EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms I Cetin	**v**	**1. Melanie Mareuge-Lejeune** **2. Stephen Derwent Griffiths**

Heard at: **Central London Employment Tribunal (By CVP videolink)**

On: **10 June 2021**

Before: **Employment Judge Brown**

Appearances:
For the Claimant: **In Person**
For the Respondents: **Mr P Wilson, Counsel**

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. **The Tribunal does not have jurisdiction to hear the Claimant's complaint of breach of contract because it is barred by issue estoppel;**

2. **Applying the rule in Henderson v Henderson, the Claimant should, in her first claim, have raised her complaints of unfair dismissal, failure to provide pay statements, failure to provide particulars of her employment, breach of contract and race discrimination in relation to acts done during her employment from 4 December 2017 until 2 May 2018. Her doing so in this claim constitutes an abuse of process, so these claims are struck out;**

3. **In any event, the unfair dismissal, failure to provide pay statements, failure to provide particulars of her employment and breach of contract claims and race discrimination in relation to acts done during her employment from 4 December 2017 until 2 May 2018 were presented out of time. Time is not extended for them. The Tribunal has no jurisdiction to consider them.**

4.The Claimant does not have the requisite service to bring a complaint of unfair dismissal. There was no complaint of auto unfair dismissal. The claim of unfair dismissal is dismissed.

5.The Claimant's complaints of race discrimination, victimization and race harassment, in relation post employment obtaining references are barred by judicial proceedings immunity. Further, the Tribunal does not have jurisdiction to consider them because they were presented out and are out of time and it is not just and equitable to extend time for them. They are struck out.

6.The Claimant's complaints of victimization, race harassment and protected disclosure detriment in relation to the Respondents' involvement in other family court proceedings are barred by judicial proceedings immunity. They are struck out;

7.The Claimant's complaints in relation to the Respondents' conduct of her first claim 2204788/2018 barred by judicial proceedings immunity;

8.The Claimant's complaints of the Respondents negatively influencing her previous nanny employer, relied on as race discrimination, post employment harassment, and protected disclosure detriment, are struck out because they have no reasonable prospects of success

9.The Claimant's complaints of race discrimination, race harassment, victimisation and protected disclosure detriment regarding the Respondents reporting the Claimant to the police were either presented in time, or it was not reasonably practicable for them to be presented in time and they were presented within a reasonable time thereafter, or it is just and equitable to extend time for them.

10. The Claimant's complaints of race discrimination, race harassment, victimisation and protected disclosure detriment regarding the Respondents reporting the Claimant to the police are not struck out, nor made subject to a deposit order.

11. All the Claimant's claims are therefore struck out EXCEPT her complaints of race discrimination, race harassment, victimisation and protected disclosure detriment regarding the Respondents reporting the Claimant to the police.

REASONS

This Hearing

1. This Open Preliminary Hearing was listed to consider:

   1.1. Whether the matters complained of by the Claimant in this claim were brought in a previous claim (case number 2204788/2018 – "the first claim") and, therefore, the Tribunal does not have jurisdiction to hear them again (issue estoppel);
   1.2. In the alternative, (applying the rule in Henderson v Henderson) the Claimant should have raised all of the complaints she now brings in the

first claim and cannot do so in the current claim/and or her doing so constitutes an abuse of process;

1.3. Whether the claims in the current claim (presented in an ET1 on 21 January 2020) are out of time (sections 111(2) Employment Rights Act 1996 and 123 Equality Act 2010) and, if so, whether the Tribunal should exercise its discretion to allow those claims to be brought outside the relevant time limit;

1.4. Whether the Tribunal has jurisdiction to hear the claim for constructive unfair dismissal, given that the claimant did not have 2 years' continuous service;

1.5. The Respondents' application to strike out all the claims on the grounds that they are vexatious or have no reasonable prospect of success (rule 37 of the Tribunal Procedure Rules 2013) or if not;

1.6. Whether the claims (or any one of them) has little reasonable prospect of success and the claimant should be required to pay a deposit (not exceeding £1000) as a condition of continuing with that claim/those claims (rule 39 Tribunal Procedure Rules 2013)

2. There was a bundle of documents for this Open Preliminary Hearing ("Bundle 2"), and a previous bundle from an earlier Preliminary Hearing (Bundle 1"). Page references in these reasons are to pages in those Bundles 1 and 2 as appropriate.

3. The Claimant submitted a witness statement, which I read. At a Case Management Preliminary Hearing in this case on 29 June 2020, EJ Henderson had originally listed this OPH (for 28 &29 October 2020) and had ordered the Claimant should prepare a witness statement explaining why she was unable to bring her claims in this case prior to 21 January 2020 and any other evidence she wished to give, but only where that evidence was relevant to the matters to be considered at the OPH (as set out above).

4. The Respondent relied on a skeleton argument, with authorities, and both parties made oral submissions. The Claimant also relied on an authority which she sent to me at the start of the hearing.

Background

First Claim

5. On 29 May 2018, the Claimant had presented an earlier claim to the London Central ET against the same Respondents, case number 2204788/2018 ("the first claim"). In section 8.1, the Claimant ticked the 'unfair dismissal', 'other payments' and 'another type of claim' boxes (said to be a failure to pay tax and NIC in the first 4 months of employment). In section 8.2 the Claimant set out her narrative. That included an allegation that "Mrs Griffiths made degrading comments about me. She made comments which I consider to be racist in nature…".

6. On 21 August 2018, the Respondents wrote to the Tribunal, saying that the Claimant had issued claims "of unfair dismissal and taxation". They said that the Claimant did not have the requisite service to bring a claim of unfair dismissal and that the Tribunal had no jurisdiction to consider a claim in respect of taxation. They asked that the Tribunal strike out both claims.

7. By a letter of 24 August 2018, the parties were informed that the ET had accepted "a claim for unpaid wages only".

8. The Claimant did not challenge that decision at the time.

9. The Respondents defended the wages claim.

10. EJ Welch conducted a case management hearing in the first claim on 3 October 2018. The record of it was sent to the parties on 4 October 2018.

11. The first paragraph of that record said, "The Claimant brings a claim for unlawful deductions from wages only under section 13 Employment Rights Act 1996."

12. Again, the Claimant did not write to the Tribunal challenging this, at the time.

13. The first claim was heard on 28 November 2018 and 10 January 2019. In a Judgment dated 7 March 2019 the Claimant's claim for failure to be paid the National Minimum Wage succeeded.

14. The Claimant contends that the claims she had made in the first proceedings were ignored by the Tribunal.

Second Claim

15. By her claim form in this case, presented on 21 January 2020, the Claimant brought complaints of unfair dismissal, race discrimination, post employment harassment, detriment, failure to provide pay statements, failure to provide particulars of her employment and breach of contract, arising out of, and following her employment by the Respondents from 4 December 2017 until 2 May 2018.

16. The Respondents defended this claim.

17. The parties had not established a list of legal and factual issues before this hearing. It was necessary to establish the complaints in the second claim, and the dates of the relevant unlawful acts, before making any decision on strike out / deposit order in the second claim.

18. In part 8 of the second claim ET1 the Claimant ticked boxes indicating that she was bringing claims of unfair dismissal, race discrimination and another claim/s as identified in her particulars of claim. The particulars of claim were in narrative form. In them, the Claimant complained of the Respondents' conduct in defending the first claim and that the Respondents (particularly R2) have harassed the Claimant because she brought the 2018 claim.

19. At paragraph 14 of the particulars of claim, the Claimant identified the complaints she was bringing arising out of the preceding paragraphs. She said:

"Therefore I would like to bring claims of race discrimination, post-employment harassment, detriment, breach of contract for not paying NMLW and for deducting accommodation offset, implied terms and constructive dismissal for not paying me

correctly after I raised the pay issue several times. The Respondents did not give me payslips for the whole duration of my employment and the payslips do not reflect the actual payments. They didn't use their legal names on the employment contract that I found in my possession. Mr Griffiths registered with the HMRC under a name that is not his legal name when the employer registration practice under Domestic Scheme was lax, but used his legal name when he signed a form with the intention of releasing him from the responsibility of minimum wage."

20. It therefore appeared that the Claimant had brought the following complaints: race discrimination, "post employment harassment, detriment", "breach of contract for not paying NMLW and for deducting accommodation offset, implied terms", "implied terms and constructive dismissal for not paying me correctly after I raised the pay issue several times", "The Respondents did not give me payslips for the whole duration of my employment and the payslips do not reflect the actual payments", "They didn't use their legal names on the employment contract that I found in my possession.."

21. On 15 April 2020 EJ Snelson ordered the Claimant to provide the further information sought by the Respondents at paragraph 9 of their grounds of resistance: of:

    21.1. the protected characteristic relied upon by the Claimant in her discrimination claim;
    21.2. the less favourable treatment of which she complains;
    21.3. the protected act relied on by the Claimant;
    21.4. the incidents of harassment complained of (including dates and persons responsible);
    21.5. the basis upon which the claim for detriment was pursued and the detriments complained of (including dates); and
    21.6. the basis upon which the claim for breach of contract was being pursued.

22. The Claimant provided the further information requested in an 8 page document on 28 April 2020, second bundle pp 26 to 33.

Further Information

23. In her 28 April 2020 document, the Claimant confirmed that, in her race discrimination complaints, she relies on being a Kurd from Turkey, as her ethnic/national origin.

24. She relies on the following less favourable treatment:

    a. Not providing a suitable children's buggy during the Claimant's employment and that her working environment was unsafe because the Respondents carried out building work to their home during her employment.
    b. Ms Mareuge 's treatment of the Claimant during her employment, in particular, calling the Claimant "£23,000" and "her birthday present" and limiting the food which the Claimant could eat, refusing to buy food and other provisions.
    c. Making racist comments in the Claimant's presence during her employment e.g. that the cleaner was aggressive because she was Polish.

d. That Ms Mareuge encouraged the cleaner to be "aggressive and demanding" towards C.
e. A failure to pay C the agreed salary, providing payslips only after the Claimant's employment had come to an end and which were inaccurate, failing to properly deduct taxes, maintaining at the Preliminary Hearing in relation to the 2018 claim that they had paid more than NMW, persisting with their defence of the 2018 claim in order to cause the Claimant "financial loss and psychological harm" and not paying the wages found to be owing to her.
f. Ms Mareuge referred to her nannies by their ethnicity during the Claimant's employment. Lying to the Claimant about not having a spare key in order to avoid giving her a set of keys to the house and not giving the Claimant the pin number for a bank card used for the purposes of her job. The Claimant compares her treatment in this respect to a French au pair who started working for the Respondents shortly before the Claimant left her employment.
g. Not paying the Claimant the minimum wage, using the Claimant's tax refund as part of her pay and failing to pay the tax due on her salary.
h. Putting pressure on the Claimant through their solicitors' correspondence to her FRU representative withdraw the 2018 claim shortly before the final hearing began on 28th November 2018.
i. Contacting the Claimant's former employers in order to obtain references about the Claimant and then using two of those references to damage the Claimant's case during the 2018 proceedings.
j. Approaching the police about the Claimant and sharing one of the references obtained (the reference from the London Borough of Islington) with them in order to damage the Claimant by affecting her DBS certificate.

25. The allegations under sub-paragraphs: a, c, d, f and g are not referred to in the second claim ET1. The Claimant has not sought permission to amend her claim to bring these complaints.

Victimization Complaint

26. At this hearing the Claimant told me that she was also bringing victimisation complaints.

27. She pointed out that, in her second claim form , she had stated that, in the Respondents' application dated 1 November 20119, in the first claim, they described her claim as having been for "unlawful deduction to wages, discrimination, unfair dismissal, racism…". In the same paragraph, the Claimant alleged that the Respondents had contacted her previous employers to obtain references, had met the Claimant's previous nanny employer and complained to the police after meeting them. In the following paragraph the Claimant said, "What is clear is that she used deceit to obtain post employment references about me and complained to the police about me six months after my employment ended and five months into the Employment Tribunal claim. She admits taking these actions because I brought a claim against them in relation to my pay and discrimination."

28. The Claimant told me that she relied on her first claim as her protected act in her victimisation claim. Having looked at the second claim, I decided that the Claimant

had brought a victimization claim, albeit that she had not used the label "victimisation." Mr Wilson, for the Respondents, very fairly did not dispute this.

29. The Claimant then clarified the unlawful acts she relied on in her victimisation claim. They were:

    1. The Respondents contacting previous employers to obtain post employment references to use against the Claimant. She contends that this generated gossip about the Claimant and negatively affected her reputation. The Claimant contends that the Respondents obtained these references in about August 2018 and that she discovered that they had done this in October 2018.
    2. The Respondents reporting the Claimant to the police and attempting to affect the Claimant's DBS check. The Claimant says that she does not know when the Respondents reported her to the police. She discovered that they had done so on about 1 November 2019, when they revealed this in their application for reconsideration of a costs judgment in the first claim.
    3. The Respondents contacting the Claimant's previous nanny employers, assisting them in their Family Court child proceedings and undermining the Claimant in those proceedings and in influencing negatively those previous employers' attitude to the Claimant. The Claimant said that this was ongoing.
    4. The Respondents' conduct of the first claim, including using the post-employment references they obtained.

30. The Claimant confirmed that she also relied on these allegations as race harassment.

Protected Detriment Complaint

31. The Claimant said that she relied on her making safeguarding allegations against her previous employers to the relevant authorities as her protected act in her protected detriment claim.

32. She said that the detriments she relied on in this complaint were the Respondents:

    32.1. Reporting the claimant to the police;
    32.2. Involving themselves in the previous employers' family court proceedings, undermining the Claimant in those proceedings and influencing negatively those previous employers' attitude to the Claimant.

The Allegations in the Second Claim

33. In summary, the Claimant's factual and legal complaints in the second claim were:

    33.1. Unfair dismissal
    33.2. Breach of Contract in relation to failure to pay NMW
    33.3. Failure to provide payslips
    33.4. Failure to provide the Claimant with accurate conditions of employment.
    33.5. Race discrimination during her employment 4 December 2017 - 2 May 2018.
    33.6. The Respondents contacting previous employers to obtain post employment references to use against the Claimant. She contends that

this generated gossip about the Claimant and negatively affected her reputation: relied on as victimization and race harassment

33.7. The Respondents reporting the Claimant to the police and attempting to affect the Claimant's DBS check: relied on as victimization, race harassment and protected disclosure detriment

33.8. The Respondents contacting the Claimant's previous nanny employers, assisting them in their Family Court child proceedings and undermining the Claimant in those proceedings and in influencing negatively those previous employers' attitude to the Claimant: relied on as victimization, race discrimination/harassment and protected disclosure detriment

33.9. The Respondents' conduct of the first claim, including using the post-employment references they obtained: relied on as victimization and race harassment.

The Claimant's Position

34. The Claimant told me that, in relation to the first claim, she just followed what she was told by the Tribunal. She said that she had been told by the previous judge that she could not refer to anything other than her wages claim. The Claimant said that, later during the first claim, she did consult the Citizen's Advice Bureau and solicitors, but that they did not tell her she could bring other claims The Claimant said that the only advice she obtained from solicitors during the first proceedings concerned disclosure of documents.

35. I asked the Claimant why she had not written to the Tribunal in the first proceedings to say that she wanted to bring other types of claim. The Claimant said that she had not been advised to – her advisors had not given her much help.

36. The Claimant said that it had taken a long time to deal with the issue of the references - Ms Mareuge had duped her previous employers into providing them. The Claimant said that she might want to go back to those organizations for work and that she had been gossiped about as a result of Ms Mareuge's actions in trying to extract references from the Claimant's former employers. She said that she did not know the future implications of Ms Mareuge's actions.

37. The Claimant said that, while she knew of the existence of the references in 2018, she did not know that it was possible to bring a victimization claim until much later: when she read about it in a Legal Action Group book.

38. The Claimant said that she believed that all the Respondents' actions towards her had been influenced by her nationality. She said that they had advertised for a French or Spanish nanny, offering higher pay. She said that the Respondents had employed a Spanish nanny after the Claimant and had treated that nanny more favourably, buying a new buggy and providing her with keys and a bank card. The Claimant said that the Respondents had made derogatory comments about different nationalities.

39. The Claimant also told me that the Respondents had reported her to the police at least 4 times, but she did not know when. The Claimant said that she had found out about the Respondents reporting her to the police for the first time during the

Respondents' reconsideration application and appeal in the first claim. She said that the Respondents wanted to affect her DBS report.

40. The Respondents agreed that the first time the Claimant could have known that the Respondents had gone to the police about her was on 1 November 2019 and that she had brought her second claim within 3 months of that date.

41. I asked the Claimant, regarding her unfair dismissal claim, what was the reason she resigned. She said that the Respondents had not paid her the salary they had promised. She also said that the Respondents' house was a hazardous place and she did not want to continue living there. The Claimant did not say that she had complained about the hazardous nature of the house, or that she had taken any other action in relation to it.

Law - Res judicata; *Henderson v Henderson*

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

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

"Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins.
…
The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336, [1928] All ER Rep 120. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment.
…….
Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355, [1775–1802] All ER Rep 623. 'Issue estoppel' was the expression devised to describe this principle by Higgins J in Hoystead v Taxation Comr (1921) 29 CLR 537 at 561 and adopted by Diplock LJ in Thoday v Thoday [1964] 1 All ER 341 at 352, [1964] P 181 at 197–198. Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100 at 115, [1843–60] All ER Rep 378 at 381–382, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

44. At paragraph [18], Lord Sumption said, of the *Henderson v Henderson* principle,

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

46. However, it is not the case that, just because a Claimant could have brought claims forward in an earlier claim, the rule in *Henderson v Henderson* automatically applies to prevent the Claimant from bringing forward these claims later.

47. In *Johnson v Gore Wood & Co*. [2002] 2 AC 1 (HL) (quoted in Virgin Atlantic v Zodiac at paragraph 24 page 731 e-f) Lord Bingham set out the approach which should be taken"

"It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not …

While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances."

Decision: Issue Estoppel – Breach of Contract Claim

48. Applying the law to the facts of these claims, I considered that the breach of contract claim, for not paying NMW and for deducting the accommodation offset relating to the NMW in the current claim, were aspects of the first claim.

49. The 2018 claim was accepted as a claim for unpaid wages. It was expressed as a claim that the Respondents had acted in breach of contract by not paying tax and national insurance on the Claimant's wages.

50. The claim was heard over two days on 28th November 2018 and 10th January 2019 by EJ Walker.

51. A worker's right to payment of the NMW arises by way of an implied term in the worker's contract of employment under *s17 NMWA 1998* so that, if a worker is paid less than the NMW, they are entitled under their contract of employment to the

difference between their actual wages and the NMW. The claim for underpayment of NMW can proceed as an unlawful deduction from wages claim under *s13 ERA 1996* or as a breach of contract claim.

52. The Respondents' case in the first claim was that the family exception in *Regulation 57 NMW Regulations 2015,* so that the Claimant was not entitled to be paid the NMW. The Tribunal found that the Claimant was not treated as a member of the family, so that the exception did not apply, and the Claimant was therefore entitled to be paid NMW.

53. The Tribunal found that the Claimant had been underpaid by £269.90.

54. I decided that the judgment in the first claim therefore gave rise to issue estoppel in relation to the Claimant's claim for breach of contract for failing to pay NMW. The facts of the first claim were the same as the facts on which the Claimant now relies in the second claim. While the cause of action is not the same in the second claim as it was in the first, the factual issues in relation to alleged underpayment of NMW are common to both claims and were decided in the first claim. That decision is binding on the parties and cannot be relitigated in new proceedings.

55. The Claimant cannot bring a second claim in these proceedings in relation to a breach of contract/ unlawful deductions from wages by way of failure to pay NMW.

Decision – Henderson v Henderson: complaints of unfair dismissal, failure to provide pay statements, failure to provide accurate particulars of employment, breach of contract, and race discrimination in relation to acts done during employment from 4 December 2017 until 2 May 2018

56. The Claimant's first claim ticked the boxes, unfair dismissal, "other payments" and indicated that the Claimant was also making another type of claim.

57. In section 8.2 of her first ET1, she set out the details of her claim, including complaints about her working conditions *"lack of paying taxes and the correct insurance contributions"* and the Respondents making *"comments which I consider to be racist in nature"*.

58. It appeared that this paragraph explained her resignation *"which led me to give them my notice early April"*.

59. Therefore, from the outset of the 2018 claim, the Claimant had been complaining, not only about the Respondents' failure to pay her wages, but also about the treatment she had received from the Respondents during her employment. Nevertheless, the Claimant had not ticked the box "race discrimination" in her claim form. It seemed to me that the Claimant's first claim put forward a constructive dismissal claim and a claim that the Claimant had not been paid properly during her employment.

60. The Tribunal accepted the claim as an unlawful deduction from wages claim only. It is not clear why it did not accept the unfair dismissal claim, although this may have been because it was clear that the Claimant did not have sufficient qualifying

service to bring an ordinary unfair dismissal claim and she had not asserted an automatic unfair dismissal claim.

61. I considered that, at the time the Claimant submitted her first claim, she clearly knew of the facts which gave rise to the race discrimination claims during employment from 4 December 2017 until 2 May 2018, failure to provide payslips and failure to provide accurate written conditions of employment.

62. She did not tell me that she only became aware of these matters later. Regarding the facts of the race discrimination allegations, she must have known about those matters when they occurred. Likewise, the Claimant must have known whether or not she received pay statements. She should also have read her contract during her employment, and noted whether or not it was accurate.

63. She could have brought all these claims in the first proceedings. She failed to do so.

64. I acknowledged that the Claimant had tried to bring her unfair claim in the first proceedings and that that claim was not accepted, without a reason being given. However, the Claimant never challenged that decision, or pursued the unfair dismissal claim.

65. The Claimant was told by the Tribunal on 24 August 2018 that the 2018 claim had been accepted as a claim for unpaid wages only. A Preliminary Hearing took place on 3 October 2018. The PH considered the issues in the unlawful deductions claim. The Case Management Summary sent to the parties prompted the parties to return to the Tribunal if they did not agree with the summary of the claim.

66. The Claimant took advice from the Citizen's Advice Bureau and from solicitors during the first claim, but did not re- assert her unfair dismissal claim, nor appeal against the decision not to accept it. The Claimant also had advice from the Free Representation Unit. She received advice relating to her first claim on many occasions.

67. On the first day of the Final Hearing, the Claimant produced a long letter raising a number of matters and gave that to Judge Walker. The judgment on the 2018 claim records that she decided to proceed with the claim as an unlawful deduction claim alone, rather than cause the Tribunal to look at any of the matters raised in the letter.

68. Applying the "broad, merits-based" judgment required in *Johnson v Gore Wood & Co*. [2002] 2 AC 1 , I considered that the Claimant had had ample opportunity, in her first claim, to bring her complaints of unfair dismissal, failure to provide pay statements, failure to provide accurate particulars of employment, breach of contract, and race discrimination in relation to acts done during employment from 4 December 2017 until 2 May 2018.

69. She failed to bring them, or to pursue them. She had plentiful opportunities to take legal advice during that first claim. There was no good reason, now, for allowing her to advance those claims. I considered that it was an abuse of the Tribunal process for the Claimant to attempt to litigate those claims when she could easily

have done so in the first proceedings. In any event, they were now being pursued long after the 3 month limitation period. It would be unjust to the Respondents to require them to meet a case which the Claimant had failed to advance at an earlier stage, despite knowing the facts which gave rise to them.

Claims out of Time - complaints of unfair dismissal, failure to provide pay statements, failure to provide accurate particulars of employment, breach of contract, and race discrimination in relation to acts done during employment from 4 December 2017 until 2 May 2018.
Claims relating to references

70. In any event, all these claims, and the Claimant's claims relating to the Respondents' seeking references after the Claimant's employment ended, were brought very much out of time. The Claimant's employment ended on 2 May 2018. She knew about the Respondents obtaining references in August 2018. She did not bring the claims until 21 January 2020, at least 16 months later. That was well outside the 3 month time limit for bringing claims.

71. It was clearly reasonably practicable for the Claimant to have brought the claims earlier – she knew the facts of the claims and she knew of her right to bring claims. She brought other timeous claims to the Tribunal on 29 May 2018.

72. It was not just and equitable to extend time for the discrimination complaints. The Claimant had not shown any reason why time should be extended.

Judicial Proceedings Immunity

73. Judicial proceedings immunity is the principle of immunity from suit in respect of things said or done in the course of judicial proceedings.

74. In *South London & Maudsley NHS Trust v Dathi* [2008] IRLR 350 the Employment Appeal Tribunal ("EAT") set out the rules relating to absolute immunity. At paragraph 17 of the judgment HHJ McMullen stated:

"The rules relating to absolute immunity for legal proceedings were restated by Devlin LJ in Lincoln v Daniels [1962] 1 QB 237 at 258, where he said this:

'The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done coram judice . This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of Watson v M'Ewen, in which the House of Lords held that the privilege attaching to evidence which a witness gives coram judice extended to the prerecognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In Beresford v White, the privilege was held to attach to what was said in the course of an interview by a solicitor with the person who

might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.'…

75. In *Dathi* the Claimant succeeded in her first claim of race and or religious discrimination against the South London and Maudsley NHS Trust. The following year, she presented a second claim alleging discrimination and victimisation based on two letters written to her solicitors by the Trust's representatives in the first proceedings. In one of the letters, the Trust had refused to disclose documents in relation to the investigation of Mrs Dathi's grievance . Mrs Dathi argued that, by doing so, the Trust was deliberately refusing to disclose interviews with witnesses who supported her case. In the other letter, the Trust's representatives made various representations in opposition to an application for costs made by Mrs Dathi's solicitors. Mrs Dathi complained that various points made in that letter amounted to race and or religious discrimination, or victimisation.

76. The EAT held that both letters fell into the second category identified in *Lincoln v Daniels* and that the Tribunal therefore had no jurisdiction to hear the second claim because the letters were subject to absolute immunity.

77. As explained in *Nicholls v Corin Tech Ltd* UKEAT/0290/07 *(4 March 2008, unreported)* and *Aston v The Martlet Group Limited UKEAT/0274/18 (21 May 2019, unreported),* matters that are an 'integral part' of the judicial process attract the judicial proceedings immunity.

Decision : Judicial Proceedings Immunity - The References

78. Ms Mareuge obtained 6 references and then relied on two of the references in the 2018 first claim. The relevant correspondence was:

    78.1. Bundle 1, p119 A letter or statement provided by Dr Anxo Cereijo.
    78.2. Bundle 1, p120-1 Reference provided by Islington Council on 23rd August 2018 following a request on the 8th August
    78.3. Bundle 1, p 123 E-mail confirming that no reference had been provided to Ms Mareuge by Family Action
    78.4. Bundle 1, p 122-5 E-mail confirming that no reference was given to Ms Mareuge by the Maya Centre
    78.5. Bundle 1, p126-7 E-mails confirming that a reference was given by IMECE Women's Centre to Ms Mareuge on 10th August 2018 following a request on 8th August 2018
    78.6. Bundle 1, pp128-131 E-mails confirming that a reference was provided to Ms Mareuge on 9th August 2018 by the Derman organisation following a request made on 8th August

79. The letter from Dr Cereijo and the Islington reference were included in the hearing bundle for the first claim.

80. I decided that they fell within the first category identified in *Lincoln v Daniels,* as they were documents put in evidence in the presence of the Judge.

81. The other four reference requests fell within the second category identified in *Lincoln v Daniels*. The reference requests were brought into existence for the purpose of the first proceedings.

82. There can be no doubt that the references were documents put in evidence in the presence of the judge. A preparation time order of £507 was made in the Claimant's favour against the Respondents because of Ms Mareuge's conduct in applying for the references by EJ Walker in the costs/PTO hearing heard on 8th August and 3rd October 2019. The references were therefore considered in the course of that hearing and were clearly in the presence of the judge.

83. Complaints based on the collection and use of references during the first claim are clearly barred by judicial proceedings immunity.

Decision: Judicial Proceedings Immunity - Conduct of the First Claim

84. The Claimant also makes allegations about the Respondents' conduct of the first claim, including allegations of putting the Claimant under pressure by threatening her with costs orders and putting her FRU representative under pressure by suggesting that her claim did not have merit and should be withdrawn.

85. These acts also fall into the first or second category in *Lincoln v Daniels*. They were done following the inception of the 2018 claim and were either in Tribunal and coram judice (the first category), or were done in writing in the course of the proceedings and were therefore "documents brought into existence for the purpose of the proceedings" (the second category). Claims in relation to these acts are barred by absolute immunity.

Decision: Judicial Proceedings Immunity – Family law Proceedings

86. The Claimant also wishes to bring complaints based on the Respondents' assistance of the Claimant's former nanny employers in their family court proceedings, and their undermining of the Claimant in relation to those proceedings.

87. Again, such actions are in the first category of things in *Lincoln v Daniels.* They relate to things said in the course of proceedings by the parties (the previous nanny employers) and witnesses (the Respondents), and/or they include the contents of documents put in as evidence in those proceedings by the Respondents.

88. The Tribunal has no jurisdiction to hear complaints based on the Respondents' involvement in the family law proceedings.

Unfair Dismissal Law – Qualifying Service

89. By *s108 Employment Rights Act 1996*, in order to have the right to bring a complaint of unfair dismissal under *s94 ERA 1996*, an employee must have been continuously employed for 2 years or more ending with the effective date of termination. This qualifying period does not apply in cases of automatic unfair dismissal.

Decision – Unfair Dismissal Claim

90. The Claimant brings only a claim for ordinary unfair dismissal. She does not have the right to bring such a claim because she was employed for less than 2 years, from 4 December 2017 until 2 May 2018.

91. Her unfair dismissal claim must be dismissed.

Law - Strike Out – No Reasonable Prospects of Success

92. An Employment Judge also has power to strike out a claim on the ground that it is scandalous, vexatious or has no reasonable prospect of success under *Employment Tribunal Rules of Procedure 2013, Rule 37(1)(a).*

93. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, *Teeside Public Transport Company Limited (T/a Travel Dundee) v Riley* [2012] CSIH 46, at 30 and Balls v *Downham Market High School & College* [2011] IRLR 217 EAT. In that case Lady Smith said: "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral recessions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect".

94. A case should not be struck out on the grounds of having no reasonable prospect of success where there are relevant issues of fact to be determined, *A v B* [2011] EWCA Civ 1378, *North Glamorgan NHS Trust v Ezsias*, [2007] ICR 1126; Tayside *Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46. J.

95. Discrimination cases should only be struck out in the very clearest circumstances, *Anyanwu v Southbank Student's Union* [2001] IRLR 305 House of Lords.

96. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.

Decision: Strike Out: Influencing negatively previous nanny employers' attitude to the Claimant: relied on as victimization, race harassment and protected disclosure detriment

97. I considered that the allegation that the Respondents had negatively influenced her previous employers' attitude to the Claimant, relied on as victimization, race

harassment and protected disclosure detriment, had no reasonable prospect of success.

98. The fact that other people had a negative view of the Claimant could not amount to a detriment, for the purposes of victimization and protected disclosure detriment claims, if those other people were not involved in a current or prospective employment relationship with the Claimant, as colleagues or employers, or did not have influence over such future employment.

99. The Claimant did not suggest that she would be applying for re-employment by these nanny employers. It would be inconceivable that she would, given her involvement in family court proceedings against them. (It was not in dispute that she had reported them to child welfare authorities).

100. *Shamoon v Chief Constable of RUC* [2003] UKHL 11 made clear that the disadvantage which constituted a detriment had to be linked to a current or future workplace – the worker must reasonably take the view that he has been "disadvantaged in the circumstances in which he had thereafter to work". The detriment relied on by the Claimant, which was a general negative view held by third parties, not related to a current or future employment, could not constitute a detriment as described in *Shamoon.* The victimization and protected disclosure detriment claims on these facts should be struck out.

101. Regarding race harassment, I considered that there was no reasonable prospect of success in relation to an allegation that a third party had been influenced to a negative view of the Claimant.

102. There was no reasonable prospect of such conduct being found to have have the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

103. There was no workplace "environment" where the conduct could operate. I considered that a third party was so removed from proximity to the Claimant that, whatever their view of the Claimant, this could <u>not</u> "violate ….. dignity".

The Claimant's complaints of race discrimination, race harassment, victimisation and protected disclosure detriment regarding the Respondents reporting the Claimant to the police

104. The Claimant does not know when the Respondents reported her to the police. She alleges that they did so in order to negatively influence her DSB status, which would affect her ability to work with children.

105. It was agreed that the Claimant first became aware that the Respondents had done this, at the earliest, on 1 November 2019. She presented her claim in relation to these allegations on 21 January 2021. The Respondents do not dispute that her claim in respect of the Respondents reporting her to the police is, therefore, in time.

106. I agreed and decided that this complaint was presented in time, on those facts. Alternatively, that it was not reasonably practicable for the complaint to be

presented and it was presented within a reasonable time thereafter. It was also just and equitable to extend time for the complaint. It was presented well inside a 3 month period after the Claimant's date of knowledge.

107. I considered that the Claimant's complaints of race discrimination, race harassment, victimisation and protected disclosure detriment regarding the Respondents reporting the Claimant to the police had reasonable prospects of success. I did not strike them out, nor make them subject to a deposit order.

108. I considered that the Claimant had reasonable prospects of success in establishing that she had done a protected act. The Respondents stated, in their documents in the first claim, that the Claimant had made allegations of race discrimination against them. They therefore believed that she had done a protected act.

109. Further, the Claimant had reasonable prospects of success in establishing that she had made a protected disclosure. She had reported her previous employers to child welfare authorities. That disclosure could come within *s43B ERA 1996* and *s43F* or *s43G or 43H ERA 1996*.

110. I considered that, on the basis of the Claimant's description of less favourable treatment of her on the grounds of race, during her employment, there were reasonable prospects of the Tribunal deciding that the Respondents' report to the police was at least partly because of the Claimant' s race.

111. Further, I considered that a report to the police, for the purposes of negatively influencing a DBS check, did have a sufficiently close nexus to employment to constitute a detriment, or to amount to harassment. It could prevent the Claimant from securing employment elsewhere. It was analogous to providing a poor reference.

Conclusion

112. The Tribunal does not have jurisdiction to hear the Claimant's complaint of breach of contract because it is barred by issue estoppel;

113. Applying the rule in Henderson v Henderson, the Claimant should, in her first claim, have raised her complaints of unfair dismissal, failure to provide pay statements, failure to provide particulars of her employment, breach of contract and race discrimination in relation to acts done during her employment from 4 December 2017 until 2 May 2018. Her doing so in this claim constitutes an abuse of process, so these claims are struck out;

114. In any event, the unfair dismissal, failure to provide pay statements, failure to provide particulars of her employment and breach of contract claims and race discrimination in relation to acts done during her employment from 4 December 2017 until 2 May 2018 were presented out of time. Time is not extended for them. The Tribunal has no jurisdiction to consider them.

115. The Claimant does not have the requisite service to bring a complaint of unfair dismissal. There was no complaint of auto unfair dismissal. The claim of unfair dismissal is dismissed.

116. The Claimant's complaints of race discrimination, victimization and race harassment, in relation post employment obtaining references are barred by judicial proceedings immunity. Further, the Tribunal does not have jurisdiction to consider them because they were presented out and are out of time and it is not just and equitable to extend time for them. They are struck out.

117. The Claimant's complaints of victimization, race harassment and protected disclosure detriment in relation to the Respondents' involvement in other family court proceedings are barred by judicial proceedings immunity. They are struck out;

118. The Claimant's complaints in relation to the Respondents' conduct of her first claim 2204788/2018 barred by judicial proceedings immunity;

119. The Claimant's complaints of the Respondents negatively influencing her previous nanny employer, relied on as race discrimination, post employment harassment, and protected disclosure detriment, are struck out because they have no reasonable prospects of success

120. The Claimant's complaints of race discrimination, race harassment, victimisation and protected disclosure detriment regarding the Respondents reporting the Claimant to the police were either presented in time, or it was not reasonably practicable for them to be presented in time and they were presented within a reasonable time thereafter, or it is just and equitable to extend time for them.

121. The Claimant's complaints of race discrimination, race harassment, victimisation and protected disclosure detriment regarding the Respondents reporting the Claimant to the police are not struck out, nor made subject to a deposit order.

122. All the Claimant's claims are therefore struck out EXCEPT her complaints of race discrimination, race harassment, victimisation and protected disclosure detriment regarding the Respondents reporting the Claimant to the police

123. I gave directions for the further conduct of the surviving claim in a case management hearing.

Employment Judge **Brown**
Date: 24 June 2021

SENT to the PARTIES ON

25/06/2021.

FOR THE TRIBUNAL OFFICE