



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Turner

**Respondent:** Western Mortgages Services Ltd

**Heard at:** Birmingham Employment Tribunal via CVP

**On:** 24 March 2023

**Before:** Employment Judge Noons

## Representation

**Claimant:** In Person

**Respondent:** Ms Wheeler - Counsel

**JUDGMENT** having been sent to the parties on 30 March 2023 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:

# REASONS

## Introduction

1. This hearing is concerned with whether the claimant should be allowed to proceed with his claims for breach of contract. The respondent says that they should be struck out under the principles of res judicata.

## Issues for the Tribunal to Decide

2. As set out by Employment Judge Flood at the preliminary hearing on 30 November 2022 the issues to be determined are “Can the claimant’s complaint of breach of contract be pursued or should it be struck out under the principles of res judicata or abuse of process as a result of the dismissal of claim numbered 1300842/2021 under rule 52 of the Employment Tribunal Rules of Procedure 2013 by a judgment of Legal Officer A Singh sent to the parties on 5 April 2022”.

3. On behalf of the respondent Ms Wheeler confirmed that the respondent was not seeking to pursue the argument that the claimant's complaints of breach of contract were an abuse of process and I therefore did not have to consider this issue.

### Background

4. On 16 March 2021 the claimant bought a claim for other payments 1300842/2021 (Claim 1) this related to a claim for 6 months of Permanent Health Insurance (PHI) payments and employer pension contributions on the PHI payments. At the time the claimant issued Claim 1 he was still an employee of the respondent.
5. There was a preliminary hearing on 18 February 2022 before Employment Judge Jones who explained to the claimant that the Tribunal did not have jurisdiction to hear breach of contract claims because he was still in employment with the respondent. The Employment Judge also pointed out that in relation to any claim under section 13 of the Employment Rights Act 1996 for unlawful deduction from wages in the case of *Somerset County Council v Chambers* the EAT had determined that pension contributions were not wages.
6. The Employment Judge went on to explain that the claimant might have the same issue in relation to the PHI payments but that the Tribunal was not aware of a decision on this point. Employment Judge Jones went on to say "it would be appropriate to give the claimant an opportunity to consider this issue (which had not been raised until the PH) take advice and put forward any arguments he wishes to in order to persuade the Tribunal that it had jurisdiction to consider the PHI claim or indeed the pensions claim, as claims to unlawful deduction from wages".
7. Following on from this hearing the claimant withdrew Claim 1. In his letter of withdrawal he did not reserve his right to bring further proceedings. Judgment dismissing the claims upon withdrawal was issued on 4 April 2022 and sent to the parties on 5 April 2022.
8. The claimant then presented the current claim (Claim 2) on 4 May 2022 which was after his employment with the respondent ended. This claim includes a claim for other payments in identical terms to Claim 1, that is to say it claims for 6 months of PHI payments and the pension contributions whilst in receipt of

PHI. It also brings a claim for disability discrimination which is not the subject of the strike out application before me today.

9. The respondent is making an application to strike out the “other payments” claim under the principles of res judicata on the initial basis of cause of action estoppel but if I am not with them on that then on the basis of issue estoppel.

## The Law

10. The starting point is that a decision of a tribunal of competent jurisdiction is capable of giving rise to res judicata, either cause of action or issue estoppel.
11. Cause of action estoppel prevents a party pursuing a cause of action that has been dealt with in earlier proceedings involving the same parties and issue estoppel prevents a party reopening an issue that has been decided in earlier proceedings involving the same parties. I have to look at cause of action estoppel first and only if I determine that there is no cause of action estoppel do I then have to consider issue estoppel.
12. I have been referred to by the respondent the following cases:
  13. *Virgin Atlantic Airways v Zodiac Seats UK Ltd* 2014 AC 160 SC “where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before offends the core policy against the re-litigation of identical claims”.
  14. *Barber v Staffordshire County Council* 1996 ICR 379, CA The Court of Appeal found that a dismissal judgment following withdrawal of the claim can give rise to cause of action or issue estoppel even though there was no reasoned decision on the merits of the claim.
  15. *British Association for shooting and conservation v Cockayne* 2008 ICR 185, EAT It is irrelevant whether a claimant always intended to bring subsequent proceedings when they withdrew their claims.
  16. *Arnold & Ors v National Westminster Bank PLC (no.1)* 1991 2 AC 93, HL issue estoppel takes effect when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue.

17. In the *Barber* judgment there is reference to the case of *Hines v Birkbeck College (no. 2) 1991 WL 837907* which is a Court of Appeal decision that seemed to me to be on point in this case and I therefore sent a copy of the judgment in *Hines* to both parties. As it supported the claimant's primary argument, that is to say that his breach of contract claims were not barred by res judicata principles. I heard submissions from Ms Wheeler on behalf of the respondents as to why if at all it was not on point or I did not have to follow it.
18. *Hines* supports the proposition that if a claim is brought before a court which does not have jurisdiction it can be withdrawn and issued in a court that does have jurisdiction (even if that is the same court) without giving rise to res judicata. In particular it says "and so the court which before 29<sup>th</sup> July 1998 had no jurisdiction to entertain the plaintiff's action, now has jurisdiction to do so. Did Mr Justice Hoffmann's dismissal of the first action for want of jurisdiction before 29 July 1998 give rise to a res judicata precluding the plaintiff from bringing the second action before a tribunal, admittedly the same tribunal, which after that date has jurisdiction to entertain it?" Lord Nourse determined that there was no res judicata and the plaintiff could bring his action now that the court (the same court) had jurisdiction.
19. *Rule 52* of the Employment Tribunal Rules of Procedure 2013 is also relevant in that where a claim or part of it has been withdrawn under *Rule 51* the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same or substantially the same complaint) unless:
  - 52 (a) "The claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be a legitimate reason for doing so"
20. The claimant's submissions are simply put which are, if the tribunal at the point in time that Claim 1 was issued had no jurisdiction to hear his breach of contract claims how can he be prevented from bringing the claims now that they do have jurisdiction? To put it in legal terms he argues the Tribunal was not a court of competent jurisdiction at the time of the dismissal of the breach of contract claims.
21. Ms Wheeler on behalf of the respondents has very fairly accepted that the case of *Hines* causes the respondent difficulties in their primary argument of cause of action estoppel both in relation to the PHI claim and the pension claim to the extent that they were originally brought as Breach of Contract claims.

22. She accepts that this Tribunal is bound by a Court of Appeal decision which has not been overturned and she does not seek to distinguish the *Hines* case.
23. She does however make the submission that as far as the PHI payment claim is concerned in the original claim that it could have been pursued as an unlawful deduction from wages claim, not to say it would have been successful but rather that the Tribunal had jurisdiction to hear it. She accepts that the position is different in relation to the pension payment claim in that pension contributions are not wages and therefore no unlawful deduction claim could have been brought in relation to them.
24. She says that this creates a difference in treatment in relation to the PHI claim and the pensions claim. She says that the pensions claim when originally issued could only be a breach of contract claim for which the Tribunal did not have jurisdiction whereas the PHI claim was also an unlawful deduction from wages claim and therefore the Tribunal did have jurisdiction to hear it under Claim 1 and that by withdrawing it and not reserving his position in accordance with Rule 52 (a) the claimant is prevented by way of issue estoppel from bringing Claim 2 in relation to the PHI claim.

### **Application of the law to the facts**

25. A judgment dismissing a claim upon withdrawal is a determination and in accordance with *Barber* is capable of giving rise to principles of res judicata. However, in the current case it does not save in one respect (as set out below) and the reason for this is that the Tribunal had no jurisdiction to determine a breach of contract claim when the claimant issued Claim 1. I therefore find, following the Court of Appeal's judgment in *Hines*, that there is no cause of action estoppel nor in relation to the pension claims any issue estoppel.
26. The claimant is therefore allowed to proceed with his breach of contract claim in relation to the non-payment of pension contributions whilst he was in receipt of PHI.
27. Turning to the claim for PHI payments, there is no cause of action estoppel in relation to the claim for PHI payments as breach of contract (for the reasons set out above and following *Hines*) However, I do find that there is issue estoppel. Claim 2 as a breach of contract claim is a different cause of action

from an unlawful deduction from wages claim but covers the same issues as Claim 1 relating to the PHI payments. Under Claim 1 the Tribunal did have jurisdiction to hear that claim as an unlawful deduction from wages claim under section 13 of the ERA 1996 in relation to the claim for the PHI payments. Employment Judge Jones at the preliminary hearing made it clear this claim might struggle to succeed but did not say the Tribunal had no jurisdiction. The claimant withdrew Claim 1 without availing himself of the exception in Rule 52 (a). I therefore find that this issue has been determined, it has been dismissed upon withdrawal and the principle of issue estoppel stops the claimant from pursuing this element of Claim 2.

28. In summary therefore the claim for pension contributions as a breach of contract claim can proceed but the claim for PHI payments cannot.

Employment Judge Noons

Date: 8 April 2023