Appeal No. UKEAT/0181/15/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 31 July 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

SANTANDER UK PLC — APPELLANT

MRS O VALVERDE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL NICHOLLS QC (of Counsel) Instructed by: EMW Law LLP Seebeck House 1 Seebeck Place Milton Keynes Bedfordshire MK5 8FR
For the Respondent	MR CRAIG RAJGOPAUL (of Counsel) Instructed by: Hodge Jones & Allen LLP Solicitors 180 North Gower Street London NW1 2NB

SUMMARY

PRACTICE AND PROCEDURE - Preliminary issues

SEX DISCRIMINATION - Jurisdiction

JURISDICTIONAL POINTS - Claim in time and effective date of termination

A decision to refuse a Preliminary Hearing to determine if a Tribunal had jurisdiction over some of the matters alleged in a claim, which it was said were out of time, was attacked on the basis that the Judge had wrongly reached final and binding conclusions as to that which the pleadings alleged, and that she ought to have ordered a separate hearing in respect of various allegations. The argument was rejected, and costs awarded against the Appellant on the basis that the appeal was misconceived.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a case management decision made by Employment Judge Goodman at London Central, Reasons for which were given on 12 June 2015. By that decision she ordered that the trial of the issues raised by the ET1 and ET3 in this matter should be heard at a date that she set in early January 2016. She did not, despite an invitation to do so, decide that there should be two hearings, one to hear and determine issues going to jurisdiction on the matter of time limits and the other to hear what remained of the claim after that hearing. The question that she had to resolve was therefore entirely one of case management. Echoing the words that Mummery LJ spoke in **London Borough of Hammersmith & Fulham v Jesuthasan** [1998] ICR 640 in the opening paragraph of his judgment:

> **"It is unusual for an appeal from an interlocutory order of an industrial tribunal [as employment tribunals were then called] to reach this court. An appeal from an industrial tribunal to the Employment Appeal Tribunal only lies on a question of law. An appeal from the appeal tribunal to [the Court of Appeal] may only be brought on a question of law *and* with leave. Interlocutory orders are made by an industrial tribunal under the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993 [now replaced by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013] which confer broad discretions on tribunals in procedural matters.**
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> **The exercise of a wide discretion rarely gives rise to a question of law. Unless there is a reasonable prospect of showing that the tribunal has misdirected itself in law, erred in principle or arrived at a decision which is plainly wrong, leave to appeal to this court will not be granted against the exercise of a discretion. …"**

2. Mr Nicholls QC, who appears for the Respondent, rightly indicates that in exercising a discretion the Tribunal is not entitled to leave out of account matters that it should take into account nor to take into account matters that it should not.

3. The underlying facts of the present case have never been established by any Tribunal. What I say therefore is derived entirely from the pleadings and to that extent may or may not be shown in due course to be the case. By her pleading, without intending to give a ruling on any matter that may subsequently be a matter of contention as to what those pleadings say, it

appears that the Claimant occupied a senior post in the Respondent organisation. She complained of sex discrimination against her, not only in respect of individual acts but in respect of an inequality of terms in particular relating to pay. Equal pay claims are of course claims of sex discrimination in pay. She complained also that she had been victimised.

4. Time points were raised by the Respondent. The **Equality Act 2010** at section 123 provides materially:

> **"(1) Proceedings on a complaint within section 120 [which this is] may not be brought after the end of -**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **…**
>
> **(3) For the purposes of this section -**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **…"**

5. In the case of **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 the expression "conduct extending over a period", which is often in practice referred to as a "continuing act", was discussed by the Court of Appeal in the judgment of Mummery LJ. He regarded the words "continuing state of affairs" as being a convenient substitute for the concept and regarded that, as he said (paragraph 48), as a:

> **"48. … legally more precise way of characterising her case [that of a Metropolitan Police officer who complained of several acts that she said were linked by institutional racism] than the use of expressions such as 'institutionalised racism', 'a prevailing way of life', a 'generalised policy of discrimination', or 'climate' or 'culture' of unlawful discrimination."**

6. Where issues of time are raised, they may, given the wording of section 123 or in the field of unfair dismissal, give rise to an application or a decision that a Tribunal should hear the issue as to time first. It has an entirely unfettered jurisdiction to do so; like all discretions, its decision must be exercised judicially with regard to reason, relevance, logic and fairness and

must take account of the appropriate Rules. In particular, the overriding objective set out in those Rules will apply.

7. Employment Judge Goodman dealt with the overriding objective, to which she made reference in her Judgment. It involves avoiding unnecessary formality and seeking flexibility in the proceedings, it involves avoiding delay, and it involves saving expense. It is obvious that, where time is an entirely discrete issue unaffected by any of the evidence that is likely to go to the merits of the claim being made, as, for instance, in the case of a one-off act where there is no suggestion that it is linked to any other act, which is not brought within the three-month period, it may be convenient for the Tribunal to list the matter so that it may determine whether it is just and equitable that that time limit should be extended. If it does not extend time, then it has no jurisdiction to hear the case further. It may take the view that having a hearing to decide whether to extend time will therefore in the circumstances of such a case save time, save money and, importantly too, save the resources of the Tribunal: the alternative that might be anticipated might be a long hearing, involving expense to both parties and the taking up of time of the Tribunal which could equally and better be devoted to other cases and the use of which might potentially be better safeguarded by an early decision on time, even though any hearing will inevitably itself take time. Any hearing will involve preparation. Any hearing will involve costs. It must thus be weighed in the balance whether time is likely to be spared, or wasted, by proceeding to a Preliminary Hearing on time. If on assessment it seems likely that the discretion would be exercised at the hearing in favour of the Claimant, then without determining that issue, which of course remains for the Tribunal seized of the hearing itself, it might be sensible for the Judge to decide there would be no Preliminary Hearing, for to do so would simply add to the time, the cost, the expense and take up the resources of the Tribunal in doing so.

8. These considerations involve necessarily a prediction or an assessment of the chances - no more than that, and so far as they can be determined on what necessarily has to be a rough, ready and summary view - that the listing of a hearing as to the preliminary issue of jurisdiction on time grounds may save time, costs, expense, trouble and resource overall. Thus it is that the Rules do not entitle a party to have a Preliminary Hearing at their request. Parties subject only to what is now the preliminary consideration of the Employment Tribunal are entitled to a hearing; they are not entitled to a Preliminary Hearing, though one may be ordered.

9. It is accepted before me by Mr Nicholls that the decision is a discretionary one, though his argument is that in the particular circumstances of the present case there was in effect only one decision that the Judge could properly have reached. The discretion is conferred by Rule 29, which provides for case management orders, and by Rule 54 in particular, which refers to Preliminary Hearings and their fixing. Rule 54 provides:

> **"A preliminary hearing may be directed by the Tribunal on its own initiative following its initial consideration (under rule 26) or at any time thereafter or as the result of an application by a party. …"**

10. Whilst considering the Rules, one further Rule, to which I shall make further reference, is that a case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice; in other words, that which is decided at a case management hearing is not final in disposing of the issues between the parties.

11. The Judge here was invited by Mr Nicholls to list a Preliminary Hearing so that issues of time could be resolved. The contention broadly was that the claim form was issued on 28 April 2015, following a referral in February to ACAS for conciliation, and it had the consequence that of those matters to which a precise date could be fixed from the claim form claims in respect of equal pay were not out of time, a claim as part of the allegations that the

Claimant had had a power of attorney withdrawn from her in November 2014 was within time, and there was a reference to conduct of one of the two managers of whom she specifically complained in 2015, which was self-evidently also within time, though there was only a small part of her complaint in respect of him. At the conclusion of the ET1 the Claimant had said this (paragraph 39 of the grounds of complaint):

> **"39. To the extent that any specific complaint appears to be out of time the Claimant contends that it will be necessary to consider the merits of her complaints to determine whether**
>
> **a. There is conduct extending over a period (for the purposes of s.123(3) … and/or**
>
> **b. Whether it would be just and equitable to extend time …"**

12. The contention on this appeal is that unusually the Judge was in error of law because she came to her decision taking a view of that which the claim form said. Mr Nicholls' case is that the pleadings are capable of confining the factual matters which are to be proved. Therefore, if upon a proper reading they confine the matters to events that happened at the latest before the removal of the power of attorney, then in respect of those matters there could be no successful claim. The Tribunal would lack jurisdiction. He argues that the Judge expressed a view that would be binding upon a Tribunal later hearing the issue of time as part and parcel of the Full Hearing on the merits, which would prevent or proscribe the argument that the Respondent would wish to put forward. It was impermissible for her to express a view that belonged not to her but to the Tribunal that was due to hear the case.

13. He made a similar point in respect of the way in which the Judge dealt with the case in paragraph 10, in which she expressed a view as to what was being alleged in the Particulars of Claim; she should not have done so, because that bound, effectively, a subsequent Tribunal. The two paragraphs central in this argument are paragraphs 8 and 10. Paragraph 8 says this:

> **"8. This is a case where, depending on the facts found, the claimant may establish an underlying discriminatory state of affairs. In some cases a respondent can show that this is improbable, for example where several different decision makers have made allegedly discriminatory decisions at different times, but the grounds of claim here allege an underlying**

> **continuity of approach by Mr Aranguena from late 2012, for example, and the continuity of discriminatory decisions from 2009 relating to pay and grade. Whether there was a discriminatory state of affairs, so that conduct extended over a period which had not ended before the relevant time limit, is something a tribunal will have to decide after hearing the evidence and deciding whether this was the case, as made clear in *Hendricks* … Whether a state of affairs is discriminatory is fact specific."**

14. She then went on to deal with the question of extension of time. It should be noted that if there is a continuing act or, as Mummery LJ would have put it, a continuing state of affairs, then a claim when brought will be brought within the primary time limit. The secondary question, if it is not, is whether it might be just and equitable to extend that time limit. That is a discretion that has to be exercised in light of all the circumstances, though having particular regard usually to those matters that have been identified in authorities as being of particular relevance, amongst them the matters outlined in **British Coal Corporation v Keeble** [1997] IRLR 336. At paragraph 10 she said:

> **"10. Even if some - or many - of the earlier claims are ruled out of time, it may still be necessary for the tribunal to hear evidence of those past events in order to make findings on the reason for later treatment, as often happens where the same managers have been involved in some years, or where a discriminatory culture is alleged, as here. Thus even if successful in striking out some claims, a preliminary hearing might do little to shorten the final hearing time."**

15. The case as put in the Notice of Appeal is that the Judge did not consider the correct question, namely whether there should be a hearing to consider whether the claims were in time, but she reached her decision on the wrong basis by pre-empting what decision might be reached if such a hearing were held; alternatively, took into account irrelevant matters or ignored relevant ones. The pre-emption was in respect of the view that she took of that which the pleadings showed. In the Notice of Appeal the two relevant sentences from (vi) of paragraph 6 of the grounds are:

> **"… [The Judge] said that there might be a continuing act and that this might need to be decided in the light of the evidence (para 8). That was not correct. The question whether there is a continuing act is one which depends on the pleaded case. …"**

16. As put, that contention is completely unarguable given established case law that a continuing act does indeed need to be decided in the light of the evidence; see **Arthur v London Eastern Railway Limited** [2007] ICR 193, in which (see in particular paragraphs 33 and 34) the Court of Appeal, considering the question of whether a Tribunal was entitled to rule that there had been no series of similar acts - essentially the same question as asked here - thought it preferable for a Tribunal to find the facts looking at all the surrounding circumstances and to see what link there might be between the acts both within and outside the limitation period before attempting to apply the law. As it transpired from his argument, Mr Nicholls was not taking the point as it had been put in the Notice of Appeal, at least as it appears to me, but was arguing that the pleadings were not the sole ground of reference but did confine the facts that could be alleged and proved.

17. The Notice goes on to allege, again in (vi), that the Judge impermissibly speculated as to the arguments that might be advanced by the Claimant in relation to a just and equitable extension of time. I have to say I see nothing impermissible about taking a view as to what *might* be argued. It is necessary in order to decide whether a Preliminary Hearing will have the savings I have identified to take some view as to why that should be. The view the Judge expressed here was entirely within the grounds of her entitlement.

18. The same point - that the Judge had resolved a substantive argument to do with jurisdiction - is made throughout the grounds. In his argument before me today, as I have indicated, Mr Nicholls explained more of the reasoning, which had it rested on ground 6(vi) of the Notice of Appeal would have seemed completely unarguable, in the way in which I have described. He complained that the Judge's decision - or such he characterised it as being - that the pleadings alleged an underlying continuity of approach (paragraph 8) and a discriminatory

culture as alleged (paragraph 10) were findings that were binding on the parties in any later argument. However, on any subsequent argument as to time at the substantive hearing, he would wish to put those matters in issue. The argument substantively would be that the claim form revealed a number of contentions, under separate headings, complaining of specific groups of acts. Thus the Claimant, he would wish to argue, under the heading of "Sex Discrimination" (page 8 of the grounds attached to the ET1) dealt first with targets and resources from paragraphs 15(a) to (e), performance ratings from paragraphs 16 to 19, lack of promotion at paragraph 20, treatment following illness at paragraphs 21 to 22, de facto demotion at paragraphs 23 to 28, bullying at paragraphs 29 to 31, and the removal of the power of attorney at paragraph 32. He would wish to demonstrate that, viewed individually, the latest date in respect of each of the allegations was prior to 19 December 2014 and prior to the start of the three-month period.

19. Thus, he says, the Judge in deciding as she did was taking into account a view of the pleadings that was not hers to take and that this was precluding the parties from later argument. In so far as she dealt with the possible results of the hearing he argued that she had based her decision on what she thought would be the outcome of the hearing and she had no right to predict what was yet to be argued.

20. In my view, these submissions are wholly unrealistic. I have not in the event found it necessary to call upon Mr Rajgopaul, who appears for the Claimant. I have read the skeleton argument that was supplied by Mr Tatton-Brown, who appeared for the Claimant below, to which Mr Rajgopaul was to speak.

21. My reasons are these. First, the complaint that the Judge should have been deciding whether there should be a Preliminary Hearing or not and took her focus off that question is, in my view, unfounded. The decision that she gave has to be read as a whole. It is quite plain that she was describing a decision not to list a Preliminary Hearing; those words, indeed, appear in bold at the outset of her Reasons. As I have already said, that necessarily involved forming some idea of what might be the benefits and disadvantages of such a course. It necessarily involved concluding to what extent time would be saved in respect of the overall hearing to which the parties were entitled by having a Preliminary Hearing. Viewed broadly, her decision focused upon the question of whether there should be such a hearing, and whether it would or was likely to take a disproportionate amount of time and resource without there being any possibility of substantial benefit. She did not, as I see it, make any determination one way or the other as to time; indeed, she said quite clearly (paragraph 4) that she was not being asked to decide any jurisdictional point. She began her particular reasons having set out the overriding objective at paragraph 7. She noted appropriately that many of the claims would have to be heard in any event; in other words, this was not one of those cases in which a time point taken shortly may dispose of a much longer case because it is a simple and clear-cut possibility that it may dispose of the entire case if resolved against the Claimant.

22. Then paragraph 8, which I have already cited: I do not read here that the Judge was expressing any concluded view as to that which the pleadings showed. It had not been in dispute before her, because there had been no discussion as to time, and in any event, as I have pointed out, being a case management decision it would be open to a subsequent Tribunal to take a different view. I do not consider, contrary to Mr Nicholls' fears, that there was anything that binds him in any subsequent argument as to the scope of the pleadings and as to the extent to which the Claimant might properly be restricted in her arguments.

23. The suggestion here that there was an underlying continuity of approach by Mr Aranguena, for example, and a continuity of discriminatory decisions relating to pay and grade is undoubtedly true in respect of the second because the equal pay aspects of the case are not sought to be struck out on the grounds of time, but in any event the Judge was entitled, as it seems to me, to have regard to the grounds of complaint as a whole. It appears to me (without, I would emphasise in the current context, myself seeking to preclude any argument that might later be addressed as to the pleadings by either party) that those grounds of complaint are infused with the suggestion that the Respondent had a culture which was one of male supremacy. Indeed, part of the claim to which Mr Nicholls did not refer is headed "The Respondent and its culture", paragraphs 6 to 7. The prevailing work culture was said to be "macho, "alpha male" and "occasionally misogynistic". Under "Equal Pay" the opening words say (paragraph 8), "A further feature of the Respondent's culture is …". When dealing with the individual heads under which sex discrimination is put as I have described them, there are references such as "This less favourable treatment is longstanding and ongoing" (paragraph 15); and that in respect of performance rating since 2014 it has "so far been recognised with a Deferred Rating" (paragraph 19), these being suggestive of a continuing state of affairs even if the last specific matter is dated some time prior to the three months' time limit. Under "Lack of promotion" there is a description of the failure to promote as being the "most recent example of a continuing failure" (paragraph 20). As to bullying, the undermining of the Claimant is said to be on a consistent basis and the "prolonged and sustained campaign of bullying at work" is how it is referred to (paragraph 29). In this respect under the Further and Better Particulars there is one case, albeit what might on the face of it seem a fairly minor complaint, which is said to be part of this campaign of bullying to which reference is made at least so far as Mr Aranguena is concerned.

24. I do not think that the Judge was doing anything other than reflecting some of the wording of the ET1 in saying what she did in her decision. The argument that she impermissibly took a view as to what would be decided, again, does not seem to me to be faithful to the terms of the Judgment. In the opening words of paragraph 8 she said the Claimant "may establish an underlying discriminatory state of affairs": the word is "may". At paragraph 10 it is "may still be necessary". These are not findings as to what would be the consequence of such a hearing. The last sentence in paragraph 10 says that a Preliminary Hearing "might do little to shorten the final hearing time". These are words of uncertainty that are entirely appropriate to the decision being made.

25. The overriding approach taken in the authorities, as Mr Tatton-Brown's skeleton argument demonstrates, is that Preliminary Hearings in any event should be ordered with great care. As was observed in **Waters v Commissioner of Police of the Metropolis** [1995] IRLR 531, in the Judgment of the Appeal Tribunal given by Mummery J (as he then was), paragraph 17(2), it was said:

> **"… The preliminary issue procedure is less appropriate in cases where the isolation of a point of law or fact separates it from the context of the whole case and involves a risk of distorting the dispute, eg by restricting the scope of enquiry to such an extent that the tribunal reaches a decision without a full appreciation of the case as a whole. …"**

26. This is consistent with that which is said in **Hendricks** - that was not, as Mr Nicholls points out, a case about whether to order a Preliminary Hearing, but it did indicate the importance of establishing the overall facts - and in particular the most recent Court of Appeal direct authority to which I have been referred, that of **Arthur**, the substance of which I have already described, in which in particular in addition to paragraphs 33 and 34 I would draw attention to paragraph 36, where the point was made that:

> **"36. … Even if it is decided at a pre-hearing review or other preliminary hearing that there is no continuing act or series of similar acts, that will not prevent the complainant from relying**

> **evidentially on the pre-limitation period acts to prove the acts (or failures) which establish liability. …"**

(Indeed, there is appellate encouragement at the highest level (see **Anyanwu v South Bank Student Union** [2001] ICR 391) for this to be so in the case of alleged discrimination as is this case.)

Mummery LJ went on to say, continuing the citation from his paragraph 36:

> **" … It will in many cases be better to hear all the evidence and then decide the case in the round, including limitation questions, on the basis of all the evidence: see, for example … *Hendricks* … particularly paras 48 and 49, regarding the approach to multiple acts alleged to extend over a period."**

27. Lloyd LJ in paragraph 43 added:

> **"I agree with Mummery LJ that the appeal should be allowed. It is not helpful or sensible, in the present case, to try to decide on a preliminary basis without evidence whether a number of acts, or failures, do or do not constitute a series of similar acts, so that the complainant can claim for detriment suffered by him as a result of those which happened more than three months before the issue of his proceedings. This is the equivalent of a striking-out application. It seems to me that this is rarely likely to be a sensible approach in relation to a discrimination claim."**

28. In **Boyle v SCA Packaging Ltd** [2009] UKHL 37 there was a discussion as to whether a Preliminary Hearing in a disability discrimination case was appropriate (see paragraphs 9 and 10). Lord Hope of Craighead said by reference to the decision of Lord Kerr in **Ryder v Northern Ireland Policing Board** [2007] NICA 43 at paragraph 16 that he endorsed the view that the power to determine a preliminary point should be sparingly exercised and that it is:

> **"16. … often difficult to segregate in a wholly compartmentalised way a single issue … from other material that may have relevance to the matter to be decided."**

29. These authorities point to the inappropriateness of holding a Preliminary Hearing in any case in which there is likely to be - and I use the word "likely" in the same rough, ready and anticipatory sense as I have described as appropriate for the Employment Judge - an overlap

between the matters to which the application in respect of time limits and other merits of the claim relate.

30. Finally, I would observe that the focus of this appeal having been upon the particular supposed pre-emption by the Judge of arguments that ought to be available to the Respondent at a substantive hearing in respect of time and her alleged pre-judgement of how a Preliminary Hearing would, rather than might, result has diverted attention from the fact that what she was deciding was whether or not there should be two hearings, rather than one hearing all at one time, to discuss precisely the same matters. She had ample reason for concluding that there should be just one hearing.

31. The decision is in no sense mine to take; I have merely to ask whether the Judge made an error of law. For the reasons I have given, she did not do so, but if and in so far as it is suggested, as indeed it was towards the end of Mr Nicholls' submissions, that there was only one conclusion that the Judge could have reached, I do not accept it. Though as I say the decision is not mine to take I would wholly endorse the decision this Judge reached: mine would have been the same. I regard the appeal as being without merit.

32. I am asked by the successful Claimant to make an order in respect of costs. I can do so under Rule 34A and indeed am empowered to do so when it appears to the Tribunal that the proceedings brought have been misconceived. That does not conclude the matter; I then have a further discretion to exercise as to whether, if I come to that conclusion, I should make such an order, and thirdly, if I come to that conclusion, as to the amount in which I should make that order.

33. I have come to the conclusion that, in this particular case, the appeal was misconceived. I acknowledge the points that Wilkie J took a view of the papers in granting permission that might be said to indicate that I should not come to that conclusion. He did not, however, say in terms that the case was arguable, but he said that the interests of justice required the Respondent to have the opportunity, and he described himself as far from convinced that the Employment Judge erred. He did not have the benefit of the argument that I have had, which in some significant respects has explained matters in the Notice of Appeal that otherwise would have appeared entirely unarguable, but I still consider that it is a very tall order to attack an interlocutory hearing that does not preclude either party from a proper hearing of the issues, where to succeed on appeal the exercise of judicial discretion has to be attacked on what have to be quite clear and compelling arguments that there has been a failure to adopt the proper approach, a taking into account of impermissible conclusions or a leaving out of account those matters that should be taken into account. The fact that I did not call upon the Claimant's counsel to respond demonstrates I was unpersuaded.

34. I have therefore on balance, and just, come to the conclusion that the appeal was misconceived. As to exercising my discretion, I think I should in this case, because the Claimant has been put to the expense of attending, which was made necessary only by the Appeal. I have looked at the Schedule of Costs. I think in this case that there are considerable grounds for thinking that a round-figure sum would represent the proper balance between the parties, and I propose in the light of the submissions that have been made to me and having had regard to the Schedule to adopt a broad-brush approach. I order that the Respondent pays £6,000 by the way of costs to the Claimant.