EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Cameron of Lochbroom

Lord Marnoch

Lord Nimmo Smith

0/45/17/99

OPINION OF THE COURT

delivered by LORD MARNOCH

in

APPEAL TO THE COURT OF SESSION

under Section 37 of the Employment Tribunals Act 1996 (as amended)

by

BRITISH AIRWAYS plc

Appellants;

against

a decision of the Employment Appeal Tribunal dated 24 February 1999

in

Application (2) by MARK BOYCE

Respondent:

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Act: O'Neill, Q.C., Carmichael; Maclay Murray & Spens (Appellants)

Alt: Tyre, Q.C., Devlin; Drummond Miller, W.S. (Respondents)

7 December 2000

[1] The Race Relations Act 1976 contains provisions against discrimination on "racial grounds" and, by section 3(1) of the Act, these are defined as meaning "any of the following grounds, namely colour, race, nationality or ethnic or national origins".

[2] On 12 August 1996 the respondent, Mark Boyce, applied to what was then known as an Industrial Tribunal specifying the "type of complaint" he wished the Tribunal to "decide" as "Race Discrimination" and seeking *inter alia* a "declaration" that the appellants, British Airways, had discriminated against him on the "grounds of his race". In the body of the application, however, emphasis was placed on the "ethnic origins" aspect of the definition referred to above and, in the submissions made to the Tribunal and, later, to the Employment Appeal Tribunal, it appears to have been a matter of concession that this was the only aspect of the definition which might possibly be relevant. In the result, both the Tribunal and Employment Appeal Tribunal refused the application and a further appeal to the Court of Session was later abandoned. Subsequently, however, in about July 1998, the respondent lodged with the Office of Industrial Tribunals a further application which has given rise to the appeal in the present case. That application turns out to be in terms identical to those of the earlier application with the single exception that emphasis is now placed on the "national origins" aspect of the definition.

[3] In the foregoing circumstances it is hardly surprising that this second application was resisted on, *inter alia*, the plea of *res judicata*. The Tribunal rejected that plea but it was common ground before the Employment Appeal Tribunal that its reasons for doing so were unsupportable. The Employment Appeal Tribunal instead substituted its own reasoning for rejecting the plea, which was essentially that the "*media concludendi*" of the two applications were different. For the reasons given later in this Opinion we are unable on any view of matters to agree with that conclusion, but we emphasise at the outset that the "type of complaint" made - namely a complaint about "Race Discrimination" - was the same in each case and our strong impression is that the change in emphasis from one part of the definition clause to another reflects no more than a different legal approach in support of the same underlying proposition. That, at least, was the clear understanding of the respondent's own legal adviser as expressed, in terms, to both the Tribunal and the Employment Appeal Tribunal in the present case. No doubt that different approach resulted from an altered legal understanding on the part of the respondent's legal adviser but such altered legal thinking (even if engendered by an intervening decision of the court - as we are told was the case here) can never be relevant to the test of what is, or is not, *res judicata*. In this connection the observations of the Privy Council in *Hoystead* v. *Taxation Commissioners* [1926] A.C. 155 at p. 165 are very much in point:-

> "Parties are not permitted to bring fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be the proper apprehension by the Court of the legal result either of the construction of certain documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted."

We would add, only, that a decision of an appellate tribunal or court of law, while it may well result in a new understanding of the law, in no way alters the law, as such. It is simply declaratory of what the law has always been or must be taken to have been. In expressing the foregoing views we have not overlooked the decision of the Employment Appeal Tribunal in *Methilhill Bowling Club* v. *Hunter* [1995]

I.R.L.R. 232 in which, following on an intervening decision of the House of Lords, a second complaint of unfair dismissal was allowed to proceed on a new argument that certain provisions of the Employment Protection (Consolidation) Act 1978 were incompatible with Article 119 of the Treaty of Rome. However, that decision proceeded on a number of concessions in the course of the argument and cannot stand with the approach and reasoning of the Court of Appeal in England in *Staffordshire County Council* v. *Barber* [1996] I.C.R. 379. In the end counsel for the respondents conceded - in our opinion correctly - that the case had, in fact, been wrongly decided.

[4] Turning now to a consideration of the other arguments canvassed before us, two of the English authorities cited by counsel for the appellants - unless wrongly decided or inapplicable in Scotland - really determine the issue. First, in *Curtis* v. *James Paterson (Darlington) Ltd.* [1974] I.R.L.R. 88 the NIRC dismissed an appeal from an Industrial Tribunal's finding that an application for a redundancy payment was precluded by an earlier application in which the applicant had claimed that his dismissal was due to ill health and was thus unfair. In doing so the Court expressed itself as being in "full agreement" with the way in which the Tribunal had put the matter, the relevant passage, for present purposes, being as follows:-

> "To our minds it would be entirely wrong for this Tribunal to entertain this application upon the merits. We think that what lawyers call the plea *res judicata* which has been raised...by the respondents in this case has been properly raised. As we see it the legal rights and obligations of the parties which arose from the dismissal of the applicant have been concluded by the decision of the Tribunal on 7.11.72...."

The Tribunal go on to mention estoppel by the findings of fact involved in the earlier decision of 7.11.72 and that, no doubt, formed a separate or additional strand of reasoning which was concurred in by the Court. However, as regards the matter of *res judicata*, it appears to us that what the Tribunal and the Court had in mind was that the "dismissal" of an applicant should normally result in only one application to the Tribunal.

[5] The second of the two authorities cited to us makes the matter even clearer. We refer to *Divine-Bortey* v. *Brent London Borough Council* [1998] I.C.R. 886, which was a decision of the Court of Appeal. In that case the applicant employee presented a complaint to the Industrial Tribunal alleging unfair dismissal, which proved to be unsuccessful. He then made a fresh complaint of having been dismissed due to racial discrimination under the 1976 Act. That second application was, however, held to be susceptible to the plea of *res judicata*. The particular form which that plea took was described as "issue estoppel in the wider sense" or the "rule in *Henderson*", that latter being a reference to a passage in the judgment of Sir James Wigram V-C in *Henderson* v. *Henderson* (1843) 3 Hare 100 at p. 115:-

> "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."

We do not in any way overlook the leading opinion delivered by Simon Brown L.J. but Potter L.J. seems to us to sum the matter up very succinctly at p. 898F where, having cited the above passage from *Henderson*, he says this:

> "This was a case where it seems to me that, broadly but properly described for the purposes of the application of the rule, the 'subject of litigation' was the reason or reasons for the dismissal of the applicant by the council.
>
> The basis of the rule in *Henderson* is the avoidance of multiplicity of litigation in relation to a particular subject or set of circumstances in order to avoid the prejudice to a defendant which inevitably results in terms of wasted time and cost, duplication of effort, dispersal of evidence and risk of inconsistent findings which are involved if different courts at different times are obliged to examine the same substratum of fact which gives rise to the subject of litigation. The rule is justifiable and justified as a matter both of common sense and common justice between the parties and it is the aspects of prejudice which I have mentioned which will usually render a second bite of the cherry worthy of the description 'abuse of process.' They are essentially objective considerations to which the particular circumstances of the parties will generally be irrelevant; hence the need for special circumstances if the full rigour of the rule is to be alleviated."

[6] The above two decisions point clearly to the proposition that, in the absence of special circumstances, all possible remedies and legal arguments relative to what is said to be an unfair or unjustified dismissal should be sought and raised in a single application to what are now called the Employment Tribunals. This, it seems to us, is an eminently sensible approach and the reasoning behind it in our view applies, *mutatis mutandis*, to complaints about racial discrimination in contexts other than that of dismissal.

[7] It was argued for the respondent - and it is undoubtedly correct - that the definition of *res judicata* in Scotland does not go so far as does the "rule in *Henderson*" in England. For instance, it was made clear in the recent decision of the Extra Division in *Waydale Limited* v. *D.H.L Holdings (U.K.) Limited* 2000 S.C. 172 that the doctrine of *res judicata*, as so far understood in Scotland, will often require a decree of absolvitor. It is clear, therefore, that that doctrine cannot, as such, be applied in the procedure before Industrial Tribunals where, as we understand it, there is no place for absolvitor as opposed to a simple dismissal or refusal of the application. To surmount this perceived difficulty counsel for the appellants submitted that the Court in Scotland also had a general discretionary power to prevent a multiplicity of proceedings and that this general power, lacking the technical requirements of the plea of *res judicata*, was, in its application, akin to issue estoppel in the so-called "wider sense". Reference was made in this context to McLaren, *Court of Session Practice* at p. 401, Mackay, *Manual of Practice* at p. 312 and to the old case of *Bruce* v. *Duncan*, 26 November 1793, *Hume's Decisions*, 596 which is the only judicial authority referred to by McLaren and Mackay in support of their respective texts. Counsel also pointed out that this proposition, under reference to the same authorities, appeared to have been accepted by Lord Hamilton sitting in the Outer House in the case of *Waydale Ltd.*, reported in the Outer House in 1999 S.L.T. at p. 631, and also, indeed, by the Employment Appeal Tribunal in the present case. However, we are far from satisfied that the case of *Bruce* v. *Duncan* justifies the assertions made by McLaren and

Mackay. It is true that the case was concerned with a succession of defamatory statements but, in refusing to allow a second action to proceed, the reasoning of the court is expressed to be that "Though uttered to different persons, and at different periods of time, the slander complained of was still the *same* [our italics], and done by the same person;...". That reasoning - right or wrong - is, as we see it, wholly consonant with an application of the doctrine of *res judicata*, as such. Alternatively, since the proposed second action concerned alleged slanders earlier in date than the subject matter of the first action, the decision could be viewed as being, no more and no less, than a decision that all damages arising out of what was seen as a single wrong should be claimed at the same time: cf. *Stevenson* v. *Pontifex & Wood* (1887) 15 R. 125. This interpretation would explain that part of the decision which reads that,

> "a pursuer is bound to inform himself sufficiently with respect to the particulars and the extent of the injury he has sustained, and that he has himself only to blame if he fail to make the due enquiries."

Either way, it is difficult to see how the case can possibly be authority for the existence of a supposed general equitable power. Moreover, if this wide general power really does exist, it seems to us to render almost superfluous the plea of *res judicata*. It is therefore surprising, to say the least, that there have been countless disputes about the latter without even a reference to the former.

[8] But, whether or not there is some such equitable power, we see no reason whatever why the principle underlying *res judicata* - being the principle expressed by the brocard *nemo debit bis vexari si constat curiae quod sit pro una et eadem causa* - should not in some way be applied to proceedings before administrative tribunals such as those involved in the Employment Tribunal system. Indeed, it is plain, as matter of common sense, that that must be so. In that connection, we note that the Extra Division in *Waydale Ltd.* were not averse to an extension of the doctrine of *res judicata*, even within the court system, through the medium of Rules of Court. It follows that the only real question is precisely how the more general principle should be regarded and should operate within the Tribunal system. It was suggested by counsel for the respondent that it was necessary to look at the "substance" of what transpired before a tribunal and then decide whether, by reason of evidence having been led or facts agreed, the situation was analogous to one in which absolvitor would be granted by a court. However, against the background of informality and flexibility in the conduct of tribunal hearings, it seems to us that there may be practical difficulties about that approach which could in any event result in a great deal of uncertainty, if not injustice. Instead, borrowing from Lord President Cooper in *Grahame* v. *Secretary of State for Scotland* 1957 S.C. 368 at p. 387, we consider that the proper approach is encapsulated by the question, "What was litigated and what was decided?". As to the first part of that question, we have already expressed the view, regarding this particular case, that all that lay between the two applications was an altered legal perception on the part of the respondent's legal adviser. We would, however, go further and say that in the Tribunal system the *media concludendi* should in general be taken as covering everything in the legislation, both in its legal and its factual aspects, which is pertinent to the act or acts of the employer made the subject of complaint - here the act of the employer in refusing the respondent's job application on allegedly racial grounds. And, as for the matter of what was decided, we are of opinion that it should in general be presumed that an Industrial Tribunal, by its decision, has reached a "proper judicial determination of the subject in question" - that, as we understand it, being the underlying requirement for a decree of absolvitor *vide* McLaren, *Court of Session Practice* p. 396. What we have said does, however, admit of exceptions for special circumstances of a wholly unforeseen nature or for a situation (quite unlike the present) in which the Tribunal has made it clear that no final decision was intended. All this we

consider to be consistent with the general approach taken in the cases of *Curtis* and *Divine-Bortey* in England with the happy result that the practical outcomes of cases, such as the present, should be similar in both jurisdictions. As Lord Nimmo Smith observed in the course of the debate, any other approach would leave it open to an applicant to lodge up to five separate applications under each of the five meanings of "racial grounds" contained in section 3(1) of the 1976 Act.

[9] It only remains to add that if an attempt had been made by Mr. Boyce in the course of the earlier proceedings to expand his argument to cover "national origins", it seems not at all unlikely that that attempt would have failed; cf. *Jones* v. *Governing Body of Burdett Coutts School* [1998] I.R.L.R. 521. If that is so, then it would be very odd indeed if the respondent were permitted, instead, to lodge a new application such as that now before us.

[10] In the result we allow the appeal and dismiss the application. We should note, however, for the record, that there was a subsidiary ground of appeal which asserted that the respondent's case of racial discrimination on the ground of national origins was irrelevant. However, for the reasons which we have given in the appeal in *Souster* v. *B.B.C. Scotland*, which was heard together with this appeal, we are satisfied that this ground of appeal was unfounded.