Appeal No. UKEAT/0036/15/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 May 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR M BRAILSFORD — APPELLANT

JOHN REID AND SONS (STRUCSTEEL) LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS KATHERINE APPS (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR PETER DOUGHTY (of Counsel) Messrs Preston Redman Solicitors Hinton House Hinton Road Bournemouth Dorset BH1 2EN

SUMMARY

UNFAIR DISMISSAL - Automatically unfair reasons

Automatic Unfair Dismissal - Section 100(1)(e) ***Employment Rights Act 1996***

Applying the two-stage approach laid down by the EAT in **Oudahar v Esporta Group Ltd** [2011] IRLR 730 (HHJ David Richardson presiding), the Claimant's case before the Employment Tribunal did not satisfy the criteria required for the first stage. Characterising the Claimant's case in this way was not unfairly taking a pleading point against him. He had been given the opportunity to provide further particulars of his case and the Employment Judge had further sought to clarify the nature of his complaint at the Preliminary Hearing. It was on the basis of the Claimant's case as thus put that the Employment Tribunal determined it had no reasonable prospects of success and should be struck out. The case as now characterised on appeal was not the way in which the claim was put below and the Employment Tribunal did not err in determining the case before it. Appeal dismissed.

HER HONOUR JUDGE EADY QC

1. I refer to the parties as the Claimant and the Respondent, as below. This is the Claimant's appeal against a Judgment of the Southampton Employment Tribunal (Employment Judge Kolanko, sitting alone on 30 May 2014; "the ET"), sent to the parties on 24 June 2014. The Claimant appeared before the ET in person but, on his earlier Rule 3(10) Hearing on 21 January 2015 had the benefit of representation under ELAAS, and today, at the Full Hearing of his appeal, has benefited from representation by Ms Apps, of counsel, acting pro bono. At all stages the Respondent has had the benefit of representation by Mr Doughty, of counsel

2. By its Judgment, the ET dismissed the Claimant's claims for interim relief; dismissed, upon the Claimant's withdrawal, his claims of unlawful detriment pursuant to sections 44 (health and safety) and 47B (public interest disclosure) of the **Employment Rights Act 1996** ("the ERA"); and dismissed, as having no reasonable prospect of success, his complaint of unfair dismissal pursuant to sections 100 and 103A, claims of automatic unfair dismissal because of health and safety and protected disclosure respectively.

3. At the Rule 3(10) Hearing on 21 January, I was persuaded there might be something in the Claimant's challenge to the striking out of his claim of automatic unfair dismissal on health and safety grounds, under section 100(1)(e) of the **ERA**; understanding his case to be that his dismissal related to his absence from work on 14 February 2014, so as to protect himself from imminent or serious danger to his health caused by the stress or anxiety that he was suffering at work. Arguably, that case had at least been suggested by the ET1 and it had some support given that the letter of dismissal referred to the Respondent's rejection of the Claimant's reason for staying away from work. It seemed arguable that the ET had failed to properly understand

the Claimant's case in this regard - possibly because it had failed to hear evidence from either party - and/or should not have struck out that part of the claim without hearing evidence.

The Background Facts

4. The Claimant commenced employment with the Respondent on 3 February 2014, as a Trainee Engineer. He attended two meetings on 13 February 2014. At the first, he was given two options: either to leave immediately, with two weeks' pay in lieu of notice, or to submit to a two-week probationary period, after which, if there was no improvement, he would be dismissed. The second meeting was instigated by the Claimant, in which he raised his concern that he was being placed under constraints in terms of the work he was given due to health and safety restrictions and was thus unable to improve his work.

5. On leaving work on 13 February 2014, the Claimant did not return. He emailed the Respondent early on 14 February 2014, saying he was unfit for work due to stress. Later that morning, the Respondent served a letter of dismissal on the Claimant. It appeared not to have been satisfied with the Claimant's explanation. Although unclear whether it was before the ET, the letter of dismissal stated (relevantly) as follows:

> **"Having considered your reasons for not attending and the discussion we had yesterday, we have decided that it is best we part company and therefore we will be ending your employment with us with immediate effect."**

"… *your reasons for not attending*" seems to refer to the Claimant being off work due to stress.

6. After receiving the dismissal letter, that evening, the Claimant emailed the Respondent, setting out his grounds of grievance as to how he felt he had been treated. The Respondent did not revisit its decision and the Claimant thereafter brought ET proceedings.

The ET Claims and the Decision

7. The Claimant's ET1 includes particulars of complaint that are densely typed and hard to follow. The most relevant parts of his particulars, for present purposes, read as follows:

> **"… I subsequently was up in the night 13/02/14 anxiously knowing I am in danger of being corporately stitched up and blackmailed by Reid Steel and made grievance notes. I reported to Reid Steel off with stress 14/02/14 and on this day sort [*sic*] legal advice and continued grievance in summary and fell asleep late evening. … I genuinely and sincerely believe the decision to sack me was due to a protected disclosure I made to Mr Simon Boyd Health and Safety Director during the meetings we had 13/02/14 where I had concern of my Health Safety and work being in danger without training as the training was refused by Mr Simon Boyd with threats against my job made. Mr Simon Boyd in my view is in complete breach of Health and Safety and training, guilty of gross hypocrisy and in serious breach of trust and confidence towards me the employee. My contractual arrangements, agreements, company policy regarding Health and Safety and training have also been directly breached. …."**

8. At an earlier case management discussion, the Claimant was asked to provide a statement of his claims so as to clarify the way in which he was putting his case. He did so in a number of additional documents totalling some 12 pages, which have been made available for me at this hearing. Again, the way in which the complaints are put are hard to follow, but there is a reference to the section 100 **ERA** claim in the following terms:

> **"(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or… (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger … I reported stress 13/02/14, my employment was in danger of termination by Mr Simon Boyd. …"**

9. Thus, the claim came to be considered by the ET at the Preliminary Hearing. Some time was spent clarifying the issues. In relation to the section 100 claim, the ET recorded the Claimant's case, as follows:

> **"10. The claimant relies upon Section 100(1)(c)(ii) that he was dismissed for bringing to the attention of Mr Boyd during the meeting on 13 February circumstances connected with his work which he reasonably believed were potentially harmful to the claimant's health and safety, namely refusal to provide training. The claimant confirmed that he relies on general non specific harm to health and safety."**

10. Although the ET did not receive oral evidence, its recitation of the facts is taken from what it was told by the Claimant (it being noted that this was, in essence, agreed). For his appeal, the Claimant relies, in particular, on paragraph 12.6 of the ET's recitation of the facts:

> **"12.6. At the end of this day the claimant went home, and says he was up all night anxious. He states *"knowing I am in danger of being corporately stitched up and blackmailed by Reid Steel and made grievance notes."* … it is common ground that the claimant did not attend for work the following day and indicated by email that he was unfit to work through stress. It is equally common ground that the respondent appears not to have been satisfied with the explanation, and sent a letter directly to the claimant indicating that he was dismissed."**

11. The ET again recorded how the Claimant was putting his claim, relevant to section 100 **ERA**, at paragraph 12.12:

> **"12.12. In the same email the claimant refers to Sections 44 and 100 of the Employment Rights Act regarding health and safety, and he quotes Section 100. The claimant states that he brought to his employers attention by reasonable circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety. The claimant then stated in his email that Mr Simon Boyd stated *"you have two weeks to improve if not you are fired or leave now with two weeks pay that is the deal"*. He stated *"I again raised protected disclosure of practical and legislative danger of working as a trainee without necessary training would result in dismissal under the disciplinary procedure."* Again the claimant seems to be concerned that without further training in the two weeks of probation he would inevitably be dismissed under the disciplinary process."**

12. The ET observed (paragraph 12.13), that it was not holding the Claimant - as a litigant in person - solely to the pleaded case in the ET1, but concluded:

> **"22. … it is quite clear from the claimant's own evidence that the thought of dismissal was in the mind of the respondent in a substantive way prior to any disclosure being made, and in those circumstances I judge that there would have been no reasonable prospect of the claimant establishing that his dismissal was in consequence of making such disclosures, as opposed to what had been the apparent discontent festering between the claimant and fellow workers which appears to have been the genesis for the meeting on 13 February when the two options were proposed of dismissal or probation but that if no improvement was made within two weeks, then he would have been dismissed. The claimant's absence from work the following day with alleged stress does not assist the claimant's case.**
>
> **23. I now turn to the complaint under Section 100. The claimant's case is that as a consequence of not providing training this was potentially harmful to the claimant's health and safety. The claimant at the outset acknowledged that he was not relying on any specific danger but potential general danger in the future. As the claimant could not identify any danger that he had imparted to the respondent it is quite impossible to contend that he was dismissed for a potentially unspecified harm which was not conveyed to the respondent. Further it is clear from the claimant's case articulated in his various statements, that his concern was that the lack of training would result in him losing his employment, and not being at risk of any harm to. In so far as it is contended that the risk of his loss of employment would cause the claimant anxiety. I do not find that that fits within the statutory definition which would if established, [have] entitled the claimant to pursue a claim for unfair dismissal notwithstanding his absence of the necessary two years continuous employment.**
>
> **24. This complaint, I therefore judge, has no reasonable prospect of success based solely upon what the claimant alleges before me.**

> **25. In conclusion I agree with Mr Doughty that the claimant's complaint at its best was that if he did not receive training, he could not improve and was at risk of being dismissed. What the claimant is in fact alleging is general unfair dismissal under the guise of having made protected disclosures or raised health and safety concerns."**

The Appeal

13. As stated, this appeal relates exclusively to the Claimant's claim for automatic unfair dismissal under section 100(1)(e) of the **ERA**; specifically, to his removal from the workplace in circumstances of danger (to his mental health), in order to protect himself from that danger. More particularly, the appeal raises the question whether the ET erred in striking out that claim on the basis that it had no reasonable prospect of success.

14. The Respondent resists the appeal. It relies on the ET's reasoning but also draws support from the Claimant's documentation, contending that did not make the case now put on appeal.

The Relevant Legal Principles

15. The power to strike out a claim is provided by Rule 37(1) of the **ET Rules 2013**. It is a draconian measure and, where there is a crucial core of disputed facts in the case, it would be an error of law for an ET to proceed other by hearing and evaluating the evidence (**North Glamorgan NHS Trust v Eszias** [2007] IRLR 603, paragraphs 29 and 30 to 32). That is likely to be the case where the reason for dismissal is in issue (**Romanowska v Aspirations Care Ltd** UKEAT/0015/14/SM, paragraphs 15 and 21).

16. I am concerned in this case with section 100(1)(e) **ERA**, which (relevantly) provides:

> **"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that -**
>
> **…**

> **(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.**
>
> **(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.**
>
> **(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them."**

17. The danger in question need not refer to the workplace; threats posed by fellow employees will also be covered (**Harvest Press Ltd v McCaffrey** [1999] IRLR 778, paragraphs 15 to 17). Moreover, provided the employee had such a reasonable belief, s/he will be covered by the section: a dismissal because of actions taken as a result of that belief will be unfair; an employer cannot avoid the protection merely by disagreeing with the employee (**Oudahar v Esporta Group Ltd** [2011] IRLR 730 EAT, HHJ David Richardson presiding).

18. In **Oudahar**, the EAT proposed a two-stage test in claims under section 100(1)(e):

> **"25. Firstly, the tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or … did he take appropriate steps to communicate these circumstances to his employer by appropriate means? If these criteria are not satisfied, s.100(1)(e) is not engaged.**
>
> **26. Secondly, if the criteria are made out, the tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair."**

Submissions

The Claimant's Case

19. Ms Apps observes that the ET and the Respondent in this case seem to have assumed that the reason for not attending work had to be notified to the employer for the purposes of section 100(1)(e) **ERA**. That was incorrect (see **Oudahar**). The first step (per **Oudahar)** required consideration of the Claimant's state of mind and an assessment as to whether he had a

reasonable belief. The second question was whether the Respondent dismissed the Claimant because he took or proposed to take the step of removing himself from the workplace.

20. Taking the Claimant's case at its highest - as the ET was required to do when considering whether to strike out the claim - the ET needed to test his belief that he was being put at risk as a result of bullying (corporately and/or by other employees) and ask whether that was reasonable. That would require hearing evidence from the Claimant and that was not done here. In those circumstances (per **Eszias**), it was wrong to strike out.

21. The second question was whether the dismissal was for the reason (or principal reason) of the Claimant's absenting himself from work. Again, the ET needed to hear evidence (**Romanowska**). Here the ET apparently did not even have before it the dismissal letter.

The Respondent's Case

22. Relying on **Kuzel v Roche Products Ltd** [2008] IRLR 530, the ET needed to find the facts operating on the Respondent's mind when determining the reason for the dismissal. That would include the reason why the Claimant had absented himself from work (albeit that was not what the case-law under section 100(1)(e) **ERA** laid down).

23. In any event, the case now being put was not the Claimant's case before the ET: it was not apparent from his pleaded case in the ET1 and was not set out in his additional statements. The ET could not be criticised for failing to deal with a case not properly before it.

24. The ET (at paragraph 23) was addressing the correct question; looking at whether the Claimant had informed the Respondent of the specific danger (rather than simply asking what was his reason for absenting himself) and did the Respondent dismiss because he did so.

25. Finally, the Respondent also sought to resist the appeal on the alternative basis that, if the ET did err in its approach, this court could uphold the decision by itself having regard to the Claimant's email of 14 February 2014 setting out his grievances. Had the ET had regard to that document, it would have been clear that he had absented himself due to stress rather than taking appropriate steps in circumstances of danger as envisaged by section 100(1)(e) **ERA**.

The Claimant's Reply

26. On a strike-out application it would have been wrong for the ET to have departed from the clear case-law in terms of its approach to section 100(1)(e).

27. Otherwise, the Respondent was essentially making a pleading point. The ET itself had not taken that point against the Claimant (see paragraph 12.13). As the Claimant's grievance document made clear, it was his belief he was being bullied and, as a result, he was absenting himself from work to avoid suffering stress. Sufficient was raised in his case before the ET to make it apparent he was pursuing a section 100(1)(e) claim: the base facts were set out in the ET1 and that was all the Claimant - as a litigant in person, suffering from anxiety - had to do.

Discussion and Conclusions

28. I agree with the Claimant that the correct approach to a section 100(1)(e) **ERA** claim is as set out in the Judgment of the EAT (HHJ David Richardson presiding) in **Oudahar**. I do not see that as inconsistent with **Kuzel**. The ET would still be concerned with the set of facts

operating on the employer's mind, but those facts, for section 100(1)(e) purposes, need only relate to the employee's actions not his/her underlying reasons for those actions.

29. I further agree that, to the extent the Respondent's reason for dismissal came to be in issue, the ET would be on dangerous ground in striking out the claim without hearing evidence (see **Ezsias** and **Romanowska**). In this case, however, the argument simply did not get that far.

30. The difficulty for the Claimant is that the way in which his case has been characterised on this appeal is simply not the case he put before the ET. That is made apparent from the additional statements he submitted to the ET expressly for the purpose of clarifying how he was putting his case. Reading those statements (along with the ET1) makes sense of how the ET recorded the case before it. It was not for the ET to search through the background documents - the grievance email; the dismissal letter - to find a possible case for the Claimant. Nor was it for the ET to review its recitation of the factual background to try to identify possible claims for the Claimant. Each time the ET clarified the nature of the section 100 claim with the Claimant the response given was not the case that has been put before me. In particular, I note paragraph 10, where the Claimant's case is recorded as complaining that he had brought circumstances to the Respondent's attention in terms of the refusal to provide training, which he believed harmful to his health and safety. That is the case further recorded at paragraphs 12.12, 23 and 25. That was the Claimant's section 100 case before the ET.

31. Although it is right that a passing reference was made to section 100(1)(e) in the Claimant's supporting statement, no actual claim could be understood simply from that. Certainly it does not begin to articulate the claim suggested before me. Similarly, although it might be possible to pick out the odd sentence from the ET1 to assist in formulating the claim

as presently argued, it could not be said that document identified such a claim in any sensible way such as could be understood by the ET or the Respondent. Hence the opportunity was given for the Claimant to clarify the way he was putting his claim in statements before the hearing and, indeed, at the hearing itself.

32. This is not taking an unfair pleading point against the Claimant as a litigant in person. He was not required to specify the precise statutory provision. The ET was concerned with the substance of his complaints, not the form, and it was careful to record how the Claimant's case was put in that regard. And that is not how it has been put before me on the appeal. The case as now put would not have been particularly difficult for the Claimant to have articulated if that had indeed been his complaint. I can only conclude that it was not.

33. That being so, the simple answer to the appeal is that the ET did not err in striking out the Claimant's claim on the basis it was put. It did not err in failing to approach section 100(1)(e) in the way laid down in **Oudahar** because the Claimant was not suggesting that he had taken the required action for the required reasons. He did not even put forward a *prima facie* case to make good the first stage of the test.

34. A good advocate may be able to pick up points to support a claim of this nature from the ET's recitation of the facts, looking back at the letter of dismissal so as to formulate a possible cause of action. That is, however, not the way the Claimant put his case before the ET and the ET was not bound to undertake that exercise on his behalf. I therefore dismiss the appeal.

35. Having given my Judgment in this matter Ms Apps has asked for permission to appeal on the pleading point. For the reasons I have identified, I cannot consider that a point of law properly arises in this matter. I do not grant permission.