Appeal No. UKEAT/0387/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 March 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MS C P — APPELLANT

T U — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RUSSELL HOLLAND (of Counsel) Direct Public Access
For the Respondent	MS JANE McNEILL QC (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW

SUMMARY

VICTIMISATION DISCRIMINATION

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

PRACTICE AND PROCEDURE

UNFAIR DISMISSAL

Victimisation; Point not pleaded; Procedure; Unfair dismissal

On the evidence, an Employment Tribunal found that a decision by the General Secretary of a trade union to offer the Claimant the choice of reaching a compromise agreement to leave her post or face discipline was reached because a week earlier she had informally complained of his sexual harassment of her, and he was concerned she might make the complaint formal.

The Claimant claimed that offering her this disadvantageous choice was victimisation, but did so on the basis it was in response to a grievance made one month earlier. She made no claim it was in response to any complaint about his harassment of her the week before, denying that she had complained, or that his action was responsive to a fear of future complaint. Nor, in her ET1, Amended Grounds of Claim, list of issues, witness statement and opening to the Employment Tribunal did she raise any suggestion that it was. Making such a complaint was not set out as one of the protected acts on which she relied. Nor was the General Secretary cross-examined on this basis. Then, in closing submissions her counsel raised for the first time that the choice was offered, because of protected acts, they being her informal complaints. No application was made either to amend the claim to plead this or recall the General Secretary for further cross-examination.

The Employment Tribunal held that it had no jurisdiction to consider the complaint, applying **Chapman v Simon**. A second ground argued that the Employment Tribunal was perverse to

hold the subsequent dismissal of Claimant not unfair, since the process had been put in train by the General Secretary having a concern for his own position and to cover up his harassment of the Claimant.

The appeal was dismissed; the Employment Tribunal correctly applied **Chapman**, and in fact took the conduct of General Secretary at the outset into account when assessing the overall fairness of the dismissal. It did not apply too narrow a focus. A claim for costs by Respondent on the basis the appeal was misconceived was rejected.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal on two grounds against a 94-page Decision sent to the parties on 5 August 2013, reached by a Tribunal at London (South), Employment Judge Emerton, Ms Forecast and Mr Shaw.

The Underlying Facts

2. The Claimant was the Assistant General Secretary of a well-known small trade union, by whom she had been employed since 1998 until she was dismissed on 10 May 2011. The dismissal was purportedly for misconduct in five respects: that she failed to identify and raise appropriately with the union financial risks and liabilities arising from a conference which she had organised in December 2009; secondly, that she had promised employees of the union that they would be paid overtime for work in connection with the conference when she had no authority to make any such promise; thirdly, that she managed the conference carelessly financially, which led to the union's accounts receiving a qualified opinion from the auditors and requiring action from the NEC and without authority had used the trade union's name and bank details for credit facilities up to £50,000 with the hotel concerned at the conference and had tried to conceal it. A further point, not regarded as gross misconduct but as serious, was that she had used the title "Dr" and the qualification CIPD, holding herself out as having qualifications which in fact she did not have.

3. The dismissal post-dated her having made two claims to the Employment Tribunal about discrimination on a variety of grounds and in a variety of forms to which she said she had been subject during her employment. The dismissal itself was post-dated by a third application to the Tribunal, which complained about her dismissal. All her claims were rejected by the Tribunal

except for three claims which she had made that she had been sexually harassed by an employee of the union for whom the union was responsible, the Tribunal considering that it was just and equitable to extend time to enable those acts to be considered.

4. The appeal is on a narrow basis. It raises two points which are largely but not entirely separate. The first complains that the Tribunal should have found that there had been an act of victimisation committed by the Respondents; the second that the conclusion reached as to unfair dismissal was flawed.

5. The background to this, summarising what is a lengthy and thoroughly detailed recitation by the Tribunal, focussed on events at the trade union general conference held in Manchester in respect of which the Claimant in her position as AGS was, with others including the General Secretary, staying at the Midland Hotel. On the night of the 12th, morning of 13th, September 2010 the General Secretary came to her room and made sexual advances to her which were unwelcome including what amounted to a physical but unwelcome approach.

6. Some two days later, at the conference, the General Secretary acted in a particularly and uncharacteristically abrupt and unpleasant manner toward the Claimant. The Tribunal concluded that this was because his approach had been rebuffed on the evening of the 12th, morning of the 13th. Some few days later, on 21 September, the General Secretary had called the Claimant to a meeting. He gave her what was in effect an ultimatum. She had either to choose whether she would enter into negotiations with a view to reaching a compromise agreement to terminate her employment or disciplinary proceedings would follow in relation to matters which ultimately were defined as I have indicated. He had done that off his own bat.

7. In the event the Claimant did not by the date required, 4 October, indicate that she wished to enter into an acceptable compromise agreement. Disciplinary proceedings then began. She was suspended at the outset. When the matter came to the Tribunal, it is common ground that the Claimant did not, in her ET1, nor in the amended pleading which summarised the contents of all three ET1s which had then been served, nor in the list of issues to which she and her representatives agreed, nor at the outset of the hearing, identify any complaint in respect of the events of 21 September as having been in response to the events of 12/13 September or 15 September at the conference.

8. There was a claim for victimisation in respect of the events of the 21st. Victimisation is defined by the **Equality Act 2010** in these terms:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because -**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act."**

Section 27(2) defines what is a protected act. It includes bringing proceedings under the Act and making an allegation that A or another person has contravened the Act. Therefore an allegation of sexual harassment is capable of being a protected act.

9. The Claimant did not identify in any of the documents to which I have referred the events of the conference and any complaint made about them, more particularly, as having been protected acts. There was a good reason for that. The Tribunal found, in paragraphs 103 and 107, that the Claimant's case was that she had made no complaints at all about the sexual misbehaviour of the General Secretary during the conference. It was therefore unsurprising that she did not raise her doing so as being a protected act in any of the pleadings, or for that matter

in her witness statement, or for that matter in her opening to the Tribunal at the start of what was to be an 11-day hearing.

10. The Tribunal had to consider the whole of the evidence. It had to consider the whole of the evidence including all the circumstances which were relevant. It concluded that what had been pleaded was that the actions on 21 September amounted to victimisation for what the Claimant had done on 20 August when she had sent an email which made various complaints, that being the first and only protected act upon which she had relied prior to the events of 21 September.

11. As to that, the Tribunal saw the complaints in the email as representing unhappiness and not making any specific complaint of discrimination. It considered whether or not what happened on 21 September was caused by the reaction of the Respondents to that event as had been alleged. Section 27 of the **Equality Act 2010** applies a causative approach. The protected act must be identified. That must be the cause of the action which subjects the victim to a detriment. The Tribunal, having considered the evidence about 21 September, came to the very firm conclusion as a matter of fact that it was not in any sense in response to what had happened on 21 August. That was all that the Tribunal needed to do because that was the only allegation before it. However, it went further. It concluded, at paragraph 102, that the Claimant's "choice of the protected acts relied upon" did not "get to the heart of the narrative". It considered that the pivotal event in what took place later was the General Secretary discovering that there had actually been complaints to various people by the Claimant about his sexual misconduct. What it thought inspired his unilateral action in calling her to the ultimatum meeting of 21 September was his fear that these complaints would be formalised. They were thus capable potentially of being victimisation. The Tribunal expressed some surprise that this

link had not been argued before it until the closing submissions of counsel on behalf of the Claimant.

12. It observed also that counsel even then did not suggest that the reason for the behaviour on 21 September was because the General Secretary thought that the Claimant *might do* a protected act. It was, rather, that she *had done*. However, the problem with this approach was that, as I say is common ground, there had never been any pleading to that effect. It had never been an issue in the case and indeed the Tribunal noted that the General Secretary, when he had been cross-examined, had been cross-examined on the basis of what had been pleaded and not on the basis of this allegation. Though the Tribunal did not say this, it would have been necessary for him to have been recalled if the matter were fairly to be put.

13. The question, then, of this being the motivation as part of the Claimant's case was raised for the first time in closing argument. There had been no application and there still was no application by counsel to amend the pleaded case despite the fact that counsel acting for the Respondent had drawn clear attention to it in her closing submissions. There was no application for the General Secretary to be recalled and cross-examined on this basis. Indeed counsel's submissions on behalf of the Respondent, which argued that there was no jurisdiction in the Tribunal to consider this as a separate allegation of victimisation, was simply not disputed by counsel acting for the Claimant.

14. Accordingly the Tribunal between paragraphs 102 and 109 not only set out what its factual findings were but also its conclusion that it could not find victimisation made out in respect of the events of 21 September on the basis of those findings because there had never been any allegation before the Tribunal to that effect.

15. The law is not significantly in dispute between the parties. In the case of **Chapman v Simon** [1994] IRLR 124 the Court of Appeal considered the case of an Industrial Tribunal (as it was then called) which had considered various complaints of discrimination on racial grounds. It rejected the charge which had been formally made to it on behalf of the Claimant. It went on, however, to hold on the facts that a different unpleaded act had been made out. Balcombe LJ noted that in paragraphs 22 and 23, and at paragraph 33 said:

> **"33. … In my judgment the EAT was wholly justified in accepting the appellants' submissions that the Industrial Tribunal was wrong as a matter of law in reaching this finding. …**
>
> **(1) This was not a matter of which Ms Simon had ever complained. I have already set out the terms of Ms Simon's originating application, which gives every indication of having been prepared with professional assistance, and the way in which Mr Munasinghe framed his statement of the first incident. Sections 54 and 56 of the 1976 Act make it clear that the jurisdiction of the Industrial Tribunal is limited to complaints which have been made to it; no complaint was ever made by Ms Simon relating to the matters which the majority in paragraph 9 found to have constituted racial discrimination."**

16. In **Ahuja v Inghams** [2002] EWCA Civ 1292 the court considered a case in which the Tribunal had considered the facts of the one allegation which had been pleaded before it and had found that not made out, but considered that two other acts which had not been complained of before it had been made out. It did so on the basis of evidence. It did so having heard the parties. But the Court of Appeal (Kennedy and Mummery LJJ and Sedley J) had no difficulty in concluding that the law was such that there was no other decision that the Tribunal could reach than to reject the claims.

17. At paragraph 35 the submission was made by Miss Grewal, who appeared for the Respondents, that the jurisdiction of Employment Tribunals was limited to complaints made to it. If the act of which complaint was made was found not to be proven, it was not for the Tribunal to find another act of race discrimination of which complaint had not been made and to give a remedy in respect of that act:

> **"… If the act of which complaint is made is found to be not proven, it is not for the tribunal to find another act of racial discrimination of which complaint has not been made and to give a remedy in respect of that act. The tribunal should confine itself to the acts of racial**

discrimination specified in the originating application, unless it allows the originating application to be amended."

18. Having cited the passages to which I have referred from **Chapman v Simon**, Mummery LJ observed that the submission followed the reasoning of Peter Gibson LJ at paragraph 42 in that authority and noted that the approach had been followed in later cases on a number of occasions to his knowledge. He thought there was no answer to her submission. Though expressing anxiety (paragraph 42) that someone who might have had a good case had not had the case as fully and properly presented as it should have been nonetheless he was bound to and did come to the conclusion that the appeal against a decision of the Employment Tribunal reached on that ground should be allowed. Sedley LJ agreed. He noted that the witness statement of the Claimant did not reflect the allegation which was not proved, but described two other unpleaded episodes of bullying. As he said at paragraph 49:

"Here, as it happened, one allegation was pleaded but not formally proved and two were proved but not pleaded. …"

There was no other answer to which the court could come than that which it did.

19. The importance of pleadings, as the basis for a case, was restated most recently in this Tribunal in **Chandhok v Tirkey** UKEAT/0190/14/KN, to which Ms McNeill QC for the Respondent draws attention in her submissions:

"17. … the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute."

20. What the Notice of Appeal contends in respect of the Tribunal's decision, applying those principles, is that, given its own findings of fact, the Tribunal should have found that there was victimisation (paragraph 12 of the Notice of Appeal). The factual connection between what happened at the conference and 21 September was "more than sufficient to show that this [i.e. the acts of the 21st] was an act of victimisation. Paragraph 14:

> **"… it is submitted that the Tribunal's conclusions on victimisation were irrational, unreasonable and/or perverse. The Tribunal erred in its application of the case of *Chapman v Simon* … It is submitted that the Tribunal should have distinguished *Chapman* because the [Claimant's] case in the ET1, witness statement and submissions made it clear that victimisation had been alleged. It is accordingly submitted that the meeting on 21st September 2010 and every subsequent act in connection with the disciplinary proceedings was an act of victimisation."**

21. In submission, Mr Holland appearing here as he did not below, accepted that there had been no case in the ET1 or witness statement or the other documents to which I have referred, which at the outset the Tribunal identified, of complaints made during the conference as being protected acts and of there being an allegation that it was in response to those that the events of 21 September took place.

22. Undaunted he submitted that **Chapman v Simon**, though good law, did not apply. It was not as if the Tribunal had found a new fact. Rather, they were looking at the same factual circumstances as were relevant to other claims but in a different light. This submission was linked to some extent with the case of **Amin v Wincanton Group Ltd**, a decision of this Tribunal (Judge Serota presiding) of 27 May 2011, UKEAT/0508/10, unreported. In the course of his submissions, however, he felt constrained to recognise that the Judge had, in paragraphs 43 and 44 and thereafter (paragraph 52), clearly recognised the force and correctness of the **Chapman** and **Ahuja** line of authority. Paragraph 53, the reason for this decision was that in that particular case, on its particular facts, there had indeed been a plea in the ET1 which covered the factual circumstances which the Tribunal had thought outside the pleading. This

was thus really a case about the interpretation of the ET1 and therefore not applicable to the current case before me. He had somewhat more fertile ground for his submission, based upon the earlier decision of **Eltek (UK) Ltd v Thomson and Anr** [2000] ICR 689, a decision of this Tribunal presided over by Lord Johnston. That was a case in which, at a Preliminary Hearing, the Claimant had claimed that she had been unfairly dismissed for a reason related to pregnancy and thereby discriminated against in respect of her pregnancy on the basis that she was an employee. That would fall under section 6 of the **Sex Discrimination Act 1975**.

23. The Preliminary Hearing called to determine whether she was an employee found she was not, but that she was a contract worker to whom section 9 of the Act of 1975 would apply, giving her precisely the same claim but through a different port of entry. On that basis Lord Johnston for the EAT considered that the case was the relabelling of an existing factual claim rather than a fresh claim which had not been pleaded.

24. The question in issue, as Mr Holland accepted, was really whether or not the dismissal had a relationship to the Claimant's pregnancy or not. That issue did not depend upon her precise contractual status. Secondly, I note that the decision was made at a Preliminary Hearing, at which prospective amendment is always possible and often encouraged with a view to deciding the real issues between the parties at a Full Hearing. It thus seems to me to be of no real assistance in the present case beyond demonstrating that a close view needs to be had of the scope of that which is pleaded and to see what the facts themselves show.

25. Mr Holland's argument continued to the effect that the Tribunal could only rationally conclude that the motivation of the General Secretary was in relation to a protected act. He accepted in argument, however, that if the Tribunal had simply said that it had considered

whether or not what happened on 21 September was responsive to what had happened, or what was then feared to happen, arising out of the complaint of 20 August, which was a protected act, and had said nothing about its concerns about whether the pleadings identified the real issues, and had held it was not, he would not have been able to argue that its conclusion was irrational and he accepted that he would be in difficulty. He argued that the Employment Tribunal here was looking at the same set of facts but in a different way.

26. I cannot accept this. The reason why I cannot accept this is because of the way in which victimisation is defined in the **Equality Act 2010**. It requires identification of a protected act. Unless the protected act is identified the Tribunal is not in any position to know what subsequent detriment is caused as a result of it. The conclusion in **Chapman v Simon** and **Ahuja** and the several cases which have followed those authorities is not surprising if one considers the role which the Tribunals and courts occupy. It is not inquisitorial. It is accusatorial. That puts the Judge or Tribunal as decision maker in the role not of deciding what it thinks would be just, even though the reasons for reaching such a view might be compelling. Its role is instead to resolve the disputes which the parties bring to it for resolution. If, as experience teaches happens on a number of occasions, a party does not identify a claim which it might be to their advantage to identify, the court is in no position to resolve it. Its role is to resolve the actual disputes brought to it.

27. Here, perhaps because the Claimant was denying having made any complaints at the conference, at least at the outset of proceedings (though it seems obvious there must have been some evidential basis for Mr Herbert's submissions on her behalf at the conclusion) it is unsurprising that there was no complaint. The plain fact is that there was none. Without the particular protected act being identified, there could be no finding that there had been

victimisation because of it. The finding of a protected act is a necessary finding for the conclusion. It is therefore a fact which is different from facts which relate to other allegations of victimisation. I do not therefore accept that this Tribunal was guilty of failing to recognise that the relevant facts had already been pleaded. They had not, because the protected act was not identified as such. Indeed I would observe that the way in which the Tribunal expressed its view showed that, if it had been pleaded, it would have undoubtedly wished to resolve the issue.

28. The submission of Mr Holland went further than I had, on my first reading of the Notice of Appeal and his Skeleton, anticipated that it might. In his last sentence of his paragraph 14, echoing a similar sentence in the Notice of Appeal, he submitted that the meeting on 21 September 2010:

> **"… and every subsequent act in connection with the disciplinary proceedings was an act of victimisation."**

He complains that, in looking at later detriments, said on the pleadings to have been caused as a result of other protected acts, the Tribunal had failed to take into account its view as to the realities of the cause of the meeting on 21 September 2010.

29. It seems to me that there is no obvious basis for supposing that the view which the Tribunal had in respect of the events of the conference would have made any difference to its conclusions on all the other allegations of victimisation. This is, in my view, an argument too far.

30. Accordingly the appeal, insofar as it rests on the **Chapman v Simon** points, must be and is dismissed. Having read her Skeleton and considered the argument addressed to me, I did not

think it necessary to call upon Ms McNeill QC to respond orally, nor did I think it necessary on the second point of the appeal, which related to unfair dismissal.

31. The argument here was identified by Mr Holland in his submissions as, in effect, supposing that the Tribunal was irrational (that is, perverse) in concluding that the dismissal was fair. It could not be because what put the matters in train was the decision of the General Secretary to give the ultimatum he did to the Claimant on 21 September. Since that was motivated by his own desire to protect himself from complaint and not by, it would follow, any real concern for the best interests of the union, it was unfair to subject the Claimant from that starting point to an investigation and hearings which, Mr Holland asked me to infer, would not otherwise have occurred.

32. First, there is no finding by the Tribunal from which I could conclude that it would not otherwise have occurred. There is a hint (but perhaps no more than that) in the papers that there were matters which were unresolved, although there had already been an investigation into the events of the organisation of the conference which had found no wrongdoing with the Claimant. However, the argument also is that the Tribunal took too narrow a view of the circumstances. Section 98 of the **Employment Rights Act** requires a Tribunal to have regard to all the circumstances. Since, in effect, Mr Holland submitted, it had put out of mind the causation of the ultimatum on 21 September because it had thought there was a pleading failure on behalf of the Claimant, it had disabled itself from considering the full picture which it should have considered.

33. I do not accept these arguments. The reason why I do not accept them is that the Tribunal itself is the arbiter of what is a fair dismissal. There is nothing in the Decision which

suggests it took a deliberately narrow view of all the circumstances. There is nothing to show it left out of account the origin, as it might be thought, of the proceedings. Indeed it actually expressed itself to the contrary. It set out, in some detail, the history of the disciplinary proceedings. It considered, at paragraph 221, that "… whatever the General Secretary's motivation in triggering the initial disciplinary process" the matter had been investigated properly and in detail; the Claimant's response had been provided and considered; the evidence indicated the Claimant's guilt; the panel, completely independent of the General Secretary, genuinely believed in her guilt.

34. That might be thought entirely sufficient. But in any event the Tribunal, at paragraph 234, having applied the last of the **Burchell** criteria, turned to look at overall fairness. It thus not only approached the question of unfair dismissal by applying the fourfold approach derived from **BHS Ltd v Burchell** [1978] IRLR 379 and **Iceland Frozen Foods v Jones** [1983] ICR 17 - asking whether there was a genuine belief by the employer based on reasonable grounds after a reasonable investigation leading to a sanction which was within the range of reasonable responses - but also looked at fairness overall. That is an impeccable approach. It said it had taken account of the matters "referred to above" without specifying what they were but indicating it had regard thereby to the whole of the circumstances. That is not a narrow approach. It is the opposite. It expressly noted that the findings in respect of the General Secretary's motivation were "a cause of concern". It discussed (paragraph 236) what that gave rise to the Claimant's allegation that the case was a stitch-up, and returned (paragraph 237) to its final conclusion:

> **"Overall, the Tribunal has concluded that the First Respondent's decision to dismiss the Claimant was within the band of reasonable responses. …"**

35. I see nothing legally in error in that reasoning. It cannot be said that this was perverse or irrational. The fact that, but for a particular event, a dismissal may not have happened does not mean that the dismissal is caused by the event in any real sense which the law would recognise. The question is one of overall fairness in all the circumstances. It is not directly a causation question. The Tribunal made an assessment which was within its competence to make. I see no reason to think it was not entitled to reach the conclusion it did. Plainly it had regard to relevant considerations including that which it is argued it should have had more firmly in mind, namely the behaviour of the General Secretary and the events which occurred at and following the trade union conference in Manchester. It follows that on both the Grounds of Appeal this appeal must be and is dismissed.

36. Ms McNeill QC applied for costs at the conclusion of the hearing. I came very close to awarding them because it seemed to me that the submissions which I had anticipated from the Notice of Appeal and the Skeleton Argument rather fell away, particularly at the outset of the submissions; realistically and rightly so, and realism should have dawned earlier. So I came within a whisker of regarding the matter as misconceived. What has saved it I think is the fact that it did appear to Judge Shanks that, on very close consideration, there were two points which might have substance. In the background of this particular case I think there was a real point in those matters being argued and articulated.

37. I think, therefore, that the appeal just narrowly fails to meet "misconceived". I do not know what I would have decided in exercising my discretion if I had the basis to exercise it, but even if I had exercised my discretion to award costs, I would have needed to consider the means of the Claimant which might have persuaded me, had I made an order, to make only a very small one.

38. Those are my reasons. Application well made, but rejected.