Case Number: 1303755/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Sidhu**

Respondent: **1. Worcestershire County Council**
2. Our Place Schools Ltd

Heard at: **Midlands West ET (via CVP)** **On:** **06 March 2023**

Before: **Employment Judge Hussain**

Representation
Claimant: Litigant in person
First Respondent: Mr Mortin (Counsel)
Second Respondent: Mr Philp (Consultant Solicitor)

RESERVED JUDGMENT

1. The tribunal does not have jurisdiction to hear claimant's complaint of discrimination based on race and religion or belief by virtue of the operation of the res judicata principle and the claims in respect of both respondents are dismissed (complaint 1).

2. The claimant's claim under the Equality Act 2010 in respect of discrimination based on race and religion or belief has no reasonable prospect of success and is struck out pursuant to Rule 37(1)(a) (complaint 2).

3. The application for costs, made by the first respondent, is dismissed.

REASONS

1. The claimant presented his claim form on 28 August 2022 and brought complaints of discrimination because of race and religion or belief. This was an Open Preliminary Hearing to determine the first respondent's application to strike out the claimant's claims in their entirety or, in the alternative, for a deposit order to be made against the claimant as a condition of his claims proceeding.

2. The first respondent made an application to strike out the claimant's claims pursuant to Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 (the Rules) on the grounds that there is no reasonable prospect of success because the principles of res judicata apply and claims have already been determined. In the alternative, the first respondent applied to strike out the claimant's claims on the grounds that there is no reasonable prospect of success because the first respondent did not have any contractual relationship with the claimant and there is no jurisdiction under the Equality Act 2010 to hear the claims and the claims were out of time.

3. The first respondent also made an application for costs.

4. The second respondent made an application to strike out the claimant's claims on the grounds that the claim has previously been determined and, in the alternative, it was out of time.

5. The claimant appeared in person. The first respondent was represented by Mr Mortin of counsel and the second respondent was represented by Mr Philp, consultant solicitor.

6. The respondent had prepared an agreed bundle of documents for the hearing and references to page numbers are to pages in that bundle. In addition, late evidence received from the claimant was admitted, namely the claimant's witness statement and the decision of Judge Keith dated 09 March 2022, allowing the appeal in respect of 2 allegations.

Relevant Facts

7. The claimant, in his claim form presented on 25 August 2022, made complaints that in connection with a safeguarding allegation from 05 October 2017, head teacher Chris Coombs and LADO James Borland treated him unfairly by subjecting him to 2 police investigations due to him being a turban wearing Sikh. This complaint has been made in relation to both respondents (complaint 1). He also complained that the first respondent treated him unfairly by refusing to investigate his complaint regarding the safeguarding of a child at the school (complaint 2).

8. The claimant was employed by the second respondent, a school, as a Weekend Support Worker from 07 August 2018 until his dismissal on 20 November 2019.

9. During his employment the claimant submitted an ET1 on 19 June 2018 (claim number 1303155/2018) where he complained of discrimination on grounds of race and religion or belief.

10. An 8-day final hearing took place and was concluded on 29 January 2020. All the claims were dismissed by a judgment from EJ Woffenden dated 04 May 2020. In the judgment the following findings of fact were made:

i. Paragraph 15.24: "*On 5 October 2017 Georgina Martin made a handwritten statement at the request of Sarah Davies setting out her account of what had occurred that day when she and the claimant were working with the YP raising a safeguarding issue about the way the claimant had treated the YP ('the safeguarding allegation'). On that day Katie Walker suspended the claimant with pay pending investigation into the safeguarding allegation and a letter confirming the suspension was sent to the claimant reminding him he should not contact anyone connected with the allegation unless authorised by Mr Poturalski*." [B98]

ii. Paragraph 15.25: "*There was no cogent evidence to support the serious and wide-ranging allegations", namely* "*that white staff members had neglected a child and used the YP to further their agenda of racism towards the claimant as a BME staff member to sabotage and destroy his career"* [B98]

iii. Paragraph 15.26: "*The LADO was informed about the safeguarding allegation on 06 October 2017 and advised the police should be contacted which was done that same day"* [B99]

iv. Paragraph 15.28: "*The police attended the school and interviewed staff on 09 October 2017"* [B99]

v. Paragraph 15.29: "*A Position of Trust ('POT') meeting took place on 18 October 2017 attended by Chris Coombes…. It recorded that initially the police had recommended no further action but upon review the LADO had escalated the matter which the police had agreed to revisit and was now the subject of a live investigation"* [B99]

vi. Paragraph 15.30: "*The police also attended the school and interviewed staff on 19 October 2017. The claimant was interviewed by the police in the presence of his solicitor on 2 November 2017"* [B99]

vii. Paragraph 15.31: "*There was another POT meeting on 27 November 2017 attended by Chris Coombes and Mr Poturalski. The outcome was that the allegation was 'unsubstantiated' because 'Overall, there is insufficient identifiable evidence to prove or disprove the allegation. The term, therefore, does not imply guilt or innocence. Where there is insufficient evidence to substantiate an allegation, the employer should consider what further action, if any should be taken*.'" [B99]

viii. Paragraph 15.32: "*We find the LADO did not state it was an unfounded case as alleged by the claimant and contrary to the claimant's assertion the respondent played no part in the reactivation of the police investigation"* [B99]

11. The claimant appealed to the Employment Appal Tribunal against that decision. His appeal was considered at a preliminary hearing before Judge

Keith on 09 March 2021. The appeal was allowed to proceed on 2 grounds, namely an allegation that an offensive hand sawing gesture was used by a colleague, and an allegation that the term “coloured people” was used.

12. The decision by Judge Keith also concluded that “*The ET had made clear at paragraph 15.23 that the reporting of safeguarding allegations was not an unusual occurrence. The ET was entitled to conclude that even if it were proven that the allegations were unsubstantiated, there was nothing from which the ET could conclude or infer that safeguarding concerns were raised because of the appellant’s race of religion. This was in the specific context of the ET’s rejection of the allegation of conspiracy with another colleague. The challenge to this reasoning has no arguable merit*” (decision of Judge J Keith, 09 March 2022).

13. On 26 February 2020 the claimant purported to bring claims for unfair dismissal and unlawful discrimination on the grounds of race and religion or belief (claim number 1301150/2020). The claim against the first respondent was rejected on presentation because there was no corresponding ACAS early conciliation certificate relating to Worcestershire County Council. Proceedings were never served upon the first respondent. The claimant produced an ACAS early conciliation certificate on 21 October 2021 but did not apply for a reconsideration of the earlier rejection of the claim against the first respondent. Consequently, the first respondent was not included as a party in these proceedings (order of EJ Gaskell dated 17 March 2022). The claims against the second respondent were considered at a preliminary hearing.

14. By judgment of EJ Jones, dated 03 December 2022, the claims for unlawful discrimination on the grounds of race and religion belief were struck out. EJ Jones made the following comments and findings:

    i. Paragraph 23: “*The claimant wishes to make claims against Chris Coombs (Headteacher) and James Borland (Local Authority Designated Officer (LADO) at Worcestershire) in relation to the second referral to the police. He says these are new matters he has not raised before. He says he learned in the course of the respondent’s evidence at the hearing of his first claim that no other employee has been the subject of two police investigations*” [B113]

    ii. Paragraph 46: “*At paras 15.25-15.32 of its decision, the first Tribunal dealt with the events regarding the claimant’s suspension and the police investigations. There were two “Position of Trust” meetings on 18 October, 17 and 22 November 2017, both of which involved Chris Coombs. He is referred to by name in the decision. After the first of these meetings, the claimant was interviewed by the police (on 2 and 18 November) the Tribunal found that “contrary to the claimant’s assertions, the respondent played no part in the reactivation of the police investigation”. That issue was essential to the tribunal’s decision*

on the claimant's first claim and has been determined. The claimant's submission that he has only subsequently "joined the dots" in relation to the Ofsted evidence does not provide reasons to depart from the doctrine of res judicata. With reasonable diligence he could and should have raised these points at the first tribunal" [B117]

The Law

15. Rule 37(1)(a) of the Rules provides that at any stage of the proceedings an employment tribunal may strike out all or part of a claim or response on the ground that it is scandalous or vexatious or has no reasonable prospect of success.

16. Rule 39(1) of the Rules provides that where at a preliminary hearing the tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.

Res Judicata

17. Where a cause of action or an issue has already come before a tribunal and has been decided, or an issue could have been brought before a tribunal in previous proceedings but was not, a party who seeks to reopen or raise such an issue in subsequent proceedings before a different tribunal may be barred, or 'estopped', from doing so because of the "res judicata" doctrine. The underlying reason for this is to ensure finality in litigation and prevent abusive and duplicative litigation.

18. There are three distinct forms of estoppel, all of which are underpinned by the general procedural rule against abusive proceedings:

    i. cause of action estoppel, which prevents a party pursuing a cause of action that has been dealt with in earlier proceedings involving the same parties

    ii. issue estoppel, which prevents a party reopening an issue that has been decided in earlier proceedings involving the same parties, and

    iii. 'Henderson abuse of process' (arising from Henderson v Henderson 1843 3 Hare 100, ChD), which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones

19. EJ Jones, in the decision dated 03 December 2021 in paras 35 to 39 [B115-B116], clearly sets out the legal principles which apply, and I do not repeat them here.

Time Limits

20. Section 123 of the Equality Act 2010 stipulates that prohibited conduct claims may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Any conduct extending over a period is to be treated as done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it and the time limit will run starting with the date of that decision.

21. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds, there is no presumption that they should do so unless they can justify failure to exercise the discretion. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. The exercise of discretion is thus the exception rather than the rule (per Robertson v Bexley Community Centre [2003] EWCA Civ 576).

22. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, LJ Underhill commented that "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular… "the length of, and the reasons for, the delay".

Employment Status and Vicarious Liability

23. The workplace protections under the Equality Act 2010 against prohibited conduct are extended to all persons in employment within the meaning of the Act. Section 83 (2) of the Equality Act 2010 defines "employment" as employment under a contact of employment, a contract of apprenticeship or a contract to personally do work. To be covered, the person must, for a certain period of time, perform services for and under the direction of another person in return for which they receive remuneration. Section 109 of the Equality Act 2010 makes an employer liable for any contravention committed by a person it employs provided the contravention is done in the course of that person's employment.

24. Sections 40(2) and 40(3) of the Equality Act 2010 were repealed on 01 October 2013. These provisions provided protection to employees against repetitive harassment by third parties.

25. The liability of an employer, under the Equality Act 2010, does not extend to acts of negligence or any other tort. A claim relating to an employer that may be liable for the tort relating to the action of an employee, does not fall within the jurisdiction of this tribunal. Tort and negligence claims are civil claims that must be made in the civil courts.

Costs

26. Rules 74 to 84 of the Rules deal with the question of whether an employment tribunal should make an order for costs.

27. Rule 76 sets out the relevant circumstances in which an employment judge or tribunal can exercise their discretion to make an order for costs and the relevant parts of that Rule provide as follows:

> "*When a costs order or a preparation time order may or shall be made*
>
> *76.(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively, or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
> *(b) any claim or response had no reasonable prospect of success; or*
> *(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.*
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party*".

28. It should be noted that merely because a party has been found to have acted in the manner set out in Rule 76(1) or (2) of the Rules, it does not automatically follow that an order for costs should be made. Once such conduct or issue has been found, a tribunal must then go on to consider whether an order should be made and, particularly, whether it is appropriate to make one. When deciding whether an order should be made at all and, if so, in what terms, a tribunal is required to take all relevant mitigating factors into account.

29. In accordance with Rule 84, a tribunal is entitled to have regard to an individual's ability to pay any costs both in relation to the making of an order at all, or the amount of any such order. However, it is not a mandatory requirement that such consideration must automatically be given.

Conclusions

30. Witness evidence was given by the claimant, Jonathan Hancock (for the first respondent) and Seam McGuinness (for the second respondent). Submissions were made by the claimant and both respondents.

Res Judicata

31. The claimant has pursued a claim against both respondents relating to head teacher, Chris Coombs, and LADO, James Borland, for treating him unfairly by subjecting him to 2 police investigations due to him being a turban wearing Sikh. In his evidence, the claimant explained that in April 2018, in response to a Subject Access Request, he became aware that on 18 October 2017 James Borland escalated the safeguarding matter and asked police to reinvestigate the complaint against him. The claimant stated that he first made this claim in 2020. In respect of the claim against the first respondent, who had not been added as a party to the proceedings, he says he was told to make a fresh claim by the EJ Gaskell.

32. The claimant also states that the Chris Coombes was negligent and his inaction in connection with the LADO investigation was discriminatory, and this falls within the jurisdiction of the tribunal.

33. The claimant argues that his original claim related to a complaint by Georgina Martin, and he did not pursue any claims against Chris Coombes and James Borland, which is what he is seeking to do now. He also stated that EJ Woffenden, in her judgment, referred to the claims against Georgina Martin when mentioning Chris Coombes, as separate claims had not been made against him. The claimant submits that this is a new claim, albeit he accepts that he pursued this claim in 2020 proceedings.

34. Mr Mortin submitted that the allegations against Chris Coombes and James Borland were addressed in the claim from 2018 and the claim from 2020. Submissions were made as set out in pages 3 to 5 of the skeleton argument. Mr Mortin added that Mr Borland and Mr Coombes were identified several times during the final hearing for the claim from 2018 and it is an abuse of process that the claimant has brought fresh proceedings in relation to the same issues.

35. Mr Philp submitted that the claimant appeared to complain about allegations made by Georgina Martin but is now complaining about negligence and inaction to properly follow the LADO process. He further submitted that the principles of both cause and issue estoppel apply because the issues have been litigated not once but twice and even if they hadn't been, the rule in Henderson V Henderson applies as the claimant had an opportunity to raise the matters from October 2017. Mr Philp Also relies on the statements made in the ET3 response form (A56) to support his submissions.

36. I have carefully considered the evidence and submissions. I find that the facts upon which the allegations against Chris Coombes and James Borland are based, were within the knowledge of the claimant from April 2018. This is based upon the claimant’s own evidence that, in response to his Subject Access Request he was given the POT meeting notes. These notes show that James Borland escalated the complaint and asked the police to reinvestigate

the safeguarding complaint [B4]. The evidence on these matters was not heard in until January 2020. The claimant did not make any application to amend the claim to include specific allegations against Chris Coombes and James Borland despite the claims before the tribunal in January 2020 including claims complaining of discrimination because of race and/or religion or belief [B90] because he is a turban wearing Sikh. Allegations 6 and 7(2) related to the safeguarding complaint made by Georgina Martin and the fairness of the subsequent investigation [B97-B98]. The claims before the tribunal today are also discrimination claims because of race and religion or belief and they also relate to the fairness of investigation into the safeguarding complaint by Georgina Martin. The claimant is aggrieved by the fact that he was subjected to a second police investigation which he says only came about from the combined actions off Mr Coombes and Mr Borland. The tribunal made a significant finding of fact on this point, which was upheld on appeal, namely that the respondent played no part in the reactivation of the police investigation [B99].

37. Despite this the claimant made a claim in February 2020 raising the complaints against Mr Coombes and Mr Borland. These complaints were considered in detail by EJ Jones. The complaints before EJ Jones are the same complaints before this tribunal, and the arguments made by claimants as set out in paragraphs 23 and 25 of EJ Jones' judgment [B113-B117], are the same as those advanced to this tribunal. EJ Jones found that cause of action estoppel, issue estoppel or the rule in Henderson v Henderson applied and clearly set out the reasons why in paragraphs 45 to 47 [B17-B118] of the decision.

38. The claimant, when giving evidence on the lateness of this claim, asserted that this is not the first time he has made this claim and he made this claim in 2020. The claimant has not put forward any explanation for why he has made the same complaint against the second respondent. The claimant's evidence on these issues was inconsistent and contradictory in respect of the second respondent, as he accepted he made this claim in February 2020, but still insisted this was a new claim.

39. I find that cause of action estoppel applies. Cause of action estoppel prevents a party pursuing a cause of action that has been dealt with in earlier proceedings involving the same parties (or their privies). The cause of action pursued in these proceedings, namely discrimination because of race and religion or belief, was also pursued in the proceedings from 2018 and 2020. There is no difference in the cause of action pursued in these proceedings as those pursued in earlier proceedings, and in particular in the 2020 proceedings. Furthermore, issue estoppel applies. This form of estoppel prevents a party reopening an issue that has been decided in earlier proceedings involving the same parties (or their privies). The issues complained of relate to the LADO, Mr Borland, escalating the matter to the police and whether the claimant was treated less favourably because of his race or religion. These issues were adjudicated upon and findings made as

detailed in paragraph 37 of EJ Woffenden's decision [B107]. In paragraph 45 [B117] EJ Jones explains that issue estoppel applies in respect of this.

40. The claimant argues that this is the first time that he has brought proceedings against the first respondent. However, the cause action estoppel and issue estoppel can also bar the raising of the cause of action or issue against anyone who has a privity of interest with a party to earlier proceedings. If there is no relationship between the respondents, the rule in Henderson v Henderson could apply to successive claims involving different respondents who are not privies. In Henderson v Henderson, Sir Wigram said, *"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"*.

41. Taking a broad, merits- based approach, I have taken into account all the circumstances of the case. In accordance with my findings on cause of action estoppel and issue estoppel, the complaint with regards to the LADO referring the matter to the police is one that was raised in both the 2018 and 2020 proceedings. The first respondent, with reasonable diligence, could have added the first respondent to the proceedings but did not do so. The claimant made a claim against the first respondent in the 2020 proceedings, but the claim was rejected on the basis that early conciliation had not taken place. The claimant did not apply for reconsideration and did not seek to rectify the matter until 18 months later, when he obtained an early conciliation certificate. There was a further delay of 5 months before these proceedings were pursued. Taking into account all the circumstances of the case, including my findings in relation to employment status and time limits (see below), I find that the claimant, with reasonable diligence could have raised these matters against the first respondent in the 2018 or 2020 proceedings.

42. I find that the doctrine of res judicata applies to the complaint relating to the second police investigation, in respect of both respondents. Accordingly, the complaints are struck out.

Time Limits

43. The act the claimant complains of is the escalation of the safeguarding matter by Mr Borland on 18 October 2017. Therefore, the claimant should have contacted ACAS to commence early conciliation proceedings by 17 January 2018. He became aware of the facts of this act in April 2018 and pursued the first claim on 19 June 2018. He made a claim on 26 February 2020 and a further claim on 25 August 2022.

44. The reasons cited for the delay by the claimant included that he works 6 days per week and has very little capacity for anything else, he has been prioritising the ongoing appeal and unfair dismissal proceedings and he has been caring for his ill brother. This was not supported by any corroborating evidence. The claimant also stated that he could not join these claims to the first claim from 2018 as there was still a complaint outstanding regarding the safeguarding complaint made to the first respondent.

45. One of the reasons cited for the delay is that the first respondent was not added to the claim and the claimant did not become aware until later. The order of EJ Gaskell, dated 17 March 2022, states that the claim against the first respondent was rejected on presentation because there was no corresponding ACAS early conciliation certificate. 18 months later, the claimant produced a certificate dated 01 October 2021 naming the first respondent but was told that the certificates could not rectify the reason for rejection. The order clearly records EJ Gaskell's comments that the claimant had not applied for a reconsideration of the earlier rejection of the claim, nor had he presented a separate fresh claim against the first respondent. Whilst the claimant may have understood the comments as an instruction to apply for a fresh claim, it is apparent that the comments were made to explain why the first respondent had not been added to the proceedings.

46. No explanation has been provided for why he did not apply for a reconsideration of the rejection. The claimant stated that delay between March 2022 and August 2022, when he submitted the fresh claim, was due to him being away in India and then experiencing a period of illness. However, he later clarified that he became ill after he had already submitted the claim in August 2022.

47. I have considered the overall length of delay in this case from the date of the act to the date the claim was presented, which amounts 4 years and 10 months. The is a lengthy delay and exercising discretion to extend time cannot be justified in the absence of clear and compelling reasons for the delay. The claimant has put forward a number of reasons which, taken together, amount to an admission that he has not been able to commit the time necessary to pursue this claim and he had prioritised other matters.

48. I find the reasons for the delay unconvincing in persuading me to exercise my discretion to extend time. The claimant would have been aware of the time limit as he had previous experience of proceedings in the tribunal from 2018. Furthermore, the claimant had many opportunities between the act complained of and the date of the presentation of the claim where he could have found the time to complete and submit the claim form. In particular, after the claim was rejected in respect of the first respondent as he would have been notified on how to apply for a reconsideration of the decision. Also, after the order of EJ Gaskell, which explained why the claim against the first respondent had been rejected. Furthermore, Mr Hancock has confirmed that Mr Borland no longer works for the first respondent which will impact on how

the respondents challenge the claims. I have taken in to account the overriding objecting and the balance of prejudice and find that it is not just and equitable to extend the time limits in this case.

49. I am satisfied that the claimant has had sufficient notice of first respondent's application to strike out the claimant's case and has had an opportunity to respond by way or written and oral evidence. Based on my findings and reasons for those findings, the claimant has been unable to satisfy the tribunal that it has jurisdiction to hear these claims under the Equality Act 2010, in respect of the first respondent. I therefore find that the claims have no reasonable prospect of success and strike out the claimant's claim against the first respondent under Rule 37(1)(a) in relation to the complaint that the first respondent treated the claimant unfairly when dealing with his complaint about the safeguarding of a young person.

Employment Status and Vicarious Liability

50. Although I have struck out the complaint regarding the second investigation police investigation, I have considered the complaint again in respect of the first respondent in the context of the tribunal's jurisdiction under the Equality Act 2010. The claimant also complains that the first respondent treated him unfairly by refusing to investigate his complaint regarding the safeguarding of a child at the school.

51. The claimant gave evidence that this is the first time that he has brought proceedings against the first respondent. The claimant accepts that he was not employed by the first respondent and did not have any contractual relationship with it. He also accepts that he was employed by the second respondent, with whom he did have a contract, was issued payslips and by whom he was dismissed. The claimant asserts the respondents are directly linked as the first respondent has a responsibility to safeguard children in the care of the second respondent when at school. He also states that a police investigation could only have been possible if the second respondent made a referral to the first respondent. This, in his view makes the first respondent vicariously liable for the actions of LADO, James Borland, who, the claimant claims, discriminated against him by escalating the complaint and requesting a further police investigation. The claimant further asserted that the second respondent has breached its duty of care towards him and acted negligently by failing to safeguard him.

52. The claimant accepted that his understanding of the law was limited and requested the tribunal's advice on how to set out his claims as he did not understand the principles of vicarious liability in tort. This assistance was declined, I explained that whilst I can help him in clarifying and particularising his claim, I could not advise him on how to put his case. He would need to seek independent legal advice for this.

53. Mr Hancock gave evidence that the only connection the first respondent has with the claimant is as a result of a complaint made by the claimant in August 2019 arising out of an investigation conducted by James Borland in 2017. Mr Hancock confirmed that an employer could approach the police directly, although, there is an agreed procedure where the employer would usually discuss the matter with the LADO first. He explained that they did not have any power to make the police reactivate an investigation and the reason why the police decided to reactivate the investigation in this case was because the initial investigation was not sufficiently rigorous. He further explained that the complaint was responded to by Matthew Davis, who did not uphold the complaint and gave advice about proceeding to the next stage. No response was received from the claimant. Mr Hancock also confirmed that there is no contractual relationship whatsoever between the respondents. Mr Hancock gave evidence that the claimant had never worked for the second respondent.

54. Mr McGuiness also confirmed that the first respondent could go directly to the police where there is a safeguarding concern, however, in this specific situation the LADO was involved and gave directions on how the situation should best be managed.

55. Mr Mortin, on behalf of the first respondent, submitted that it is for the claimant to establish that there is a relationship to be protected. The claimant has not identified any basis other than vicarious liability which does not fall within the remit of this jurisdiction and such a claim ought to be pursued in the county court. Mr Mortin further submitted that section 83 of the Equality Act 2010 defines employment as employment under a contract of employment. He argued that there was no written contract between the first respondent and the claimant, and the tribunal cannot infer a relationship. The second respondent making a referral to the first respondent is not the only way of instigating a police investigation. Mr Boland became involved as a result of legal obligations imposed by statute not because there is a contractual relationship between the respondents. He also argued that harassment of third parties is repealed and does not apply.

56. Mr Philp, on behalf of the second respondent, supported Mr Mortin's representations on this matter.

57. The claimant’s claim, as noted in his claim form is submitted as a claim for discrimination on the grounds of race and religion or belief. During the course of the evidence, it became apparent that the basis upon which the claimant was pursuing the claims against the first respondent was that it was vicariously liable for the acts of Mr Borland and that it had acted negligently in failing to safeguard him. Section 83 of the Equality Act 2010, stipulates that those working under a contract of employment with the employer or contract to personally do work, are protected against discrimination claims arising out of actions by the employer. The claimant and the respondents agree that the claimant was not employed by the first respondent. Mr Borland was employed by the first respondent. The remit of the Equality Act 2010, in these

circumstances, does not extend to protecting a person who is not employed by the first respondent from the acts of one of their employees.

58. The claimant sought to argue that a relationship existed between the respondents because the police investigation could not have been triggered by the second respondent without the involvement of the first respondent. I find the evidence of Mr McGuinness and Mr Hancock on this point is compelling and consistent. Both witnesses asserted that there are processes in place that encourage collaborative working but confirmed that an employer can raise a safeguarding matter with the police without the involvement of the Local Authority. I find that this accurately reflects the position. Furthermore, Mr Hancock gave clear and cogent evidence that there was no contractual relationship between the respondents. The evidence presented did not demonstrate that a relationship existed between the respondents that would mean they are subject to vicarious liability on a joint basis in respect of the actions of Mr Borland. For these reasons, I find that the claims have no reasonable prospect of success.

59. In view of my orders in respect of res judicata and time limits, I make no separate order regarding employment status.

Costs

60. The first respondent applies for costs in the sum of £3,532.50 plus VAT incurred in the preparation of, and attendance at, the preliminary hearing on 06 March 2023 and with costs incurred in making this application. The first respondent relied upon the submissions made in the skeleton argument, a cost schedule, and a breakdown of costs document.

61. The claimant relies on his witness statement and documents sent to the tribunal on 13 March 2023 (breakdown of income and expenditure, pay slips from December 2022, February 2023 and March 2023, 1 page credit report showing a credit score, document showing the claimant is in default in respect of payment on a credit card (dated February 2023) and a document showing the claimant is in default in respect of a loan (dated January 2023).

62. Under Rule 76(1) of the Rules, the tribunal has a discretion as to whether to make a costs order, and must consider whether to do so, where it considers that a party acted vexatiously, abusively, disruptively, or otherwise unreasonably or where a claim or response had no reasonable prospects of success.

63. The first respondent submits that the claimant has acted vexatiously and unreasonably in bringing these claims as he has had ample time to articulate his case but has repackaged the same allegations and made them against both respondents. Further, he has failed to establish any link that would entitle him to protection against discrimination in the tribunal, the claims are over 2 years out of time and the claimant pursued the claims despite being sent a

cost warning letter on 03 February 2023. The first respondent also submits that by pursuing claims that had no reasonable prospect of success, the claimant acted unreasonably, and his actions amounted to an abuse of process.

64. The claimant gave evidence that he has only been able to access legal advice and representation for the hearing at the Employment Appeal Tribunal. He stated that he has not been able to access any legal advice for this claim and has relied on a book and internet research to put his case together. He further gave evidence that this is the first time that a live claim against the first respondent is before the tribunal, and from his limited understanding of the law, he was under the impression that the first respondent could be vicariously liable for the discriminatory actions of its employees where the acts were against a third party. The claimant, in evidence, stated that he had only become aware, during the course of the hearing, that these types of claims can only be brought in the county court or high court, when Mr Mortin challenged him cross examination.

65. In deciding whether to award costs I must first consider whether the claimant's conduct amounted to vexatious, abusive, or unreasonable conduct. In doing so I have taken into account that the claimant is a litigant in person. Many of the difficulties faced by litigants in person stem from their lack of knowledge of the law and tribunal procedure and often can experience feelings of ignorance, frustration, and disadvantage, especially if appearing against a represented party. These are feelings that were expressed by the claimant during his evidence. Although the claimant is capable of advocating for himself, he is a lay person that does not have any training in the law. Legal concepts of joint vicarious liability and negligence, and issues of jurisdiction can be complex and difficult to understand and apply for a person who is not legally qualified. I have taken into account that what is reasonable to a lay person will not always reasonable by the standards of a legal professional. For these reasons, I find that the claimant misunderstood the law and the remit of the jurisdiction of the employment tribunal when making claims against the first respondent. I further find that the claimant understood EJ Gaskell's comments to be an invitation to make a fresh application and upon making a fresh application, he was of the view that because he was making a claim for the first time against the first respondent, he was not estopped from making that claim. Accordingly, I find that the claimant's conduct, with regards to the claim against the first respondent, was not vexatious, abusive, or unreasonable.

66. However, I have found that there was no reasonable prospect of success in respect of the claims against the first respondent, with regards to time limits. On this basis, I must consider whether to exercise my discretion to make a costs order. In doing so, I have considered whether the claimant knew or reasonably ought to have known that the claims had no reasonable prospect of success. For the reasons mentioned in paragraph 65, I find that, in respect

of the claims against the first respondent, the claimant did not know or ought to have known that his claims had no reasonable prospect of success.

67. Although I am not obliged to take into account the claimant's ability to pay, I may do so. I have taken in to account the claimant's means. Although the claimant is working and receiving a regular income, I note that he does not have any savings and is in default in respect of 2 debts amounting to £16, 467.00. Furthermore, I note that he has 1 dependant, in respect of whom the claimant pays medical costs. The claimant commented he does not have sufficient money to pay for the funeral of his brother, should he pass way. For these reasons, I find that the claimant does not have the means to pay the amount applied for within a reasonable time.

68. All litigants of full age and capacity are entitled to be heard by a court or tribunal, and when unrepresented, a litigant is often operating in a system that was not developed with a focus on unrepresented litigants. Although, the claimant bought claims that did not have a reasonable prospect of success it was not reasonable to expect the claimant to understand the full extent of the legal complexities of the issues that he raised. An order for costs by an employment tribunal is very much an exception rather than the rule and, in this case, for the reasons noted, I decline to exercise my discretion to award costs. The application for costs is dismissed.

Employment Judge Hussain

Date: 17 March 2023