Appeal No. UKEAT/0206/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 May 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MS I ODU-OBI APPELLANT

(1) INTERSERVE FM LTD
(2) MISS JUDY ROBINS RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR DAVID STEPHENSON (of Counsel) Instructed by: TMP Solicitors LLP 29th Floor One Canada Square London E14 5DY
For the Respondent	MS ELIZABETH CUNNINGHAM (of Counsel) Instructed by: BPE Solicitors LLP St James House St James Square Cheltenham Gloucestershire GL50 3PR

SUMMARY

PRACTICE AND PROCEDURE

Appellate jurisdiction/reasons/Burns-Barke

Estoppel or abuse of process

Admissibility of evidence

An Employment Judge ruled at a preliminary hearing that the Claimant could not criticise any past conduct of the Respondent prior to the date of entering into a COT3 agreement in respect of earlier proceedings. The Claimant complained that her resignation was caused by breaches related to the conduct of the Respondent before the relevant date, in that discrimination etc continued. The Respondent responded that the reason for its behaviour was the poor performance and illness of the Claimant, as to which it contended that the COT3 did not debar it from relying on events prior to the date the COT3 was signed, although maintaining that the Claimant could not rebut those contentions by making any criticism of the Respondent in respect of those events in order to explain why the Respondent's acts had not truly related to performance or illness. On the hearing of the appeal it was argued that since the Claimant could have appealed the EJ's interpretation of the COT3 agreement, she was estopped now from contending that at a third PHR the EJ was wrong to continue so to construe it.

Held. Estoppel should yield to fairness if and when appropriate, as it was here: the COT3 did not, as the judge thought, bar complaints about the behaviour of the employer, but rather barred claims arising specifically out of those complaints. The Claimant could not fairly be stopped raising relevant evidence, subject to careful case management orders.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. By a decision made on 22 April 2013, Employment Judge Hyde, sitting at London (South), ruled in a Pre-Hearing Review (in relation to a case due to be heard very soon) that whereas the Respondent could rely upon actions preceding a date in February 2011, the Claimant could not rely upon any matter before that date if to do so would be to criticise the Respondent. This apparently bizarre result, that the Respondent could answer the Claimant's claims by referring to matters it holds to the detriment of the Claimant, but the Claimant cannot explain in her response what she would complain of in respect of the Respondent, has a long history, some of which it is necessary to set out.

The facts

2. The Claimant was employed as an FM Co-ordinator by a facilities management company, the First Respondent. She is black African. Her line manager was the Second Respondent, Judy Robins.

3. She began work in 2007. Issues arose in March 2010. She complained that her employer had insisted that there be a move of her desk; that she was being heavily monitored and that she had, in May 2010, suffered racial abuse and harassment. She complained of that in May 2010 and issued a grievance on 18 May and subsequently an Employment Tribunal claim on 4 August 2010. The employer's response was to the effect that the comments which had been made were inappropriate, that the Second Respondent had not intended them as racist, nor had intended them to be aggressive and was very apologetic if they had inadvertently given offence.

4. The issues arising out of the allegations of racial discrimination and more from that passage of events was mediated. On 18 February 2011, the parties agreed orally that they

would compromise the claims. They entered into a Compromise Agreement. That agreement provided by clause 3:

> **"The Claimant agrees to accept the Settlement Monies in full and final settlement of the Claimant's Employment Tribunal claim number 2330686/2010 ("the Claim") and all and any other claims, howsoever arising, whether statutory, tortious or contractual which she has or may have against any and all of the Respondent's [...] officers or employees, whether arising out of the Claimant's contract of employment with the First Respondent or otherwise, at the time of signing this agreement including (without limitation) any claims for: (a)…."**

It then specified from letter (a) to (j) a number of specific claims.

5. There was no corresponding obligation which the Respondent entered into not to raise any complaint which it might have had in respect of the Claimant's conduct prior to the date of signing the agreement, but both parties made similar commitments in paragraphs 10 and 11 of the agreement confirming that each would not, and the Second and Third Respondent (the Third Respondent being another employee) confirmed that they too would not make, publish or issue or cause to be made, published or issued any derogatory or disparaging comments about the other party, and the First Respondent would not encourage, procure or condone the making of such comments by any of its officers or employees and would take reasonable efforts to prevent such comments being made.

6. The Claimant remained in work. The date of signing the agreement, and therefore the date by which the agreement itself provided it should be effective, was 9 March 2011. She raised a claim which was inspired by the way in which she said she had been treated after the Compromise Agreement until her dismissal, as she contended it to be, on 23 November 2011, when she resigned.

7. The specific matters which she claimed in her grounds of claim in the ET1 then issued included from paragraphs 1 to 19 allegations of matters which had happened before 9 March 2011. Paragraphs 20 and thereafter dealt with matters which had arisen since. The claim was for racial discrimination, disability discrimination and constructive dismissal. The racial discrimination consisted of victimisation for doing the protected acts of raising a grievance complaint in May 2010; bringing a Tribunal claim in August 2010 and submitting a grievance on 3 October 2011. Two of those acts pre-dated the 9 March 2011 date of the agreement.

8. The allegation of unfair constructive dismissal was vague and general, alleging a breach of the duty of trust and confidence and/or breach of duty of care by the Respondent under health and safety legislation and/or breach of the **Equality Act** relating to race and disability discrimination, with "full particulars set out above", thereby on one reading incorporating what had been put in paragraphs 1 to 19.

9. The response to that by the Respondent was to seek to strike out the claim. It did so because it contended that the effect of the Compromise Agreement was to compromise not only the claims which had historically had been raised but, in anticipation, to agree not to pursue any claim at any time, notwithstanding that the basis for it arose entirely after 9 March 2011. But as a fallback position, the Respondent (paragraph 8 of the original ET3) submitted that the Claimant was barred from referring to or relying on any events which took place or were alleged to have taken place on or before 9 March 2011. The basis for that was said to be *res judicata*/cause of estoppel, or rules 25(4) and 25A(3) of the regulations relating to Compromise Agreements, which provide that following the dismissal of the original claim, the Claimant might not bring a further claim against the Respondents for the same or substantially the same cause of action.

10. It further submitted (paragraph 14) that the Claimant's grievance of 18 May 2010 could not constitute a protected act for the purposes of the claim because it said it had been subject to the Compromise Agreement.

11. In the light of that stance there was a Pre-Hearing Review, held for the first time on 15 May 2012 before Judge Hyde. She construed the COT3 agreement in paragraph 7 of her reasons. Materially, she said this:

> **"[…] it appeared to me that it was intended that the Claimant was giving up her right to complain about the actions of the First Respondent or their staff and about any actions that had been taken in relation to her or any matters that she might want to complain about which had occurred up to the date on which the agreement was signed [...] It appeared to me that the way in which this agreement dealt with matters such as the constructive dismissal provisions under clause 3A and the specific reference to personal injury claims under clause 4 made it clear that to the extent that the parties were free in the future to complain about matters which post-dated the agreement, they could not place any reliance on events which had occurred up to the date of the agreement. That was also the intention in respect of the preceding paragraph of the agreement."**

12. She went on to hold that the Respondent's case that the agreement had compromised all claims whenever arising, whether before or after 9 March 2011, was to be rejected; that further, in principle there could be no objection to the Claimant relying on protected acts having been done. The fact that they had been done was a matter of fact about which she had raised no complaint. Accordingly, it was not proscribed by the terms of the agreement. She, however, directed that there should be amended grounds of claim lodged which eliminated the paragraphs from 1 to 19.

13. Paragraphs 17 to 19, however, remained in the draft submitted by the Claimant, despite the other paragraphs being deleted. They related to the settlement (agreed on 18 February 2011) and matters which had happened on 6 March 2011 relating to the Claimant's health: the Claimant maintains in her action that she is disabled because she suffers from

regular and disabling migraines that require reasonable adjustments in the physical environment in which she has to work and that these can, on occasions and under stress, cause her to be absent.

14. The Respondent complained that there had not been compliance with the order and the consequence was a second Pre-Hearing Review held on 18 December 2012, again before Employment Judge Hyde. In her directions she gave reasons. Paragraph 4 of those reasons read as follows:

> **"The Claimant was estopped from raising matters from the original claim in support of her public interest disclosure claim in the current case. The earlier Pre-Hearing Review Judgment had made findings or conclusions about the matters that could be relied on. The original claim was dismissed. The Claimant could not reopen those matters in the current proceedings as a way of criticising the Respondents or as evidence of explanation as to why the Respondents were hostile to the Claimant. [...]"**

15. It excluded two matters in relation to public interest disclosure, saying:

> **"[…] it would be impossible for the Claimant to demonstrate that they were protected qualifying disclosures without going into the estopped material. The Tribunal considered that there was a considerable risk of re-opening matters in respect of which the Claimant had accepted as settlement…"**

16. In paragraph 5 she noted:

> **"[…] The gist of the previous Judgment was that the Claimant was estopped from relying in support of her current claims on matters, which pre-dated the COT3 settlement."**

17. In paragraph 6 she noted an agreement that the reference to the date on which the COT3 settlement was reached should have been 18 February 2011 in the reasons given for the previous PHR Judgment, and should not have been the date on which the COT3 was signed. This is slightly surprising, since the COT3 itself provides for its enforceability to run from the latter and not the former date, but the parties appear to have agreed it.

18. After that, it might have appeared that matters were proceeding to a hearing in May this year. The reasons for the PHR decision were sent to the parties on 8 February 2013. The Claimant had, prior to the receipt of those reasons, substituted grounds of claim dated 17 January. The Respondent, on 8 February 2013, issued amended grounds of resistance. Those amended grounds of resistance mentioned at paragraph 6 that, from 2007 onwards, the manager of the FMC Department had raised a number of performance issues about the Claimant's work. It set out two particular examples, running from August 2007 to May 2008, and issues of alleged poor communication towards others in May 2008 and August that year. The following paragraphs from 7 through to paragraph 20 all raised matters in response to the claim, many of which related to poor performance, as alleged, occurring before 9 March 2011 and, up to paragraph 19, prior to the date of 18 February 2011. Thereafter, at paragraphs 21 and following, the Respondent sought to deal with the Claimant's ill-health.

19. In summary, it was saying that the Claimant had underperformed so as to give doubts as to her capability in the job and that she had been sick so often that the illness was another reason to doubt whether she should continue in employment. They had been the reasons, it suggested, that she had been subject to the meetings and events occurring after 18 February 2011 about which she centrally complained in her current claim.

20. The fact that the Respondent would take this course was appreciated by the Claimant's solicitors before 8 February. Ms McGuigan emailed the Respondent's solicitors on 28 February 2013 saying, amongst other things that, "From the moment you disclosed the Respondent's documents…" (that was, I am told, in October 2012) and raising objections to the Respondent about the contents of the pre-estoppel documents commenting:

> **"[…] Even though the Respondents had not filed a fully particularised Grounds of Resistance, I could envisage what the Respondents' case was likely to be based on the disclosure. Effectively, I knew where you were heading and I tried to object before you got there. On your advice the Respondents filed an Amended Grounds of Resistance on 8 February 2013. I contend that this defence is misconceived and is leading and will lead to significant legal problems in this case."**

21. On 27 February 2013, Ms McGuigan also emailed Ms Lee to make complaints about the nature of the decisions which Judge Hyde had made at the PHRs. She said in the second paragraph:

> **"You will be aware that at the PHR on 18 December I raised concerns that the Respondent had disclosed documents that pre-dated the estoppel date. I told EJ Hyde that the Claimant would be entitled to rebut this evidence. I agree that EJ Hyde said that the Respondents could rely upon events pre-dating the estoppel date to support its defence. With respect to EJ Hyde I do not think this was a sound decision. It is my view that if the Respondent is going to adduce evidence pre-dating the estoppel date of 18 February 2011 then the Claimant is entitled to rebut that evidence either in a witness statement, orally at the Tribunal, or by disclosing counter documents [...]"**

22. She noted that another PHR would take the case into the "higher realms of unreasonable", as she put it, and:

> **"[…] Therefore, I am not going to be writing to the Tribunal about this issue, as you suggest. I am proposing to raise it with the Tribunal on the first day of the hearing. […]"**

23. Sadly, that letter demonstrated an inability to accept the reasons given by Judge Hyde and her decision, or alternatively recognised that she could have appealed the decision, had she been minded to do so.

24. The pleadings were further clarified by a re-substituted grounds of claim on 26 April 2013 and re-amended grounds of resistance on 2 May 2013. Both of those, however, were subsequent to the ventilation of the issues which had arisen between the parties as to the way in which the Claimant could or could not rely upon criticisms of the Respondent in meeting the positive case put forward by the Respondent for the reason for her treatment,

which, if accepted, would leave no room (reasonably viewed) for her allegations that the true reason was discrimination on the grounds of race or disability.

25. The matter thus was raised finally by a letter of 1 March, despite what had earlier been said by Ms McGuigan, requesting an urgent telephone CMD hearing. She set out what Judge Hyde had clearly said in paragraphs 7, 10 and 11 from her PHR reasons of May 2012. It referred to the amended grounds of resistance filed on 8 February 2013 and contended that the Respondents were impermissibly attempting to re-open what were described as estopped matters as a way of unjustly criticising the Claimant or unjustly undermining her case. It asked that those paragraphs be struck out, or if allowed to stand, that the Claimant should be allowed to bring contrary evidence to rebut them. It is plain that, in saying so, she was expressing recognition that as matters stood, Judge Hyde had ruled that the Claimant could not bring such evidence. The issue she was raising was whether the Respondent could raise matters detrimental to the Claimant which had arisen prior to 18 February 2011.

26. It was on the basis of that letter that the Respondents wrote a letter of 15 March in reply. In summary, that letter indicated that the Judge had confirmed in the first and second Judgments in the PHR that the Claimant could not criticise the Respondents for anything done prior to the estoppel date, but that the Respondents could bring those matters in as evidence.

27. When the matter came before Judge Hyde, she again gave it full and careful consideration. No revised Judgment is available from her; the reasons have not yet been provided. However, there is a joint note of the Judgment agreed between counsel, which contains the essence of what was said, which I am assured by counsel is reasonably accurate for present purposes. Given that the hearing was due to take place on Monday, when I saw the Notice of Appeal earlier this week, I ordered the matter into Court for a swift *inter partes*

hearing. The parties are to be complimented upon being able to put before me skeleton arguments, though not required to do so, presenting me with authorities and arguments of detail, subtlety and no little skill.

28. What the Judge said is summed up in paragraph 6 of a six-paragraph note:

> **"The Claimant cannot criticise the Respondent actions. The same does not apply to the Respondents."**

29. That is plainly referring to actions prior to 18 February 2011. That is what she had decided. This is clear from paragraph 2, where she said she had looked at the effect of the settlement Judgment and whether the Claimant was estopped from events prior to that agreement, saying:

> **"2. […] The Claimant cannot criticise the Respondent in that timeframe.**
>
> **3. The Claimant said that the Respondent was barred from relying on events in the same timeframe.**
>
> **4. I emphasise that I started with an open mind. Initially I thought I may have gone too far in my previous judgments. I said that the parties should feel free to argue those matters to vary the order. I have read the issues in more detail. I agree with the Respondent's submission/position. The Claimant has misunderstood the effect or has failed to reconcile herself to it. The Respondent's letter of 15 March is the basis on which I reject the Claimant's submission on estoppel/application [...]**
>
> **5. I agree with Miss Cunningham's succinct statement that the Respondent has merely given lawful explanations to the claims made. In the current complaint it is inevitable that the Respondent will need to respond by reference to some of the background [...] The Tribunal cannot specify in minute detail what evidence will be admissible. I am grateful to Ms Lee for extracting the two principles in her letter of 15 March."**

30. The two principles are these, as set out in that letter:

> **"1. The Respondents are permitted to rely upon events pre-dating the COT3 to support their defence (which was agreed by TMP in their email dated 27 February at page 66 of the Bundle); and**
>
> **2. The Claimant cannot criticise the Respondents in relation to any actions or events prior to the COT3, as she settled her complaints in respect of the same by accepting payment under a COT3, and the Tribunals then dismissed these complaints."**

The Appellant's case

31. The Claimant appeals against that decision. This gives rise to two linked issues. One is whether the Judge was correct in law to interpret the COT3 as she did. Her interpretation has the effect that the parties had agreed that the Claimant could not criticise the Respondent for any actions which it had taken prior to 18 February 2011. However, if she were wrong in the view she took, the second issue arises, whether this Tribunal could now interfere. Since the decision was made at a PHR on 15 May 2012, it could have been appealed. It was not appealed. It is now too late. There has to be finality in litigation, all the more so where serious allegations are raised against Respondents and they might legitimately think, by reference to time limits, that they are free of those aspersions.

32. I shall take the grounds as they are put to me. In summary, there are five grounds of appeal. In essence, they all make the same point: it is unfair of the Judge to make an order which effectively requires the Claimant to litigate with, as it was put in argument, one hand tied behind her back; there was an imbalance between the Respondent, who could refer to matters prior to 18 February 2011, and the Claimant, who could not, except where matters were uncontroversial and were uncritical of the Respondent; the ruling might give rise to significant problems at trial, and could affect a number of evidential matters.

33. It is not, in my view, unfair to summarise what is essentially one ground of appeal masquerading as five to say the Claimant is complaining about the unfairness of not being permitted to rely upon relevant evidence at a forthcoming trial. The question whether she is barred must initially depend upon what she agreed. If in a Compromise Agreement a party agreed to be barred from making any criticism of an employer subsequently, or in relation to particular periods of time or particular events, then provided that is what the agreement on a fair

reading of it means, that party cannot complain that they will subsequently be barred from resiling from it.

34. What did the agreement say and was the Judge right in her interpretation? At the moment, I deal with this *de bene esse,* not having yet resolved the question whether I am entitled to consider the question, given the opportunity to appeal in between. The relevant parts of the agreement I have already quoted, save for paragraph 3(a), to which the Judge made reference in her PHR ruling, that is that one of the claims which was barred was constructive dismissal:

> **"[...] arising from a fundamental breach of contract and/or trust and confidence which has or may have occurred up to the date of this agreement; […]"**

35. An agreement which prevents a party from litigating matters which otherwise could be taken to Court must be construed narrowly. It should not be assumed that any party will willingly give away what is a fundamental right. Thus one asks what it is that the Claimant here has agreed not to do. The answer, as it seems to me, is that she has debarred herself from making any claim in respect of any event of a statutory, tortious or contractual nature which had arisen in her employment up until the signing of the agreement.

36. The reference to constructive dismissal shows that it may include matters of fact which have contractual consequences in making a claim, but it is the claim which is barred. Part of the difficulty that has arisen has been the interchangeable use of the words "claim", "complaint" and "criticism". There is nothing in the agreement which, on the face of it, prevents the Claimant from criticising the Respondent, although clauses 10 and 11 agree not to make derogatory or disparaging comments. Those are, in the context of this agreement, to be

seen as akin to defamatory, libelous, slanderous comments, and Ms Cunningham in the course of her excellent submissions appeared to acknowledge and adopt that construction.

37. I could not, for myself, think it would be right to construe this agreement as preventing reliance upon past facts. It cannot change history. The purpose was to prevent a claim, and it is improbable that the parties intended that the agreement was meant to prevent either party, should appropriate occasion arise in the future, from saying as they really thought namely, that a particular act was motivated by race or had the effect of being discriminatory. It follows I do not accept the construction to which the Judge came. The result of her construction is only too clear in the events of the present case. It would mean the Claimant could not rely upon past events in support of a present claim or to rebut a present response however justified her reliance might otherwise be.

38. It might be necessary for a fair resolution of claims for discrimination to have regard to events which had happened before 9 March 2011: it is difficult to understand a scene in the third act of a play without having watched the play up until that time. The point was well-made in the Court of Appeal by Sedley LJ in **Anya v University of Oxford** [2001] EWCA Civ 405. Exactly that same point is demonstrated by the Respondent here, seeking to put in context its actions, hostile in one sense to the Claimant, in seeking to take capability proceedings against her and illness proceedings between March 2011 and November 2011, when she resigned. Without contextualisation, it might be difficult to understand the justice of that approach, if it was just. That would have answered the appeal, had one been brought against the decision of 15 May 2012. It was not.

39. When I gave permission for this case to be argued, I noted that neither party had argued that the Claimant was precluded from arguing about the proper interpretation of the COT3

agreement merely because she could have appealed the earlier decision by Judge Hyde. That was slightly unfair to the Respondent, because they had not by then seen the appeal so as to be able to respond to it and they duly took the point. The way in which Mr Stephenson, who appears to represent the Claimant, seeks to answer it, is to construct an artificial hypothesis, which supposes that the Judge was exercising a power of review under rule 34 of the Employment Tribunal Rules without saying that was what she was doing, without being asked to do that and without recognising whether any of the grounds for review were actually met and setting them out.

40. Moreover, he cast the matter in the light of the Claimant having just realised, because of the nature of the amended grounds of resistance, that the Respondent would indeed be looking to rely upon matters prior to 9 March 2011 to contextualise its actions between March and November. That also is unsatisfactory, since, as long ago as last October, the Claimant's solicitor was well aware that that was what the Respondents were about to do, as I have already recited.

41. I therefore do not accept that the Judge set out formally to review her earlier decision. But that is not an end to the story. The Judge plainly had a power to take a fresh decision on any matter which might affect the forthcoming trial. This was an interlocutory hearing. It is ancillary to a trial. It is designed to ensure that the trial does justice between the parties. In that light, judges are free to depart from previous rulings if there is a good reason to do so. The Judge here, at paragraph 4, recorded that she had said the parties should feel free to argue that she had gone too far in previous judgments so as to vary the order. In other words, she is recording that she invited argument and was in fact reconsidering her decision. Therefore, her decision was not simply a reiteration of a matter she had previously decided. It was a fresh consideration of the same point.

42. For that reason, I consider that an appeal against that decision may properly bring into argument whether the Judge had been right to construe the settlement agreement as she did. That is not the only reason I have, however, for coming to the view that although the Claimant could have appealed the matter and did not do so, I should not decline to hear argument here on that basis.

43. Further and separately, I must bear in mind that the essential principle which underpins the argument that a Claimant should not be allowed to litigate a decision which they could have appealed in time is the finality of litigation. This is an important principle, as was said in **House of Spring Gardens Limited v Waite** [1991] 1 QB 241, as quoted by Lord Bingham of Cornhill in **Johnson v Gore Wood & Co** [2002] 2 AC 1 at 25C:

> **"Public policy requires that there should be an end of litigation and that a litigant should not be vexed more than once in the same cause."**

But he quickly went on to note that although that was the principle which underlay estoppel - cause of action estoppel on the **Henderson v Henderson** [1843] 3 Hare 100 basis was an issue in **Johnson** - an object of it was to achieve justice. He quoted from **Arnold v National Westminster Bank Plc** [1991] 2 AC 93 (see Johnson at 25F to G):

> **"One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result [...]"**

and Lord Upjohn in **Carl Zeiss Stiftung v Rayner** & **Keeler Limited** (No 2) [1967] 1 AC 853 at 947 had said:

> **"All estoppels [...] must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."**

44. Specifically turning to the question of **Henderson v Henderson** estoppel, as it might be called, Lord Bingham said (31 C-F):

> **"It is, however, 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. That is to adopt too dogmatic an approach to what should in my opinion, be a broad, merits-based judgment which takes account the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question of 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."**

He went on to note at the end of the paragraph that:

> **"[…] Properly applied, and whatever the legitimacy to its descent, the rule has in my view a valuable part to play in protecting the interests of justice."**

45. There are similar expressions of view, to which I was taken to by Mr Stephenson in the course of his argument, in the speech of Lord Millett (see in particular 59 C-F). I draw from that the essential principle to bear in mind is whether a fair trial can take place. It is the fairness of the proceedings in which the estoppel is said to act as a bar which must be borne in mind and to which ancillary rules, important though they are as to the finality of justice, must play a proper part. Here the decision made at the PHRs was with a view to a hearing of the real issues in dispute between the parties. Here there was no final decision of a court, as to which different considerations might apply. Here the effect of the ruling would be to rule out what would otherwise be admissible evidence. The rule, which serves its proper purpose in that parties should not be allowed to litigate matters which have been decided conclusively between them, should yield to the importance of doing proper and full justice in a case before the Court or Tribunal where they have not, when otherwise they might impede fairness.

46. With those matters in mind therefore, I am pleased to reach the interpretation which I have done of the Judge's words, tersely recorded though they are.

The Respondent's case

47. I should say more than I already have about the argument (excellent, as I have said) produced by the Respondent. Essentially, it argued the difficulties which on a practical level the Respondent currently has in knowing precisely what evidence the Claimant would wish to adduce about which it has not been informed. It is obvious that the Respondent does not wish to be taken by ambush by evidence from some time ago without being in a position to meet that evidence. I would add that there is plainly a danger in permitting a Claimant to give evidence about previous events, that such permission may wrongly be seen to give licence for rhetoric and assertion and move away from fact, which is the legitimate focus of evidence. A Tribunal must inevitably be on its guard against that, particularly if the issues are of relatively peripheral importance, though certainly not of no importance.

48. She argued that the Claimant was properly bound by the earlier views which Judge Hyde had expressed. She met each of the five grounds advanced upon the terms on which it had been put. The overall justice, she pointed out, was that the Claimant had accepted a sum in settlement, having raised complaints; that those who enter COT3 agreements should not too readily be permitted to revisit matters of fact which it might be thought had been settled by those agreements, for otherwise a COT3 agreement has diminishing force. It is important that employers and employees should be willing to enter into such an agreement and the incentive for the employer is to be free of allegation. If a Claimant can revisit evidential matters which form the basis of an earlier complaint, there is a risk that that system will be prejudiced.

Conclusion

49. I take those points into account. The proper resolution of them, as it seems to me, is this: (1) the Claimant is not entitled to make any claim for compensation or relief arising out of or relying upon any matter which she might have complained of prior to 9 March 2011; (2) she is entitled only to rely upon matters which formed the territory of the earlier complaints as broad context to any current claim, if that is necessary and proportionate to do so. I would expect case management to rigorously ensure that those guidelines are not overstepped; (3) if the Respondent says, as it does here, that the real reason for its behaviour toward the Claimant was her performance and her illness, then it is open to the Claimant to cross-examine or to call evidence that it was not. If she were unable to do so, she might be unable to present her case, but again, it must be kept within bounds, because the trial about to take place is not a trial of the claims which have been compromised, it is a trial of the claims made in the current re-substituted grounds of complaint and nothing else.

50. The effect of what I have said is that the hearing may take a little longer (but I would not expect much longer) before the ET. The ET may wish to consider at a Case Management Discussion whether the Claimant has given proper notice of the points she wishes to make in answer to the Respondent. It seems to me that the Respondent has a legitimate cause for concern in not knowing how wide-ranging the Claimant's response might be. I do not rule out the Tribunal making orders which preclude the Claimant from producing such evidence unless she has given proper notice of it by some form, whether it be witness statement served in reasonable time or by some other appropriate means.

51. I make those general points, not giving directions myself, but indicating to those who will give directions in the Tribunal how they might wish to approach what is a real problem, ensuring on the one hand, as the result of this appeal does, that the Claimant will suffer no sense

of injustice in being at all precluded from raising relevant (and I emphasise that word) matters in support or defence of her case, whilst ensuring that the Respondent has a sufficient knowledge of what will be said by the Claimant also for its part to meet it. In that way, evenhanded justice is ensured.

52. The appeal is allowed.