



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr George Ferguson-Haizel

**Respondent:** Tesco Stores Ltd

**Heard at:** Watford CVP                      **On:** 17<sup>th</sup> September 2021

**Before:** Employment Judge A Frazer

**Representation:**

Claimant:  
In person

Respondent:  
Ms C Goodman  
of Counsel

## RESERVED JUDGMENT

1. The Claimant's claims for whistleblowing (detriment), victimisation (detriment), unpaid wages and holiday pay cannot proceed because of the operation of rule 52 and *res judicata*.
2. The Claimant's claims in respect of his dismissal shall proceed. These are his direct race discrimination claim under paragraph 23 of his grounds of complaint; his claim for whistleblowing unfair dismissal (s.103A ERA 1996) and any claim for victimisation (dismissal) under s.27 Equality Act 2010.

## REASONS

### Introduction

1. This case was listed for a preliminary hearing via CVP to determine whether, upon the Respondent's application, the claim should be struck out or a deposit ordered on the basis that it either had no or little reasonable prospect of

success. The application was presented on the basis that the Claimant's claim was subject to the doctrine of *res judicata* or was otherwise an abuse of process further to the principle as set out in **Henderson v Henderson (1843) All ER 378**.

2. While I was requested by counsel to consider the application to strike out on the merits, owing to the time constraints and the fact that the focus of the application had been on the issue of *res judicata*/abuse of process I confined my decision to this issue. I indicated to both parties however that once there had been a decision as to what claim(s) were going forward it would be clear whether whatever was left ought properly be subject to an application to strike out/deposit on the prospects of success.
3. I received a hearing bundle running to 429 pages from Mr Ferguson-Haizel and a hearing bundle running to 89 pages from the Respondent. I was provided with a skeleton argument from Mr Ferguson-Haizel and one from Ms Goodman. The case was listed for three hours on CVP but unfortunately there were technical difficulties for the first hour which meant that the hearing could only take place over two hours. I was still able to hear full submissions. I then reserved my decision.
4. The claim for ordinary unfair dismissal was not subject to the *res judicata* argument advanced by the Respondent.

## Background

5. The Claimant was employed as a Customer Assistant working four hours a week at the Respondent's Colney Express Store between 28<sup>th</sup> November 2010 and 17<sup>th</sup> August 2020. He was dismissed summarily on 17<sup>th</sup> August 2020.
6. There are two claims which have been the subject of the parties' submissions in this application. '*Claim One*' has claim number 3307908/2020 and '*Claim Two*' is number 3313501/2020.
7. The history and details of '*Claim One*' are as follows. The Claimant put in an early conciliation notification on 5<sup>th</sup> June 2020 and the EC certificate was issued by ACAS on 5<sup>th</sup> July 2020. The claim form was presented on 13<sup>th</sup> August 2020.
8. The Claimant declared that his employment was continuing. Under Box 8 he claimed age, race and sex discrimination and holiday pay and arrears of pay. The particulars of his claim were as follows:

### *'Race discrimination*

*It is illegal to discriminate against a person because of a protected characteristic.*

*On 18/05/2020 I was suspended from work for failing to proceed with investigatory without a Usdaw union representation. ?Concerns are very high*

*among BAME staffs and we should not be surprised given the awful situation happened on 18/05/2020 to a member of staff from a BAME background.*

*People with protected characteristic can often experience discrimination based on their identity, such as their age or gender. This may have a negative impact on health and wellbeing. This can result in poorer health outcomes and further health inequalities.*

*Employees from all age groups are entitled to union representation when affected with any problems at work. Their support for a union representation has been unsatisfactory. At the time they should have, I was badly affected by their conduct. There were fears that I wanted to run away. It was clear that they did not show any sign of back up for my claim for a union representation.'*

9. Under Box 9.2 the Claimant sought 'mandatory compensation, returned back to my regular place of work and to receive the right minimum wage and holiday entitlements'. Under Box 15 ('Additional Information') he wrote:

*'I am shocked that the investigation into my grievance was flipped and I then became the subject of an investigation, rather than the people being complained about.*

*Tesco has responsibility to ensure its obligation under the Equality Act 2010 in ensuring that people with a protected characteristic do not experience disadvantage at workplace.*

*All managers have a responsibility for ensuring the safety and wellbeing of those they are managing. The role of an investigator is about someone who actually it is to a person from a BAME background and who knows what it entails in the day to day life and working life within Tesco. This role needs a leader, clear direction, desire to be part of changes around inequalities and having someone who truly believes in what they say and can push forward as a collective with the rest of the BAME network.*

*There's clear evidence of inequality, prejudice and lack of diversity with regards to employment within Tesco – Negative views around equality and diversity. Given the above I believe I've been subject to discrimination. I am not afraid to speak out on issues. This is clearly evident in the case of Chontay Marie Nathan, former Tesco employee who worked in the Gallions Reach branch in Beckton after reporting incidents of racial abuse of black colleagues is set to take legal action against the company.*

*However, I will choose in this instance, I truly believe that this role is not about who can write the best or who can say what is expected but may not necessarily mean. The current Black Lives Matter movement and concerns flagged around employment vulnerability associated with BAME has magnified more than ever the need for change across all employment sector. I believe we have once in lifetime opportunity to move the debate we have had for decades to challenge and dismantle the existing status quo. This role also required a certain level of lived experience, resilience and ultimately thick skin and an ability to take a*

*position some negative scenarios faced by people of colour both within our day to day lives and within Tesco and this I believe gives me a better understanding of the challenges ahead.*

*I have always known I was different whether by virtue of my colour, gender or ethnic background highlighted by someone or some behaviour towards me.'*

10. While the Claimant did not expressly claim whistleblowing detriment the claim appeared to be within his contemplation when he referred to his 'grievance being flipped'. Essentially he was complaining that he had disclosed bullying by colleagues to the Respondent's protectorline and that after he had complained he became the subject of an investigation himself instead. To this broad extent – and only for the purposes of this application - I shall read into this complaint a claim for whistleblowing detriment under s.47B ERA 1996 and victimisation detriment under s.27 Equality Act 2010. I have some doubts that those claims were sufficiently clear as pleaded but they may have been expanded upon a direction for the provision of further information had Claim One proceeded to a hearing.
11. On 7<sup>th</sup> September 2020 the claim was served by the Tribunal staff on the Respondent. By email of the same date the Claimant wrote to the Tribunal discontinuing his claim and confirming that he had served the email on the parties. On 21<sup>st</sup> September 2020 the Respondent wrote to the Tribunal. It stated that while it had received the Notice of Claim and was required to serve a response by 5<sup>th</sup> October, it had also received the Claimant's notice of discontinuance dated 7<sup>th</sup> September. The Respondent requested a rule 52 judgment be entered and that the Tribunal write to the parties to confirm that no Response would be required to be entered in the circumstances. In any event and not having heard from the Tribunal/ the rule 52 judgment not having been entered, the Respondent did in fact enter a response on 4<sup>th</sup> October 2020 in order to protect its position.
12. In its Response the Respondent stated that on 10<sup>th</sup> August 2019 four colleagues of the Claimant had made a complaint against him, alleging that he had made disrespectful and derogatory comments and had displayed disrespectful behaviour towards them, in particular regarding their nationalities and immigration status. The Response went on to say that the Claimant had been invited to four separate investigation meetings but they had not gone ahead owing to disruption by him. He was then invited to a meeting in May 2020 and on that occasion he did not attend. The Respondent therefore suspended him and invited him to a disciplinary hearing. The Respondent suspended him from work on 18<sup>th</sup> May for refusing to attend an investigation meeting, not informing the Respondent that he needed assistance arranging a trade union representative and unreasonable behaviour. On 20<sup>th</sup> May the Claimant raised a protector line complaint and complained that he had been subject to victimisation and discrimination by colleagues. The Claimant was then invited to a meeting on 6<sup>th</sup> July to discuss his complaint and the complaints made by the colleagues. There were then further investigation meetings. It was stated that the Respondent decided to refer the matter to a disciplinary hearing on 17<sup>th</sup> August at which the Claimant was dismissed summarily for gross misconduct.

It was stated that the appeal was raised on 28<sup>th</sup> August 2020 and that the Respondent was in the process of carrying out the dismissal appeal process and the Claimant's grievance. The Respondent denied the Claimant's claims in their entirety and defended its position as to the dismissal insofar as it was alleged to be discriminatory.

13. On 19<sup>th</sup> October 2020 EJ Lewis dismissed the claim upon withdrawal under Rule 52. The judgment was sent to the parties on 8<sup>th</sup> November 2020.
14. On 21<sup>st</sup> November 2020 the Claimant wrote to the Tribunal requesting reconsideration of that judgment. He said that he had withdrawn his claim upon advice from his union representative but now believed that he had been negligently advised.
15. On 31<sup>st</sup> December 2020 the Tribunal wrote to the parties stating that EJ Lewis had refused the reconsideration application: there was no prospect of the original decision being varied as the Claimant could not change a written withdrawal.
16. I now come to the facts surrounding 'Claim No.2' which is case number 3313501/2020. There was an early conciliation notification submitted on 10<sup>th</sup> September 2020 and the EC certificate was issued on 10<sup>th</sup> October 2020. The claim form was received by the Tribunal on 13<sup>th</sup> November 2020. In this claim form the Claimant stated that his dates of employment were from 28<sup>th</sup> November 2010 to 17<sup>th</sup> August 2020. At Box 8 he claimed unfair dismissal, race discrimination, holiday pay and arrears of pay. He provided a separate sheet entitled 'basis of claim'. The particulars of unfair dismissal appeared to be claims for both ordinary unfair dismissal (s.98 ERA 1996) and automatically unfair dismissal (s.103A ERA 1996).
17. The essence of the race discrimination complaint was that the Claimant had been discriminated for complaining about the bullying that he had been subjected to. He stated that the complaints about him were made up by the colleagues. At paragraph 22 the Claimant complained that his complaint to Protectorline had not been resolved and that this was race discrimination. At paragraph 23 he stated:
 

*'It is submitted that Tesco's decision to summarily dismiss me based on uncorroborated (the allegations are from the same source) allegations of friends from the same ethnic background, and without considering alternative sanctions was due to my race. It is submitted that a person of White or Asian background would have received a better treatment from Tesco management and a different sanction other than summary dismissal would have been considered. This is based on the fact that the allegations are uncorroborated, investigations flawed and took approximately one year and there are other sanctions that could have been considered by Tesco management to mitigate the foregoing issues.'*
18. In respect of his pay claim at paragraph 24 the Claimant said, 'since joining Tesco on 28<sup>th</sup> November 2010 there have been problems with my pay. I have

evidence to support the fact that I have not been paid properly and that the problem continued throughout my employment.'

19. The claim was served on 3<sup>rd</sup> December 2020. The Response was entered on 21<sup>st</sup> December 2020. The Respondent also made an application for striking out of the Claimant's claims. It was stated: 'It is the Respondent's position that the Claimant is barred from pursuing claims for race discrimination (save insofar as the dismissal itself is now relied on as an act of discrimination), holiday pay and arrears of pay under the Second Claim and these parts of the Second Claim should be struck out. The claim for unfair dismissal may proceed and does not form part of the Respondent's application.'

## The Law

20. Rule 52 of the Employment Tribunal's Rules of Procedure states as follows:

*'Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless –*

- (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or*
- (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.'*

21. The rule in **Henderson v Henderson** provides that 'the Court requires the parties to that litigation to bring forward the whole of their case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter that might have been brought forward as part of the subject in contest but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case.'
22. In **Virgin Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46** at paragraph 17 Sumption LJ described the term '*res judicata*' as a '*portmanteau term which is used to describe a number of different legal principles with different juridical origins*'. He stated that once a cause of action had been held to exist or not to exist, that outcome may not be challenged in subsequent proceedings (cause of action estoppel).
23. In **Johnson v Gore Wood and Co (a firm) [2001] 1 All ER 481** the House of Lords found that a subsequent action does not automatically amount to an abuse of process where an issue could have been raised before but was not. Instead the court should make a broad, merits based judgment that takes into account all of the facts of the case and focuses on whether, in all of the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it an issue that could have been raised before.

## Submissions

24. On behalf of the Respondent Ms Goodman submitted that the Claimant's claims for race discrimination, holiday pay and arrears of pay were subject to cause of action estoppel as they were the same or substantially the same as those brought in the first claim. He did not in effect protect his position by indicating to the Tribunal, when he withdrew his claim, that he wished to litigate the issues which he now pursues in his second claim. His claims for whistleblowing and victimisation, to the extent that they are pleaded, are estopped in accordance with rule 52 as they are substantially the same as those brought in the first claim. Ms Goodman stated that even the race discrimination claim brought on the basis of the dismissal was an abuse of process. The Claimant had had an opportunity to present this claim by form or amendment prior to the dismissal judgment having been entered on 8<sup>th</sup> November. The Claimant was to have put forward the whole of his case and did not. She submitted that the Respondent had been unjustly harassed as it had had to instruct lawyers to defend the second claim and it had the right to expect some finality in the litigation.
25. On his own behalf Mr Ferguson-Haizel submitted that the appeal process ended on 12<sup>th</sup> October 2020, which post-dated his application for withdrawal. He had only withdrawn his claim based on negligent advice. He said that he submitted the first claim because he had been suspended because he had requested the assistance of a union representative. The first and second claims had different bases of claim. The whistleblowing claim was of significance as it had a public interest implications since all of the staff in the shop were affected by people who were related working on the same shift. The application to strike out for an abuse of process was an extension of the Respondent's harassment of him. The Tribunal should have regard to the merits of the claim.
26. I queried the holiday pay and unpaid wages claims with Mr Ferguson-Haizel as there were no particulars. He said that throughout his employment the hourly rate was wrong. He said that he complained but that nothing was done. I asked him what the difference was between the first and second complaint and he said that the second claim was different because at that time he was not employed. He said that his claim for holiday pay was on the basis that he had not been allocated the correct holiday entitlement. He had only been given 4 days and ought to have been given 9.

## Findings

27. At the time that he withdrew his claim on 9<sup>th</sup> September 2020 Mr Ferguson-Haizel did not express a wish to reserve his right to bring a further claim pursuant to rule 52(a). I find that the claims for holiday pay and unpaid wages were substantially the same complaints as were raised in the second claim as they dealt with a general complaint of not having been paid the right wages or given the right holiday entitlement over the course of his employment. It makes no difference whether those claims are brought while he is in or out of

employment. Those claims cannot continue under the principle of cause of action estoppel. They have already been dismissed under Rule 52.

28. The Claimant had not expressly complained of whistleblowing detriment or victimisation pursuant to s.27 Equality Act 2010. However, his complaint in Claim One was that he had become the subject of an investigation and this complaint could be construed as a whistleblowing or victimisation detriment claim. These claims cannot proceed under the principle of cause of action estoppel.
29. To the extent that he is bringing any detriment claim on the basis of action taken towards him short of dismissal and while still in employment I find that this would be substantially the same complaint as his detriment claims in 'Claim One'. He is therefore estopped from bringing any such complaint. He presented his claim form on 13<sup>th</sup> August 2020 which was shortly before his summary dismissal. It would have been open to him to bring any claim for action short of dismissal at that juncture.
30. However the Claim Two complaints are broadly concerned with dismissal and in my finding the complaint at paragraph 23 is a different complaint to the detriment claim that he made in Claim One. It appears to be a direct discrimination complaint about the choice of sanction applied by the Respondent in respect of his conduct. In Claim One the Claimant had complained that he wanted the suspension to be lifted so that he could return to work: that was the remedy he sought. In Claim two he was complaining that he was dismissed when the Respondent would have applied a lesser sanction to a white comparator. That was a different complaint.
31. **In Abernethy v Mott, Hay and Anderson [1974] ICR 323** Cairns LJ said: '*a reason for the dismissal of an employee is a set of facts known to the employer it may be beliefs held by him, which cause him to dismiss the employee*'. Considerations going to the reason for dismissal are not the same as those going to the decision to suspend or to the choice to investigate. They may end up being the same on a finding of fact but the question calls for different considerations such as why the Respondent chose dismissal and not some lesser sanction.
32. I do not consider that the Claimant would be misusing the process of the court in bringing any complaint concerning his dismissal, nor would it be contrary to the requirement for him to reserve his right under rule 52(a). It is a different complaint. I find that paragraph 23 of Claim Two shall proceed as a direct race discrimination complaint concerning his dismissal.
33. I also take into account that Mr Ferguson-Haizel applied for a reconsideration promptly when he realised that he had withdrawn on negligent advice. I do not find that it would have been incumbent on him to express a wish to reserve his right to bring a dismissal claim when withdrawing as he was withdrawing in relation to his suspension and the decision to investigate. For him to have articulated his right to reserve in this way would mean he might be



considering Claim Two as substantially the same complaint, which I find it is not. Claim Two is a complaint about the decision to dismiss.

34. Accordingly I find that any complaint which relates to dismissal can go ahead. That includes the claim for direct race discrimination as per paragraph 23 of the Grounds of Complaint, s.103A ERA 1996 and s.27 insofar as it relates to dismissal. The Respondent has not argued that rule 52 should apply to the claim for ordinary unfair dismissal.
35. The complaints of unpaid wages and holiday pay cannot proceed owing to the principle of *res judicata* and rule 52. These are substantially the same complaints as between Claims One and two. The Claimant ought to have expressed a wish to reserve his right in respect of those complaints at the time of lodging his notice of withdrawal and he did not.
36. Further, any complaints relating to detriment (action short of dismissal) which appear in Claim Two would have been reasonably open to the Claimant to bring by way of Claim One when he presented his claim form on 13<sup>th</sup> August, just four days prior to his dismissal. They are therefore caught by the principle of cause of action estoppel.

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Employment Judge A Frazer  
Dated: 20<sup>th</sup> September 2021

JUDGMENT REASONS SENT TO THE PARTIES ON  
15<sup>th</sup> October 2021

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THY

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FOR THE SECRETARY OF EMPLOYMENT  
TRIBUNALS