since December 2019 at the latest). In particular, given that the claimant in his written submissions commented on respondent's counsel's submissions paragraph by paragraph, the Judge was entitled to assume that if, for example, the claimant felt there were important omissions in paragraph 9 of counsel's submissions, he would say so in his own submissions.

80.3 Given what was and was not in the claimant's submissions and impact statement, I don't see how counsel could be expected to know or guess that the claimant thought the risk of hernia strangulation was significant in relation to the disability issue. This is particularly so given the evidence from the occupational health referral sent on 13 June 2019 that the claimant had said it was not the case that his "*hernia could become strangulated which is very dangerous*". Still less do I think counsel could reasonably be expected to know or guess that the claimant thought the part of the occupational health referral

which included him having said this helped his case and undermined the respondent's.

80.4 Respondent's counsel was entitled to assume that Employment Judge Hutchinson had read the medical evidence and certainly that he would have read the whole of the reports mentioned in counsel's submissions, not just the parts of them quoted in submissions.

80.5 I make that assumption. Having made it, I think it rather improbable that counsel not quoting and highlighting in his written submissions the parts of the medical evidence and the small part of the occupational health referral that it is said he should have quoted and highlighted affected Employment Judge Hutchinson's substantive decision.

80.6 This is a very long way away from being a case where a litigant in person is obviously struggling to explain a point to the Employment Judge, or to locate something in the evidence, and where counsel on the other side stays silent despite being able to help; or where counsel fails to draw to the Employment Judge's attention an important document the Judge would probably not otherwise notice, tucked away in an obscure corner of a large hearing bundle, that counsel ought to know helps the unrepresented person on the other side; or anything like that.

81. Another thing the claimant is, or may be, relying on to resist applications 1 & 2 is the existence of new evidence.

82. I have just used the phrase "*may be*" because the gist of the relevant part of his oral submissions was that the evidence before the Tribunal on 11 June 2020 was more than adequate to prove his case; that Employment Judge Hutchinson should on that evidence have found in his favour but did not do so due to what he referred to as "*untoward circumstances*" (unspecified); and that more evidence would have made no difference because Employment Judge Hutchinson was set against him.

83. If and in so far as 'new evidence' is a part of his defence to the respondent's applications 1 & 2, the new evidence is:

83.1 the report of a CT scan performed on 29 March 2021. The significance of this, the claimant says, is that it shows how large the divarication is;

83.2 a letter from a GP, Dr Wiesemann, dated 28 July 2022 enclosing a physiotherapist's letter dated 19 July 2022. Dr Wiesemann states that the claimant "*is suffering from significant divarication of the recti and also from a small umbilical hernia. This is causing him considerable abdominal pains, especially when doing any manual work. For further specifics, please see [the physiotherapist's letter] ... Of note is that because of his hernia, it is advisable not to do any physical work because of the risk of strangulation.*" The physiotherapist's, Mr Kelly's, letter, which apparently followed a self-referral by the claimant, states, amongst other things, that, "*His divarication is having a significant impact on the quality of his life, affecting normal everyday tasks such as walking, getting out of chairs and it has led to him being unable to work.*"

84. These pieces of evidence do not assist the claimant so far as these applications are concerned.
- 84.1 As already explained, absent a successful appeal or reconsideration application, the claimant may not go behind the decision on disability relating to the hernia.
- 84.2 The CT scan report says nothing about the effect of the divarication on his ability to carry out day to day activities.
- 84.3 The GP's and physiotherapist's letters post-date the hearing before Employment Judge Hutchinson by more than two years, say nothing about the claimant's state of health in June 2020 and before, and comparing the description of the state of his health in the two letters of July 2022 with the description in the evidence that was before Employment Judge Hutchinson, there would seem to have been a significant deterioration. In particular, it was not the claimant's position in and before June 2020 that he was unable to work; instead it was that he could work if adjustments were made.
- 84.4 Dr Wiesemann does not express a view as to which symptoms stemmed from the hernia and which from the divarication. He explicitly identifies the hernia as being the thing that prevents the claimant from doing any physical work. Although Mr Kelly does suggest that the divarication is causing significant effects on day-to-day activities, it is not clear to me (without wishing to disrespect his expertise and professionalism) how qualified he is to express a view on causation, nor whether he is actually expressing his professional view on the cause of the claimant's difficulties as opposed to reflecting the claimant's views on this.
- 84.5 The claimant's case as to why he could not with reasonable diligence have presented similar evidence to the Tribunal in June 2020 is opaque. My understanding of his position is that he blames his GP, whose surgery was or had been in special measures. He also points out that from March 2020 onwards the pandemic limited everyone's ability to access their GPs. However, claim 1 began life in May 2019. Prior to that, there had been discussions about his health between him and the respondent from at least September 2018. The divarication had been identified in 2017. To the best of my knowledge he has not suggested that at any relevant stage he asked for relevant evidence from his GP and his GP failed or refused to provide it. He did not apply to the Tribunal prior to the 11 June 2020 hearing for a postponement on that or any other basis. Employment Judge Hutchinson's decision records (in paragraph 23 of the Reasons) the claimant's GP writing in September 2019 that he had not been seen in their surgery for some time and (in paragraph 33 of the Reasons) that the claimant had not sought any advice or treatment from his GP "*in the 3 years since he discovered the hernia*". In addition, it appears that the claimant self-referred to physiotherapy in 2022 and he has not explained why he did not do the same between late 2018 and mid 2020. In the circumstances, I am not satisfied that if and in so far as the claimant's condition was in June 2020 similar to how it is recorded in the GP's and physiotherapist's letters of July 2022, that

he could not with reasonable diligence have obtained something similar before the 11 June 2020 hearing.

84.6 More fundamentally:

84.6.1 as above, the claimant did not argue before Employment Judge Hutchinson that the divarication was a disability, and this was not, even on his own case, on the basis that he lacked the evidence to do so. He can't in those circumstances rely on this new evidence as a reason for allowing him to argue that point in relation to claim 3, for the first time. Alternatively (also as above), if he did argue the point, it is res judicata and the relevant judgment has not been set aside;

84.6.2 it was for him to prove his case on the disability issue at the hearing on 11 June 2020. He lost on the point. He has no right to come back later with more evidence for a 'second bite of the cherry'. See paragraph 63.3 above.

Applications 1 & 2 – summary & conclusions

85. The res judicata and the principle from Henderson v Henderson apply to the disability discrimination part of the third claim. It would be an abuse of process for any complaints of disability discrimination to continue. Those complaints therefore have no reasonable prospects of success. In the circumstances I can see no reason, let alone a good one, why they should not be struck out pursuant to rule 37 and I therefore do so.

Application 3

86. Application 3 is the application to strike out the third claim under rule 37 on the basis that it is scandalous and vexatious and/or on the basis that the claimant's conduct has been scandalous, vexatious and/or unreasonable.

87. In terms of the law, I simply adopt the summary set out in the respondent's written submissions dated 17 October 2022. In oral submissions, Mr Bownes for the respondent confirmed:

87.1 he accepted that, absent exceptional circumstances, a claim should not be struck out if a fair trial remains possible;

87.2 the respondent was not arguing that such exceptional circumstances applied.

88. It is not right to characterise the third claim itself as scandalous or vexatious; certainly not the unfair dismissal part of it. When it was presented to the Tribunal, the claimant was appealing and was applying for reconsideration of Employment Judge Hutchinson's decision. Although some of the language the claimant used when challenging that decision has been inappropriate, the claimant had a perfect right to do this and to bring the claim on the basis that he was challenging it. He has now exhausted his appeal and reconsideration options, and with that lost the ability to challenge it, but this only impacts on the disability discrimination complaints and makes only them an abuse of process – and they have accordingly been struck out; it does not affect the unfair dismissal claim.

89. There is nothing improper about the unfair dismissal complaint. It was not brought in order to harass the respondent or to challenge Employment Judge Hutchinson's decision – it was brought because the respondent dismissed the claimant on 30 June 2020. The respondent is not suggesting it has little or no reasonable prospects. It seems to be common ground that the claimant was dismissed in the following circumstances: following Employment Judge Hutchinson's decision, the claimant was asked to return to work in his contractual role without any adjustments in place; his position was that he could not do so; without obtaining further occupational health or other medical evidence, he was dismissed for incapability; at the time of his dismissal, the most up to date occupational health evidence came in a report of 30 January 2020. I could not and do not express a view as to how likely the claimant is to win on unfair dismissal, but on any reasonable view, it is arguable that the respondent should have got more up to date medical evidence before dismissing, and that the respondent should not have treated the question of whether the claimant had a disability as determinative of whether to make adjustments to facilitate a return to work. A duty to act reasonably towards employees who are potentially facing dismissal for incapability, and to consider alternatives to dismissal, exists in relation to all employees, not just those with disabilities.
90. Were I to strike out the unfair dismissal complaint as well as the disability discrimination complaints, then, I would be striking out a complaint with at least some reasonable prospects of success.
91. Nevertheless, I agree with the respondent that the claimant has been guilty of unreasonable conduct and, subject to the question of whether a fair trial remains possible, there are grounds for striking out what is left of the third claim under rule 37(1)(b).
- 91.1 The claimant has made and continues to make baseless allegations of fraud and dishonesty against the respondent and individual members of its legal team – see (e.g.) paragraphs 77 to 80 above.
- 91.2 The claimant has made and continues to make baseless allegations of professional misconduct against the respondent's solicitors as a firm and as individuals. See, for example, what is described at the start of paragraph 72 of the respondent's written submissions of 17 October 2022, to which the claimant has responded at paragraphs 48 to 50 of his own written submissions. What happened was: the claimant accused the respondent of making unfounded and deceitful allegations in correspondence to the Tribunal; far from being unfounded allegations, they were allegations that the claimant had written certain things in correspondence which he had in fact written; the entire correspondence was provided to the Tribunal so that the accuracy of the allegations could be ascertained by the Tribunal; in paragraphs 48 to 50 of his own written submissions, he suggested that what was written in paragraph 72 of the respondent's written submissions of 17 October 2022 was itself false and that the relevant correspondence hadn't been provided to the Tribunal; this was untrue, demonstrably so; at the hearing before me, the claimant disingenuously insisted he had not meant to suggest that the correspondence had not been provided.

- 91.3 The claimant has threatened and/or has said he has reported individuals within the respondent's solicitors to the SRA simply – so far as I can tell – for acting for the respondent in relation to claims 1 and 2 and continuing to act for the respondent in claim 3, including in particular making and continuing to pursue the applications being dealt with in this decision. See for example the emails appearing on the following pages of the hearing bundles: 298, 307, S2-S3 & S5-S6. This included, on 11 October 2022, trying to use the threat of SRA referrals as leverage to persuade the respondent's solicitors to withdraw the applications.
- 91.4 It was obvious from the correspondence and became even more so during this hearing that the claimant wishes to use the third claim as a vehicle for attacking Employment Judge Hutchinson's decision and replaying the first claim. This is clearly expressed in, amongst other places, the claimant's email to the respondent's solicitors of 12 July 2022, in which he stated: "*What ever happens going forward the Tribunal cannot conclude my dismissal was fair without going over my assertions that both the respondent and their legal advisors misled the Tribunal. That involves revisiting the first claim and the medical evidence, even if the disability element is thrown out.*"
- 91.5 The volume and nature of the claimant's correspondence means the respondent's solicitors are having to spend a disproportionate amount of their time responding to and dealing with it and, generally, dealing with these proceedings. This presumably means the respondent is having to expend a disproportionate amount on legal costs.
92. The difficulty I have with the third application is twofold:
- 92.1 It would be disproportionate to strike out the unfair dismissal complaint given its potential merits unless a fair trial were no longer possible.
- 92.2 A fair trial is possible.
93. The basis of the respondent's argument that a fair trial is no longer possible boils down to an understandable fear that the claimant will continue to behave unreasonably and in particular will do his best to drag the first claim into the third claim, including his assertions that the respondent and its legal advisors misled the Tribunal. However, it seems to me to be wrong in principle to decide this kind of strike out application on the basis that the claimant may in the future behave in a way that will make a fair trial impossible. Moreover, however hard the claimant tries, he is not going to be permitted to raise in relation to the third claim his allegations that the respondent and its legal advisors misled the Tribunal during the first claim, nor replay the first claim. And he is right, at least to some extent, that the Tribunal will not be able to decide on the fairness of dismissal without considering medical evidence that was relied on at the hearing on 11 June 2020. The respondent had a duty in relation to dismissal to consider all the relevant medical evidence that was available to it. Employment Judge Hutchinson's decision would naturally be a big part of the picture, and it would have been unreasonable for the respondent not to have accepted it, but it was not the entire picture. Employment Judge Hutchinson was deciding whether or not the claimant had a disability on the basis of the evidence put

before him, not whether it would be reasonable to require the claimant to come back to work without any adjustments in place, nor whether it would be reasonable for the respondent to obtain further occupational health evidence.

94. Accordingly, I reject the respondent's application 3 and decline to strike out the unfair dismissal complaint.

Employment Judge Camp
13 November 2022