Appeal No. UKEAT/0170/14/KN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 5 November 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MS J JAMES APPELLANT

PUBLIC HEALTH WALES NHS TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS JULIA JAMES (The Appellant in Person)
For the Respondent	MR ANTONY SENDALL (of Counsel) Instructed by: Blake Morgan LLP Bradley Court 11 Park Place Cardiff CF10 3DR

SUMMARY

PRACTICE AND PROCEDURE - Estoppel or abuse of process

The Claimant brought four claims, three in respect of unlawful deductions (one of which was successful, and the others compromised apparently on terms that the Claimant succeeded in full, and were then withdrawn) and one seeking pay statements (which were then provided without the need for litigation). At the time of each she could have brought a claim in respect of detriment caused by public interest disclosures she said she had made, but deliberately chose not to do so - she said, for a number of reasons which included her desire to keep her job, and resolve her differences through the grievance procedure or negotiation. She was dismissed - she made a fifth claim, that this was unfair and by reason of having made public interest disclosures. An Employment Judge regarded this as an abuse, and struck out those parts of the claim under the principle in **Johnson v Gore Wood**. In doing so, he appeared to place heavy emphasis on the delay in bringing the claims (which per **Stuart v Linde** is irrelevant in assessing abuse of this nature) and was wrong to do so; failed to ask what the effects on the employer would be (contrary to what may well have been his view, it was unlikely to free him from having to bring evidence about the issues raised in the struck-out portions of the claim, since it was likely anyway to be relevant to the dismissal claims); did not explain why he formed the view that the conduct was capable of amounting to harassment; and failed to show that he appreciated the very great difference in nature, in the circumstances, between the claims in respect of deductions on the one hand and the more complex and demanding claims involving whistleblowing on the other.

An appeal was allowed, and the case remitted.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. In a Decision (Reasons for which were promulgated on 26 September 2013) of Employment Judge Cadney sitting alone in Cardiff, some of the Claimant's claims were struck out as being an abuse of process under the principle that all claims which could be litigated in the same case should be litigated together. The Judge held that this was a case in which they not only could but should be litigated, and the Defendant should not be serially exposed to allegations which could and should have been brought at the same time.

2. That principle is best expressed in modern terms, having derived from the case of **Henderson v Henderson** (1843) 3 Hare 100, in **Johnson v Gore Wood** [2002] 2 AC 1. At page 30H Lord Bingham, with whom Lords Goff, Cooke and Hutton agreed, said:

> **"… The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. 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 early 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. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."**

3. Lord Millett at page 59A observed:

> **"… It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a**

question which has not previously been adjudicated upon. This latter (though not the former) is *prima facie* a denial of the citizen's right of access to the court conferred by the common law and guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms [Rome, 4th. November 1950]. While, therefore, the doctrine of *res judicata* in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the Court from abuse and the defendant from oppression. In *Brisbane City Council v. A.-G. for Queensland* [1979] AC 411 at p. 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in *Henderson v Henderson* is abuse of process and observed that it

> **'. . . ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.'**

There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court for Mr. Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the Company's action. This question must be determined as at the time when Mr. Johnson brought the present proceedings and in the light of everything that had then happened. … Insofar as the so-called rule in *Henderson v. Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action."

4. I should mention for completeness that in **Johnson v Gore Wood** Lord Bingham at page 32H also said that an important purpose of the rule was to protect a Defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action was not the less harassing because the Defendant had been driven or thought it prudent to settle the first. Often, indeed, that outcome would make a second action be more harassing. And he observed that there would rarely be a finding of abuse unless the later proceedings involved what the court regarded as unjust harassment of a party.

5. The basis for the claim by the employer Respondent had this relevant background in fact. I shall summarise. The Claimant became a graduate fast-track manager in the employment of the Respondent in 2002. In 2006 she obtained a job which she particularly liked as the national coordinator of Stop Smoking Wales. It was not until around 2008 when a new manager, a Mr Jones, was appointed above her that any sense of sourness in the relationships which she had at work became apparent. Her case was that in January 2008 she began to draw his behaviour (which as she saw it was likely to cause ill-health through stress and bullying to those around

him) to the attention of senior management. There were various other disclosures which she claims to have made thereafter. Her case was that in response events occurred from 2009 until finally she was dismissed on 28 February 2012 which were, first, detriments caused to her because she had made the public interest disclosures she claimed to have made and at the end dismissal in part for that reason.

6. Those events, she claims, had an impact upon her. It is a fact that she took time off work for some nine months in 2009 with an illness attributed to stress and bullying and on 31 October took a period of over a year's absence from work until 4 October with what she says was a stress breakdown.

7. During the period of her employment she brought four claims: the first, on 19 July 2010; the second, 16 June 2011; the third, 17 September 2011; and the fourth, 20 January 2012. On each occasion bar one she claimed that she had had an unlawful deduction made from the money due to her. On the other occasion she claimed to have no proper salary slips provided to her. On each occasion save one, as it happens, the cases never came to trial. The first was argued to a conclusion, which was favourable to the Claimant. The others were conceded by the Respondent and she was paid, and received the salary slips she had been asking for. The essence of the case for the Respondent was that on one or other or all of these occasions there was an opportunity which not only could but should have been taken to put before the Tribunal the claims which she then had, that she had been acted against to her detriment because she had made a public interest disclosure.

8. Having been dismissed in February 2012, but very shortly thereafter, on 14 March, attending a case management and directions hearing in front of Judge Clark in relation to the

fourth of the claims I have mentioned, she made it clear to the Judge that she was likely to proceed with a claim for unfair dismissal and/or whistleblowing. The Judge expressed the view that it was unlikely that such a claim would be consolidated with the unlawful deductions claim which was the subject of his case management hearing because the areas of overlap, as he said, appeared minimal. It was open to the Claimant to make an application to amend to join those matters if she wished. She did not in fact do so.

The Tribunal Decision

9. The hearing before Judge Cadney was in respect of a fifth claim. The fifth claim was made in an ET1, which set out, in 81 pages, the details of her claim. She gave a narrative account, carefully grouped by reference to time periods for ease of comprehension. In the course of that she complained about a sequence of events which she maintained included a number of disciplinary hearings against her, three in total, for charges which she said were false; a criminal investigation, which she said had been inspired by the manager against whom she had complained; a number of false criminal allegations; a malicious grievance; an unwarranted suspension; ultimately a dismissal for an alleged breakdown in trust and confidence because she continued to complaint about what she said was ongoing victimisation; and in addition, it has to be said as part of the picture, the four unlawful deductions of salary about which she had brought the four claims.

10. As part and parcel of that picture, she set out how she had brought grievances and had hoped that they might be resolved in such as a way that she could continue to work at a job she enjoyed without the problems that had beset her since she had to work in the management of Mr Jones.

11. The Judge dealt from paragraph 13 of his Decision until its conclusion with the abuse of process argument presented by the Respondent, which maintained that the Claimant could and should have brought the claims she was now bringing on those earlier occasions. The Judge recited that the law was not in dispute. He set out a passage from **Henderson v Henderson** and cited the passage which I have quoted from **Johnson v Gore Wood**. He noted that the simple fact that a claim could have been raised earlier was not in and of itself sufficient to categorise a subsequent claim as an abuse and recognised that there would "rarely" be a finding of abuse unless the proceedings amounted to unjust harassment of a party, observing that the fact that that was a rare position did not mean to say that a finding of harassment was therefore a necessary pre-condition for such a strikeout.

12. At paragraph 19 he directed himself as to what would be relevant: (a) what claims were brought and when; (b) at the point at which a claim was brought, which of the current claims did the Claimant then know or believe she could have brought, or had sufficient knowledge of so as to have been able to have appreciated that she could have brought; and (c) what was the reason or reasons for not bringing the current claim at that time. What is absent from his list of factual areas is any consideration of the position of the Respondent. Where a claim is to be considered harassment, as is almost always though not in every single case the situation, it is so because of its intended or actual effect upon the victim. Thus the vice of re-litigating the same facts in a second case as have fallen for consideration in an earlier case is the effect on the Respondent of having to produce much the same witnesses and much the same evidence and go through much the same procedure as it already once had, when all that might have been avoided had the claims been brought together. Thus a classic case, for example, of the application of the **Johnson v Gore Wood** principle would be where very much the same facts give rise to two possible causes of action, only one of which is litigated in a first hearing but the second held up

the sleeve of the Claimant in order to be produced at a second hearing in order to claim whatever may be and certainly to have the effect of harassing the defendant.

13. What is absent, therefore, and what would be necessary were the principle set out by Lord Bingham to be fully explored is any conclusion here as to the effect of what occurred upon the Respondent. This is a point to which I will return.

14. The Judge set out the state of mind of the Claimant on each and every one of the four cases. He concluded, and indeed the Claimant concedes, that she could have brought a claim in respect of public interest disclosures at the time of each of the earlier claims had she been so minded. The Judge concluded that she deliberately chose not to do so. She accepts that description.

15. Of particular concern to Mr Sendall, who appears for the Respondent, were passages which showed that the decision not to make a claim in respect of disclosures was, as he put it, tactical. In support of his argument that it was unfair to the Defendant, he drew attention to extracts quoted by the Tribunal, in particular at paragraph 30 from an e-mail sent by the Claimant. This was at a time when she faced disciplinary charges which she thought were made on a false basis. She said that she had instructed her legal team (she then having legal representation) to:

> **"… prioritise options for legal action that involve holding individual executive and independent members to account in the High Court, as opposed to holding Public Health Wales liable in the Employment Tribunal wherever this is possible."**

16. On an earlier occasion in relation to the second claim she had referred to her potential for taking legal action against named individuals in the High Court rather than against the corporate legal entity, her employer, in the Employment Tribunal if the issues which she then was

pursuing through a grievance procedure could not be satisfactorily resolved by the formal grievance.

17. Mr Sendall characterises those comments as indicating that the Claimant was engaged here in a crusade against the Defendant. The tactic which was adopted was, in his submission, deliberately not to bring a claim in the Employment Tribunal but against individuals in the High Court and in reality to threaten to do so without necessarily any real intention of pursuing it in order to secure an advantage to her.

18. This is a powerful point. If a Tribunal thought that the Claimant was deliberately holding back from action in order to make threats to secure her position in employment with her employer, when otherwise she could have brought those proceedings and knew very well that she could, it might be open to it to see that as harassment. The problem for Mr Sendall's argument is that it does not seem to me, reading the Tribunal Judgment, that that is what this Tribunal actually made of it. Rather, it was making the point that the Claimant knew very well that she had the option of taking her case to the Tribunal should she wish. That is a different point. It is a point which relates to knowledge and opportunity. It emphasises the "could" rather than the "should" in respect of bringing a claim.

19. The Judge's conclusions are set out in paragraphs 35 to 40. He first of all concluded that the Claimant knew that she could bring a claim. At paragraph 36:

> **"One of the consequences of this is that it appears that the claimant decided for a period of nearly 2 years from July 2010 until May 2012 that she could ignore the time limits for presenting a claim for suffering detriment as a result of whistleblowing. …"**

He went on to say that there was an obvious possible consequence of that, which was that she was putting herself at risk of being prevented from pursuing the claim by reason of the time bar

which would apply to her detriment claims unless she could satisfy a Tribunal that there was a continuing act within the meaning of the statute which justified extension of time. Dealing with that, at paragraph 37 he noted that that could not be resolved unless the whole facts relating to the allegations were explored and dealt with, which would impose considerable cost and resource and time upon the Respondent and for that matter take up the time of the Tribunal.

20. Those considerations form the first of the four paragraphs of its conclusions. The central paragraph I shall cite in full, paragraph 39. He said:

> **"39. In my judgment the answer to that [the time point and the inconvenience caused thereby in resolving it] derives from the issues themselves. The claimant has prior to this claim brought four claims during the period covered by these allegations and on none of those occasions did she advance her whole case. In my judgment it is unjust harassment for a party to bring a succession of claims cherry picking small parts of its overall case but never until years later advancing that case in its entirety. Even had I not concluded that this claim did involve unjust harassment of the respondent I would have concluded that this was one of the rare cases in which the principle applied even in its absence, as there is a clear public interest in finality of litigation. For the same reason as set out above in my view the public interest equally justifies the conclusion that this claim involves an abuse of process. The simple fact is that in this case the claimant chose to bring four earlier claims and that at the point at which she brought those claims she made a deliberate choice not to bring claims that she could have brought and which it was open to her to have brought at that time. Although she is not now legally represented, the claimant was certainly legally represented both prior to July 2010 and as she herself has set out prior to September 2011, and appears to have had a large number of sources of legal advice. As is set out above at various points the claimant has made it explicitly clear that she has rejected the possibility of fixing the respondent with corporate liability in the employment tribunal, in favour of attempting to fix individuals with liability in the civil courts. Whilst that it is her right it does appear to me an abuse for a party which has deliberately chosen not bring its whole case forward despite having four earlier opportunities to do so, effectively to say that she has changed her mind and now wishes to do so. In my judgment that is an abuse of process in and of itself irrespective of whether it does or does not constitute unjust harassment of the other party.**
>
> **40. In my judgment, applying the test as I have to and weighing all of those factors I have come to the conclusion that this is a case in which the doctrine should apply and in my judgment it is an abuse of process for the claimant to bring claims in respect of any alleged detriment suffered as a consequence of making a protected disclosure prior to 20th January 2012."**

The Grounds of Appeal

21. The Claimant represents herself. She has carefully and thoroughly analysed the reasoning of the Employment Judge under a number of headings. She argues that the Employment Judge was in error of law because, first, he did not appreciate that in reality the claim now brought was of a very different type from that which had been articulated in each of

the four claims. The claim now brought had not in any respect, save in respect of the unlawful deductions, been the subject of judicial determination, and in those cases it might be said there had been no actual judicial determination since the Respondent had settled. In effect, the position was no different than if the Claimant had written a letter to her employer telling her employer that it owed her a sum and the employer, after due consideration and perhaps even after a chasing letter, had then paid her in full. In such a case no-one could suggest that subsequently bringing a claim in respect of detriment caused by whistleblowing (even if it included the allegation that the delay in payment was part of the detriment) was in any sense re-litigating or revisiting facts which had already been before court. There would be no obvious reason, applying any merits test, to conclude that that would be so. The approach taken by Judge Clark as to the essential differences between the nature of the claims stands in stark distinction to the way in which Judge Cadney approached it. Sitting as I do in the Employment Appeal Tribunal, I recognise the significant difference in terms of scope, evidence, time and essential nature between a claim for unlawful deductions, which is usually quick, simple and requires little by way of resource and a claim in respect of public interest disclosures, which involves complex law, frequently involves complex facts and argument, and is likely to involve heavy documentation in any serious case; all the more so in a case such as this.

22. The Judge, as it seems to me, did not recognise as he should have done the essential differences between the cases. In this case there could be no suggestion that each claim of unlawful deduction was in any sense oppressive, because it followed an earlier claim for an unlawful deduction. Since each was conceded, the converse would appear to be the case: that rather the history showed that the Claimant had something to complain about.

23. What the Judge thought was unjust harassment was the next ground of appeal. The Judge regarded it as:

> **"… unjust harassment for a party to bring a succession of claims but cherry picking small parts of its overall case but never until years later advancing that case in its entirety."**

This overlaps with the points which I have just made. But the Claimant referred, in support of her argument, to **Johnson v Gore Wood** and extracts from **Dexter Ltd v Vlieland-Boddy** [2003] EWCA Civ 14, **Chaudhary v Royal College of Surgeons and Others** [2003] EWCA Civ 645, [2003] ICR 1510, **Thomas and Devon County Council** UKEAT 0513/07, a decision of HHJ Reid QC of this Tribunal on 7 December 2007, **Aldi Stores Ltd v WSP Group plc** [2007] EWCA Civ 1260, **Henley v Bloom** [2010] EWCA Civ 202, **Foste v Bon Groundwork**, which she gave to me in the first-instance report, which has subsequently been appealed but without affecting the principles which she mentioned at paragraphs 55 and 56, **Parker v Northumbrian Water**, a decision of HHJ Hand at this Tribunal, UKEAT 0221/10/CEA, a Judgment handed down on 31 March 2011.

24. She pointed out that those matters which had been identified in various cases as being capable of being unjust harassment were matters such as being twice vexed in the same case, the causing of additional cost, the imposing additional stress on witnesses having to revisit the same matter more than once, and pointed out that none of those had been pleaded by the Respondent. I shall come back to that.

25. The third ground which she had was that she had given reasons for not bringing the claim earlier. What she had said in her written submission to the Tribunal was that she had deliberately decided not to proceed with her claim in respect of public interest disclosure detriment because (1) she felt obliged by her contract of employment to seek to resolve the

issues without resort to litigation if she could; (2) that she had raised grievances in respect of those matters and she hoped that they would be resolved satisfactorily to her and thus avoid the need for litigation; (3) at one period of time she was engaged in negotiations, open and without prejudice, with her employer and they, she hoped, would lead to a resolution which would allow her to continue at work, again without litigation; (4) at the time that she brought the first two claims, at any rate, she lacked firm evidence to support her conviction that she had been treated as she had because she had made a public interest disclosure. In part that was because there were accusations against her, which at that stage had neither been withdrawn nor resolved in her favour. She therefore thought that it might be taking too much of a risk to litigate in the light of those uncertainties at that time; (5) the matters involved were matters of complex fact and law. At that time, the time of her first claims, she lacked the resources to devote to pursuing those claims. These were both financial (in part) and (principally) personal because at that time, as I have recited, she was both suffering from illness, and concentrating upon dealing with internal disciplinaries and grievance procedures which were ongoing. Above all, she wished to retain her employment. She objected that of those reasons, with which she maintained the Tribunal should have dealt but did not, the Judge dealt only with one in the course of his findings of fact (paragraph 23), saying that her explanation was the same as she gave effectively throughout:

> **"… There was a process of grievance and grievance appeals ongoing and she wished to give the respondent an opportunity to remedy the problems, and to allow her to return to work free from harassment and victimisation, which at that stage that was all she required [sic]. She did not therefore want to bring a claim against the respondent in respect of these matters at that stage."**

26. The Judge thought that a difficult reason to maintain because the same time limit would apply to such claims as did to the claims for unlawful deduction which she did in fact begin. When dealing with his conclusions he did not revisit what he had said at that paragraph, nor did he deal with any of the other matters which she had raised, if only to reject them upon the facts

which he had heard and therefore he failed to do even that which he had promised himself (paragraph 19(c)) namely to establish what were the reasons for not bringing the claim at the time she did.

27. The next point she took was that the Judge, for similar reasons, put weight on the fact that she made a deliberate decision. In dealing with public interest, she argued that the Tribunal failed to take into account the public interest in attempting to avoid litigation by using an employer's grievance procedure. She objected that the Judge had made an error of law in failing to conclude that the fact that she told the Respondent that she might take legal action at the High Court should have been viewed positively as her putting all her cards on the table rather than the way in which the Tribunal Judge viewed it, as tending to show that she had been guilty of harassment. The cards on the table approach was demonstrated by the cases to which I have already referred, including **Stuart v Goldberg Linde** [2008] EWCA Civ 2. She argued that the Tribunal had failed to consider the practical considerations. Linked to this, in her submissions to the Tribunal, had been the argument that the Tribunal had simply failed to take into account the effect on the employer. Here, for instance, the Judge appeared to place weight in his consideration upon the fact that, if he did not strike out the claim, the Respondent might be faced with a case in which it would not be known until the very end whether allegations were capable of proceeding on time grounds or should be struck out. This ignored the fact that the evidence in respect of the struck-out allegations would be admissible in respect of the unfair dismissal, the case in respect of which continued. In much the same vein, she argued that the Tribunal had not taken into account the fact that by distinction with the earlier claims when she was in employment, the fifth claim was brought when she had lost it and therefore involved dismissal as a necessary aspect.

28. The Tribunal wrongly considered delay as a relevant factor. That it had done so, she submitted, was plain in the early part of the considerations, it occupying paragraphs 36 to 38. As to that she relied on **Stuart v Linde**. That case in the Court of Appeal raised for the first time, according to Lloyd LJ giving the lead Judgment, whether it was relevant in assessing whether there had been an abuse of process to consider the prospects of success or otherwise of the second claim or the promptness or otherwise with which the second claim had been brought. The conclusion to which the court came was that neither delay nor the merits (prospects of success) should be taken into account (see paragraphs 57 and 58). As to delay, he said, absent any defence under the Limitation Act:

> **"58. … the mere fact that the claimant has brought his second claim late, but in time, is not relevant to the question whether bringing the new claim in a second set of proceedings is an abuse of process. Of course, things may have happened during the period of delay which are relevant, but nothing of that kind is relied on in the present case."**

29. As to paragraph 65 he noted that the cases in respect of this form of abuse of process included many reminders that a party is not likely to be shut out from bringing before the court a genuine cause of action, a point now underwritten by Article 6 of the European Convention, upon which, as the next point, the Claimant relied.

30. It is unnecessary for this Judgment to consider other arguments which, with equal care and courtesy, she put before me. But essentially she argued that the Tribunal wrongly approached the question of whether the claim should have been brought earlier.

31. In response Mr Sendall argued that there was a public interest in the finality of litigation, that if the Claimant had been intending to bring another claim, the appropriate procedure was that indicated in the **Aldi Stores v WSP** case [2008] 1 WLR 748: in particular, at paragraphs 29

to 31 in the leading Judgment of Thomas LJ, as he then was. He submitted that this was a case to which the words of Sedley LJ in **Stuart** at paragraph 77 were applicable:

> **"… as *Aldi* again makes clear and as the Master of the Rolls stresses, a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process. Moreover, putting his cards on the table does not simply mean warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides."**

He rejected the contention that the Judge had failed to take into account relevant matters or had taken into account irrelevant matters and urged that, for the reasons given by the Judge, the appeal should be dismissed.

Conclusions

32. I cannot differ from the Tribunal Judge simply because I consider that I would judge the circumstances differently from him. There has to be an error of law. That said, the question of whether there has been an abuse is not a matter of discretionary decision. It has to be based properly on evidence and approached not only by recognising but by applying the right law. Reading the Tribunal Judgment as a whole, as I have to do, I have also to place it in context. The context is that the Claimant had started four other proceedings. There had never been any actual judicial determination. This was therefore the first case which might lead to a judicial determination. Secondly, the public interest disclosure assertions had been made available freely to the Respondent by way of the grievance procedure. They had not formed part of the material in any claim before. They could have done. There was an overlap between that claim and the claim in respect of unlawful deductions. But, insofar as the Judge thought that the two claims should be dealt with as if of equal weight and severity, in my view he was in error. They are very different in their nature, as I have already indicated. He did not remind himself, in dealing with the law or in dealing with the facts from paragraphs 35 to 38, that delay is *per*

Stuart not a relevant factor. The delay was deliberate. But it might very well be within the limitation period for which statute provides.

33. He took an approach to the reasons given by the Claimant about her pursuing a grievance procedure, which did not in my view recognise that the essential nature of the principle in **Johnson v Gore Wood** is that litigation should, if possible, be kept to the minimum. Harassment involves assessing in part the effect upon the party claiming to have been harassed. Where a Claimant seeks resolution of issues without recourse to litigation, then that, as it seems to me, is a proper reason which may justify not bringing a case at a time when it might otherwise be brought. The Judge did not credit the reason, nor did he say that it was not genuine. Although he might have had that in mind, in his comments about it he did not say so. Therefore this case is essentially, as presented, one in which the Claimant did not bring a claim when she might have done. That in itself answers the question whether she could have litigated earlier, but not the question whether she should have done so. Her reason, as found by the Tribunal Judge, was not expressly taken into account in his conclusions. It should have been. To that extent his conclusion was flawed.

34. If it had been, it would probably have been held to be a good reason, although much would depend upon what the Judge made of that as an evaluation of fact. The delay in her proceeding was of itself irrelevant. The consequence in terms of the effect of the hearing involving substantial evidence, and time was a feature which the Judge should have considered would occur in any event, because part of the context here was that the Claimant had an ongoing and has an ongoing claim of unfair dismissal, which will almost inevitably involve, either as part of the background, if it is not part of a formal allegation, the issues to which she gave vent in her ET1. It is possible that case management might limit the extent of that

evidence, but it is difficult to see how it could do that substantially. Accordingly there is no real basis for his conclusion for saying why the fact of her bringing a succession of claims, if not cherry picking, then adopting the phrase that Mr Sendall used "picking the low hanging fruit" in respect of unlawful deductions, amounted to harassment, particularly since those claims were, as it happens, conceded or in one case established. They did not go over old ground. When the Judge relied on the fact that she made a deliberate choice not to bring claims, it seemed to me that it is inevitable in finding that a party could have brought a claim, that the party had some knowledge that they could have brought a claim and therefore to an extent, in not doing so, they were making a deliberate choice.

35. The second point which the Judge took in [39] apart from that was that it appeared to him in any event to be an abuse, leave aside the question of harassment, for a party who has deliberately chosen not to bring her whole case forward, despite having had four earlier opportunities to do so, effectively to say that she had changed her mind and now wished to do so.

36. That may well be harassment if the circumstances are such that the Respondent and its employees had been led to believe by the behaviour of the Claimant that she would not advance those claims even though she could, if for instance they had been considered as part and parcel of earlier settlement discussions which had been resolved between the parties. There is no such finding here to support that conclusion.

37. Accordingly, bearing in mind the fact that to deprive a litigant of the chance to litigate a claim which may very well be a proper and respectable claim, and deprive her of what would otherwise be her rights under common law and Article 6, is not lightly to be taken. The burden

of proof lay on the defendant. The Judge was not entitled, for the reasons that he gave, to come to the conclusion that in this case the defendants had satisfied that burden. Accordingly this appeal will be allowed on those grounds.

Consequence

38. The consequence of this decision is not that I shall substitute my own decision. I have indicated that there are a number of matters which were not explored by the Judge which should have been. I am persuaded by Mr Sendall that the proper order is that the case should be remitted to the Tribunal for further consideration and argument if need be. Given the firm view which emerges from Judge Cadney's Decision and the factors to which Burton J makes reference in **Sinclair Roche Temperley v Heard & Anr** [2004] IRLR 763, in particular at paragraph 46 and having particular regard to 46.5, I have concluded that the remission should be to a fresh Tribunal. I think that is in these circumstances proportionate. On remission the Tribunal considering the question can take such evidence as it thinks appropriate -- it may very well wish to do so -- such as either party wishes to call before it and will consider fresh submissions, if the same application to strike out is made -- it is entirely a matter obviously for you, Mr Sendall -- made on the basis of that evidence and the case as it then appears.