

What's the alternative?

Bayo Randle outlines issue estoppel in jurisdiction disputes

IN BRIEF

► Issue estoppel will no longer arise if a claim was previously dismissed for lack of jurisdiction, provided the merits have not been considered.

► In some case where jurisdiction is declined, claimants may take advantage of favourable decisions on the merits in alternative forums.

In the recent decision of *Nayif v High Commission of Brunei Darussalam* [2014] EWCA Civ 1521, [2014] All ER (D) 297 (Nov) the Court of Appeal restricted the application of the doctrine of issue estoppel and in doing so handed a victory to claimants. A litigant will no longer be estopped from litigating an issue in an alternative forum if a claim in respect of that issue was dismissed in an earlier forum for lack of jurisdiction, provided there has been no consideration of the merits.

Background

Mr Nayif brought a claim in the employment tribunal against his former employer in October 2011. The claim was in respect of bullying, harassment and abuse which took place between 2003 and 2010 and which Mr Nayif alleged was attributable to race discrimination and caused him psychiatric harm.

The employment tribunal would only have jurisdiction to hear the claim if it was brought within three months of the act in respect of which the complaint was made and failing that, if it considered it "just and equitable" to extend time.

Unfortunately for Mr Nayif, all the claims were outside the three-month time limit and the employment tribunal concluded that it would not be just and equitable to extend time. As a result his claim was dismissed.

Mr Nayif then issued proceedings in the High Court for negligence and breach of contract in respect of the same psychiatric harm. The claims were supported by the same facts and matters as were pursued in the employment tribunal; for these reasons Master Leslie and Mr Justice Bean, on appeal, found that Mr Nayif was estopped from bringing his claim.

noted that it was clear from previous cases, including *Lennon v Birmingham City Council* [2001] IRLR 826, [2001] All ER (D) 321 (Mar) and *Barber v Staffordshire City Council* [1995] ICR 379, that issue estoppel could arise where a court or tribunal had heard no argument or evidence on the issue, but the claim had been dismissed.

However, it was accepted that Mr Nayif's case could be distinguished. In those previous cases, issue estoppel arose not simply because the claim had been dismissed, but because the party had put forward a positive case, then declined to proceed. In this case, the claim was dismissed because the employment tribunal had no jurisdiction to hear it; the claimant had every intention of putting forward his case.

Elias LJ's judgment helpfully highlighted the underlying principle of issue estoppel: that there should be finality in litigation such

that matters which have been litigated or would have been litigated (but for a party's unwillingness to put them to the test) should not be reopened.

Consistent with this principle, the Court of Appeal also found that even if jurisdiction were declined, if a decision had been made on the merits with respect to an issue, issue estoppel would still arise. There was no merits decision in this case, so this problem did not arise. As a result, the Court of Appeal concluded that Mr Nayif was not estopped from bringing his claim in the High Court.

Generally good for claimants

This judgment will be of comfort to claimants because, until the Court of Appeal's decision, there was an unfortunate precedent whereby claimants were estopped from bringing their claims in alternative forums in circumstances to which the underlying purpose of issue estoppel was not aimed. A claim, which has been dismissed for lack of jurisdiction and where the merits had not been considered, could not be taken as a complete loss or withdrawal such that the finality principle was undermined. Notably, there is implicit acceptance from the Court of Appeal that the restrictive approaches of the courts below likely conflicted with the Art 6 right of the European Convention on Human Rights of access to court.

The judgment also highlights the fact that whenever a court or tribunal declines jurisdiction, if a party attempts to re-litigate an issue after the merits have been considered, issue estoppel will arise. An unusual side effect of this is that a court or tribunal may decide issues in favour of a claimant, but then ultimately decide that it has no jurisdiction in respect of the claim. The claimant could then go to an alternate forum, armed with favourable decisions from the earlier hearing and the defendant would be estopped from challenging the findings in respect of those issues that were decided against it.

Of course, if jurisdiction has been declined, the more likely scenario is that issues will have been decided in a manner that is unhelpful to the claimant. Therefore, pursuant to any prospective decision on jurisdiction, claimants will need to judge carefully the extent to which they are willing to expose themselves to decisions of any particular court or tribunal on the merits, because even if jurisdiction is declined, unhelpful decisions in respect of the merits can prove a hindrance if the claim is later brought in a different forum.

The decision

In the Court of Appeal, Mr Justice Elias



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