EMPLOYMENT TRIBUNALS

AT AN OPEN ATTENDED PRELIMINARY HEARING
BY CLOUD VIDEO PLATFORM

Claimant: Mr C McDonald

Respondent: University of Derby

Heard at: Nottingham by CVP

On: 5 and 6 May 2021

Before: Employment Judge Victoria Butler (sitting alone)

Representation
Claimant: In person
Respondent: Mr N Smith, Counsel

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT having been sent to the parties on 18 May 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The Employment Judge gave judgment as follows:

1. The Claimant is estopped from relying on allegations 1 – 20 as set out in the schedule of allegations against the Respondent. Those allegations are, therefore, dismissed.

REASONS

Background

1. The Claimant is employed by the Respondent as a Senior Academic Counsellor and the employment relationship continues.

2. Prior to this claim, the Claimant issued two claims in the Employment Tribunal, under case numbers 2601879/2008 and 2604179/2009.

The 2008 claim

3. There were three primary allegations of race discrimination advanced by the Claimant in the 2008 proceedings, namely:

   - That he was denied an interview for the post of Head of Combined Subject Programme during the period July to September 2004 ("allegation 1");

   - That the Respondent failed to appoint him as Head of Combined Subject Programme in November 2004 ("allegation 2"); and

   - That the Respondent failed to give him an interview for the post of Head of Joint Honours Scheme during the period February to April 2007 ("allegation 3").

4. The Respondent made an application for a pre-hearing review to determine if the Claimant's claim was outside the time limit for presenting it. The decision of the Regional Employment Judge ("REJ") was that:

   > "*The Respondent's application succeeds. The claims were presented after the statutory time limit had expired and are accordingly dismissed*".

5. The REJ provided written reasons for their decision, explaining why the last act relied on by the Claimant was out of time.

The 2009 claim

6. The Claimant issued a further claim of race discrimination in 2009 citing allegations 1-3 from the 2008 litigation, along with the following further allegations:

   - That he suffered less favourable treatment on the ground of his colour when he was allegedly told that he was at risk of redundancy in February 2009 ("allegation 4"); and

   - That the Respondent failed to shortlist him for the Head of Computing position in November 2008 ("allegation 5").

7. The claim was subject to a pre-hearing review to determine whether the Claimant was estopped from relying on allegations 1 -3, whether allegation 4

had no reasonable prospect of success and whether allegation five was presented outside the statutory time limit.

8. Employment Judge Milgate gave judgment that:

   - The Claimant was estopped from relying on allegations 1-3;
   - Allegation 4 had no reasonable prospect of success and was struck out; and
   - Allegation 5 was presented out of time and it was not just and equitable to extend the time limit.

9. Judge Milgate noted in her judgment that '*for the avoidance of doubt the Claimant confirmed to the Tribunal that his claim form contained no further claims*".

The current claim

10. The Claimant presented this claim alleging race discrimination to the Tribunal on 14 August 2020 following a period of early conciliation between 15 June 2020 and 10 July 2020. The Claimant makes allegations dating back to 1991, including a repeat of allegations 1 – 3 relied upon in the 2008 and 2009 litigation.

11. The case was subject to a closed preliminary hearing by telephone before me on 4 November 2020 after which I noted in my case management summary:

> *"The Respondent raises two jurisdictional issues in its response. Firstly, it says that the Claimant has previously litigated against the Respondent under claim numbers 2601879/2008 and 2604179/2009. The first claim was dismissed after a determination that the claims were out of time and allegations in the second claim were either struck out as having no reasonable prospects of success or dismissed because they were out of time. The Respondent avers that the Claimant is estopped from relying on matters previously raised in those cases. Unfortunately, I did not have sight of the them, but the Respondent makes a valid point which needs determining*".

12. The Claimant was ordered to provide further and better particulars of his claim and a lengthy schedule ("the Schedule") containing fifty-one allegations of discrimination was produced.

13. An urgent preliminary hearing was listed on 30 April 2021 at the Respondent's request to attempt to clarify the claims set out in the schedule as they remained unclear as pleaded. Given the time it took to clarify the first five allegations, there was insufficient time to clarify the remainder. However, the Claimant agreed that allegations 1-3 appear at complaint numbers 14, 15 and 18 of the Schedule and were repeat allegations. Allegations 4 and 5 do not appear in this claim.

The hearing

14. This hearing was listed by me to determine the following issues:

> *"15.1 Whether the Claimant is estopped from relying on events that were subject to previous litigation;*
>
> *15.2 Whether any allegations relied on by the Claimant are out of time and, if so, whether it is just and equitable to extend time;*
>
> *15.3 To hear the Claimant's application to amend (if necessary); and*
>
> *15.4 To make further case management orders and list the case for a final hearing."*

15. This judgment covers the estoppel issue only.

The law

16. The doctrine of res judicata prevents a party re-litigating an issue that has already been decided by a Judge or Tribunal or which could and should have been brought before a Tribunal in previous claim/s but was not. The purpose of the doctrine is to provide finality of litigation for both parties and that the parties who are subject to the litigation are not subject to re-litigation on the same issue.

17. Rule 1 of The Employment Tribunal Rules of Procedure 2013 describes a judgment as:

> "*being a decision, made at any stage of the proceedings which finally determines a claim or part of a claim as regards liability, remedy or costs but also any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so, for example an issue whether a claim should be struck out or a jurisdictional issue*".

18. The opportunity to re-litigate matters already litigated arises only where there are special circumstances, for example a change in the law after the original decision, new evidence arising or allegations of fraud or collusion.

19. In the case of Virgin Atlantic Airways Limited v Zodiac Seats UK Limited [2013] UKSC 46, Lord Sumption summarised the concept of res judicata as follows:

> *17. Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from*

challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197-198. Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.

18. *It is only in relatively recent times that the courts have endeavoured to impose some coherent scheme on these disparate areas of law. The starting point is the statement of principle of Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115. This was an action by the former business partner of a deceased for an account of sums due to him by the estate. There had previously been similar proceedings between the same parties in Newfoundland in which an account had been ordered and taken, and judgment given for sums found due to the estate. The personal representative and the next of kin applied for an injunction to restrain the proceedings, raising what would now be called cause of action estoppel. The issue was whether the partner could reopen the matter in*

England by proving transactions not before the Newfoundland court when it took its own account. The Vice-Chancellor said:

> *"In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time... Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."*

20. Accordingly, the rule in ***Henderson and Henderson*** provides that if a party fails to raise an issue in proceedings that they could and should have raised in previous litigation but failed to do so, they will be prevented from raising that issue in the future. To do so would amount to an abuse of process.

21. When considering whether the ***Henderson and Henderson*** rule applies, an Employment Judge is to take a broad merits-based approach to the circumstances of the case.

Submissions

The Respondent's position

22. The Respondent provided a skeleton argument in advance of the hearing. It referred to the *Virgin Atlantic* case and submitted that all matters that were, or could and should have been, included in the 2009 claim should be dismissed.

23. Allegations 1 – 3 are clearly subject to issue estoppel and the Claimant should

have exercised reasonable diligence in raising all other matters occurring up to and including the second claim in that claim. The current claim is effectively a third bite of the cherry and the Claimant should be estopped from relying on allegations 1 to 20 inclusive in the Schedule. The Claimant has not advanced any reason for not raising them earlier because of any special circumstances.

The Claimant's position

24. The Claimant made the following submissions (my numbering):

    i. He argued that the 2008 and 2009 judgments were not '*decisions*' because his allegations of discrimination were not determined on their merits. Instead, they were not permitted to proceed because of jurisdictional reasons and are not, therefore, subject to the doctrine of res judicata;

    ii. The REJ in the 2008 litigation did not consider whether the acts he relied on amounted to continuing acts of discrimination;

    iii. Given that he now alleges that all fifty-one allegations in this litigation amount to conduct extending over a period, this revives the earlier allegations that were included, and those that could and should have been included, in the 2008 and 2009 litigation;

    iv. It is difficult to bring proceedings against an employer hence why he did not raise matters on which he now relies on in 2009. He had a close friend who issued proceedings against a potential employer and was consequently prevented from working in his chosen industry; and

    v. It has only come to light in the last week or so that a contract of employment promoting him to Senior Academic Counsellor was not in his personnel file which amounts to new evidence pointing to discrimination.

Conclusions

The Claimant's first submission

25. The Claimant's first submission is that the judgments in the 2008 and 2009 cases were not '*decisions'* because the allegations were not ventilated before a Tribunal. Accordingly, they are not subject to the doctrine of res judicata.

26. Rule 2 of the Employment Tribunal Rules 2013 clearly sets out that a judgment "*is decision, made at any stage of the proceedings which finally determines a claim or part of a claim as regards liability, remedy or costs but also any issue which is capable of finally disposing of any claim, or part of a claim,* ***even if it does not necessarily do so, for example an issue whether a claim should be struck out or a jurisdictional issue****"* (my emphasis).

27. The 2008 claim was dismissed for being out of time and the allegations in the 2009 claim were either dismissed or struck out. Accordingly, I am satisfied that they are both judgments falling within Rule 2 and, therefore, fall within scope of the doctrine of res judicata.

The Claimant's second submission

28. His second submission was that the REJ in the 2008 litigation did not consider whether the acts he relied on were continuing acts. Having reviewed the decision, I am satisfied that this is simply not the case. The REJ set out the law clearly in the judgment with reference to continuing acts. The focus was properly on the last act relied on which was determined to be out of time. If the last act is out of time, it follows that any earlier acts, continuing or not, are also out of time. Accordingly, the REJ did consider whether the acts relied on were continuing acts.

The Claimant's third submission

29. Thirdly, the Claimant submits that acts relied on in this claim form part of a continuing act which in turn revives any acts that were dismissed in the earlier litigation or are subject to the doctrine of res judicata. However, there is no basis in law for this submission. If a matter has been determined to be outside the jurisdiction of the Employment Tribunal, that determination can only be challenged by way of reconsideration or an appeal. The Claimant did not ask for a reconsideration of the 2008 and 2009 judgments, nor did he appeal. As such, I am satisfied that those judgments stand, and the Tribunal simply has no power to determine matters that it does not have jurisdiction to hear.

30. Notably, during the course of this hearing, the Claimant conceded that even if he had raised certain matters on which he now relies on in 2008 and/or 2009, they would have been out of time back then. He is not permitted to use further litigation as a vehicle to try and bring them back in time over a decade later.

The Claimant's fourth submission

31. Fourthly, the Claimant submits that it is difficult to bring proceedings against his employer hence why he did not include matters in 2009 that he now seeks to rely on. He points to a friend who he says was prevented from working in his chosen industry in consequence of bringing a claim against a prospective employer.

32. Evidently, the Claimant has no difficulty in raising grievances against his employer and has raised circa twelve to date. He has also issued proceedings in the Employment Tribunal against his employer twice before these proceedings.

33. The Claimant has failed to explain why he felt able to raise some allegations in 2008 and 2009, but not others. His assertion that it was difficult to bring proceedings against his employer, or he was fearful of the consequences, is

irreconcilable with the fact that he issued proceedings in respect of allegations 1 – 5. Further, he has no difficulty citing fifty-one allegations of discrimination in this claim when he is in the same position i.e. remains employed. Accordingly, I see no merit whatsoever in this submission

The Claimant's fifth submission

34. Turning to the Claimant's fifth submission, I cannot comprehend how his discovery that a contract of employment not being on his personnel file amounts to '*new evidence'* amounting to special circumstances. I note that this discovery only came to his attention *after* issuing these proceedings.

35. The Claimant does not proffer any explanation as to why he is able to raise fifty-one allegations in this case absent that knowledge but was unable to raise the same allegations in 2008/9. Further, there is no sustainable link between a mis-placed contract and the alleged discrimination, and I am satisfied that this is no more than an attempt to bring into play special circumstances where there are none.

Overall conclusion

36. I have considered the Claimant's submissions but conclude that they are not persuasive. He has not provided any credible evidence that special circumstances apply in explaining why he should not be prevented from relying on matters that were, or could and should have, been raised in the 2009 litigation by reason of issue estoppel or the rule in *Henderson v Henderson*.

37. As above, the Claimant is well versed in raising complaints of discrimination by way of grievance and was versed in litigation in 2009 because of his earlier case. He has not persuaded me that there was any good reason why he did not raise matters that he now seeks to rely on in 2009 when he had opportunity to do so, nor has he advanced any credible special circumstances to persuade me that he should not be estopped from relying on those matters.

38. The Claimant was on notice of his belief that he was subject to discrimination given his grievances and the 2008 litigation. Further, the Claimant said in this hearing that he '*realised*' his line manager was '*racist*' in 1997. Accordingly, he held the belief that he was subject to discrimination over two decades ago yet failed to raise allegations earlier that he now wishes to rely on.

39. Notably, the Claimant was also fully aware of the importance of time limits considering the judgment in the 2008 litigation.

40. Given that I am satisfied that the Claimant's submissions as to why the doctrine of res judicata should not be applied have no merit, I am satisfied that allegations 1-3 are subject to issue estoppel having already been raised in 2008 and 2009 (allegations 4 and 5 are not relied on in these proceedings) and the rule in *Henderson v Henderson* applies to all allegations that could and should have been included in the 2008/2009 litigation but were omitted.

41. To conclude, I am satisfied that no special circumstances arise and that the Claimant is estopped from relying on allegations 1 to 20 inclusive of the schedule of allegations.

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Employment Judge Victoria Butler

Date: 21 June 2021

JUDGMENT SENT TO THE PARTIES ON

24 June 2021

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FOR THE TRIBUNAL OFFICE

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