Appeal No. UKEAT/0123/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 November 2016

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

DEPARTMENT FOR WORK AND PENSIONS APPELLANT

MRS M BRINDLEY RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JULIAN ALLSOP (of Counsel) Instructed by: Government Legal Department Employment Group E4 One Kemble Street London WC2B 4TS
For the Respondent	MR STEVE TILSTON (Representative)

SUMMARY

PRACTICE AND PROCEDURE - Compromise

The Appellant employer challenged a decision of the Employment Tribunal ("the ET") that the Respondent employee's claim was not barred by a compromise agreement ("the agreement"). The Employment Appeal Tribunal ("the EAT") held that the ET's construction of the agreement was correct. The EAT dismissed the appeal.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

1. This is an appeal from a Decision of the Employment Tribunal sitting at Ashford ("the ET"). The ET consisted of Employment Judge Wallis ("the EJ"). In a Decision announced on 22 December 2015, the ET decided that it had jurisdiction to consider the Claimant's claim. At the Respondent's request, the ET sent Written Reasons to the parties on 6 January 2016. I will refer to the parties as they were below. The Claimant was represented today by Mr Steve Tilston, a lay representative, and the Respondent by Mr Allsop of counsel. I am grateful to both of them for their helpful written and oral submissions.

2. The issue for the ET and on this appeal is whether the Claimant's current claims ("claim 2") are barred by an agreement embodied in form COT3, by which the Claimant's claims against the Respondent in case 2301290/2014 ("claim 1") were settled.

The Facts

3. Claim 1 was presented on 14 July 2014. The Claimant claimed that she had been discriminated against on the grounds of her disability. In box 8.2 of her claim form ("the ET1") the Claimant said that she was denied a disabled parking space after a reorganisation. She had had such a space for several years and had given the Administrator details of her needs. The stress of not being able to attend her workplace for her contracted hours caused stress which made her condition worse. Her only option was to park outside on a single yellow line displaying her blue badge. She was then unable to go to work for two weeks because of severe back pain. She was given a final written warning on 11 April 2014. She said "My claim is for that final written warning to be withdrawn" because the period of sickness which led to it was

caused by the Respondent discriminating against her and refusing to acknowledge her disability.

4. The Respondent's response ("ET3") denied the claim. The Respondent accepted that the Claimant suffered from a disability. The Respondent said that the Claimant had not told managers that she had mobility issues when the parking spaces were reorganised other than to say that she had a blue badge. She could walk to the shopping centre where there was blue badge parking available. The Claimant had been given, according to the ET3, a first written warning for sickness absence on 23 December 2013; she was given another for a period of absence in March 2014. Her manager agreed to reinstate her parking space. She was referred to Occupational Health on 31 March 2014. The Respondent decided that she should be given a permanent parking space. She was given a final written warning for her absence in March on 11 April 2014. She was told of her right of appeal; she appealed and her appeal was not upheld.

5. The Respondent denied that issuing a final written warning for poor attendance was discrimination on grounds of disability. The Respondent had not breached the duty to make reasonable adjustments. The Claimant had failed to specify what provision, criterion or practice placed her at a substantial disadvantage and other material matters.

6. In December 2014 a form COT3 was signed; on 19 December by the Claimant, and on 31 December on behalf of the Respondent. It was headed "Settlement reached on 11/12/2014 as a result of conciliation action". By clause 1, the Respondent agreed to perform the obligations described in clause 2 of the agreement and the Claimant agreed to accept that the performance of those obligations in full and final settlement of:

> **"… her claim against the Respondent currently before the London South Employment Tribunal under case number 2301290/2014 ("the Proceedings") and all other Relevant Claims arising from the facts of the Proceedings up to and including the date this Agreement [sic]. …"**

A The "relevant claims" were:

> **"… claims related to the Claimant's employment with the Respondent, whether at common law, under Statute, or pursuant to European Union law either against the Respondent, or any officer or employee of the Respondent including without limitation any claim relating to equal pay, discrimination, harassment, and claims under the Employment Rights Act 1996, or any other claim which might be made by the Claimant in relation to her employment to a court or tribunal provided that nothing herein contained shall affect the Claimant's accrued pension entitlement or any claim for latent personal injury."**

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7. Claim 2 was presented on 8 June 2015. It was also a claim for disability discrimination. The Claimant claimed that the Respondent was discriminating against her by subjecting her to its attendance management policy and procedures, "specifically" by giving her a final written warning for her attendance in December 2014. It appears from the Respondent's rider to the ET3 that the date of the final written warning was in fact 28 November 2014 and that the Claimant's appeal against that final written warning was dismissed on 26 January 2015.

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8. She named the manager who had given her the warning and named others who had been involved in the process. One of those was described as the "Appeal Manager". She said that this was the second final written warning given to her that year. The first warning had been "redacted" after she took her case to the Tribunal. The redaction was not part of the settlement as the earlier warning had been withdrawn by her manager. She was told that her manager had reviewed it. She asked for the December 2014 warning to be reviewed after her appeal failed, but was told that it was not possible.

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G 9. Both sets of pleadings refer to the dismissal of her appeal against the December final warning; the second paragraph of box 8.2 and paragraph 37 of the rider to the ET3 both refer to this. The appeal was dismissed after the date when the COT3 was made; that is 26 January 2015.

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10. In the ET1 the Claimant went on to describe the problems with her work station and her arm, which caused her to be absent from work in July 2014 after her work station was moved without consultation. Her arm, she said, had gone into severe spasm. She was eventually told to stay off work until she was fit. That period of absence in December 2014 was the subject of the final written warning. She asked for that final written warning to be withdrawn and for "those previous sickness periods [to be] disregarded" (ET1, box 9.2). I am satisfied that those periods are the periods referred to in paragraph 3 of box 8.2; in other words the two periods of sickness absence which led to the imposition of the second final written warning.

11. The Respondent's initial response to the ET1 was dated 10 July 2015. An amended version was dated 19 November 2015. In the first version the Respondent took a preliminary point that the claim was out of time; it did not then argue that the claim was barred by the settlement agreement - it did not argue that until the November amendment. The Respondent set out in the rider to the ET3 its factual case on the Claimant's allegations of discrimination. By the November amendment the Respondent argued that the Claimant's claim was barred by the December 2014 settlement agreement.

The Employment Tribunal's Decision

12. The EJ recorded Mr Allsop's submission that the consideration had been paid and that all the pertinent facts in respect of the second final written warning were known to both parties when they signed the COT3. He submitted that claim 2 was clearly "a relevant claim" and relied on the same factual matrix. Mr Tilston for the Claimant submitted that the two actions were not linked and that if the Respondent thought that the matter had settled it should not have heard an appeal against the warning.

13. The EJ said that whether the ET had jurisdiction turned on the words of the COT3 and what a reasonable person would understand them to mean. She could not agree with Mr Tilston that the emails he referred to "about the negotiation of the agreement" had any bearing on the interpretation of the COT3. They were not admissible to construe the COT3. Nor was she persuaded by Mr Tilston's point that the appeal had not been decided before the COT3 was signed and it could not have been part of the settlement.

14. In paragraph 15 of the Judgment she quoted accurately the relevant words of clause 1. She considered whether claim 2 fell within the description in clause 1, "all other Relevant Claims *arising from the facts of the Proceedings*" [her emphasis]. Claim 1 related to car parking, reasonable adjustments and the first final written warning issued on 11 April 2014. Claim 2 related to a second final written warning issued on 28 November 2014. The COT3 did not say that the "relevant claims" included for example "all or any claims arising within the period up to 11 December 2014 (the date that the COT3 was signed)". Nor did it refer to "all other relevant employment claims". The COT3 qualified "all other relevant claims" with the words "arising from the facts of the Proceedings" - that is, the facts of claim 1.

15. The EJ concluded that a reasonable person would consider that all claims arising from the circumstances of the first claim had been settled, but that the new circumstances referred to in claim 2 were not part of the settlement.

> **"17. … The second claim did not arise from the facts of the first claim. It was a separate claim about a different warning in a different time frame."**

Submissions

16. Mr Allsop took me through the background documents to show me the context or "factual matrix", as he put it. His submission was that both claims were claims for a final

written warning to be withdrawn. Both claims arose from the application of the Respondent's attendance management policy to the Claimant's case. That was enough to show that claim 2 was a relevant claim arising from the facts of the Proceedings. The facts of the Proceedings included the background facts common to both claims, such as the warning in December 2013. The second claim was part of the same continuum as the first claim. The words of the COT3 were wide enough to catch the second claim.

17. He made three other submissions based on what he said were flaws in the EJ's analysis. First, he submitted that the EJ stated the wrong test. Rather than asking what a reasonable person would understand, she should have asked what a reasonable person with the knowledge of the parties would have understood the words to mean. I think that he accepted that this error - if error it is - is immaterial. He accepted that what matters is what the relevant words mean. He then focused his submissions on the language of clause 1.

18. The second flaw he suggested in the ET's analysis was that the EJ left out of account all that had happened after the close of pleadings in the first claim. Those matters included, in his submission, all subsequent developments in the application by the Respondent of its attendance management policy to the Claimant to the extent that it arose out of the facts of "the Proceedings".

19. The third flaw he suggested in the EJ's reasoning was that paragraph 14 of the Judgment displayed an error. In paragraph 14 the EJ:

> **"14. I noted that the Acas practice is to explain to the parties in detail the effect and implications of a COT3, before it is signed."**

A He submitted that this was irrelevant and there was no evidence before the EJ of ACAS practice.

B 20. In my judgment this is a "so what" point, in the vernacular. It seems to me to be a point which does not add to the submissions that were being made on the main point. Even if in making this aside the EJ erred it is, in my judgment, a wholly immaterial error.

C 21. Mr Tilston in his submissions referred first to an email from Mrs Pirot dated 5 November 2014. In paragraph 12 of the Judgment the EJ said this:

> **"12. I could not agree with Mr Tilston that the emails in the bundle had any bearing on the interpretation of the COT3; they simply demonstrated that the parties were engaged in settlement discussions. I noted that 'the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent' …"**

D In that context, she referred to the decision of the House of Lords in **ICS Ltd v West Bromwich Building Society** [1998] 1 WLR 896; a decision to which Mr Allsop had referred the EJ in the course of his submissions.

E 22. Like the EJ, I consider that emails leading up to the negotiation and agreement of the COT3 are inadmissible and I reject the submission that they are in any way relevant to the issue I have to decide.

F 23. Mr Tilston's second submission was that the second claim did not arise from the facts of the Proceedings. He submitted that it was a different claim. The COT3, he submitted, was not intended to catch any claim arising from the further application of the attendance management policy to the Claimant; it was intended to settle the first claim. The two periods of absence dealt with in the Proceedings and the periods of absence in second claim were not linked - they

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were different incidents. The intention, he said, was only to settle the claim about the first final written warning which was based on the events surrounding the car parking space.

Discussion

24. It is convenient for me to deal first with the second flaw in the EJ's analysis which was suggested by Mr Allsop. I do not consider that the EJ fell into this error. There are two reasons for this. First, in paragraph 15 of the Judgment she quoted all the relevant words including the words on which Mr Allsop relies - that is the phrase, "up to and including the date this Agreement [sic]".

25. Second, in paragraph 16 of the Judgment the EJ said this:

> **"16. … The COT3 did not say that 'relevant claims' included, for example, 'all or any claims arising within the period up to 11 December 2014' (the date that the COT3 was signed). …"**

This passage shows, in my judgment, that the EJ was very much alive to the point that clause 1 included the phrase "up to and including the date this Agreement [sic]".

26. I turn then to the heart of the argument - what do the words mean? In my judgment, the phrase "arising from the facts of the Proceedings up to and including the date this Agreement [sic]" means that a relevant claim is caught if it arises from the specific factual matrix of the Proceedings. In other words that is a first written warning given in April 2014 for absence caused by a disability, which on the Claimant's case was attributable to the withdrawal of her parking space in early 2014. I reject Mr Allsop's submission that the relevant factual matrix is and is only the broad procedural background, that is the application of the Respondent's attendance management policy to the Claimant. The "facts of the Proceedings" are the specific matters which led to the particular application of the attendance management policy to the

Claimant which resulted in the April 2014 final written warning. They are not simply, in my judgment, any application of the attendance management policy to the Claimant's case happening at any date down to 11 December 2014. I appreciate that on the facts the April 2014 final written warning had been rescinded by the date of the COT3, but if it had been reinstated after the pleadings were closed, but on or before the date of the COT3 - that is, 11 December 2014 - that action would have been caught by the words of the release. That action would have arisen "from the facts of the Proceedings up to and including the date this Agreement [sic]".

27. For those reasons I accept Mr Tilston's submissions about the correct interpretation of the COT3 and I reject Mr Allsop's. That means that I dismiss this appeal.