Appeal No. UKEATS/0016/20/SH (V)

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 18 March 2021
Judgment handed down on
26 March 2021

Before

THE HONOURABLE LORD FAIRLEY

(SITTING ALONE)

MR G IMRIE — APPELLANT

RIGHT TRACK SCOTLAND LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR G CUNNINGHAM, (of Counsel) Instructed by: Livingstone Brown, Solicitors, 775 Shettleston Road, Glasgow G32 7NN.
For the Respondent	MR W LANE, (Solicitor) Peninsula Business Services Ltd., Legal Services Department, Victoria Place, Manchester M4 4FB.

SUMMARY

TOPIC NUMBER(S):

30 – JURISDICTION; *Res judicata.*

8 – PRACTICE AND PROCEDURE; Delay.

The Employment Judge dismissed claims for unfair dismissal, disability discrimination and protected disclosure detriment on the basis of *res judicata* in circumstances where a personal injury action between the same parties had been pursued in parallel in the Court of Session and had settled on terms which resulted in with decree of absolvitor being pronounced pursuant to a Joint Minute.

Held: The Employment Judge had erred. The subject matter and *media concludendi* of the two actions were not the same. The Judgment of the Employment Tribunal was quashed and the case remitted to the Employment Tribunal for the claims to be determined at a merits hearing.

Observed: It was unacceptable that claims first presented to an Employment Tribunal in September 2014 had never reached the stage of a merits hearing five years later in September 2019. In terms of the overriding objective, the final responsibility for avoiding delay rests with the Employment Tribunal itself.

A **THE HONOURABLE LORD FAIRLEY**

Introduction

B 1. This is an appeal by Gerald Imrie ("the Appellant") against a Judgment of Employment Judge Rory McPherson (sitting alone) dated 10 December 2019. The Respondent to the appeal is Right Track Scotland Limited ("the Respondent"). The appeal was heard at a sitting of the Employment Appeal Tribunal in Edinburgh on 18 March 2021. Due to Covid restrictions, the C hearing was conducted by video conference. The Appellant was represented by Mr Greg Cunningham, Advocate. The Respondent was represented by Mr William Lane, Solicitor.

Procedural History

D 2. On 8 September 2014, the Appellant presented a Claim Form (ET1) in which he made various claims against the Respondent, all of which were within the exclusive jurisdiction of the Employment Tribunal. In summary, he brought claims alleging unfair dismissal, and detriment E for making a protected disclosure in terms of the **Employment Rights Act, 1996** ("**EA**") and for disability discrimination in terms of the **Equality Act, 2010** ("**EA**"). In addition, he brought a claim for holiday pay.

F 3. The claims were resisted by the Respondent. After sundry case management procedure, parties were notified in July 2015 of dates in late November 2015 for a five day full Hearing on the merits of all of the claims.

G 4. On 5 October 2015, the Appellant raised separate proceedings against the Respondent in the Court of Session. In those proceedings, he sought damages for personal injuries said to have been caused by the negligence of the Respondent at common law and through breach by the H Respondent of its duties under the **Protection from Harassment Act, 1997**.

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5. On 6 November 2015, the Appellant's Agents wrote to the Tribunal requesting that the Tribunal Hearing which was due to commence on 27 November 2015 be discharged and the claims before the Employment Tribunal sisted to await the outcome of the proceedings in the Court of Session. That request was acceded to by an Employment Judge, the Tribunal Hearing was discharged, and all of the claims before the Tribunal were sisted.

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6. The action in the Court of Session was defended. It was ultimately settled extra-judicially, and was disposed of by a Joint Minute to which authority was interponed on 24 October 2017. In terms of the Joint Minute, the Respondent was assoilzied from the conclusions of the Summons and no expenses were found due to or by either party.

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7. Thereafter, in the early part of 2018, the sist of the claims before Employment Tribunal was recalled, and correspondence thereafter passed between the Tribunal and the parties about arrangements for further procedure. That correspondence became protracted. In part that was due to the fact the Appellant parted company with his legal representatives in May 2018. Eventually, new representatives were instructed, and a Preliminary Hearing finally took place on 4 December 2018. At that Hearing, the Appellant's new representatives were instructed to intimate within 21 days which of the claims were still insisted upon. The Respondent was also directed to provide submissions on further procedure.

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8. On 18 January 2019, the Appellant's representatives confirmed that he continued to insist upon the following claims:

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a) Constructive unfair dismissal – section 94 **ERA**

b) Disability Discrimination – sections 20 and 21 **EA**

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c) Disability Discrimination – section 15 **EA**

d) Protected Disclosure Detriment – section 47B **ERA**; and

e) Automatically Unfair Dismissal – section 103A **ERA**.

The claims of direct discrimination (section 13 **EA**) and for holiday pay were not insisted upon.

9. In June of 2019, the Appellant was permitted to amend his case to add an additional complaint of detriment arising from the making of a protected disclosure (sections 43A and 43B **ERA**) and a claim of indirect discrimination (section 19 **EA**), under reservation of issues of time bar.

10. At a Preliminary Hearing on 12 June 2019, the Respondent sought to raise as a preliminary issue the question of whether

"…the whole or part of these proceedings may be *res judicata*"

11. In addition, the Respondent made an application for strike-out in terms of Rule 37 of the Employment Tribunal Rules. A Preliminary Hearing was fixed for 27 September 2019 to consider these two issues. Ultimately, however, the Respondent did not insist upon the strike-out application. The *res judicata* point was insisted upon and was argued.

12. At the Preliminary Hearing on 27 September 2019, the Respondent relied upon **Smith v. Sabre Insurance** 2013 SC 569 and **British Airways v. Boyce** 2001 SC 510 to argue that as the Court of Session action had been disposed of by a decree of absolvitor, its plea of *res judicata* should be sustained. Its primary position was that all of the claims before the Employment Tribunal should be dismissed. As a secondary position, it maintained that, at the very least, the disability discrimination claims should be dismissed on the basis that they were as "statutory delicts". Reference was also apparently made by the Respondent to the non-employment

jurisdiction of the Sheriff Court under section 119(3) of the **EA** in relation to matters falling within section 114 (services and public functions, premises, education, and associations). Finally, it was submitted that if the Appellant had wished to retain the right to pursue his claims before the Employment Tribunal, the Court of Session should have been disposed of by dismissal rather than absolvitor.

13. In reply, the Appellant submitted to the Employment Judge that the grounds of action and *media concludendi* of the two sets of proceedings were different. The Court of Session action was one of personal injury based on the common law and the **Protection from Harassment Act, 1997**. By contrast, the claims before the Employment Tribunal were claims under the **ERA** and the **EA** which could only be raised before the Employment Tribunal. In these circumstances, it was submitted that the plea of *res judicata* should not be sustained either in whole or in part.

14. Having heard both sets of submissions and considered the terms of the written pleadings in the Court of Session action the Employment Judge, in a reserved Judgment issued on 10 December 2019, dismissed the following claims on the basis of *res judicata*:

a) Unfair Dismissal – section 94 **ERA**, under exception of the claim for a basic award and for compensation in respect of the loss of statutory rights;

b) Disability Discrimination – sections 20 and 21 **EA**;

c) Disability Discrimination – section 15 **EA**;

d) Disability Discrimination – section 19 **EA**;

e) Protected Disclosure Detriment – section 47B **ERA**, under exception for his claim for a declaration under section 49; and

f) Unfair Dismissal – section 103A **ERA**, under exception of the claim for a basic award and for compensation in respect of the loss of statutory rights

Submissions

15. Mr Cunningham invited me to allow the appeal. He submitted that the Employment Judge had erred in concluding the subject matter and *media concludendi* of the two actions were to any extent the same. That was apparent from the particular rights founded upon in each, and from the exclusivity of jurisdiction of the Employment Tribunal over the claims of unfair dismissal (section 111 **ERA**), protected disclosure detriment (section 48 **ERA**) and disability discrimination in employment (section 120 **EA**). He submitted that the Employment Judge had erred in his application of the test of "what was litigated and what was decided?" He relied upon **Clink v. Speyside Distillery** 1995 SLT 1344 as the clearest statement of the law on the issue of *res judicata* as between the Employment Tribunal and the Court of Session. He submitted that the Employment Judge had erred in concluding that the Court of Session action had determined the issue of disability status or, indeed, any aspect of the discrimination claims.

16. Under reference to **Grahame v. Secretary of State for Scotland** 1951 SC 368, **Smith v. Sabre Insurance** and **RG v. Glasgow City Council and SA** 2020 SC 1, Mr Lane submitted that by looking at the "essence and reality" of the respective claims, the Tribunal had correctly applied the principles of *res judicata*. He submitted that the broad factual matrix of the two cases was the same in that both cases concerned a disciplinary and grievance procedure within an employment context. There was also significant overlap between the two actions in relation to the remedies sought. He submitted that the Tribunal had been correct to consider the "broad nature of the alleged wrongdoing" founded upon in the Court of Session action without focussing too closely upon the legal characterisation or "badge" applied to that conduct. Mr Lane did not go so far as to suggest that **Clink** had been wrongly decided, but urged me to look at the substance

rather than the technical form of the two actions and to conclude that the Employment Judge had been correct to sustain the plea of *res judicata* to the extent that he did.

Decision and reasons

17. A plea of *res judicata* is a plea to the merits of the action. It should be sustained only where five cumulative conditions are all met. These are that there must have been (i) a prior judicial decree of a competent court / tribunal; (ii) pronounced in in contested proceedings; (iii) between the same parties; (iv) relative to the same subject matter; (v) on the same grounds (or *media concludendi*) (**Esso Petroleum Co. v. Law** 1956 SC 33; **Margrie Holdings Ltd v. City of Edinburgh Council** 1994 SC 2). In **Clink**, for example, it was held that the subject matter of a claim for damages for breach of contract consisting of a failure to give proper notice of dismissal was not the same as a claim to the Employment Tribunal in respect of unfair dismissal. The factual background to both actions was the same dismissal, but the issues in the two actions were different. Collectively, the five elements of *res judicata* have often been summarised in the short question: "what was litigated and what was decided?" (see **Grahame v. Secretary of State for Scotland** 1951 SC 368 at page 387).

18. There is no suggestion that points (i), (ii) and (iii) are not satisfied in the present case. In his analysis of points (iv) and (v), however, the Employment Judge erred in law. In particular, in considering issues (iv) and (v), the Employment Judge appears to have focused almost entirely – and erroneously – upon the issue of the remedies which might be available in each of the two cases. As a result, he failed properly and fully to analyse the issues of subject matter and *media concludendi* of the respective actions.

19. The pleadings in the Court of Session action are in the abbreviated form applicable to actions for personal injury brought in terms of Chapter 43 of the Rules of the Court of Session, 1994 (as amended). Consequently, they contain no pleas-in-law. Of itself, however, the use of

A Chapter 43 procedure should have been a strong indicator of the subject matter of the Court of Session action. It was an action for reparation for personal injuries said to have been suffered by the Appellant by reason of the negligence of the Respondent at common law and for breach of its statutory duties under the **Protection from Harassment Act, 1997**. Specifically, the Appellant claimed that, by reason of a failure on the part of the Respondent to take reasonable care for his safety, and by its breach of statutory duty, he developed an illness. He averred that as a result of the combined effect of the alleged common law and statutory breaches, he had suffered loss, injury and damage for which he sought financial redress in the form *solatium*, past and future wage loss, compensation for loss of employability. The subject matter of the Court of Session action was, accordingly, a claim for reparation for personal injuries. The issue in the action was whether or not, as a result of their negligence at common law and breach of statutory duty, the defender (the Respondent) had caused the pursuer (the Appellant) loss injury and damage.

20. The claims to the Employment Tribunal and the issues raised by them were wholly different. They related to whether or not the Appellant had been unfairly dismissed, subjected to detriment or discriminated against in a way that contravened either the **ERA** or the **EA** such as to give rise to the remedies available in terms of those acts. These are all matters in relation to which Employment Tribunals exercise exclusive jurisdiction. There was no overlap whatsoever between these issues and the issues which arose in the Court of Session action.

21. On no possible view of matters were the subject matter or the *media concludendi* of the two actions the same. The submissions made by the Appellant to the Employment Judge in that regard and by Mr Cunningham in this appeal were entirely correct.

22. As I have already noted, in considering the issues which arose in the Employment Tribunal claims, the Employment Judge focussed almost entirely on the issue of remedies

(Reasons at paragraphs 105-126). In **RG v. Glasgow City Council and SA** 2020 SC 1, the Lord President (Carloway) delivering the Opinion of the Court stated (at paragraph [27]):

> **"…in relation to the *media concludendi*, excessive concentration on the precise nature of the remedies sought in each action should be avoided in favour of a simple inquiry into 'What was litigated and what was decided?'"**

23. As **RG** makes clear, an overlap of possible remedies or heads of loss does not of itself lead to a conclusion that the subject matter and *media concludendi* of the actions are the same. Similarly, an overlap of what Mr Lane described as the "factual matrix" does not lead to that conclusion. In **Clink** the broad factual matrix was that the employee had been dismissed by her employer without notice. As Lord Cullen correctly noted, her claim for breach of contract in the Court of Session was quite different from her claim that she had been unfairly dismissed. That approach is entirely consistent with the case of **Grahame** and also with what was said in **RG**.

24. The circumstances of **British Airways v. Boyce** were entirely different from those in this case. **Boyce** concerned two sets of proceedings brought sequentially in the Employment Tribunal each of which relied on exactly the same facts and also the same subject matter jurisdiction of the Tribunal over claims based on discrimination on grounds of race in the context of employment. Unsurprisingly the Court held that the subject matter of both claims was the same. **Boyce** was not concerned with the situation with which this appeal is concerned, namely the exercise by two different courts of claims brought on wholly different legal bases in respect of which neither could competently trespass on the subject matter jurisdiction of the other. Had any attempt been made to bring claims in the Court of Session or the Sheriff Court for unfair dismissal, disability discrimination in the context of employment or protected disclosure detriment, such claims would inevitably and correctly have been dismissed as incompetent due to an absence of jurisdiction over their subject matter. Similarly, an attempt to raise a claim in the Employment Tribunal for

personal injury caused by negligence would have been dismissed by the Tribunal for want of jurisdiction.

25. The significance of any overlap between the heads of loss claimed in the two actions with which this appeal is concerned is simply that the Appellant cannot not recover the same loss twice. Thus, if payment was made to him as part of the settlement of the Court of Session action which was calculated by reference to loss of wages in respect of a period of time, that amount would fall to be deducted from any award which the Tribunal might make in respect of wage loss for the same period. That, however, is an issue that would fall to be considered only once the Tribunal had decided upon the merits of the claims properly made to it in terms of its exclusive jurisdictions over the matters before it.

26. The Employment Judge also appears to have concluded that:

> **"..the issue of Mr Imrie's qualification as a disabled person has been resolved by decree of Absolvitor**

His reason for coming to that conclusion seems to have been that mention was made of the issue of disability status within the pleadings in the Court of Session Action. The Employment Judge failed to recognise, however, that the issue of whether or not Mr Imrie was disabled was not an issue that was before the Court of Session for determination, nor was it an issue which had any direct bearing upon the question raised by the claim for reparation. It is perfectly possible for a claim for reparation to succeed without the pursuer establishing the existence of a "disability" in terms of the **EA**. Similarly, the existence of a disability does not assist in determining whether or not the employer breached a duty of care or statutory duty.

27. The Employment Judge seems also to have been distracted by a misunderstanding of the "single action" rule – described in **Stevenson v. Pontifex & Wood** (1887) 15R 125 – that a single

act amounting to either a delict or a breach of contract cannot be the subject of two or more actions for the purposes of recovering damages. That rule – which also prevents a pursuer from claiming different heads of loss arising from the same wrong in sequential actions – was the basis of the decision in **Smith v. Sabre Insurance**. The rule has no applicability whatsoever to the situation here where the alleged wrongs were different, the more so where the Employment Tribunal was the only forum in which the particular claims brought by the Appellant could competently have been brought.

28. For all of these reasons, the Employment Judge erred in concluding that any of the claims to the Employment Tribunal were barred by a plea of *res judicata*. His Judgment of 10 December 2019 is, accordingly quashed, and the case is remitted to the Employment Tribunal.

The Overriding Objective

29. The procedural history of this case demonstrates what can happen when all parties to the process – and especially the Tribunal – lose sight of the overriding objective described in Rule 2 of the Employment Tribunal Rules. Part of the overriding objective is a duty, so far as practicable, to avoid delay. At paragraph 143 of his Reasons, the Employment Judge expresses the view that the duration of this case, whilst lengthy "is perhaps not exceptionally so" and that the substantial delay in resolving Mr Imrie's claims is "excusable". I disagree. That a situation should have arisen in which claims first presented to the Employment Tribunal in September 2014 had never reached the stage of a merits hearing half a decade later in September 2019 is unacceptable. Other than in exceptional circumstances, the final responsibility for avoiding delay rests with the Employment Tribunal itself. I would expect every possible effort now to be made by parties and by the Employment Tribunal swiftly and efficiently to bring the Appellant's various claims to a hearing at which they can be determined on their merits. In particular, I would expect that any reserved issues of time bar arising from the amendment of the Appellant's claim in June 2019

would be dealt with not as a further preliminary issue, but as part of a full merits hearing on all outstanding issues.