Neutral Citation Number: [2021] EWHC 2418 (QB)

Case No: QB-2020-002318

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31st August 2021

Before :

MASTER DAGNALL

- -

Between :

MARCUS FARNHAM-OLIVER	**Claimant**
- and -	
RM EDUCATIONAL RESOURCES LIMITED	**Defendant**

- -
- -

Andrew Watson (instructed by **Anthony Gold Solicitors**) for the **Claimant**
Jonathan Grace (instructed by **Weightmans LLP**) for the **Defendant**

Hearing dates: 16 July and 5 August 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER DAGNALL

MASTER DAGNALL :

Introduction

1. This is my Judgment in relation to an Application ("the Application") made by the defendant by Application Notice dated 11 February 2021 to strike out the claim pursuant to CPR3.4(2)(b) on the grounds that the bringing of it is an abuse of the court's process.

2. This claim is the latest in a line of claims where what happens is that an (past or present) employee of an organisation brings a claim against the employer in an employment tribunal ("the Tribunal Claim") seeking remedies, in particular for failure to pay wages and/or discrimination and/or harassment and/or unfair dismissal. The claim in the employment tribunal is then compromised but the employee then brings a further claim ("the Civil Claim") in the civil court, whether county court or High Court, for damages arising out of the same situation which was the subject matter of the employment claim. Although in various of the cases including this one, the compromise agreement ending the Tribunal Claim litigation in the employment tribunal contains a provision that the employee will be not prevented from bringing the Civil Claim, the employer then asserts that the actual doing so by the employee involves an abuse of process because the employer is being subjected to undue harassment by the employee bringing two claims when the employee could simply have just brought one global set of claims in the employment tribunal. This claim before me is merely the latest of a series of such applications in some of which the employer has been successful and in others the employee.

3. The situation involves the interaction of various principles of legal policy. One is the right of the employee encapsulated in Article 6 of the Protocol to the Human Rights Convention that a person is entitled to have their claims determined by a court or other judicial authority and that in the absence of a determination of a claim (or at least of the underlying cause of action) the person is entitled to pursue it. There are, however, two other important principles in play both encapsulated in Latin maxims. The first is one effectively of private law policy "nemo debet bis vexari pro una et eadem causa" that is to say that a person, here the employer, should not have to contest a further claim having resolved a first claim in which the relevant matter could have been ventilated and determined. The second is more of a public policy maxim being "interest reipublicae ut sit finis litium" being that it is a matter of public policy that litigation and disputes should come to an end and not be protracted by the bringing of further claims which could have been brought and resolved with previous claims. It is the interaction of those principles and policies which gives rise to the difficulty in this case.

History

4. The claimant was employed by the defendant as a customer adviser working in an office from prior to 2012. The claimant suffered various physical and mobility problems and following treatment returned to full-time work in 2014. Following various occurrences he resigned in February 2015.

5. On 26 August 2014, the claimant had lodged a grievance with the defendant. This asserted that (1) the claimant was suffering from work-related stress occurring from his working environment (2) the claimant had been unlawfully harassed by another employee ("V") and which had caused stress, distress and anxiety and was also

discriminatory being sue to the claimant have a disability (3) the claimant had been unlawfully discriminated against (in particular by V) within the provisions of the Equality Act 2010 ("the 2010 Act") due to his disability and which had caused stress and other matters including depression (4) the defendant had discriminated against the claimant (although this was probably more an assertion of a failure to make reasonable adjustments) by insisting of his sitting near a drinks machine and failing to assist or appoint him to carry out certain roles.

6. On 4 December 2014 the claimant (while still an employee) lodged a Tribunal Claim with the Employment Tribunal ("the Tribunal") with accompanying "Particulars of Claim" ("the Tribunal Particulars") which (1) alleged the existence of the disability (2) gave a history including regarding actions of V and the claimant suffering increasing mental stress (paragraph 22) (3) asserting "Failure to make reasonable adjustments" in breach of section 21 of the 2010 Act – this being with regard to where the claimant was being seated in the office and requiring medical appointments to be taken as annual leave (4) asserting "[Breach of] Section 15 [of the 2010 Act] unfavourable treatment – referring to the same matters (5) asserting "Indirect Discrimination" in breach of section 19 of the 2010 Act – referring to the medical appointments point. Harassment was not alleged. The claimant's legal representatives for this purpose were DAS Law ("DAS").

7. On 28 January 2014 the claimant by different legal representatives, being Norrie Waite & Slater solicitors ("NWS") sent a letter to the defendant saying that the claimant wished to pursue a claim "for personal injury suffered as a result of Work Related Stress during the course of his employment", referring to there being an upcoming hearing in the Tribunal and requesting copies of employment records.

8. There then followed negotiations between DAS and the defendant's solicitors with the assistance of an ACAS mediator with regard to the resolution of the Tribunal proceedings. The Claimant's evidence, which is not controverted and which I accept, is that the Claimant was keen to protect his position with regard to the Civil Claim (being his "personal injury case") which he was intending (and was making clear that he was going) to bring, and that he was both told by DAS and believed that he would be allowed by the defendant to pursue the personal injury case against it, and that he would not have settled the Tribunal Claim proceedings if that meant he could not pursue the personal injury case.

9. On 26 February 2015 a settlement was reached encapsulated in a written ACA COT3 Form (signed by DAS for the claimant on 26 February 2015 and by solicitors for the defendant on 6 March 2015). This ("the Tribunal Settlement Agreement") provided amongst other things for:

    i) The claimant's employment to cease on 26 February 2015 (clause 2)

    ii) It being a condition that the Tribunal proceedings would be withdrawn with an email to such effect being sent to the Tribunal by DAS within 2 days (clause 3)

    iii) A payment being made of £12,000 by the defendant to the claimant (clause 4)

iv) By clause 6 "Subject to the exclusion at clause 7 below…" a full and final settlement of all claims the claimant had or might have against the defendant arising from the employment

v) By clause 7: "The Claimant is not prevented from pursuing his potential claim for damages arising from a personal injury allegedly suffered as a result of work related stress which is currently being handed handled by Norrie Waite and Slater Solicitors on behalf of the Claimant which was raised with the Respondent [the defendant] by way of solicitors' letter dated 28 January 2015 ("the PI claim")."

vi) By clause 9 that the claimant would keep the Agreement and the history confidential

vii) By clause 11 that the claimant would not disparage the defendant but that "For the avoidance of doubt the claimant is not precluded from disclosing such information as outlined in clause 9 for the purpose of the PI claim and the same will not be construed as a breach of this Agreement."

10. DAS then sent an email dated 26 February 2015 to the Tribunal stating that the claimant was withdrawing his submitted claims in their entirety. Rule 51 of the Employment Tribunal Procedure Rules 2013 provides that the claim in those proceedings ("the Employment Claim") comes to an end upon the sending of such a notice of withdrawal.

11. Rule 52 provides that:

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

(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or

(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice."

12. However, there is no evidence before me that the Tribunal ever issued a Rule 52 judgment of dismissal.

13. In June 2015 NWS sent a claim notification form regarding alleged personal injury to the defendant and which was followed in February 2019 by a Letter of Claim from new solicitors, Anthony Gold.

The Claim Form and Particulars of Claim

14. The (Civil Claim) Claim Form was issued in this court on 3 July 2020. It and its Particulars of Claim seek damages under sections 1 and 3 of the Protection from Harassment Act 1977 ("the 1977 Act") on the basis that V had unlawfully harassed the claimant within the workplace and that the defendant is vicariously liable for V's

conduct. It is alleged that the claimant suffered psychiatric injury as a result of V's conduct. I have not been asked to and do not decide in any way whether these claims do or not have substance although no suggestion has been made to me that either they or a substantive defence to them are not reasonably arguable, and it seems to me that I should proceed on that basis.

15. The Application Notice was issued on 11 February 2021 and seeks to strike-out "on the basis that the Claim is duplicative litigation and an abuse of process." There is no attempt to strike-out on the basis that the (or any part of the) Claim does not fall within the terms of the clause 7 exception to the full settlement provided for by clause 6 of the Tribunal Settlement Agreement. No submissions have been made to me to such effect and therefore I proceed on the basis that this civil High Court claim does fall within the clause 7 exception's wording. That may not necessarily prevent the defendant from contending in the future that some or all of this Civil Claim is outwith the clause 7 exception but I do not have to and do not decide that point.

The Case-Law

16. There have been numerous decisions in somewhat similar factual circumstances such as these dealing with the question of whether a person in the position of the claimant is permitted to bring a Civil Claim notwithstanding the termination of the Employment Claim. Many of those decisions were either before the present leading cases on the principles to be applied in relation to whether the commencing of new proceedings in relation to matters which were or could have been raised in previously compromised or otherwise resolved proceedings were decided or are referred to in those subsequent leading cases. Therefore, while I have considered all the case-law adduced to me by counsel, I am only going to refer in detail to what I regard as being the leading (and most recent) case-law.

Abuse of Process Jurisdiction

17. In Virgin Atlantic v Zodiac 2013 UKSC 46, the Supreme Court revised the law of res judicata and related abuse of process. At paragraphs 17-22 Lord Sumption reviewed the doctrine of res judicata generally and its two main essential limbs of cause of action estoppel (where a judicial decision against a party on whether a cause of action exists is simply binding for the future) and issue estoppel (where in the event of a judicial decision on a particular issue against a party, the party is bound for the future both in relation to that issue and any other issue which it could and should have raised at that point, unless there are exceptional circumstances).

18. At paragraph 23 Lord Sumption referred to the principle known as "the rule in Henderson v Henderson", which he had summed up in paragraph 17 as "which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones", and counsel's contention that this was only an example of abuse of process and not part of the law of res judicata. Although the context of his next paragraph 24 is not relevant to this case (as Lord Sumption was concerned with a situation where there had been a previous judicial decision), the content in which he summed up the Henderson rule is relevant, and it reads as follows:

"24. I do not accept this. The principle in *Henderson v Henderson* has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in *Yat Tung*. The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, *Johnson v Gore-Wood & Co* [2002] 2 AC 1, in which the House of Lords considered their effect. This appeal arose out of an application to strike out proceedings on the ground that the plaintiff's claim should have been made in an earlier action on the same subject-matter brought by a company under his control. Lord Bingham took up the earlier suggestion of Lord Hailsham of St. Marylebone LC in *Vervaeke v Smith* [1983] 1 AC 145, 157 that that the principle in *Henderson v Henderson* was "both a rule of public policy and an application of the law of res judicata". He expressed his own view of the relationship between the two at p 31 as follows:

"*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. 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 all 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."

The rest of the Committee, apart from Lord Millett, agreed in terms with Lord Bingham's speech on this issue. Lord Millett agreed in substance in a concurring speech. He dealt with the relationship between res judicata and the *Henderson v Henderson* principle at pp 58H-59B as follows:

"Later decisions have doubted the correctness of treating the principle as an application of the doctrine of res judicata, while describing it as an extension of the doctrine or analogous to it. In *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257, Sir Thomas Bingham MR explained that it is not based on the doctrine in a narrow sense, nor on the strict doctrines of issue or cause of action estoppel. As May LJ observed in *Manson v Vooght* [1999] BPIR 376, 387, it is not concerned with cases where a court has decided the matter, but rather cases where the court has not decided

the matter. But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. While the exact relationship between the principle expounded by Sir James Wigram V-C and the defences of res judicata and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented."

19. Johnson v Gore Wood 2002 2 AC 1 was itself a case where a claim brought by a company had been compromised mid-way through a lengthy trial and then its shareholder sought to bring his own claim (such claim having been intimated by the time of and specifically excepted from the relevant settlement agreement) and it was contended that that was an abuse of process. It was in that context that the Lord Bingham formulated his "broad merits based judgment" test which was cited with approval in Virgin Atlantic.

20. Lord Bingham came to the conclusion that there were two reason why the shareholder's claim should not fail on Henderson grounds; being firstly that the negotiations and then terms of the settlement agreement were only consistent with an expectation on the part of the shareholder acquiesced in by the defendant that the shareholder claim should be able to proceed to trial (rather than being met by a procedural defence of abuse of process), and, secondly, that in all the circumstances (including the settlement agreement) there was no sufficient abuse anyway. He said:

"The question is whether the parties to the settlement of WWH's action (relevantly, Mr Johnson and GW) proceeded on the basis of an underlying assumption that a further proceeding by Mr Johnson would not be an abuse of process and whether, if they did, it would be unfair or unjust to allow GW to go back on that assumption. In my judgment both these conditions were met on the present facts. Mr Johnson was willing in principle to try to negotiate an overall settlement of his and the company's claims but this was not possible in the time available and it was GW's solicitor who said that the personal claim "would be a separate claim and it would really be a matter for separate negotiation in due course". It is noteworthy that Mr Johnson personally was party to the settlement agreement, and that the agreement contained terms designed to preclude (in one instance) and limit (in another) personal claims by him. Those provisions only made sense on the assumption that Mr Johnson was likely to make a personal claim. GW did not, of course, agree to forgo any defence the firm might have to Mr Johnson's claim if brought, and the documents show that GW's solicitor was alert to issues of remoteness and duplication. Had Mr Johnson delayed unduly before proceeding, a limitation defence would have become available. But an application to strike out for abuse of process is not a defence; it is an objection to an action being brought at all. The terms of the settlement agreement and the exchanges which preceded it in my view point strongly towards acceptance by both parties that it was open to Mr Johnson to issue proceedings to enforce a personal claim, which could then be tried or settled on its merits, and I consider that it would be unjust to permit GW to resile from that assumption.

If, contrary to my view, GW is not estopped by convention from seeking to strike out Mr Johnson's action, its failure to take action to strike out over a long period of time is potent evidence not only that the action was not seen as abusive at the time but also that, on the facts, it was not abusive. The indicia of true abuse are not so obscure that

an experienced professional party, advised by leading counsel (not, at that stage, Mr Steinfeld), will fail to recognise them. It is accepted that Mr Johnson had reasons which he regarded as compelling to defer prosecution of his personal claim. If, as he contended, the urgency of obtaining an early and favourable decision in the company's action was itself a result of GW's breach of duty to the company and to him, it would seem to me wrong to stigmatise as abusive what was, in practical terms, unavoidable. I agree with GW that it would certainly have been preferable if the judge who tried the company's action, and thereby became familiar with much of the relevant detail and evidence, had been able at the same time or shortly thereafter to rule on the personal claim. That would have been efficient and economical. But there were reasons accepted at least implicitly by both parties at the time for not proceeding in that way, and GW could, if it wishes, limit the extent to which issues extensively canvassed in the earlier action are to be reopened. It is far-fetched to suggest that this action involves a collateral attack on GW's non-admission of liability in the first action when that action was settled by insurers on terms quite inconsistent with any realistic expectation that GW would not be found liable.

In my opinion, based on the facts of this case, the bringing of this action was not an abuse of process. The Court of Appeal adopted too mechanical an approach, giving little or no weight to the considerations which led Mr Johnson to act as he did and failing to weigh the overall balance of justice. I would allow Mr Johnson's appeal."

21. Those were decisions made on the particular facts of that case. However, it seems to me clear from these authorities that:

(1) the Henderson principle can operate where one claim has been the subject of compromised proceedings so as to make the bringing of a second claim, which could have been brought in those proceedings but was not, an abuse even if it was not settled by the compromise and even if it is made by a different person; but

(2) the settlement and its process may themselves prevent an application contending abuse of process being made on the basis that the relevant party is estopped by agreement or convention from taking the point; and in any event

(3) whether there is an abuse of process sufficient to justify the relevant party being prevented from pursuing the second claim involves the conducting of a "broad merits based judgment" test considering all the circumstances and including whether there has been "undue harassment" of the other party, and asking whether the process of the court is being misused and/or abused (and see also the citations from the Akay judgment below).

Srivatsa v SoS

22. I was also taken to a number of cases dealing with the attempts to pursue Civil Claims (i.e. claims in the court system) following resolutions and compromises of Tribunal Claims. Mr Watson relied on the decision in Srivatsa v Secretary of State for Health 2018 ICR 1660. There an Employment Claim had been made and withdrawn with a Rule 52 dismissal and then a Civil Claim based on the same facts was brought. The defendant sought to argue that the Rule 52 dismissal amounted to a cause of action estoppel on the basis that there had been an actual dismissal of the Employment Claim. At paragraphs 42 to 47, Mummery LJ held (joined in with by the other

members of the Court of Appeal; and after reviewing numerous previous decisions) that, in the circumstances of a Rule 52 dismissal which although a technical "dismissal" was in substance a "withdrawal", the question was whether the claimant had intended to terminate all claims, including any Civil Claim, by the withdrawal and that the burden was on the defendant to show that this intention had existed at the time (and which burden had not been discharged). It seems clear to me (and Mr Grace has not really sought to argue otherwise) that even if there had been a Rule 52 dismissal in this case (and there is no evidence that there has been such), in the light of clause 7 of the Tribunal Settlement Agreement (as well as the preceding letter from NWS) the claimant had not intended to terminate any Civil Claim and so that no cause of action (or issue) estoppel arises.

23. I have noted that there appears to have been no attempt to argue Henderson abuse of process in Sviratsa and which may explain the Court of Appeal's not dealing with it. It can be argued that the Court of Appeal would have mentioned abuse of process if they had thought that what had happened could have amounted to a Henderson abuse. However, in Sviratsa the claimant faced jurisdictional problems in bringing his claims in the Tribunal, and which could potentially have justified his ceasing to proceed there and choosing to proceed instead in Court, and which matters do not exist in this case.

Dattani v Trio

24. Mr Watson also relied upon Dattani v Trio 1998 ICR 872. There a claim had been made (at a time when the Employment Tribunal rules were different) in an industrial tribunal for unfair dismissal and following a compromise of that claim, a claim was made for unpaid wages in the county court which was attacked on grounds of abuse of process.

25. Mummery LJ (joined in with by the rest of the Court of Appeal) held that (1) the relevant court order simply recited the compromise agreement and "The substance of this document could not give rise to the plea of res judicata either in strict form or in the extended *Henderson v. Henderson* form." and (2) on its true construction (which was based in part on admitting in evidence a statement from relevant counsel that the compromise had been intended only to be a compromise of the unfair dismissal claim which had actually been brought in the Tribunal) the compromise agreement did not extend to the unpaid wages claim.

26. Mummery LJ then went on to say "I reject Mr. Stallebrass's submission that the reservation made by Mr. Dattani's solicitors, as described in counsel's statement, was a reservation that Mr. Dattani was not entitled to make, i.e. that he was reserving the right to abuse the process of the court by starting a separate set of proceedings based on the same facts in the county court. It would not be an abuse of the process of the court to start a claim in the county court, if the compromise was limited to the unfair dismissal claim."

27. Those citations may well suggest that Henderson abuse of process simply does not apply where a compromise agreement has been made which excepts a particular cause of action or area of dispute. However, I do bear in mind that: (1) Mummery LJ's analysis of Henderson as being (only) as to the law of res judicata does not involve (at

least expressly) the application of a "broad merits based judgment" approach as is now required by the Supreme Court decisions (above) (2) Dattani is early in the sequence of these claims and not mentioned in the later decisions (in particular in Sheriff and in Akay below). Nevertheless, it is a bald statement from the Court of Appeal that where a right has been reserved to bring county court proceedings then there is no abuse made in relation to somewhat analogous facts to this case.

Sheriff v Klyne

28. Mr Grace has, however, relied upon various authorities in the line of these cases to advance the defendant's position that this Civil Claim is an abuse of process.

29. He has drawn my attention to Sheriff v Klyne 1999 ICR 1170 where there had been a full settlement in the Tribunal of the "all claims in respect of which [the Tribunal] has jurisdiction" and then brought a Civil Claim for personal injuries. It was held that a negligence claim for injuries suffered during the course of the employment could have been brought in the Tribunal and which could award damages for personal injury.

30. At paragraph 22 it was held that the Civil Claim fell within the wording of the compromise agreement and should fail on that basis:

> "22. But is the present claim one to which paragraph 4 of the agreement applies? Mr. Buchan submits that it is not, because the cause of action is different. The claim in the action is based upon the tort of negligence. The claimant will have to prove not only the conduct of the master, but that it was reasonably foreseeable to a reasonable employer that this might cause psychiatric injury. I merely comment in passing that this might in any event prove a difficult hurdle to surmount. One can reasonably appreciate that such harassment may cause injury to feelings; but psychiatric injury is a different matter. The advantage of the statutory tort, from the claimant's point of view, is that this requirement does not need to be established; all that needs to be established is the causal link. But in any event, in my judgment, the claim does fall within paragraph 4 of the compromise *1180 agreement. It is a claim for compensation for injury sustained by the employee arising out of his employment with the respondent employers (i.e., through the master's conduct) and in respect of which the employment tribunal has jurisdiction."

31. However, it was also held in the following paragraphs that the Civil Claim was an abuse of process:

> "23. Mr. Pleming also argues that the action should be struck out as an abuse of process on the basis of res judicata; he relies on the decision of the industrial tribunal dismissing the application. I do not think this is a case of res judicata in the strict sense, because the cause of action is not the same in both proceedings. However, the principle applies to matters which could have been raised in previous proceedings, but were not. In *Henderson v. Henderson (1843) 3 Hare 100* , 114–115 Wigram V.-C. said:
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> "In trying this question, I believe I state the rule of the court correctly, when I say, that 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. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

This principle was applied in *Talbot v. Berkshire County Council [1994] Q.B. 290* . After citing it, I said, at p. 296 c :

"The rule is thus in two parts. The first relates to those points which were actually decided by the court; this is res judicata in the strict sense. Secondly, those which might have been brought forward at the time, but were not. The second is not a true case of res judicata but rather is founded on the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation; the court will stay or strike out the subsequent action as an abuse of process: *per* Lord Wilberforce in *Brisbane City Council v. Attorney-General for Queensland [1979] A.C. 411* , 425 g ."

And, at p. 297 e , I said:

"In my judgment there is no reason why the rule in *Henderson's* case should not apply in personal injury actions. Indeed there is every reason why it should. It is a salutary rule. It avoids unnecessary proceedings involving expense to the parties and waste of court time which could be available to others; it prevents stale claims being brought long after the event, which is the bane of this type of litigation; it enables the defendant to know the extent of his potential liability in respect of any one event; this is important for insurance companies who have to make provision for claims and it may also affect their conduct of negotiations, their defence and any question of appeal."

24. The principle applies in this case. The same issue of the conduct of the master of the employers' vessel lies at the heart of both the proceedings in the industrial tribunal and the county court action, although in the latter the employee assumes the additional burden of proving negligence. For the reasons I have already given, the employee could have brought forward his whole claim for compensation in the tribunal. He did not do so.

25. There is an exception to the rule in *Henderson's* case where there are special circumstances. The special circumstances must afford an adequate explanation of why the claim now made was not made in the earlier proceedings. As I said in *Talbot's* case, at p. 299 d , "The court has to consider why the claim was not brought in the earlier proceedings."

26. Mr. Buchan submitted that there were a number of special circumstances here. He listed the following: (a) the different limitation period and in particular the very short period in the employment tribunal; (b) different cost provisions: an applicant in the employment tribunal is not usually awarded costs, and this may be a disadvantage to a claimant with a heavy claim; (c) the procedure in the court is more suitable for trying

a complex personal injury claim; (d) there is no facility for interim payments or provisional damages in the employment tribunal; (e) the expertise of the employment tribunal does not lie in the field of adjudication on perhaps difficult questions of psychiatric injury.

27. In my opinion these considerations cannot be regarded as special circumstances; they are inherent in the two different forms of jurisdiction. The principle of public policy is that claims that have been or could have been litigated in one tribunal, should not be allowed to be litigated in another.

28. What might be a special reason would be if the claimant's condition had not come to light at the time the earlier proceedings were concluded. That is not the position here. Although the employee's condition may not have been formally diagnosed as post traumatic stress disorder by October 1995, it is clear that he was complaining of anxiety and depression from February 1995 and continuing. This was not mere injury to feelings, but was the essence of his psychiatric injury.

29. For these reasons I would dismiss this appeal, both on the grounds that the claim in the county court action is one that falls within paragraph 4 of the agreement and on the principle in *Henderson v. Henderson* ."

32. Mr Grace accepts, correctly, that, as with Dattani, this decision pre-dates the modern "broad merits based judgment" approach to Henderson abuse of process. Nevertheless, it is a decision of the Court of Appeal which reaches the opposite conclusion to that reached in Dattani which is recorded as having been cited in argument but, perhaps curiously, is not referred to in the judgment. This may be because of the wording of the compromise agreement in Dattani, with its exception provision, but this is not stated.

33. Mr Grace also accepts, as stated in Sheriff, that there may be special circumstances as to why bringing a further Civil Claim would not be an abuse, for example if the Tribunal did not have jurisdiction (e.g. its time-limit had expired by the time that a claimant learnt of relevant facts) but submits that none such exist here.

Akay v Newcastle

34. However, Mr Grace mainly relied upon the decision in Akay v Newcastle University 2020 QB 1669 and which does post-date Virgin Atlantic, and is again on analogous facts of a compromised Tribunal Claim followed by a Civil Claim.

35. In this case Tribunal proceedings had been brought in relation to various claims and those for harassment had been struck out for (i) failure to comply with orders regarding provision of particulars and (ii) having no reasonable prospect of success as having been brought outside the Tribunal's jurisdictional time-limit with no prospect of obtaining an extension of time (see paragraph 9 of the judgment).

36. A Civil Claim for harassment was brought and proceeding in the county court before the compromise of the remaining Tribunal proceedings was agreed. , and which compromise included a clauses 6 and 7 which (see paragraph 12 of the judgment) containing the following wordings:

"The Claimant confirms that he is aware of no other cause of action which he has made against the Respondent (save for the personal injury claim referred to in clause 7) …

The Claimant is not precluded by this agreement from bringing any personal injury claim against the Respondent where he is not and could not reasonably have been, aware of any such claim at the date of this Agreement. For the avoidance of doubt nothing in this Agreement prevents the Claimant from pursuing the personal injury claim that he has already made. The making and pursuing of this claim is not a breach of this agreement."

35. The defendant (i.e. the Respondent in the Tribunal Claim) then applied to strike-out the Civil Claim on the basis of abuse of process. The application was heard by HHJ Gargan in the county court who granted it and struck it out and the claimant appealed to Mr Justice Lavender who dismissed the appeal in the reported judgment.

36. Paragraph 13 of judgment refers to the fact that the uncontroverted evidence of the claimant was that he had made clear in the negotiations for the compromise that he intended to purse the Civil Claim and nothing had been said which suggested that it could be struck out as an abuse without its merits being determined.

37. Paragraphs 19 and 20 of the judgment refer to HHJ Gargan having considered the Henderson and Virgin Atlantic line of authority.

38. However, Paragraph 21 of the judgment refers to HHJ Gargan having considered another line of authority ("the Securum Finance principle") to the effect that where one claim had been struck out as a result of failure to comply with a coercive order of the court then it would generally be an abuse to bring a second claim based on the same alleged facts. It reads:

"The Judge also quoted paragraph 34 of Chadwick LJ's judgment in *Securum Finance Ltd v Ashton (No 1) [2001] Ch 291* :

"For my part, I think that the time has come for this court to hold that the "change of culture" which has taken place in the last three years - and, in particular, the advent of the Civil Procedure Rules - has led to a position in which it is no longer open to a litigant whose action has been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out save in exceptional cases. The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind - and must consider whether the claimant's wish to have "a second bite at the cherry" outweighs the need to allot its own limited resources to other cases. The courts should now follow the guidance given by this court in the *Arbuthnot Latham case [1998] 1 WLR 1426* , 1436-1437:

"The question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action: see *Janov v Morris [1981] 1 WLR 1389* . The position is the same as it is under the first limb of *Birkett v James* . In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for

abuse of process some special reason has to be identified to justify a second action being allowed to proceed."

39. Paragraph 22 then referred to HHJ Gargan considering Sheriff; and then Paragraph 23 referred to HHJ Gargan returning to the Securum Finance line of authorities as follows:

"23. The judge also cited the summary in paragraph 3.4.3.2 of the White Book of the guidance given by Morris J in his judgment in *Davies v Carillion Energy Services Ltd [2018] 1 WLR 1734* . That guidance included the following, in subparagraphs 52(1) & (2):

"(1) Where a first action has been struck out as itself being an abuse of process, a second action covering the same subject matter will be struck out as an abuse of process, unless there is special reason: the *Securum* case, para 34, citing the *Arbuthnot Latham* case, and *Aktas v Adepta [2011] QB 894* , paras 48 and 52.

(2) In this context abuse of process in the first action comprises: intentional and contumelious conduct; or want of prosecution; or wholesale disregard of rules of court: *Aktas v Adepta* , paras 72 and 90."

40. Paragraphs 24 and 25 of the judgment refer to HHJ Gargan having simply considered the compromise agreement as dealing with the Tribunal Claim leaving the issues in the Civil Claim including any of abuse of process "entirely at large".

41. Paragraph 26 then set out HHJ Gargan's view that the Civil Claim was in principle an abuse of process, and to be struck out, on the basis of the Securum Finance line of authorities:

" 26. The Judge then dealt with abuse of process in paragraphs 85 to 105 of his judgment. In the light of the guidance in *Davies v Carillion* , he started by asking himself whether the 2013 Harassment Claims were struck out as an abuse of process. He held that they were. He then said as follows in paragraph 96 (which Mr Buchan, acting for the Claimant, accepted was correct):

"Therefore, the County Court action should be struck out unless there is some special reason why I should not do so. However, when carrying out that exercise I must give effect to the overriding objective (see: *Securum* §34) and the need to do justice (see the fourth guideline in *Davies* (above)). Further, I should take a broad merits-based approach to the matter (see: *Johnson* per Lord Bingham)."

42. Paragraphs 27 and 28 of the judgment referred to HHJ Gargan deciding that there was no special reason justifying the Civil Claim (in particular the claimant knew of the alleged facts underlying the personal injury claim throughout and had had a chance to properly advance them in the Tribunal Claim but had failed to take it) and applying the "broad merits based judgment" approach holding the Civil Claim to be an abuse of process which could only be properly met by striking it out.

43. In Paragraphs 32 and 33 of the judgment, Lavender J held that the Tribunal Claim had been struck out for contumelious disregard of an unless order. In Paragraphs 34 to 41, Lavender J held that there was no special reason justifying the personal injury claim,

the subject-matter of the Civil Claim, having not been brought and resolved in the Tribunal Claim.

44. In Paragraphs 42 onwards, Lavender J considered a ground of appeal that HHJ Gargan had failed to apply properly a "broad merits based judgment" approach. He set out the appropriate approach as follows:

"46. Lord Bingham used the expression "broad, merits-based judgment" in contrast with what he called "too dogmatic an approach", namely holding that, because a matter could have been raised in earlier proceedings, it should have been. The judge in this case certainly did not adopt that too dogmatic approach.

47. Lord Bingham went on to explain what he meant by a "broad, merits-based judgment" in the remainder of the sentence in which he used that phrase. A "broad, merits-based judgment" is one which:

(1) takes account of the public and private interests involved;

(2) takes account of all the facts of the case; and

(3) focuses 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."

45. In Paragraph 48, Lavender J said that HHJ Gargan had carried out precisely what Lord Bingham had required to be done; and in succeeding paragraphs rejected contentions that HHJ Gargan had failed to consider various possibly relevant matters.

46. In Paragraphs 53 onwards, Lavender J dealt with arguments based on the compromise agreement and negotiations in that case as follows:

"53. I do not accept Mr Buchan's submission that the judge misconstrued the Compromise Agreement. The meaning of clause 7 is quite clear: the Compromise Agreement itself did not prevent the Claimant from pursuing the personal injury claim. However, there was no agreement, express or implied, that the claim was not an abuse of process.

54. Mr Buchan also submitted that the circumstances in which the Compromise Agreement was made gave rise to an estoppel by convention. He relied on the following passage from Lord Bingham's speech in *Johnson v Gore Wood & Co (No 1)* (at 33G-34C):

"The question is whether the parties to the settlement of WWH's action (relevantly, Mr Johnson and GW) proceeded on the basis of an underlying assumption that a further proceeding by Mr Johnson would not be an abuse of process and whether, if they did, it would be unfair or unjust to allow GW to go back on that assumption. In my judgment both these conditions were met on the present facts. Mr Johnson was willing in principle to try to negotiate an overall settlement of his and the company's claims but this was not possible in the time available and it was GW's solicitor who said that the personal claim "would be a separate claim and it would really be a matter for separate negotiation in due course". It is noteworthy that Mr Johnson personally

was party to the settlement agreement, and that the agreement contained terms designed to preclude (in one instance) and limit (in another) personal claims by him. Those provisions only made sense on the assumption that Mr Johnson was likely to make a personal claim. GW did not, of course, agree to forgo any defence the firm might have to Mr Johnson's claim if brought, and the documents show that GW's solicitor was alert to issues of remoteness and duplication. Had Mr Johnson delayed unduly before proceeding, a limitation defence would have become available. But an application to strike out for abuse of process is not a defence; it is an objection to an action being brought at all. The terms of the settlement agreement and the exchanges which preceded it in my view point strongly towards acceptance by both parties that it was open to Mr Johnson to issue proceedings to enforce a personal claim, which could then be tried or settled on its merits, and I consider that it would be unjust to permit GW to resile from that assumption."

55. This was an application on the particular facts of that case of the doctrine of estoppel by convention as stated by Lord Denning MR in *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84* , 122:

"When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

56. However, the judge in the present case found that there was no such common assumption. That was the effect of his conclusion in paragraph 84 of his judgment that there was nothing in the material to which he was referred which supported an argument that the Claimant believed that (i) the Defendant was giving up a potential defence to the personal injury action by entering into the Compromise Agreement and/or (ii) the Compromise Agreement would improve, rather than preserve, his position in the personal injury claim.

57. The judge was wrong (in this paragraph and others) to refer to an application to strike out the claim on the grounds of abuse of process as a potential defence. As Lord Bingham explained in *Johnson v Gore Wood & Co (No 1)* , it was not a defence, but an objection to the action being brought at all. However, it does not seem to me that that error detracts from the Judge's finding that there was no common understanding (because even the Claimant did not believe) that the Compromise Agreement would improve, rather than preserve, his position in the present claim.

58. It is relevant to note that the facts of this case are significantly different from those of *Johnson v Gore Wood & Co (No 1)* . Neither Mr Johnson nor his company, Westway Homes Ltd, had brought a claim which had been struck out as an abuse of process. Moreover, the settlement agreement in that case was a settlement of the very action in which the defendant subsequently contended that Mr Johnson should have brought his claim. In the present case, the Compromise Agreement only settled the Dismissal Claims, since the 2013 Harassment Claims (which should have included the Claimant's personal injury claim) had already been struck out. The Defendant having applied once before for those claims to be struck out, it was to be expected that the Defendant would apply again for any claim based on the same facts to be struck out.

> 59. Moreover, the Claimant's evidence as to what was said and what he believed when he entered into the Compromise Agreement, and the documents exhibited to his witness statement, are not inconsistent with the judge's finding. I conclude that the judge was entitled to make that finding and, as I have said, it is inconsistent with any estoppel by convention."

47. It seems to me that those paragraphs state, amongst other things, that:

> (1) the claims which were the subject-matter of the Civil Claim were, or at least should have been, included in those harassment claims which were advanced in the Tribunal Claim but which had been struck out in the Tribunal Claim (including for contumelious non-compliance with an order of the Tribunal) – see Paragraph 58 and other paragraphs cited above
>
> (2) an argument that the compromise agreement provided that the Civil Claim could proceed failed on the basis that it was held that that compromise agreement only provided that it "itself" did not prevent the Civil Claim being pursued, and did not prevent the Civil Claim being challenged on any other basis including abuse of process – Paragraph 53
>
> (3) an argument that the compromise agreement and the compromise negotiations gave rise to an estoppel by convention barring the defendant from relying on abuse of process failed for two reasons, relating to the absence of anything giving rise to a convention that the defendant would lose a potential defence (or rather ground to resist) the Civil Claim and the absence of any belief on the part of the claimant that the defendant was giving up such an existing potential defence (or rather ground to resist) rather than merely preserving whatever the situation otherwise was – Paragraphs 56 and 57. However, those Paragraphs need to be seen in the context of Paragraph 58 which makes clear that this compromise agreement only settled other claims (than the Civil Claim) in a factual context which indicated that the defendant would (presumably) seek to strike-out the Civil Claim on the same basis (non-compliance with orders of the Tribunal) that the relevant previous elements of the Tribunal Claim had been struck out.

48. The appeal against HHJ Gargan's order was dismissed. There is nothing expressly in Lavender J's judgment to state that Lavender J would have reached the same conclusion as HHJ Gargan had the matter come before Lavender J at first instance and not by way of appeal. I note that the test for an appeal to succeed is a finding requiring the first instance judge to be "wrong" (CPR52.21), and so there is no need for the appellate judge to indicate their own view as a matter of evaluation but rather they decide whether the first instance judge's evaluation was within the range of legitimate evaluations. However, in general, Lavender J appears to have approved of HHJ Gargan's reasoning and conclusions.

Manda v UBS

49. Mr Grace also took me to the county court decision in Manda v UBS delivered on 16 June 2016 by HHJ Hand QC. Being a county court judgment it is, at most, of persuasive effect and is not binding upon me. Here some claims before the Tribunal had been struck out and then the remainder were withdrawn and then the Civil Claim was brought.

50. HHJ Hand treated Sheriff as having been decided on alternative grounds of (1) the compromise agreement in that case settling the underlying claim and (2) Henderson abuse of process (see paragraphs 38 onwards); and went on to say that Sheriff in relation to the second point had been overtaken by Virgin Atlantic and the need to apply the "broad merits based judgment" approach (paragraphs 44 and 66). It is relatively common-ground, and in any event it is my view, that he was correct in saying that.

51. In paragraphs 64 to 66, HHJ Hand referred to the various maxims I have cited above, said that he regarded each case as depending on it own facts and then sought to apply Virgin Atlantic principles. In paragraphs 67 to 70 he held that the effect of the Tribunal strike-out combined with a Rule 52 dismissal on withdrawal was that the subject-matter of the Civil Claim could no longer be determined in the Tribunal, and in paragraphs 72 to 74 he held that consequently the attempt to revive those claims in the county court by way of the Civil Claim was an illegitimate abuse of process which should be struck-out.

52. That decision is only persuasive at most. Part of its reasoning has been undermined by the decision in Sviratsa which holds that a Rule 52 dismissal is merely procedural reflecting a withdrawal and is not a judicial determination with dispositive effect on a cause of action. However, otherwise I note that its reasoning was also based upon the Tribunal having struck-out relevant claims.

The defendant's submissions

53. In these circumstances, Mr Grace submits that this Civil Claim is an abuse and I should strike it out essentially applying the same approach as in Akay. In general he submits that:

(1) the subject matter of the Civil Claim could have been brought as part of the Tribunal Claim and there is no special reason justifying its not having been

(2) the Tribunal Settlement Agreement, as in Akay, did not deprive the defendant of any right to contest the Civil Claim but merely prevented the defendant relying on the fact that the Tribunal Claim had been compromised as being a defence

(3) it is undue harassment of the defendant to bring a Civil Claim where the claimant had chosen to bring the Tribunal Claim and then compromised it; essentially a claimant who could (as was the case here) bring all their claims in the Tribunal and who has chosen to issue proceedings in the Tribunal is stuck (in the absence of an express agreement or similar (giving rise to an estoppel by convention)) with that i.e. they simply have to proceed down the Tribunal route, and by bringing separate proceedings in the county court, even with the benefit of clause 7 of Tribunal Settlement Agreement, they are guilty of undue harassment and misuse of the court system

(4) Akay effectively held the above and is binding upon me. In any event, applying the "broad merits based judgment" approach, I should come to the same decision here as HHJ Gargan did in Akay.

54. Mr Watson concentrated his submissions upon the application of the broad merits based judgment test with regard to the particular circumstances of the case. However, in particular, he contended that:

(1) Akay was distinguishable on two grounds being (i) that the terms of the Tribunal Settlement Agreement and the surrounding circumstances were not limited to preserving whatever was the then position regarding the bringing of the Civil Claims but prevented the defendant from relying upon abuse of process and (ii) there was no preceding strike-out in this case which rendered bringing the Civil Claim an abuse of process

(2) the circumstances of the Tribunal Claim having been compromised at a very early stage and where it was brought only under the 2010 Act (and which required that claim to be brought in the Tribunal) meant (with the Tribunal Settlement Agreement) that there was no undue harassment and no misuse or abuse of process in bringing the separate and later Civil Claim.

Discussion and Conclusions

The Compromise Agreement

55. Although Mr Watson did not put it at the forefront of his submissions, it seems to me to be essential to first construe the Tribunal Settlement Agreement both in its own terms as a matter of contract and then together with the surrounding negotiations. That is because it is potentially relevant for three sets of legal reasons:

(1) the Tribunal Settlement Agreement may amount to a contract that the claimant is to be permitted to pursue the Civil Claim without any application being made to strike-out for abuse of process – if so then the defendant is barred by way of contract from making this Application – this is simply a matter of orthodox contractual analysis

(2) the Tribunal Settlement Agreement together with the negotiations and other circumstances may give rise to an estoppel by convention preventing the defendant from making this Application

(3) the Tribunal Settlement Agreement together with the negotiations and other circumstances may be relevant matters in applying the "broad-based merits/judgment" test.

56. It seems to be that this analysis is entirely consistent with Johnson v Gore Wood, in which Lord Sumption essentially treated estoppel by convention and "the broad-based merits/judgment" test as being different and separate although with the terms of the relevant compromise agreement and the surrounding negotiations being relevant to both. It is consistent with principle and is not inconsistent with Akay where the terms of the relevant compromise agreement were held, in the relevant factual matrix, to be distinctly limited. I note that in Johnson v Gore Wood the argument of a pure contract not to take the point was not apparently advanced but that may well have been because of the terms and structure of that contract, but which did not prevent the estoppel by convention argument succeeding.

57. In construing the Tribunal Settlement Agreement, I apply the approach laid down in Arnold v Britton 2015 AC 1619 (especially at paragraphs 14-23) and other subsequent cases and which essentially requires me:

(1) to consider the words used in the factual matrix of matters known or reasonably available to the parties and the commercial purpose of the agreement, and using commercial common-sense, but ignoring the underlying negotiations (where they do not form part of the agreement) and subjective intentions of the parties. This involves giving the language used its proper importance as expressing the parties' agreement, and not penalising an astute party or assisting an imprudent party when the words used may appear to have a (possibly) unfortunate effect

(2) to consider the various possible constructions of the agreement and come to that which the reasonable reader would consider to be the most appropriate as reflecting the expressed common intention of the parties (this being an holistic exercise of considering the possible constructions altogether to reach the most appropriate rather than rejecting various constructions individually leaving a residual construction to be adopted).

58. The words used in clause 7 of the Tribunal Settlement Agreement are: "The claimant is not prevented from pursuing [the Civil Claim]…" (and clause 11 permits the claimant to use relevant information to pursue it, and notwithstanding that it will involve disparaging the defendant).

59. Mr Grace submits that this is no different from the compromise agreement in Akay i.e. the meaning is that the compromise itself does not prevent the claimant from advancing the Civil Claim but does not assist the claimant in relation to the fact that advancing it is an abuse and so that it is always open to be simply struck-out and not allowed to proceed irrespective of its merits (or absence of them). Mr Watson submits that there is a crucial difference between the wordings of the two agreements where that in Akay said "The Claimant is not precluded *by this agreement* [my emphasis] from bringing [the personal injury claim]…" Mr Grace's submission is that the wording here is simply preserving what would (according to the defendant) otherwise be the position absent the compromise agreement. Mr Watson's submission is that it has a positive effect, affirmatively permitting the Civil Claim to be brought notwithstanding what has occurred i.e. both the compromise agreement and the Tribunal proceedings.

60. I have come to the conclusion that the correct construction of clause 7 of the Tribunal Settlement Agreement is that it positively permits the Civil Claims to be brought in the civil (County or High) court and prohibits the defendant from relying on the Tribunal proceedings (or the Tribunal Settlement Agreement) to contend that they are an abuse of process. I do this ignoring the evidence as to the negotiations and the claimant's subjective belief and intentions which are irrelevant for the purposes of contractual construction (see above). I come to the conclusion that this is the way in which the reasonable reader would read the agreement as expressing the parties' contractual intentions having applied the Arnold v Britton approach and in particular as:

(1) the factual matrix context (all of which effectively appears within the Tribunal Settlement Agreement itself) is that (i) the Tribunal Proceedings are being brought and are being compromised (ii) the personal injury claim has been intimated, but is a matter which is not being compromised, and which it is envisaged is to be pursued by way of a

Civil Claim (iii) nothing has happened in the Tribunal Proceedings (i.e. nothing such as a strike-out for contumelious disregard of a court order) or otherwise which would prevent the personal injury claim being pursued (if it has substantive validity) i.e. there is no (and no arguable) existing procedural bar to the actual pursuit of the personal injury claim. The factual matrix in Akay was very different as there something had already happened (the strike-out) which gave rise to a free-standing right in the defendant to prevent the claimant from pursuing that personal injury claim, and which right it would seem unlikely (without express words) that the defendant would simply give up

(2) the commercial purpose of the Tribunal Settlement Agreement is thus seemingly to compromise the 2010 Act and all other claims apart from the personal injury claim, which personal injury claim is to be pursued (if the claimant so chooses) by way of the Civil Claim. While it can be said that there is no indication of any commercial purpose of destroying any way of defeating the personal injury claim which already (i.e. immediately prior to the Tribunal Settlement Agreement) exists, there was no freestanding way of defeating the personal injury claim then in existence (as unlike in Akay, or in Manda, there has not already been a strike-out of such a claim or related claim)

(3) the language used is simply "The claimant is not to be prevented from pursuing the personal injury claim…". As to this:

(i) the language used has no limiting words. It is unqualified but the abuse of process argument which is not employed is designed to and if successful would do exactly that i.e. prevent the claimant from pursuing the personal injury claim. As stated in Akay at paragraph 57, it is not a defence but a means of preventing the claim being pursued

(ii) however, I accept that the language must have some limitation as it cannot have been intended to remove existing substantive defences or contests to the personal injury claim. On the other hand, as stated above, abuse of process is not a substantive defence or contest, rather it is simply a way of preventing a claim (however meritorious) from being pursued. Moreover, the language used gives rise to the question of "prevented by what?". Although the language is unqualified, I do not think it right to interpret it as meaning simply "prevented by the terms of the Tribunal Settlement Agreement". Clause 7 simply does not say that; and is to be contrasted with the wording in Akay of "by this agreement". That wording was interpreted in Akay as meaning exactly what it said i.e. the exception was only to prevention (actually on the wording used in Akay to "preclusion" which again seems directed to the compromise agreement rather than anything already existing outside it) by reason of the agreement "itself" (see paragraph 53 of that judgment) so that it could not be said that the fact of the compromise prevented that personal injury claim being brought. However, if that limited effect was intended, then in my judgment the Akay wording "by this agreement" should have been inserted. The unqualified wording strongly suggests that the "not prevented" extends to the entirety of what has gone before which is the subject of the Tribunal Settlement Agreement i.e. not just the compromise but the Tribunal Claim and proceedings themselves

(4) returning to the factual matrix and the commercial purpose, it seems to me that it would be odd if the indirect effect of the Tribunal Settlement Agreement would be that the claimant would be prevented from pursuing the personal injury claim. Without the

Tribunal Settlement Agreement, the claimant could pursue it by way of amendment to the Tribunal Claim, but with the Tribunal Settlement Agreement, if the defendant is correct, the claimant would be prevented, as a Rule 52 dismissal (which the Tribunal Settlement Agreement required by way of the claimant having to make a Rule 51 withdrawal) would prevent it being brought in the Tribunal and the Henderson abuse of process would prevent it a Civil Claim being brought. Thus, on the defendant's construction, and notwithstanding the unqualified language used in clause 7, the Tribunal Settlement Agreement would cause exactly what clause 7 says was not going to happen. The wording in Akay was, of course, very different, stating that it the non-preclusion was (only) "by this agreement" which implied that other free-standing preclusions could exist

(5) The situation is generally very different from that Akay (which itself is only a decision of the meaning of the individual compromise contract in that individual case) of an existing (prior to the making of the compromise) right in the defendant to seek to contest (by way of abuse of process argument) any attempt by the claimant to raise the personal injury claim in any jurisdiction (whether the Tribunal or the court). In Akay, as held in the judgment, it would be unusual for the defendant to give up such an existing right and clear words would be required. This case, it seems to me, is very different. It seems to me that it is a situation analogous to that considered in Dattani in that it would be last thing that parties seeking to preserve the right to bring a claim would intend (and would require clear words to achieve the result) that by making an agreement seeking not to prevent a claim being pursued, and where there was nothing then extant to prevent it being pursued, they had actually succeeded in preventing it being pursued.

61. I therefore consider that there is a contractual bar to the defendant bringing (or at least succeeding upon) this Application. However, and in particular in case I am wrong about that, I do go on to consider the other arguments.

62. If I am wrong as a matter of contract, the case-law next requires me to consider whether there is an estoppel by convention barring the defendant from relying upon abuse of process. Such can clearly exist as was held in Johnson v Gore Wood and recognised in Akay. As set out in Johnson v Gore Wood, it is permissible to look at the negotiations for the compromise as well as the compromise itself in considering whether any estoppel exists (and notwithstanding that estoppel by convention usually arises following the making of an agreement (by way of a convention being established as to its interpretation or effect) and that in this context it effectively adds to the wording of the agreement (as otherwise the contractual interpretation would be sufficient) although negotiations are not usually to be taken into account when construing the agreement).

63. I also note with regard to estoppel by convention that there is something of a debate in the case-law as to how firm or unequivocal a estopped party has to have been to establish a convention (in ING v Ros Roca 2012 1 WLR 472 at paragraphs 55 onwards and in particular at paragraphs 64 and 66 it was held that there was a touchstone of unconscionability and the need for certainty and unequivocality could be over-emphasised, while in, for example, Bethell v Deloitte 2011 EWCA 1231 at paragraphs 20 and 22 it was held that much was required for one solicitor when dealing with another to become bound by something beyond the true meaning of their expressed words).

64. In Johnson v Gore Wood, it was held that the content of the negotiations and the wording of the compromise agreement made clear that it was intended that the second claim would be pursued (as it was) and which estopped the defendant from arguing that it would be an abuse of process. It seems to me that even if the Tribunal Settlement Agreement does not have (but also if it does have) the construction which I have found then there is sufficient to estopp the defendant. In my judgment, the situation here is effectively identical to that in Johnson v Gore Wood; the claimant was clearly only entering into the compromise on the basis that the personal injury claim could and would be brought and proceeded with by way of a Civil Claim notwithstanding the proceedings in the Tribunal and their compromise, and was being encouraged in that belief by the insertion of the clause 7 wording with its unqualified language as meeting his concerns in that regard. There was no reason why the claimant would be seeking to give up or prejudice (procedurally) his existing right to pursue the personal injury claim. He relied on this convention by entering into the Tribunal Settlement Agreement, thus (on the defendant's case) to his detriment causing him to lose an existing (unlike in Akay) right. The defendant did not seek to qualify either the language of clause 7 or the negotiations to reserve the right to argue abuse of process. In those circumstances, I consider it to be unconscionable in law (and equity) for the defendant to argue abuse of process based simply on the fact of the Tribunal proceedings, and that an estoppel arises.

65. I have borne in mind that Mr Grace contends that this conclusion is contrary to Akay (and I also bear in mind Sheriff and Akay). However, I consider that those cases are distinguishable or should be disregarded, as:

(1) Johnson v Gore Wood is binding upon me and on the courts which decided those decisions, and both I should seek to find reasons why those decisions can be justified on their own individual facts (where otherwise potentially inconsistent with it) and, in any event, follow it

(2) Sheriff is distinguishable as there was no compromise or other matter on which an estoppel by convention could be based

(3) Manda is distinguishable as there was no compromise and there was already a strike-out and then simply a withdrawal

(4) Akay is more problematic as the estoppel by convention argument was rejected on grounds both of (i) no convention and also of (ii) no reliance as there was no evidence in the belief in the existence of the conventional matter, and as to which a similar point can be made here as the claimant does not actually say in terms that he believed that it was being agreed that an abuse of process argument could not be advanced but only that he could proceed with the Civil Claim (which is effectively the same evidence as the claimant in Akay gave). However, I think that it is distinguishable as:

(i) Akay's analysis of estoppel by convention starts from the position that (a) the defendant had a known existing free-standing basis (the strike-out for contumelious disregard of the Tribunal's orders) for saying that the pursuit of the personal injury claim in any jurisdiction, including the Civil Claim, was an abuse of process (b) there was no reason to suppose that the defendant was intending to give up such a right and (c) the words actually used made clear that the non-preclusion was limited to "by

reason of this agreement" and thus that other (free-standing and whether or not existing) preventions/preclusions would continue to exist

(ii) in such circumstances, there was no convention. However, no such or analogous circumstances existed here and the situation was, rather, similar and analogous to that in Johnson v Gore Wood in terms of a mutual conventional understanding that the Civil Claim could proceed to a substantive determination

(iii) those Akay circumstances also gave rise to the "absence of belief" point. The relevant belief which was not evidenced, and so was held not to exist, in Akay was that the defendant would not rely upon the previous strike-out and its circumstances to advance an abuse of process argument. For the same reasons as to there being no convention, the mere fact that that claimant said he believed that he could bring and pursue the Civil Claim was not enough; rather (per HHJ Gargan and Lavender J at least) he would have had to have said that he believed specifically that he could bring and pursue it notwithstanding the previous strike-out. However, in this case (and in Johnson v Gore Wood) the convention and circumstances and statements of belief were general and obviously directed to both the first set of proceedings and their compromise (because there was nothing else (such as a previous strike-out) as to which the relevant person, here the claimant and there Mr Johnson, could be concerned). Further, here the claimant has said that he would never have compromised had he thought that the effect of the Tribunal Settlement Agreement (which, of course, required the Rule 51 withdrawal) would be to prevent him bringing and pursuing (obviously to judgment) the personal injury claim. Further, here clause 7 was unqualified while the clause in Akay was limited to the compromise agreement itself. In any event, it seems to me that Akay on this point is distinguishable because of its above-mentioned circumstances which do not exist here and if that is wrong then I should still follow Johnson v Gore Wood.

66. I therefore hold that even if not barred by contract from bringing or succeeding on this Application, the defendant is barred by estoppel by convention.

Abuse of Process and Res Judicata

67. This holding also makes it strictly unnecessary to consider abuse of process and the broad merits based judgment approach, but, in case I am wrong as to the foregoing, I now turn to it.

68. I do first mention the question of whether the effect of the withdrawal of the Tribunal Claim could give rise to a cause of action (or issue) estoppel by reason of the Rule 52 requirement for the Tribunal to effect a formal dismissal of the Tribunal Claim. However, Mr Grace did not press this and I think that he was right to do so as (1) there is no evidence from which to find that any Rule 52 dismissal actually occurred, and I do not think that I can simply infer that such occurred from the existence of the Rule itself (with which one would have expected a Tribunal to comply) in circumstances where no form of order was sent out by the Tribunal and the Tribunal had a discretion to make an alternative form of order permitting a further claim to be brought; but also, and in any event, as (2) Sviratsa holds that a Rule 51 withdrawal and consequent Rule 52 dismissal is only a technical affirmation of and is to be treated as a pure "withdrawal" and not as a dispositive dismissal and resolution of any

cause of action or issue, and thus not so as to attract the operation of cause of action or issue estoppels.

69. I therefore turn to "abuse of process" considering it in terms of where I assume in turn each of my decision on the interpretation of the Tribunal Settlement Agreement and assessment of its surrounding negotiations being correct and incorrect.

70. As stated above, this involves a "broad merits-based approach"; taking into account of the public and private interests involved and all the facts of the case; and 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 (see Akay above) but also asking whether not the Civil Claim amounts to "undue harassment" of the defendant (Johnson v Gore Wood).

71. The parties in submissions sought to rely on various potentially relevant matters, and which I have taken all into account, and the more important matters being as follows:

(1) the claimant knew throughout of the (alleged) facts underlying the Civil Claim and there is no suggestion that the claimant could not, as a matter of law (as confirmed by both Sheriff (decided many years before the Tribunal Claim was commenced) and Akay; and I note also that the Tribunal is a fit place for the assessment of tort (and thus personal injury) damages as is confirmed by its specific statutory jurisdiction to do so in discrimination claims – see section 119 of the 2010 Act), have advanced the personal injury claim in the Tribunal Claim. It would thus also have been open to the claimant not only to have done that but to have resolved all other issues in the Tribunal Claim by a compromise whilst leaving the personal injury claim to be pursued in the Tribunal. Thus, there could have been just one set of proceedings and I can see (especially in the light of the matters which I go through below) any special reason why the personal injury claim was not or could not have been included in the Tribunal Claim

(2) the factual basis of the Tribunal Claim had little overlap with the factual basis of the Civil Claim; while both related to the employment and to how the defendant had not adjusted matters to protect the claimant from adverse consequences regarding his condition, the only specific matter of complaint which appeared in both proceedings was with regard to the comparative siting of the claimant's chair and a drinks machine, and the vast majority of the complaints which are said in the Civil Claim to amount to wrongful and actionable harassment of the claimant by V did not appear in the Tribunal Particulars of Claim. That is correct, but it is also clear that the personal injury claim matters both arose from the employment and could have been raised in the Tribunal Claim. The Henderson principle itself in its original form (i.e. where the first set of proceedings have been resolved substantively rather than dealt with by way of compromise and stay/withdrawal) applies to claims which could have been but were not raised in the first set of proceedings and the various abuse of process cases all use that language when describing the extent of the abuse jurisdiction and which reflects the Latin maxims which I have set out above. Thus, while this could be said to be a point in the claimant's favour, it is of little weight and I disregard it as such (although it flows into the some of the following points)

(3) the compromise and resolution of the Tribunal Claim took place at a very early stage within it and before any substantial judicial (or, it would seem likely, party)

expense of time or cost upon it had occurred. That goes (at least) some way towards balancing against the previous point as the fact that the Tribunal Claim was brought and then compromised seems (especially in the circumstances of the Tribunal Settlement Agreement and its clause 7) to have made very little difference to the practical process of pursuing the personal injury claim and there is no suggestion that any particular waste or prejudice has been caused to either the defendant or the tribunal/court system as a result

(4) the 2010 Act claim, being one for discrimination in employment, could only have been brought in the Tribunal and not in the court. This is common-ground, and flows from the provisions of section 117 and 120 of the 2010 Act. Thus, if the defendant is correct (i.e. it is an abuse to bring cases in both the Tribunal and the Court), the claimant could only go to court in relation to the personal injury claim if the claimant was prepared to abandon the 2010 Act claim. At first sight, this seems contrary to Article 6, and especially where claims in the Tribunal are subject to various provisions (in particular in relation to limits on recovery of legal costs) which could be highly prejudicial (although also some perhaps beneficial) to a claimant. On the other hand, an argument to the effect that this would justify bringing proceedings in both jurisdictions was rejected expressly in Sheriff (see paragraph 27 of that judgment) and that is binding upon me and so it seems to me that I should not regard this as being a matter in any way in the claimant's favour

(5) the claimant's evidence is that DAS would only deal with the employment (including discrimination) claims and not the personal injury claim which had to be dealt with by separate solicitors and where NWS (at least) would not deal with the employment aspect (at least in a way desired by the claimant, and although I suspect, in view of the involvement of DAS, that there was some insurance point I have no evidence as to this and cannot proceed on that basis). While I accept that evidence, which is not controverted, it seems to me that (a) this is no concern of and should not prejudice the defendant and (b) is in any event something which the reasoning in paragraphs 26 and 27 of the Sheriff judgment again requires me to disregard.

(6) there had been no strike-out or contumelious (or, indeed, any) non-compliance in the Tribunal Claim and, in particular, none regarding the personal injury claim or any related issue. This is not a situation where what had happened in the Tribunal Claim had given rise to any procedural (or substantive) bar to the bringing or the pursuit of the personal injury claim. thus nothing to prevent the personal injury claim being advanced. That not only is a major point of distinction between this case and Akay but also raises the question as to why a discontinuance and withdrawal of other claims should result in a bar against proceeding with the personal injury claim (although I do also bear in mind that the effect of Rule 52 is that the withdrawal does expressly bar (absent an exceptive order being made) the further pursuit of the withdrawn claims which is a different, and more dispositive, effect than that provided for by CPR38.7 in relation to Civil Claims withdrawn prior to service of a defence (but where the law of abuse of process remains in point – see White Book notes 38.7.1 and cases there cited)

(7) the Tribunal Settlement Agreement by clause 7 expressly provided that the claimant was not prevented from pursuing the personal injury claim (and which must be taken, in the light of the withdrawal of the Tribunal Claim, to be by way of Civil Claim). On the basis of my previous conclusions as to the construction of that clause

7 and the surrounding negotiations, the situation was one where the parties were agreeing that the Civil Claim would be able to proceed to a substantive resolution, and where the agreement was very different from that in Akay. However, I also should consider the position which would ensue if those previous conclusions were wrong and all the parties were agreeing was (as in Akay) that the mere fact of the compromise would not bar the personal injury claim but that all other possible procedural arguments, including in particular abuse of process, would remain live and in issue. Nevertheless, even on that basis the existence of the clause 7, and the surrounding circumstances including the preceding letter, made clear both that the defendant knew about the intended personal injury claim (i.e. that claim which was not being compromised) and was not intending to compromise it (or being misled as to what were the claimant's intentions to pursue it), and where the defendant could have chosen to insist that the personal injury claim formed part of the compromise

(8) there could be some form of overlap of damages between the compromised claims and the personal injury claims. This, if anything, is a factor pointing to abuse but in my judgment is negated by the existence of clause 7 of the Tribunal Settlement Agreement which must (by excluding the personal injury claim from the compromise) contemplate the court having to grapple with the possibility of overlap and as occurs in many situations where one claim is compromised on the basis that the compromise is only partial and others may proceed.

72. With regard to the various cases relied upon by counsel:

(1) I agree with HHJ Hand in Manda that each case fell to be decided on its own facts and that the case-law is relevant with regard to setting out matters of principle rather than for what happened in any individual case (and which is only persuasive at most in any event)

(2) The fact that the Court of Appeal did not suggest any "abuse of process" in Sviratsa, even on somewhat analogous facts, is of little weight in view of the fact that the point did not seem to be argued and there were apparently jurisdictional issues in bringing that personal injury claim in the Tribunal

(3) The conclusion in Dattani that it was not an abuse to compromise only the claim which had been brought in the Tribunal and then to bring a different claim by way of Civil Claim seems inconsistent with what seems to be the contrary conclusion in Sheriff. However, both cases pre-date Johnson v Gore Wood and Virgin Atlantic and, in all these circumstances, I do not think that either amounts to binding authority either way on that general point but rather the "broad merits based judgment" approach is now to be applied without such restriction

(4) Akay:

(A) is distinguishable and should be distinguished from this case on two separate (but also cumulative) bases, being:

(i) it is a case where there was already a free-standing procedural defence (or rather right of response) to the relevant personal injury claim being that the relevant claimant has been barred by reason of a contumelious disregard of a judicial (there Tribunal) order from bringing the personal injury claim.. In those circumstances, the

primary relevant abuse of process was that developed in the Securum Finance line of authorities, being that absent special circumstances the personal injury claim could no longer be advanced in any jurisdiction. In my judgment, HHJ Gargan decided Akay at first instance on that basis and Lavender J decided that HHJ Gargan was correct and justified in doing so, and neither judge proceeded on any other basis. Since the Civil Claim in that case was brought in a different jurisdiction from the strike-out order, the Henderson principle had to be invoked but what rendered that Civil Claim an abuse was the fact of the previous strike-out arising from a contumelious non-compliance with an order. It is, in fact, difficult to see how the result could have been otherwise as such would have involved an way round the consequence of such a strike-out (i.e. unless a relief from sanction is granted then the sanction i.e. the inability to raise and pursue the claim, should continue to apply), and, further

(ii) the fact that the provisions of that compromise agreement (a) only applied to ensure that the compromise agreement "itself" did not bar the personal injury claim while all other existing bars would continue to exist and could be relied upon and (b) this was due to such a "bar" already existing (i.e. apart from and before the entry into the compromise agreement) due to the strike-out (and which "bar" it was held that the defendant would have not been likely to have wished to give up and which thus supported the conclusion that the wording and effect of the compromise agreement and its exception were so limited)

(B) in relation to this case: the situation in point (A)(i) simply does not apply here, there was no strike-out or similar, but it was crucial to the decisions in Akay; the situation in point (A)(ii) does not apply if my previous conclusions are right as the clause 7 of the Tribunal Settlement Agreement was different from the provision in Akay, but, if they are wrong, then in the absence of the strike-out the reasoning regarding the compromise in Akay is, at best, neutral with regard to this case

(C) I do not, in the light of the reasoning in Akay, see it as being any authority for a general proposition that bringing and then compromising, with a withdrawal of, a Tribunal Claim but with an exception for a particular claim, is an abuse of process. Akay very much depends on the existence of the particular strike-out in that case

(5) Manda is at most persuasive but, like Akay, has the feature of a preceding strike-out (at least in part) of a relevant claim, and also has the feature of the subsequent unilateral (i.e. not in the context of a compromise and in particular not a compromise with an exception) withdrawal. The decision in Manda is also "tainted" (in terms of its persuasiveness) by its application of Rule 52 as giving rise to a dismissal which should be treated as being dispositive in law (and which conclusion was practically overruled in Sviratsa).

73. Looking at matters in the round, and applying the "broad merits based judgment" approach I do not see this Civil Claim (on the assumption, which I have to make, that it is within the clause 7 of the Tribunal Settlement Agreement exception) as amounting to an abuse of process on any basis. I have considered all the material and in particular the above specific matters and what follows is a summary of my main reasons.

74. On the assumption that my conclusions above as to the interpretation of the Tribunal Settlement Agreement and/or the surrounding negotiations are correct i.e. that it was

intended that what had happened already would not bar the personal injury claim, it seems to me that their cannot be an abuse. There is no "undue harassment" of a party (the defendant) which has agreed that a claim against it can continue. There has been no contravention of or inconsistency with any judicial order. There has been no serious waste of time or expense. All that has happened is that one claim was initiated, dealt with by non-dispositive compromise and withdrawal, and the specifically excepted claim is then brought in another jurisdiction. I cannot see any misuse or abuse of either jurisdiction or any inappropriate invasion or misuse of either private or public interests.

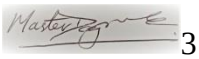
75. On the contrary assumption that my conclusions above as to the interpretation of the Tribunal Settlement Agreement and/or the surrounding negotiations are incorrect i.e. that it was only intended (as a matter of common objectively assessed intention) that the defendant would only not be able to argue that the compromise agreement barred the personal injury claim whilst being able to argue that what had previously and was to happen in relation to the Tribunal Claim could be and was an abuse, it seems to me that the matter is more complex.

76. Nevertheless, I still consider that the bringing of and proceeding with the Civil Claim is not an "undue harassment" of the defendant. The Tribunal Claim had only progressed to a very early stage without involving any great expenditure of time or cost. The defendant had not required the personal injury claim to be included in the compromise but had allowed it to be specifically excepted, and thus accepted that it was not part of the Tribunal Claim, and, at first sight, was prepared to take the risk that the Civil Claim would be brought. I note that there was no attempt (agreed or otherwise) by the defendant in or at the time of the Tribunal Settlement Agreement to include or intimate any provision or assertion that to bring the Civil Claim would be an abuse. I therefore do not see this as "harassment" or, even if it is, as being "undue".

77. I also again do not see why this should be such an abuse to deprive the claimant of his Article 6 right to have his substantive claim determined substantively. I repeat that all that has happened is that one claim was initiated, dealt with by non-dispositive compromise and withdrawal, and the specifically excepted claim is then brought in another jurisdiction. I cannot see any misuse or abuse of either jurisdiction or any inappropriate invasion or misuse of either private or public interests.

78. I have been tempted to consider whether I should be determining the question of whether it is now an abuse of process to do what was done in Dattani and Sheriff (compromise one matter related to the employment brought in the Tribunal and then litigate another matter related to the employment, and which could have been litigated in the Tribunal Claim, in the Court). However, I do not think that I should accede to the temptation as (1) all cases depend on their own facts and that is not the situation before me where there was a specific exception from the compromise of the personal injury claim and (2) the question is one of some general importance and I do not feel, as a Master, that I should be venturing beyond the bounds of the factual scenario before me.

79. For the reasons given above I will dismiss the Application.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