Neutral Citation Number: [2020] EWHC 1669 (QB)

County Court Claim No: B70YM939

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
ON APPEAL FROM
THE COUNTY COURT AT TEESSIDE

Combined Court Centre
1 Oxford Row
Leeds LS1 3BG
(Remote hearing conducted by Skype for Business)

Date: 25 June 2020

Before:

MR JUSTICE LAVENDER

- -

Between:

Professor Galip Akay — **Claimant/ Appellant**

- and -

Newcastle University — **Defendant/ Respondent**

- -
- -

Andrew Buchan (instructed by **Oakwood Solicitors Limited**) for the **Appellant**
James Weston (instructed by**Weightmans LLP**) for the **Respondent**

Hearing date: 15 May 2020

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JUDGMENT

Mr Justice Lavender:

(1) Introduction

1. This is an appeal against the order of HHJ Gargan, sitting in the County Court at Newcastle on 1 May 2019, striking out as an abuse of process the Claimant's claim for damages for personal injury, namely post-traumatic stress disorder, allegedly caused by breach of contract, breach of duty and/or harassment on the part of the Defendant. There is also an appeal against HHJ Gargan's order of 23 July 2019 that the Claimant pay the Defendant's costs of the proceedings.

(2) The Claimant's Employment

2. The Claimant was employed by the Defendant from January 1998 to 30 September 2013, when he either retired or was constructively dismissed. As to what happened during his employment, he contends in his Particulars of Claim that:

   (1) From 21 January 2001 the Defendant's employees harassed and bullied him, with the result that the Defendant was in breach of contract, in breach of the duty of care which it owed to the Claimant and in breach of the Protection from Harassment Act 1997.

   (2) He was signed off work with work-related stress:

      (a) for 2 weeks from 19 June 2003; and

      (b) for 2 weeks from 14 January 2005.

   (3) He sent an email dated 3 May 2007 which "made express reference to the adverse impact which the ongoing issues were having upon his psychiatric health."

   (4) In or around 2008 he had a meeting with Professor Steve Bull in which he "expressly disclosed to Professor Bull that the ongoing issues in the workplace were having a detrimental effect upon his health."

   (5) On a number of occasions in 2012-13 the Claimant took time off due to work-related stress.

   (6) On 12 July 2012 he sent an email which "made express reference to the adverse impact which the ongoing issues were having upon his psychiatric health".

   (7) 30 August 2012 was the date on which the Claimant's injury became so significant as to warrant increasingly frequent attendances on his GP and was therefore his "date of knowledge" for the purposes of sections 11 and 14 of the Limitation Act 1980.

   (8) On 20 September 2012 the Claimant sent an email in which he expressed his concern that "his stress symptoms were so severe that he may be at risk of a heart attack."

(9) In January 2013 the Claimant spoke to the Pro-Vice Chancellor about "the adverse effect matters were having upon his health."

(10) On 14 February 2013 the Claimant sent another email in which he referred to "the adverse impact which the ongoing issues were having upon his psychiatric health".

(11) On 9 May 2013 the Claimant referred in a review meeting to "the adverse impact … upon his psychiatric heath".

(12) The Claimant has sustained Post-Traumatic Stress Disorder as a result of the Defendant's conduct.

3. Meanwhile, the Claimant was referred by his GP to Dr Hardman, a psychologist, who said that the Claimant had "post traumatic stress syndrome" and who prepared a report dated 10 October 2013 in which he said as follows:

> "… your presentation suggests that you are suffering from symptoms of traumatic stress secondary to the events and experiences you have described in your working environment. … As a consequence of the pressures you feel in your job you present with many salient features of stress: insomnia; intense panic symptoms; problems with concentration; paranoia, excessive worry and rumination."

4. The subsequent report of Dr Jarman, to which I will refer in due course, contains a summary of the Claimant's medical records. In particular:

(1) The Claimant had a nervous breakdown on 11 October 2013 (when he received Dr Hardman's report). I note that the entry in his GP's records for 11 October 2013 states, "Psychologist as per family have diagnosed him with PTSD".

(2) A letter dated November 2013 from Newcastle upon Tyne NHS Foundation Trust "notes perforation secondary to sigmoid polypectomy requiring an open right hemicolectomy and primary anastomosis." This was major bowel surgery, as a result of which the Claimant was in hospital for 11 days.

(3) The entry for 21 May 2015 quotes a "To Whom It May Concern" letter from the Claimant's GP, which states as follows:

> "I can confirm that his capability to do his duties were significantly affected already in July 2013 due to symptoms of stress related illness linked to his work. Although a sick note was not issued at the time, he required medication and further psychological support. Symptoms deteriorated during October 2013 when he had a nervous breakdown."
>
> "Due to his medical problems in October 2013, (traumatic stress and nervous breakdown) and in November 2013 (bowel removal), he would have been unfit to work during the whole of October to December 2013."

(3) The Employment Claim

5. The Claimant brought a claim ("the Employment Claim") against the Defendant in the Employment Tribunal on 23 December 2013, by which he alleged:

   (1) in relation to his alleged dismissal ("the Dismissal Claims"):

      (a) unfair dismissal; and

      (b) direct age discrimination; and

   (2) over the period from 1999 to 2004 and from 2010 to 2013 ("the 2013 Harassment Claims"):

      (a) discrimination on the grounds of age, race and religion;

      (b) harassment; and

      (c) victimisation.

6. It is acknowledged that the present claim arises out of essentially the same underlying facts as the 2013 Harassment Claims. However, the Claimant did not claim damages for personal injury from the Employment Tribunal, although it had jurisdiction to determine a claim for damages for personal injury.

7. The Claimant's evidence as to why he did not make a claim for personal injury before the Employment Tribunal is set out in his statement dated 8 March 2019, in paragraph 1 of which he said:

> "For the avoidance of doubt I deliberately chose not to bring a claim for personal injury in the Employment Tribunal. No medical evidence was therefore obtained in those proceedings. I was advised that injury to feelings is not the same as personal injury."

8. Attached to the Claimant's ET1 claim form were 11 pages of Grounds of Complaint, which contained details of the matters about which the Claimant complained, going back to 2000. It was asserted in the Grounds of Complaint that the Claimant:

> "was diagnosed as suffering from post traumatic stress syndrome as a result of the fear of losing his job through false allegations and being "framed"."

9. However, the Claimant did not give proper particulars of the 2013 Harassment Claims, despite repeated orders requiring him to do so. In a judgment dated 5 November 2014, and sent to the parties on 6 November 2014, the Employment Tribunal struck out the 2013 Harassment Claims. It did so on two grounds.

   (1) The first was the Claimant's failure to comply with the orders requiring provision of particulars, which the Employment Tribunal described as "contumelious disregard for those orders".

   (2) The second was because the 2013 Harassment Claims had no reasonable prospect of success, at least in the sense that the Claimant had no reasonable

prospect of establishing either that the claims were brought within the primary time limit or that the Employment Tribunal ought to extend that time limit.

(4) The Commencement of the Action and the Compromise Agreement

10. The Dismissal Claims were still proceeding when, on 3 July 2015, the Claimant's solicitors wrote to the Defendant and stated that they had been instructed to pursue a personal injury claim against the Defendant. Then on 25 August 2015 the Claimant issued the claim form in the County Court at Newcastle. This stated, inter alia, that:

> "The Claimant will aver that they have [*sic*] suffered psychological injury (work related stress) as a result of the Defendant's negligence, breach of contract, breach of statutory duty and/or bullying and harassment."

11. There was a mediation of the Dismissal Claims on 27 August 2015. That resulted in a Compromise Agreement dated 3 September 2015 by which the parties settled the Dismissal Claims. Although issued on 25 August 2015, the claim form was not served on the Defendant before 3 September 2015. By the Compromise Agreement, the Defendant agreed to pay £65,000 to the Claimant, made up of £30,000 as compensation for termination of employment and £35,000 as compensation for injury to feelings.

12. Clauses 6 and 7 of the Compromise Agreement referred to the Claimant's personal injury claim, as follows:

> "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."

13. In his witness statement of 8 March 2019, which was not controverted, the Claimant gave evidence as to the mediation and the subsequent negotiation of the terms of the Compromise Agreement, in which he was represented by the late Jake Dutton of counsel and the Defendant was represented by Victoria Vallely. In particular, the Claimant said as follows:

(1) In paragraph 11:

> "I had made it clear during the mediation that I would not accept a settlement which would compromise my ability to bring my personal injury claim."

(2) In paragraph 5:

> "Prior to settling my employment claim I was advised by Mr Dutton, the other side's counsel Victoria Vallely and the mediator that if I settle it

would not prevent me continuing with my personal injury claim which had been issued on the 25th August 2015."

(3) In paragraph 7:

"After reading that [i.e. clause 7 of the Compromise agreement] I was satisfied that I would be able to continue with my claim in the County Court. There was nothing in the words of the agreement that suggested otherwise."

(4) In paragraph 14:

"Nothing in the prior discussions or COT3 alerted my representative to the potential for my personal injury claim to be struck out. He certainly did not advise me to this effect. In fact, quite the opposite, he said it would be preserved."

(5) The Action and the Strike-Out Application

14. On 23 February 2016 the Claimant's solicitors instructed Dr Ruth Anne Jarman, a consultant psychiatrist. She examined the Claimant on 23 February 2016 and prepared a report dated 6 April 2016. In that report, Dr Jarman stated that it was her opinion that the Claimant had developed symptoms of post-traumatic stress disorder. Her report contained a summary of the Claimant's medical records. I have already referred to the relevant parts of that summary.

15. The Claimant served his Particulars of Claim on 28 May 2016. The Defendant's Defence is dated 19 September 2016. In paragraph 5 the Defendant referred to the strike-out of the 2013 Harassment Claims and averred that the action was an abuse of process. In paragraph 6 the Defendant said as follows:

"The Defendant reserves the right to plead further in this regard including within any associated application for strike out, abuse of process or otherwise."

16. In letters dated 19 October 2016 and 4 January 2017 and in a Directions Questionnaire dated 24 October 2016 the Defendant's solicitors referred to the possibility of issuing a strike-out application. In response to the second of these letters, the Claimants' solicitors confirmed by letter dated 26 January 2017 that the Claimant intended to proceed with his claim as pleaded. However, the Defendant did not issue an application seeking an order striking out the claim until 28 November 2018. Indeed, the Defendant made no more mention of estoppel or abuse of process until 26 October 2018, when it proposed that the issues of estoppel and abuse of process be considered at the start of the trial.

17. Meanwhile, there was a costs and case management conference before Deputy District Judge Coulson on 25 September 2017. Directions were given, which included an order that the claim be listed for trial. The case was subsequently set down for trial on 6 November 2018. On 31 October 2018 HHJ Freedman heard an application for an adjournment of the trial. He ordered that the trial date be vacated and also ordered that the Defendant's application to strike out the claim as an abuse of process/estoppel be

listed to be dealt with as a preliminary issue. He also directed that the application be filed by 29 November 2018.

18. On 28 November 2018 the Defendant issued its application for an order striking out the claim as res judicata and/or an abuse of process. The application was heard on 13 March 2019.

(6) The Judgment

19. On 1 May 2019, in a long and careful judgment, HHJ Gargan:

    (1) rejected the Claimant's contention that the Compromise Agreement precluded the Defendant from seeking to strike out the claim as an abuse of process or res judicata; and

    (2) held that it was appropriate to strike out the claim as an abuse of process; but

    (3) held that the claim was not res judicata.

20. In the course of his judgment, the judge reviewed the authorities to which he had been referred, including *Henderson v Henderson* (1843) 3 Hare 100, *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 and *Johnson v Gore-Wood & Co (No 1)* [2002] 2 AC 1. He quoted, inter alia, the following passage from Lord Bingham's speech in the latter case (at 31B-D):

> "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."

21. 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."

22. The judge was also referred to *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] ICR 1170, a case with some similarities to the present case, in that Mr Sheriff brought a personal injury claim against his employer in the County Court after he had brought and then settled a claim arising out of the same facts before the Employment Tribunal. The Court of Appeal held that the personal injury claim was an abuse of process both because it was settled by the settlement agreement and because the case fell within the *Henderson v Henderson* principle. Stuart-Smith LJ said as follows in paragraphs 21, 25 and 28 of his judgment:

> "21. In my judgment both the Employment Tribunal under s56 and the County Court under s57 have jurisdiction to award damages for the tort of racial discrimination including damages for personal injury caused by the tort. The question, which may be a difficult one, is one of causation. It follows that care needs to be taken in any complaint to an Employment Tribunal under this head where the claim includes, or might include, injury to health as well as injury to feelings. A complainant and his advisers may well wish in those circumstances to heed the advice of the editors of Harvey, just referred to, to obtain a medical report. This has particular relevance as the time within which to make a complaint is only 3 or 6 months and, unless an adjournment is obtained, an adjudication may follow quite shortly."
>
> "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 p299E, "The court has to consider why the claim was not brought in the earlier proceedings".
>
> "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 Appellant'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."

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.

24. The judge dealt with the Compromise Agreement in paragraphs 79 to 84 of his judgment. His conclusion on the construction of the Compromise Agreement was set out in paragraph 83, as follows:

> "As set out above, I do not consider that there is anything in the terms of the Compromise Agreement to suggest that it extended beyond compromising the ET claim, leaving the issues in the personal injury action at large. Therefore, I consider that the defendant is entitled to argue res judicata and/or abuse of process as part of its defence to the personal injury claim."

25. Then he said as follows in paragraph 84:

> "By way of completeness, I was asked by the claimant to look at a number of documents leading up to the settlement of his E.T. claim. It is not clear to me that these documents are properly admissible when seeking to construe the Compromise Agreement. However, whether admissible or not, I do not consider that they support the claimant's case. In my judgment the documents demonstrate that the claimant was understandably anxious that the Compromise Agreement should not prejudice his personal injury claim. He did not want to find that he had accepted £65,000 in full and final settlement of all his claims because he believed the personal injury claim had a substantially greater value. I accept that he would not have agreed a settlement of the ET claim which compromised his ability to bring a personal injury action. However, equally it is clear that he regarded £65,000 as reasonable compensation for the claims that were outstanding in the ET. There is nothing in the material to which I was referred which supports 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. Therefore, insofar as these documents are admissible, they confirm my view that the Compromise Agreement resolved the ET claim but did not affect the parties' rights to bring/defendant the personal injury claim."

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)."

27. The Judge then said as follows in relation to the issue of "special reason" in paragraphs 97 to 101 of his judgment:

> "97. Mr Buchan accepted (as he had to) that the claimant had been entitled to bring a claim for personal injuries in his ET claim. However, he referred me to the passage in the claimant's witness statement where he states that he *"deliberately chose not to bring a claim for personal injury in the Employment Tribunal"* and argued that this might form a special reason why the claim should not be struck out.
>
> 98. I accept that a deliberate decision was made as to whether to claim personal injury damages in the ET. However, the claimant does not give any explanation as to why he took that deliberate decision – other than hinting that it was made on the advice of his solicitors.
>
> 99. In general terms there can be three reasons why personal injury claims might not be brought as part of ET discrimination claims: (i) ignorance, in the sense that the claimant did not know that was possible to bring such a claim in the ET; (ii) a deliberate decision not to advance the claim in the ET; and (iii) where the injuries had not yet come to light or, possibly, where the true extent of such psychological symptoms had not been properly understood.
>
> 100. Stuart Smith LJ in *Sheriff* plainly regarding the third situation as capable of amounting to a special reason: see §28 of his judgment. However, there is no suggestion that Prof Akay was unaware of his psychological problems when he launched the ET claim.
>
> 101. I do not consider that the situations identified in (i) and (ii) are capable of amounting to a special reason. It is not for the court to reward a claimant for his/his adviser's failure to understand the law in situation (i). Further, it is clear from the Court of Appeal's decision in *Sheriff* that a party "should" bring forward any claim for personal injuries in the ET if the injuries were caused by the conduct which gave rise to the discrimination claim. That was the basis upon which the Court of Appeal found that the *Henderson* principle applied. As set out by Lord Sumption in *Virgin Atlantic* the principles of res judicata and the procedural rules on abuse of process are distinct but overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation.

Elevating the claimant's deliberate decision to refrain from pursuing his personal injury claim to a special reason would be to encourage such duplicative litigation. I do not wholly rule out the possibility that there may be a hypothetical case where the underlying reasons for such a decision might amount to a special reason but there is nothing in this case which can satisfy that test."

28. Next, the Judge turned to the overriding objective. He dealt with each of the factors listed in CPR 1.1(2) in turn in the seven sub-paragraphs of paragraph 102 of his judgment. Then he expressed his conclusions in paragraphs 103 to 105 of his judgment, as follows:

> "103. Therefore, balancing the relevant factors, applying the overriding objective points strongly towards striking out the claim. Further, in my judgment, applying the overriding objective here is synonymous with the need to do justice and the need to take a broad merits-based approach to the matter.
>
> 104. Finally, I remind myself that striking out a claim is a draconian step and that I should consider whether some lesser sanction might properly and justly be applied. However, it is agreed that partial strike out is not appropriate in this case. Therefore, the choice is between allowing the claimant to proceed with his claim or not.
>
> 105. In the circumstances I am firmly of the view that the claim should be struck out as an abuse of process on the grounds identified in §34 of *Securum Finance*."

(7) Costs

29. The judge heard argument on costs at a telephone hearing on 23 July 2019. As his order recorded, he read the witness statement of Emma Piorkowska of the Claimant's solicitors. She set out the history of the action in some detail and explained the basis for the Claimant's contention that the Defendant should not recover its costs of the action, and indeed should pay the Claimant's costs of the action, for the period after 27 January 2017, when the Claimant contended that the Defendant should have issued its strike-out application.

30. The judge considered these factors and also the fact that the Defendant was the successful party and that the Claimant's claim was an abuse of process. The judge decided to order that the Claimant pay the whole of the Defendant's costs of the action, as well as the costs of the strike out application. I have not seen a transcript of the judge's reasons, but the following summary, prepared by Mr Weston, was not disputed:

> "He concluded, …, that the Respondent had approached matters reasonably. It had raised the res judicata/abuse point in its defence. It had taken a view that the point could be, in a low value claim, resolved at trial. He noted that the parties can raise limitation defences and it is matter of case management whether they are heard as a preliminary issue or at trial. It was for the parties to consider when this limb of the case should have been considered earlier. At the CMC on 25 September 2017, the case was managed so as to have all issues resolved at

trial. An application was only made after the trial had been vacated and pursuant to the order of HHJ Freedman on 31 October 2018. The designated civil judge actively case managed the case. In light of the lost trial days, he ordered that the strike out point should be heard as a preliminary issue."

(8) Ground 1: The Employment Tribunal's Decision

31. By ground 1 in his grounds of appeal, the Claimant contends that the Judge misinterpreted the Employment Tribunal decision in that he found that the claim had been struck out for abuse and not jurisdiction.

32. This ground of appeal is misconceived. The Employment Tribunal struck out the 2013 Harassment Claim on two grounds, one of which was the Claimant's failure to comply with the Employment Tribunal's orders, which the Employment Tribunal characterised as "contumelious disregard for those orders". The Judge was right to conclude that the 2013 Harassment Claims were struck out as an abuse of process.

(9) Grounds 3 and 4: Special Reason

33. Grounds 3 and 4 in the grounds of appeal both concern aspects of the Judge's approach to the question whether there was "special reason" not to strike out the Claimant's claim. More specifically, they concern the Judge's approach in paragraphs 97 to 101 of his judgment to the question why the Claimant did not include a claim for personal injury in his Employment Claim.

34. By ground 4, the Claimant asserts that the judge erred in applying the obiter dictum of Stuart-Smith LJ in paragraph 28 of his judgment in *Sheriff* as if it was settled authority. This ground of appeal is again misconceived. The unspoken premise for this ground of appeal is that what Stuart-Smith LJ said in paragraph 28 of his judgment in *Sheriff* is wrong, but it plainly is not. Indeed, Mr Buchan accepted that the first sentence of paragraph 28 is a correct statement of the law and that the remainder of paragraph 28 consists of observations on the facts of that case.

35. As appears from the first sentence of paragraph 100 of his judgment, the judge followed the first sentence of paragraph 28 of Stuart-Smith LJ's judgment in *Sheriff*. There can be no objection to the judge following what is acknowledged to be a correct statement of the law, whether or not that statement was technically binding on him. The Judge held that there could be a special reason where a personal injury claim was not brought as part of an Employment Tribunal discrimination claim because the injuries had not yet come to light or, possibly, where the true extent of such psychological symptoms had not been properly understood.

36. The judge went on to say in the second sentence of paragraph 100 of his judgment that there was no suggestion that the Claimant was unaware of his psychological problems when he launched the Employment Claim. Mr Buchan submitted to me that he had in fact argued before the judge that, in effect, the Claimant had not properly understood the nature of his psychological problems when he commenced the Employment Claim.

37. This is the context for ground 3, by which the Claimant alleges that the Judge wrongly took into account the fact that the Claimant had "post-traumatic syndrome", which is not a recognised injury. The first obstacle facing this ground is that the judge did not

refer to "post-traumatic syndrome" in his judgment. However, I do not decide this aspect of the appeal on that basis, given that it was, in effect, Mr Buchan's submission to me that the judge did not appreciate the submission which had been made to him.

38. Mr Buchan submitted to me (and said that he had submitted to the judge) that:

(1) The Claimant was not diagnosed with post-traumatic stress disorder (which is a recognised psychiatric disorder) until April 2016, when Dr Jarman produced her report.

(2) By 30 December 2013, all that the Claimant had been diagnosed with was stress or post-traumatic disorder, neither of which is a recognised psychiatric disorder and therefore neither of which would be sufficient to sustain a claim for damages for personal injury: see *Sutherland v Hatton* [2002] ICR 613. (I will assume in the Claimant's favour that there is a distinction to be drawn between post-traumatic stress syndrome and post-traumatic stress disorder, although it may be that one was simply used, whether correctly or not, as a synonym for the other, and I note in that context that PTSD was mentioned in the Claimant's medical notes as early as 11 October 2013.)

(3) That is why the Claimant decided not to include a personal injury claim in the Employment Claim.

(4) That is also what the Claimant was referring to in paragraph 1 of his witness statement when he said that he was advised that injury to feeling is not the same as personal injury.

39. I do not find it necessary to resolve the dispute as to what was said before the judge. Nor could I do so in the absence of a transcript of the hearing. It is sufficient to say that Mr Buchan's submission to me as to why the Claimant did not include a personal injury claim in the Employment Claim is not supported by, and indeed is contradicted by, the evidence which was before the judge. It follows that, if that submission was made to the judge, the judge was right to reject it. In particular:

(1) The Claimant's witness statement is clear insofar as he says that he deliberately chose not to bring a personal injury claim in the Employment Claim, but the statement does not go on to set out clearly why he made that choice. Had it been the case, he could easily have said, "I made that choice because, after taking advice, I did not believe that I had suffered personal injury which could support a personal injury claim", but he did not do so. It would be a stretch to infer this from any other part of paragraph 1 of the Claimant's witness statement. As the judge rightly said in paragraph 98 of his judgment, the Claimant merely hinted in his witness statement that his decision not to bring a personal injury claim in the Employment Claim was made on the advice of his solicitors.

(2) Much clearer is the statement in the Particulars of Claim (verified by a statement of truth signed by the Claimant) that 30 August 2012 was his "date of knowledge" for the purposes of sections 11 and 14 of the Limitation Act 1980, i.e. the date on which he first had knowledge, inter alia, that the injury in question was significant and attributable in whole or in part to the Defendant's

acts or omissions which were alleged to constitute negligence. In other words, it is the Claimant's own evidence that he knew enough to be able to bring a personal injury claim from 30 August 2012. That directly contradicts Mr Buchan's submission.

(3) Moreover, it is relevant to note that there is no evidence that anything changed between 30 December 2013 and 25 July 2015, when he commenced this claim. On 25 July 2015, the Claimant had still not received Dr Jarman's report diagnosing PTSD, so his state of knowledge, according to the evidence, was no different when he commenced this claim than when he commenced the Employment Claim.

40. In paragraphs 4 and 5 of Mr Buchan's Skeleton Argument and in a document submitted after the hearing by the Claimant personally, an alternative explanation for the Claimant's failure to include a personal injury claim in the Employment Claim was advanced, namely that, as a result of his mental condition and the bowel surgery in November 2013 and other matters, he was too ill to give instructions to his solicitors to pursue a personal injury claim. I do not accept this submission:

(1) It is inconsistent with the Claimant's own evidence that he made a deliberate choice.

(2) The Claimant was unfit to work during this period, but that is not the same as being unfit to give instructions to his solicitors. There is no medical evidence that the Claimant was unfit to give instructions to his solicitors.

(3) The Claimant plainly was fit enough to give instructions to his solicitors to make the Employment Claim and, in doing so, to draft the 11-page Grounds of Complaint.

41. For the avoidance of doubt, I do not accept Mr Buchan's submission that in paragraphs 97 to 101 of his judgment the judge was wrongly putting the onus on the Claimant to prove that there was a "special reason". However, I do not find it necessary to make any decision about the incidence of any evidential or persuasive burden on any issue. Nor, it seems it me, did the judge. Wherever any burden lay, the evidence in this case was clear: the Claimant knew enough to be able to bring a personal injury claim before he commenced the Employment Claim.

(10) Grounds 2 and 5: Broad, Merits-Based Judgment

42. It was not disputed before me that the judge was obliged to conduct what Lord Bingham described as a "broad, merits-based judgment". Ground 2 is in the following terms:

> "The learned Judge systematically applied the paragraphs of the 'overriding objective' rather than the broad, merits-based judgment taking into account 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. (per Lord Bingham in *Johnson v Gore Wood & Co.* [2002] 2 AC)

43. Ground 5 is in the following terms:

> "The learned Judge should have considered all the facts and applied the broad merits-based test in *Johnson* and weighed in the balance arguments in the Proposed Appellant's favour."

44. The judge took the trouble, in paragraph 102 of his judgment, to address each element of the overriding objective seriatim. Despite Mr Buchan's submissions, I see no basis for criticising this approach. It was systematic and thorough. Nor do I accept Mr Buchan's criticisms of individual parts of paragraph 102 of the judgment.

45. Mr Buchan contends that the judge should then have carried out a separate "broad, merits-based judgment" rather than saying what he did in paragraph 103 of his judgment, but I do not agree. The expression "broad, merits-based judgment" was not used to denote a separate test to be applied by the court, but rather to describe the judgment which the court makes when deciding whether or not to strike out a claim as an abuse of the process on *Henderson v Henderson* grounds. It is clear from the final sentence of paragraph 96 of his judgment that that is how the Judge understood the position.

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.

48. In my judgment, taking his judgment in the round, the judge did all of these things. In particular:

    (1) The judge took account of the public and private interests involved when he considered the case in the light of the various aspects of the overriding objective.

    (2) The judge certainly took account of the facts of the case, which he set out in the first 4½ pages of his judgment. As I have explained, he considered, inter alia; (a) the evidence as to why the Claimant did not bring a personal injury claim as part of the Employment Claim; (b) the nature of the Claimant's conduct of the 2013 Harassment Claims and the reason why they were struck out; and (c) the meaning and effect of the Compromise Agreement.

    (3) The judge considered both whether the Claimant had abused the process of the Employment Tribunal and whether there was any special reason why it did not follow that the Claimant was abusing the process of the County Court when he

brought a claim which could and should have been brought before the Employment Tribunal.

49. For all of these reasons, I do not accept that there was any error in the structure of the judge's reasoning. That disposes of much of grounds 2 and 5, but there remains the assertion in those grounds that the judge should have taken account of all of the facts and arguments. Mr Buchan took issue with the second sentence of paragraph 103 of the judgment and contended that applying the overriding objective was not synonymous with making a broad, merits-based judgment. However, this would be a sterile exercise in semantics unless the judge can be shown to have failed as a result to take a relevant factor into account. As to that, Mr Buchan listed in paragraph 67 of his skeleton argument sixteen factors which he contended that the judge should have expressly considered and to which he contended that the judge should have attached some weight.

50. This is an unsatisfactory way of presenting an appeal. If it was to be alleged that the judge failed to take a relevant matter into account, then that matter ought to have been identified in the grounds of appeal. A ground of appeal such as ground 5 which asserts that, "The learned Judge should have … weighed in the balance arguments in the ... Appellant's favour" cannot be used as a Trojan horse in order to smuggle in to the appeal all of the arguments deployed at the hearing below. For instance, in paragraph 67(xiii) of his skeleton argument Mr Buchan contended that the judge's construction of the Compromise Agreement was wrong. If that was to be alleged on appeal, then it should have been the subject of an express ground of appeal.

51. Moreover, Mr Buchan's contention that the Judge ought to have expressly considered all sixteen of these matters falls foul of the proposition that a judge is not obliged in his judgment to address every argument advanced before him. In any event, however, there is no merit in any of these sixteen points:

(1) Six of them (numbers (i), (iv), (v) (in part), (xiii), (xiv) and (xv)) concern the Compromise Agreement. I will return to the Compromise Agreement and explain in more detail why I do not consider that it was a factor to be accorded any weight.

(2) One point (number (ii)) effectively repeats ground 1.

(3) Two points (numbers (iii) and (xi)) concern the reason why the Claimant did not include a personal injury claim in the Employment Claim, which I have already dealt with.

(4) One point (number (v) (in part)) concerns the delay in making the strike-out application. In *Johnson v Gore Wood & Co (No 1)* Lord Bingham said (at 34C-D) that a failure to take action to strike out a claim can be potent evidence that the claim is not perceived to be, and is not, an abuse of process. In the present case, however, the 2013 Employment Claims were struck out as an abuse of process, the Defendant had asserted in its Defence that this claim was an abuse of process and HHJ Freedman directed that that be tried as a preliminary issue.

(5) One point (number (vi)) is without foundation. Mr Buchan asserts that the judge was obliged to assume that the personal injury claim had reasonable prospects of success. There is no indication in the judgment that the judge did otherwise.

(6) One point (number (vii)) was abandoned in the hearing before me.

(7) Two points (numbers (viii) and (xvi)) involve an assertion that the claim ought to be permitted to proceed because it involves an area of developing jurisprudence. That is not a factor which carries any weight in this case.

(8) One point (number (ix)) is that the burden of establishing abuse of process was on the Defendant. The judge did not decide this case by relying on the burden of proof.

(9) One point (number (x)) is that the Employment Tribunal did not have jurisdiction over the 2013 Harassment Claims, because they were out of time, and so those claims must be treated as if they were not made. Mr Buchan relied in this respect on *Nayif v High Commission of Brunei Darussalam* [2015] ICR 517, a case which was not cited before the judge and in which the claimant's first claim was dismissed on limitation grounds alone, and not for abuse of process. In the present case, whether or not the 2013 Harassment Claims were brought in time, the Claimant's conduct of them was an abuse of process.

52. For all of these reasons, I am not persuaded that the judge failed to take a relevant matter into account.

(11) The Compromise Agreement

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.

(12) Costs

60. Costs are a matter of discretion and the judge had a wide discretion. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order: CPR 44.2(2). In deciding what order to make about costs, the court will have regard to all the circumstances, including the conduct of the parties, which includes the manner in which a party has pursued a particular issue: CPR 44.2(4)(a) & (5)(c).

61. Mr Buchan contended that the Defendant's failure to issue a strike-out application after 27 January 2017 was contrary to paragraph 2.7 of CPR Practice Direction 23A, which provides that "Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it", and that that was such a significant factor that the judge was obliged to depart from the general rule and to deprive the Defendant of some of its costs of the action.

62. The judge undoubtedly took account of this submission. However, he considered that the Defendant had acted reasonably, in that it had raised the abuse of process issue in its defence and had taken the view that that issue could be dealt with at trial, which the judge considered was not an unreasonable approach in a low-value case. In effect, the judge considered that this way of proceeding was consistent with the overriding objective, and in particular CPR 1.1(2)(c)(i). The judge also noted that there was a cost and case management conference at which the district judge made directions for a single trial.

63. I note that the allegation that the action was an abuse of process remained part of the Defendant's defence throughout the period from 19 September 2016 and I have seen no evidence that the Claimant objected to the course ordered at the CCMC of a single trial of all issues, notwithstanding the duty on the Claimant as well as the Defendant under CPR 1.3 to help the court to further the overriding objective, which includes saving expense: see CPR 1.1(2)(b).

64. In all the circumstances, while some other judges might have departed to some extent from the general rule that costs follow the event, I do not consider that the order made by the judge was outside the scope of his wide discretion.

(13) Conclusion

65. For all of these reasons, I dismiss this appeal. I express my thanks to counsel for the clear and efficient manner in which they presented their submissions, which has been of great assistance to me in preparing this judgment.