Appeal No. UKEAT/0092/16/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 4 & 5 January 2017

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

BMC SOFTWARE LTD APPELLANT

MS A SHAIKH RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS MING-YEE SHIU (of Counsel) Instructed by: CMS Cameron McKenna 78 Cannon Street London EC4N 6AF
For the Respondent	MR ANDREW MacPHAIL (of Counsel) Instructed by: LB Law 123 Honor Oak Park London SE23 3LD

SUMMARY

PRACTICE AND PROCEDURE - Amendment

An application to re-amend the grounds of appeal was made as result of the Employment Appeal Tribunal raising a query with the parties after the close of submissions as to whether part of the Judgment was sound in law. After considering competing submissions the further amendment was allowed because the prejudice to the Appellant in being subject to an award(s) of compensation that the Employment Tribunal might have no jurisdiction to make and a Judgment, which might be unlawful not being subject to challenge, outweighed the prejudice suffered by the Appellant as a result of further delay.

HIS HONOUR JUDGE HAND QC

1. This is an application by Ms Shiu of counsel on behalf of the Appellant to re-amend the amended grounds of appeal in a case, decided by an Employment Tribunal sitting in Reading, in which a number of claims of sex discrimination were dismissed by the Employment Tribunal but a claim of a breach of the sex equality clause provided for by section 66 of the **Equality Act 2010** ("EqA"), in other words an equal pay claim, was upheld. As a result of that claim being upheld, two claims of constructive dismissal and a claim of wrongful dismissal were also upheld. Each of those four conclusions is dealt with in four separate paragraphs of the Judgment at page 3 of the appeal bundle.

2. The matter was first heard at this Tribunal by HHJ Eady QC at a Preliminary Hearing on 5 July 2016. She permitted the appeal to proceed, the grounds of appeal being amended to take account of what she concluded was arguable at a Full Hearing. Part of the amendment was to clarify that the then proposed Appellant sought to rely upon inadequacy of reasoning. The case had already undergone a number of changes at first instance, and various amendments had been made both before the hearing and at the hearing itself.

3. It is against that background yet another proposed amendment is now being canvassed, although I should say at the outset that the circumstances are unusual and are of my own making. The case was set down for a Full Hearing with a time estimate of one and a half days. It commenced yesterday, and counsel completed their submissions yesterday. Having done so, I indicated that I would give judgment sometime today. Whilst considering the matter overnight, it occurred to me that there might be a difficulty about the way in which the

A Employment Tribunal had decided the case, which difficulty did not appear in the amended Notice of Appeal as one of the matters for consideration by this Tribunal.

B 4. The difficulty can be understood by considering the last sentence of paragraph 94 of the Written Reasons, which reads:

> **"94. … For avoidance of doubt, we find under this heading that the claim of constructive dismissal succeeds both under the ERA[1] 1996 and under section 39 of the Equality Act 2010."**

C 5. This finding is reflected in paragraphs 2 and 3 of the Judgment. Paragraph 2 upholds the claim of constructive dismissal under the **ERA**, and paragraph 3 upholds a claim of discrimination by constructive dismissal under the **EqA**.

D 6. By section 70 of the **EqA**, which has a section heading of "Exclusion of sex discrimination provisions", Parliament has provided that certain provisions, called "the relevant sex discrimination provision[s]", have no effect in relation to a sex equality clause. The relevant sex discrimination provisions are set out in a table below subsection (3), which identifies one of the provisions in the context of employment, section 39(2) of the **EqA**. Section 39(2) appears in Part 5 of the **EqA**. That Part is entitled "Work" and has a number of chapters. Chapter 1 is entitled "Employment, etc". Section 39(2) provides that an employer must not discriminate against an employee in a variety of ways one of which, by subparagraph (c), is dismissing the employee. On considering those two provisions, it seemed to me at least arguable that the Employment Tribunal does not have jurisdiction to give a Judgment in the terms of paragraph 3 when further understood by the last sentence of paragraph 94 of the Written Reasons; namely that there has been a discriminatory constructive dismissal as a result of a failure to comply with the equal pay provisions set out at sections 66-71 of the **EqA**.

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[1] The **Employment Rights Act 1996**, which I will also refer to henceforth as "the **ERA**".

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7. I raised the matter by communicating with counsel by email earlier this morning and heard further submissions. Having heard those submissions, I directed that the Appellant, who, through Ms Shiu, wished to re-amend the grounds of appeal, should provide a written draft and after an adjournment of about an hour she did so. The hearing then resumed, and I heard oral submissions. Ms Shiu proposed two amendments. The first is to existing ground 3 and adds a third sentence to that ground. It reads:

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> **"… Correspondingly, the Employment Tribunal's finding of sex discrimination was based solely upon the success of the constructive dismissal claim, which was based solely upon the success of the equal pay claim. Therefore if the appeal against the constructive dismissal claim succeeds, the sex discrimination claim should have been dismissed."**

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8. That was not the subject of my email communication to counsel. It seems to me, however, that this is a matter that is very closely linked with the existing ground and provides clarification of it. It does not seem to me that it involves any great departure from the case as already set out and the submissions that have already been made. Indeed, there need be no further submissions on the point.

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9. Mr MacPhail objects to the point on the basis that it is now over a year since the original Decision was made and the matter has not yet been resolved on appeal. He relies on the judgment of this Tribunal in one of its familiar cases, **Khudados v Leggate** [2005] ICR 1013. In that case, a division of this Tribunal, presided over by HHJ Serota QC, was faced with an application for an extensive amendment. That was refused, and in the process of rejecting the application this Tribunal took the opportunity to make a number of remarks about the amendment of Notices of Appeal. These are to be found at paragraph 86 of the Judgment at pages 1032 and 1033, and there is also something of substance said at paragraph 87, which has found its way into the commentary on this matter in the latest edition of *Harvey on Industrial Relations and Employment Law* in the section "Practice and Procedure" in paragraph 1469 of

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A that section. It does not seem to me, however, that this is a matter that causes any significant prejudice to the Respondent to this appeal. Indeed, it might be argued that the existing ground of appeal already caters for both paragraphs 2 and 3 of the Judgment.

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10. It seems to me, however, that further clarity is desirable. The issue is entirely dependent upon the outcome of the appeal against a finding of a breach of the sex equality clause, and it does not seem to me that in terms of delay or any of the other considerations set out at C paragraph 86 of the **Khudados** judgment that this alteration to the case is such that the Respondent will be adversely affected by it, save in one respect, namely that the way that the Judgment is framed at paragraph 3 is on the basis that there is some form of discrimination D under the **EqA** that underpins the constructive dismissal. In that sense, the proposed amendment to the existing ground 3 of the grounds of appeal is linked conceptually to the proposed new ground 3A, to which I now turn.

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11. Ground 3A is headed "constructive dismissal sex discrimination excluded by section 70 of [the **2010 Act**]". The introductory part of the new ground reads:

> **"The Employment Tribunal did not have power or jurisdiction to make a finding of sex discrimination by way of constructive dismissal under section 39(2) where this was based upon** F **breach of the equal pay provisions:**
>
> **…"**

12. Reference is then made in two subparagraphs to subsections 70(1) and (2). G Subparagraph (1) summarises those provisions, and subparagraph (2) states this:

> **"The Employment Tribunal's finding of sex discrimination was based solely upon the finding of constructive dismissal which was based solely upon breach of the equality clause. The discrimination provisions under section 39(2) have no effect in such a case and therefore the claim should have been dismissed."**

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13. Whilst that this proposed amendment has a resemblance to and, therefore, a relationship with, the proposed amendment to the existing ground 3, Ms Shiu submitted that it is a matter of an entirely different character. The issue that would arise if this amendment were permitted is whether the Employment Tribunal had made a Judgment based on reasoning that was consistent with the application of section 70 of the **EqA** to the facts of this case, in particular whether if, as appears to be the position, having regard to the last sentence of paragraph 4 of the Written Reasons, the Employment Tribunal regarded the discrimination as occurring under section 39(2)(c) and whether that was within their jurisdiction in the sense that the Employment Tribunal was permitted to reach such a conclusion notwithstanding the provisions of section 70.

14. In simple terms, Ms Shiu submits that it is strongly arguable the Employment Tribunal made a Decision that it is contrary to the effect of section 70 and is therefore void as being outside their jurisdiction. She accepts that the point arises almost beyond the eleventh hour in this appeal and frankly explains that it has been overlooked. In one sense, paradoxically, that explanation is in her favour because it means the issue of delay in making the application, the first of HHJ Serota QC's factors to be considered, as set out in paragraph 86 of the judgment in **Khudados**, scarcely arises.

15. Mr MacPhail submits that not only is the failure to recognise the point something that this Tribunal should not excuse but I should take account of the fact there have been a number of alterations to the way in which the Appellant has put its case both at first instance and in this Tribunal and that according to his note of what occurred at the Employment Tribunal it was effectively conceded that the Employment Tribunal was entitled to reach the conclusion it did at paragraph 94 and so conceded it could express the Judgment in the terms in which it was expressed at paragraph 3 of the Judgment.

16. It does not seem to me that the fact that there was a concession, if that was indeed the case, and I should say that Ms Shiu has not had any opportunity to consult her own records or those of her instructing solicitors on this point, assuming such a concession was made, that it is an overwhelming obstacle to the matter now being raised. If this matter has any substance, it is arguable it has the character identified by Ms Shiu, namely, if the point raised by the proposed amendment at ground 3A is ultimately accepted, then the Employment Tribunal has plainly made a fundamental error as to its powers.

17. It ought to be observed also that this is not an insignificant or merely academic matter. Mr MacPhail frankly accepted that his client's ambition was to be awarded compensation based on injury to feelings, which could only be awarded if she had succeeded on discrimination and also that, if in terms of the overall amount of loss that she had suffered, there would be a limit placed on compensation in terms of future loss as would be so if the case were confined to unfair dismissal pursuant to the **ERA**, then the Appellant wished to succeed on discrimination, in respect of which there would be no cap on future loss. It is a matter of mathematical computation to be made after a remedies hearing as to whether the latter point is a point of real significance, but certainly the issue as to whether any award can be made for injury to feelings does depend upon whether paragraph 3 of the Judgment is sound in law or not. Moreover, as Ms Shiu put it, it would be an unsatisfactory state of affairs if, because of the terms of the Judgment, it remained open to the Employment Tribunal to make such an award even though it had no jurisdiction to do so.

18. Mr MacPhail submits that this is not such an open and shut matter as the Appellant suggests. He relies upon the introductory words of section 70(1) as restricting the division between sex discrimination claims and equal pay claims only to the pure terms of the sex

A equality clause. It would be, he submitted, very strange if there were a blatant and personal piece of discrimination attached to a refusal to give a woman the same pay as a man, and there could be no compensation in terms of injury to feelings. That is no doubt a significant point that merits further consideration. Ms Shiu's answer to it was that that is not this case and that this case is a paradigm of what Parliament intended to ensure should not happen when it enacted section 70.

C 19. Accordingly, it seems to me that at the present time, without further argument, this is a point that is of substance, although, perhaps, not beyond argument. Finally, it is a point that if it is correct means that the Employment Tribunal has reached a Decision that it had no power to reach.

20. One of the factors, but by no means the only factor (see paragraph 87 of the judgment of HHJ Serota QC in **Khudados**), is as to the merits of the proposed amendment. Other factors are the reason for delay and whether there has been a full, honest and acceptable explanation. It seems to me there can be no doubt that there has been an honest and full explanation. The point has not occurred either to Ms Shiu or Mr MacPhail, or, indeed, I am ashamed to say, until very recently to myself. Although, during the course of argument yesterday, I did mention section 70, it was only last night that it struck me that this was a matter that may have some real bearing on the case.

21. What I find fundamental, however, is the character of the point at issue. It seems to me, although there may be arguments against construing section70 as rendering paragraph 3 of the Judgment unsound, that if the point is right then the Employment Tribunal has made a Decision that it had no power to make. To my mind, that is a very important factor. Not surprisingly, it

A is not to be found listed amongst the factors that HHJ Serota QC enunciated at paragraph 86 of the **Khudados** decision. It is not there because it will not be a common occurrence in any appeal that a matter of this kind arises at a late stage, having been previously overlooked, and goes to a fundamental question as to whether the Employment Tribunal could make the kind of Judgment that it has made. In my judgment that is a factor which has to be given very considerable weight.

C 22. Moreover it seems to me to raise what HHJ Serota QC called in **Khudados** "a crisp point of law". It requires no further evidence and only limited submissions, and it is possible that such submissions could be made in written form. Plainly, the extent to which allowing D such an amendment might delay this case is a very considerable issue and one that I am concerned about. Whether or not it was ever going to be possible for me to deliver a Judgment today is by no means something that can be regarded as completely resolved. I did yesterday indicate that I would give Judgment either at 12.00pm or 2.30pm. But that may have been over E optimism on my part because it is possible I might have found, in a case that has some complexity, it difficult to produce a Judgment in that space of time, but, even assuming that I could have given a Judgment today and therefore there must be delay, occasioned by my F allowing the proposed amendment, if that is what I decide to do, it does seem to me that that delay need not be very great. The matter could be dealt with relatively shortly even if oral submissions are necessary. Mr MacPhail has indicated that he cannot be available for four days G next week, but it does seem to me that it may be possible to have the matter dealt with on Monday.

H 23. At the moment, and I have not heard counsel on this, I do not see why the matter cannot be dealt with by written submission. Of course, if I were to consider that method of

presentation, I would have to allow some time, but it does not seem to me that need delay the matter by very long. The delay would of course be a form of prejudice to the Appellant. The Appellant has waited for some time to have this matter finalised, and, of course, justice delayed is justice denied, as Cardozo J said in another jurisdiction a long time ago. On the other hand, if I reject the application and the point cannot be raised by the Appellant, the Appellant will suffer prejudice, and, further, if the point is a good one, the whole system of administration of justice will suffer prejudice, because there will exist a Judgment that was made without power. It seems to me for the sake of the proper administration of justice and good order that it should be dealt with now whilst the case is under appeal. I of course must take account of the administration of justice generally in terms of the impact that an adjournment would have on the caseload and listing at this Tribunal, and I bear all of those factors in mind.

24. Weighing them up, it seems to me that this is, as I have already said, a proposed amendment addressing a point of considerable significance not just to the parties in this case but to other parties and that it is desirable that this matter be argued out rather than put to one side. I accept that by allowing it to be argued out there will be some delay and some prejudice to the Respondent, but, to my mind, that is balanced out not only by the fact that refusing to allow it to be argued will involve some prejudice to the Appellant but that this is a matter that ought to be resolved not just in terms of the parties but also in terms of the functions of this Tribunal to ensure that incorrect Decisions are rectified at this level if it is possible to do so. In my judgment, it is possible to address this without there being too much prejudice to any party or to the administration of justice. Accordingly, I propose to allow the amendment.