Appeal No. UKEAT/0369/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 February 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MISS A D HYLTON — APPELLANT

ROYAL MAIL GROUP LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES KHALID (of Counsel) Direct Public Access
For the Respondent	MR STEPHEN PEACOCK (Solicitor) Weightmans LLP 100 Old Hall Street Liverpool L3 9QJ

SUMMARY

PRACTICE AND PROCEDURE

PRACTICE AND PROCEDURE - Striking out/dismissal

The Claimant made completely unspecific allegations of discrimination in her ET1. The Employment Tribunal ordered there be a Preliminary Hearing to discover what she was really alleging. 30 minutes before the hearing she asked for a postponement, since she had had a panic attack. It was granted, but it was ordered that she clarify her allegations by setting out, in chronological order, what acts she was actually complaining about as being discriminatory. She did not do so by the date set. A second Preliminary Hearing, shortly thereafter, was also postponed because she phoned in 2 minutes before it was due to start to say she had suffered a panic attack. The same order for particulars was repeated, but now as an "Unless" order. It was not complied with, though some days later the Claimant did provide 38 pages of material. Her application under Rule 38 **Employment Tribunal Rules of Procedure 2013** for relief from the automatic strike-out following non-compliance was refused, the Judge thinking that the new material did not assist - indeed, it made matters more difficult: a view that was not challenged on appeal. He thought that without particularisation a hearing could not go ahead: a further Preliminary Hearing would be needed: and the history was such that, in the absence of clear medical evidence showing that panic attacks/illness would not recur when a hearing was imminent, there was a real risk that a Preliminary Hearing would not be effective. In all the circumstances, it was not appropriate to grant relief.

Held: In so deciding, the Judge had not been shown to have erred in law.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. The Claimant made complaints that she had been discriminated against by reason of her race and disability in the course of her employment with the Royal Mail. That employment continues. Since the Judge considered that her ET1 was hopelessly unspecific in the complaints it made, he ordered a Preliminary Hearing to understand precisely what it was that the Claimant was relying upon. She had used phrases such as that she had not been treated with dignity and respect, that she had been under the management of "two alleged male bully managers", one of whom was "alleged to be a self-confessed racist". She had been "treated worse than an animal" and "subjected to continuous harassment, bullying, discrimination and victimisation". When she complained to HR, she said that they sat back quietly "watching their disgusting, corrupted, unprofessional and bullying managers destroy me". She complained that the company needed to act honestly, properly and fairly. No-one should be made to suffer as she had and go through her experiences. It needed to work with integrity, honesty, decency, fairly, justly, reasonably, impartially and professionally, thereby implying it had done none of those things. No detail was given in the ET1 of any of those.

2. On 24 January the Tribunal ordered that the Claimant provide, in numbered paragraphs and chronological date order, the complaints that she made in respect of (a) race discrimination and (b) disability discrimination. The information was to be given on the matters set out in her claim form, which had been received on 21 October 2013. That was to be provided to the Tribunal no later than 21 February 2014. When the matter came back to the Tribunal on 25 February, since the Claimant had, minutes before it was due to start on the 24th, asked for a postponement because she had had a severe anxiety panic attack the day before and the Judge had granted that postponement, the required particulars had not been given.

3. For a second time, this time two minutes before the hearing, the Claimant asked for a postponement. The reason was that she "still remains unwell with ongoing depression and anxiety". In his order the Judge indicated that he was considering striking out the claim on the grounds that it was not being actively pursued, but so far as the particulars were concerned, he ordered that:

> **"Unless by 14 March 2014 the claimant provides the information requested in paragraph 4 of the order sent to the parties on the 24 January 2014 the claimant's claim is struck out."**

It was paragraph 4 to which I referred above. 14 March came and went. The information was not provided.

4. On 20 March 2014 the Tribunal wrote to the parties to ask whether the Claimant had complied with the order. Since both accepted that she had not the claim at that stage stood struck out. The rule, Rule 38 of the **Rules of Procedure 2013**, provides:

> **"(2) A party whose claim or response has been dismissed, in whole or in part, as a result of [an unless order] may apply to the Tribunal in writing, within 14 days of the date that the [notice of the strike-out] was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations."**

5. Notification was sent to the parties on 4 April. Within 14 days the Claimant sought the setting aside of the order. Judge Gumbiti Zimuto, sitting at Reading Employment Tribunal, dismissed that request for reasons delivered on 28 April 2014.

6. This is an appeal by the Claimant against the dismissal of her application to reinstate the claim. It should be noted that the decision was not a decision to strike out the claim. That had already been taken by the Claimant by her own actions, with knowledge of the consequence that her inaction would have. The decision was whether or not to restore. The starting point is thus different from that which it would have been had this been an application to strike out the

claim. Nonetheless, as Mr Khalid, who appears for the Claimant today, though she was unrepresented below, points out, the Court of Appeal in the case of **Governing Body of St Albans' Girls School and Hertfordshire CC v Anthony Neary** [2009] EWCA Civ 1190, found the principles expressed in relation to strike-out as such in the earlier case of **Blockbuster v James** [2006] IRLR 630 to be of utility.

The Judge's Decision

7. The Judge decided the matter on paper since he had not been asked for an oral hearing. He set out the history. The interests of justice to which he is required by the rule to direct himself necessarily require that all relevant circumstances fall for consideration. Amongst those in this case was the history of the Claimant's psychological difficulties. She had suffered from anxiety and depression. She had severe panic attacks. She took medication to control them. The Judge set out the Claimant's explanation for her failure to provide any information until 27 March 2014. On that date she supplied some 38 pages of material, which were intended to flesh out and provide specificity to the allegations she was making. She said in the e-mail that it had never been her intention not to comply with the order, nor to be unreasonable, but:

> **"… I honestly did not remember due to the side effects of the various prescribed medications (x2 antidepressants, x1 sleeping tablets, x2 High Blood Pressure medication), I have been taking over the last 12 months. They do make me feel lethargic and forgetful sometimes and I believe this is the reason for my late response to send the Disability and Race discrimination incidents against me on time.**
>
> **Both my GP and psychologist have recently told me that the medications I am taking will cause lethargy and forgetfulness."**

8. The Judge set out the material parts at paragraph 18 of a letter from the Claimant's GP. The letter was written with the purpose of supporting her application that the strike-out should be set aside. He made specific reference to the following passages.

> **"She attended my surgery Friday clearly shaken at her inability to submit all the evidence/ facts about her workplace abuse and harassment to you on time. No doubt her state of**

> **psychological ill health and the side effects of her medications would account for her poverty of action. …"**

9. In his conclusions the Judge, as I read his Decision, considered that the material which had been supplied by the Claimant, albeit after the claim had been struck out, was of little assistance. He thought the claim remained unclear and, if anything, had been further complicated by that information. She had not set out the case in a way which enabled one easily to understand the complaints that she made.

10. He had originally ordered a Preliminary Hearing in order that the complaints could be explored and understood. He observed (paragraph 25) that without such a Preliminary Hearing an efficient and proportionate hearing was unlikely to be capable of taking place. But that involved an assessment of how likely it was, given the track record thus far, that there could be an effective Preliminary Hearing. As to that, in the second of two paragraphs 24, the Judge said this:

> **"On the occasions that the claim has been listed for hearing the claimant has that day attended at her GP and presented as unwell and failed to attend the Tribunal. The medical evidence presented has been unsatisfactory as it has failed to state that the claimant is unable to attend due to illness or to state the prognosis of the claimant's condition or how long the situation is likely to last. The risk must remain that if the matter is restored and relisted the claimant will once [again] be unable to attend claiming that [she] is unwell."**

11. It was on that basis that, given the risk that there might not be a Preliminary Hearing and given the failures thus far, the Judge felt it was not an appropriate case in which he should grant the Claimant relief from the sanction of strike-out.

12. The matter came before HHJ Serota on the sift on appeal. He thought that the Judge understood the effect of Dr Uduku's letter of 16 April 2014 since that appeared to provide medical evidence in support of the Claimant's case that, by reason of her illness, she had failed to comply with the unless order. It was arguable that he had fallen into error in failing to

reconsider whether her claim should have been struck out on the grounds he did not address the question whether a fair trial was still possible and whether he took proper account of the medical evidence or the proportionality of the strike-out. Those reflected the separate Grounds of Appeal drafted by Mr Khalid on behalf of the Claimant.

13. Before me he stressed that the Judge had not, as he submitted, considered whether a fair trial remained possible. He had not had proper regard to whether there was a proportional order that could be made short of strike-out and, in so doing, failed to take account of the way Wilkie J approached the question of reinstatement after strike-out (see paragraph 44 where he thought that a separate consideration of the issue of proportionality, however expressed, should be contained in such a decision).

14. He drew attention to the words of the Appeal Tribunal in **Johnson v Oldham MBC** UKEAT/0095/13, since reported, in which the Appeal Tribunal said:

> **"2. It is a critical aspect of fairness that a party knows the case it has to meet. It is also a central tenet of justice that disputes should be heard where a fair hearing is possible and cases should not lightly be ruled out on a procedural technicality without determination on the merits. These two principles may seen on occasion to be in conflict, as where a case is struck out for the failure of one party to state its case sufficiently to allow the other to answer it, but in truth they are capable of reconciliation by exercising case management powers to facilitate a hearing which is fair for both parties by ensuring that each knows sufficiently what case it has to meet."**

15. Referring to **Blockbuster v James** Mr Khalid observed that this was not a case in which there had been a deliberate and contumelious disregard of the orders of the court. He argued that the Judge had paid no sufficient regard to that which Dr Uduku had said. The reference in his letter of 16 April could lend itself to misunderstanding, but what he submitted must have been meant and should have been understood was that the side effects of medication and the Claimant's state of health would account for her lack of action (that was his interpretation of the words "poverty of action").

16. The power should have been exercised in the same way as it would be in the High Court by regard to cases such as **Denton v T H White Ltd** [2014] EWCA Civ 906 in which (see paragraph 41) in any case where the failure of the relevant party could be seen to be neither serious nor significant, where a good reason was demonstrated or where it was otherwise obvious that relief from sanctions was appropriate, there should be relief from sanctions, and indeed the parties should agree that that should be the case.

17. If the Tribunal had adopted the practice of the Tribunal, to which reference is made in the case of **Riley v Crown Prosecution Service** [2013] EWCA Civ 951, it could have asked further questions of Dr Uduku to establish a proper evidential basis for the Judge's conclusion that there was a risk that there might not be another effective hearing because of the sudden late panic of the Claimant. Then there would have been a more substantial medical basis upon which to rest his conclusion that there was a real risk that such a hearing might, in the circumstances, never take place.

18. Those submissions reflect the Grounds of Appeal set out in the form of a Skeleton Argument attached to the Notice of Appeal in which it is argued that the Judge failed to ask whether or not a fair trial was possible, made a significant finding when there was no evidence at all (that is, as to the risk that the Claimant might be unable to attend again), had taken insufficient account of the medical evidence, which he argued gave no support for the Judge's views and, in particular, was misunderstood where it referred to poverty of action, and had failed to consider a lesser sanction. It might, for instance, have considered whether it should award the costs of one of the adjourned hearings to the Claimant, and took account of irrelevant matters.

19. In response Mr Peacock wished to argue that the Claimant's previous track record in respect of an earlier claim to which the Judge made reference was relevant. I observed early in the hearing that that might have been of considerable assistance had I been in the position of making a decision in this case for myself at first instance. However, the issue on appeal is not what the Judge might have had regard to but what he did take regard of. Here, his only reference to the previous proceedings was that in paragraph 23, to say that they had been brought and concluded. Since it seems to have played no part in his reasoning, I do not see why I need consider that part of Mr Peacock's Skeleton Argument further.

20. He does, however, argue that on each of the matters to which the Claimant refers there is a proper and adequate response. The matter was one of discretion, and the Judge was entitled to come to the conclusion he did.

Discussion

21. The purpose of case management orders is in general to secure, where that remains possible, that there should be a fair hearing of the allegations made by one party against the other. Where accusations have been made on a very generalised basis, as here, clarity of the accusation is needed. The Respondent is entitled to know what acts it is being accused of, and the Tribunal cannot adjudicate properly unless that is the case. Unless and until that is done, it is difficult if not impossible to have a fair trial. As observed in **Johnson v Oldham**, parties are entitled to know the case against them.

22. It must usually be the case that, where a claim has been struck out because of a failure to provide such information but by the time of an application for relief the information has been supplied, a court will grant relief. The purpose of the orders would have been achieved. Again,

as observed in **Johnson**, the approach should be facilitative rather than penal. That cannot, however, apply where there has been no compliance even at the stage of seeking relief from the order which was made. Orders are made to be observed. As was said by Underhill J (as he was) in the case of **Thind v Salvesen Logistics Ltd** [2010] UKEAT/0487/09, every case turns on its own facts, and it should not be thought to be usual that relief will be granted from the effect of an unless order (paragraph 36):

> **"… Provided that the order itself has been appropriately made, there is an important interest in employment tribunals enforcing compliance, and it may well be just in such a case for a claim to be struck out even though a fair trial would remain possible. …"**

23. In dealing with the arguments by Mr Khalid, it seems to me the Judge did have regard to the possibility of a fair hearing taking place. At the end of paragraph 25 he noted that without a Preliminary Hearing (that is, to clarify and understand what the Claimant was actually complaining of) "an efficient and proportionate hearing is unlikely to be capable of taking place." Though he does not use the words "fair" and "trial", that is plainly what he had in consideration.

24. As to the assertion that the Claimant's behaviour was not deliberate, the Judge did not say in terms that it was. But nor did he say that it was not. He noted in the body of his Decision that the medical evidence did not include any medical evidence to support her assertion that the medication she was taking affected her ability to comply with the order made on 25 February (see paragraph 19) except for the one sentence in the letter from Dr Uduku to which I have already referred. In his conclusions he did not rely particularly upon those save to say (paragraph 24, second paragraph) that the medical evidence presented was unsatisfactory. That was in the context not of explaining the absence of the particulars, though I think a fair reading of the Judgment suggests the Judge thought little of it, and it had been pointed out to him by Mr Peacock for the Respondent that the Claimant had been able to adhere to other directions, that

there was no obvious explanation why she should be fit to be at work between 10 and 24 February, and still failed to comply, and that the letter which she wrote on 27 February was a model of fluency, coherence and it was constructive. He was concerned more with whether or not a Preliminary Hearing might not take place. This being an application for relief from sanction, it was for the Claimant to satisfy him of that which it was necessary to show that it was the interests of justice that her claim proceed. The reference to **Riley** and the suggestion that the Tribunal itself should have written to the doctor misses the point that, in an application such as this, it was really for the Claimant to set before the Tribunal clear evidence as to why she had not complied thus far and clear evidence that there was a real chance that she would be fit enough to attend the hearing and would not, because of the understandable effects of her condition, suffer panic attacks as the hearing became immediately imminent.

25. The argument about proportionality shaded into arguments about the balance of prejudice. I note that the latter is a factor to which Underhill J had regard in **Thind**. Here Mr Peacock argued that the Judge had to have in mind the effects of unspecific but serious claims made in strong terms against those who remained work colleagues of the Claimant. What is proportional to one party's case cannot be disproportionate to the effects on another.

26. In that context I am disposed to accept his argument that the concept of proportionality includes a consideration, where appropriate, of the effect on others. The Judge did make reference to proportionality (see paragraph 25). He did not do so in terms, however, of seeing whether a lesser sanction might be appropriate.

27. The only suggestion made to me as to what a lesser sanction might have been was either a case management order along the lines envisaged in **Johnson** or in some way remedying the

disadvantage of the Respondent by a suitable award of costs in respect of the postponements. Neither, it seems to me, could have fitted the bill here since the whole thrust of what the Judge had to say in his conclusions was looking to see if a sufficient clarification of the claim to enable it to proceed could sensibly be expected.

28. I do not accept that the Judge misunderstood that which Dr Uduku said. There is no indication in his conclusions that he did so. Accordingly none of the grounds as presented is in itself a ground for showing that the Judge failed to direct himself appropriately in accordance with the law. He did not set the law out save to make reference to the rule. He did not have to, provided that the Judgment contained sufficient indication that he had the relevant principles in mind. I cannot identify any error of law in his reasoning. It follows that, whatever my own decision might personally have been, his decision must stand, and despite the best efforts of Mr Khalid this appeal must be and is dismissed.