

**NAVIGATING THE MINEFIELD**

**CLAIMS IN THE EMPLOYMENT TRIBUNAL, COUNTY COURT AND ABUSE OF PROCESS**

When dealing with Stress at Work cases one of the first issues that needs to be considered is in which forum (County or High Court as opposed to the Employment Tribunal) should a Claimant bring their claim? In cases where a Claimant has suffered psychiatric injury, issues that can arise with such an injury, such as an inability to engage with legal advisors, can naturally direct a Claimant to pursuing a claim for personal injury in the County or High Court as opposed to seeking remedies in the Employment Tribunal due to limitation issues.

However, what happens when an Employment Tribunal claim comes to an end but the Claimant seeks to bring County or High Court proceedings? A Claimant who may well have proceeded initially as a litigant in person in the Employment Tribunal can find themselves being precluded from being able to bring the later action due to it being classed as an abuse of process. Whilst most Confidentiality Agreements entered into upon the settlement of Employment Tribunal claims include clauses that limit future actions, but exclude future personal injury claims, it should always be remembered that an award for injury to feelings can be construed as falling into the class of damages for personal injury (*Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] I.C.R. 1170) creating a situation whereby the same claim is effectively brought for a second time, just by a different mechanism (*Lennon v Birmingham City Council* [2001] EWCA Civ 435). This can be especially hazardous considering part 44.15 (a) CPR which allows a Defendant to side-step the QOCS protection provided by part 44.14 CPR and recover its costs directly from a Claimant where a claim is struck out as being an abuse of process.

The recent decision of *Manda v USB AG* (Central London County Court), 16th June 2016 provides guidance as to the issues such a scenario creates, and the application of the principles and analysis of “*res judicata*” as set out by Lord Sumption in *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2013] UKSC 46, [2014] A.C. 160.

**Manda v USB AG (Central London County Court), 16th June 2016**

In this matter, Mr Manda started working for the Defendant in August 2006 as a Quantitative Risk Analyst. In late 2007 he joined a team led by a Mr Cesari. Mr Manda alleged that from then onwards he was the subject of inappropriate treatment by employees of the Defendant. He raised a grievance about this in July 2010 which was rejected in September 2010, and on the 1st October 2010 he went on sick leave. He remained absent for over 8 months and returned to work in June 2011 but 2 days later he was absent due to illness again. In December 2011, he raised a second grievance which was also rejected and by January 2013 he had exhausted the internal appeal procedure relating to it. Around this time there were discussions about his return to work but he resigned on the 10th April 2013 and almost immediately issued unfair dismissal and discrimination proceedings in the Employment Tribunal.

The Employment Tribunal claim

On the 22nd November 2013 Employment Judge Clark struck out the Claimant’s claim of direct disability discrimination contrary to section 13 of the Equality Act 2010 and of discrimination arising from a failure to make reasonable adjustments contrary to section 21 of the Equality Act 2010 “*as having no reasonable prospects of success*” since Mr Manda could not identify the provision, criterion or practice, reasonable adjustments and the detriment he had suffered, but left open the possibility of a formal application to amend the ET1. An application was duly made to amend by adding back in the disability discrimination claims as a breach of the duty to make reasonable adjustments imposed by section 21 of the Equality Act 2010 resulting in a claim of direct disability discrimination. That application was heard on the 7th February 2014 by Employment Judge Lewzey but was rejected. Employment Judge Lewzey did so on the basis that either “*cause of action estoppel*” or “*issue estoppel*” applied. Employment Judge Lewzey reasoned that to reinstate it would therefore amount to an abuse of process. The remaining causes of action of race discrimination and unfair dismissal were heard by Employment Judge Snelson and two lay members, on the 8th and 9th September 2014. Mr Manda gave evidence on the second day and on the following day he withdrew his claims of race discrimination and constructive dismissal against the Defendant. He also specifically withdrew his allegations of race discrimination against Mr Cesari.

The County Court claim

On the 12th June 2014 a letter before action was written on behalf of Mr Manda by his solicitors. The action being contemplated was a claim for damages for personal injury arising out of alleged bullying and harassment of Mr Manda by members of the team led by Mr Cesari, who was alleged to have encouraged or tolerated such conduct and to have engaged in it himself. On the 27th November 2014, the Claim Form, together with a Particulars of Claim and a Schedule of Loss, was served on the Defendant. The core of the claim included, and in part related to facts akin those already put before the Employment Tribunal including allegations of bullying, harassment and racially motivated treatment by Mr Cesari. The Defendant in its defence highlighted that the factual issues underlying Mr Manda’s complaints had already been determined by a Court and either struck out or withdrawn, and argued that the case had already been determined and issued an application to strike out the Claimant’s case under part 3.4 (2) CPR as an abuse of process.

**So, what happened?**

HHJ Hand QC struck out Mr Manda’s claim on the grounds of “*res judicata*” and an abuse of process for two main reasons. Firstly, he held that the principle underlying the concept of “*res judicata*” was that there should be finality in litigation. Every case fell to be decided by applying the analysis and categories of “*res judicata*” as described by Lord Sumption in Virgin *Atlantic Airways Ltd*, namely that;

1. The bar to re-litigation or further litigation should be absolute when an attempt is made to raise points in subsequent proceedings, “*which had to be and were decided* [in the earlier proceedings] *in order to establish the existence or non-existence of a cause of action*”;
2. Re-litigation or further litigation should also be barred when an attempt is made to raise points in subsequent proceedings which are “*essential to the existence or non-existence of a cause of action*” even where those points were not decided in earlier proceedings based on the same cause of action because they had not been raised if “*they could with reasonable diligence and should in all the circumstance have been raised*”;
	1. What has been known as issue estoppel prevents the raising in subsequent proceedings of points which
		1. Were not raised in the earlier proceedings; or
		2. Were raised unsuccessfully;
		3. But with an exception of “*special circumstances where this would cause injustice*”;
	2. Where “*the point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised*”.

When applying these principals to the case of Mr Manda, the reality was that Mr Manda was attempting to relitigate the same points, just in a new forum. Mr Manda argued that the County Court proceedings were based on an entirely different cause of action with a different conceptual structure (negligence) but forgot that when a case in the Employment Tribunal is case dismissed or withdrawn this action should be taken as to represent an adjudication on the case on its the merits (Regulation 51 and 52 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237). Whilst HHJ Hand QC accepted that the disability discrimination claim ended differently to the other causes of action (in that it failed because it had been inadequately pleaded and its demise might be seen as procedural rather than substantive) there was no significant distinction between the manner of its disposal and the other causes of action. It is noted in paragraph 70 of the Judgment that:

“*I do not accept the argument that there is any significant distinction between the manner of disposal of the disability discrimination claim and manner of disposal of the other causes of action raised before the Employment Tribunal. In my Judgment... The Employment Tribunal had jurisdiction in respect of the allegations of disability discrimination, including the jurisdiction to award compensation, which could include compensation for personal injury, in respect of any such discrimination.*”

The question in reality before the Court was whether to permit Mr Manda’s revival of a claim for compensation for personal injuries. HHJ Hand QC stated that the answer lay in Lord Sumption’s analysis adding forcefully at paragraph 72 of the Judgment that:

“*… if I were to allow this matter to proceed now I would be constituting myself as some kind of appellate Court from a decision discussed twice in a different forum some two years ago. In in other words I would be sanctioning a revival of the case that should have been raised properly but was not and in my view this is precisely what the doctrine of res judicata should prevent. I accept that the Claimant may feel a sense of injustice but I have heard nothing of any “special circumstances” that would justify the matter now being reopened*”.

HHJ Hand QC concluded at paragraph 74 of the Judgment that:

“*The attempt to revive* [this claim] *… under the guise of a claim in tort, as opposed to one in contract, to my mind falls within the absolute bar to resurrection identified by Lord Sumption in paragraphs 20, 21 and 22 of his Judgment in Virgin Atlantic ….* [the Claimant’s] *arguments that there is a distinction between compensation arising from a statutory tort and compensation arising from breach of duty in the common law tort of negligence, as well as flying in the face of the analysis of the Court of Appeal in Sheriff, ignores the fact that the statutory tort of unfair dismissal in the context of so-called “constructive dismissal” depends upon the establishing of a breach of duty in contract, which is exactly the same as the breach of duty in the common law tort of negligence*”.

**How to navigate the minefield?**

The first point to note is to emphasise the need for early and effective advice. Without this is seems almost inevitable that irreparable damage can be caused to a Claimant’s County or High Court claim before it even comes into existence.

Secondly, if a claim brought in the Employment Tribunal comes to an end through agreement, it’s essential to make sure that future claims for personal injury are protected by not being excluded by way of any settlement agreement, or by being marked as withdrawn. In all circumstances, the Claimant should seek to avoid any prejudicial “*determination of the facts*” (*Manda* and *Lennon*) if he intends to bring future proceedings. This is especially true where allegations of harassment and bullying are put forward, as in the case of *Manda*, and regularly will have to form part of any future County or High Court claim.

Thirdly, if the Claimant has through their own actions potentially precluded themselves from being able to bring a future County or High Court claim robust advice must be given and if possible, the Defendant persuaded into agreeing that they would not take the abuse of process point.

Finally, if the Claimant finds themselves having to argue their point before a Court, they would be well advised not to fall into the same error as Mr Manda, and make sure they present evidence of “*special circumstances*” to justify the Court allowing their claims to proceed. Failing this, the Claimant may well find themselves exposed to the risk of costs due to presenting a fundamentally flawed case.

**Conclusion**

With more and more Claimants being forced to bring claims in the Employment Tribunal as litigants in person due to rising fees it seems likely that Defendants may find themselves able to take the points expressed in *Manda* with more regularity. Claimants need to seek early legal advice to ensure that they best insulate themselves from abuse of process arguments. In the event of a *Manda* type situation, it is possible to argue that the effect of psychiatric injuries could be seen as to giving rise to “*special circumstances”* (as per *Virgin Atlantic Airways Ltd*) which would need to be considered as to do otherwise “*would cause injustice*”. Evidence would be need to be put forward to support such an argument.

Whilst we don’t know why Mr Manda didn’t make this argument, it is reassuring to know that the law itself retains a control mechanism in such cases, to ensure justice can be done in the event a Claimant finds themselves, quite inadvertently, in a position of abuse of process.

**LIAM** **RYAN**