

# You're Barred:

*A review of the current judicial thinking on estoppel and abuse of process in overlapping employment tribunal and civil claims*

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# Introduction

- ▶ What are we primarily concerned with?
  - ▶ Claimants who bring both ET and civil claims
  - ▶ Because of time limits (3 months vs 3 or 6 years), ET claim will be brought first
  - ▶ That claim might then be withdrawn, settle, or go through to final hearing with judgment
  - ▶ This might overlap with civil claim or happen beforehand.
  - ▶ How does the ET claim then affect the civil claim?

# The principles of res judicata

- ▶ From *Virgin Atlantic v Zodiac Seats* [2014] AC 160 at [17]:
- ▶ Cause of action estoppel:
  - ▶ Once a cause of action estoppel has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings.
- ▶ Issue estoppel:
  - ▶ Even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties
- ▶ The rule in *Henderson v Henderson*:
  - ▶ Operates to preclude a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.

# The principles of res judicata cont.

- ▶ The rule against second actions:
  - ▶ The principle that where a claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages.
- ▶ The doctrine of merger:
  - ▶ A cause of action is extinguished once judgment is given on it, and the claimant's sole right is then a right on the judgment.
- ▶ And finally:
  - ▶ The more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger

# Rule 52 of the ET Rules of Procedure 2013

- ▶ Rule 52 – dismissal follow withdrawal:
  - ▶ “Where a claim (or part) has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless...
    - (a) C has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied there would be legitimate reason for doing so; or
    - (b) the Tribunal believes entering judgment would not be in the interests of justice.
- ▶ Biktasheva v University of Liverpool UKEAT/0253/19: the underlined words are simply descriptive of the common law position.

# The Developing Case Law from *Barber v Staffordshire*

- ▶ *Barber v Staffordshire County Council* [1996] ICR 379
- ▶ *Dattani v Trio Supermarkets Ltd* [1998] ICR 872
- ▶ *Sheriff v Klyne Tugs* [1999] ICR 1170
- ▶ *Lennon v Birmingham City Council* [2001] IRLR 826
- ▶ *Johnson v Gore Wood & Co* [2002] 2 AC 1
- ▶ *Sajid v Sussex Muslim Society* [2001] IRLR 113
- ▶ *Ako v Rothschild Asset Management Ltd* [2002] IRLR 348
- ▶ *Fraser v HLMAD Ltd* [2006] ICR 1395
- ▶ *British Association for Shooting and Conservation v Cockayne* [2008] ICR 185
- ▶ *Virgin Atlantic Airways v Zodiac Seats UK Ltd* [2014] AC 160
- ▶ *Nayif v High Commission of Brunei Darussalem* [2015] ICR 517
- ▶ *Srivatsa v Secretary of State for Health* [2018] ICR 1660

# *Barber v Staffordshire County Council*

- ▶ In 1992, C sued R for a redundancy payment, but lacked qualifying service. Claim withdrawn on day of hearing, and Tribunal dismissed claim.
- ▶ Later, qualifying service rules held to be contrary to Community law. C brought second claim.
- ▶ CA held:
  - ▶ Cause of action estoppel applied to judgments dismissing claim on withdrawal because it depends on the existence of a judgment, not a decision on the merits
  - ▶ No special circumstances applied, so C was estopped from bringing second claim



# *Dattani v Trio Supermarkets Ltd*

- ▶ C claimed unfair dismissal, alleging he was dismissed after requesting to be paid wages he was owed.
- ▶ C's claim settled during hearing; C expressly reserved right to bring civil claim for wages (Note: same facts)
- ▶ The settlement was "recorded" in a decision of the Tribunal
- ▶ C then tried to bring the civil claim; D sought to strike out
- ▶ CA held:
  - ▶ The "recording" was not a judgment, so no issue estoppel
  - ▶ There was no *Henderson v Henderson* abuse
  - ▶ The compromise agreement did not settle the wages claim
  - ▶ C was free to bring his claim in the county court

## *Sheriff v Klyne Tugs*

- ▶ C claimed for racial harassment in the ET.
- ▶ Claim settled: *“full and final settlement of all claims... in respect of which an ET has jurisdiction”*
- ▶ C brings civil claim in negligence for PI damages
- ▶ Employer applies to strike out:
- ▶ CA held:
  - ▶ The negligence claim for PI damages was caught by the settlement agreement, because ET can order PI damages in discrimination claim.
  - ▶ In addition, *Henderson v Henderson* applied because C could have brought claim for PI in the ET

# *Lennon v Birmingham City Council*

- ▶ C brought claim for sex discrimination, alleging offensive and intimidating behaviour by colleagues
- ▶ Two days before first hearing, C withdrew claim. ET issued judgment dismissing claim on withdrawal.
- ▶ C then issues civil claim for breach of contract or negligence, relying on same behaviour as breaches.
- ▶ CA held:
  - ▶ The dismissal judgment created an issue estoppel even though there was no determination on merits: *Barber*.
  - ▶ Makes no difference with an issue estoppel whether Court knew reasons for withdrawal.
  - ▶ Civil claim struck out

# *Johnson v Gore Wood & Co*

- ▶ J was director of W Ltd. W Ltd brought claim against GW for professional negligence. Settled during trial.
- ▶ J had made W Ltd aware of personal claim, settlement was discussed but in the end only W Ltd's claim settled.
- ▶ J brought personal claim, GW sought to strike out on basis of *Henderson v Henderson*
- ▶ HL held no abuse. In particular Lord Bingham at 31C-D:

*"there will rarely be a finding of abuse unless the later proceeding involves... unjust harassment of a party."*

*"It is... 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."*

The correct approach is: *"a broad, merits-based judgment which 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."*

# *Sajid v Sussex Muslim Society*

- ▶ C brought ET claim for unfair dismissal, also breach of contract valued at £72k. ET damages limit for breach of contract is £25k.
- ▶ C initially reserved right to rely on ET findings in subsequent HC proceedings (NB can't do that – *doctrine of merger*)
- ▶ C then commenced a HC BoC claim, and withdrew the ET BoC claim, which was dismissed
- ▶ D argued cause of action or issue estoppel.
- ▶ CA held:
  - ▶ No estoppel because C's HC claim does not offend against the underlying policy of cause of action/issue estoppel: to prevent the re-litigation of an issue which has been finally determined

# *Ako v Rothschild Asset Management Ltd*

- ▶ C issued claim for race discrimination against R.
- ▶ On advice, withdrew (and ET dismissed) first claim and re-issued so she could sue second respondent.
- ▶ At that time there was no equivalent of a discontinuance in the ET: all claims withdrawn then dismissed
- ▶ R argued res judicata. CA held:
  - ▶ *Barber* and *Lennon* do not preclude application of the general principle that a court may have regard to the factual matrix in order to understand the meaning and effect of a consensual act (in this case, the judgment).
  - ▶ Dyson LJ: did the person withdrawing intend thereby to abandon his claim or cause of action?
  - ▶ Mummery LJ: on examination of the surrounding circumstances, is the withdrawal in substance a discontinuance?

## *Fraser v HLMAD Ltd*

- ▶ C brought wrongful dismissal (breach of contract) claim in ET. Value was £80k. Also brought HC claim for BoC. ET claim determined first.
- ▶ D succeeded in striking out the HC claim on grounds of res judicata: doctrine of merger applied
- ▶ Also: Moore-Bick LJ offered interpretation of *Ako*:
  - ▶ Court's approach reflected the ambiguous nature of an order in the ET at that time dismissing a claim.
  - ▶ Not authority for the general proposition that a person who seeks to bring second claim can delve into the circumstances surrounding judgment in first claim *"with a view to persuading the court that he did not intend to abandon his right to take further proceedings on the basis of it"*

# *British Association for Shooting and Conservation v Cockayne*

- ▶ Following *Ako* the 2004 ET Rules provided a route for claimants to withdraw without a dismissal judgment
- ▶ In *Cockayne*, C issued UD claim; withdrew expressing intention to reissue when grievance completed; then reissued. R said cause of action estoppel.
- ▶ The EAT agreed and applied the approach in *Fraser*.
  - ▶ *Ako* turned on the absence of a procedure for withdrawing a claim without dismissing it, and is not of general application.
  - ▶ C is caught by cause of action estoppel.



# *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*

- ▶ C sues D for breach of patent over design of passenger aeroplane seating
- ▶ D counterclaims for revocation of patent
- ▶ D also challenges patent in European Patent Office
- ▶ In HC trial in Jan 2009, held no infringement of patent; C appeals
- ▶ EPO upheld patent in Mar 2009; D appeals to board of appeal
- ▶ In Oct 2009, CA reversed HC decision, held patent infringed
- ▶ D applied for stay pending SC appeal and EPO appeal; CA refused and ordered inquiry into damages (Jan 2010)
- ▶ Sept 2010: C abandons all claims held by CA to have been infringed; EPO board amends patent with *retrospective effect*
- ▶ D applies to discharge CA's order for inquiry on basis that the patent in its retrospectively-amended form is not infringed.
- ▶ CA refuse on ground that their underlying decision that the patent is valid is res judicata.
- ▶ SC reviewed law of res judicata and held that the principle did not prevent D from relying on the retrospective amendment of the patent in answer to the inquiry into damages.

# *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd cont*

- ▶ Per Lord Sumption:
- ▶ *Arnold v National Westminster Bank plc* [1991] 2 AC 93 is authority for the following:
  - ▶ Cause of action estoppel is absolute in relation to all points which had to be and were decided to establish existence or non-existence of cause of action.
  - ▶ Cause of action also bars raising in subsequent proceedings of points essential to existence or non-existence of cause of action which were not decided because they were not raised, if they could with reasonable diligence and should in all the circumstances have been raised.
  - ▶ Except in exceptional circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.

# *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd cont*

- ▶ Also per Lord Sumption:
- ▶ Res judicata is a rule of substantive law, while abuse of process is concept which informs the exercise of the court's procedural powers.
- ▶ They are *“distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive.”*

# *Nayif v High Commission of Brunei Darussalem*

- ▶ C's claims for discrimination dismissed by ET for want of jurisdiction because out of time
- ▶ C then commenced civil claim in negligence for PI damages based on same facts. D argued issue estoppel.
- ▶ CA held:
  - ▶ *Barber* distinguishable because underlying principle was "there should be finality and matters which have been litigated, or would have been litigated but for a party being unwilling to put them to the test, should not be re-opened."
  - ▶ *Barber* was not concerned with dismissal order resulting from refusal to accept jurisdiction.
  - ▶ No justification for applying the rule where "no actual adjudication of any issue and no action by a party which would justify treating him as having consented, either expressly or by implication, to having conceded the issue by choosing not to have the matter formally determined"

# *Srivatsa v Secretary of State for Health*

- ▶ C brought ET claim, then withdrew it citing economic reasons.
- ▶ ET dismissed the claim (after request by D).
- ▶ C then brought civil claim arising out of similar facts. D sought to strike out
- ▶ CA held no estoppel:
  - ▶ Referred to Lord Sumption in *Virgin Atlantic* and the need to qualify the absolute character of cause of action and issue estoppel when conduct is not abusive
  - ▶ Applying *Ako* and *Nayif*, the question is “*whether the claimant has consented either expressly or by implication to concede the issue*”
  - ▶ The circumstances around the time of C’s withdrawal do not lead to the conclusion that he intended to concede the merits of his claim

# Two recent authorities: *Akay* and *Farnham-Oliver*

- ▶ *Akay v Newcastle University* [2020] EWHC 1669
- ▶ *Farnham-Oliver v RM Educational Resources Ltd*  
[2021] EWHC 2418

# *Akay v Newcastle University*

- ▶ C brought ET discrimination claims in re (1) his dismissal and (2) alleged harassment over several years
- ▶ C failed to respond to orders to particularise claim (2); these claims were struck out because, the court held, of C's *"contumelious disregard"* for court orders; i.e. it was struck out for abuse of process
- ▶ C then brought civil PI claim arising from claim (2) facts
- ▶ C then settled claim (1). Settlement agreement said: *"nothing in this Agreement prevents C from pursuing the PI claim that he has already made"*

# *Akay v Newcastle University* *cont*

- ▶ D in due course applied to strike out C's civil claim as being an abuse of process.
- ▶ The Judge agreed and the HC upheld the decision for two reasons:
- ▶ Prior abuse: the rule in *Securum Finance Ltd v Ashton (No 1)* [2001] Ch 291 applied, that where a claim has been struck out for abuse of process, some special reason has to be identified to justify a second action being allowed to process. There was no special reason here.
- ▶ Settlement agreement: the agreement did not prevent D from running the *Securum Finance* argument:
  - ▶ Nothing in the Agreement suggests D was giving up this defence or that the Agreement would improve C's position in PI claim



# *Farnham-Oliver v RM Educational Resources Ltd*

- ▶ C allegedly suffered disability discrimination and harassment at work.
- ▶ C brought ET claim alleging disability discrimination
- ▶ That claim was settled before D filed a Response. The agreement said at clause 7: *"The claimant is not prevented from pursuing his potential claim for damages from personal injury allegedly suffered as a result of work related stress..."* and then referenced the firm acting and a letter they had sent.
- ▶ C then brought a claim under the Protection from Harassment Act 1997
- ▶ D applied to strike out. They accepted that the claim fell within clause 7, but argued that (1) applying *Akay* the agreement did not prevent them from arguing abuse; and (2) the claim was abusive because it was duplicative

# *Farnham-Oliver v RM Educational Resources Ltd cont*

- ▶ The HC held:
- ▶ Application of *Akay*: distinguishable on the facts because (1) no prior abuse and (2) settlement agreement worded differently
- ▶ Construction of settlement agreement: the proper interpretation of clause 7 is that C is permitted to pursue the civil claim, and D is prohibited from relying on the ET proceedings to argue that the civil proceedings are an abuse of process.
- ▶ Estoppel by convention: the content of the negotiations and the wording of the agreement made clear that it was intended that the civil claim would be brought. C only entered into the agreement on that basis that he could bring the civil claim, and was encouraged in that belief by clause 7. It is unconscionable for D to argue abuse in those circumstances, and an estoppel arises.
- ▶ Abuse of process: if that is wrong, the civil claim is in any event not abusive applying the broad, merits-based approach: the ET claim was at a very early stage when settled and D had allowed the PI claim to be specifically excepted. There is therefore no undue harassment of D.

# Drawing together the threads

- ▶ What type of res judicata?
  - ▶ Cause of action estoppel: unlikely – little overlap of causes of action between the ET and HC; only really breach of contract.
  - ▶ Issue estoppel: more likely. Test is whether it was *necessary* to determine the issue in the earlier proceedings. For example, ET claim of discriminatory harassment; HC claim under PfHA.
  - ▶ Henderson v Henderson: whether the claim “could have” been brought; applying the broad, merits-based approach, “claim” should be taken to mean not *cause of action* but *damages claim* – i.e. a claim for PI can be brought as part of a discrimination claim. Touchstone is “*undue harassment*”
  - ▶ The “general rule against abuse”: if the case does not fit into the above categories, in practice Court will proceed along the same lines as a *Henderson v Henderson* argument: if it amounts to “*undue harassment*” for C to bring it, can be held to be abusive

# Drawing together the threads

- ▶ Approaching an estoppel argument:
  - ▶ What judgment are you relying on?
    - ▶ Dismissal following withdrawal?
      - ▶ Q is whether C intended to abandon claim by withdrawing: *Srivatsa*
    - ▶ Dismissal following finding of no jurisdiction?
      - ▶ Judgment unlikely to create estoppel, *unless* a substantive issue (other than time limits) has been determined: *Nayif*
    - ▶ Dismissal following substantive hearing on merits?
      - ▶ Will create an estoppel in re cause of action, and any issue which was *necessary* for determination of cause of action
      - ▶ Following *Virgin Atlantic* and *Srivatsa*, there may be room for C if they can argue second claim is not abusive, but that is unlikely to be the case.

# Drawing together the threads

- ▶ The relevance of a settlement agreement:
- ▶ If the agreement settles all claims without a carve-out for subsequent PI claim, C is barred: *Sheriff*
- ▶ If there is a carve-out for a PI claim:
  - ▶ What precisely does the agreement mean? This may create contractual bar to D pursuing abuse argument: *Farnham-Oliver*
  - ▶ Is there any pre-existing abuse which D can rely on which is not covered by the settlement agreement: *Akay*
  - ▶ Does the carve-out create an estoppel by convention: *Farnham-Oliver*

# Drawing together the threads

- ▶ Approaching a *Henderson v Henderson* argument:
  - ▶ “broad, merits-based approach”; is there “unjust harassment”?
  - ▶ This is going to depend on all the circumstances but, in reality, Court will look at what in fact D has had to do:
    - ▶ Did the first claim settle or go to trial?
      - ▶ If it settled, was it early or late in the day?
      - ▶ Did D have to file a Defence, go through disclosure, prep witness statements, were its witnesses cross-examined?
    - ▶ What is the level of factual overlap between first claim and second claim?
      - ▶ Same documentary disclosure?
      - ▶ Same witnesses speaking to the same things?
  - ▶ For example:
    - ▶ In *Farnham-Oliver* the first claim settled before Defence; no abuse
    - ▶ If first claim settles in the middle of trial, then C brings second claim on same facts, will almost certainly be abusive

# The End

