Appeal No. UKEAT/0159/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 October 2016

Before

THE HONOURABLE MR JUSTICE WILKIE

(SITTING ALONE)

MR A TCHANTCHOU — APPELLANT

THE CO-OPERATIVE GROUP LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	DR ROLAND IBAKAKOMBO (Representative)
For the Respondent	MR GARETH GRAHAM (of Counsel) Instructed by: TLT LLP 3 Hardman Square Manchester M3 3EB

SUMMARY

PRACTICE AND PROCEDURE - Case management

Certain case management directions were erroneous and have been overturned.

Certain other directions were correct and have been upheld.

THE HONOURABLE MR JUSTICE WILKIE

1. This is an appeal by Mr Tchantchou, the Claimant, against certain case management decisions made by Employment Judge Hughes on 2 February 2016 in relation to his claim against The Co-Operative Group Retail Logistics Ltd.

2. The Claimant launched his proceedings in the Employment Tribunal on 3 March 2015 in a claim form that runs to almost 50 pages. On 14 May 2015 there was a case management hearing before Employment Judge Harding at which, with the assistance of the Claimant's representative, Dr Ibakakombo, who has represented him throughout, and Mr Graham of counsel, who has represented the Respondent throughout, a list of claims and complaints was agreed and recorded. They were as follows. The Claimant was making a claim of direct race discrimination on the following bases:

(1) His case is that the matters listed at paragraphs 41.2(a)-(c) of his claim form are acts of direct race discrimination. That is: (a) suspension; (b) the initiation of the disciplinary procedure, including the investigation; and (c) the disciplinary meeting. Each of these complaints is then further subdivided into the individual complaints listed in the paragraphs directly following paragraphs 41.2(a)-(c), which are numbered 1-54.3.

(2) In respect of his suspension the Claimant relies on two comparators: Mr Simpson and Mr Murdoch. His case is that grievances were raised both against him and his comparators and yet the Claimant is the only one who was suspended.

(3) There was an issue about two other comparators.

(4) There was also a case that the Respondent failed to investigate certain grievances raised after 14 November 2014.

A The Claimant also raised issues of victimisation, which were briefly listed in the list of issues.

3. On the same occasion, 14 May, the Respondent applied for a Preliminary Hearing to consider striking out the claims or ordering a deposit, and directions were made for such a hearing to take place later in the year. In fact, that hearing took place on 21 December 2015 in front of Employment Judge Harding, and the outcome was an Order for a deposit of £250 to be paid in respect of each of the two types of claim, direct discrimination and victimisation, on the basis that the Employment Judge concluded that the claims had little reasonable prospect of success. Full Reasons were given for that decision. For the purposes of this appeal, the only part that is, in my judgment, relevant is a passage in paragraph 18 dealing with the named comparators, Mr Simpson and Mr Murdoch, where the Employment Judge said:

> **"18. … The respondent submitted that Dr Ibabakombo [sic] had not been able to articulate why the named comparators are appropriate comparators and, the respondent submitted, those named were not in similar circumstances to the claimant. That is a dispute of [fact] that will require to be resolved on the facts but in any event even were the tribunal to conclude that the named individuals were not appropriate comparators it would still be necessary to analyse the complaints using hypothetical comparators. …"**

4. It would seem that arising out of the discussions on that day Employment Judge Harding reflected and on the following day, 22 December 2015, issued or had issued by the Employment Tribunal office a Notice of Hearing for a total of, by my calculation, 16 days plus two non-sitting days ranging from 4 to 26 July. There was an indicative timetable identifying which dates would deal with which aspects of the case. They included two reading days in advance of the hearing, a total of six days in respect of the Claimant's and his witness' evidence, and a total of four days for the hearing of the Respondent's evidence.

5. On 2 February 2016 there was a further case management hearing, in front of a different Employment Judge, Employment Judge Hughes. On that occasion the Judge dealt with a number of matters, including an application to amend to add complaints that post-dated the

presentation of the claim form, which Employment Judge Hughes permitted to the extent set out at paragraphs 1.1-1.8 of the Decision. Employment Judge Hughes also made the following decisions in respect of witnesses who were going to be permitted to be called to give evidence by the Claimant and the Respondent respectively. The Order read as follows:

> **"2. The claimant shall not be permitted to call witnesses to give evidence about grievances they have brought against the respondent. Consequently the following persons may not be called as witnesses: Mr M Mvula; Mr M Aweshak; Mr P Binda; Dr R Ibakakombo; Mr A Kwele; Mr J Albert.**
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> **3. The respondent shall not be permitted to call witnesses in respect of the historical events set out in the Claim Form. Instead, I hereby record that the respondent does not accept that the claimant's version of events is accurate."**

6. She then made an Order identifying which witnesses the Respondent would be permitted to call because their evidence was relevant to the issues to be determined. Finally, she ordered that:

> **"5. Item 2 of the agreed list of claims and complaints produced by Judge Harding and signed by the claimant's representative concerns Mr Simpson and Mr Murdoch, who were the subject of grievances brought by colleagues not the claimant. Consequently I direct that it is deleted."**

7. She then gave some limited reasons. Those reasons included the following:

> **"1. This case was listed for a seventeen day substantive Hearing by Employment Judge Harding commencing 4 July 2016. The events which led to this claim are deceptively simple. The claimant was suspended following some form of altercation in the workplace. He subsequently brought grievances about that suspension and also appealed against the imposition of a six month written warning.**
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> **…**
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> **4. It is difficult to understand how the events outlined in paragraph 1 could justify a seventeen day Hearing. However, having spoken at length to both representatives, I now understand why it was listed for that long. In part it is because the claimant wanted to call witnesses to explain about how grievances they brought against the respondent were dealt with. Dr Ibakakombo confirmed that the intention was to ask the Tribunal to draw an inference of [institutionalised] racism. He confirmed that some of those persons have brought Employment Tribunal claims themselves, but none has yet been successful. Having regard to the over-riding objective in Rule 2 of [Schedule] 1 of the Employment Tribunals (Constitution and Rules of Procedure Regulations) I am satisfied that it is wholly disproportionate to permit such evidence to be adduced. It is not relevant to the issues to be determined and it and [sic] would add unnecessary costs. This additional costs burden might fall on the respondent or on the claimant, bearing in mind the deposit order.**
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> **5. The claimant and his representative appear to me to be attempting to turn an action in tort into a public inquiry into the respondent's wider operations. That is unacceptable. I do not accept such evidence is relevant or proper. I do not accept that it is evidence from which the Tribunal could or would draw an inference. It is not in the interests of justice, nor is it a good use of scarce resources, bearing in mind the cost to the public purse of a seventeen day hearing.**

> **6. For the same reason I have concluded that hearing evidence from witnesses for the respondent about historical issues will be a costly and unproductive exercise."**

8. She then concluded:

> **"9. Having made my decision in respect of the above points, the time estimate was revised to eight days plus one non-sitting day which, I am bound to say, still appears disproportionate. …"**

9. The Claimant sought to appeal against a number of aspects of this Order by an appeal Notice received by the Employment Appeal Tribunal on 17 February 2016. The initial sift resulted in a Rule 3(7) Order, but, as he was entitled to do, the Claimant asked for a Rule 3(10) Hearing, which took place on 24 May 2016 before Slade J. She permitted a limited number of issues to go ahead to the Full Hearing, which has taken place today. Effectively, there were three issues that were the subject of the Full Hearing Order: the direction that the Claimant would not be permitted to call his fellow colleagues as witnesses to give evidence in relation to their grievances and claims about discrimination; the decision of Employment Judge Hughes to strike out item 2 of the agreed list of claims - that is to say, the use as comparators Mr Simpson and Mr Murdoch; and the Order of Employment Judge Hughes to reduce the projected length of the hearing from 17 days to eight days plus one non-sitting day.

10. In the skeleton argument and in argument before me Dr Ibakakombo has contended that it is necessary for the named witnesses to give evidence orally as well as having the complaints that they have made against the Respondent before the Tribunal for consideration on the basis that an inference may be drawn statistically and the way in which the Respondent dealt with their various grievances. He has very helpfully gone through each of the complaints of the persons proposed to be called as witnesses and has confirmed that in each case they have lodged Employment Tribunal proceedings on their own behalf. He has acknowledged that none of those claims have as yet succeeded. A number of them have been dismissed at Preliminary

Hearings as having either no or little prospect of success. One of them went to a Full Hearing. Another was settled. Another has gone to a Full Hearing and the outcome is yet to be known. In respect of some of those that have been dismissed at a Preliminary hearing there are outstanding appeals to this Tribunal.

11. Mr Graham, in his written response and in his oral argument, has acknowledged that, as part of the material upon which a Tribunal may properly be invited to draw an inference of discriminatory conduct in the case of the Claimant, it would be difficult for him to argue that it was impermissible to have placed before the Tribunal evidence in the form of documentation recording a number of grievances raised by people of the same ethnic origin as the Claimant, their outcome and the way in which they were dealt with. He says, however, that it would be inconsistent with the position of a Tribunal hearing his claim to invite it to deal substantively with the complaints of others who have themselves lodged their own proceedings, proceedings which are being dealt with or have been dealt with separately within the Tribunals system, but he does say that the outcome of those claims may be relevant. He says that both the number of grievances and complaints, the way they were dealt with, the process by which they were dealt, their outcome and the outcome of complaints made to the Employment Tribunals all can properly be evidenced by documents of record and that it is both unnecessary and would be contrary to the interests of justice for time to be taken up with the particular grievances being ventilated and cross-examined upon by oral evidence particularly with the risk, as I have indicated, of that leading to a situation in which the Tribunal is not using those other cases as a statistical or evidential basis from which an inference may be drawn but where it may be drawn into findings of fact in cases where findings of fact on the chances of a claim succeeding have already been the subject of final decisions.

12. Accordingly, he says that if read properly the Decision and the Order of Employment Judge Hughes does not do anything more than preclude the calling of oral evidence from those individuals. I am not sure that he is correct in that. However, I do agree with him that the evidence that may properly be placed before the Employment Tribunal and from which the Tribunal may be invited properly to draw an adverse inference can be sufficiently placed before them in forms of documentation, being the respective records of various grievances, complaints, hearings, outcomes and, if so permitted, Employment Tribunal claims and their outcomes and that it was not an error on the part of Employment Judge Hughes to preclude the calling of witnesses orally to give evidence about the substance of their complaints and grievances.

13. Accordingly, in my judgment, ground 7.7 should be dismissed but with the caveat of what Mr Graham has said about him accepting that documentary evidence may well be relevant. I am not for a moment going to try to case manage the bundle of documents, and if need be the contents of a bundle of documents may be the subject of a subsequent case management hearing.

14. On the other two grounds, in my judgment, Mr Graham is not on sound ground in seeking to uphold Employment Judge Hughes' decision to strike out issue number 2. It may or may not be the case that there was some discussion before Employment Judge Hughes about this, but it is clear to me that Employment Judge Harding had already considered the question of whether Mr Simpson and Mr Murdoch were properly to be regarded as comparators or their treatment might simply be placed before the Tribunal as an example from which an inference might be drawn. In my judgment, Employment Judge Harding was correct to say that that is a matter of fact and can be considered at the Full Hearing of the Claimant's claims, and there is

no proper basis for a Judge excluding it from issues that had previously been agreed. The fact that the issue is there does not necessarily mean that the premise underlying the statement of issue is accepted, and accordingly it is open to the Respondent to argue before a Full Hearing that neither Mr Simpson nor Mr Murdoch were comparators and as a result a hypothetical comparator having to be constructed. So, in my judgment, the appeal succeeds in respect of ground 8.

15. As far as the length of the hearing is concerned, in my judgment Employment Judge Hughes was quite right to revisit the issue of the length of the hearing. It had previously been estimated by Employment Judge Harding on the basis of her then understanding of the fact that the Claimant was going to call a significant number of other witnesses and that the Respondent was going to call a number of witnesses in relation to historical allegations. As a result of Employment Judge Hughes' decisions to refuse to permit the Claimant to call a number of oral witnesses and to refuse to permit the Respondent to call a number of oral witnesses, it was necessary for Employment Judge Hughes to revisit the estimate of 17 days to reflect the smaller number of witnesses who it was envisaged would be called.

16. Mr Graham, in considering the question of eight days plus one, has inferred that half a day reading time for the Tribunal to familiarise themselves with the documentation in the case would be insufficient. In my judgment, having regard to the quantity of documentation that is likely to be placed before the Tribunal, Mr Graham is correct to say that two days is a more realistic timeframe for the Tribunal to engage in the pre-reading required to enable them to address the issues as revealed by the documentation. Accordingly, in my judgment, the estimate of eight days plus one is probably an underestimate, and, as I put to Mr Graham and as he agreed, a time estimate of ten days plus one is more realistic bearing in mind the pre-reading

A that will have to be built into that. Accordingly, ground 9 of the appeal succeeds at least to this extent: that instead of eight days plus one, the time estimate will be ten days plus one, those ten days to include two days of pre-reading by the Tribunal.

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17. Thus the appeal succeeds on those limited grounds, and I dismiss the appeal in respect of the question of additional witnesses to be called on behalf of the Claimant. I would envisage that in a case such as this there may be further case management hearings required, not least to

C fix dates and if need be to resolve any issues about bundles and their contents, but that obviously is a matter for the parties to place before the Employment Tribunal.

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