EMPLOYMENT TRIBUNALS

Claimant: Mr Bryan Southward

Respondent: Colas Rail Limited

RESERVED JUDGMENT ON A PRELIMINARY HEARING

Heard at: Birmingham by CVP **On:** 11 May 2022 & 25 May 2022 (in Chambers)

Before: Employment Judge Connolly (sitting alone)

Appearances
For the claimant: Mr Owen (Specialist Advisor with Citizens Advice Gateshead)
For the respondent: Ms G Rezaie (Counsel)

JUDGMENT

1. The above-numbered claim is rejected pursuant to Rule 12(1)(b) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 as an abuse of process on the ground that the claimant is precluded from pursuing the claim by the operation of cause of action estoppel.

REASONS

INTRODUCTION

1. This claim has been listed for a preliminary hearing on the application of the respondent. Employment Judge Camp defined the issue to be determined as follows:
   In light of the withdrawal and dismissal of case number 1310553/2020, is case number 1311267/2020 estopped from proceeding and/or an abuse of process and so should be rejected under rule 12 and/or is it a claim with no reasonable prospect of success that should be struck out under rule 37?

2. The basis of the respondent's application is that the claimant was precluded from pursuing this claim (which I shall refer to as 'Claim 2') by cause of action of estoppel resulting from the Judgment dismissing the earlier claim ('Claim 1'). In correspondence, the respondent also put forward an alternative argument that the claimant would be estopped by virtue of the application of the rule in **Henderson v Henderson (1843) 3 Hare 100**. At the hearing, the claimant clarified that he accepted that Claims 1 and 2 were materially the same for the purpose of the application of cause action estoppel. It was therefore unnecessary to consider the the rule in **Henderson v Henderson**.

3. I was provided with an agreed bundle of 112 pages, a witness statement from the claimant, a skeleton argument from each party, a bundle of some 8 authorities from the respondent and an additional authority by the claimant.

4. The respondent confirmed that there was no relevant factual dispute and that the evidence contained in the claimant's witness statement was not challenged for the purpose of today's hearing.

5. Having been delayed by some technical difficulties at the start of the hearing, I took some time to read the claimant's statement and the Skeleton Arguments. It was also necessary to take a little time to obtain and digest the claimant's additional authority and digest the authorities in general. In the circumstances, there was insufficient time to deliberate and deliver a reasoned Judgment in the 3 hours allocated to the hearing and I reserved my decision.

RELEVANT FACTS

6. The respondent company provides maintenance services to the railway network. The claimant was employed by them or their predecessors from 7 February 2002 / 8 May 2003 until 21 August 2020, latterly, as the operator / driver of an on-track machine. He was absent from work for some 2 years and 10 months prior to 20 August 2020 when he was dismissed on the grounds of ill health.

7. The claimant presented Claim 1 against the respondent on 2 November 2020. At that time, he was representing himself but was being provided with advice and assistance by a discrimination law caseworker at Citizens Advice Gateshead for Civil Legal Advice. The caseworker was not legally qualified.

8. The claimant populated all relevant parts of the Tribunal claim form. He checked the boxes to indicate he was claiming unfair dismissal and discrimination on the grounds of disability but provided limited details of the complaints he was making. In fact, as the claimant explained in evidence, he clicked the online 'submit' button erroneously before he had provided all the detail he wished to.

9. He realised his error immediately. He telephoned the caseworker to ask for assistance. She advised him to write to the Tribunal, inform them of his error and to inform them that a fresh claim form would be submitted in place of that submitted in error.

10. The following day (3 November 2020), the claimant telephoned the Tribunal, explained that he had submitted the form by mistake and needed to cancel it. He says the member of Tribunal staff told him to write to the Tribunal with all relevant information in an email requesting that the claim be withdrawn.

11. The claimant immediately emailed the Tribunal with his claim reference number and as follows:

    "URGENT CANCELATION OF CLAIM
    Hi I have submitted this in error as I haven't completed the form in full i need to cancel this one and will be submitting a new one kind regards B Southward"

12. On 15 November 2020 the claimant received notification from the Tribunal of the acceptance of his claim. This prompted him to write on 17 November 2020 as follows:

    "Hi please can you withdraw this claim as it was sent in error I asked for this to be done on the 3rd of November I have tried calling but no response"

13. On 8 December 2020 the respondent filed its Response and Grounds of Resistance to Claim 1.

14. On 10 December 2020 Employment Judge Broughton signed a Judgment dismissing Claim 1 following a withdrawal of the claim by the claimant. This Judgment was sent to the parties on 16 December 2020.

15. On 17 December 2020 the claimant presented Claim 2. In this claim he identified his caseworker as his representative. His caseworker has dealt with all correspondence from the Tribunal thereafter. She also informed the respondent that the claimant had presented Claim 2.

16. On 25 January 2021, the respondent wrote to the Tribunal. They noted that they had not yet been served with Claim 2 but were aware of its existence. They requested that the Tribunal reject the claim and/or strike it out because the claimant was precluded from bringing such a claim by the application of cause of action estoppel.

17. The claimant's representative, the caseworker, replied to this application and a fuller form of the same application on 2 February 2021, 12 February 2021 and 18 February 2021. The Tribunal did not accept Claim 2 and, after some delay, on 27 August 2021, Employment Judge Harding wrote to the claimant's representative pointing out that her replies addressed issue estoppel rather than cause of action estoppel and asked if there was anything the claimant wished to say in that respect. She reminded the claimant that '*if the second claim is estopped it cannot proceed whilst there remains a judgment dismissing the first claim on withdrawal'.*

18. The claimant's representative replied on 2 further occasions making various points including a request that the Tribunal take account of the circumstances in which the claimant withdrew Claim 1 and that it should, in those circumstances, decline to apply an estoppel in this case. The respondent also took the opportunity to set

out its arguments including the assertion that, if the claimant wished to re-open the circumstances in which Claim 1 was dismissed, the proper course would have been to apply for a reconsideration of the Judgment dismissing Claim 1 or to have appealed against that Judgment.

19. It was this correspondence that led Employment Judge Camp to list today's preliminary hearing. As at the date of this hearing, Claim 2 has not been accepted or rejected by the Tribunal.

RELEVANT LAW

20. **Barber v Staffordshire County Council [1996] IRLR 209, CA** is authority for the proposition that the principles of cause of action estoppel apply to a tribunal claim which is dismissed by a tribunal following withdrawal by a claimant. In Barber the Court of Appeal held that there was nothing in the principles of estoppel which stipulate that they can only apply in cases where a tribunal has given a reasoned decision on the issue of fact and law.

21. The **Employment Tribunal Rules of Procedure 2013** apply to these proceedings. **Rule 52** provides

"*Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgement 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 such a further claim and the Tribunal is satisfied that there would be a legitimate reason for doing so or

(b) the Tribunal believes that to issue such a judgement would not be in the interests of justice"

22. As set out in **Biktasheva v University of Liverpool UKEAT/0253/19/LA** and accepted by the claimant in this case, **Rule 52** was introduced to deal with a problem that had been identified by Lord Justice Mummery in **Ako v Rothschild Asset Management Limited and Another 2002 ICR 899**. Lord Justice Mummery noted the distinction between the tribunal rules, then in force, and the approach in the civil courts. Withdrawal of a claim in the Employment Tribunal could result in an order dismissing the proceedings which would give rise to a cause of action estoppel, whereas a party was entitled under CPR to discontinue proceedings, which would not give rise to cause of action estoppel because no final order is made determining the complaint.

23. **Rule 52** provides a means by which a claimant can withdraw a claim without a judgment dismissing the claim being made in circumstances where the claimant still intends to pursue the same claim, subject to persuading the Tribunal that the circumstances are appropriate. It appears that the words in parenthesis in Rule 52 are explanatory and set out the effect of the common law rule of cause of action estoppel for the benefit of Tribunal parties.

24. Whether further proceedings can be brought after the withdrawal and dismissal of materially the same claim is therefore governed by the application of what is often referred to as the 'doctrine of res judicata' (literally translated as 'a matter judged'). In this case it is a specific 'species' of res judicata which is under consideration, namely, cause of action estoppel.

25. Res judicata and the related principles were considered by Lord Sumption in **Virgin Atlantic Airways Ltd v Zodiac Seats Limited [2013] UKSC 46.** In **Virgin**, Lord Sumption analysed the nature, scope and effect of cause of action estoppel amongst other forms/principles of res judicata.

26. He formulated the principle in the following terms

'*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'.* **[17]**

27. He held that

'*Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.*
Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.' **[22]**

28. He set out that the purpose of all the principles of res judicata (save with the possible exception of merger) was to limit abusive and duplicative action and stated '*that purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive'* **[25].** The claimant relied upon this part of the Judgment and its repetition in **Srivatsa v Secretary of State for Health and another [2018] EWCA Civ 936, [2018] ICR 1660 [26]-[27]**.

29. In my view, it is, however, important to note that in **[26]** of **Virgin** Lord Sumption went on to state that

'It may be said that if this is the principle it should apply to the one area hitherto regarded as absolute, namely cases of cause of action estoppel where it is sought to reargue a point raised and rejected on the earlier occasion. But this point was addressed in the ***Arnold*** *case and to my mind remains a compelling one. Where the existence or non-existence of a course 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.'*

SUBMISSIONS OF THE PARTIES

30. It is agreed that Claim 2 raises the same or substantially the same complaints as Claim 1.

31. The respondent contends that the judgment dismissing Claim 1 estops the claimant from presenting the same complaints again and that the bar against doing so is absolute. The respondent argues that, if the claimant wishes to pursue the same complaints as were pursued in Claim 1, he must successfully apply to have the Judgment in Claim 1 reconsidered or appealed.

32. The claimant submits, primarily by reference to **Ako, Srivatsa** and the quote from **Virgin** above, that the bar against presenting a further claim is not absolute and that I am entitled to examine the circumstances surrounding the withdrawal of the first claim. He contends that, where it is clear that the party withdrawing the claim did not intend to abandon it, he is or should not be debarred from pursuing that claim again unless it would be an abuse of process to permit it to proceed. The claimant submitted that it would not be an abuse of the tribunal process were Claim 2 permitted to proceed in the circumstances of this case.

CONCLUSIONS

33. I accept the submissions of the respondent. I do so despite a degree of sympathy for the claimant.

34. I accept that the claimant attempted to reserve a right to bring the same complaints as had been made in Claim 1 after withdrawing the same. I acknowledge that he was not represented by a qualified lawyer and that, after the dismissal of Claim 1, he trusted to his representative to pursue the complaints he thought he had preserved in the most appropriate way. I imagine that his hard-pressed representative did her best to do so when she presented Claim 2.

35. I must, however, determine the case on the basis of my understanding as to how the principle of cause of action estoppel applies. I find that Employment Judge Broughton's Judgment dismissing Claim 1 gave rise to an absolute bar against the claimant presenting the same complaints for determination on a second occasion. I make that finding on the basis of the analysis in **Virgin** particularly in **paragraph 26** which summarised the effect of earlier authorities (such as **Arnold)** on this issue.

36. I do not accept that there is any proper scope for me to examine the circumstances in which the claimant withdrew his claim i.e. the foundation upon which Employment Judge Broughton's Judgment was built. Pursuant to **Rule 52**, that is a matter for Employment Judge Broughton which I find can only be disturbed by a reconsideration or appeal.

37. **Ako** and **Srivasta** were decided in the context of earlier and different iterations of the Tribunal Rules of Procedure. They were decided at a time when, although the Tribunal had a discretion whether or not to dismiss a claim when it was withdrawn, the basis upon which that discretion should be exercised was not specified in the

Rules. **Rule 52** now specifically addresses the circumstance where a withdrawing party seeks to reserve the right to bring materially the same claim again. It also specifically warns parties of the estoppel which will apply as a consequence of a judgment dismissing the claim. In other words, it seeks to prevent a mechanistic application of cause of action estoppel (which **Ako** and other cases sought to avoid) and clearly provides the withdrawing party with this opportunity and this one opportunity to make their position plain. If they do not secure the outcome they seek (i.e. an acceptance of the withdrawal rather than a dismissal of the claim) they have a remedy by way of an application for reconsideration or an appeal.

38. I acknowledge that the claimant made the reason for his withdrawal and his intention to present a new claim tolerably clear in his first email to the Tribunal on 3 November 2020 ([11] above) although it was unclear if one read his second email in isolation ([12] above). The claimant could, however, have avoided the application of cause of action estoppel in a number of ways: he could have (a) applied to amend Claim 1 by including the further detail he ultimately included in Claim 2 and/or (b) applied to reconsider the Judgment dismissing Claim 1 within 14 days of receiving it when he discovered his claim had been dismissed rather than simply withdrawn and/or (c) appealed the Judgment dismissing his claim and/or (d) applied for a reconsideration out of time within 8 weeks of the Judgment when the respondent objected to Claim 2 being accepted.

39. In the circumstances, I find that cause of action estoppel applies to Claim 2, the bar against Claim 2 is absolute and, indeed, there is good reason why it is so: it would erode the important public interest in certainty and finality of litigation were it otherwise.

40. As the claimant is debarred from presenting or pursuing this claim, I reject it as an abuse of process under **Rule 12(1)(b) of the Tribunal Rules of Procedure 2013.** Alternatively, I would have accepted it but immediately struck it out pursuant to **Rule 37 (1)(a)** on the grounds it has no reasonable prospect of success in the circumstances.

Employment Judge Connolly

Signed on 29 May 2022