

CONCURRENT CLAIMS AND ISSUES ARISING



INTRODUCTION



Paras Gorasia

Paras is a senior junior barrister specialising in employment, privacy and information Law.



Frederick Powell

Frederick specialises in personal injury, healthcare, and human rights. He has acted in numerous cases arising from workplace injuries, including stress at work.



Matthew Turner

Matthew specialises in personal injury, clinical negligence, inquests, actions against the police, and professional discipline.



Finnian Clarke

Finnian is an employment and immigration specialist pupil, with a background in representing trade union claimants.

Overview

- Background and recap on previous seminar
- Part 1: staying proceedings where there are concurrent claims
- Part 2: the principles
 - Cause of Action Estoppel
 - Issue Estoppel
 - Abuse of Process
 - Practical applications of the res judicata principles
- Part 3: case studies

Previous seminar in summary

Employment Tribunal

- A PI claim can only attach to certain causes of action
 - You would run those cases as you usually would, requiring the same evidential threshold
- Usual position re limitation (3 months) and costs
- Can sometimes separate out remedy from liability...consider at what stage you should seek evidence on prognosis

County/High Court

- May be better for higher value claims or where focus is more on the PI aspect
 - Need to establish negligence (i.e. foreseeability) and/or harassment (i.e. course of conduct)
 - Longer limitation period (3 years)
 - Costs protection through QOCS
 - Lengthy litigation, slower process

Staying proceedings

- Generally a question of case management:
 - The ET can stay proceedings before it under its general case management powers in rule 29, ET Rules of Procedure, and in accordance with overriding objective: ***Gbidi v Edwards and anor*** EAT 0146/14, 22 August 2014, §29
- Wrong in principle and not in accordance with the overriding objective for essentially the same issue to be run in two separate proceedings: ***Mindimaxnox LLP v Gover & Ho*** UKEAT/0225/10/DA, 7 December 2010, §§42, 45
- The High Court (“HC”) can stay proceedings before it, or order the employee to stay their ET proceedings: ***Chorion Plc v Lane*** [1999] Times Law Report, 24/02/1999 (cited in ***Mindimaxnox*** at §43)

Staying proceedings (2)

- If there are concurrent ET and HC proceedings raising common issues, usually the former will be stayed: **Mindimaxnox** at §§37, 42. Whilst ETs are capable of deciding complex factual issues, it is a question of balance, §29
- Supporting considerations identified by HHJ McMullen QC:
 - If there are complex factual matters, particularly if voluminous documents §§29-30;
 - If there are complex legal issues, §35;
 - If findings made by the ET (if that case was heard first) would bind the High Court, §§32-33;
 - More substantial remedies sought in the HC proceedings, §38.
- On facts, because of considerable factual overlap, appropriate for ET to cede to High Court, §37

Staying proceedings (3)

- However, it is not invariably the case that non-ET proceedings go first. Considerations pointing the other way:
 - If the ET proceedings are already at an advanced stage: e.g. ***Langford v Barking & Dagenham Primary Care Trust*** EAT 0461/13, 25 October 2013;
 - If the degree/risk of overlap is limited: e.g. ***Vaughan v London Borough of Lewisham*** [2013] IRLR 720, QBD, 11 April 2023;
 - The short time limits applicable to ET proceedings indicated Parliament's intention that employment disputes be determined without delay: e.g. ***Vaughan***, §42.

Staying proceedings (4)

- The *Mindimaxnox* principles only apply where non-ET proceedings have already been issued. An ET Claimant cannot be required to bring intimated civil proceedings first.
- E.g. it was wrong in principle to stay ET proceedings where the claimant had sent a letter before action, but had not issued a HC claim: *Halstead v Paymentshield Group Holdings Ltd* [2012] EWCA Civ 524 at §§21, 24, 25 and 28.

Staying proceedings (5)

- In the recent case of ***Lycatel Services v Schneider*** [2023] EAT 81, the EAT rejected argument that, because the issues to be determined in the two separate proceedings were identical, as opposed to merely related, the tribunal was entitled to give precedence to his choice of forum.
- In that case, the Respondent brought HC proceedings seeking negative declaratory relief. EAT said ET was wrong to characterise the bringing of High Court proceedings as LS Ltd seeking to ‘dictate’ the choice of forum.

Staying proceedings (6)

- Practical reasons why client may prefer civil/ET proceedings first:
 - Better quality decision-making, depending on the issues;
 - Different costs regimes;
 - Limitation difficulties in one or other jurisdiction;
 - CC proceedings may be quicker;
 - Judgment enforcement in HC.

THE RES JUDICATA PRINCIPLES

The Res Judicata Principles (1)

- Review of the res judicata principles by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at [17]:
 - Cause of action estoppel
 - Merger
 - Issue estoppel
 - Abuse of process

The Res Judicata Principles (2)

- **Cause of action estoppel**: precludes a party from challenging the same cause of action that has been the subject of a judicial decision in earlier proceedings involving the same parties (or their privies).
- Neither cause of action estoppel or issue estoppel is limited to cases where the ET has given a reasoned decision on the merits: ***Staffordshire County Council v Barber*** [1996] ICR 379 CA.

The Res Judicata Principles (3)

- **Merger**: a cause of action is extinguished once a judgment has been given on it. A rule of law that leaves no room for exercise of discretion in special circumstances.
- A claimant was precluded from bringing a HC claim for the excess damages, after his wrongful dismissal claim succeeded in the ET, but was subject to the £25,000 cap: ***Fraser v HLMAD Ltd*** [2006] ICR 1395 CA.

The Res Judicata Principles (4)

- ***Fraser v HLMAD Ltd*** (cont.):
 - The claimant was not assisted by having expressly reserved the right to bring HC proceedings for the excess in his ET claim: at [29];
 - Claimants should not include wrongful dismissal claims within ET proceedings for unfair dismissal, unless they are willing to limit their damages for the former to £25,000: at [31].

The merger doctrine will not apply if the two causes of action are not the same, on analysis: e.g. ***Botham v Ministry of Defence*** [2010] EWHC 646 (QB).

The Res Judicata Principles (5)

- **Issue estoppel**: prevents a party from re-opening an issue decided in earlier proceedings involving the same parties (or their privies), if it is necessarily common to both proceedings.
- E.g. ***Green v Hampshire County Council*** [1979] ICR 861: unsuccessful earlier unfair dismissal claims precluded HC action seeking declaration the dismissals were ultra vires and void, as ET had found claimants dismissed and no unfairness in the process.

The Res Judicata Principles (6)

- Where an ET rejected a race discrimination claim on limitation grounds, without adjudicating upon any relevant issues, issue estoppel did not apply in a subsequent HC claim for negligence and breach of contract regarding the same psychiatric injury: ***Zaki Nayif v The High Commission of Brunei Darussalam*** [2014] EWCA Civ 1521 at [27] – [32].

The Res Judicata Principles (7)

- In *Virgin Atlantic Airways*, the SC considered the scope of these estoppels at [22]:
 - Cause of action estoppel is absolute in relation to all points which had to be and were decided to establish / reject the cause of action;
 - Cause of action estoppel also bars raising in subsequent proceedings points essential to the cause of action *which were not raised in the earlier proceedings*, if they could with reasonable diligence and should have been raised.

The Res Judicata Principles (8)

- ***Virgin Atlantic Airways*** (cont):
 - Issue estoppel, exceptionally, will not apply if there are special circumstances, where injustice would be caused;
 - Issue estoppel also bars the raising in subsequent proceedings of points that were not raised in the earlier proceedings (as well as those raised unsuccessfully) if they could with reasonable diligence and should have been raised.

The Res Judicata Principles (9)

- **Abuse of process**: traditionally precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones: *Henderson v Henderson* (1843) 3 Hare 100;
- The modern approach: a broad merits-based judgment, taking account of the facts of the case and the public and private interests involved; the crucial question is whether a party is misusing or abusing the process of the court: *Johnson v Gore-Wood & Co* [2002] 2 AC 1.

The Res Judicata Principles (10)

- ***University of London v Tariquez-Zaman*** [2010] EWHC 908 (QB): an e.g. of subsequent HC proceedings *not* being an abuse of process after failed discrimination and successful victimisation claims in the ET [55] – [60]:
 - The success / failure of the earlier ET claims did not turn on the contractual entitlement point raised in the HC proceedings;
 - The proceedings were not abusive simply because the remedy sought was the same as for the discrimination claim;
 - Findings of fact from the ET proceedings could be relied on and this did not of itself render the second proceedings abusive.

The Res Judicata Principles (11)

- Dismissal of an ET claim upon the claimant's withdrawal precluded a second claim as caught by cause of action estoppel and/or an abuse of process: ***Staffordshire County Council v Barber*** [1996] ICR 379.
- Under the ET Rules 2004, this outcome was avoided where the claimant reserved the right to bring civil proceedings when withdrawing the ET claim: ***Verdin v Harrods Ltd*** [2006] ICR 396 EAT; ***Srivatsa v Secretary of State for Health*** [2018] EWCA Civ 936.

The Res Judicata Principles (12)

- Under rule 52, ET Rules 2013, where a claim is withdrawn, the ET “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 –
 - (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring a further claim *and* the Tribunal is satisfied there would be a legitimate reason for doing so; or
 - (b) the Tribunal believes to issue such a judgment would not be in the interests of justice.

The Res Judicata Principles (13)

- A compromise of discrimination and harassment claims involving payment in full and final settlement of all claims against the claimant's employers arising out of his employment "being claims in respect of which an [employment] tribunal has jurisdiction", rendered the subsequent negligence action for personal injuries re the same incidents an abuse of process, as this loss could have been claimed in the ET: ***Sheriff v Klyne Tugs (Lowestoft) Ltd*** [1999] ICR 1170. For a recent example: ***Akay v Newcastle University*** [2020] EWHC 1669 (QB).

EMPLOYMENT CASE STUDY

Background

- Fictional case study based on a case which I have conducted in the last couple of years covering issue estoppel and staying proceedings when involved in concurrent proceedings in the ET and High Court
- This part of the talk builds on the summary of legal principles covered in the first half of this talk from an employment perspective

Facts (1)

- C1 and C2 are married couple who are residents of Syria, C1 recruited to work for R as IT Systems manager and C2 export assistant
- Both C's sponsored by R for work visas and R has ability to revoke visas at will
- R's business is ostensibly in the supply/ resale of chemical products worldwide

Facts (2)

- During their employment, C1 is informed by C2 that the Export Manager had criticised her for questioning the accuracy of an export license for the supply of chemicals into Syria and that the Director of R had been informed
- About a week later, C1 is also informed by C2 that she had been asked to alter the description of some goods destined for Syria
- C1 and C2 investigate this and raise with the Export Manager (PID)

Facts (3)

- C2 objects to carrying out any unlawful instructions and reports this to the Director of R as Export Manager dismisses issue
- Director and C2 have a phone conversation in which it is acknowledged that C2 has made a disclosure about this matter and is reminded to keep quiet otherwise there will be consequences
- Director comes back to the UK after a work trip to Syria a week later

Facts (4)

- In the interim, C2 decides to raise third party (PID) disclosures to the police and OFSI as well as HMRC
- One day after the Director returns to the UK, C1 and C2's passports are confiscated at work on the (false) basis that the Home Office wish to check documentation
- The following day C1 and C2 are asked to stay behind after their work shifts for a 'meeting' with the Director

Facts (5)

- C1 and C2 (who is heavily pregnant) are kept in separate rooms, C1 is asked for all IT login passwords and asked to speak to a 'police officer' on the phone
- C1 protests at this treatment and is threatened by the Director and another individual and told to divulge all information otherwise his baby will be at risk
- Director also threatens harm to C1's family in Syria

Facts (6)

- After C1 has finished speaking to the 'police officer', he is informed by the Director that he believes C1 and C2 have stolen £400,000+ from the Respondent
- C1 is threatened again as is C2 and her baby, C1 under duress is asked to login into his personal bank account and transfer circa £35,000 to the bank account of the Respondent
- Both C's are summarily dismissed on the same date

High Court Proceedings (1)

- Shortly after the dismissal of C's, R applies *ex parte* for a Freezing Order which is granted and is extended to worldwide accounts held by C's on the return date until the end of proceedings
- Four weeks later, R files and serves PoC and shortly thereafter amended PoC alleging fraud, conspiracy, misrepresentation and breach of fiduciary duties by both C's and claiming in excess of £400,000

High Court Proceedings (2)

- Defence filed by C's to claim and allege that any circumvention of funds were done on the express instruction of Director of Respondent
- Furthermore, C's explicitly claim that the legal action by R as well as their dismissals was a direct result of PID's made by them in relation to unlawful activity by R

ET Proceedings (1)

- As a result of Freezing Order, C's have restricted funds but have benefit of home insurance for bringing ET proceedings and protective claims issued on their behalf for (automatic) unfair dismissal and detriment due to PID
- After consultation with Counsel, claims are amended and clarified
- Respondent files a defence and seeks a stay of proceedings pending an application for summary judgment and/or conclusion of High Court proceedings

ET Proceedings (2)

- C's anxious to have their ET claim heard first as they believe it will exonerate them completely and will strengthen defence to HC proceedings
- ET decides to list a PH to determine whether proceedings should be stayed upon the application of the Respondent
- What do you think the outcome would be?

Mindimaxnox Factors

- Complexity of factual matters?
- Embarrassment to High Court?
- Complexity of legal matters?
- Extent of overlap between proceedings?
- Comparative value of claims?
- What about if HC action was threatened – c/f ***Halstead v Paymentshield?***

Impact on ET Proceedings

- If ET proceedings stayed – lengthy delay in adjudication?
- Claim heavily predicated (at least in part) in ET on witness evidence and recall?
- Findings on credibility key?
- Issue estoppel problems when running arguments in ET?
- Potential for disposal of entire claim before ET even considers it?
- If adverse finding against C's –criminal investigation?

PI CASE STUDIES

Case study 1 - Facts

- C is an inspector for a government agency
- Raises issues with OH re back pain travelling – OH advise to try to reduce number of off-site visits and find ways for her to join meetings via technology
- Line manager agrees to try 1:1 meetings remotely, but suggests she get disabled badge for travelling
- C then required to travel to a meeting – standing for train journey with heavy bag – suffers back injury

Case study 1 – Procedural background

- C brings ET claim - alleges failure to make reasonable adjustments (section 21 Equality Act)
- Goes to ET – unanimously dismisses all the claims
- Appeals ET decision but is refused
- Then issues PI claim for negligence and breach of statutory duty

Case study 1 – cause of action estoppel?

- No
- Cause of action in ET claim was under Equality Act
- Causes of action in the PI claim were common law negligence and breach of statutory duty
- Breach of statutory duty was the regulations made under the Health and Safety at Work Act 1974, not the Equality Act

Case study 1 – issue estoppel?

- Yes
- Need to carefully look at the factual matters in the PI claim and ask if they are the same as the ET claim
- Compare the POCs side by side
- Both have the same factual ingredients
- These very factual matters were addressed by the ET – claim was dismissed

Case study 1 – HvH abuse of process?

- Probably
- Not automatic – but starting point is should be unless ‘special reason’
- First Q – had full extent of injuries come to light when ET Claim brought? On these facts, no
- If not, broad, merits-based judgment (not too dogmatic)
- Takes account of: (1) public and private interests; (2) all facts; and (3) whether abuse of process

Case study 1 – HvH abuse of process?

- Public and private interests
 - Justice and efficient use of court resources
 - Preventing repeat or re-litigation
 - Justice to employees vs employers / defendants
 - Principle of finality
 - Forensic prejudice?
- Facts of case
 - Why C did not bring PI claim as part of ET claim
 - What happened in ET claim / decision of ET
- Key Q - is C abusing the court process?

Case study 2 - Facts

- Senior community healthcare nurse in NHS
- Service is privatised - staff numbers cut, increase in workload, concerns re patient safety etc.
- C suffers breakdown
- Recovers and returns - no adjustments made
- C then has second breakdown, goes off sick and resigns

Case study 2 – Procedural background

- C brings ET claim for constructive dismissal
- Scenario 1 – claim settled via compromise agreement
- Scenario 2 – claim withdrawn
- C then brings PI claim in CC

Case study 2 – scenario 1 – settlement

- Compromise agreement states it does not prevent PI claim
- Can D argue abuse of process?
- Was there an agreement that PI claim would not be abuse of process?
- Farnham-Oliver – Clause 7 “*The Claimant is not prevented from pursuing his potential claim for damages arising from a personal injury allegedly suffered as a result of work related stress which is currently being handled by [solicitors] on behalf of the Claimant which was raised with [the defendant] by way of solicitors’ letter dated [date]*”

Case study 2 – scenario 1 – settlement

- Assume no contractual agreement
- Q is whether the basis of agreement / common assumption that PI claim would not be an abuse of process = estoppel by convention
- Johnson v Gore Wood & Co – was such an assumption
- Akay – no such assumption (but the claims settled were different from the claims then brought in PI claim)
- Farnham-Oliver – was such an assumption

Case study 2 – scenario 1 – settlement

- Suggested wording:

“The Claimant is not prevented from pursuing her potential claim for damages for personal injury allegedly suffered as a result of work related stress which is currently being handled by [solicitors] on behalf of the Claimant and the parties agree that to pursue this claim is not an abuse of the court process and the Defendant will not raise any arguments that it is an abuse of process”

Case study 2 – scenario 2 – withdrawal

- There is no settlement agreement, but the ET claim is withdrawn
- Rule 52, ET Rules 2013
- Key Q – is C expressly or impliedly conceding the claim would fail on the merits?
- Look at what email / cover letter actually says:
 - ‘C accepts she has no claim and has agreed to withdraw’ – likely concession
 - ‘C cannot afford to continue the claim’ or ‘C has decided to pursue the claim elsewhere’ – likely no concession
- See *Srivatsa v SS Health* [2018] EWCA Civ 936

Case study 2 – scenario 2 – withdrawal

- What about silence?
- Rule 52 now requires an express reservation
- Suggested wording:

“In withdrawing the claim, the Claimant is not conceding that the claim would fail on the merits, and the withdrawal does not amount to an abandonment of the underlying complaints for all purposes and in all fora”

- C can they proceed with PI claim