Was a claimant prevented by a tribunal claim settlement agreement from pursuing a personal injury claim in the civil courts?

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Farnham-Oliver v RM Educational Resources Ltd [2021] EWHC 2418 (QB)

The High Court (Master Dagnall) has handed down judgment in relation to an application made by a defendant employer to strike out a claimant employee's claim on the grounds that the bringing of it was an abuse of the court's process.

The Master considered the correct construction of the relevant clause of the settlement agreement and concluded that it positively permitted the civil claims to be brought in the civil court and prohibited the defendant from relying on the ET proceedings (or the ET settlement agreement) to contend that they were an abuse of process.

The case-law next required it to consider whether there was an estoppel by convention barring the defendant from relying upon abuse of process. As set out in *Johnson v Gore Wood*, it is permissible to look at the negotiations for the compromise as well as the compromise itself in considering whether any estoppel exists although negotiations are not usually to be taken into account when construing the agreement. In *Johnson v Gore Wood* it was held that the content of the negotiations and the wording of the compromise agreement made clear that it was intended that the second claim would be pursued (as it was) and which estopped the defendant from arguing that it would be an abuse of process. The Master considered that the situation in the instant case was effectively identical to that in *Johnson v Gore Wood*: the claimant was clearly only entering into the compromise on the basis that the personal injury claim could and would be brought and proceeded with by way of a civil claim notwithstanding the proceedings in the ET and their compromise, and was being encouraged in that belief by the insertion of the relevant clause wording with its unqualified language as meeting his concerns in that regard. There was no reason why the claimant would be seeking to give up or prejudice (procedurally) his existing right to pursue the personal injury claim. He relied on this convention by entering into the tribunal settlement agreement, thus (on the defendant's case) to his detriment causing him to lose an existing right. The defendant did not seek to

qualify either the language of the relevant clause or the negotiations to reserve the right to argue abuse of process. In those circumstances, the Master considered it to be unconscionable in law (and equity) for the defendant to argue abuse of process based simply on the fact of the tribunal proceedings, and that an estoppel arose.

The question of whether the effect of the withdrawal of the ET claim could give rise to a cause of action (or issue) estoppel by reason of the Rule 52 requirement for the tribunal to effect a formal dismissal of the ET claim was not pressed, and the Master considered that this was right as (1) there was no evidence from which to find that any Rule 52 dismissal actually occurred, and he did not think he could simply infer that such occurred from the existence of the Rule itself (with which one would have expected an ET to comply) in circumstances where no form of order was sent out by the ET and the ET had a discretion to make an alternative form of order permitting a further claim to be brought; but also, and in any event, as (2) the case of *Sviratsa* holds that a Rule 51 withdrawal and consequent Rule 52 dismissal is only a technical affirmation of and is to be treated as a pure "withdrawal" and not as a dispositive dismissal and resolution of any cause of action or issue, and thus not so as to attract the operation of cause of action or issue estoppels.

The Master then considered abuse of process and the “broad merits based judgment approach" which involves taking into account of the public and private interests involved and all the facts of the case; and focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before (see *Akay*) but also asking whether not the civil claim amounts to "undue harassment" of the defendant (*Johnson v Gore Wood*). On the assumption that its conclusions as to the interpretation of the ET settlement agreement and/or the surrounding negotiations were correct, it concluded that the civil claim did not amount to an abuse of process on any basis. There was no "undue harassment" of a party - the defendant, which had agreed that a claim against it could continue. There had been no contravention of or inconsistency with any judicial order. There had been no serious waste of time or expense. All that had happened was that one claim was initiated, dealt with by non-dispositive compromise and withdrawal, and the specifically excepted claim was then brought in another jurisdiction. The Master could not see any misuse or abuse of either jurisdiction or any inappropriate invasion or misuse of either private or public interests.

On the contrary assumption that his conclusions as to the interpretation of the ET settlement agreement and/or the surrounding negotiations were *incorrect* (i.e. that it was only intended that the defendant would only not be able to argue that the compromise agreement barred the

personal injury claim whilst being able to argue that what had previously and was to happen in relation to the ET claim could be and was an abuse) the matter was more complex, but the Master still considered that the bringing of and proceeding with the civil claim was not an "undue harassment" of the defendant. The ET claim had only progressed to a very early stage without involving any great expenditure of time or cost. The defendant had not required the personal injury claim to be included in the compromise but had allowed it to be specifically excepted, and thus accepted that it was not part of the ET, and, at first sight, was prepared to take the risk that the civil claim would be brought. There was no attempt (agreed or otherwise) by the defendant in or at the time of the ET settlement agreement to include or intimate any provision or assertion that to bring the civil claim would be an abuse. Therefore, the Master did not see this as "harassment" or, even if it was, as being "undue". The Master also again did not see why this should be such an abuse to deprive the claimant of his Article 6 right to have his substantive claim determined substantively. To repeat, all that had happened was that one claim was initiated, dealt with by non-dispositive compromise and withdrawal, and the specifically excepted claim was then brought in another jurisdiction. The Master could not see any misuse or abuse of either jurisdiction or any inappropriate invasion or misuse of either private or public interests.

The Master was tempted to consider whether he should be determining the question of whether it was now an abuse of process to do what was done *in Dattani* and *Sheriff* (i.e. compromise one matter related to the employment brought in the ET and then litigate another matter related to the employment, and which could have been litigated in the ET claim, in the court) but did not think that he should accede to the temptation as (1) all cases depend on their own facts and that was not the situation before him, where there was a specific exception from the compromise of the personal injury claim and (2) the question was one of some general importance and he did not feel, as a Master, that he should be venturing beyond the bounds of the factual scenario before him.

Comment

The judgment comments that this is the latest in a line of claims where an employee or former employee brings a claim against an employer in an employment tribunal (“ET”) seeking remedies, the claim in the ET is then compromised, but the employee then brings a further claim in a civil court for damages arising out of the same situation which was the subject matter of the ET claim. Although in various of the cases (including this one) the compromise agreement ending the litigation in the ET contained a provision that the employee would not be prevented from bringing the civil claim, the employer then asserts that the actual doing so by the employee involves an abuse of process because the employer is being subjected to

undue harassment by the employee bringing two claims when he/she could have brought just one set of claims in the ET. In some the employer has been successful and in others the employee.

The judgment goes on to comment that the situation involves the interaction of various principles of legal policy. One is the right of the employee encapsulated in Article 6 of the Protocol to the Human Rights Convention that a person is entitled to have their claims determined by a court or other judicial authority and that in the absence of a determination of a claim (or at least of the underlying cause of action) the person is entitled to pursue it. However, there are two other important principles in play. The first is one of private law policy, that a person (here the employer), having resolved a first claim in which the relevant matter could have been ventilated and determined, should not have to contest a further claim. The second is that it is a matter of public policy that litigation and disputes should come to an end and not be protracted by the bringing of further claims which could have been brought and resolved with previous claims. It is the interaction of those principles and policies which gives rise to the difficulty in this case.

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