Case No: A2/2005/1698

Neutral Citation Number: [2006] EWCA Civ 738
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MASTER EYRE
HQ04X04156

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 15th June 2006

Before :

LORD JUSTICE MUMMERY
and
LORD JUSTICE MOORE-BICK

- -

Between :

RODERICK FRASER	**Appellant**
- and -	
HLMAD LIMITED	**Respondent**

(Transcript of the Handed Down Judgment of
Smith Bernal WordWave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Representation

- -

MR SIMON CHEETHAM (instructed by Stone Rowe Brewer) for the Appellant
MR RAOUL DOWNEY (instructed by DLA Piper Rudnick Gray Cary UK LLP) for the Respondent

Hearing date: 27th April 2006

- -

Judgment
As Approved by the Court

Lord Justice Mummery :

Introduction

1. This is an appeal from an order of Master Eyre dated 15 July 2005. He struck out the claim form and the particulars of claim and dismissed with costs (summarily assessed at £9,500) a wrongful dismissal action brought by Mr Roderick Fraser against HLMAD Limited. The Master granted permission to appeal.

2. The issue between the parties is of a sort that rarely crops up in employment cases. It is concerned with the application of the doctrines of merger of causes of action, res judicata and related forms of estoppel and abuse of process to judgments in the employment tribunal for unfair dismissal and wrongful dismissal, so as to bar civil proceedings for a subsequent judgment for wrongful dismissal in the ordinary courts. Merger of causes of action, res judicata, estoppel and abuse of process are all common law pleas. They are not mentioned in the employment legislation or in the rules of procedure governing claims in the employment tribunals. It may be news to some tribunal users that they apply to judgments of tribunals equally as they apply to ordinary courts for the purpose of bringing finality to legal disputes in the interests of the parties and of the public.

Proceedings for unfair and wrongful dismissal

3. The circumstances in which Mr Fraser was dismissed from his position as Chief Executive by the Administrative Receivers of HLM Design International (Holdings) Limited on 17 March 2004 led him to present an application to the employment tribunal on 28 May 2004. He claimed unfair dismissal, a statutory cause of action which an employment tribunal has exclusive jurisdiction to consider and determine (sections 94 and 111(1) Employment Rights Act 1996), and wrongful dismissal, an action for breach of a contract of employment, which can be brought concurrently in the ordinary civil courts and in the employment tribunal, subject, however, in the latter case to a statutory limit of £25,000 on the amount of the payment to be ordered: article 10 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623 (the 1994 Order) and sections 3 and 44 of the Employment Tribunals Act 1996. As for enforcement of a judgment for compensation and damages obtained in the employment tribunal, any sum payable in pursuance of a decision of an employment tribunal in England and Wales which has been duly registered is recoverable, if a county court so orders, by execution issued from the county court: section 15(1) Employment Tribunals Act 1996.

4. In paragraph 11 of Section 11 of his ET1 Mr Fraser left HLMAD in no doubt that, although he was pursuing his claims in the employment tribunal, he also intended to keep open the possibility of bringing proceedings in the High Court in order to recover damages for wrongful dismissal in excess of £25,000-

> " 11. I claim damages for wrongful dismissal and compensation for unfair dismissal. Insofar as my claim for damages for wrongful dismissal exceeds the Tribunal's jurisdiction of £25,000, I expressly reserve the right to pursue an action in the High Court."

5. Originally the industrial tribunal (later to be re-named the employment tribunal) had no jurisdiction to consider a common law contract claim, even if, as would usually be the case, it arose out of the very same facts as the unfair dismissal claim, which only the tribunal could hear and determine. Since the 1994 Order came into force proceedings may be brought before an employment tribunal in respect of a contract claim by an employee for the recovery of damages for wrongful dismissal up to a maximum of £25,000. Counsel have been unable to assist the court about the reasons for the limit on the amount of damages recoverable in the tribunal or why it has not been increased since 1994. There were no debates in Parliament, as the jurisdiction was extended and the limit on compensation was set by the Minister acting under delegated powers.

6. Although the statutory cap on the amount of compensation recoverable for unfair dismissal has been substantially increased since 1994, the £25,000 limit for wrongful dismissal has remained at the same significantly lower amount. I do not know the reason for this. It cannot be that employment tribunals lack relevant experience in handling large claims or difficult cases. There is, for example, no upper limit to the amounts of compensation that can be awarded by tribunals in discrimination cases. Very large sums of compensation have been awarded to claimants in discrimination proceedings as factually complex and as legally challenging as any that can be brought in a court of law.

7. I mention these matters because, as will be explained later in the judgment, the facts of this case reveal a nasty potential trap for the litigant who decides to add a wrongful dismissal claim to his unfair dismissal claim in the employment tribunal and to pursue both claims to judgment in the tribunal. As is well known, many litigants in the tribunals act without the benefit of legal advice or representation. Mr Fraser was professionally advised and represented throughout, but he is now faced with the prospect of his successful claim for wrongful dismissal in the employment tribunal operating as a bar to recovery of more than £25,000 for breach of contract, even though the loss which the employment tribunal found that he had in fact suffered as a result of the breach far exceeds that amount.

8. I have little doubt that this comes as an unpleasant surprise to Mr Fraser, even though his advisers took the precaution of starting an action for wrongful dismissal in the High Court on 23 December 2004 with a view to recovering the excess of any award that he received in the employment tribunal. The amount claimed was £261,146 together with interest. They did not, however, take the additional precaution of withdrawing his wrongful dismissal claim from the employment tribunal proceedings. Instead, they pressed on with the proceedings in the employment tribunal for both unfair dismissal and wrongful dismissal. There were some advantages in doing so: proceedings in the employment tribunal would, in general, be decided quicker and cheaper than in the ordinary courts, though public funding, which is unavailable in the tribunal, may be available in the ordinary courts; they would be without the same risk as to costs, if unsuccessful; and success in the tribunal on an unfair dismissal claim would normally shorten substantially the length of any subsequent proceedings in the High Court for wrongful dismissal. But, as I shall explain, there were also disadvantages in pursuing the claim for wrongful dismissal in the tribunal.

9. The principal area of dispute in the employment tribunal proceedings was application to the claims of the Transfer of Undertakings (Protection of Employment) Regulations

1981 (TUPE), which are not relevant to the issues on this appeal. There was no real dispute that, if TUPE applied and HLMAD was liable to Mr Fraser for unfair dismissal, it was also liable to him for wrongful dismissal.

10. In its judgment registered on 31 March 2005 the employment tribunal found that Mr Fraser had been unfairly and wrongfully dismissed. In an amended remedies decision registered on 16 June 2005 the tribunal determined his damages for breach of contract in the sum of £80,090.62, but limited its award to the capped amount of £25,000 damages in addition to the compensatory award of £16,034.88 for unfair dismissal, making a total of £41,034.88. On these figures Mr Fraser's net shortfall is £55,090.62.

11. The employment tribunal had thus adjudicated on issues of liability and remedy relating to both the statutory and common law causes of action. This feature of the tribunal's judgments was seized on by HLMAD's advisers to halt the progress of Mr Fraser's High Court proceedings.

Strike out applications

12. On 26 May 2005 HLMAD applied to strike out the High Court action as "res judicata and [an] abuse of the court's process", contending that the wrongful dismissal claim had already been litigated in the employment tribunal and that Mr Fraser could not litigate the matter further in the ordinary courts.

13. On 16 June 2005 Mr Fraser responded by a cross application for summary judgment under Part 24 against HLMAD for £96,125.50 total net damages for loss of employment or that its defence be struck out because

> "the matter of liability and quantum in respect of wrongful dismissal has been adjudicated upon at the South London Employment Tribunal and it is an abuse of the Court's process for the Defendant to defend these proceedings."

14. It is an unusual feature of the case that both sides invoked the doctrines of estoppel and abuse of process in the High Court action. HLMAD relied on merger and cause of action estoppel to prevent Mr Fraser from suing them for wrongful dismissal in the High Court after the conclusion of the employment tribunal proceedings. Mr Fraser sought to rely on the doctrine of issue estoppel to prevent HLMAD from denying liability for wrongful dismissal, as already determined by the employment tribunal, in order to recover the excess of damages over £25,000. (He is not, it should be made clear, seeking double recovery against HLMAD).

Decision of the Master

15. In his reasons for striking out the High Court proceedings for wrongful dismissal the Master referred to the decisions of this court in **Sajid v. Sussex Muslim Society** [2001] EWCA Civ 1684 [2002] IRLR 113 and **London Borough of Enfield v. Sivanandan** [2005] EWCA Civ 10 that had been cited to him. He reached the following conclusions.

> "10. ….
>
> (1) **Sivanandan** apart, it is clear that, for a claimant to protect his position, it is not enough merely to recite that he 'reserves his

rights.' He must also ensure that the tribunal does not rule on his cause of action, so that it is litigated-if at all-once, and once only.

(2) In this case, the Claimant chose to refrain from taking the latter precaution.

(3) He now seeks to litigate the same cause of action a second time.

(4) He seeks to justify this by suing only for the excess over the amount that the tribunal is permitted by statute to award.

(5) But:

(a) It must be incongruous and contrary to principle for a claimant both to choose to obtain a verdict from a tribunal that happens to be subject to a statutory limit, and then to sue again so as to be able to go behind that limit.

(b) That consideration was at the very heart of the analysis in **Sajid:** see especially the last sentence of Paragraph 16 thereof.

(c) In **Sivanandan**:

(i) The claimant neither withdrew her contract claim from the tribunal nor purported to reserve her rights: she simply failed before the tribunal and then sought to re-litigate her allegations by action. The Court of Appeal's review of the authorities in that respect was accordingly obiter.

(ii) The Court of Appeal appeared to approve **Sajid.**

11. It follows that the Claimant's reliance on **Sivanandan** is mistaken, and the Defendant's application must be granted."

16. There is common ground between the parties on many points. The cause of action pleaded by Mr Fraser in the High Court action is identical to the cause of action adjudicated on by the employment tribunal i.e. wrongful dismissal; the factual and legal issues were the same on liability and quantum, save for the limit of recovery of more than £25,000 in the employment tribunal; the parties were identical in both proceedings; and Mr Fraser could have withdrawn his claim for wrongful dismissal from the tribunal without giving rise to an estoppel, but he never did so. It was also accepted by Mr Cheetham, who did not appear in the tribunal hearings or before Master Eyre, that neither of the authorities cited to the Master is on all fours with this case. Nor did Mr Cheetham rely on paragraph 107 in the judgment of Wall LJ in **Sivanandan** which had been cited to the Master as a complete statement of the legal position (see paragraph 26 below).

Discussion

17. Although HLMAD's application to strike out states that it is made on the ground that "the Claimant's claim is res judicata and [an] abuse of the court's process", Mr Downey appearing for HLMAD relied specifically on the common law doctrine of merger of causes of action, which was not expressly discussed in the cases of **Sajid** and **Sivanandan**. He submitted that Mr Fraser's wrongful dismissal claim had merged into the judgment of the employment tribunal on his wrongful dismissal claim. His cause of action for wrongful dismissal was transmuted into the judgment and thereafter ceased to exist independently of the judgment. The cause of action is replaced by the rights created by the judgment, including, in certain circumstances, the right to bring a claim on the judgment. The important point is that Mr Fraser no longer had any cause of action for wrongful dismissal which he could pursue in the pending High Court action with a view to recovering damages in excess of £25,000.

18. In **Republic of India v. India Steamship Co Ltd** [1993] AC 410 at 417D-E Lord Goff pointed out that the doctrine of merger in judgment "cannot be described simply as a species of estoppel" (see Phipson on Evidence 16th edition paragraph 44-17 to 44-22 for further discussion and illustrations) and continued-

> "The basis of the principle is that the cause of action, having become merged in the judgment, ceases to exist, as is expressed in the Latin maxim *transit in rem judicatam* …"

19. He added that in some contexts, principally where the judgment in question is the judgment of a foreign court, the distinction between, on the one hand, cause of action estoppel and issue estoppel, and, on the other hand, the principle of merger in judgment, "has been of the greatest importance."

20. The relevance of the doctrine of merger to this case is that its mode of operation leaves no room for special circumstances which might create an exception in order to avoid or mitigate the effects of estoppel and abuse of process. See, for example, **Arnold v. National Westminster Bank Plc** [1991] 2 AC 93 in the case of issue estoppel.

21. Mr Fraser's case is that it would be an unjust and improper use of the doctrine of estoppel and abuse of process in order to prevent him from recovering, by way of a claim limited to the excess over the statutory cap applicable in the tribunal, the sum already found to be due to him by the employment tribunal. I have some sympathy with that position on the facts of this case. The course adopted by his legal advisers expressly put the tribunal and HLMAD on notice of the possibility of High Court proceedings. It was sensible to give priority to the proceedings in the employment tribunal, which had exclusive jurisdiction over unfair dismissal claims. The findings of the employment tribunal on the unfair dismissal claims between the parties within its jurisdiction would then create issue estoppels in the High Court proceedings for wrongful dismissal: **Soteriou v. Ultrachem** [2004] EWHC 983 (QB) [2004] IRLR 870.

22. The problem in this case arises from the fact that, unlike **Soteriou,** the claim for unfair dismissal was coupled with a claim for wrongful dismissal and the employment

tribunal determined both causes of action in a judgment into which the cause of action for wrongful dismissal merged and was extinguished.

23. In my judgment, the other authorities cited by the Master and referred to in the skeleton arguments do not assist Mr Fraser. It is true that in **Sajid** the claimant began proceedings in the employment tribunal for unfair dismissal and wrongful dismissal, and that, in recognition of the jurisdictional limits of the tribunal, he reserved the right to rely on the findings of the tribunal in proceedings in another court to recover the balance and instituted proceedings in the High Court for the full amount of damages for wrongful dismissal. However, before the substantive hearing in the employment tribunal he withdrew his wrongful dismissal claim from the employment tribunal, whereupon an order was made dismissing it on withdrawal. It was withdrawn not because it was being abandoned by the claimant, but for the purpose of litigating it in a court that could award the full amount claimed.

24. The estoppel issue arose from the defendant's contention that the claimant was debarred by the dismissal order from pursuing his claim for wrongful dismissal in another court. This Court ruled against the application of an estoppel which would prevent him from pursuing his wrongful dismissal claim in the High Court. The wrongful dismissal claim had not been decided on its merits in the employment tribunal. The claim was withdrawn from it so that it could be litigated and determined in the High Court. It was not a case of re-litigation contrary to the principle of finality. See also **Ako v. Rothschild Assset Management** [2002] IRLR 348 and **Verdin v. Harrods Ltd** [2006] IRLR 339, which were also concerned with the effect of withdrawal of claims from the employment tribunal.

25. In **Sivanandan** the claimant had brought a number of claims in proceedings in the employment tribunal – race discrimination and victimisation, sex discrimination, unfair dismissal and breach of contract. The tribunal struck out and dismissed all of the claims on 22 September 2000. On 10 December 2002 the claimant started proceedings in the High Court, including a claim for breach of contract which had never been withdrawn by her from the employment tribunal before it was struck out and became res judicata. It was held by the Court of Appeal that those proceedings were an attempt to re-litigate the breach of contract claim which the tribunal had struck out and that that they should be struck out as an abuse of process.

26. It was submitted before the Master that this case was covered by the dicta of Wall LJ at paragraph 107 of the leading judgment-

> "By contrast, however, the decision of this court in **Sajid** makes it plain that it is not an abuse of process if (1) an applicant brings proceedings before an Employment Tribunal for damages for breach of contract, unfair dismissal and a redundancy payment; (2) the claim for breach of contract is in excess of the Employment Tribunal limit of £25,000; and (3) the applicant makes it clear in the application to the Employment Tribunal that he reserves the right to rely on the findings of the Tribunal in order to bring proceedings in another court to recover the excess."

27. In this court Mr Cheetham accepted that that paragraph was an incomplete statement of the decision in **Sajid** and that it must be read in a context (see paragraphs 109 and 110) which shows that there was a fourth element in **Sajid,** in that the claimant went

on to withdraw the proceedings from the employment tribunal not for the purpose of re-litigating what had been decided by the employment tribunal, but in order to litigate for the first time the issue of wrongful dismissal in the High Court, where no statutory cap would apply to the quantum of damages that could be awarded.

28. Counsel's attention was drawn to **Soteriou v. Ultrachem Ltd** [2004] IRLR 870, in which it was held that the findings of an employment tribunal in proceedings for unfair dismissal, in which the claimant expressly reserved the right to make a claim for wrongful dismissal arising out of the same facts, constituted issue estoppel or res judicata for the purpose of the proceedings in the High Court for wrongful dismissal. The value of that decision, which I would respectfully approve on this point, is that it shows that, if the unfair dismissal claim is litigated first in the employment tribunal, it is neither necessary nor permissible to re-litigate in High Court proceedings for wrongful dismissal the factual issues common to both causes of action. If the claimant loses on the unfair dismissal claim in the employment tribunal, he would not be allowed, on a wrongful dismissal claim in the High Court to re-open issues of fact or law decided by the employment tribunal. If, however, he won his claim for unfair dismissal, the defendant would not be entitled to re-litigate defences which had been rejected by employment tribunal.

Conclusion

29. In my judgment, this was clearly a case of merger of Mr Fraser's cause of action for wrongful dismissal in the final judgment of the tribunal on the claim for wrongful dismissal as between the same parties as in the High Court proceedings. Merger was not prevented from taking place by the express statement in the ET1 that Mr Fraser expressly reserved his rights to bring High Court proceedings for the excess. The merger arose from the fact that the cause of action had been the subject of a final judgment of the tribunal. Once it had merged Mr Fraser no longer had any cause of action which he could pursue in the High Court, even for the excess over £25,000. The claim for the excess is not a separate cause of action. The cause of action for wrongful dismissal could not be split into two causes of action, one for damages up to £25,000 and another for the balance. A claim in the High Court for the balance of the loss determined in the tribunal would have to be based on a single indivisible cause of action for wrongful dismissal.

30. From Mr Fraser's point of view the outcome is unfair: his advisers had made his intentions known to HLMAD and the employment tribunal; he was not seeking in the High Court action to reopen any findings of the employment tribunal, on the contrary he was seeking to rely on the findings in support of the application for summary judgment; and there was no prejudice to HLMAD in his being able to bring proceedings in the High Court based on the findings of the employment tribunal. The prejudice will be suffered by Mr Fraser as a result of HLMAD taking the point that he should not have pursued his wrongful dismissal claim in the tribunal, but instead should have withdrawn it and pursued it in parallel proceedings in the High Court. It is not, however, prejudice of a kind of which Mr Fraser can complain, as HLMAD's point on merger is legally correct.

31. In future claimants and their legal advisers would be well advised to confine claims in employment tribunal proceedings to unfair dismissal, unless they are sure that the claimant is willing to limit the total damages claimed for wrongful dismissal to £25,000 or less. If the claimant wishes to recover over £25,000, the wrongful dismissal claim should only be made in High Court proceedings. The findings of the employment tribunal in its judgment on the unfair dismissal claim will assist, as they will give rise to an issue estoppel in any subsequent High Court proceedings for wrongful dismissal, but there will be no merger of causes of action and the claimant will not be prevented by success in the employment tribunal claim for unfair dismissal from pursuing an action for wrongful dismissal. An application for summary judgment in the High Court for the wrongful dismissal claim will be appropriate in straightforward cases.

32. It would also be adviseable for the brochures and other material issued by the Tribunal Service from time to time to make it clear that wrongful dismissal claims in which the claimant expects to be awarded more than £25,000 should not be brought in the employment tribunal, but in the ordinary courts.

33. The time might have arrived for the Secretary of State for Trade and Industry to reconsider the limits on the jurisdiction of employment tribunals in respect of claims for wrongful dismissal, but that is, of course, a matter for him.

Lord Justice Moore-Bick:

34. This appeal concerns the application of the principle of estoppel per rem judicatam, otherwise known as estoppel by record, to proceedings in the High Court as a result of earlier proceedings in the Employment Tribunal. It is unnecessary for me to describe the circumstances in which it has arisen since a full account of them is given in the judgment of Mummery L.J. which I gratefully adopt. I agree with him that this appeal must be dismissed, but in view of the importance of the issues to those who appear before the Employment Tribunals, both practitioners and litigants in person, I propose to express my own reasons for reaching that conclusion.

35. It has been recognised for centuries that it is neither just nor in the public interest that a person should be allowed to litigate the same issue more than once. The principle is encapsulated in the well-known maxims ‘nemo debet bis vexari pro una et eadem causa’ and ‘interest reipublicae ut sit finis litium’. Out of these broad principles of justice and policy, however, there have developed three distinct principles of law usually referred to as ‘cause of action estoppel’, ‘issue estoppel’ and ‘abuse of process’. The first two are aspects of estoppel by record since they both depend on a prior decision by a court or tribunal of competent jurisdiction on matters before it. The third involves the exercise of the court’s inherent jurisdiction to prevent abuse of its process. This appeal is concerned with cause of action estoppel.

36. In May 2004 the appellant, Mr. Fraser, made a claim for damages for wrongful dismissal before the Employment Tribunal taking advantage of the jurisdiction conferred on that tribunal by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, article 10 of which limits the relief which the tribunal may award in respect of the breach of any one contract to £25,000. In his

application notice he stated that, insofar as his claim for damages for wrongful dismissal exceeded the tribunal's jurisdiction he reserved the right to pursue an action in the High Court. There can be no doubt, therefore, that he was aware that the tribunal had limited jurisdiction to grant relief in respect of his claim and that, if he were successful, it might not be able to make an order providing full compensation for the loss he had suffered.

37. On 23rd December 2004, before there had been any determination of his claim before the tribunal, Mr. Fraser issued proceedings in the High Court claiming damages for wrongful dismissal and breach of contract. That claim was based on the same contract and exactly the same cause of action as the claim for wrongful dismissal he was pursuing before the tribunal. Mr. Fraser was legally represented in relation to both sets of proceedings, but neither he nor those acting for him appear to have thought that there was anything incongruous in his pursuing two sets of proceedings concurrently in relation to the same claim.

38. Following the determination by the tribunal of the claim for wrongful dismissal the defendant made an application to strike out the claim in the High Court on the grounds that the matter was res judicata and that it would be an abuse of the process to continue the proceedings. When the matter came on for hearing before Master Eyre the defendant relied on the decision of this court in *Sajid v Sussex Muslim Society* [2001] EWCA Civ 1684, [2002] IRLR 113 which, it said, was authority for the proposition that a decision of the Employment Tribunal on a claim for wrongful dismissal gives rise to cause of action estoppel. It will be necessary to refer to that case in greater detail in a moment, but before doing so it is convenient to say something about the principles of cause of action estoppel as they apply in relation to proceedings in the Employment Tribunal generally since they have given rise to some difficulty in the past.

39. In a well-known passage in his judgment in *Thoday v Thoday* [1964] P. 181 at pages 197-198 Diplock L.J. summarised the principles of estoppel by record in the following way:

> "The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call "cause of action estoppel," is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim "Nemo debet bis vexari pro una et eadem causa." In this application of the maxim "causa" bears its literal Latin meaning. The second species, which I will call "issue estoppel," is an extension of the same

> rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

These principles are of general application and, as the authorities demonstrate, apply in relations to decisions of the Employment Tribunal as they do to decisions of the courts.

40. There has been a number of cases in which the courts have considered the effect of an order of the Employment Tribunal dismissing a claim, whether on the merits or following its withdrawal by the claimant. In *Barber v Staffordshire County Council* [1996] 2 All E.R. 748, [1996] IRLR 209 the claimant made a claim in what was then called the Industrial Tribunal for redundancy payment following the termination of her employment by the defendant as a part-time teacher under three separate contracts of employment. She later withdrew the claim following advice that she was not entitled to aggregate hours of work under separate contracts in order to satisfy the statutory requirements and the tribunal made an order dismissing her claim. Some time later, following a decision of the House of Lords that the relevant statutory provisions were incompatible with European Community law, she brought a second claim seeking redundancy payment and compensation for unfair dismissal. The respondent contended that the dismissal of the first claim operated as a bar to any subsequent claim, either by reason of cause of action estoppel or because the second proceedings involved an abuse of the process falling within the principles of *Henderson v Henderson* (1843) 3 Hare 100.

41. The matter eventually came before this court on appeal from the Employment Appeal Tribunal. Neill L.J., with whom Auld L.J. and Sir Iain Glidewell agreed, referred to the passage in the judgment of Diplock L.J. in *Thoday v Thoday* to which I referred earlier, in particular that part which relates to cause of action estoppel. He rejected the argument that such an estoppel could only arise when the tribunal seised of the first set of proceedings had given a reasoned decision and held that the order dismissing the first claim was a judicial decision by the tribunal in the exercise of its powers under the relevant legislation and not merely an administrative act. He also rejected the argument that the rule might be avoided in exceptional circumstances, relying on a passage in the speech of Lord Keith in *Arnold v Westminster Bank Plc* [1991] 2 A.C. 93 at 104 in which he said

> "Cause of action estoppel arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened."

42. It does not seem to have been argued in that case that the claim for compensation for unfair dismissal was also barred by cause of action estoppel, even though it was based on the same contracts and arose out of the same facts as those giving rise to the claim for redundancy payment, but it was argued that it represented an abuse of the process. The distinction may be important because there is a degree of flexibility in the application of the principles relating to issue estoppel (in the sense used by Diplock L.J. in *Thoday v Thoday*) and the restraint of abuse of process which does not appear to exist in relation to cause of action estoppel. Nonetheless, the court held that the claimant should have brought forward all her claims on the first occasion and that the second proceedings were an abuse of the process.

43. As has been recognised in subsequent cases, *Barber v Staffordshire County Council* is authority for the proposition that the principles of estoppel by record, both cause of action estoppel and issue estoppel, apply to decisions of the Employment Tribunal. In *Lennon v Birmingham City Council* [2001] EWCA Civ 435, [2001] IRLR 826 the claimant brought proceedings against her employer, Birmingham City Council, in the Employment Tribunal alleging sex discrimination, harassment and bullying which she later withdrew, whereupon an order was made reciting that the application was dismissed on withdrawal. Five months later the claimant started proceedings against the Council in the County Court claiming damages for breach of contract and negligence alleging various forms of unpleasant and intimidatory behaviour towards her by certain members of the Council's staff which she alleged had adversely affected her physical and mental health. The Council applied to strike out the claim on the grounds that it was an abuse of process, being based on the same facts as had given rise to her claim in the Employment Tribunal. Buxton L.J., with whom Mantel and Pill L.JJ. agreed, pointed out that *Barber v Staffordshire County Council* was binding authority for the proposition that an order of the Employment Tribunal dismissing a claim gave rise to cause of action estoppel, whether the claim had been considered on the merits or not.

44. However, in later cases, such as *Sajid v Sussex Muslim Society* [2001] EWCA Civ 1684, [2002] IRLR 113 and *Ako v Rothschild Asset Management Ltd* [2002] EWCA Civ 236, [2002] IRLR 348, those decisions were distinguished by reference to the circumstances giving rise to the decision to withdraw the claim. Thus, in *Sajid v Sussex Muslim Society* the court distinguished *Barber v Staffordshire County Council* on the grounds that in that case the applicant had withdrawn her claim because she recognised that, as the law then stood, it could not succeed, whereas Dr. Sajid had withdrawn his claim simply in order to enable him to take proceedings in another forum. The same distinction was applied in *Ako v Rothschild Asset Management Ltd*

in which Mummery L.J. drew attention to the fact that the rules then governing proceedings in the Employment Tribunal made no provision for the discontinuance of a claim without adjudication of any kind upon it. The only order that could be made to give effect to the withdrawal of the claim was an order that it be dismissed. In those circumstances he held that it was necessary to look behind the order dismissing the claim in order to determine whether it was, in effect, a true dismissal of the claim or a mere discontinuance.

45. As I read the decision, the court's approach to the question of cause of action estoppel in *Ako v Rothschild Asset Management Ltd* reflected the ambiguous nature of an order in the Employment Tribunal at that time dismissing a claim. It is not authority for the general proposition that a person who seeks to pursue proceedings based on a cause of action which has been the subject of a judgment in former proceedings can subsequently delve into the circumstances surrounding the former judgment with a view to persuading the court that he did not intend to abandon his right to take further proceedings on the basis of it. That would be inconsistent with the observations of Lord Keith in *Arnold v National Westminster Bank Plc* and contrary to the principles underlying cause of action estoppel which, as this court held in *Barber v Staffordshire County Council*, depends on the existence of a judgment rather than a decision on the merits, much less the circumstances in which it came to be entered.

46. Since those cases were decided a new set of rules, the Employment Tribunals Rules of Procedure 2004, has been introduced governing proceedings in the Employment Tribunal. Rule 25(1) of those rules allows a claimant to withdraw all or part of his claim at any time and the withdrawal takes effect when the Employment Tribunal Office (in the case of a written withdrawal) or the tribunal itself (in the case of an oral notification) receives notice of it. No further order is required to make the withdrawal effective, but the respondent may apply for an order dismissing the proceedings against him and the rules expressly provide that, if such an application is granted and the proceedings are dismissed, those proceedings cannot be continued by the claimant. It would seem, therefore, that the lacuna in the previous rules identified by Mummery L.J. in *Ako v Rothschild Asset Management Ltd* has now been made good. That was the thrust of the decision of His Honour Judge Richardson in the Employment Appeal Tribunal in *Verdin v Harrods Ltd* [2005] UKEAT 0538, [2006] IRLR 339 with which I would respectfully agree. Accordingly, claimants should no longer assume that if they allow an order to be made dismissing the claim they can prevent a cause of action estoppel arising by making it clear that they intend to pursue a claim elsewhere.

47. The present case differs from those that have previously come before this court in that the proceedings in the Employment Tribunal resulted in a judgment in the claimant's favour, albeit for an amount well below that to which the tribunal was satisfied he was entitled. Before the Master the respondent relied on the decision in *Sajid v Sussex Muslim Society* in support of his submission that since the first claim had not been withdrawn from the tribunal the doctrine of cause of action estoppel applied so as to bar the second claim. Counsel appearing for Mr. Fraser argued that the decision of this court in *London Borough of Enfield v Sivanandan* [2005] EWCA Civ 10 supported the conclusion that his client was entitled to pursue the current proceedings. He relied in particular on paragraph 107 of the judgment Wall L.J. in which he said

> "107. By contrast, however, the decision of this court in ***Sajid*** makes it plain that it is not an abuse of process if (1) an applicant brings proceedings before an Employment Tribunal for damages for breach of contract, unfair dismissal and a redundancy payment; (2) the claim for breach of contract is in excess of the Employment Tribunal limit of £25,000; and (3) the applicant makes it clear in the application to the Employment Tribunal that he reserves the right to rely on the findings of the Tribunal in order to bring proceedings in another court to recover the excess."

48. The Master rejected that argument. He held that, since the respondent in *London Borough of Enfield v Sivanandan* had not in fact withdrawn her claim before the tribunal, Wall L.J.'s comments were obiter and he noted that the court had apparently approved its earlier decision in *Sajid v Sussex Muslim Society*. He therefore held that the application to strike out the claim should succeed.

49. In my view the Master was right to regard the comments of Wall L.J. in paragraph 107 as obiter and with all respect to him I do not think they provide a complete description of the position in *Sajid v Sussex Muslim Society* since they omit any reference to the fact that Dr. Sajid withdrew the claim he had made before the tribunal in circumstances which amounted to a discontinuance. Before this court Mr. Cheetham, who did not appear for Mr. Fraser below, recognised that difficulty and accepted that little assistance is to be derived in this case from the decision in *London Borough of Enfield v Sivanandan*.

50. The only basis for challenging the Master's decision in this case is that Mr. Fraser had made it quite clear throughout the proceedings before the Employment Tribunal that he reserved the right to pursue a claim in the High Court to recover the balance of his loss. Mr. Cheetham submitted that in those circumstances it would be a grave injustice if he were to be prevented from doing so. The difficulty he faces, however, is that the principles of cause of action estoppel do not depend on the exercise of the court's discretion and it is not open to a claimant to avoid their operation simply by purporting to reserve a right to make a second claim in the future.

51. A valuable summary of the law relating to estoppel by record is to be found in chapter 44 of *Phipson on Evidence*, 16th ed. In particular the authors draw attention in paragraph 44-16 to the distinction between the positive and negative aspects of a judgment which both prevents a successful claimant from bringing a fresh claim on the same cause of action and prevents the unsuccessful party, whether claimant or defendant, from challenging the correctness of the decision in subsequent proceedings. The former is a reflection of the doctrine of merger which was discussed and explained by Lord Goff in *Republic of India v Indian Steamship Co. Ltd (The 'Indian Grace')* [1993] A.C. 410.

52. In *The 'Indian Grace'* a cargo of munitions being carried on board the vessel from Sweden to India was damaged when water was pumped into one of the vessel's holds during the course of the voyage in order to extinguish a fire in a cargo of wood pulp stowed in the same compartment. A small number of shells were jettisoned and some damage was caused to boxes of munitions by swelling of the wood pulp. The

claimants said that the cargo was a total loss because all the boxes which remained on board had been adversely affected by radiant heat from the fire. The total claim was put at £2.6 million.

53. For reasons which are unclear, proceedings were started in Cochin to recover damages only in respect of the 51 shells which had been jettisoned. In due course judgment was entered for the full amount of the claim, Rs. 189,508.67 (about £6,000). In the meantime, however, the claimant had begun proceedings in England claiming damages for the loss of the whole cargo. After judgment had been entered in India the defendant sought to strike out the claim in this country under R.S.C. Ord. 18, r. 19 on the grounds that the judgment in Cochin had given rise to cause of action estoppel by virtue of the provisions of section 34 of the Civil Jurisdiction and Judgments Act 1982 which prevents a person from bringing proceedings on a cause of action in respect of which judgment has been given in his favour in proceedings between the same parties in a foreign court. The argument succeeded at first instance and before the Court of Appeal, but failed in the House of Lords. Their Lordships held that, contrary to the position at common law, section 34 creates a purely procedural bar to further proceedings and because the claimants had raised issues of waiver and estoppel the matter could not be determined in advance of trial.

54. The leading speech was delivered by Lord Goff with whom the rest of their Lordships agreed and is relevant to the present case primarily because of the discussion of the principles of cause of action estoppel at common law and the doctrine of merger. Lord Goff introduced that part of his speech by citing the passage from the judgment of Diplock L.J. in *Thoday v Thoday* to which I referred earlier and at page 417 he continued as follows:

> "There is one observation which I wish to make upon the passage from the judgment of Diplock L.J. which I have just quoted. This is that the principle of merger to which Diplock L.J. refers as applying where the cause of action was determined to exist, in the sense that judgment was given upon it, cannot be described simply as a species of estoppel. The principle, which is sometimes called the doctrine of merger in judgment, is that a person
>
> > "in whose favour an English judicial tribunal of competent jurisdiction has pronounced a final judgment . . . is precluded from afterwards recovering before any English tribunal a second judgment for the same civil relief in the same cause of action:" see *Spencer Bower and Turner, Res Judicata*, 2nd ed. (1969), pp. 355 et seq.
>
> The basis of the principle is that the cause of action, having become merged in the judgment, ceases to exist, as is expressed in the Latin maxim transit in rem judicatam: see *King v. Hoare* (1844) 13 M. & W. 494, 504, *per* Parke B., cited by Lord Penzance and Lord Blackburn in *Kendall v. Hamilton* (1879) 4 App. Cas. 504, 526 and 542."

55. The Employment Tribunal has a statutory jurisdiction to determine claims for wrongful dismissal and, although its jurisdiction to grant relief is subject to a financial limit, its judgment may be enforced in accordance with its terms through the County Court procedure. The judgment creates a new and independent obligation which is in substance of the same character as a judgment of the court. Since, as the authorities show, a judgment of the Employment Tribunal gives rise to cause of action estoppel, I think it must follow that the doctrine of merger as described by Diplock L.J. in *Thoday v Thoday* and Lord Goff in *The 'Indian Grace'* also applies in cases where the claimant is successful and obtains judgment on his claim. Accordingly, I can see no escape from the conclusion that when judgment has been entered in favour of the claimant the cause of action merges in the judgment and is extinguished. The result in this case is that once the tribunal's judgment had been entered on the register Mr. Fraser no longer had any cause of action for wrongful dismissal and his reservation of the right to pursue an action in the High Court was wholly ineffective.

56. In view of the limit on the Employment Tribunal's jurisdiction to grant relief two earlier decisions on the operation of the doctrine of merger are of some interest in the context of the present case. The first, *Wright v The London General Omnibus Company* (1877) L.R. 2 Q.B.D. 271, concerned an award of compensation by a magistrate in the exercise of his jurisdiction under the London Hackney Carriages Act 1843 following the conviction of two omnibus drivers for furious driving. They had been racing and in the course of doing so the driver employed by the defendant collided with the plaintiff's cab causing him injuries. The magistrate's jurisdiction to award compensation was limited to the sum of £10 and despite the cabman's protestation that it was not enough the magistrate awarded him £5 against each driver. The amounts were paid into court and received by the plaintiff. Later the cabman brought an action for damages against the defendant who pleaded cause of action estoppel in its defence. The judge at trial allowed the case to go to the jury who awarded the plaintiff £95, but on appeal it was held that the magistrate's award rendered the matter res judicata and the judgment was set aside.

57. Cockburn C.J. regarded the case as one of cause of action estoppel. He said at page 273-274

> "I think that such award of compensation is binding on the plaintiff, and prevents this action from being maintainable. Assuming at present that the plaintiff was a party complaining before the magistrate, and asking for the exercise of this jurisdiction, it was admitted that if the award of compensation by the magistrate had been against the company itself, the plaintiff could not have proceeded further. Having appealed to the special jurisdiction given under the Act he must abide the result, and could not obtain a further award of compensation against the company by another tribunal. . . . . It seems to us that when the jurisdiction given by the section is exercised and compensation is awarded, the award is in full of the whole compensation recoverable by the party damaged, and he cannot recover anything more."

58. The second case is *Clarke v Yorke* (1882) 52 L.J.Ch. 32. In that case the plaintiff made a claim for damages against the defendant in the County Court for fraudulently

misrepresenting the drainage condition of a farm which he had leased. The defendant refused to waive the jurisdiction limit of the court which then stood at £50 and the plaintiff therefore amended his particulars of claim to abandon so much of his loss as to bring his claim within the limit of the court's jurisdiction. The plaintiff subsequently brought an action in the High Court claiming damages for further loss he had sustained since the commencement of the County Court action as a result of the defendant's fraudulent misrepresentation. The defendant pleaded cause of action estoppel in response to the claim. The judge held that, although the plaintiff had suffered further damage, he had only one cause of action which was exhausted by the action he brought in the County Court. Pearson J. expressed the view that

> "He might, if he was really entitled, in respect of that misrepresentation, to larger damages, have sought and obtained larger damages in the superior Court. If, therefore, he has recovered only 50*l*. in the County Court, and 50*l*. is not the measure of his damage, it is his own fault for having sued in a Court of limited jurisdiction instead of having sued in the superior Court."

59. In their different ways each of these cases bears a degree of similarity to the present case, being an example of an award of damages made by a tribunal with limited jurisdiction. In the case of *Wright v The London General Omnibus Company* there was no judgment in the ordinary sense, but an award of damages was made by a court of competent jurisdiction in respect of the plaintiff's loss. The decision is all the more striking in view of the fact that the plaintiff had made it clear to the magistrate that he did not consider £10 to be adequate compensation for his loss. *Clarke v Yorke* is closer to the present case and it is interesting to note that the ground of decision was not that part of the claim had been abandoned in the County Court, but that the judgment exhausted the cause of action.

60. I can well understand why Mr. Cheetham submitted that it would be unjust if Mr. Fraser were to be deprived of the opportunity of pursuing a claim for the balance of his loss, but the fact is that he was not bound to make his claim for wrongful dismissal in the Employment Tribunal. He chose to do so, even though he knew that it could not award him the full amount to which he believed he was entitled. The Employment Tribunal offers a claimant various advantages, such as relative speed, informality, reduced expense and (in general) freedom from the risk of having to pay the defendant's costs if the claim fails. There are disadvantages, however, principally the limit on the amount of damages that the tribunal can award. A claimant who wishes to pursue a claim for wrongful dismissal can choose where to bring his claim and, as Pearson J. observed in *Clarke v Yorke*, the problem that arises in this case is really the result of a decision to pursue the claim to judgment before a tribunal of limited jurisdiction. However, I agree with Mummery L.J. that in this context the principles of cause of action estoppel pose a trap for the unwary, particularly for unrepresented claimants who may not be aware of this somewhat technical rule of law. I agree with him that it would be desirable for the literature published to assist parties to proceedings before the Employment Tribunal to draw claimants' attention to the fact that once the tribunal has given a judgment on a claim for wrongful dismissal, whether granting relief or dismissing the claim, it is not possible to make a further claim on the same grounds, either before the tribunal or elsewhere.

61. For these reasons, as well as for the reasons given by Mummery L.J., I would dismiss the appeal.