EMPLOYMENT TRIBUNALS

Claimant: Mr O Ogunjimi

Respondents:
1. Health Education England (North West)
2. Dr Munish Batra
3. Dr Tanya Syed

Heard at: Manchester **On:** 8 October 2018
9 and 10 October 2018
(in Chambers)

Before: Employment Judge Whittaker

REPRESENTATION:

Claimant: Mr Ogunyanwo (Consultant)
1st and 2nd Respondents: Miss Smith of Counsel
3rd Respondent: Miss A Del Priore, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claims of the claimant against the three named respondents are struck out and dismissed.

REASONS

1. On 28 May 2018 the Tribunal received from the claimant's representative, Mr Ogunyanwo, a claim form which was registered by the Tribunal with claim number 2911365/2018. This claim form named one single respondent, Dr Tanya Syed. For the avoidance of doubt, no other respondents were named in boxes 2.5, 2.7 or box 13. The respondent was therefore recorded as one single respondent. In box 11 Mr Ogunyanwo set out his details as the appointed representative of the claimant.

2. The submitted eight pages of Particulars of Claim contained 40 paragraphs. That document was headed “Claim against Dr Tanya Syed”. No attempt was made by the claimant or his representative within the substantial narrative to identify the

specific claims, by reference to specific statutes or sections which were being pursued by the claimant against Dr Syed. This was noticed immediately by the Employment Tribunal and so by a Notice dated 12 June 2018 the parties were notified (in advance of receipt of any Response) that a preliminary hearing would be held on 13 August 2018 with an estimated length of hearing of one hour, primarily to identify the claims and issues and to then make appropriate Case Management Orders.

3. No indication whatsoever was made on the part of the claimant or by his representative, Mr Ogunyanwo, that a further claim form was in the pipeline.

4. A Response was sent to the Tribunal by email on 10 July 2018 on behalf of Dr Syed. It made lengthy and detailed representations to reject the factual allegations made but also made a substantial application to strike out the claims on the grounds of abuse, the claims being out of time and that the claims were both scandalous and vexatious. Furthermore, it was alleged that the claims against Dr Syed should be rejected on the grounds of res judicata, both on the grounds of issue estoppel and action estoppel. Furthermore, it was claimed that the claims lodged against Dr Syed should be rejected on the basis of the rule in **Henderson v Henderson**. Very significant reference was made in the application to the existing claims which had already been lodged by the claimant in October 2017. Those claims had been registered by the Employment Tribunal under case number 2421196/2017, and had been the subject of a substantial Preliminary Hearing by way of case management on 21 February 2018.

5. By the date of the second Preliminary Hearing which took place on Monday 8 October, those existing claims of the claimant had already been listed for hearing over eight days to begin on Tuesday 5 February 2019.

6. By a letter dated 23 July 2018 the solicitors representing the respondents sent in a six page detailed application to strike out the claims which had been lodged against Dr Syed. Each of the claims was denied and refuted. The respondent was now represented by Mills & Reeve Solicitors in her personal capacity, presumably on a standard solicitor/client basis.

7. Having submitted the claims to the Tribunal against Dr Syed on 28 May 2018 the claimant, on his own and without indicating that he was represented or supported by Mr Ogunyanwo, submitted a separate claim form to the Employment Tribunal on 5 June 2018, one week later. The Tribunal allocated claim number 2411491/2018. In this claim form the claimant named two different respondents, namely Health Education England (North West) and Dr Munish Batra. The claimant left box 11 blank without making any indication that he was represented in connection with this claim. Furthermore, the claimant answered box 3 by indicating that this new claim was not in any way linked to any existing claims. That was clearly not true.

8. Furthermore, the claimant submitted exactly the same 40 paragraphs of Particulars of Claim that Mr Ogunyanwo had submitted in connection with the claim lodged against Dr Syed on 28 May 2018, about a week earlier. The claimant even included the heading “Claimant against Dr Tanya Syed” without making any attempt to amend it to now include claims against the two new named respondents. No attempt again was made by the claimant to specify the claims which were being made or the sections of statue under which those claims were being made.

9. The Tribunal, however, was able from its own systems to link these two claims and to furthermore link it with the existing claim which had been registered in October 2017. The Tribunal therefore linked all the three claims together and set them for consideration at the existing Preliminary Hearing which had already been sent for 13 August 2018 with an estimated length of hearing of one hour.

10. After linking the claims in that way to the existing Preliminary Hearing the two additional respondents, now represented by Hill Dickinson Solicitors, lodged a response on behalf of the two named respondents on 18 July 2018. They defended the factual allegations whilst at the same time alleging that the claims were out of time and that they should be rejected on the grounds of estoppel. It was alleged that the claims were effectively a repeat of proceedings which had already been adjudicated on by the Tribunal at a preliminary hearing held on 21 February 2018 in connection with the original claims of the claimant. With justification the solicitors pointed out the lack of clarity of the claims being pursued and indicated very clearly that further particulars and clarification were required.

11. Both these new claims presented at the end of May 2018 and early June 2018 followed a significant and comprehensive Preliminary Hearing by way of case management, rejection of applications for amendment and the making of deposit orders. That Preliminary Hearing took place before Employment Judge Horne on 21 February 2018. The subsequent Case Management Orders and the Reserved Judgment were sent to the parties on 16 March 2018. That delay reflected the obvious care and attention to detail which had been expressed and included by Employment Judge Horne, both in the Case Management Orders and in the Reserved Judgment. The written details of the Case Management Orders ran to some six pages. The claimant was represented by Mr Ogunyanwo at that hearing. There is no record of any suggestion or indication being made that additional claims were being considered or were to follow or were even in the pipeline. It was obviously anticipated by all parties that during that extensive preliminary hearing all the relevant claims had been identified and discussed, at great length, and that the appropriate respondents had been identified and that those claims were now to proceed to an eight day hearing. That eight day hearing had already been set to commence in February 2019.

12. As already indicated, at the hearing before Employment Judge Horne on 21 February 2018, a Preliminary Hearing took place by way of determination and judgment on certain claims and issues which had been raised by/on behalf of the claimant. A subsequent Reserved Judgment, running to some 20 pages, was prepared by Employment Judge Horne and again sent to the parties on 16 March 2018.

13. That Reserved Judgment was in respect of the four named respondents to the original claim lodged by the claimant in October 2017, but in additional dealt in considerable detail with potential claims and issues relating to two of the respondents now named in the “new” claims lodged at the end of May/beginning of June 2018. Those respondents were Dr Syed and Dr Batra.

14. The Tribunal thought it extremely important to consider, with great care, the content of that Reserved Judgment.

15. At the top of page 2, in paragraph 4, the Tribunal "refuses the claimant's application to join Dr Syed as a respondent". Immediately below, at paragraph 5, the Tribunal "refused the claimant's application to amend his claim to include complaints against Dr Syed".

16. On the first page of that Reserved Judgment, at paragraph, the claimant had been refused permission to amend his claim to include "a complaint of detriment on the ground of protected disclosures". There were therefore specific Judgments issued by Employment Judge Horne refusing to join Dr Syed as a respondent and refusing to amend the claims of the claimant to include complaints against Dr Syed.

17. This Tribunal carefully noted that there were no applications whatsoever to join Dr Batra as a named respondent, and neither was there any application to join Health Education England (North West) as a named respondent. Furthermore, there was no application made to amend the existing claims of the claimant to include complaints against either Dr Batra or against Health Education England.

18. At paragraph 3.1 on page 3 of that Reserved Judgment the Employment Judge confirmed that he had sat to "adjudicate" on the claimant's application to amend to include "various complaints against Dr Syed". It was in the opinion of this Tribunal, therefore, very clear that the focus at the hearing on 21 February 2018 was very much on Dr Syed as a potential respondent to claims being made against her as a named individual.

19. At paragraph 3.4 Employment Judge Horne remarks that a large part of the hearing on 21 February was taken up with Mr Ogunyanwo clarifying the way that he put his case. The Tribunal on 8 October 2018 faced very similar challenges in struggling to understand the way in which the claimant was presenting the various ways in which it was being suggested to the Tribunal that the claims against the three new named respondents should not be struck out.

20. At paragraph 29 of the Reserved Judgment Employment Judge Horne specifically refers to having received and read a witness statement from Dr Syed in respect of the applications which were made to join her as a respondent and to allow the claimant to proceed with claims against her as an individual.

21. At paragraph 21 of that Judgment Employment Judge Horne confirms that: "The claimant described in some detail the way in which Dr Syed had allegedly behaved towards him". The Employment Judge also confirms, however, that in the original claim form lodged in October 2017 no attempt had been made to include Dr Syed as a named respondent and neither had any suggestion been made in that original claim that Dr Syed "should be held liable".

22. Moving to page 6 of the Reserved Judgment a number of important comments are made at paragraphs 33.2, 33.3 and 33.4. In paragraph 33.2 it is clear that the Tribunal in February 2018 was considering in detail allegations against Dr Syed and Dr Batra as named individuals specifically in connection with allegations relating to alleged whistle-blowing. In paragraph 33.3 it was noted that only now was an attempt being made to hold Dr Syed personally liable for her own alleged detrimental acts. In paragraph 33.4 it is clear that Employment Judge Horne is considering the alleged failures of Dr Batra as an individual.

23. Moving on to paragraph 36 of the Reserved Judgment again it is clear that at the hearing on 21 February 2018 the Tribunal was specifically concerned with "Dr Syed's proposed liability", and that paragraph is clearly focussed on Dr Syed.

24. The conclusions and judgment of the Tribunal begin, after a detailed rehearsal and recital of the relevant law, at paragraph 72 (page 15). Paragraphs 72-82 are headed "Conclusions – amendment to include Dr Syed". Employment Judge Horne notes at paragraph 72.1 that any such amendment would expose Dr Syed to the risk of personal liability. He notes at paragraph 72.2 that it would also open up a new area of factual enquiry about what Dr Syed did and why. At paragraph 72.3, when considering whistle-blowing, Employment Judge Horne notes that again additional factfinding would be required if any amendment was permitted.

25. At paragraph 75 of the Reserved Judgment at the top of page 16, Employment Judge Horne concludes that in his opinion it would have been reasonably practicable for the claimant to have presented the claims he wished to proceed with before 31 May 2017. Furthermore, he concludes at the end of paragraph 75 that at least since 21 October 2017 or possibly earlier, the claimant has had the assistance of one or more people holding themselves out as legal representatives. Indeed before the Tribunal on 8 October 2018, Mr Ogunyanwo confirmed on more than one occasion when asked by the Tribunal that he was experienced in the rules and procedure of an Employment Tribunal.

26. At paragraph 77 of the Reserved Judgment the Tribunal declares that it was neither just nor equitable to extend the relevant time limit relating to acts of discrimination. Employment Judge Horne pointed out that no good reason had been given for the delay which had occurred and that any extension would be bound to adversely affect the parties' recollections of the conversations in which discrimination and harassment were said to have taken place. Furthermore, in paragraph 79 Employment Judge Horne comments that allowing any amendment would put Dr Syed at a disadvantage in having to cast her mind back to the incidents concerned, those incidents having occurred at least a year earlier. The Reserved Judgment at paragraph 80 furthermore confirms that there was no evidence of the claimant having made any genuine mistake as to the identity of the respondent. The Employment Judge comments that when issuing the original proceedings in October 2017 that the claimant had carefully chosen the four named respondents, including individual alleged perpetrators. The Employment Judge concluded, therefore, by saying that had the claimant originally wanted to issue proceedings and to include Dr Syed as a respondent that he should have done so when issuing the proceedings in October 2017.

27. Employment Judge Horne therefore concluded at paragraph 82 (page 17) that he should refuse "the proposed amendment and decline to add Dr Syed as a respondent".

28. At paragraph 83 onwards Employment Judge Horne sets out his conclusions in rejecting the application to amend the claims of the claimant to add a protected disclosure detriment complaint. In the subsequent paragraphs Employment Judge Horne makes repeated reference to both Dr Batra and Dr Syed and to their alleged conduct to which the Tribunal had been referred by the claimant. The Employment Judge concludes, however, after taking all the relevant factors into account, that the

amendment should be refused. This is set out at paragraph 94 at the top of page 19 of the Reserved Judgment.

29. Mr Ogunyanwo submitted a response to the application to strike out the new claim brought against Dr Syed "and others" in an email/letter dated 23 July 2018. The Tribunal numbered the email and subsequent pages with numbers 132-143 inclusive, including copies of what Mr Ogunyanwo claimed were relevant ACAS certificates.

30. Mr Ogunyanwo submitted a further objection and response to the application for strike out in an email dated 5 October to which he submitted a copy of a letter which he had sent to the solicitors representing Health Education England and Dr Batra only (Hill Dickinson) on 4 October 2018. The Tribunal numbered the letter dated 4 October with pages 124-131 inclusive. They were numbered in that order because the Tribunal firstly received the later correspondence dated 4 October and the earlier correspondence was not included in a bundle of documents comprising 123 pages which had been prepared by Hill Dickinson for use by the Tribunal at the preliminary hearing on 8 October.

31. At the very last moment of the hearing the Tribunal also accepted and numbered with pages 144-150 a letter dated 26 May 2018 which at the very conclusion of his submissions on behalf of the claimant Mr Ogunyanwo indicated that he wished to rely upon. This letter had not formed part of any of the comments or earlier submissions which had been made on behalf of the claimant, and it therefore came as a complete surprise not only to the Tribunal but also to Miss Smith and Miss Del Priore. The Tribunal received a copy of the letter for its consideration. The claimant, through Mr Ogunyanwo, claimed that this letter demonstrated that the claimant had waited to issue his claims on 28 May and then 6 June because he had genuinely believed that he was attempting to resolve matters amicably through other channels, and that it was only after realising that those channels were closed off that he had submitted his claim on 28 May 2018. The letter, dated 26 May 2018, only two days before the first of the two new claims was issued, was not sent to any representative of any of the named respondents. It was instead sent to Professor Wendy Reid, a National Medical Director. No evidence whatsoever was given as to what response, if any, the claimant received to this letter, but the Tribunal took note of the timescale which was that the second claim was submitted to the Tribunal only two days later, on 28 May. The letter had been sent by email to Professor Wendy Reid but no evidence whatsoever was given as to when she had actually read it.

32. There was considerable discussion with Mr Ogunyanwo as to the timing of the submission of this letter and the fact that it was now, for the very first time, being suggested that it was reasonable for the claimant to have delayed submitting his claims at the end of May/beginning of June because he had sent this letter on 26 May, with what he claimed to be some genuine expectation that matters could be resolved with the named respondents amicably by the submission of that letter. The Tribunal initially considered that it might be appropriate for the preliminary hearing to be adjourned in order for the respondents to have the opportunity to consider its contents and to respond. The Tribunal itself announced that it required a short period of time in which to pause and reflect on the conduct of Mr Ogunyanwo in making these submissions and submitting this document at the very very last moment.

33. After pausing to reflect for some 15/20 minutes the Tribunal returned with the intention of indicating that it believed that the appropriate step would be for the case to be adjourned to allow the respondents the opportunity to reflect and respond. However, both Miss Smith and Miss Del Priore indicated that in the same short adjournment they had taken instructions from their clients. They did not want the case to be adjourned and said that they were content for the Tribunal to receive and consider the letter. In response to what had been said by Mr Ogunyanwo they both indicated that no evidence whatsoever had been given about the time of receipt of the letter, and more importantly there was no evidence whatsoever of any response having been sent by the recipient, Professor Reid, which allegedly had any impact at all on the thinking of the claimant and/or Mr Ogunyanwo. The submissions, therefore, of Miss Del Priore and Miss Smith were that the letter made absolutely no difference to the detailed representations which they had already made on behalf of their clients, and they indicated very clearly therefore that they were content for the hearing to be closed and for the Tribunal to retire to consider its judgment. After further reflection the Tribunal accepted that proposal and the case was then closed to allow the Tribunal the opportunity to consider the applications which had been made on behalf of the three named respondents to the “new” claims.

34. The Tribunal did not hear evidence from any witnesses. There was considerable confusion when at the beginning of the hearing a substantial witness statement was handed in on behalf of the claimant. It was believed by everyone, including the Tribunal, that this was a witness statement which the claimant intended to submit in connection with the Preliminary Hearing. Significant questions were therefore asked as to why this had never been served previously. To cut matters short, that discussion ended with the claimant and Mr Ogunyanwo confirming that it was the witness statement of the claimant in connection with the hearing which was already listed to be heard in February 2019 and that it was not a statement which the Tribunal at the preliminary hearing were being asked to read or consider. The Tribunal confirms, therefore, that it did not read any of the witness statement which was submitted and in effect it was ignored. There was no Order for witness statements to be served on the Tribunal and it will therefore be for Mr Ogunyanwo to exchange witness statements with the named respondents in accordance with the existing Case Management Orders. The existence and production of that statement was in effect, therefore, completely ignored by the Employment Tribunal.

35. The Tribunal has already alluded to the significant difficulties in understanding the claims of the claimant from the 40 paragraphs of narrative which the claimant submitted with the claims at the end of May 2018 and beginning of June 2018. The Tribunal has already commented on the fact that the paragraphs were identical even though they were meant to refer to completely different respondents. Prior to the Preliminary Hearing on 8 October neither the claimant nor Mr Ogunyanwo had taken any steps whatsoever to identify potential claims from those 40 paragraphs of narrative. The Tribunal therefore held a prolonged discussion with Mr Ogunyanwo to identify what the specific claims were in connection with which sections of which statute.

36. As a result of prolonged discussions between the Tribunal and Mr Ogunyanwo the following claims were identified as the claims which the claimant now wished to pursue against the three new respondents, Dr Syed, Dr Batra and Health Education England. For ease of reference in connection with this Judgment,

the Tribunal has added to the Judgment a copy of the 40 paragraphs of particulars which were submitted by the claimant. Those pages have been added to the bundle and have been numbered pages 151-159 inclusive. Referring to those page numbers the claims of the claimant carefully identified by Mr Ogunyanwo were as follows:-

(a) At paragraph 9 at the foot of page 2 the claimant alleges that he suffered direct race discrimination on 6 December 2016. Going over to the top of page 3, continuing in paragraph 9, the claimant alleges that on 6 December 2017 Dr Syed stated that Nigerians lacked communicating skills and referred to another Nigerian doctor as an example. The Tribunal specifically asked Mr Ogunyanwo whether or not the claimant was, at the time that this comment was allegedly made, upset. Mr Ogunyanwo confirmed that the claimant was upset at the time and that as a result of the comments the claimant had been unnecessarily sent on a two day training course in London (see paragraph 11). Indeed in paragraph 10 the claimant confirms that he suffered "a lot of distress" as a result of the encounter. The Tribunal was careful to confirm with Mr Ogunyanwo that the claimant was upset and suffered the described distress at the time of the incident on 6 December 2017. Mr Ogunyanwo confirmed that that was the case.

(b) The second allegation of direct race discrimination related to an incident on 4 January 2017 and that date was again set out at paragraph 9. Particulars of the alleged incident were included at paragraph 12. Again the allegation named Dr Syed specifically. Again Mr Ogunyanwo was very clear to confirm that the claimant was upset by what happened at the time. Mr Ogunyanwo confirmed that this was discrimination on the grounds of race because the claimant had never seen a colleague of his race being spoken to in that way. He was upset because he was a Registrar and was therefore a Senior Medical Officer.

(c) The third allegation related to the third of the dates set out at paragraph 9, the 6 February 2017. The particulars were set out at paragraph 16. The claimant complained about the alleged comment by Dr Syed, "I know how you Nigerians speak". It was alleged that again Dr Syed had given an example of another colleague who was also a Nigerian. Mr Ogunyanwo confirmed that the claimant was upset at the time and indeed said to the Tribunal that the claimant was "very upset, Sir".

(d) The fourth claim related to the particulars set out at paragraph 17 where the claimant was complaining about being yelled at. The claimant again confirmed that he had been upset by this at the time and that he believed that it was direct race discrimination because he had never seen any of his colleagues yelled at in that way, and that his colleagues were of a different racial background. Mr Ogunyanwo also alleged that this act of yelling at the claimant was a claim of harassment on the grounds of the protected characteristic of race.

(e) The fifth claim related to the particulars set out at paragraph 21 and the date of 1 March 2017. The claimant alleged that this would not have

happened to him if he had not been Nigerian. Again it was confirmed to the Tribunal that the claimant was "very upset" and indeed that he had been upset to the extent that as a reaction he had gone off work with anxiety, had had panic attacks and had had to go to see his GP.

(f) The sixth claim related to the particulars at paragraph 23 and the date of 2 March 2017. The claimant alleged that the failure to respond to his letter of complaint was an act of direct race discrimination and that Dr Batra had refused to escalate the issues because the claimant was Nigerian. Again Mr Ogunyanwo confirmed that the claimant was upset by this incident at the time.

(g) The seventh claim related to paragraph 25. No date was set out in paragraph 25 but Mr Ogunyanwo confirmed that the relevant date was 6 February 2017. He described this incident as being a set of circumstances where the claimant was directed not to raise incident forms. This was an act of direct race discrimination. This step was only taken against him because of his race and Dr Syed would not have spoken to the claimant in that way if he had not had his specific racial characteristics.

(h) The eighth claim related to paragraph 28, the Tribunal was informed by Mr Ogunyanwo. This related to an email dated 6 February 2017. The claimant placed great emphasis on this email which was included in the bundle at page 119. The claimant alleged that this email was sent because of his race and that on that basis it was an act of direct race discrimination. The claimant alleged that someone not of his race would not have been treated in that way. There was a dispute about the date when that email first came to the knowledge of the claimant. In any event it was agreed by all concerned that the earliest possible date that this came to the attention and knowledge of the claimant was 13 February 2018 and at the latest was prior to or at the Preliminary Hearing on 21 February 2018. In view of the short potential timescale the Tribunal did not consider the exact date to be a matter of any importance. It came to the attention of the claimant between 13 and 21 February 2018. That was the allegation of the claimant.

37. After identifying those eight claims the Tribunal then continued discussions with Mr Ogunyanwo to identify the next alleged claim. There were then lengthy periods of silence with Mr Ogunyanwo flicking back and forth between the pages of the claim form and various pages of the bundle. At one stage Mr Ogunyanwo said that "the only other" but then paused and again there was a lengthy silence recorded by the Tribunal as being as long as five minutes. Mr Ogunyanwo then said that the "only other incident" related to a meeting with Dr Batra. Mr Ogunyanwo was asked which paragraph this related to and what took place at the meeting and when it took place. There were further periods of silence with both the claimant and Mr Ogunyanwo flicking back and forth through various pages. It was then suggested that a meeting took place on 13 March but then there was then a further pause in order to identify what the year was. It was suggested that the claim was 2017. By now a further period of time had passed. It was agreed by Mr Ogunyanwo that there was nothing whatsoever in the claim form about any meeting on 13 March and the

Tribunal expressed the view, therefore, that there was no claim to adjudicate on. After pausing to consider matters Mr Ogunyanwo confirmed that it was only the first eight claims that the claimant wished to pursue.

38. The Tribunal noted, therefore, that the first seven claims cover the period between 6 December 2016 and 2 March 2017. The final claim related to the discovery of an email (page 119) some time between 13 and 21 February 2018. The email was dated 6 February 2017. Dr Ogunyanwo attempted to persuade the Tribunal that time in respect of the impact of that email did not begin to run for the purposes of the relevant three month period relating to claims under the Equality Act 2010 until the claimant became aware of that email. The Tribunal pointed out to the claimant that that was not an accurate assessment of the law, and that time began to run from the time that the act of alleged discrimination actually occurred, which was therefore 6 February 2017. By the time that the claims were therefore lodged on 28 May 2018 the claim relating to the email was some one year and 3½ months out of date. The Tribunal indicated to Mr Ogunyanwo that it was considering whether or not it would be just and equitable to extend time and that it was not possible to argue that the claim was in time simply because the date when the email was discovered was some date between 13 and 21 February 2018. After pausing to reflect Mr Ogunyanwo accepted that this was a correct statement of the law and that it would therefore be appropriate for the Tribunal to consider the speed with which the claimant reacted to the alleged sudden discovery of this email between 13 and 21 February 2018. The claim was not lodged until 28 May 2018, which was over three months later. The Tribunal also pointed out to Mr Ogunyanwo that the first claim had been lodged on 21 October 2017 and that that was the date which the Tribunal would take into account when considering the first seven claims which related to events between 6 December 2016 and 2 March 2017.

39. The Tribunal, at the stage that it was identifying with Mr Ogunyanwo the claims of the claimant, asked Mr Ogunyanwo to explain why if the claimant had been upset and indeed had been very upset, and indeed had needed to go to his GP for treatment for anxiety, that the claims had not in fact been lodged until at the earliest the end of May 2017. He was asked to explain why the claims had not been issued in October 2017 and why it was necessary to issue new claims.

40. Repeated discussion took place with Mr Ogunyanwo about this point, and he repeatedly explained that the discovery of the email at page 119 dated February 2017 but only revealed to the claimant allegedly in February 2018, had changed everything. He told the Tribunal that as a result of the discovery of that email the claimant now believed that it was appropriate for the individuals who were responsible for the treatment of him in December 2016/January 2017 to be pursued as individuals. Mr Ogunyanwo sought to explain that previously the claimant had only brought claims against the employer, but the Tribunal noted that the original complaint lodged in October 2017 had named two specific doctors as named respondents, namely Dr Donaldson and Dr Raza. It was not the case, therefore, that the claimant had previously only issued proceedings against employers. That was, however, the explanation which was given to the Tribunal on behalf of the claimant. It was suggested by Mr Ogunyanwo that at this stage the claimant believed that it was not the employer that was to blame but that it was the individuals who were responsible for what had happened who should now be sued as individuals. Mr Ogunyanwo went on to say that there had been “continuous acts”. However, he did

not elaborate on that or explain how he believed that there was an appropriate chain of continuity which would excuse the time delays. Mr Ogunyanwo nevertheless went on to allege that it was "impossible to lodge claims at the time of the events" and that it was only when he discovered the email in February 2018 that he knew then who were the persons who were responsible. The Tribunal pointed out to Mr Ogunyanwo that throughout the Particulars of Claim (40 paragraphs) that the claimant had been able to identify the individuals and that the events which he said had occurred between 6 December 2016 and the beginning of March 2017 had been face to face encounters between the claimant and people that he knew and recognised. Furthermore, in answer to specific questions from the Tribunal Mr Ogunyanwo had made it very clear indeed that at the time of those alleged incidents, when the claimant knew exactly what was happening to him and who was responsible, the claimant had been upset and he had known very well who were the people who were speaking to him and treating him in a way which caused him to be so upset. Nevertheless, and the Tribunal made a careful note of this, Mr Ogunyanwo argued that up until the discovery of the email in February 2018 the claimant did not "know that the individual was the person responsible".

41. The Tribunal considered it important to understand the history of the presentation of the new claims on 28 May and 6 June 2018.

42. At a Preliminary Hearing by way of case management held with Regional Employment Judge Parkin on 2 January 2018 (when the claimant was represented by Mr Ogunyanwo), it was at that hearing that Mr Ogunyanwo told REJ Parkin that, "The claimant seeks to amend his claim to include a fifth respondent, Dr Tanya Syed". The claimant was therefore ordered to provide the basis of the proposed amendment in writing to the Tribunal by 23 January 2018. That was on the basis that Dr Syed could then be made aware of the proceedings and the application. Furthermore, it was made clear that the claimant was to provide further details of his claims of race discrimination and harassment and that he had to do so again by 23 January 2018. In the notes of a "Discussion" REJ Parkin notes that the claimant, "now seeks to join Dr Syed as his fifth respondent in these proceedings, contending there was a link or connection between Dr Syed and the third respondent, and Dr Batra, his Training Programme Director". As early therefore as 2 January 2018 Mr Ogunyanwo on behalf of the claimant is raising the potential of additional claims against Dr Syed and alleging a link between Dr Syed and Dr Batra. REJ Parkin also commented that in terms of unlawful acts of discrimination that these were "still clearly not set out" and that the claimant needed to provide further particulars of the claims "together with the basis of his application to join Dr Syed and to add further claims in writing so that the existing respondents and Dr Syed can understand fully what is alleged". The claimant was obliged to do this by 23 January 2018.

43. Mr Ogunyanwo sent the application to join Dr Syed and Further and Better Particulars of the claim to the Tribunal by email dated 24 January 2018 (one day late). Understandably no issue was taken with that short delay. A copy of that email appeared in the bundle at page 30. The substantial additional particulars prepared by the claimant and submitted by Mr Ogunyanwo then ran to some very considerable length and appeared in the bundle before the Tribunal on 8 October 2018 at pages 31-54 inclusive. There were, therefore, no fewer than 23 pages of additional particulars set out by the claimant in tabular form.

44. At paragraph 48 in the bundle, included in the additional particulars which REJ Parkin had ordered the claimant to provide, there are four paragraphs which relate to 6 February 2017 (two occasions) and two additional paragraphs which do not have dates attributed to them. Nevertheless the focus of the four paragraphs set out in detail on page 48 is on Dr Syed and Dr Batra. Furthermore, the issues in question relate to dates and incidents which were included in the 40 paragraphs of Particulars of Claim which were submitted by the claimant in support of his "new" claims on 28 May and 6 June 2018.

45. There was also included on page 51 detail of the incident on 6 December 2016 which the claimant wanted to complain about. It was accepted by all parties that the incident being described was 6 December 2016 and not, as stated, 2017. This again specifically named Dr Syed and specifically referred to the date of 6 December. That date, and that incident, was the very first allegation of direct race discrimination which the claimant now sought at this Preliminary Hearing to bring by way of a new claim against Dr Syed.

46. At page 52 there is a detailed description provided by the claimant in respect of an incident on 4 January 2017, again specifically naming Dr Syed. The Tribunal noted the obvious and real similarities with the content of paragraph 12 of the "new" Particulars of Claim (page 153 in the bundle).

47. At page 53 the claimant recites significant details of an incident which he says occurred involving Dr Syed on 6 February 2017. The Tribunal notes the obvious and real similarities with the detail provided at paragraph 16 of the "new" Particulars of Claim. Indeed the specific allegation of, "and I know how you Nigerians speak" and the name of the other Nigerian doctor are specifically included in the details set out by the claimant at page 54.

48. It was, therefore, clear that in response to the specific requirement of REJ Parkin to prepare detailed particulars of his claims and detailed particulars of the claims by way of amendment that he wanted to bring against Dr Syed, that the claimant had in mind and set out in writing at the pages identified above specific details of dates and allegations which in effect the claimant simply repeated in the Particulars of Claim submitted in May/June 2018. Indeed it was submitted by Miss Smith of counsel that the claimant had in fact simply "cut and pasted" the allegations almost word for word from the amended particulars which were supplied to the Tribunal for consideration at the Preliminary Hearing on 21 February 2018, and then simply repeated them in the new claim form by using exactly the same Particulars of Claim in support of each of the two new claims.

49. The Tribunal believes it important to record very clearly that in its discussions with Mr Ogunyanwo that at no stage did he seek to suggest that there was any claim which was included in the 40 paragraphs of particulars submitted with the new claims which could or should be interpreted as claims of whistle-blowing. The Tribunal was very careful indeed and took a particular length of time in discussing with Mr Ogunyanwo, as described above, the exact claims which could reasonably be ascertained from the 40 paragraphs of Particulars of Claim. As the Tribunal has indicated above, Mr Ogunyanwo was given every opportunity, in conjunction with discussions with the claimant who was sitting next to him, to identify those claims. There were, towards the end of those discussions, significant periods of extended

silence which were punctured only with discussions between the claimant and Mr Ogunyanwo and a repeated flicking to and fro between various pages of documents in front of them in order to identify those claims. The claimant had participated in a case management discussion with REJ Parkin on 2 January 2018, and the importance of identifying claims and issues had obviously been a focus of that Preliminary Hearing. Furthermore, the claimant, in the opinion of the Tribunal, knew the purpose of that discussion because it was reflected in the substantial numbers of sheets which the claimant then submitted by way of application to amend which was then considered, at great length, at the Preliminary Hearing on 21 February 2018 by Employment Judge Horne. The length and care taken to examine those issues is reflected in the length and detail of the Reserved Judgment which was issued by Employment Judge Horne.

50. In the opinion of the Tribunal, therefore, there could be no suggestion of any misunderstanding on the part of the claimant or on the part of Mr Ogunyanwo about the importance of identifying claims and identifying the relevant statutory provisions. Mr Ogunyanwo made it clear that he was attempting to persuade the Tribunal not to strike out the claims but only on the basis that the claims were claims of direct race discrimination and a single claim of racial harassment. At no stage was any suggestion made by Mr Ogunyanwo that anywhere within those 40 paragraphs of Particulars of Claim was there any claim relating to whistle-blowing. There was no attempt to identify a qualifying or protected disclosure, and there was therefore no discussion with the claimant whatsoever about the requirements of section 43B of the Employment Rights Act 1996 or other relevant statute provisions relating to any claim relating to whistle-blowing. Mr Ogunyanwo, given every opportunity to do so, clarified, at length, that the claims brought were claims of direct race discrimination and one single claim of harassment on the grounds of the protected characteristic of race.

51. Whilst the Tribunal had no difficulty at all in recognising and understanding the nature of the claims which the claimant now wished to pursue against Dr Syed and Dr Batra, the Tribunal had some considerable difficulty in understanding the basis upon which it was now, in May 2018/June 2018, felt appropriate to widen the scope of the claims of the claimant to involve the third of the three potential new respondents, namely Health Education England. It was recognised by Employment Judge Horne and set out in his extensive Reserved Judgment and Case Management Orders that the relationship between the various bodies and potential employers was complicated. Nevertheless, it was equally clear that by October 2017 the claimant, with the assistance of Mr Ogunyanwo, had considered the claims of the claimant and had, in the opinion of this Tribunal, had the opportunity to consider the identity of the relevant parties. When the initial proceedings were issued in October 2017 they were limited to the named four respondents, two of which were Hospital Trusts.

52. At the case management discussion held with REJ Parkin on 2 January 2018 there had by then been a further significant opportunity for the claimant and Mr Ogunyanwo to consider their position and to consider the circumstances, including an opportunity to consider the response which had by then been filed by the four named respondents. Furthermore, Mr Ogunyanwo clearly demonstrated that further consideration had been given by his indication given to REJ Parkin that the claimant wished to amend his claims. There was then a further significant opportunity

between 2 January and 23 January 2018 for the claimant to hold further discussions with Mr Ogunyanwo and to carry out further investigations as to the identity of any other potential respondents if he wished to do so. 23 January 2018 was the date by which the claimant was ordered to file further particulars in support of his application to amend.

53. There was then a further opportunity of approximately a month between 23 January and 21 February 2018 when the Preliminary Hearing took place for further consideration on the part of the claimant and Mr Ogunyanwo. However, there was no suggestion made, either to REJ Parkin or to Employment Judge Horne, that Health Education England was even possibly a potential respondent to any of the claims of the claimant. The potential joining of Health Education England was not an issue which was raised in front of Employment Judge Horne, and it was not something which was therefore given any consideration whatsoever.

54. The Tribunal therefore carefully considered the 40 paragraphs of Particulars of Claim which had been submitted in support of the new claims. Whilst obviously the names of Dr Syed and Dr Batra appeared on a number of occasions, the single mention of Health Education England appears in the final paragraph, paragraph 40. It is, to use a colloquialism, nothing more than a throwaway comment where the claimant says that he will also seek to hold "Health Education England" jointly and severally liable for the grave discrimination he has suffered. However, the claimant provides absolutely no justification for that allegation, and at the hearing on 8 October 2018 the Tribunal was not given any evidence whatsoever to indicate how or why Health Education England could or should in any way be held responsible, or why they should be a named respondent to these proceedings. A detailed response had been submitted to the suggested involvement of Health Education England. Despite that robust response neither the claimant nor Mr Ogunyanwo gave the Tribunal any information whatsoever on 8 October 2018 as to what any causal or contractual link could be to include Health Education England as a named respondent.

55. It seemed to the Tribunal, therefore, that the approach by now of the claimant was to include the names of almost any Body that had any connection or any possible connection with the incidents that he wanted to complain about, and that they should be named without giving any proper thought as to the legal basis on which they could properly and reasonably be considered as a named respondent.

56. One of the grounds on which application was made to strike out the claims against Health Education England was that the claims were vexatious. In the opinion of the Tribunal it was indeed vexatious to seek to bring claims against a named respondent without in any way seeking to demonstrate how or why that Body should be a respondent to any of the claims of the claimant. The claimant failed to produce any evidence whatsoever, or indeed to formulate or put forward any argument as to why Health Education England should be a respondent to any of the claims of the claimant.

57. Secondly, it was put forward on behalf of the Health Education England that the claims against it should be struck out on the basis that they had no reasonable prospects of success. As there was no evidence whatsoever in front of the Tribunal to indicate the basis upon which Health Education England had been named as a

potential respondent to the claims of the claimant, then in the opinion of the Tribunal the claims against that Body did indeed have absolutely no reasonable prospects of success. Indeed the Tribunal would go further and say that those claims had absolutely no prospects of success whatsoever. The claimant was bringing claims on the basis of his employment. He was bringing claims before an Employment Tribunal. He put forward no evidence or information whatsoever to suggest how there had been any form of employment relationship, or even quasi employment relationship, between himself and Health Education England.

58. In the absence of any such information the Tribunal concluded that the claims against Health Education England were indeed vexatious and had no reasonable prospects of success whatsoever, and on that basis the claims against Health Education England were struck out.

Conclusions – Issue Estoppel

59. Issue estopppel means that a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. A final decision made by a Judge meets the requirement for a point to have been solemnly and with certainty determined. Even if the objects of the first and any subsequent claim or action are different, the finding on a matter which came directly in issue in the first claim or action, provided it is embodied in a judicial decision that is final, is conclusive in a second claim or action between the same parties. The Tribunal recognises that issue estoppel only arises where it is the same issue which a party is seeking to re-litigate. The principle of issue estoppel applies whether the point involved in the earlier decision is one of fact or one of law or one of mixed fact and law.

60. The conditions for the application of issue estoppel require a final decision on the issue by a court of competent jurisdiction, and also require that the issue raised in both proceedings is the same issue and the parties to the judicial decision must be the same persons as the parties to the proceedings in which the estoppel is raised. The question of whether the raising of an issue in subsequent proceedings amounts to an abuse of process is one which is to be decided in a broad, merits based way in the light of all the circumstances.

61. Where a matter is held not to fall within the scope of issue estoppel, it may nonetheless be struck out as vexatious or frivolous. A party who seeks to re-litigate a question which in substance has already been determined does so as an abuse of process.

62. In this part of the Judgment, therefore, the Tribunal sets out its conclusions in respect of the submissions made by counsel for the three respondents on both issue estoppel and the argument put forward that the two claims issued by the claimant in late May and early 2018 are an abuse of process, and that to issue those proceedings is vexatious conduct on the part of the claimant which justifies the claims being struck out.

63. Miss Del Priore on behalf of Dr Syed argued that the claims against her client should be struck out on the application of the principle of issue estoppel. She argued that the Judgment of EJ Horne was very clear. He had refused to join Dr Syed to the proceedings which were already in issue, and he had refused to amend the existing

claim form of the claimant to allow claims to be brought against Dr Syed. Miss Del Priore argued that to then issue a subsequent new claim form against Dr Syed was a deliberate attempt on the part of the claimant to circumvent those two Judgments of EJ Horne. She pointed out that if the claimant wished to overcome the clear Judges of EJ Horne then the appropriate approach of the claimant would have been to have appealed those Judgments to the Employment Appeal Tribunal. No such appeal had been lodged. In essence Miss Del Priore argued that what the claimant was now attempting to do was to in effect ignore completely the Judgment and reasoning of EJ Horne by seeking to issue a new claim form altogether despite the clear Judgment and reasoning of EJ Horne. She furthermore pointed out that the claimant had been given permission by REJ Parkin at the preliminary hearing in January 2018 to seek to amend the existing claim form which had been issued in October 2017. As the Tribunal has already referred to above, Mr Ogunyanwo acting on behalf of the claimant then submitted very detailed and lengthy written details, running to many pages, of the amendments which he sought to pursue at the subsequent preliminary hearing before EJ Horne on 21 February 2018. The Tribunal has already made earlier reference to the amendments which specifically referred to Dr Syed which were put before the Tribunal on 8 October at pages 50-54 inclusive. The Tribunal has already commented on the similarity, or indeed exact repetition, of the nature of the claims which were included in the new claim form by comparison to the details which Mr Ogunyanwo on behalf of the claimant set out as amendments which were specifically considered and rejected by EJ Horne.

64. The conclusion of the Tribunal is that the claim form issued against Dr Syed under case number 2411365/2018 was indeed an abuse of process and the decision of the Tribunal is that it should be struck out on that basis. In the opinion of the Tribunal, it is difficult to see how there is a more obvious example of issue estoppel bearing in mind the specific and carefully constructed written details of proposed amendments which the claimant advanced at the hearing on 21 February 2018, which were rejected by EJ Horne. In the opinion of the Tribunal, by issuing the subsequent claim form, the claimant is doing nothing more than seeking to deliberately circumvent the Judgment of EJ Horne and the law simply does not allow someone to do that by issuing a second claim form.

65. Again considering the claim against Dr Syed, the decision of the Tribunal is that that claim should equally be struck out on the basis that to issue it was an abuse of process. It is, in the opinion of the Tribunal, a very clear example of vexatious conduct to effectively issue that claim form as an attempt to re-open and re-litigate a question which has clearly already been carefully considered and decided by EJ Horne. The specifics of the amendments are either the same or almost identical to the claims which the claimant sought to have included by way of amendment at the Preliminary Hearing on 21 February 2018. EJ Horne made two decisions. He refused to join Dr Syed as a party and he refused to allow any amendment to enable claims to be brought against her. He did so in clear and obvious language. The claimant did not seek to appeal either of those Judgments. Instead he has deliberately sought to circumvent the Judgments of EJ Horne by issuing a new claim form. A party is not allowed to simply ignore the Judgments of the Employment Tribunal in this way. To ignore the Judgments of an Employment Judge in that way must be vexatious conduct and, in the opinion of the Tribunal, to issue that claim was a real and obvious abuse of process.

66. The decision of the Tribunal, therefore, is that the claim against Dr Syed should also be struck out on the grounds that to have issued it was an abuse of process.

67. Insofar as the claims against Health Education England are concerned, the Tribunal does not believe that the arguments of issue estoppel or abuse of process are relevant. As the Tribunal has already indicated in this Judgment, there was no attempt to join Health Education England as a party to the proceedings at the Preliminary Hearing on 21 February 2018. There was no suggested amendment before that Tribunal, either to include them as a party or alternatively to seek to amend the original claim from October 2017 to include claims against them.

68. The Tribunal now turns to the arguments presented by Miss Smith on behalf of Dr Batra that the claims against him should be struck out on the basis that they are both subject to the rule of issue estoppel and that to have issued the claims against him is an abuse of process. Again, the Tribunal carefully considered the lengthy and very detailed written amendments which were set out on behalf of the claimant in advance of the preliminary hearing held in February 2018. It may be useful to once again record that they were sent to the Tribunal by Mr Ogunyanwo by an email dated 24 January 2018 (page 30) and that he then set out some 23 pages of detailed subsequent amendments which were then carefully considered by EJ Horne on 21 February 2018. There is reference in those pages to Dr Batra on pages 45 and 48. On page 45 the claimant is alleging that he reported his concerns to Dr Batra but that nothing had changed. At page 48 a very similar allegation is made against Dr Batra indicating that the claimant has reported an incident to Dr Batra and that the claimant and his wife then subsequently met with Dr Batra but that Dr Batra "failed to escalate the issue appropriately".

69. A copy of the claim form which was subsequently issued against Dr Batra was included in the bundle presented to the Tribunal on 8 October, and the 40 pages of Particulars of Claim appeared at pages 102-109. At paragraph 19 (page 105) the claimant raises an identical complaint against Dr Batra to the one which he sought to raise against him by way of amendment at the Preliminary Hearing on 21 February 2018. The claimant then expands upon that at paragraph 23 by referring to the alleged "failure of Dr Batra in claiming with the claimant's grievance". He goes on in paragraph 13 to allege that "Dr Batra refused to escalate the issues raised to him on two different occasions". In the concluding paragraph at page 109 the claimant repeats this allegation against Dr Batra by alleging that the claimant has suffered as a result of the "un-investigated rumours". In the opinion of the Tribunal this is clear reference to the allegations made against Dr Batra that he refused/failed to investigate complaints and concerns which were raised to him by the claimant.

70. In the opinion of the Tribunal, to issue these allegations against Dr Batra when they were specifically considered and dealt with by EJ Horne in paragraphs 83-88 of his Reserved Judgment is again a deliberate attempt on the part of the claimant to circumvent and avoid the Judgment of EJ Horne which was to reject those claims. There was no appeal lodged against the Judgment of EJ Horne. In the opinion of the Tribunal the claimant is seeking to avoid making an appeal and is instead seeking to persuade this Tribunal that he should be allowed to do so and should be allowed, in effect, to repeat and proceed with exactly the same allegations which EJ Horne refused him permission to do at the hearing on 21 February 2018. It

is clear from paragraphs 83-88 of the Judgment of EJ Horne that he considered all the relevant circumstances and factors and principles of law. At paragraph 87 the amendment is refused, with the observation of EJ Horne that the claimant was simply being prevented from pursuing a hopeless claim.

71. The Tribunal recognises, of course, that the amendment which was sought by the claimant was not an amendment in respect of the Equality Act to enable claims to be brought against Dr Batra but in effect an amendment to pursue claims of whistle-blowing. However, there was clear and obvious focus on the alleged failures of Dr Batra. He was clearly in the mind and focus of the claimant as were the reasons why the claimant was unhappy with the alleged behaviour of Dr. Batra.

72. The conclusion of the Tribunal is that the "issue" which was therefore determined by EJ Horne was an issue relating to whistle-blowing under the Employment Rights Act 1996 and not an issue relating to allegations under the Equality Act 2010. Amendments in respect of the Equality Act to enable claims to be brought against Dr Batra were not claims which were considered by EJ Horne. In those circumstances the Tribunal does not accept that it would be appropriate to strike out the claims now brought against Dr Batra by applying the principle of issue estoppel.

73. For the same reasons the Tribunal does not believe that it would be appropriate to strike out the claims relating to Dr Batra in respect of the Equality Act by applying the principle that to do so would be an abuse of process. EJ Horne on 21 February 2018 was considering a completely different statute altogether, namely the Employment Rights Act 1996. The claims now pursued against Dr Batra, as clearly specified by Mr Ogunyanwo, are claims under the Equality Act. The Tribunal believes, therefore, that these are completely different and separate issues.

74. For the avoidance of any doubt, however, had the claimant sought to bring claims of whistle-blowing against Dr Batra at the hearing on 8 October 2018 then the overwhelming conclusion of the Tribunal would be that to do so would be an abuse of process and would also be equally contrary to the principle of issue estoppel. The claims brought by way of amendment to the hearing on 21 February 2018 relating to Dr Batra were claims of whistle-blowing. They were rejected. To then seek to effectively repeat those claims and to include them in a new claim form, circumventing any requirement to appeal, and in effect seeking to ignore completely the reasoning and Judgment of EJ Horne, would, in the opinion of the Tribunal, be a real and obvious abuse of process and would be vexatious. Furthermore, in the paragraphs of his Judgment to which the Tribunal has referred above EJ Horne considered those claims in detail against Dr Batra and refused permission for the amendment. The Tribunal would, therefore, have had no hesitation in rejecting whistle-blowing claims against Dr Batra by applying the principles of issue estoppel and abuse of process amounting to vexatious conduct should claims of whistle-blowing have been pursued against Dr Batra.

Conclusions – rule in Henderson v Henderson

75. The law discourages re-litigation of the same issues except by means of an appeal. The Tribunal has already made this point very clearly. It is not in the interests of justice that there should be a re-trial of a case that has already been

decided by another court of Tribunal, leading to the possibility of conflicting judicial decisions.

76. Where a case does not fall to be considered under the principles of issue estoppel and/or abuse of process, the court or Tribunal may still exercise its discretion under its general inherent jurisdiction to prevent litigation that amounts to an abuse of process so as to stop the party raising an issue which was **or could have been** determined in earlier proceedings. The rule in **Henderson v Henderson** has been described as being essentially part of the court's wider jurisdiction for striking out claims as an abuse of process. It is now understood that the rule is separate and distinct from estoppel, but it has much in common with those doctrines and the underlying public interest or policy is the same in that there should be finality in litigation and that a party should not be twice vexed in the same matter.

77. The rule also provides that a claimant is barred from litigating a claim that could or should have been brought before this Tribunal in earlier proceedings arising out of the same facts. Parties are expected to bring their whole case to the Tribunal and will in general not be permitted to re-open the same litigation in respect of a matter which they might have brought forward but did not, even where this might be from negligence, inadvertence or even accident. The abuse in question need not involve the re-opening of the matter already decided in proceedings between the same parties. It may cover issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of process of the Tribunal to allow new proceedings to be started in respect of them. The Tribunal has reminded itself that it would be wrong to hold that because the 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. The question is whether in all the circumstances the party's conduct is an abuse of process.

78. The Tribunal also strikes out the new claims brought against Dr Syed and Dr Batra by the application of the rule in **Henderson v Henderson**. The Tribunal has already made detailed reference to the substantive written amendments which the claimant put before the Preliminary Hearing on 21 February 2018, and there is no doubt whatsoever that the claimant had his sights set on both Dr Syed and on Dr Batra. That is very clear. Indeed, so far as Dr Syed is concerned the claimant even prepared and submitted a set of amendments which were described as being specifically related to Dr Syed. The Tribunal has referred to the relevant paragraphs of those particulars above, but for the avoidance of doubt they include not only pages 50-54 in the bundle but they include the detailed particulars set out at page 48 in which specific and repeated reference is made to allegations against Dr Syed, those allegations being ones which are then specifically repeated in the 40 paragraphs of particulars which were submitted with the new claims, not only against Dr Syed but also against Dr Batra. The Tribunal considers that this is a real and obvious abuse of process by application of the rule of **Henderson v Henderson**. Both Dr Syed and Dr Batra were the subject of applications to include them as parties and to make amendments to enable claims to be brought against them at the hearing on 21 February 2018. Those applications were considered and rejected. The Tribunal was not given any reasoning or explanation whatsoever as to why the detail included in the new claims issued against both Dr Batra and Dr Syed could not have been included in the applications for amendment which were considered by EJ Horne. The Tribunal can find absolutely no reason or explanation as to why the

claims now sought to be pursued under the Equality Act against those two claimants could not and should not have been included in the application for amendments put before EJ Horne. Indeed no explanation for not having done so was put forward other than what the Tribunal found to be an utterly incomprehensible explanation relation to the email of 5 February 2017 which appeared in the bundle at page 119.

79. The Tribunal has already made specific and detailed reference to this email. It allegedly came to the attention of the claimant for the first time between 13 and 21 February 2018. Mr Ogunyanwo, on a number of occasions, indicated, with passion, that this altered the opinions and thoughts of the claimant to such a significant extent that it was only on reading that email that he then felt it appropriate to raise claims individually against Dr Batra and Dr Syed. Despite being asked to explain, on a number of occasions, the claimant failed to show how that was consistent with Mr Ogunyanwo confirming that earlier specific allegations of discrimination made against Dr Syed had led the claimant to be upset or very upset at the time that those incidents occurred or how the claimant was in any way affected by the receipt of or content of the email. The Tribunal was left perplexed as to the reasoning and concluded, after carefully considering the email at page 119, that the submissions made by Mr Ogunyanwo on behalf of the claimant were unreasonable and without merit. The Tribunal could see absolutely no reason why the claimant could not and should not have raised his dissatisfaction with the conduct of both Dr Syed and Dr Batra at the hearing in February 2018. If, as the claimant instructed Mr Ogunyanwo, his reading of the email had affected him in such a way, then there was no reason why that effect could not and should not have been described to EJ Horne at the hearing on 21 February. There is no evidence whatsoever that that happened.

80. The claimant is now attempting to bring proceedings against Dr Syed and Dr Batra as individuals. They are clearly being put to substantial inconvenience and as EJ Horne commented in his own Judgment where it relates to the whistle-blowing claims, if the new claims were allowed to proceed then they would both be required to consider events which occurred a long time ago, at least 18 months ago. More importantly, however, they would be put to significant personal inconvenience as they would now be named respondents in proceedings brought against them as individuals under the Equality Act. In the opinion of the Tribunal there is no satisfactory reason or explanation as to why they were not named by way of amendment prior to and at the hearing on 21 February 2018. In the opinion of the Tribunal not only could they have been named in that way but they should have been named in that way. Both Dr Batra and Dr Syed had a reasonable expectation following the Judgment of EJ Horne that so far as their personal involvement in these proceedings would be concerned that that was the end of it. There had been a detailed and reasoned presentation to EJ Horne and his decision was clear and reasoned. The Tribunal has no doubt at all, so far as personal involvement and/or personal liability was concerned, that following that Judgment both Dr Batra and Dr Syed reasonably considered that that was the end of the matter as far as they were concerned from a personal involvement perspective. Without lodging any appeal, the new claims are a deliberate attempt to circumvent the need to appeal the Judgment of EJ Horne and is an abuse of process by the application of the rule in **Henderson v Henderson**. There is no doubt that the issues now raised against them both could have and should have been brought and determined in earlier proceedings. There is no doubt at all that both Dr Batra and Dr Syed are now being “twice vexed” in the same manner. They believed that they had reached finality in litigation only then for

the claimant to raise these new claims against them, re-opening the prospect of them being named as individual respondents. There is no doubt that the claims now sought to be pursued against them are clearly part of the subject matter of the original litigation which was issued in October 2017. There is certainly no doubt, in the opinion of the Tribunal, that the subject matter of the new claims is most clearly part of the subject matter of the litigation which was considered and decided upon by EJ Horne. The new claims could clearly and obviously should have been raised at that stage, if not earlier. In the opinion of the Tribunal, therefore, it is the clearest abuse of process for the new proceedings to be started in respect of Dr Syed and Dr Batra. On that basis the claims against them are struck out on the basis that to raise these new claims is abusive of the principles which apply to litigation and is clearly vexatious.

81. In summary, therefore, applying the rule in **Henderson v Henderson**, the claims against Dr Batra and Dr Syed are struck out as being an abuse of process.

82. The Tribunal then considered the application of the rule in **Henderson v Henderson** insofar as it applies to the claims brought against Health Education England. Again the Tribunal considers that to join them at such a late stage is an abuse of process and that any claims, whatever they may be, could and should have brought either in the original claim form or certainly could and should have been included in the substantial applications to amend which were put before EJ Horne in February 2018. The Tribunal was not presented with any new facts or reasoning as to why suddenly Health Education England becomes a relevant respondent. Indeed as the Tribunal has already indicated in its reasoning above, the basis on which they are introduced into this litigation is almost a mystery. They are simply named as a party without any justification or reasoning as to the nature of the claims brought against them, but more importantly the legal and factual basis upon which they could or should be named as a respondent.

83. The original claim form was issued in October 2017. The substantial applications for amendment were submitted to the Tribunal on 24 January 2018 on behalf of the claimant. There was a three month gap between those two events. There was then a further month between the amendment particulars being submitted and the hearing on 21 February which would again have allowed both the claimant and his representative to reflect on the possible involvement of any other parties, including Health Education England. During that four month process there was no suggestion made that Health Education England should now become a party to these proceedings. In the opinion of the Tribunal, it is a real and obvious abuse of process to effectively name them only in the new claim which was issued in June 2018, and to do so without any reasoning as to why they should be a respondent or any reasoning as to the nature of the claims which are being made against them as a public body. The Tribunal has already indicated that they are only named in the new particulars of claim in the final paragraph at page 40, and even then the most that the claimant says is that he “will also seek to hold Health Education England jointly and severally liable”. He does not, however, indicate any basis for that broad statement. He has, however, in the opinion of the Tribunal, had every reasonable and fair opportunity in which to consider their role in the matters about which he complains, and if he wanted to join them as a party then it was his obligation to bring those claims either in the original claim form or to do so at the Preliminary Hearing on 21 February 2018. The Tribunal has already decided that the claims against that

public body should be struck out for different reasons, but for the avoidance of doubt the Tribunal equally believes that it would be appropriate for the claims to be struck out by application of the rule in **Henderson v Henderson** on the basis that the claims, whatever they may be, could and should have been brought against them in earlier litigation, and certainly before the hearing on 21 February 2018 when the role of all the different parties was being considered carefully and in detail by EJ Horne.

Conclusions – New Claims Out of Time

84. The general rule is that a claim concerning work-related discrimination under Part V of the Equality Act 2010 must be presented to the Employment Tribunal within the period of three months "beginning with the date of the act complained of". These are the requirements established by section 123(1)(a). There is no absolute bar on claims being presented outside that relevant three month period because section 123(1)(b) allow a claim to be brought within "such other period as the Employment Tribunal thinks just and equitable".

85. Mr Ogunyanwo sought to argue, specifically in connection with the email at page 119 which he says the claimant only first saw during the period between 13 and 21 February 2018, that time in respect of that email and its contents only began to run from the time that the email came to the attention of the claimant. The Tribunal discussed with Mr Ogunyanwo, however, that that was not a correct interpretation of the law, and that, for example, the claims which he was seeking to bring against Dr Syed and Dr Batra relating to incidents between December 2016 and March 2017 were, by the time that the new claims were issued against them, substantially out of time. They were approximately 15 months out of time by application of the wording of section 123(1)(a). After discussion with Mr Ogunyanwo he accepted that that was the correct interpretation of the legislation and that the only argument open to him was therefore that the claims relating to 2016/2017 were substantially out of time but that time should be extended under section 123(1)(b). That equally applied to the email at page 119 because it was dated February 2017, a point which again after discussion Mr Ogunyanwo acknowledged and accepted.

86. The Tribunal reminded itself that when considering the extension of time provisions of the Equality Act 2010 it has a broader discretion under discrimination law than it has in respect of unfair dismissal cases. The Tribunal equally, however, reminded itself that there is no presumption that time should be extended unless the Tribunal can justify the failure to exercise the discretion, and indeed case law establishes quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. On that basis the exercise of discretion is the exception rather than the rule. That does not, however, mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

87. In exercising their discretion to allow out of time claims to proceed, Tribunals may (not must) also have regard to the checklist contained in section 33 of the Limitation Act 1980 as modified by the EAT in **British Coal Corporation v Keeble [1997] IRLR 336**. Section 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party

would suffer as a result of the decision reached, and have regard to all the circumstances of the case.

88. The factors which the Tribunal is required to take into account when considering all the circumstances of the case include, in particular:

- The length of and reasons for the delay;
- The extent to which the cogency of the evidence is likely to be affected by the delay;
- The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action;
- The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

89. The Tribunal is reminded that these factors are a valuable reminder of what may be taken into account, but that the relevance of each of the factors depends on the facts of each individual case and Tribunals do not need to consider all the facts in each and every case. The Tribunal is not required to go through every factor in the list referred to, but the Tribunal reminded itself that if a significant factor was left out of account that that would be an error. The Tribunal equally reminded itself that it would be an error to simply focus on whether the claimant ought to have submitted his or her claim in time.

90. The Tribunal considered each of these factors in order to decide what relevance they had to the decision which the Tribunal which the Tribunal was required to make as to whether or not it would be just and equitable to extend time relating to the new claims issued against Dr Syed, Dr Batra and Health Education England on 28 May 2018 and 6 June 2018 respectively.

91. So far as prejudice is concerned, the Tribunal reflected upon the words of EJ Horne at paragraph 88 of his Reserved Judgment. At paragraph of his Judgment he reflected that the latest alleged detrimental failure by Dr Batra was at the beginning of March 2017. At paragraph 88 EJ Horne commented that the delay would inevitably make recollections of the thought process more difficult. In the opinion of this Tribunal, that is a justifiable conclusion to come to. The allegations against Dr Batra and Dr Syed relate back now well over 18 months, and even longer. The incidents in question were immediately recognised as being upsetting by the claimant. The Tribunal could not understand at all, despite the repeated attempts to persuade it otherwise which were made by Mr Ogunyanwo, how the alleged knowledge of the email at page 199 significantly altered the perspective and views of the claimant. The Tribunal could find no justification whatsoever for that suggestion. The claimant had been upset at the time of the incidents in December 2016 and then up to early March 2017. He had been upset there and then. He had known the names of the people very easily. If those claims were being brought then they should have been brought at a time when the memory of the persons against whom the allegations were made was as fresh as it could be. The Tribunal considered, therefore, there would be substantial prejudice to both Dr Batra and to Dr Syed if these individual claims were not allowed to be brought against them after such a substantial passage of time.

92. When considering the length of the delay the Tribunal has rejected the suggestion that the email at page 119 was a real and substantial trigger for the claimant. On that basis there has been a very substantial delay in issuing proceedings against Dr Syed and Dr Batra as individuals in respect of these breaches of the Equality Act 2010. The delay is in excess of 15 months to 28 May 2018. That is a very substantial delay, particularly bearing in mind that even prior to the issue of the initial claim the claimant was receiving advice from Mr Ogunyanwo who has himself confirmed to the Tribunal that he is someone who practices in the law and procedure of Employment Tribunals, and that he does so on a regular basis and that he is well versed in the practice and procedure of Employment Tribunals.

93. No cogent reasons at all were put forward as to why there had been such an extraordinary delay. The claimant was upset by the incidents at the time. That was specifically confirmed to the Tribunal. Indeed it was even suggested that he was upset to the extent that he was off work and required medical assistance. Yet the claimant took no steps at all to issue claims against Dr Batra or Dr Syed. There was no explanation given as to why they had not been named as individuals in the original claim, and of course any applications to join them were rejected in February 2018 on the basis of the applications which were then considered by EJ Horne.

94. The Tribunal has already commented on what it believes the effect of the delay on the cogency of the evidence would be. By the time that the matter came to hearing the incidents in question would have happened well over two years earlier. The existing claims are listed for hearing in early February 2019, and yet if these new claims were then to be allowed to proceed then the Tribunal was told on 8 October that it would not be possible for that length of hearing to be lengthened and that a new date would be set. It was likely then that the cases would not be listed for hearing until May 2019 by which time some of the allegations would be 2½ years old. In the opinion of the Tribunal there was an obvious and real risk of effect on the cogency of evidence when individuals are being required to recollect and give evidence about, and indeed be cross examined about, incidents which happened up to 2½ years ago.

95. The Tribunal then considered the promptness with which the claimant acted when he knew of the facts giving rise to the cause of action. There was no doubt whatsoever that the claimant was aware of the actions of Dr Batra and Dr Syed and was equally aware that he was upset by them, and that they amounted to discrimination on the grounds of race, in December 2016 and then up to early March 2017. The claims, however, were not issued until 28 May 2018 and 6 June 2018 respectively. The Tribunal has already commented on the substantial length of that delay. The Tribunal does not believe that the word “prompt” could in any way describe or be associated with a delay of that length. No satisfactory explanation at all was provided by Mr Ogunyanwo on behalf of the claimant despite his spirited and repeated attempts to explain that the trigger was the knowledge of the email at page 119 which the claimant did not know about until between 13 and 21 February 2018. However, even if the Tribunal were to accept that as a real and proper trigger, the appropriate step then to be taken by the claimant would have been to have applied to amend the original claim. He ought to have attempted to raise that as an issue at the hearing on 21 February 2018. He ought to have explained to the Tribunal the alleged effect of discovering this email, and the issues could and should then have been considered by EJ Horne, bearing in mind that he was considering such a wide

range of issues and perspective and background in relation to the circumstances of the claimant. Instead of doing so the claimant then went through the standard process of pre action conciliation with ACAS. Mr Ogunyanwo described this as the "statutory grievance procedure". The Tribunal indicated that such language was unhelpful bearing in mind that that was a process which was by now significantly in the past. However, the Tribunal equally took into account the timings of the claimant referring the matter to ACAS and the timings of the issue of the proceedings. There was, in the opinion of the Tribunal, quite obviously no prospect of an amicable settlement between the parties by February 2018. That must have been clear and obvious to everyone, including both the claimant and his representative.

96. On that basis, in the opinion of the Tribunal, the claimant ought to have submitted the matter to ACAS immediately, within a very short period of allegedly becoming aware of the email at page 119. Even allowing for a short period of reflection, in the view of the Tribunal the matter should have been referred to ACAS at the very latest by the end of February 2018. It is possible, in appropriate circumstances, for the claimant then to, when referring the matter to ACAS, to say that they do not wish the respondent to be contacted and that they wish a completion of conciliation certificate to be issued immediately. That certificate would then have been issued in early March 2017 and proceedings then could and should have been issued at the latest by the middle of March 2018. The first of the proceedings were not issued until 28 May and the second then not until 6 June 2018. The claimant and his representative ought to have been well aware of the provisions of section 123 and of the requirement to demonstrate absolute speed in bringing these matters before the Tribunal if that was what they felt was appropriate. The Tribunal does not accept that the claimant acted with appropriate promptness or speed and that the delays which occurred in preparing and issuing the proceedings were not satisfactorily explained at all.

97. Finally, the Tribunal considered whether or not the claimant had the benefit of advice. The Tribunal has already clearly indicated that the claimant had advice and assistance from Mr Ogunyanwo from the time prior to the issue of the original claim in October 2017. Mr Ogunyanwo confirmed to this Tribunal that he was well aware of the law, practice and procedures of Employment Tribunals, and on that basis the claimant had available to him the benefit of that advice at all times following the "discovery" of the email at page 119. Even in those circumstances, therefore, the Tribunal does not accept that the claimant acted with appropriate speed or that he followed the appropriate procedures which ought to have been obvious bearing in mind the dates of the alleged incidents and the time limits which are applicable by virtue of section 123.

98. The Tribunal therefore sat back and took into account all the necessary circumstances. It sat back and considered whether or not the picture which was painted by "all the circumstances" suggested that it was just and equitable to extend time. The conclusion of the Tribunal was that it was not just and equitable to extend time by taking into account all the above factors and reasoning and on that basis the claims against Dr Syed, Dr Batra and against Health Education England are struck out on the basis that they were presented out of time and that it would not be just and equitable to extend time.

99. The Tribunal finally wishes to comment on two cases which were presented by Mr Ogunyanwo as being allegedly relevant to the principles which were being considered by the Tribunal at the hearing on 8 October 2018. The claimant presented a full copy of:

- Dr Day v Health Education England/Public Concern at Work/Lewisham & Greenwich NHS Trust [2017] EWCA Civ 329; and

- London Borough of Southwark v Afolabi [2003] EWCA Civ 15.

100. Mr Ogunyanwo began by referring the Tribunal to paragraphs of these cases on the basis that he argued that the thought processes and conclusions of the employers in those cases, and the conclusions of the various Tribunals and Courts in each of those two cases were, on their facts, an indication as to what the judgment of this Tribunal should be in this particular case. The Tribunal carefully explained to Mr Ogunyanwo that case law in an Employment Tribunal ought only to be considered in circumstances where the cases referred to and established are principles of law or principles of interpretation of law which could then be applied, irrespective of the facts, to the particular facts of the claims which were then being considered by the Tribunal.

101. Despite this explanation Mr Ogunyanwo continued to seek to make reference to paragraphs in the Judgments which were obviously paragraphs relating to the facts of each of those two cases without making reference to any principles of law. This was again, therefore, explained to Mr Ogunyanwo. He was asked to provide details of the numbered paragraphs of each of these Judgments which referred to principles of law which he was then saying should be taken into account by this Employment Tribunal. Mr Ogunyanwo was unable to point the Tribunal to any of the paragraphs of either of these two Judgments and it was clear, in the opinion of the Tribunal, that what Mr Ogunyanwo was attempting to do was to compare the facts of these two cases with the facts of the claimant and to then oblige the Tribunal to take those facts and the findings about those facts into account. The Tribunal explained that it would refuse to do so on the basis that the facts were obviously very different indeed and that for the Tribunal to take those facts and those findings of fact into account would be a significant and real error of law on the part of the Tribunal, a step which the Tribunal was unwilling to take.

102. For the avoidance of any doubt, therefore, the Tribunal did not take into account any part of the Judgments of those two cases which were presented for consideration by Mr Ogunyanwo.

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Employment Judge Whittaker

Date____30th October 2018_____

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

6 November 2018

FOR THE TRIBUNAL OFFICE

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