Appeal No. UKEAT/0137/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 September 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

BARTS HEALTH TRUST APPELLANT

MRS I KENSINGTON-OLOYE RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON WARLEY (Solicitor) Capsticks Solicitors LLP 1 St Georges Road Wimbledon London SW19 4DR
For the Respondent	MISS ESTHER FALADE (Representative) Equip Law Ltd Tottenham Green Enterprise Centre Town Hall Approach Road London N15 4RX

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

The Employment Tribunal made a single finding of unlawful race discrimination against the Respondent. It was, however, not open to the Employment Tribunal to make that finding having regard to the ET1 and the agreed issues. Appeal allowed.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Barts NHS Trust ("the Respondent") against part of a Judgment of the Employment Tribunal sitting in London (Central) dated 16 December 2013 (Employment Judge Baty presiding). Mrs Ibironke Kesington-Oloye ("the Claimant") brought proceedings against the Respondent claiming direct race discrimination and harassment. The Employment Tribunal found in her favour in one narrow respect concerned with direct race discrimination. It found against her in all other aspects of her claim.

2. The Respondent appeals against the single finding of unlawful discrimination which the Employment Tribunal made against it. Its principal ground is procedural. It argues that the Employment Tribunal decided the case on a point which was never identified as an issue, in consequence of which it did not call the appropriate witness or make focussed submissions. The second ground is substantive. It argues that there is an error of law in the reasoning of the Employment Tribunal.

The Background Facts

3. The Claimant was employed by Newham University Hospital NHS Trust ("Newham") from September 1991 until October 2012. She worked at Newham Hospital. In about October 2012 there was a merger by virtue of which her employment transferred to the Respondent. She moved hospital. The events with which this appeal is concerned mostly occurred prior to October 2012 when she was working for Newham at Newham University Hospital.

4. From November 2004 until May 2011 the Claimant had been a band 8A manager. On 2 May 2011 she was promoted to work as a band 8B manager, a Business Unit Operative and

Development Lead for Acute Care. In September 2011 her direct manager became Miss Pat Rubin. Miss Rubin began to address what she said were "performance concerns" with the Claimant. An informal capability meeting was held without notice on 6 December 2011. A formal capability meeting took place on 2 March 2012. A three-month monitoring period was imposed.

5. Following the formal capability meeting the Claimant submitted a series of grievances and supporting documents. It is necessary to describe these documents briefly.

6. The first was on 6 March 2012. It was a two-page standard grievance form. The Claimant complained of "bullying and harassment and race discrimination" and sought an immediate change of line manager.

7. The second was on 16 March. It was a two-page letter to Miss McCrindle, then Acting Head of Employment, seeking to lodge a formal grievance against Miss Rubin. One of the six points in the letter was an express statement of the Claimant's belief that Miss Rubin's treatment was different as compared to others and amounted to race discrimination.

8. The third was on 23 March. This was again a two-page standard grievance form. It was, however, more detailed. It set out 11 points. These 11 points did not explicitly mention race discrimination, but they did mention differential treatment as one of the grounds.

9. The fourth was a lengthy document dated 10 April 2012, described as a "supporting statement to my grievance". It made many of the points set out in earlier grievances. It

contained only limited references to race or colour or discrimination. There were, however, many references to being treated differently.

10. The dates and order of documents which I have just described I have taken from the Employment Tribunal's reasons. Today the Claimant's representative, Miss Esther Falade, told me on instructions that the Claimant believed that what I have described as the third document was actually the first. I have no doubt that the Employment Tribunal had material on which to reach its conclusions. I mention this simply lest there be misunderstanding later.

11. The Claimant and Newham agreed that the Claimant's grievance would be dealt with under Newham's Dignity at Work policy. Miss McCrindle appointed Miss Jan Tomes, Interim Chief Pharmacist, to conduct an investigation and prepare a report. The terms of reference did not mention race discrimination although they mentioned bullying, harassment, and differential style of treatment.

12. At an early stage in the investigation, on 18 May, Miss Tomes interviewed the Claimant with her union representative. The Claimant's representative said that the Claimant felt that there was a race-related element to her treatment. Miss Tomes understood the point. She met with Newham's Equality and Diversity Lead to obtain advice about dealing with such allegations.

13. Miss Tomes completed her report on 2 August 2012. The Employment Tribunal described the report as extremely thorough, giving appropriate consideration to the issues including the Claimant's allegations of race discrimination. Miss Tomes had interviewed a

range of witnesses. She made some comments adverse to Miss Rubin but did not accept allegations of bullying, harassment or racial motivation.

14. It was during this period that the amalgamation of different Trusts was being undertaken. By reason of the upheaval the report was not shown to the Claimant until 9 January 2013. A hearing into the Claimant's grievances took place on 28 January and 28 February. The complaints of race discrimination were not upheld. Later in the year an appeal was rejected. In the meantime, on 5 April 2013, the Claimant had commenced the Employment Tribunal proceedings with which this appeal is concerned.

The Employment Tribunal proceedings

15. The Claimant's ET1 claim form stated that a claim of race discrimination was being made. Two closely typed pages of detail were given. The detail first outlined behaviour of Miss Rubin about which complaint was made. It then criticised the investigatory process, which was said to be flawed in a number of respects. There is no specific mention of Miss McCrindle in the claim form. A reference in that form to a "senior HR officer" is to a Miss Pratt. As Miss Falade accepted, Miss McCrindle was not specifically in the line of complaint in the claim form. However, it is right to say that there was a general complaint made about the ability of Newham's HR Department as a whole to handle a race discrimination grievance.

16. On 3 June 2013 a case management discussion took place. The Claimant was represented by a consultant; the Respondent by a solicitor. An agreed list of issues was drawn up. 13 allegations of less favourable treatment/harassment were identified. The first five

related to treatment by Miss Rubin; the second eight related to aspects of the way in which the grievance was dealt with. Some were quite specific. The most general was No.11:

> **"Conducting a flawed investigation culminating in a report in January 2013, in particular Ms Tomes' uncritical acceptance of Ms Rubin's evidence and her disregarding the evidence of a key witness, Sandra Munonye."**

17. The case management order dated 3 June 2013 stated in paragraph 1 that "the complaints and issues arising in this case are as set out in Schedule A to this order". Schedule A was the list of issues. At the foot of the list of issues the Employment Tribunal added a note:

> **"This Schedule set out the complaints to be determined and the issues to be decided for that purpose. These are the matters to be decided by the Tribunal and no other matter will be decided at the hearing."**

18. The Employment Tribunal heard the case over five days from 11-15 November 2013. Both parties were represented by the advocates who appear for them today: Miss Falade for the Claimant; Mr Warley for the Respondent.

19. The Respondent's witnesses were Miss Tomes, who conducted the investigation; Miss Lacey, who chaired the panel which considered the grievance; and Miss Lewis, who chaired the panel hearing the appeal. The Claimant gave evidence herself.

20. During the course of Miss Tomes' evidence Miss Falade asked her a series of questions for the purpose of establishing what documents she had and did not have when she undertook her investigation. It emerged from her evidence that she had been supplied with the grievance dated 23 March 2012 but not any of the other documents. So Miss Tomes was not supplied with the first two grievances, which expressly referred to race discrimination or to the full statement, which in a very lengthy narrative did contain reference to race and colour.

21. The following day Miss Lacey was asked about this. She said that Miss McCrindle, who was not a witness at the hearing, had left and she (Miss Lacey) could not answer why only certain documents had been forwarded.

22. There the matter remained until closing submissions. Mr Warley gave his closing submissions first. Miss Falade followed the next day. In her closing submissions she took the point that the grievance investigation was flawed from the start because of the failure to provide the other three grievance documents. It was only one of a substantial number of points which she took. Mr Warley did not reply to it.

The Employment Tribunal's Reasons

23. The Employment Tribunal reserved Judgment. Its written reasons are detailed and thorough. It set out the issues by reference to the case management order. It identified the applicable law in paragraphs 22-31 and set out findings of primary fact in paragraphs 32-115. It then set out its reasoned conclusions in paragraphs 116-161.

24. The Employment Tribunal turned to issue 11 between paragraphs 136 and 152. In addition to the points specifically made concerning "uncritical acceptance" of Miss Rubin's evidence and concerning Miss Munonye, the Employment Tribunal dealt with a number of additional submissions about the Miss Tomes' investigation which Miss Falade made in her closing submissions. It rejected all the criticisms but one. It found that Miss Tomes investigated the case properly including the allegations of race discrimination which had been made during the process. Her report was "thorough and professional".

25. The issue which the Employment Tribunal found proved related to the evidence Miss Tomes gave that she had seen only one grievance document. The Employment Tribunal said the following:

> **"137. However Ms Falade made a number of criticisms of the investigation being flawed in addition to this.**
>
> **138. The first of these was that it was flawed from the start because Ms McCrindle only gave Ms Tomes one of the four grievance documents which the Claimant had submitted and this was the only one which did not include allegations of race discrimination. That is clearly less favourable treatment as it stopped Ms Tomes realising that there was an element of racial allegations in the Claimant's grievance. As the documents related to race, we find that the failure to forward them had the extra link capable of shifting the burden of proof in relation to discrimination claims. The burden therefore shifts to the respondent in this respect. Furthermore we have had no explanation as to why these documents were not forwarded to Ms Tomes. Ms McCrindle was not at the Tribunal and none of the other witnesses were able to give an explanation. We are therefore bound to conclude, in the absence of such an explanation, that this treatment was because of race and the Claimant's complaint of race discrimination therefore succeeds on this ground."**

26. Later it said:

> **"We find that, absent the fact that Ms Tomes was not fully informed about the nature of the Claimant's grievances, which was no fault of her own, the investigation she carried out and the report she produced were through and professional."**

27. The Employment Tribunal accordingly did not regard its finding as being a finding against Miss Tomes.

28. The Respondent asked the Employment Tribunal to reconsider its Judgment on the basis that the finding was not part of issue 11. The Employment Judge refused the application because there was, in his view, no reasonable prospect of the decision being varied or revoked. He said the following:

> **"The Respondent firstly suggests that this was effectively not part of the remit of agreed issue 11 set out at paragraph 6 of the reasons and should not have been considered. However, that issue as set out, whilst it also referred to particular aspects of the investigation process, relates to the whole investigation. Clearly the failure to provide the investigating officer with all the grievance documents at the start is part of that investigation and the Tribunal's findings were therefore very much within the remit of issue 11."**

Submissions

29. On behalf of the Respondent Mr Warley submits that the failure of Miss McCrindle, if such it was, to forward three grievance documents to the Claimant was not an issue in the case for the Employment Tribunal to determine. It could not sensibly be brought within issue 11, which was concerned with the conduct of the investigation. This being so, Mr Warley submits, the Employment Tribunal was neither required nor entitled to decide any issue about the forwarding of the three documents. He relies on **Chapman and Anr v Simon** [1994] IRLR 124 at paragraphs 33, 45 and 46, **Anya v University of Oxford and Anr** [2001] IRLR 377 at paragraph 9, and **Birmingham City Council v Laws** UKEAT/0360/06/MAA, a case specifically concerned with issues. He submits that, if the Claimant wished to raise a new issue, she should have applied to amend the ET1 claim form. If she did not but the Employment Tribunal saw that a new issue was being raised, the Employment Tribunal should have asked her whether she wished to amend the ET1. He referred to **Ladbrokes Racing Ltd v Traynor** UKEATS/0067/06 for guidance given by Lady Smith on the way to deal with a new issue arising during proceedings.

30. On behalf of the Claimant Miss Falade submits that the finding directly arose out of issue 11, which was concerned with the grievance investigation process as a whole. The failure to provide Miss Tomes with the full set of grievance documents was a matter directly related to that issue. The Employment Tribunal was entitled to make a finding on it. She derives support from the comments of the Employment Tribunal when he refused to countenance reconsideration of the Employment Tribunal's Judgment. She said the fact that the information arose out of cross-examination did not matter. It was a proper purpose of cross-examination to investigate how the grievance process was dealt with.

31. I drew to the attention of Counsel two cases concerned with lists of issues. **Land Rover v Short** UKEAT/0496/10/RN and **Parekh v LB of Brent** [2012 EWCA Civ 1630 at paragraph 31. Miss Falade submitted that there had, as **Parekh** suggested, been an application to the Employment Judge for reconsideration which had been refused.

32. Mr Warley's other submission is that the Employment Tribunal committed an error of law in its Reasons. He submitted, in effect, that the Employment Tribunal did not consider properly whether Miss McCrindle had treated the Claimant less favourably than she would treat others. Miss Falade responded that there was no error of law in the Employment Tribunal's Reasons and that it had properly applied the burden of proof provision.

Discussion and Conclusions

33. It is convenient to begin by saying a word about the function of a list of issues. This is an important feature of current employment practice and procedure especially in more complex cases such as this. In many cases before Employment Tribunals claim forms are prepared by litigants in person or else by lay or inexperienced representatives. It is common to see a narrative accompanied by a list of quite general allegations. Sometimes the narrative and the complaints can be very long and complicated indeed. Employment law, however, especially equality law and whistleblowing law, can be prescriptive and detailed; rightly so, for the allegations are serious ones for those who are implicated in them. Moreover unless allegations are carefully identified it is impossible to prepare properly for a hearing, identifying and calling the correct witnesses. It is therefore often essential to drill down from a lengthy narrative and a general set of complaints to identify specific legal complaints defined properly for an Employment Tribunal to adjudicate. It is therefore good general Employment Tribunal practice

in a case of any complexity to hold a Preliminary Hearing to ascertain and define the issues, generally by agreement.

34. The formulation of a list of issues is not the subject of any particular Employment Tribunal rule. The current **Employment Tribunal Rules of Procedure 2013** make it clear, however, that it is part of the purpose of a Preliminary Hearing to

> **"...conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the hearing)" (Rule 53(1)(a))**

35. In **Parekh v LB Brent** [2012] EWCA Civ 1630, at paragraph 31, Mummery LJ made it clear that a list of issues was not necessarily set in stone. He said:

> **"A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see** *Land Rover v. Short* **Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: see** *Price v. Surrey CC* **Appeal No UKEAT/0450/10/SM (27 October 2011) at [23]. As was recognised in** *Hart v. English Heritage* **[2006] ICR 555 at [31]-[35] case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays."**

36. In this case the Claimant's case had been put very widely in her ET1 claim form. It is not surprising that a case management discussion was heard. The issues were defined. In this case they were specifically incorporated in the case management order.

37. The first question for me to determine is whether the Employment Tribunal's finding concerning the three grievance documents was or was not within issue no. 11. To my mind, issue no. 11 is plainly directed towards criticism of Miss Tomes. She was the person "conducting the investigation". Hers was the report in January 2013. Her "uncritical

acceptance" of Miss Rubin's evidence and her "disregarding the evidence" of Miss Munonye were the specific allegations made within issue no. 11.

38. I cannot read issue no. 11 as making an allegation against Miss McCrindle. She was not the person who conducted the investigation. She did not produce the report. She was not concerned with accepting or rejecting the evidence of any witness. I do not find it at all surprising, given the list of issues, that Miss Tomes was a key witness and Miss McCrindle was not called at all.

39. Further, there was no real allegation against Miss McCrindle in the claim form. It is true that the claim form is pleaded widely, including a broad complaint against the whole of the Human Resources department, but there was nothing specific to alert the Respondent to a complaint about Miss McCrindle.

40. When evidence was given at the hearing that Miss McCrindle had not passed on three grievance documents, it was not too late to raise an allegation about the letter. The evidence had come out on the spur of the moment. There could have been an application to amend the claim and introduce the issue. The Employment Tribunal would, on well-established principles, have had power to permit this. If it had done so, it would then have had to address specifically whether justice required an opportunity for Miss McCrindle to be called to give evidence.

41. Guidance is given in **Ladbroke v Traynor** on the procedure to be followed when a problem of this kind arises:

> **"30. We are persuaded that this appeal is well founded. The Tribunal seems, unfortunately, to have jumped too far too fast. What, in our view, it required to recognise before making its decision was as follows:**

31. Firstly, the Claimant had not, it seems, actually made any application to amend the ET1. The decision recorded in the written reasons is a decision to allow a line of cross examination which was manifestly not foreshadowed in the Claimant's statement of his case in his ET1. The line which the Claimant sought to pursue was plainly a separate issue in law, as discussed, and involved different facts from any of which notice had been given in the ET1, albeit that it would not take the case outwith the 'unfair dismissal' umbrella. That being so, the allowance of the line of cross examination would have been extremely difficult to justify in the absence of amendment.

32. Secondly, the Tribunal thus did need to turn its mind to the matter of amendment but the question is how? We see no difficulty in a Tribunal in such circumstances enquiring of the Claimant or his representative whether he seeks to amend the ET1 in the light of the line of evidence which he appears to seek to explore.

33. Thirdly, if the answer to that enquiry is that the Claimant does seek to amend, then the Tribunal requires to enquire as to the precise terms of the amendment proposed. If it does not do that, then it cannot begin to consider the principles that apply when considering an application to amend, as discussed above. Further, unless it does so, the fair notice obligations referred to in the quotation from *Ali*, above, will not be complied with.

34. Fourthly, it may be advisable, if not necessary, to allow the Claimant a short adjournment to formulate the wording of the proposed amendment.

35. Fifthly, it is only once the wording of the proposed amendment is known that the Respondent can be expected to be able to respond to it.

36. Sixthly, once the wording of the proposed amendment is known, the Tribunal requires to allow both parties to address it in respect of the application to amend before considering its response.

37. Seventhly, the Tribunal's response requires to be that of all members and requires to take account of the submissions made and the principles to which we have referred. The Chairman and members may require to retire to consider their decision.

38. Eighthly, the Tribunal requires to give reasons for its decision on an application to amend. Those reasons can be shortly stated and, as we have indicated, we would expect them to be given orally. They must, however, be indicative of the Tribunal having borne in mind all relevant considerations and excluded the irrelevant from its considerations."

42. In this case the Employment Tribunal simply proceeded to decide the argument put forward by Miss Falade, adopting the burden of proof and noting that Miss McCrindle had not given evidence. Given the issues, however, it is not surprising that Miss McCrindle had not given evidence. The Employment Tribunal had, in my opinion, treated an issue which was really directed to the conduct of Miss Tomes as if it related to the conduct of Miss McCrindle. It did not.

43. I am not without sympathy for the position of the Employment Tribunal. The point concerning Miss McCrindle had been addressed only in the briefest of terms in a hearing almost entirely concerned with other matters. But if the Employment Tribunal was minded to make a

finding on this issue, it was required to give a fair opportunity to the parties first. This would, to my mind, have involved consideration of the definition of a new issue following an application for permission to amend in accordance with the procedure suggested in Traynor.

44. I can deal quite briefly with the ground concerning a question of law for it is academic in the light of the conclusion I have already reached. Paragraph 138 of the Employment Tribunal's Reasons contains a finding on "less favourable treatment" which does not actually address the circumstances of the case. The Employment Tribunal appears to have thought that the treatment was less favourable because it stopped Miss Tomes realising that there was an element of racial allegation in the Claimant's grievance. The question, however, is whether Miss McCrindle treated the Claimant less favourably than she would treat others. In other words, whether in like circumstances Miss McCrindle would have forwarded only one grievance document to the investigator in another case. Mr Warley says that is not entirely obvious. The document passed on appears to have been the last and most detailed of the three grievances. The Employment Tribunal may well have concluded that Miss McCrindle would have forwarded all documents in another case, but it did not say that, and its reasoning on the "less favourable treatment" point is not apposite.

45. I would add that if Miss McCrindle had, as alleged, some unlawful motivation for not passing on the other documents, it would seem to me to be altogether more likely to be because they contained a complaint of race discrimination rather than because of the Claimant's race. If so, they would raise an issue of victimisation rather than an issue of discrimination. The Employment Tribunal, however, considering that it was dealing with the matter under issue 11, which was an issue of race discrimination, did not consider victimisation. This is another

disadvantage of the Employment Tribunal attempting to deal with the matter under an issue for which it was not really designed.

46. It follows that the Employment Tribunal was not entitled to make the finding of unlawful race discrimination which it made. The appeal must be allowed, and the finding must be set aside.

After an application under rule 34A(2)(a) of the Employment Appeal Tribunal Rules 1993

47. I have before me an application under Rule 34A(2)(a) of the Employment Appeal Tribunal Rules 1993 for repayment of the £1,600 fees which the Respondent has incurred in bringing the appeal. There have been cases in the Employment Tribunal on this subject, notably HHJ Eady in Horizon Security Services v Ndeze & Anr UKEAT/0071/14/JOJ. The whole of paragraphs 9-12 repays reading. It is sufficient to say that the general expectation must be that a successful Appellant will be entitled to recover the sums paid from a Respondent which has actively sought to resist the appeal. That is the position here.

48. Even though the sum involved is quite small, the structure of the Rules means that I may have regard to the paying party's ability to pay when considering the amount of a costs order (see Rule 34B(2), which appears to me to apply in the context of Rule 34A(2)(a), since that defines an order for payment of fees as a costs order). I am told by Miss Falade that the Claimant says that she has significant debts, debts of the order of £25,000, and she is the breadwinner for her family. Nevertheless it remains the case that she is a senior manager, with a net pay in excess of £3,000 per month. It seems to me in principle that it is not disproportionate or unreasonable that she should pay the fees in question. Time to pay is

something which, if it were not capable of being agreed with the Respondent, could be resolved in enforcement proceedings. In principle, however, it seems to me that there should be an order for costs and I will make one.