CANTERBURY LAW LIMITED

CANTERBURY LAW LIMITED
BARRISTERS & ATTORNEYS
THIRD FLOOR, SWAN BUILDING
26 VICTORIA STREET, HAMILTON HM 12
BERMUDA
TELEPHONE: +1 (441) 296-8444
WEBSITE: WWW.CANTERBURYLAW.BM

MAIL:
PO BOX HM 2439
HAMILTON HM JX
BERMUDA

FAX: +1 (441) 296-8446
EMAIL: MAIL@CANTERBURYLAW.BM

THE DOCTRINE OF *RES JUDICATA* AND THE EMPLOYMENT TRIBUNAL

The well-known rule against having a "second bite at the cherry" in court proceedings has also been applied to proceedings before employment tribunals.

The *Employment Act 2000* (the "*2000 Act*") established in Bermuda a mechanism for resolving disputes relating to employment rights under the *2000 Act*. That mechanism includes establishing the position of Inspectors for the purposes of enforcement of the *2000 Act* and an Employment Tribunal to hear and determine complaints referred to it under the *2000 Act*. As a tribunal established by law for the determination of legal rights, the Employment Tribunal is a quasi-judicial body bound by the law and by all of the obligations inherent in a fair hearing that one would expect in a court.

The legal principle which prevents parties to litigation from bringing a second action against a person whom they have already sued in court (or some other legally constituted tribunal) is known by the Latin phrase "*res judicata*", which is usually translated as "the thing has been decided". The principle of *res judicata* prevents a person from bringing a second action against someone with whom they have been in previous litigation, whether in the place of a plaintiff or a defendant,[1] on matters which were, or could have been, in issue in the original action.

The distinction between those matters which *have been* the subject of adjudication and those *which have not but could have been* the subject of adjudication in earlier proceedings was set out by Sir James Wigram nearly 170 years ago in *Henderson v. Henderson*[2] in the following terms:

> "In trying this question, I believe I state the rule of the court correctly, when I say, that 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

---

1 Including by way of counter-claim or cross-claim.

2 (1843) 3 Hare 100, at 114-115.

> 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."

That statement of principle in *Henderson v. Henderson* has been regarded as good law and consistently followed since 1843. It applies to all courts and tribunals applying the law in Bermuda.

In Bermuda, *Henderson v. Henderson* has been followed by Kawaley J (as he then was) as recently as 2004 in *Roberts and Hayward v. Minister of Home Affairs.*[3] It has never been doubted that the principle of *res judicata* applies in Bermuda as it does in England.

Henderson v. Henderson has been considered in a number of subsequent British cases and perhaps the most instructive is *Johnson v. Gore Wood & Co.*[4], in which the House of Lords in England undertook a review of many cases based on the principle in *Henderson v. Henderson*, including cases such as *Talbot v. Berkshire County Council*[5] where the Court of Appeal (of England and Wales) said:[6]

> "The rule is thus in two parts. The first relates to those points which were actually decided by the court; this is *res judicata* in the strict sense. Secondly, those which might have been brought forward at the time, but were not. The second is not a true case of *res judicata* but rather is founded on the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation; the court will stay or strike out the subsequent action as an abuse of process: per Lord Wilberforce in *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411, 425G."

---

3 [2004] Bda LR 5.
4 [2000] UKHL 65; [2001] 1 BCLC 313.
5 [1994] QB 290.
6 *Ibid.* at 296D.

Both limbs of the principle, *res judicata* properly so-called and the "wider principle" where the issue could have been decided but was not brought forward, are equally applicable in an employment tribunal as they are in arbitration or litigation in court: see, for example, the decision of the Court of Appeal of England and Wales in *London Borough of Lambeth & Anor v. Apelogun-Gabriels* [2001] EWCA Civ 1853.

The difference between the two limbs of the rule appears to be that, if it is a true case of *res judicata* there is an absolute bar on re-litigating the issue whereas if it is a matter which could have been put forward in previous proceedings but was not (the "wider principle" in *Henderson v. Henderson*), it will be prohibited if it amounts to an abuse of process, but not otherwise.[7] In other words, there is a discretion to permit or prohibit the adjudication of a matter which could have been put forward previously but which was not.[8]

The burden of proof is on the person alleging abuse to show that it would be oppressive or abusive for him to be subjected to a second action in order to invoke the wider principle in *Henderson v. Henderson*.[9]

The principle in *Henderson v. Henderson* has been applied by employment tribunals in England to: (1) the cause of action; (2) an issue in the proceedings; (3) a finding of fact made by an earlier tribunal; (4) a head of loss awarded; and (5) an interlocutory decision on the case management of the proceedings.

The principle of cause of action estoppel in employment tribunals raises a number of potential problems. A problem may arise, for example, where an applicant presents and then withdraws a complaint and afterward attempts to bring forward the same complaint again, either in the Employment Tribunal or in civil proceedings. That may be the case where the employee, after having lost a claim for unfair dismissal before the Employment Tribunal, is then prevented from bringing proceedings in Court alleging that his dismissal was illegal as a matter of public law;[10] or where, after the Employment Tribunal decided that the employee had been unfairly dismissed by reason of ill-health, the employee

---

7 *Johnson v. Gore Wood & Co.* [2001] 1 BCLC 313 at 333 *b*, *per* Lord Bingham of Cornhill.

8 *Johnson v. Gore Wood & Co.* [2001] 1 BCLC 313 at 333 *b-c*, *per* Lord Bingham of Cornhill.

9 *Johnson v. Gore Wood & Co.* [2001] 1 BCLC 313 at 332 *i*, *per* Lord Bingham of Cornhill.

10 *Green v. Hampshire County Council* [1979] ICR 861.

is prevented from bringing a second application claiming a redundancy payment.[11]

What this means in practical terms is that an employee putting a case to the Employment Tribunal had better get his case right the first time, otherwise the employee may find that he is prevented from "fixing" his case afterward in a different forum, no matter the rule that normally allows a person to amend his complaint in civil proceedings up to the time judgment is delivered. This is especially important in Bermuda where the Employment Tribunal has jurisdiction to entertain some matters relating to breach of employment rights (those matters set out in the Employment Act 2000) but not others (*e.g.* breach of a special term in the contract of employment giving rise to a claim in damages).

Not only must an aggrieved employee put his whole case forward the first time, he must also consider which forum is the appropriate forum; or, where he has a choice, in which forum he wishes to bring his complaint. Such strategic considerations can be complex and should be discussed with an attorney to ensure the maximum protection of available legal rights.

This article addresses general principles only and is not intended to be a comprehensive exposition of the subject. Specific legal advice should be obtained in respect of any particular complaint made in Bermuda.

For further information please contact Paul A. Harshaw, Director, Canterbury Law Limited at +1 441 296 8444 or Paul.Harshaw@CanterburyLaw.bm

11 *Curtis v. James Paterson (Darlington) Ltd.* [1974] IRLR 88.