Employment law brief

Ian Smith discusses statutory caps and unwary litigants; the limited jurisdiction of the EAT; and the dangers of going on secondment

The last month has seen activity on both the legislative and case law fronts. In the case of the latter, one decision involved essentially reminding the Employment Appeal Tribunal (EAT) of the limits of its powers, another raised a procedural point of considerable practical significance for dismissed employees sitting on large common law claims as well as an action for unfair dismissal and two decisions required our higher courts to consider quite complex arguments on statutory interpretation.

"You say tomayto and I say tomahto; the only correct thing in our system is to call the whole thing off"

The EAT's limited jurisdiction

When it was before the EAT, *Unison v Leicester CC* UKEAT/0066/05 [2005] IRLR 920, [2005] All ER (D) 175 (Sep) seemed to be potentially important in the application of the redundancy consultation laws to a local authority, in particular the emphasis placed, not on the later date when the constitutional power (the full council) decides to make redundancies, but on the earlier date when the council officers decided to "recommend" those redundancies. The EAT left alone one 90-day award—controversially by ignoring any prior attempts to consult the union, holding them to be irrelevant legally—but reduced another award for less affected employees from 20 to 10 days. The Court of Appeal ([2006] EWCA Civ 825, [2006] All ER (D) 339 (Jun)) has now turned down the council's appeal, but purely on the grounds that it depended on arguments not raised before the employment tribunal (ET), that the EAT should only allow such arguments in exceptional cases and that the fact that a large amount of public money was at issue was not in itself an exceptional case. It allowed the union's cross-appeal because the EAT should not have reduced the smaller award—the EAT could only step in if the ET's decision was perverse, which it clearly thought highly unlikely in a case of only a 10 day difference. Laws LJ made the classic point that one ET may have fixed 20 days and another ET 10 days, without either of them being appealably wrong. You say tomayto and I say tomahto; the only correct thing in our system is to call the whole thing off.

Large common law claims—care needed

There has been some discussion in case law in recent years about the position where a claimant withdraws part of a claim to pursue it elsewhere, particularly in the light of the wording of r 25 of the Employment Tribunal Rules of Procedure (SI 2004/1861) (the ET rules). The complicating factor here has for years been the doctrine of issue or cause of action estoppel lurking in the background if the claimant is not careful. It was thought that much might depend on how the claim or part-claim was withdrawn, whether the claimant had made it clear that s/he was not abandoning it, and whether it would be an abuse of process to allow him/her to resurrect it elsewhere. Now, however, the Court of Appeal has reappraised the position in a more fundamental way that goes to the essentials of the relationship between common law and statutory jurisdictions, against the backdrop of estoppel.

In *Fraser v HLMAD Ltd* [2006] EWCA Civ 738, [2006] All ER (D) 152 (Jun) the claimant was dismissed as chief executive of the respondent company. He brought unfair dismissal proceedings in a tribunal, adding a claim for wrongful dismissal. He knew of the statutory limit of £25,000 on the latter and that his claim would exceed that amount; he clearly "reserved his right" to go subsequently to the civil courts for the excess over the statutory limit. He succeeded before the ET, who awarded him compensation for unfair dismissal, computed his wrongful dismissal entitlement at £80,000 and awarded him £25,000 of it. When he brought proceedings in the High Court for the remaining £55,000 the respondent sought to have them struck out on the basis that the claim was *res judicata* and an abuse of the court's process. Master Eyre agreed and struck the claim out. At the appeal, the claimant argued that his reservation of position was enough to avoid *res judicata* and, indeed, that his High Court claim should succeed automatically on the basis of issue estoppel from the tribunal's decision. The respondent now relied on the common law doctrine of merger, ie that where the initial action is successful the whole claim merges into the decision of the original forum (*transit in rem judicatam*, as we say in all the pubs in East Suffolk), so that there was nothing left to litigate in any subsequent forum.

Both Mummery and Moore-Bick LJJ in the Court of Appeal gave reasoned judgment in the respondent's favour. The issue was complicated by the fact that curiously we have not had an authoritative decision on this point before, and that such case law as we have seen has been on the similar but separate issue of the effect of a withdrawal of an ET claim to litigate it elsewhere—where the point of re-litigation does not arise. On the point directly in issue, both judges held—in spite of some slight differences in terminology about estoppel/merger—that in a case such as this, a judgment by a tribunal awarding an amount within its capped common law jurisdiction does activate the doctrine of merger, so that the claimant then may not sue in the civil courts for any excess over the statutory cap. This is the clear importance of the case as a statement of principle.

Unwary litigants

Both judges accepted that this could cause injustice and be a trap for the unwary—especially an unwary litigant in person—but the crucial point about the doctrine of merger applying was that—unlike certain other aspects of estoppel—it applies automatically and gives the court no discretion to disapply it on grounds of fairness or because the claimant was trying to reserve his position. Mummery LJ concludes his judgment with three observations:

(i) In future, claimants and their advisers should confine any common law claims likely to exceed £25,000 to High Court proceedings; if a tribunal has already found unfair dismissal and the issues are similar in a wrongful dismissal action the claimant can plead issue estoppel in those High Court proceedings—see *Soteriou v Ultrachem Ltd* [2004] EWHC 983 (QB).

(ii) Tribunal service literature for claimants should make this clear.

(iii) It may be time for the secretary of state to review the £25,000 limit which has not been raised since its inception in 1994.

Commentary

This case is clearly of fundamental importance, but it does raise one further question. Does it affect the position where the claimant mistakenly starts an action for wrongful dismissal—perhaps without legal advice, not understanding the statutory cap—and then seeks to withdraw it before an ET determines it on the merits. This is where the existing case law has arisen. *Barber v Staffordshire CC* [1996] IRLR 209, [1996] 2 All ER 748 held that an ET's dismissal of a claim raises a cause of action estoppel whether or not the claim had been considered on its merits. This approach was softened somewhat in *Sajid v Sussex Muslim Society* [2001] EWCA Civ 1684, [2001] All ER (D) 19 (Oct) and *Ako v Rothschild Asset Management Ltd* [2002] EWCA Civ 236, [2002] 2 All ER 693 (both cited with approval by both judges) because—as Mummery LJ had pointed out in *Ako*—the then ET rules had no provision for discontinuance *simpliciter* and so it was necessary to look behind an order for dismissal to see whether it was a true dismissal or merely an intended discontinuance by the claimant (to proceed elsewhere). As Moore-Bick LJ points out, the 2004 ET rules do address this issue in r 25(1) which allows a claimant to simply withdraw a claim. However, it does so in a potentially ambiguous way because r 25(4) allows the respondent to apply for an order formally dismissing the claim. The problem was that such an order could potentially raise an estoppel.

Verdin v Harrods

It is for this reason that the latest decision, that of Judge Richardson in *Verdin v Harrods Ltd* [2006] IRLR 396, EAT, is of such importance. It held that in such a case the ET should decide whether the claimant was intending to abandon the claim or resurrect it elsewhere—and whether the latter would be an abuse of process—when deciding whether to accede to a respondent's request under r 25(4) at all, because what the ET is actually deciding on is whether any further action by the claimant is estopped or not. Where the inclusion of a wrongful dismissal action potentially for more than the cap by a claimant—especially an unrepresented one—was a mistake, arguably the ET should normally refuse to make the order—which was the actual result in *Verdin*. Thus, it is suggested that *Verdin* is now the dominant authority—where a claim is withdrawn before being adjudicated upon—rather than *Sajid* and *Ako* (in the light of the rule change in 2004) and fortunately both judges in the Court of Appeal in *Fraser* cited it with approval. However, in the light of that case, the best answer is not to get into this position as a claimant and, if there is any chance of a common law/wrongful dismissal claim exceeding the £25,000 cap, not to bring it before the ET at all.

Woodward v Abbey National

In *Woodward v Abbey National plc* [2006] EWCA Civ 822, [2006] All ER (D) 253 (Jun) the Court of Appeal had to decide whether the protection from victimisation in the Employment Rights Act 1996 Pt V can extend to a detriment suffered after termination of employment. The point of law was a neat one, but possibly of considerable practical importance in a case where the allegation is that the employer had continued to exact revenge on the ex-employee, eg by bad references or interfering with his/her search for new employment.

The Court of Appeal had held that Pt V did not apply post-termination, on a literal interpretation that the protection is given to "employees" (*Fadipe v Reed Nursing Personnel* [2001] EWCA Civ 1885, [2001] All ER (D) 23 (Dec)), but that case pre-dated the decision of the House of Lords in *Rhys-Harper v Relaxion Group plc* [2003] UKHL 33, [2003] IRLR 484, [2003] 4 All ER 1113 that the (separate) anti-discrimination provisions in the discrimination legislation can apply post-termination.

In *Woodward* the EAT followed *Fadipe* and accepted that Pt V and discrimination law were different. However, the Court of Appeal upheld the employee's appeal and held that *Fadipe* was impliedly overruled by *Rhys-Harper* and so should be departed from. That decision significantly increases the protection for employees, under any of the protected heads in Pt V, not just for whistleblowers.

Celtec v Astley

In *Celtec v Astley* [2006] UKHL 29, [2006] All ER (D) 219 (Jun) the House of Lords was faced with a double form of interpretation, namely interpreting the interpretation given by the European Court of Justice (ECJ) to a transfer of undertakings (protection of employment) (TUPE) transfer over a period of time (C-478/03 [2005] IRLR 647, [2005] All ER (D) 400 (May)). The ECJ held that there must be a point in time to the transfer, adding that if there is, the employees transfer automatically, whether or not anyone realised it. The House of Lords had to apply this to the facts.

Background

Three civil servants had been "seconded" from the old Department of Employment (DoE) to a newly established Training and Enterprise Council (TEC) in 1990 before eventually accepting permanent employment with the TEC in 1993. When later dismissed they claimed to count all their service with the DoE as against the TEC. The tribunal had found a long-distance transfer over the period 1990–93, but that was no longer open to the employees after the ECJ decision. They thus changed their tack and argued that they had been TUPE-transferred to the TEC in 1990, even though no-one had any idea that this had happened.

Law Lords' decision

They won their appeal in the House of Lords by 4-1 on the result, but the Lords actually split 3-1-1 on the reasoning. Lords Hope, Bingham and Carswell held that the employees were allowed to maintain this new argument, that they had transferred in 1990 and that their continuity was preserved. They accepted this was a fiction that in itself could raise further issues—in particular, what was the position of their continued membership of the civil service pension scheme from 1990 to 1993?—but felt compelled to come to it under TUPE's own perverted logic.

Lord Rodger sought to avoid the fiction by dating the transfer to 1993 and finding continuity then. Lord Mance dissented, partly because there was possibly an insuperable objection that the employees had "chosen" not to transfer in 1990. All good clean fun, but it does have some serious implications in the public sector (especially on a part-privatisation) and it does reinforce one of the fundamentals of modern employment law—never trust that weasel word "secondment".

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