Neutral Citation Number: [2021] EWCA Civ 199

Case No: A2/2020/0043

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mr Justice Lavender
UKEAT/0147/19/DA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2021

Before :

LORD JUSTICE HENDERSON
LORD JUSTICE SINGH
and
LADY JUSTICE ELISABETH LAING

- -

Between :

UNITE THE UNION	**Appellant**
- and -	
ALEC McFADDEN	**Respondent**

- -
- -

Mr Oliver Segal QC (instructed by **Unite the Union**) for the **Appellant**
Mr Marc Beaumont (instructed by **Beaumont Legal Services**) for the **Respondent**

Hearing date: 21 January 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2 p.m. on Friday, 19 February 2021.

Lord Justice Singh :

Introduction

1. The main issue of law which arises in this case is whether the doctrine of *res judicata* applies to the disciplinary proceedings of a trade union.

2. On 19 December 2019 the Employment Appeal Tribunal ("EAT") allowed the present Respondent's appeal against the decision dated 4 April 2019 of the Certification Officer ("CO"), who had held that the doctrine of *res judicata* does not apply to the disciplinary proceedings of a trade union.

3. The case arises from two sets of disciplinary proceedings that Unite the Union ("Unite"), the Appellant, brought against Alec McFadden, the Respondent. At the relevant time the Respondent was the chair of Unite NW522 Branch. Both disciplinary proceedings followed an allegation that the Respondent had slapped a woman's bottom. She was also a member of Unite. The Respondent has always denied the allegation.

4. The first disciplinary proceedings panel found that the alleged incident had occurred and constituted misconduct under rule 27.1.7 of Unite's rulebook. The Respondent unsuccessfully appealed against the decision to an internal appeal panel; but subsequently the Assistant Certification Officer ("ACO") held that rule 27.1.7 was inapplicable, as the incident had taken place outside the workplace.

5. The second disciplinary proceedings were brought under rules 27.1.1, 27.1.4 and 27.1.5 of the Unite rulebook. It was found in these proceedings that the actions of the Respondent breached those rules; and sanctions were imposed, including a bar from holding office in Unite.

6. The Respondent complained to the CO that the doctrine of *res judicata* applied and the second disciplinary proceedings were in breach of that doctrine. The CO held that the doctrine did not apply to Unite's disciplinary processes. The Respondent's appeal to the EAT was successful: see para. 2 above.

7. Unite now appeals to this Court. Permission to appeal was granted by Lewison LJ on 25 February 2020 for the reason that the grounds of appeal raised important issues and had a real prospect of success.

8. At the hearing of this appeal we heard submissions from Mr Oliver Segal QC for the Appellant, who did not appear below; and from Mr Marc Beaumont, who did. I express our gratitude to both counsel for their assistance.

Factual background

9. In October 2015, Unite received a complaint from a female member, alleging that the Respondent had slapped her bottom. The alleged incident was said to have occurred at an event at a restaurant during the 'March against Austerity' on 3 October 2015. Neither the event nor the march was organised by Unite. The Respondent denied the allegation.

10. The first disciplinary proceedings were brought by Unite under rule 27.1.7 of Unite's rulebook. The rule states as follows:

> "27.1 A member may be charged with:
>
> …
>
> 27.1.7 Breach of the Union's policies on diversity, bullying and harassment *in the workplace*, which will include cyber bullying and harassment." (Emphasis added)

11. On 15 April 2016 the panel in the first set of disciplinary proceedings found that the alleged action of the Respondent had occurred and amounted to misconduct under rule 27.1.7. The matter in due course came before the ACO (HH Jeffrey Burke QC). His decision was given on 3 October 2017: that there was no misconduct under rule 27.1.7, because the incident did not occur in the workplace; and that Unite had not relied on any other rules in its rulebook. On 20 November 2017, after considering the parties' submissions on remedies, the ACO made an order which included a declaration that Unite's first disciplinary proceedings and the penalties imposed were "null and void and of no effect".

12. Unite brought the second set of disciplinary proceedings against the Respondent on 28 November 2017. These proceedings concerned the same factual allegation, but were brought under rules 27.1.1, 27.1.4 and 27.1.5 of the Unite rulebook. These rules are as follows:

> "27.1 A member may be charged with:
>
> 27.1.1 Acting in any way contrary to the rules or any duty or obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder of a lay office or a representative of the Union.
>
> …
>
> 27.1.4 Inciting, espousing or practising discrimination or intolerance amongst members on grounds of race, ethnic origin, religion, age, gender, disability or sexual orientation.
>
> 27.1.5 Bringing about injury to or discredit upon the Union or any member of the Union, including the undermining of the Union, branch or workplace organisation and individual workplace representatives or branch officers"

13. The hearing in the second disciplinary proceedings took place on 10 December 2018 and it was determined that the Respondent was in breach of rules 27.1.1, 27.1.4 and 27.1.5. The sanction imposed was that the Respondent was barred from holding office in Unite.

14. In the meantime the Respondent had made a second complaint to the CO on 14 March 2018. A hearing took place on 21 March 2019 before the CO, Sarah Bedwell, to determine whether Unite was entitled to bring the second disciplinary proceedings. Her decision, given on 4 April 2019, so far as material, was that:

    (1) The doctrine of *res judicata* does not apply to decisions made under Unite's disciplinary procedures. The CO held that the relationship between Unite and its members is comparable to that between an employer and an employee.

    (2) There was no decision to which the doctrine of *res judicata* could apply even if it were applicable. This was because the decision of the panel in the first disciplinary proceedings had been declared null and void by the order of the ACO.

15. The decision of the CO was appealed by the Respondent to the EAT, where it was heard by Lavender J on 7 October 2019. His judgment was handed down on 19 December 2019, reversing the decision of the CO.

Material legislation

16. Section 108A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") provides:

> "(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).
>
> (2) The matters are—
>
> …
>
> (b) disciplinary proceedings by the union (including expulsion);
>
> …"

17. Section 108B, which has the side note "Declarations and orders", provides:

> "…
>
> (2) If he accepts an application under section 108A the Certification Officer—
>
> …
>
> (d) may make or refuse the declaration asked for, and

> (e) shall, whether he makes or refuses the declaration, give reasons for his decision in writing.
>
> (3) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements—
>
> (a) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;
>
> (b) to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.
>
> …
>
> (6) A declaration made by the Certification Officer under this section may be relied on as if it were a declaration made by the court.
>
> …
>
> (8) An enforcement order made by the Certification Officer under this section may be enforced in the same way as an order of the court.
>
> …"

The decision of the Certification Officer

18. In her decision, at paras. 16-17, the CO summarised the submission which was made by Mr Beaumont on behalf of the Respondent: that the decision taken in the first set of disciplinary procedures prevented Unite from taking further disciplinary action arising from the same complaint. He argued that cause of action estoppel, issue estoppel and the rule in *Henderson v Henderson* (1843) 3 Hare 100 are all part of the principles of *res judicata*.

19. In recording the submissions made by Mr Potter (who was then counsel for Unite) at para. 18, the CO noted that it was accepted that a decision by a union to suspend or to expel of a member is quasi-judicial in nature but it was submitted that such decisions are not amenable to the doctrine of *res judicata*, as they are not made by a professional regulatory body reaching an independent decision in respect of a professional on its register.

20. In setting out her decision and her reasons, at para. 34, the CO said that the relationship between a professional body (which controls access to a profession) and its registrants or members, is different from that between a union and its members. A professional has no choice whether to register with, or become a member of, the

professional body if they wish to work within that profession. Furthermore, a professional disciplinary case in almost all cases arises following a complaint from a third party (for example a client) and the professional body will be an independent adjudicator of that complaint.

21. At para. 35, the CO said:

> "In my view, the relationship between the Union and its member is closer to the relationship between an employer and employee than to a professional body and a member or registrant. The Union member freely enters into the contract with the Union and, by entering into the contract, gives the Union a contractual right to take disciplinary action in certain circumstances. That disciplinary action is, usually, taken internally within the Union without any external adjudication. This is very similar to an employee entering into a contract with an employer."

22. At para. 37, the CO said that she did not accept that a union's disciplinary procedures could be compared to litigation or an adjudication which is susceptible to the doctrine of *res judicata*. She said that the panels which were constituted to take decisions in this case were panels of Unite. Although they were required to act fairly and without bias, they were not an independent tribunal or adjudicator.

23. In concluding this part of her decision, at para. 40, the CO said:

> "On that basis, I am satisfied that the concept of *res judicata* in the form of cause of action estoppel does not apply to the decision made by Unite the Union to begin the second set of proceedings."

The judgment of the EAT

24. At para. 28 of his judgment, Lavender J said that:

> "… the dispute between the parties is whether the Union was estopped from bringing fresh disciplinary proceedings against the Appellant in respect of the same allegation, but alleging breaches of different rules in the Union's rulebook. In summary, the Appellant's argument is that the doctrine of *res judicata* applies to decisions made in the Union's disciplinary proceedings and that the Union, having pursued the first set of disciplinary proceedings to a conclusion, was estopped from commencing a second set of proceedings which raised either the same issues or, following the *Henderson v Henderson* line of authorities, related issues (i.e. allegations that the Appellant's alleged conduct constituted a breach of rules other than rule

> 27.1.7) which could and should have been made in the first disciplinary proceedings."

25. At para. 29 the Judge summarised the relevant legal principles as follows:

> "A number of authorities were cited to me, but it is sufficient to note that in paragraph 22 of his judgment in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 Lord Sumption stated that *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 is authority for the following propositions:
>
> > '22.
> >
> > (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.
> >
> > (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.
> >
> > (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant 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.' "

26. At para. 35 the Judge recorded the way in which the case was presented by counsel who was then appearing for Unite in the following way:

> "… For the Union, Mr Potter contended that the Certification Officer was right to hold that the doctrine does not apply. In answer to my questions, he acknowledged that the effect of his submissions was that, even if the disciplinary panel had dismissed the charge against the Appellant under rule 27.1.7 (either on the basis that that rule did not apply or on the basis that it was not satisfied that the Appellant did slap the Complainant's bottom), then it would have been open to the Union to bring exactly the same charge before a differently-

> constituted disciplinary panel in the hope of achieving a different result."

27. At the hearing before us, Mr Segal, who did not appear below, disavowed that stance. In my view, he was right to do so. That, however, is not conclusive of the issue which arises on this appeal: this is because, as Mr Segal submits, the facts of the present case are such that the first disciplinary panel concluded that the Respondent *had* done what was alleged and so the second panel's conclusion on the facts was not inconsistent with it.

28. The Judge did not find it necessary to decide the main issue which was in dispute between the parties. At paras. 36-37 he explained as follows:

> "36. I need not go into the rival submissions on this point in any detail, because I do not find it necessary to decide the point. That is because the first disciplinary proceedings did not conclude with the decision of the disciplinary panel or the decision of the appeal panel, but with the decision of the Assistant Certification Officer. His declaration and enforcement order may be relied on or enforced as if it was a declaration made by, or an order of, the court. Mr Potter accepted that the doctrine of *res judicata* does apply to such decisions and he also accepted that the Union would have been estopped by the Assistant Certification Officer's decision from bringing a second set of disciplinary proceedings against the Appellant relying on the same allegation and the same rule, i.e. rule 27.1.7.
>
> 37. Accordingly, during the course of the hearing I invited the parties to focus on the question of the effect of what the Assistant Certification Officer decided. The provisions of the 1992 Act which I have cited gave the Assistant Certification Officer a wide discretion as to the declaration and order which he made. It seems to me, and the parties did not seriously dispute this, that the Assistant Certification Officer could have made an order which either expressly permitted, or expressly prohibited, a second set of disciplinary proceedings based on the same allegation, but alleging breach of different rules in the Union's rulebook."

29. The reasons which the Judge gave for allowing the appeal were set out at paras. 40-45. For present purposes it is necessary only to set out part of that passage:

> "40. As I have said, I do not consider it necessary to decide the principal issue raised by the parties, i.e. whether the doctrine of *res judicata* applies to decisions made pursuant to the Union's disciplinary procedure. …

> 41. The decision of the Assistant Certification Officer was capable of giving rise to an estoppel *per rem judicatam*, but that makes it necessary to consider exactly what he decided. There is an attractive simplicity in Mr Potter's submission (with which the Certification Officer agreed) that no estoppel could arise from the first disciplinary proceedings, since the Assistant Certification Officer declared that they 'were null and void and of no effect'. Moreover, I do not consider that Mr Beaumont's primary submission in response (i.e. that the Union's failure to rely on rules 27.1.1, 27.1.4 or 27.1.5 was a fact which was not rendered null or void) assists the Appellant, since the Appellant needs to identify a decision in order to rely on the doctrine of res judicata.
>
> 42. However, the Assistant Certification Officer's decision itself was neither null nor void nor of no effect. The effect of his decision was that the Appellant was not in breach of rule 27.1.7 and that the Union had not relied on any other rules in its rulebook. In my judgment, and this was conceded, the Union was estopped by that decision from bringing further disciplinary proceedings alleging that the Appellant had slapped the complainant's bottom and was thereby in breach of rule 27.1.7.
>
> 43. It follows, in line with the *Henderson v Henderson* line of authorities, that the Union was estopped from bringing further disciplinary proceedings alleging that the Appellant had slapped the complainant's bottom and was thereby in breach of rules 27.1.1, 27.1.4 or 27.1.5 (or any other rules in the Union's rulebook). The Union could and should have asserted that the Appellant had breached those rules in the first disciplinary proceedings.
>
> …"

Submissions of the Parties

Appellant's Submissions

30. On behalf of Unite Mr Segal makes the simple submission that the Judge fell into error by committing a logical fallacy. The Judge said that he was going to decline to decide the principal issue which was in dispute between the parties, whether the doctrine of *res judicata* applies to a trade union's disciplinary procedures, yet that is precisely what he went on to do by a sidewind. The Judge noted that there could be no doubt that the doctrine of *res judicata* does apply to the decisions of a CO (or ACO). From that proposition he reached the conclusion that therefore Unite was precluded from bringing the second set of disciplinary proceedings, applying *Henderson*. Mr Segal submits that the conclusion simply does not follow from the premise: the Judge confused two different things, the stage at which a union brings

disciplinary proceedings and the later stage at which a decision is made by the CO (or ACO).

Respondent's Submissions

31. On behalf of the Respondent, Mr Beaumont submits, first, that the appeal should not be entertained because it is academic. The Respondent is now retired and has no wish to be an officer of Unite.

32. Turning to the substance of the appeal, Mr Beaumont submits it was not essential to the outcome of Lavender J's judgment that the principle of *res judicata* applies to the decision of the ACO. He submits that the doctrine of cause of action estoppel applies to disciplinary tribunals in the context of professions and, by way of analogy, in the present context too. He submits that his case has always been, and was before the EAT, that the principle in *Henderson* was applicable.

33. Mr Beaumont submits that the disciplinary proceedings of a trade union can properly be regarded as being quasi-judicial. In particular he notes that:

(1) Unite's guidance provides for a "charge", notice of charges, the taking of "witness evidence", "witness statements" and for "cross examination".

(2) Unite was considering an allegation of sexual assault against a senior figure, which necessarily required a degree of formality.

(3) Union disciplinary proceedings are no less formal than any professional disciplinary regime.

34. Mr Beaumont also observes that Unite is the largest union in this country, with 1.2 million members and its own in-house legal department. He submits that it could and should have got the charges right the first time around and should not be permitted to bring the same factual allegation twice, having failed in the first proceedings because it had brought the charge under the wrong rule.

<u>Should this Court consider this appeal at all?</u>

35. This appeal has become academic on its facts because the Respondent has retired and there is no prospect of his wishing to become an officer of Unite again.

36. The fact that permission to appeal was granted does not mean that this Court is bound to consider it: indeed this was common ground between the parties. The Court retains a discretion to determine an appeal in such circumstances if it would be in the public interest to do so. The position was summarised by Simler LJ in *Rehoune v London Borough of Islington* [2019] EWCA Civ 2142, at paras. 18-19:

> "18. There is no dispute that the court has discretion to determine an appeal that has become academic. The leading authority on the exercise of that discretion remains the decision

in *R v Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450 (HL) where at 456-457 Lord Slynn held:

> '… in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se* … The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the future.'

19. Subsequent cases have emphasised how narrow the discretion is. In *Hutcheson v Popdog Ltd (News Group Newspapers Ltd, third party) (Practice Note)* [2012] 1 WLR 782 (which was not a public law case and did not involve a public authority) Lord Neuberger of Abbotsbury MR held that the 'mere fact' that an appeal might raise a point of significance did not mean that it should be allowed to proceed where it is academic as between the parties (paragraph 12). He identified the following propositions (at paragraph 15):

> 'Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated.'"

37. In my view, it would clearly be in the public interest in the circumstances of the present case to determine the important issue of principle which has arisen. It will affect not only the powers of Unite but also trade unions generally and will affect the rights of their members. It may potentially affect the wider public, for example

complainants. Secondly, the parties were both legally represented by experienced counsel and so the Court could be confident that it would receive full submissions on the issue. Thirdly, the Court has on earlier occasions made orders in relation to costs so as to protect the Respondent's position, although we will consider further submissions as to costs at the end of this appeal.

Unite's appeal

38. In my view, the EAT did fall into error, as submitted by Mr Segal. There was, with respect, a logical fallacy in the reasoning of the EAT. The Judge expressly declined to decide the question whether a disciplinary body of a trade union is subject to the principles of *res judicata*: see para. 40 of his judgment. Yet he went on to say that, because the ACO is a judicial body and undoubtedly is subject to those principles, it followed that Unite could and should have raised the other charges at the first disciplinary hearing: see paras. 43 and 45.

39. In my view, the Judge's conclusion does not follow from the premise at all. As Mr Segal submitted, Unite did not have either the opportunity or the obligation to raise the other charges before the ACO. That was simply not part of the function of the ACO.

40. I do not accept Mr Beaumont's submission that this error was unimportant. It seems to me that it was fundamental to the reasoning of the EAT.

41. At para. 43, the Judge expressly held that the principle in *Henderson* did apply to prevent Unite from bringing the second set of disciplinary proceedings, even though he had earlier stated that he did not need to decide that point, which was the principal issue in dispute between the parties before him.

42. Since the only ground of appeal advanced by Mr Segal must, in my view, succeed, it is therefore necessary to consider the Respondent's alternative arguments as to why the appeal should be dismissed. Those arguments were set out in a skeleton argument dated 6 March 2020 but there was no Respondent's Notice inviting this Court to uphold the decision of the EAT on different or additional grounds.

43. It is important that proper procedures should be observed, and it is, in my view, necessary for there to be a Respondent's Notice. After this was raised by the Court at the hearing, one was filed on the day after the hearing, 22 January 2021. After the hearing we received written submissions from both parties as to whether, and to what extent, we should permit reliance to be placed on the grounds set out in the Respondent's Notice.

Application to file Respondent's Notice out of time

44. The well known principles for relief from sanctions apply in substance to an application for an extension of time in which to file a Respondent's Notice: see *Salford Estates (No 2) Ltd v Altomart Ltd (Practice Note)* [2014] EWCA Civ 1408; [2015] 1 WLR 1825. Those principles were set out by this Court in *Denton v TH*

White Ltd (Practice Note) [2014] EWCA Civ 906; [2014] 1 WLR 3926. In summary, they require the court to consider three stages: first, the seriousness of the breach of the court's rules; secondly, the reason for that breach; and, thirdly, all the circumstances of the case so as to deal with the application justly.

45. In the present case, in my view, the failure to file a Respondent's Notice in time is important: it is certainly not trivial although it is not of the most serious kind either. I can see no good reason for that failure: it simply seems not to have been appreciated that a Respondent's Notice was required until the Court pointed this out at the hearing before us. Nevertheless, when considering all the circumstances of the case, it is important to bear in mind that the Respondent did file a skeleton argument some 10 months before the hearing. In substance that skeleton argument raised additional reasons as to why this appeal should be dismissed which had not been given by the EAT. Furthermore, Mr Segal fairly accepted that he was able to deal with those submissions and indeed did so at the hearing before us. In those circumstances, I have reached the conclusion that this Court should grant the application for an extension of time to file the Respondent's Notice, until 22 January 2021. I would limit it to those matters which had already been raised in the skeleton argument.

46. In particular, as Mr Segal concedes, this includes the opening words of para. 8 of the grounds in the Respondent's Notice:

> "The learned Judge ought, additionally, to have held that the determination of the first disciplinary tribunal was the determination of a quasi-judicial body, which could thus properly found a cause of action estoppel."

47. In addition, I would grant permission to file the Respondent's Notice insofar as it reflects submissions which had already been made in the skeleton argument, that is paras. 1-6, to the extent that they invite this Court to dismiss the appeal for reasons different from, or additional to, those which the Judge gave.

48. Furthermore, I have taken into account all of the submissions made on behalf of the Respondent, both written and oral, in dealing with the substance of this appeal.

<u>The Respondent's Notice</u>

49. I turn to consider the alternative arguments made by Mr Beaumont, which were in substance advanced before the CO but rejected; and were advanced before the EAT but were not determined. The essential question which arises is whether the doctrine of *res judicata* applies to the disciplinary proceedings of a trade union.

50. The starting point is the summary of the principles of *res judicata* in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160, at paras. 17-26, where Lord Sumption JSC also cited the important decisions of the House of Lords in *Arnold v National Westminster Bank* [1991] 2 AC 93 and *Johnson v Gore-Wood & Co* [2002] 2 AC 1. At para. 17, Lord Sumption said:

> "*Res judicata* is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. … Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 State Tr 355. 'Issue estoppel' was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197–198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

51. At para. 24, Lord Sumption quoted from Lord Bingham of Cornhill in *Johnson*, at p.31, where he said the following:

> "*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. … It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

52. From those authorities I derive the following material points. There are three relevant concepts for present purposes. The first is "cause of action estoppel". The second is "issue estoppel". The third is the principle in *Henderson*. It is only the first of those concepts which operates as an absolute bar to raising an issue again (although even that is subject to exceptions for fraud or collusion, which are not material here). Importantly, the principle in *Henderson* does not operate as an absolute bar. As Lord Bingham said in *Johnson*, it requires a broad, merits-based judgment which takes account of all the facts, including the public and private interests involved.

53. The doctrine of *res judicata* undoubtedly applies in the context of a court or similar tribunal. It is clear from the authorities that it can apply outside the context of traditional courts and tribunals. For example, it was held by the House of Lords to apply to the context of planning decisions made by an inspector appointed by the Secretary of State: see *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273. An important insight into the principles underlying the doctrine of *res judicata* can be gained from the speech of Lord Bridge of Harwich, at p. 289:

> "The doctrine of *res judicata* rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims '*interest reipublicae ut sit finis litium*' and '*nemo debet bis vexari pro una et eadem causa*.' These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created *a specific jurisdiction for the determination of any issue which establishes the existence of a legal right*, the principle of *res judicata* applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions." (Emphasis added)

54. The fundamental point which Lord Bridge made there is that the doctrine of *res judicata* applies (presumptively) where a body is given jurisdiction to determine any issue which establishes the existence of a legal right.

55. The doctrine of *res judicata* has also been held to apply to a regulatory body established by Royal Charter: see *R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1; [2011] 2 AC 146, at para. 29, where Lord Clarke JSC said that the provisions of the Charter in that case were "akin to statutory provisions". Moreover, it should be noted that in that case the byelaws under which disciplinary proceedings were brought required the approval of the Privy Council.

56. It should also be noted that, at para. 52, Lord Clarke expressly declined to decide the alternative question in that case as to abuse of process. He decided the case on the basis of the principles of cause of action estoppel and issue estoppel.

57. On the other side of the dividing line are purely consensual arrangements where there is no independent body entrusted with the function of adjudicating on the legal rights of the parties. In this context it is important to recall that, as a matter of law, the rulebook of a trade union is a contract between all of its members, in other words a multilateral contract. Although the analogy with the employment relationship is not exact, I accept Mr Segal's submission that the relevant principles were set out by Elias LJ in *Christou v London Borough of Haringey* [2013] EWCA Civ 178; [2014] QB 131, at paras. 39-54. *Christou* concerned the exercise of disciplinary powers by an employer under a contract of employment.

58. The distinction which emerges from Elias LJ's analysis is between a body which is independent of the parties and is invested by law with the power to determine an issue which establishes the existence of a legal right; and other bodies, which are not. The first type of cases can be regarded as being examples of "adjudication" even if they do not arise in the context of traditional litigation.

59. In *Christou,* at para. 39, Elias LJ said:

> "The doctrine of *res judicata* provides that where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision, save on appeal. A party can set up an estoppel against his opponent to prevent him from seeking to reopen what has already been determined. This is a rigorous rule with few exceptions (fraud is one)."

60. At paras. 47-48, Elias LJ continued:

> "47. … In my judgment it is wrong to describe the exercise of disciplinary power by the employer as a form of adjudication. The purpose of the procedure is not 'a determination of any issue which establishes the existence of a legal right', as Lord Bridge put it in the *Thrasyvoulou* case [1990] 2 AC 273, nor is it properly regarded as 'determining a dispute'.
>
> 48. In the employment context the disciplinary power is conferred on the employer by reason of the hierarchical nature of the relationship. The purpose of the procedures is not to allow a body independent of the parties to determine a dispute between them. Typically it is to enable the employer to inform himself whether the employee has acted in breach of contract or in some other inappropriate way and, if so, to determine how that should affect future relations between them. It is true that sometimes (but by no means always) the procedures will have been contractually agreed, but that does not in my judgment alter their basic function or purpose. The employer has a duty to act fairly and procedures are designed to achieve that objective. The degree of formality of these procedures will vary enormously from employer to employer. But even where they

> provide a panoply of safeguards of a kind typically found in adjudicative bodies, as is sometimes the case in the public sector in particular, that does not alter their basic function. It is far removed from the process of litigation or adjudication, which is in essence where this doctrine bites."

61. In my view, in the present context too, there is no independent body invested by law with jurisdiction to determine the legal rights of the parties. The decision in *Coke-Wallis*, which provided the mainstay of Mr Beaumont's argument, is distinguishable for the reasons I have mentioned above.

62. Mr Beaumont also relied upon the decision of the Administrative Court in *R (Mandic-Bozic) v British Association for Counselling and Psychotherapy* [2016] EWHC 3134 (Admin); 154 BMLR 159. In that case Mostyn J held that the doctrine of *res judicata* applied to a situation where there were two professional regulatory bodies (the defendant and the UK Council for Psychotherapy). Although they were not regulated by statute and a practitioner was not required as a matter of law to be a member of either association, the practical reality was that they would have to be a member of at least one in order to obtain work. On the facts of that case there was in substance an attempt by both organisations to discipline the claimant in respect of the same matter. Mostyn J decided that the doctrine of cause of action estoppel operated to prevent this occurring even though it was not the same body which was attempting to bring the second set of proceedings: see paras. 39-44. It was not necessary for his decision to consider whether the doctrine of *res judicata* applied in the first place. For that purpose he simply relied upon the decision of the Supreme Court in *Coke-Wallis*: see para. 7 of his judgment.

63. In any event, that decision, like *Coke-Wallis*, is far removed from the present context, as it concerned disciplinary tribunals in the context of a professional person. It is not authority for the proposition that the doctrine of *res judicata* applies to disciplinary proceedings brought by a trade union against one of its members.

64. Next Mr Beaumont relied upon a passage in Spencer Bower and Handley on <u>Res Judicata</u> (5th ed.), p. 15, at para. 2.05:

> "Every domestic tribunal, including any arbitrator, or other person or body of persons invested with authority to hear and determine a dispute by consent of the parties, court order, or statute, is a 'judicial tribunal' for present purposes, and its awards and decisions conclusive unless set aside. Hence *res judicata* principles apply to successive complaints before professional disciplinary tribunals."

65. The only authority cited for that last sentence is the decision of the Supreme Court in *Coke-Wallis*, which I have already considered above. As I have mentioned, that case concerned an independent tribunal whose jurisdiction was founded on a Royal Charter, which was regarded as being akin to statute. I turn to consider the first

sentence in the above passage. Leaving aside cases where there is a court order or a statute, which are not relevant for present purposes, and considering only situations where a dispute is put before an independent body by the consent of the parties, in principle I would accept the proposition in the first sentence. That would apply, for example, to an arbitrator. This much is consistent with the analysis of Elias LJ in *Christou*, which I have set out above, but in no way does it amount to saying that the principles of *res judicata* apply where there is simply a contract which entitles one party to discipline another.

66. Mr Beaumont reminded this Court that the relationship between a trade union and its members is not governed only by contract. In particular, section 174 of the 1992 Act confers a statutory right on individual members not to be excluded or expelled from a trade union unless this is permitted by that section. One of the situations in which it is permitted is where the exclusion is entirely attributable to the conduct of that member (other than excluded conduct or protected conduct, which are not material in the present case): see section 174(2)(d).

67. In my view, the fact that there is some statutory regulation of the relationship between a union and its members does not take the analysis any further in the present context. The fact remains that a union is entitled under statute to take disciplinary action against a member because of his conduct.

68. Mr Beaumont also relied on the decision of P. O. Lawrence J in *Burn v National Amalgamated Labourers' Union of Great Britain and Ireland* [1920] 2 Ch 364, in particular at p. 374, where it was said:

> "I have no hesitation in holding that the power to suspend or expel a member for acting contrary to the rules is one of a quasi-judicial nature."

69. As with all judicial statements, this must be read in its proper context. The issue of law in that case did not concern the doctrine of *res judicata* at all. The facts of that case concerned a decision by the executive committee of a trade union to expel one of its officers without giving him any opportunity to respond to the allegations against him. The court held that this was contrary both to the rules of the union and to the rules of natural justice. At that time it used to be thought to be significant whether proceedings were regarded as quasi-judicial because the rules of natural justice only applied to judicial or quasi-judicial proceedings; they did not apply to ordinary administrative decisions. Such fine distinctions have not been part of our law since at least 1962, when the House of Lords decided the case of *Ridge v Baldwin* [1964] AC 40. In any event, as Mr Segal concedes, the duty to act fairly does apply in the present context. Unite's rulebook expressly provides for the rules of natural justice to apply and, even if did not, the law would readily imply such a term into it. The crucial question which we have to decide is whether the doctrine of *res judicata* also applies. Although the case of *Burn* is authority for the former proposition, it provides no authority for the latter proposition.

70. For the above reasons I have reached the conclusion that the doctrine of *res judicata* does not apply to a trade union's disciplinary proceedings.

71. This does not mean that a trade union is free to discipline its members in a way which would give rise to oppression. This is because, as I have mentioned, a union's disciplinary process is subject to the rules of natural justice or, in modern language, the duty to act fairly.

72. At the hearing before us Mr Segal accepted that if, for example, a union attempted to bring exactly the same proceedings a second time when they had been dismissed previously, that would be unfair and therefore unlawful.

73. Mr Segal also accepted that it would be unfair and unlawful if a union attempted to go behind a finding of fact which had previously been made even though the second set of proceedings is brought under different rules of the Union. For example, in the present case, if the first disciplinary panel had decided that the factual allegation that the Respondent touched the complainant's bottom had not taken place, it would not be fair or lawful for the union to argue that the factual allegation was true in a second set of proceedings brought under different rules.

74. Importantly, however, Mr Segal submits that that is not what happened in the present case. There was no inconsistency between the findings of fact in the two sets of disciplinary proceedings. What happened was that it was determined by the ACO that the first decision was contrary to Unite's rules only because the wrong charge had been brought. Mr Segal submits that it is not unfair in those circumstances for a union to bring charges under the right rules on a second occasion. I accept that submission.

75. In this context it is important to bear in mind that trade unions come in various shapes and sizes. As it happens, Unite is the largest union in this country and has access to its own lawyers but not all unions will. The relevant principle cannot be affected by which union is concerned. Furthermore, the legal principles which are applicable to a union may well also apply to other voluntary membership organisations of various kinds: like trade unions, they can be expected to act in a way which is fair but they are not necessarily to be criticised simply because they initially bring a charge under the wrong provision in their rules. Finally in this context, it is important not to lose sight of the important public interest in having serious allegations, such as allegations of sexual harassment, properly dealt with. Unions are not to be prevented from dealing with those allegations properly and fairly only because they made a mistake in the initial charging decision. That would not serve the interests of other union members, such as the complainant in the present case, or the interests of the wider public.

76. In the light of the conclusion to which I have come it is unnecessary to address an alternative basis for the decision of the CO. This was based on the fact that the ACO had declared the first decision to be null and void and of no legal effect. There may be an issue of law as to whether the ACO had power to make such a declaration, under sections 108A and 108B of the 1992 Act. This was not an issue that was raised by either of the parties and we did not hear full submissions on it. It is unnecessary to decide it in the context of the present appeal. I would prefer to leave it for decision in another case should it be necessary to the outcome of such a case.

Conclusion

77. For the reasons I have given I would allow this appeal by Unite and restore the order made by the CO.

Lady Justice Elisabeth Laing :

78. I agree.

Lord Justice Henderson :

79. I also agree.