Appeal No. UKEAT/0114/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 April 2014

Before

THE HONOURABLE LADY STACEY

BARONESS DRAKE OF SHENE

MRS R CHAPMAN

MR J C GEERE APPELLANT

WORCESTER CITIZENS ADVICE BUREAU & WHABAC AND OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SALLY COWEN (of Counsel) Direct Public Access Scheme
For the 1st to 9th Respondents	MS KEIRA GORE (of Counsel) Instructed by: Bates Wells & Braithwaite LLP Scandinavian House 2-6 Cannon Street London EC4M 6YH
For the 10th and 11th Respondents	No appearance or representation by or on behalf of 10th and 11th Respondents

SUMMARY

PRACTICE AND PROCEDURE

Striking-out/dismissal

Costs

Procedural error. At a PHR the Employment Tribunal dismissed a case and made an award of costs against the Claimant. Prior to the hearing the Claimant had written to the ET stating the he would not attend the PHR but would provide written submissions, which he did. He also asked that the PHR be heard by a three person Tribunal. An Employment Judge decided to grant that request and the Claimant was so advised, by letter. Due to an administrative error the hearing was listed for a Tribunal comprising only a legally qualified Employment Judge.

The first Judge listed recused herself and a second Judge took the case, who by coincidence was the Judge who had granted the request. No one reminded him of the request and he had no memory of it. The Claimant argued that it was a fundamental error to have the case decided by a Tribunal other than one comprising three persons. Further he argued that the reasons were insufficient to explain the decisions made. The Respondent argued that if an error was made it was not fundamental and in any event that the case was so clear that no Tribunal no matter how constituted could come to a different decision; and that the reasons were concise clear.

Held: in the circumstances the error was fundamental. Further the reasons were not sufficiently clear to show why the case was dismissed, nor were the order for costs in the particular sums made clear. The appeal is allowed and remitted to a freshly constituted Tribunal comprising three members.

THE HONOURABLE LADY STACEY

1. This is an appeal against a decision made by Employment Judge Tickle, sitting alone, at the Employment Tribunal at Birmingham on 31 October 2012 notified to parties on 1 November 2012. We refer to the parties as "Claimant" and "Respondents", as they were in the Employment Tribunal. Before us the Claimant is represented by Ms Cowen. Ms Gore appeared for the Respondents other than the ombudsman and Mr Merricks, for whom written submissions have been lodged, which we have read and which we have factored into our decision. We allowed at the outset both parties to lodge supplementary bundles, and I should have said that neither Ms Cowen nor Ms Gore appeared at the Employment Tribunal.

2. The decision of the Tribunal against which the appeal is taken was that all claims were struck out and dismissed and that an order that the Claimant pay costs totalling £16,800 to the Respondents for whom Ms Gore appears – that is, £2,800 per case be paid – and in respect of the other Respondents that costs in the sum of £7,500 plus VAT, which makes a total when one takes the VAT into account of £9,000, be paid. Those are the decisions that the Claimant seeks to appeal against.

3. Ms Cowen argued that the decisions were fundamentally flawed. She drew our attention to the fact that the Claimant had requested that the Pre-Hearing Review at which the application for a strike-out was going to be heard should be heard by a full Tribunal; that is, a Tribunal consisting of three people. She showed us a letter dated 10 September 2012 to the Claimant from the Employment Tribunal in Birmingham, which noted that the Claimant had decided not to attend the Pre-Hearing Review and to rely on written submissions and stated that his request

for a full Tribunal panel was granted. That decision was made by Employment Judge Tickle, and the letter was written by the secretary of the Employment Tribunals on his behalf.

4. As a result of a hearing under rule 3(10) of the Employment Appeal Tribunal Rules, a request was made of Employment Judge Tickle to give his explanation of what had happened at that hearing, and a witness statement was also sought from a Mr Jennings, who was a solicitor for the Respondents. Both of them complied with that, and we will note the Employment Judge's explanation in full. What he stated was as follows:

> **"The request for a full Tribunal at the Pre-Hearing Review was granted, as confirmed by the letter of 10 September attached. Regrettably, it appears that the instruction was not recorded by the administration on the case management system, and so the Pre-Hearing Review remained listed to be heard by a Judge sitting alone. I agree with the content of Paul Jennings' witness statement of 22 October 2013. So far as I recall, it is wholly accurate. In particular, paragraph 10 correctly states that I saw no impediment to my conducting the hearing. The lack of or requirement for members was not mentioned. Mr Geere had previously indicated in an email of 15 August 2012 that it was not his intention to attend and so was not present to raise the issue. The acting Regional Employment Judge asked me to take over the hearing because Employment Judge Warren found herself conflicted. I certainly would not have done so without his direction. There was no issue as to constitution of the Tribunal. Judge Warren sat alone, and so did I. I did read the documents in so far as they were relevant to the issues before me, as Mr Jennings says. I am sure that the letter of 10 September 2012 was not brought to my attention or, I suspect, Judge Warren's. If it had been, I would have asked for members to be assigned there and then. If that were not possible, I would have asked the parties present for their submissions as to the appropriate course of action."**

5. Thus it can be seen from that letter that there was an administrative error made and that Judge Tickle did not recollect that he had decided that there should be a full panel, but of course he very frankly admits that he did not recollect that and simply went ahead and heard the case himself when he was asked to do so because another Judge had discovered that she had a conflict of interest. The real point, however, is that there had been an administrative error and it had been put out for one Judge to deal with. No one pointed out to the Judge that an error had been made, and so he proceeded.

6. Ms Cowen argued that one could never know if a three-person Tribunal would have come to a different decision from the decision made by Employment Judge Tickle. She submitted that lay members brought Tribunal experience and knowledge of the world of work to a Tribunal and that if there were three people, then there might be different views and the majority view would prevail, which might mean, in some circumstances, that the legally qualified chairman would be in the minority. She also submitted that the Claimant was entitled in terms of the Rules to ask for a three-person Tribunal. He had done so, and his request had been granted, therefore as a matter of law he should have had a three-person Tribunal. She referred to the case of **Stanley Cole (Wainfleet) Ltd v Sheridan** [2003] ICR 1449 as an example of a case in which a procedural irregularity did not invalidate the decision, but she argued that this case was one in which the mistake that had happened did indeed invalidate the decision. She had summed up her submission about the three-person panel by saying that this was a case in which one could not know what a panel would have made of it because there was no panel. She argued that that was a fundamental matter and therefore different from the sort of difficulty that had arisen in the case of **Sheridan**.

7. Counsel anticipated that argument would be made against her that it was disproportionate to return this case to a new panel. She submitted that an erroneous judgment could not be allowed to stand just because revisiting it would entail time and a great deal of work. She reminded us that the overriding objective of the rules and procedures of the Employment Appeal Tribunal is to do justice between the parties, and she argued that in this case justice required that the decision be remitted, the appeal having been allowed. She made reference to another case, of **Gladwell v Secretary of State for Trade and Industry** [2007] ICR 264 but appreciated that that case relates to a different situation. Ms Cowen made it clear that she understood that in the present case she could rely on Employment Judge Tickle's frank

acknowledgement that a mistake had been made, and she took a fundamental stance. She said that this was a case in which the litigant had sought a three-person Tribunal, had been told that he would get that and did not. Therefore, she said, it was a fundamental matter.

8. With regard to the matter of the costs, Ms Cowen told us that there was a factual dispute between parties about whether the Claimant had received a Schedule from the Respondents for whom Ms Gore acts. She argued, however, in any event that the reasons given by the Employment Judge for his order in respect of costs were flawed. She took us to the terms used by the Employment Judge, and in particular, looking at paragraph 8, the Employment Judge said the following: "I am aware of the Claimant's means – which are said to be meagre". Ms Cowen argued that that indicated that the Judge was not accepting that the Claimant's means were meagre, because if he did accept it, he would simply say, "I find that his means are meagre", or he would say, "His means are meagre", whereas by saying that they were said to be meagre he indicated that he did not quite believe it. Ms Cowen argued that there was no basis for him not to believe it, because the written submissions that had been put in by the Claimant, as he had said he would put in written submissions, did say that his income and any capital was very meagre, and she said that there was no reason for the Employment Judge to doubt what was said.

9. Further, she noted that the next sentence was in the following terms: "I have regard to his circumstances – but they do not in themselves justify not making an order". Ms Cowen argued that there was nothing in that sentence to tell the disappointed litigant why he had lost, because it did not say what circumstances the Judge had had regard to and it did not say what the Judge thought about any circumstances that he had considered. Therefore, she said that these reasons

were not sufficient, after an important decision had been made, to tell the losing litigant why he had lost and therefore that amounted to an error of law.

10. She then turned her attention to paragraph 9 and noted that the Judge had said there that he accepted that the claims had adversely affected the delivery of service. It appeared that the Judge was talking there about the delivery of service by the Respondents, but Ms Cowen argued that the Judge did not say that there was any evidence before him from which he was entitled to draw that inference. Ms Cowen explained that at the hearing there was no oral evidence led but there was documentary evidence, but she argued that the Judge had not stated what it was that enabled him to decide that the claims had adversely affected the delivery of service.

11. Further, still in paragraph 9, Ms Cowen directed her attention to the question of the claims being consolidated. This is a case in which the Respondents, for whom Ms Gore appears, are all in one way or another connected with the Citizens Advice Bureau. Some are private individuals. The Employment Judge said that the claims were consolidated purely for the convenience of administration. Ms Cowen took issue with that and said that they were consolidated because they were principally about the same thing. She accepted that of course they were different because the different Respondents were said to have done different things but they were basically about the same thing, and she argued that the amount of work to be done was not as it would be if there had been six entirely different claims.

12. Ms Cowen referred to cases on the question of costs and started with the case of **Jilley v Birmingham and Solihull Mental Health NHS Trust** [2007] WLR 494, 7542. She noted that the Claimant in that case had been found to lack good faith. She reminded us that no such finding had been made in the present case. She emphasised in relation to that case that

while the Claimant in the present case had chosen not to attend the Tribunal – and she reminded us that there were health reasons for that – it was all the more important that clear reasons were given for the decision. She went on to explain that the Judge had not given reasons why he thought that each claim should come up to a figure of £2,800.

13. In connection with the costs awarded in respect of the Respondents other than those for whom Ms Gore appears, Ms Cowen argued that it simply did not make sense, because the Judge had awarded more than the Respondents had sought. It did appear that there may have been an addition in respect of counsel, but, if that was so, it was an error, because, as Ms Cowen pointed out, there was already an entry for counsel. Therefore, Ms Cowen submitted that the question of costs, even if it was appropriate that it was dealt with by one person, was not a judgment that could stand, because it did not comply with the test set out in the case of **Meek v City of Birmingham District Council** [1987] IRLR 250 for reasons, nor did it in fact make sense when looked at in detail.

14. Ms Gore very properly accepted that an error had been made; that is, that the Judge had sat alone when he should not have done so, and of course we emphasise that Employment Judge Tickle himself recognised that in the part that we have quoted above. Ms Gore argued, however, that this was not a fundamental error in the circumstances of this case. That was because no Tribunal, no matter how composed, could have come to another view. She reminded us of the background of the whole case, which she said started with a claim for unfair dismissal and discrimination in 2010. She reminded us that that claim was settled but then other claims were raised after that for post-termination discrimination of varying sorts. Ms Gore drew our attention to examples, saying that for instance the claims against certain respondents for religious discrimination did not make sense and seemed to be on

the basis that the Claimant did not offer to prove particular acts that would amount to discrimination but stated that he wanted to have a claim in respect of religious discrimination because he could not understand how he had been treated and so he wanted to be able to say that it was religious discrimination if that turned out to be the case.

15. Ms Gore emphasised that this was merely an example. Her position was that the other claims were of the same sort as those that she told us about in detail. She argued therefore that the Employment Judge made the only decision he could make about striking out the claims because they were so obviously lacking in merit. She made reference to the case of **Magenta Security Services v Wilkinson** [2007] WLR 2873 for the proposition that a procedural error would not always lead to a decision being regarded as a nullity and that it all depended on the circumstances.

16. Turning to the questions of the costs orders, Ms Gore argued that enough had been said by the Employment Judge to make it perfectly plain why he had made the order that he had made. She said that he was not obliged to consider the means of the payer of any costs order, though he could consider that if he so wished when deciding on the amount. She made reference to the Rules, which are rules 40 and 41. Ms Gore reminded us that no detailed argument had been put in by the Claimant as to the figures, and in fact he had indicated that he had not read emails. Ms Gore very frankly accepted that the Schedule from her client had not gone out with an email which it should have done with – she said it had been sent by post the next day – but she said all of this made no difference, because the Claimant's position was that he was unable to read things because of his health.

17. Ms Gore argued that the Judge's reasoning was concise but there was nothing wrong with that; she argued that it was sufficient. She summed up by arguing that it was not proportionate to send this case back, but she argued that if we were against her on the fundamental point of the Judge making the strike-out while sitting alone, then it would have to go, she accepted, to a new panel to consider. If, on the other hand, we thought that only the element of costs had gone in some way wrong in the Tribunal below, then the matter could be returned to Employment Judge Tickle for him to deal with any matters that we felt had not been dealt with.

18. Our decision is that we have decided that the lack of a three-person panel was a fundamental error in this case. We accept Ms Cowen's argument that as a matter of law it should have been a three-person panel when the Claimant had asked for that and had been told that he would get it. We accept her argument that one cannot know what a three-person panel would have said, and we accept her argument that this is a case in which having three people would have been useful. We understand her argument that in this particular case the views of the members who are not legally qualified but who have Tribunal experience as well as experience of the world of work would have been interesting and may well have been decisive.

19. In any event, should we be wrong in that, we uphold Ms Cowen's argument that the reasons given by the Judge are not sufficient to deal clearly with all the circumstances of this case and to comply with the test that is set out in the well-known case of **Meek**. Thus we are of the view that the whole decision – that is, on striking out and dismissing the case and the costs orders – does need to be reconsidered. That being so, we will remit to a new panel to do so. We have no difficulty with the professionalism of Judge Tickle in considering matters, but we think that justice should be seen to be done in this case by the matter going before a new panel that does not include him.

20. Before leaving this case, however, we think it probably is wise to repeat something said by Slade J at the rule 3(10) hearing. This was at a hearing at which she was considering whether or not the matter of the three-person panel should go to a full hearing. This is what she said:

> **"I should point out something that I pointed out to Mr Geere a little earlier. The fact that some grounds of appeal are to proceed to a Full Hearing is no indication of their ultimate success nor indeed of the ultimate outcome of these proceedings, because, notwithstanding that he may have some arguments with regard to the hearing on 31 October 2012 proceeding before a Judge alone, it is possible for that Judgment to be upheld notwithstanding any error that may be found in so conducting the hearing."**

21. We are now at the next stage. We have decided that the full hearing that we have just heard should result in our allowing the appeal and sending the case back, but, nevertheless, we have noted carefully all that has been said by Ms Gore today about the nature of the claims that have been made about post-termination discrimination, and we think it probably is wise for us to point out that Mr Geere has said in some of his written material, which we have read, that he has no wish to proceed with cases that have no ultimate prospect of success and that he wishes matters to be resolved. It may be helpful if we emphasise that what we have done today has been done because of a fundamental legal difficulty with procedure. We are not able today to make any decision about the merits of the applications. But we do draw attention to what Slade J said, and we also think it fair that we draw attention to what has been said by Employment Judge Tickle concerning the matters that were before him. It may be helpful to Mr Geere if he thinks as carefully as he can and if he considers taking advice on matters. We are conscious that we are supposed to deal with matters in a proportionate fashion, and we are of no doubt that this requires to be remitted, but we are concerned that this has been on the go since at least 2010, that the amount of expense involved must be rising constantly, and, as I

have said more than once, we are concerned about all that Ms Gore was able to point out about the nature of these claims.

22. It remains for me, then, on behalf of this Tribunal, to say that all three of us have been very grateful for the assistance given to us today by both Ms Cowen and Ms Gore.