IN THE MATTER OF THE HUMAN RIGHTS ACT 1981

IN THE MATTER OF THE BERMUDA HUMAN RIGHTS TRIBUNAL

BETWEEN:

FANAYE BROADBELT

Complainant

-v-

BERMUDA ELECTRIC LIGHT COMPANY

DENTON WILLIAMS

JOCENE WADE-HARMON

Respondents

JUDGEMENT

Quorum:	Carla George, Chairman Kim Simmons and Quinton Butterfield, Panel Members
Complainant:	Represented by Mr. Eugene Johnston, J2Chambers
Respondents:	Represented by Mr. Craig Rothwell, Cox Hallett Wilkinson

Background

1. Ms. Broadbelt was employed with the First Respondent, The Bermuda Electric Light Company ("BELCO") from July 5, 1999 until August 9, 2013, when she was terminated for serious misconduct.

2. Ms. Broadbelt filed a complaint with the Human Rights Commission against the Respondents dated January 23, 2014, as further detailed in her Particulars of the Complaint and Further Particulars of Complaint. The allegations are the Respondents discriminated against the Complainant by dismissing, demoting or refusing to employ

her because of her sex in contravention of Section 6(1)(b) of the Human Rights Act, 1981 (the "Act") as read with Section 2(2)(a)(ii) of the said Act.

3. The Complainant did not make any other allegations under the Act.

4. The matter was referred to Human Rights Tribunal on June 9, 2016.

5. As a matter of context and background, Ms. Broadbelt also filed a complaint under the Employment Act 2000 (the "2000 Act") with the Employment Tribunal against the Respondents and a fourth Respondent Mr. Roger Todd alleging she was unfairly dismissed under the 2000 Act.

6. During some unclear time during those proceedings, the Employment Tribunal dismissed the second to fourth Respondents and the case was heard only against the first Respondent BELCO on March 8, 2016.

7. On March 30, 2016, the Employment Tribunal rendered its decision and found BELCO fairly dismissed Ms. Broadbelt on the grounds of serious misconduct and that her complaint for unfair dismissal was 'frivolous and without merit'.

8. Ms. Broadbelt filed an appeal to the Supreme Court on April 5, 2016, which is still pending.

Prehearing Matters

9. Ms. Wade-Harmon was unrepresented before these proceedings began. At the Hearing Mr. Rothwell advised the Tribunal that he was now representing Ms. Wade-Harmon and apologized for her absence due to her parliamentary duties.

10. Notwithstanding the deadlines set out in a Directions Order dated November 22, 2016, for exchanging and filing of skeleton arguments and bundles between the parties and with the Human Rights Commission, Mr. Johnston failed to meet these deadlines and the Tribunal was presented with his skeleton arguments and bundles the morning of the Hearing.

Preliminary Hearing

11. On 5 December 2016, a Preliminary Hearing (the "Hearing") was held and submissions were heard in respect of an application made by the Respondents to strike out the Complainant's case on the grounds that the Employment Tribunal, after hearing all the relevant evidence including evidence of discrimination, determined Ms. Broadbelt's dismissal was fair and therefore Ms. Broadbelt's restated claim should be dismissed on the basis of the doctrine of res judicata.

12. The Complainant's arguments in response were:

    a. The Tribunal does not have the power to dismiss the complaint for any of the reasons put forward by the Respondents; and/or
    b. Even if the Tribunal had such power, res judicata does not apply in the circumstances, and/or there is no abuse of process here.

Tribunal's powers to dismiss

13. The Tribunal will address the Complainant's first argument regarding the Tribunal's powers of dismissal.

14. Mr. Johnston argued that the *Tribunal lacks the power to dismiss for abuse of process. Specifically it only has the powers provided to them under the Act; it has no inherent powers.*

15. The Tribunal does not agree with these arguments and finds that there is an expressed power under Section 20 (6) of the Act: *"The Tribunal may dismiss a complaint at any stage of the proceedings"*. Not only are these powers expressed they are also broad.

16. Further, the Tribunal finds it difficult to accept the Complainant's argument that the Executive Officer has expressed powers of dismissal under sections 15A(1)(b) of the Act, but the Tribunal is restricted in their powers notwithstanding section 20 (6) of the Act.

17. The Tribunal dismisses the Complainant's first argument and will now consider the arguments put forward by the Respondents.

Doctrine of Res Judicata

18. The Tribunal was presented with a variety of case law addressing the doctrine of res judicata. The Tribunal agrees with Mr. Rothwell's reliance on Thompson and Thompson v. Thompson [1991] BDA LR 9 at 194. H.L De Costa when considering the doctrine of res judicata:

> *The principle involved in the doctrine of res judicata is that a matter finally adjudicated on by a competent court, may not subsequently be reopened or challenged as to the matter or point decided, by the original parties... It only applies where the parties are the same, the issue is the*

same, and the means of raising the question the same as has already been considered by a court."

19. Both parties submit that the doctrine of res judicata includes 'cause of action estoppel', 'issue estoppel' and 'abuse of process'.

20. The Tribunal contends that this is not a matter of cause of action estoppel. Rather the Tribunal refers to Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd. [2014] AC 160 which examines the principle of issue estoppel reciting Lord Keith of Kinkel in Arnold v National Westminister Bank plc [1991] 2 AC 93:

> *"Cause of action estoppel arises where the cause of action in the later 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..."*
>
> *"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seek to reopen that issue".*

21. When considering the doctrine of res judicata in the form of issue estoppel the Tribunal has to consider the following:
    i. Are the parties the same?
    ii. Are the issues the same?
    iii. Is the decision final?

Are the parties the same?

22. As outlined above, the parties to Ms. Broadbelt's initial complaint to the Employment Tribunal included all of Respondents one to three of the complaint under the Act, and an additional fourth respondent, Mr. Todd. However, the parties informed the Tribunal that the Employment complaint was amended with BELCO remaining as the only Respondent to that claim. To this end, the Tribunal finds that BELCO is the same party to the Employment Tribunal case and the Human Rights Tribunal case. Mr. Williams and Ms. Wade-Harmon, however, were not parties to the Employment Tribunal case and therefore the first test of this doctrine does not apply to them.

Are the issues the same?

23. Mr. Rothwell argues that the complaint before this Tribunal is the same factual matrix that Ms. Broadbelt relied upon before the Employment Tribunal to attempt to show that she was unfairly dismissed. He refers to the bundle filed by the Complainant which is materially the same as that before the Employment Tribunal save for 6 additional pages.

24. The Tribunal was presented with a witness statement of the second Respondent with exhibited documents which included witness statements from the Employment Tribunal of both Ms. Broadbelt and Mr. Williams, written submissions to the Employment Tribunal and the decision of the Employment Tribunal (discussed above).

25. The Tribunal agrees with Mr. Rothwell's argument that the dismissal is the only act that Ms. Broadbelt complains of as breaching the Act.

26. To fully consider whether the doctrine of res judicata in the form of issue estoppel applies, the Tribunal considered the arguments and evidence presented by both parties which refers extensively to the evidence heard before the Employment Tribunal and their subsequent decision.

27. In reviewing the documentation the Tribunal finds that the documentation is materially the same and the arguments put forth by Ms. Broadbelt in the Employment Tribunal are materially the same arguments we find before this Tribunal as produced in her complaint and bundles.

28. The Tribunal agrees with Mr. Johnston that the Employment Tribunal's ruling does not make any mention of section 28 of the 2000 Act or the act of gender discrimination, however with the evidence presented it would not be prudent for this Tribunal to conclude that the Employment Tribunal did not consider all of the issues put before them, including the extensive allegations of gender discrimination, when coming to their decision that Ms. Broadbelt was fairly dismissed due to serious misconduct.

29. The Tribunal has been persuaded by the ruling in the Canadian Human Rights Tribunal in Toth v. Kitchener Aero Avionics 2005 CHRT 19. There the tribunal had to consider

very similar facts to this matter. That tribunal found:

> *"I cannot see any way around it. The legal question before the tribunal (Human Rights) is whether Ms. Toth was discriminated against. The legal question before the adjudicator was whether she was unjustly dismissed. These two questions collapse into each other. The adjudicator decision was premised on the finding that Mr. Aylward's attitude towards pregnancy entered into his decision to let her go. I think this constitutes a finding of discrimination.*
>
> *[22] If Ms. Toth was unjustly dismissed, it was because she was discriminated against. It follows that the same question was at least implicitly before the adjudicator. A ruling in favour of the Respondent on the human rights complaint would contradict the ruling of the adjudicator. It would not be possible to find that the Complainant's position was properly terminated without offending the privative clause in section 243 of the Canada Labour Code.*
>
> *[23] The situation might be different if there was a distinct allegation of harassment, which could be severed from the termination. The underlying factual issues in the two hearings are the same, however. The adjudicator had to consider the Respondent's entire course of conduct, in reaching his conclusions. Any other allegations are an integral part of the course of conduct that culminated in the termination. It is all part of the same fabric. .....*
>
> *[28] The principle in Rasanen is that a case should only be heard once. It is sometimes said that a party cannot litigate in installments. If a hearing or trial is deficient, that can be dealt with by review or appeal. But that is the end of it. It would be wrong to let a Complainant start again, merely by moving a case to another statutory regime.....*

[40] It is evident that Ms. Toth has other sources of redress. She could, for example, have filed a lawsuit for wrongful dismissal. It seems clear that she would be barred from doing so. I think she must also be barred here. It is asking too much of me, to find that the Tribunal can somehow deal with the termination, in spite of the fact that a court cannot do so."

30. In considering the evidence and the case law the Tribunal finds that the issues are the same: addressing the fairness of Ms. Broadbelt's dismissal. They have been heard and decided on by another jurisdiction namely the Employment Tribunal.

Is the decision final?

31. The issue of finality is an important one to ensure that matters are litigated fairly and justly.

32. Mr. Rothwell rightly directs the Tribunal to Quinton Robinson v Elbow Beach Hotel [2005] Bda LR 8 at page 3, Kawaley J as he was then held:

"The power to stay proceedings on abuse of process grounds in this context arises under the inherent jurisdiction of the Court and is discretionary in nature. It is clear that the principle applies not just to concurrent court proceedings, but to proceedings before a court and some other judicial tribunal, such as arbitration proceedings: Supreme Court Practice 1999, Volume 2, paragraph 20A-394. The power may be exercised where the plaintiff in one set of proceedings is the defendant in another; and the broad rule governing the exercise of the discretion is that if two tribunals are faced with substantially the same issue, a stay should where justice dictates be granted to ensure that only one tribunal decides the common issue: The Royal Bank of Scotland Ltd v Citrusdale Investments Ltd. [1971] 3 All ER 561-562.....

It is difficult to imagine the circumstances in which this Court could properly permit a litigant to launch a collateral attack on the findings of a statutory tribunal reached in proceedings in which the Court parties did or could have participated, resulting in them being bound by the tribunal decision. And, if the position were reversed, it is hard to imagine this Court declining to restrain a party to an action before the Court simultaneously pursuing an adjudication of overlapping issues in proceedings subsequently started before another tribunal."

Conclusion

33. The Tribunal finds that the doctrine of res judicata applies to the first Respondent, BELCO and therefore dismisses the complaint in its current format against BELCO. The Tribunal is, however, open to allowing the Complainant an opportunity to amend her complaint against BELCO if she so chooses.

34. The Tribunal does not accept that the doctrine of res judicata applies to Mr. Williams and Mrs. Wade-Harmon and dismisses their application to strike out Ms. Broadbelt's complaint against them. A hearing will be scheduled to hear the case against Mr. Williams and Mrs. Wade-Harmon.

DATED this 17th day of February 2017

CARLA GEORGE, CHAIRPERSON

KIM SIMMONS, PANEL MEMBER

QUINTON BUTTERFIELD, PANEL MEMBER