Neutral Citation Number: [2014] EWCA Civ 1521

Case No: A2/2013/3253/QBENF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Honourable Mr Justice Bean
QB20130421

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2014

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LORD JUSTICE ELIAS
and
LADY JUSTICE RAFFERTY

- -

Between :

MR EYAD ZAKI NAYIF	**Appellant**
- and -	
THE HIGH COMMISSION OF BRUNEI DARUSSALAM	**Respondent**

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Mr Robert Glancy QC (instructed by **Grange & Castle**) for the **Appellant**
Mr Jeremy Johnson QC (instructed by **Bircham Dyson Bell LLP**) for the **Respondent**

Hearing date : 18 November 2014

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Approved Judgment

Lord Justice Elias :

1. This appeal raises a short point on issue estoppel. The material facts can be summarised briefly. The appellant was employed by The High Commission of Brunei Darussalam as a chauffeur from 2003. He made a catalogue of complaints about his employment between 2003 and 2010 alleging that in various ways he had been treated unfairly and subjected to various acts of bullying, harassment and abuse. He alleges that he sustained psychiatric injury from these acts.

2. On 26 October 2011 he issued a claim in the Employment Tribunal pursuant to section 54 of the Race Relations Act 1976 seeking compensation for, amongst other matters, the psychiatric injury resulting from the commission of these acts, which he asserted was attributable to race discrimination. His claim was dismissed because it was out of time.

3. Section 68(1) of the 1976 Act provides:

> "An employment tribunal shall not consider a complaint under section 54 unless it is presented to the tribunal before the end of
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> (a) the period of three months beginning when the act complained of was done …."

4. By subsection (6) there is an exception. It provides that the tribunal may nevertheless hear the out of time complaint "if it considers that it is just and equitable to do so."

5. All the claims advanced here were outside the three month limit. So the tribunal considered whether in all the circumstances it was just and equitable to hear the case in any event. For this purpose the Tribunal considered documents adduced by the claimant, heard submissions as to the circumstances of the complaints, and considered the explanation why the application had been lodged so late. It declined to exercise the discretion to extend time. It did not in any way engage with the substantive merits of the case although the judge did observe that it was "still not clear from the claim form why the claimant says that the cause of his bullying was his race".

6. An application for permission to appeal to the Employment Appeal Tribunal challenging the employment tribunal's rejection of jurisdiction was refused on paper at the sift stage pursuant to rule 3(7) of the Employment Appeal Tribunal Rules. The claimant did not avail himself of the right to seek an oral hearing.

7. On 20 December 2012 the appellant issued proceedings in the High Court in negligence and breach of contract in respect of the same alleged psychiatric injury. He made the same catalogue of complaints about his treatment between 2003 and 2010 as he had made in the earlier Tribunal proceedings. He did not allege in these proceedings that he had been discriminated against on grounds of race.

8. The High Commission contended that he was precluded from pursuing these proceedings. Paragraph 1 of its defence was as follows:

> "The defendant relies on the dismissal by the Employment Tribunal of the claimant's claim for damages for compensation

> arising out of the same facts and matters as found the basis for the instant claim."

In technical terms, this is known as the defence of "issue estoppel".

9. Master Leslie felt that he was bound by authority to uphold that defence and in particular, by the decision of the Court of Appeal in *Lennon v Birmingham City Council* [2001] IRLR 826. He reached that conclusion with what he described as "considerable reluctance". He was concerned that in barring the claim he might be causing a grave injustice to the applicant. He gave permission to appeal and referred the case to the Court of Appeal but Tomlinson LJ remitted it to the High Court so that it was considered by Mr Justice Bean, as he then was. Bean J concluded that Master Leslie was correct to strike out the appeal and that this was required in accordance with the principles enunciated in *Barber v Staffordshire City Council* [1995] ICR 379 and the *Lennon* case.

10. The question is whether that analysis is correct.

Res judicata and Issue estoppel

11. As Lord Sumption pointed out in *Virgin Atlantic Airways v Zodiac Seats UK Limited* [2013] UKSC 46; [2014] AC 160, para.17, in a judgment with which Lords Neuberger, Clarke and Carnwath and Lady Hale agreed:

> "Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins."

12. Two of these principles, relevant to this case, are cause of action estoppel and issue estoppel, which Lord Sumption defined as follows:

> "The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings ….
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> Fourth, there is the principle that 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: *Duchess of Kingston's Case* (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198."

13. The policy lying behind these principles is the interest of finality in litigation; both the public interest that the courts should not be clogged by re-determinations of the same disputes; and the private interest that, as it is sometimes put, "it is unjust for a man to

be vexed twice with litigation on the same subject matter": see *Clark v Focus Asset Management and Tax Solutions Ltd*. [2014] EWCA Civ 118; [2014] 1 WLR 2502 paras. 11-12 per Arden LJ.

14. The analysis of Lord Sumption presupposes that there will have been a formal adjudication by a court. That is indeed the typical situation in which the principles arise. But it is well established that this need not be the case. There are circumstances where these principles will operate when the proceedings have been dismissed without any formal adjudication at all. This was the position in the two judgments upon which Bean J relied to uphold the strike out of the appellant's case.

15. In *Staffordshire BC v Barber* [1996] ICR 379 the applicant brought a claim for a redundancy payment in an employment tribunal. It was resisted upon the grounds that she had two contracts and under each she was employed for fewer than eight hours a week. Under the law as it was then mistakenly understood to be, she could only satisfy the qualifying period for a redundancy payment if she was employed under a contract for at least eight hours per week.

16. The day before the full hearing was due to take place her solicitors wrote to the Tribunal and said that on instructions they were withdrawing her case. As a consequence, the Tribunal judge dismissed the proceedings. Subsequently a decision of the House of Lords established that the understanding of domestic law was incorrect in the light of EU law: *R v Secretary of State for Employment ex p. Equal Opportunities Commission* [1995] A.C.1. She sought to bring her claim afresh in the Employment Tribunal for both redundancy and unfair dismissal. Each had the same hourly qualification requirement. The respondent argued that she should not be allowed to re-open the case. The employment judge found that she could bring the fresh proceedings but the Employment Appeal Tribunal upheld her appeal and its decision was in turn upheld by the Court of Appeal.

17. Mummery J, presiding in the Employment Appeal Tribunal, said this (p. 388):

> "There is nothing in the principles of cause of action or issue estoppel which stipulate that they can only apply in cases where a tribunal has given a reasoned decision on the issues of fact and law in the first litigation. On the contrary, it appears from cases such as *SCF Finance Co Ltd v. Masri (No.3*) [1987] 1 All ER 194 that an estoppel may arise from an order dismissing proceedings without argument or evidence directed to the merits of the case. In the *SCF Finance* case, which concerned a question of issue estoppel in subsequent garnishee proceedings, Ralph Gibson LJ said at p.208E -
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> > "... an order dismissing proceedings is capable of giving rise to issue estoppel even though the court making such order has not heard argument or evidence directed on the merits ... If a party puts forward a positive case, as the basis of asking the court to make the order which that party seeks, and then at trial declines to proceed and accepts that the claim must be dismissed, then that party must, in our view, save in

> exceptional circumstances, lose the right to use again that case against the other party to those proceedings."

> At p.209 E-G Ralph Gibson LJ concluded the judgment by stating the principle in the following terms:

> > "A litigant who has had an opportunity of proving a fact in support of his claim or defence and has chosen not to rely on it is not permitted afterwards to put it before another tribunal."

> See also *Khan v. Goleccha International Ltd* [1980] 2 All ER 259 and 266b, 267b, h-j, 268 d-e.

> In our view, that is the position in this case. Mrs Barber had the opportunity to prove, in support of her claim for redundancy payment, that she had continuity of employment and could satisfy the qualifying hours required by the 1978 Act. She chose not to pursue that matter and Mr Rees, as her representative, acknowledged that her application should be dismissed. In those circumstances Mrs Barber can be in no better position in relation to the principles of estoppel than if she had instructed Mr Rees to argue those points unsuccessfully. In dismissing the appeal in those circumstances the first Tribunal made a decision which involved rejecting an element in Mrs Barber's cause of action both for redundancy payment and unfair dismissal. That decision, adverse to her, prevents her from now raising those causes of action. They are extinguished. The decision resolves an issue which prevents Mrs Barber from contending that she can satisfy the requirements of continuity of employment and hours in relation to her claims."

18. The Court of Appeal upheld this analysis. Neill LJ, in a judgment with which Auld LJ and Sir Iain Glidewell agreed, approved a passage of the judgment of Ralph Gibson LJ in the *SCF* case in which the judge had expressly stated that a party who asserts a positive case and then declines to proceed and accepts that the claim must be dismissed loses the right to raise the claim again.

19. In *Lennon* the facts were closer to the facts of this case. The applicant lodged an application in the Tribunal against her employer alleging harassment; discrimination; vicarious liability of the employer; health and safety - duty of care." As Buxton LJ pointed out in his judgment in the Court of Appeal, it was not clear on what basis the Tribunal had jurisdiction to deal with these matters, although it seems that she was alleging that in some way they were related to sex discrimination.

20. After the application had been made, there were lengthy delays whilst attempts were made to compromise and eventually the Tribunal called the parties in for a directions hearing. Two days before the hearing Mrs Lennon's solicitors wrote to the Tribunal saying that they were instructed to withdraw the application and the chairman dismissed it.

21. Some five months later Mrs Lennon sought to bring a claim in the Birmingham County Court for negligence and breach of contract. The Council sought to have the claim dismissed on the grounds of res judicata submitting that it was an abuse of process because it included a claim for stress-related illness which was based on precisely the same facts as the earlier Tribunal claim. The deputy district judge expressly found that the new claim did indeed rely upon the same factual complaints as had been pursued before the Tribunal. He did not strike out the claim, however, because he thought that in effect the claimant had merely intimated a wish to discontinue the proceedings rather than to have them dismissed. A discontinuance does not constitute a res judicata and therefore does not bar further proceedings.

22. There was an appeal to the Circuit Judge. The submission advanced by Mrs Lennon was that the estoppel issue would only arise where there had been an actual adjudication of the claim and that had not occurred. The judge, His Honour Judge Griffiths-Jones, considered himself bound by the decision in the *Barber* case to reject this submission and he struck out the proceedings.

23. The Court of Appeal agreed with him in a decision given by Lord Justice Buxton, with whom Pill and Mantell LJJ agreed. Buxton LJ noted that in *Barber* the court had rejected precisely the same argument as Mrs Lennon was advancing, namely that there had been no adjudication of the merits of the claim. Buxton LJ emphasised that it had been found and accepted that the whole of the case now advanced was brought forward in the Employment Tribunal. He considered that in the circumstances it was impossible to distinguish *Barber*. He also rejected a submission that it was material to know the reason for the withdrawal (para 30):

> "The doctrine turns not on the reason why the court's decision to dismiss the claim was consented to by the party making the claim, nor on the reason why the court made the order, but on the simple fact that the order was in fact made. It is for that reason that in the case of issue estoppel, the court will not re-enter that on the merits or justice of allowing the proceedings to continue …."

24. In a later case of *Ako v Rothschild Asset Management Ltd* [2002] ICR 899 the Court of Appeal, whilst accepting that the decision in *Lennon* was correct, recognised that there is a distinction between a situation where the intention is to dismiss a claim and where the intention is to discontinue it. Under the Tribunal rules then in operation, a case would be formally dismissed even where the intention was simply to discontinue it. The Court held that if on the facts it was clear from all the surrounding circumstances that the withdrawal was in substance a discontinuation of proceedings, the principle of res judicata would not apply even though the application had been dismissed.

Discussion

25. The appellant has at all times accepted that the issues before the Employment Tribunal are the same as those before the High Court. But Mr Glancy QC, counsel for the appellant, says that *Barber* and *Lennon* can be distinguished. They were both cases where claims had been withdrawn in circumstances where the court clearly had jurisdiction to determine the matters in issue and the claimant had, for whatever

reason, chosen not to pursue them. Here, as a consequence of the claim having been lodged too late, the applicant did not have the opportunity to have the complaint considered at all. It was not a case of someone choosing to forego that opportunity. On the contrary, the appellant wished to have the merits adjudicated upon but was unable to do so. Since the question of time limits goes to the Tribunal's jurisdiction (see *Radakovits v Abbey National plc* [2009] EWCA Civ 1346; [2010] IRLR 307) the Employment Tribunal was not able to adjudicate on the merits once it had refused to exercise its discretion to extend time.

26. Mr Johnson QC, counsel for the respondent, rests his case on *Lennon* and in particular on the observation of Buxton LJ, reproduced at para. 22 above, that all that is required for the doctrine to apply is the fact that an order dismissing the proceedings has been made, irrespective of the reason for it.

27. With one qualification, I accept the submissions of the appellant. The underlying principle is that there should be finality and matters which have been litigated, or would have been but for a party being unwilling to put them to the test, should not be re-opened. But I see no justification for the principle applying in circumstances where there has been 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.

28. Bean J accepted, and Mr Johnson agreed, that if an action had been commenced in the Employment Tribunal for negligence, the Tribunal would have been compelled to dismiss the claim since it has no jurisdiction to hear it. They accept that it could not sensibly be said that this dismissal would attract the principle of res judicata if subsequent proceedings were brought in the High Court.

29. I agree. There would be no adjudication and no question of the claimant spurning the opportunity for the issue or issues to be adjudicated upon. I accept that the situation here is not a complete analogy because the Employment Tribunal was in principle capable of adjudicating on the merits of the allegation of race discrimination had a claim been lodged in time. Bean J considered that this was a critical distinction and he noted that there was in fact a substantive hearing on the jurisdiction question in this case.

30. I do not accept that the fact that there was such a hearing is enough to bring the principle of res judicata into play. That principle is rooted in a legitimate concern for finality which will generally make it unjust for a claimant to pursue the same point in two sets of proceedings. But I see no justification for treating as though it were the final disposal of a claim a determination that the issue cannot be considered at all, to use the language of section 68 of the 1976 Act. This would in my view be to work an injustice and does not advance the public policy involved.

31. A factor which weighed heavily with Bean J was the possibility that in the course of determining a jurisdiction claim, the court will have to engage with the merits. He said this:

> "Indeed, in some discrimination cases brought out of time employment tribunals exercise a discretion to postpone the issue of whether it would be just and equitable to extend time

> until the tribunal has heard evidence on the merits of the case. It would be very strange indeed if in such a case, where the employment tribunal after hearing evidence on the merits has refused to extend time, held that it therefore has no jurisdiction to consider the case and dismissed the claim, *issue estoppel* did not apply because of the classification of the decision as jurisdictional."

32. I would agree that the principle of issue estoppel should apply in such cases. But I see no reason why it cannot. The principle is not excluded automatically by the simple fact that the decision to dismiss stems from the finding that there is no jurisdiction. To that extent that Mr Glancy was suggesting otherwise, I would reject his argument. The fact that the court has only dealt with a jurisdictional issue will in my view be enough to counter a submission that the party has chosen of his own free will not to pursue the claim and must therefore be deemed to have unsuccessfully fought it, as Mummery J put it in *Barber*. But it will not prevent issue estoppel being raised where there has in fact been an adjudication of a relevant issue albeit in the context of a jurisdictional issue. That is not, however, this case since the Tribunal rejected the claim for jurisdiction without needing to address any of the issues raised in the substantive claim itself.

33. I recognise that read literally the words of Buxton LJ in para. 30 of *Lennon* could be taken to apply to any order dismissing the case. That they should not be read so widely is demonstrated by the *Ako* case. They should also be read in the context of the facts of that case. Buxton LJ did not have in mind situations where the order dismissing proceedings was the result of a refusal to accept jurisdiction.

34. I would therefore uphold the appeal. In my judgment, the appellant can pursue his negligence action in the High Court.

Article 6

35. As a separate argument the appellant submitted that to deny him the right to take proceedings in the High Court would constitute a breach of Article 6 because it would deny him a right of access to a competent tribunal. Put in that way, I consider that the argument is without merit. A similar argument was tentatively advanced in the *Lennon* case and was given short shrift by Buxton LJ (para.36):

> "Secondly, it was faintly suggested that there might be some issue arising under Article 6 of the European Convention on Human Rights with regard to the inability now of Mrs Lennon to pursue her claim. The answer to that is that the Convention gives a right of access to a court. That is what Mrs Lennon indeed has had in her access to the Employment Tribunal. It gives no right to a reiterated access to a series of courts, nor does it undermine the reasonable power of the authorities of states signatory to the Convention to make rules for the conduct of litigation in a fair and economic way. There is, therefore, no point arising under the convention at all."

36. I respectfully agree with that analysis. The appellant had a right of access to the Employment Tribunal had he presented his claim in time and the time limits were compatible with Article 6. His failure to do so does not involve a breach by the state of Article 6.

37. There is, however, a different principle which potentially has more traction. It is a breach of Article 6 for an applicant to be subject to a limitation on his right to access the court "if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved": see *Ashingdane v United Kingdom* [1985] 7 EHRR 528 para. 57. This is so even though the limitation does not constitute a complete denial of the right of access.

38. It may be said that that to deny the claimant the right to pursue an action in negligence because of his failed attempt to launch a tribunal claim would be a disproportionate interference with his fundamental right of access to the court. As such it would contravene Article 6. Since I have found that in fact his earlier failed proceedings do not bar him from taking the claim, the point does not arise. If, on the other hand, he had been denied the right in order to give effect to the desirable public policy of issue estoppel, then it would in my view have been a proportionate restriction, as indeed Bean J found.

39. What I think the appellant can say, however, is that any application of the res judicata principle which operates so as to work an injustice by denying the appellant the right to have the merits of his case determined without good cause (itself a highly fact sensitive judgment) would be a disproportionate interference with his Article 6 right. Like Master Leslie, I think it would be unjust in the circumstances of this case to deny the appellant the opportunity to have his case heard in the High Court simply because the Tribunal claim was lodged out of time. Since the law must be construed where possible to be compatible with the Convention, this would reinforce the conclusion I have reached quite independently of Article 6 considerations.

Disposal

40. For these reasons, I would allow the appeal and quash the order striking out the High Court claim.

Lady Justice Rafferty:

41. I agree.

Sir Brian Leveson:

42. I also agree.