

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

At the Tribunal
On 30 July 2014, 9 December 2014 and 3 March 2015
Judgment handed down on 1 April 2015

Before

HIS HONOUR JUDGE PETER CLARK

MR T M HAYWOOD

MR H SINGH

MR K WRAITH

APPELLANT

DRIVING STANDARDS AGENCY

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR GAVIN MANSFIELD QC
(of Counsel)
and
MR GRAHAME ANDERSON
(of Counsel)
Bar Pro Bono Scheme

For the Respondent

MS MARINA WHEELER
(of Counsel)
Instructed by:
Employment Litigation & Advice
for Government
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One Kemble Street
London
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SUMMARY

JURISDICTIONAL POINTS - 2002 Act and pre-action requirements

PRACTICE AND PROCEDURE – Estoppel or abuse of process

Two perversity grounds of appeal rejected. Employment Tribunal were wrong to re-open question of Claimant's compliance with the then Statutory Grievance Procedure requirement in relation to pre-dismissal detrimental treatment on grounds of disability resolved at an earlier Hearing, but entitled to dismiss that head of claim on limitation grounds. In the result the appeal failed and was dismissed.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. Mr Wraith, the Claimant, commenced employment with the Driving Standards Agency, the Respondent, on 31 July 1989. On 21 December 1999 he injured his back in a slipping accident. He was off sick from 27 November 2000 until 30 April 2001 when he returned to work on restricted duties. He was then signed off work again with low back pain on 19 April 2002, never to return to work before his eventual dismissal on 26 September 2008. Meanwhile he commenced an action for damages for personal injury against his employer in 2002. Those proceedings were discontinued in October 2005.

2. On 23 December 2008 he commenced these proceedings in the Employment Tribunal. He complained of disability discrimination and protected disclosure detrimental treatment prior to his dismissal. These claims gave rise to limitation issues and questions as to whether he had complied with the statutory dispute resolution procedures then in force under section 32 of the **Employment Act 2002**, since repealed. In addition he contended that his dismissal, on capability grounds, was unfair. He also pursued internal appeals against his dismissal culminating in a finding by the CSAB, following a hearing on 21 July 2009, that he had been unfairly dismissed. He received compensation of £24,216 in addition to a sum of just under £21,000 under the Civil Service Compensation Scheme.

3. The claims were fully defended and came on for final hearing before an Employment Tribunal sitting at Bedford, chaired by Employment Judge Metcalf in April and November 2012. By a reserved Judgment dated 3 January 2013 all claims were dismissed. Against that Judgment the Claimant brings this appeal. At a Preliminary Hearing before HHJ Shanks and members held on 29 January 2014 the appeal was permitted to proceed to this Full Hearing on UKEAT/0210/13/JOJ

three grounds only, those being Grounds 4, 5 and 6 set out in the Claimant's Skeleton Argument prepared for that hearing and dated 12 January 2014. For completeness, Mr Mansfield realistically did not pursue the 'further proposed ground of appeal' identified at paragraph 4 of the Preliminary Hearing order. At our first hearing on 30 July 2014 the Claimant was represented pro bono by Mr Gavin Mansfield QC, as he was before Judge Shanks' division; Mr Mansfield now leads Mr Grahame Anderson. Ms Marina Wheeler appeared on behalf of the Respondent as she has throughout.

4. That hearing was adjourned by consent in the following circumstances. Mr Mansfield applied to amend the live grounds of appeal by adding a further ground connected to Ground 5 relating to the effect of a Review Judgment made by Employment Judge Goodchild on 7 July 2011 (the Goodchild point). Ms Wheeler did not oppose the amendment; equally Mr Mansfield did not oppose Ms Wheeler's application for an adjournment to consider her position. Subsequently, Judge Goodchild has provided Written Reasons for that Review Judgment dated 30 September 2014. The appeal was relisted for 9 December 2014 but argument was not concluded on that day. The hearing resumed on 3 March 2015. We reserved our judgment.

The Employment Tribunal Procedural History

5. It is material to the principal ground of appeal now advanced by Mr Mansfield on behalf of the Claimant, Ground 5 as amended, to examine the procedural history of this case in the Employment Tribunal and in particular orders made by Judge Goodchild prior to the Metcalf Tribunal hearing.

6. Following case management discussion orders made by Employment Judge Adamson dated 21 July 2010 and 26 October 2010 and a telephone Case Management Discussion

conducted by Judge Goodchild “shortly before December 2010” the matter came on for a Pre-Hearing Review before Judge Goodchild on 3 March 2011. The issue for resolution, as directed by the Regional Employment Judge, on that occasion was whether the Claimant had complied with the Statutory Grievance Procedure, as then required by the **Employment Act 2002** and the **Dispute Resolution Regulations 2004**, for the purposes of bringing complaints of pre-termination detrimental treatment on disability and/or protected disclosure grounds. In short, had he sent the necessary Step 1 letter?

7. By a Pre-Hearing Review Judgment promulgated on 17 March 2011 for which Reasons were given in writing on 28 March 2011, Judge Goodchild ruled that a letter from the Claimant to Mr Beveridge dated 26 September 2008 did not constitute a Step 1 letter. Consequently the Tribunal had no jurisdiction to consider either his protected disclosure or disability complaints of detrimental treatment short of dismissal. The Respondent has always accepted that such complaints relating to his dismissal on 26 September 2008 were justiciable; no grievance being required for dismissal complaints.

8. On 28 May 2011 the Claimant applied for a review, as it then was, of the Pre-Hearing Review Judgment. In his letter of that date he referred to a number of earlier letters which he contended, read with the letter of 26 September to Mr Beveridge, raised the necessary grievance in relation to pre-termination disability detrimental treatment.

9. Judge Goodchild held a Review Hearing on 7 July 2011. By a Judgment dated 28 July 2011 the Employment Judge said this:

“1. In the interests of justice my earlier decision barring the claimant from raising the issue of disability discrimination is revoked. The statutory provisions then applicable have been satisfied.

2. The matter may proceed on disability discrimination. However the individual acts complained of are out of time as freestanding complaints. The claimant's claim that there was a course of conduct is in time and the case may proceed on that basis."

10. Reasons for that Judgment were given ex tempore at that hearing but not reduced into writing until after our first hearing held on 30 July 2014. Those Reasons are dated 30 September 2014. We have considered them with care and with the benefit of submissions by Counsel.

11. Whilst not a model of clarity, we interpret the effect of Judge Goodchild's orders to be as follows.

12. First, no Step 1 grievance was raised in relation to the pre-termination whistleblowing complaints.

13. As to disability, he initially ruled that no Step 1 grievance had been raised. However, on review he revoked that decision and substituted a finding that there was no statutory grievance bar to those complaints proceeding to a Full Hearing, having considered the further correspondence placed before him at the Review Hearing.

14. What is of further significance is the way in which Judge Goodchild dealt with the question of limitation in relation to the pre-termination disability complaints. At paragraph 7 of his Review Reasons the Judge observed that he would be ducking his responsibilities if he left it to the final Tribunal (the Metcalf Tribunal) to decide what were the issues. At paragraph 7(2) he directed that each of the (disability) complaints prior to dismissal were out of time as freestanding complaints. However, as a course of conduct culminating in dismissal, they were in time and each incident could be referred to in evidence to show such a course of conduct

Ms Wheeler tells us and we accept that such evidence was adduced at the final hearing on both sides.

The Metcalf Tribunal Decision

15. Material to the extant Grounds of Appeal the Metcalf Tribunal reached the following, among other, conclusions:

- (1) That, as a result of low back pain, the Claimant was disabled for the purposes of the then **Disability Discrimination Act 1995** (following his accident) until a successful denervation procedure was carried out by a consultant, Mr Fahmy, on 27 June 2008. His disability ended at the beginning of July 2008 (Reasons, paragraph 12(p)(i)).
- (2) There never was, nor was there intended to be, a follow-up appointment with Mr Fahmy after the surgical procedure carried out on 27 June 2008 (paragraph 12(n)).
- (3) The decision to dismiss the Claimant had absolutely nothing to do with public interest disclosure nor did it constitute less favourable treatment of the Claimant by reason of his having a disability (paragraph 53).
- (4) The dismissal, on capability grounds, was fair notwithstanding the decision of the Civil Service Appeals Board (paragraph 56).
- (5) The Claimant had not complied with the requirements of the statutory grievance procedure (“SGP”) in relation either to pre-termination protected disclosures or disability discrimination (paragraph 22).
- (6) Further, there was no continuing discriminatory act or acts which gave the Tribunal jurisdiction to entertain those complaints and it was not just and equitable to extend time paragraphs 22 and 23).

The Appeal

16. We begin with the challenge to the Tribunal's findings recorded at (1) (ground 4) and (2) (ground 6) above.

17. As to the finding that disability ceased shortly after the February operation on 27 June 2008, that was a finding of fact plainly open to the Tribunal, not least in light of the Claimant's own recognition of his complete recovery in his letter to Mr Fahmy dated 19 March 2011 (see paragraph 12(n)).

18. Dealing with the question of a follow-up appointment, we accept Ms Wheeler's submission that here the Tribunal were simply observing that the Claimant did not intend to be seen again after the successful operation.

19. Thus we are not persuaded that the Tribunal fell into error in making either of those findings. They were properly open to the Tribunal. Moreover, having enquired as to the relevance of those particular findings to the Tribunal's overall determination, Mr Mansfield submitted that they went to the Tribunal's assessment of the Claimant's credibility. That was a matter for the fact-finding Tribunal to assess. We can see nothing in either of these grounds of appeal.

20. That brings us to the principal argument in the appeal, ground 5 as amended. The first question raised by Mr Mansfield is whether the Metcalf Tribunal was wrong to consider whether the Claimant had complied with the SGP in relation to both his pre-termination

protected disclosures and disability claims in light of the orders made earlier by Judge Goodchild.

21. Ms Wheeler, in response, submits, having appeared below, that it was common ground before the Metcalf Tribunal that the Goodchild rulings were unclear and that the question of compliance with the SGP ought to be decided by the Metcalf Tribunal in light of the evidence led before it.

22. We prefer the submissions of Mr Mansfield for two reasons. First, we do not accept that the Claimant, then in person, accepted that the issue should be determined afresh by the Metcalf Tribunal in circumstances where, in his closing written submissions, he contended that the SGP jurisdiction issue had been resolved in his favour by Judge Goodchild, as Ms Wheeler fairly acknowledges at paragraph 10 of the Respondent's response to the Amended Ground of Appeal.

23. Secondly, and more importantly, we recognise the principle clearly stated by Langstaff J in **Kudjodji v Lidl Ltd** (UKEAT 0054/11/CEA, 25 May 2011), a case which has escaped the attention of both the ICR and IRLR reporters, that once a jurisdictional issue has been determined at a Preliminary Hearing in the Employment Tribunal it cannot, subject to review/reconsideration or appeal, be revisited at the substantive Tribunal hearing; see also **Radakovits v Abbey National plc** [2010] IRLR 307 (CA).

24. Further, we do not accept that, on analysis, the rulings of Judge Goodchild are so unclear as to justify the Metcalf Tribunal reopening the question. It is noticeable that no reference to those rulings appears anywhere in the Metcalf Tribunal Reasons and no analysis of the rulings is there provided.

25. In setting out the procedural history of the case we stated our conclusions as to the effect of the Goodchild rulings. Out of deference to the sustained arguments of Counsel as to that effect we now explain our reasons for reaching those conclusions.

26. It appears to be common ground, and were it not we find, that the effect of the original Goodchild Pre-Hearing Review Judgment was that both the protected disclosure and disability pre-termination claims were dismissed for lack of the necessary Step 1 grievance. Ms Wheeler points out that the Judgment went further to preclude the Claimant from pursuing those causes of action in relation to dismissal, although the Respondent accepted that those claims were not so barred; that inference is drawn from paragraph 2 of the Pre-Hearing Review Judgment, which limited the final hearing to the issue of unfair dismissal.

27. Thus the real question is what was the effect of the subsequent Goodchild Review Judgment.

28. Ms Wheeler submits that the Metcalf Tribunal was entitled to proceed on the basis that the real issue was the reason for the Claimant's dismissal: was it the potentially fair reason of capability or was it tainted by considerations of the Claimant's alleged protected disclosures and/or disability? We disagree. The whole purpose of the Goodchild Pre-Hearing Review was to determine the SGP question, which could only arise in relation to pre-termination detrimental treatment, and it is clear that such claims were raised in the Claimant's extensive "List of breaches" in response to Judge Adamson's earlier case management order. The significance of those allegations in relation to the issue of limitation is a matter to which we shall return.

29. Mr Mansfield contends that the Goodchild Review Judgment not only revoked the earlier finding in relation to disability; it expressly ruled that the Claimant had complied with the SGP in relation to that head of claim. Ms Wheeler does not accept that interpretation but we do. It is plain from paragraph 1 of the Review Judgment and paragraph 5 of the Reasons for that Judgment.

30. In our judgment this part of the appeal, viewed in isolation, succeeds. The Metcalf Employment Tribunal ought to have regarded itself bound by the Goodchild Review Judgment to proceed on the basis that the Claimant had complied with the SGP in relation to his pre-termination disability complaints. That leaves the question of limitation, to which we shall return.

31. However, we reject Mr Mansfield's further submission that it is implicit in the Goodchild Review Judgment and Reasons that the original Pre-Hearing Review Judgment dismissing the protected disclosure pre-termination claims was similarly revoked. We agree with Ms Wheeler that there is nothing in the Review Judgment or Reasons which gives rise to such an inference. On the contrary, Judge Goodchild was careful to confine himself, on review, to revoking his earlier decision on disability only. The only reference, expressly, to the protected disclosure claim appears at the end of paragraph 7 of the Reasons where he said this:

“The public interest disclosure point is also a matter [that] can be heard by the Tribunal. It is open to the Claimant to argue that his dismissal, wholly or in part, was by reason of public interest disclosure.”

32. That dealt in part with Ms Wheeler's point that no jurisdictional issues arose on the discrimination dismissal complaints. Those questions were properly considered by the Metcalf Tribunal and determined on the merits (Reasons, paragraph 53).

33. Thus, in summary, we conclude that, following review, the Goodchild Pre-Hearing Review Judgment as amended bound the Metcalf Tribunal to proceed on the basis that (a) the Claimant's pre-termination protected disclosure claim had been dismissed for want of a Step 1 grievance (as to this the Metcalf Tribunal were right in the result) and (b) the equivalent disability claim was not barred under the **2004 Regulations** and they were wrong to hold that it was. The parties, in any event, could not confer a jurisdiction on the Metcalf Tribunal to re-open issues which had been finally determined, as these had (see **Kudjodji**), even had they wished to do so.

34. That does not end the matter. The pre-termination protected disclosure claims having been barred by the Goodchild Pre-Hearing Review Judgment, unaltered on review, that is the end of those claims. However, having passed the SGP barrier in relation to the disability claims, as Mr Mansfield accepts, the Claimant must also dislodge the limitation ruling given by the Metcalf Tribunal.

35. Before analysing the Metcalf limitation finding in relation to pre-termination disability detriment we should mention an alternative submission advanced by Ms Wheeler; that in effect the Tribunal dismissed those claims on their merits, having heard all the necessary evidence. We cannot accept that argument. The Reasons of the Tribunal simply do not allow of that construction. However, we do think that their findings of fact informed the Tribunal's conclusion on limitation.

36. We return to the Goodchild Review Judgment. We are satisfied that no final determination on limitation was there made. Instead, that Judge gave directions for determination of the limitation issue at the final (Metcalf) hearing. Whilst he took the view

that, as freestanding complaints, the pre-termination disability claims were out of time, he allowed of the possibility that at the final hearing, having heard all the evidence, the Tribunal might conclude that there was a continuing state of affairs, to use the formulation by Mummery LJ in **Hendricks v Metropolitan Police Commissioner** [2003] IRLR 96, paragraph 52, culminating in dismissal tainted by disability discrimination.

37. In the event, having heard the evidence, the Metcalf Tribunal comprehensively rejected that case. Mr Mansfield argued that the Tribunal took a wrong approach by eliding the lack of complaint after 19 April 2007 (see Reasons; paragraph 16) relevant to the SGP question with the different continuing act question raised in relation to limitation.

38. True it is that at paragraphs 13-23 the Tribunal purport to set out their findings of fact in relation both to the SGP and limitation issues. It might have been preferable to separate the two out presentationally. However it seems to us, particularly by reference to paragraphs 16 and 22, that the Tribunal was there finding that each of his pre-termination disability complaints relying on detriment short of dismissal ended in April 2007. **Hendricks** was a case concerned with an Employment Tribunal preliminary ruling; not a substantive decision. Here, the Tribunal heard the evidence and made a clear finding of fact. Mr Mansfield referred us, by way of example, to a letter which the Claimant wrote to Mrs Porter dated 6 February 2008, raising various disability-related complaints. However that does not bring him within the primary three-month limitation period ending with presentation of the Form ET1 on 23 December 2008. Having failed on the dismissal claim the Claimant was unable to show a continuing act up to the date of dismissal, 26 September. In these circumstances the only remaining question for the Metcalf Tribunal was whether it was just and equitable to extend time. In the exercise of their broad discretion and mindful of the principles laid down by the Court of Appeal in **Robertson v**

Bexley Community College [2003] IRLR 434 (see Reasons, paragraph 22) they permissibly concluded (paragraph 23) that time should not be extended. That was the end of the Claimant's case.

Disposal

39. Whilst we have upheld the Claimant's appeal to the limited extent that the Metcalf Tribunal ought to have considered itself bound by the Goodchild Review Decision ruling that the pre-termination disability complaints were sufficiently "grieved", they were entitled to conclude that these complaints were time-barred and failed on that separate jurisdictional ground. All other grounds of appeal having failed, it follows that this appeal must be dismissed.