Appeal No. UKEAT/0108/15/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 July 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR G THOMPSON APPELLANT

LONDON CENTRAL BUS COMPANY LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GARY THOMPSON (The Appellant in Person)
For the Respondent	MR RUSSELL BAILEY (of Counsel) Instructed by: Hewitson Moorhead Kildare House 3 Dorset Rise London EC4Y 8EN

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

VICTIMISATION DISCRIMINATION

It had been determined at an earlier Preliminary Hearing - and was not in dispute either before the Employment Judge or on this appeal - that there could in principle be a claim of associative victimisation. The question for the Employment Judge was whether there was any reasonable prospect of success in such a claim. Held: the Employment Judge erred in law in seeking a particular form or degree of association for the purpose of a claim of associative victimisation. What matters is whether the treatment of the Claimant was by reason of his association with another who made protected acts: **EBR Attridge LLP v Coleman** [2010] ICR 242 at paragraph 16 followed and applied.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. By a Judgment dated 19 June 2014 Employment Judge Hall-Smith, sitting in the Employment Tribunal at London South struck out a claim by Mr Gary Thompson ("the Claimant") against the London Central Bus Company Limited ("the Respondent"). The Claimant appeals against that Judgment.

The Background

2. The Claimant was employed by the Respondent as a bus driver. On 24 October 2013, at a time when he was already subject to a final written warning for a disciplinary offence, he was dismissed on the ground that he had given away to another employee the high-visibility vest issued by the Respondent. He appealed against that dismissal. Although his stance earlier appears to have been different, at the appeal hearing he apologised and admitted he was in the wrong. His appeal was allowed. Instead of dismissing him the Respondent imposed a 21-day unpaid suspension and a final written warning.

3. In the meantime the Claimant had commenced Employment Tribunal proceedings against the Respondent. Insofar as those proceedings concerned unfair dismissal and notice pay, they fell by the wayside when he was reinstated, but he also claimed victimisation. This is the claim which the Employment Judge struck out.

4. It is unlawful for an employer to victimise an employee by subjecting him to a detriment (see section 39(4) of the **Equality Act 2010**). The definition of victimisation is found in section 27 of the **Equality Act**, which so far as material provides as follows:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because -

(a) B does a protected act, or

(b) A believes B has done, or may do, a protected act.

(2) Each of the following is a protected act -

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

5. It was not the Claimant's case that he had himself committed a protected act. His case was that he was associated in the mind of the Respondent, particularly a manager, Mr Goodger, with others who had in the past committed such acts. His case was that he had reminded Mr Goodger of those acts and mentioned his connection with the persons concerned in July 2013. The disciplinary allegations relating to the high-visibility vest were (he alleged) the consequence.

6. In his claim form he claimed victimisation "on an associative basis". He put his case in the following way. He said that he had overheard a conversation suggesting that the Respondent's predecessor company had boasted of getting rid of employers, leading opposition to organise racism. Those employees were Mr John Neckles and Mr Dan Ibekwe. He mentioned this matter to Mr Goodger, alleging a connection to an existing member of management. He says that his disciplinary proceedings relating to the high-visibility vest followed soon afterwards, were overseen by individuals implicated in what he said and were contrived.

7. We have seen that the definition of victimisation in section 27 requires the detriment suffered by B to be because of B's protected act or A's belief about B's protected act. Here on the Claimant's own case the detriment he suffered was because of protected acts by others.

8. A Preliminary Hearing was convened on 8 April 2014 to see whether a claim of victimisation "on an associative basis" could be sustained. By her Judgment dated 14 May 2014, Employment Judge Spencer decided in the Claimant's favour that his claim of victimisation could rely on the acts of others. She held that section 27(1)(a) has to be read as providing simply "because of a protected act" in order to ensure compliance with EU obligations. There has been no appeal against that Judgment.

9. Employment Judge Spencer, however, decided that a further Preliminary Hearing was required for the following reasons:

> **"19. But back to the present complaint. The point before me was an issue of law, unrelated to the merits of the present claim. Although I have determined, in principle, that the Claimant can rely on the protected acts of others, it is not at all clear which particular protected acts are relied on and what causal connection is pleaded with such acts.**
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> **20. In his Claim (in the narrative section headed "Summary details of Complaint") the Claimant appears to allege that he was subjected to a detriment because he relayed to Mr Goodger (the Assistant Operations Manager) a conversation he had overheard between a colleague and Mr Neckles in which those individuals alleged "a deliberate targeting of certain individuals who sought to oppose what they termed as wrongdoing by the management of LGTFL in partnership with the TGWU and the subsequent appointment of Mr Pat Mahon on to the Respondent's management hierarchy." As pleaded, therefore, what appears to be alleged is that the Claimant was subjected to a detriment because he relayed a conversation to Mr Goodger and not because he was associated with protected acts of others.**
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> **21. Moreover, when asked about the degree of "association" between the Claimant and those who had done protected acts, Mr Neckles stated that the Claimant was a member of Mr Neckles' trade union. This is a rather loose association which might render the causal connection hard to establish. Further, the Respondent's Response sets out with some particularity the reasons why it claims that the Claimant was subjected to disciplinary action - all of which prima facie suggests that the Claimant will have an uphill struggle in establishing the necessary causal connection to the pleaded detriment."**

The Employment Tribunal Hearing and Reasons

10. It was to decide the questions outlined by Employment Judge Spencer that Employment Judge Hall-Smith held a further Preliminary Hearing on 17 June 2014. The Claimant was

represented by Mr John Neckles; and the Respondent by counsel, Mr Russell Bailey. In his Reasons the Employment Judge summarised the procedural history, quoted from the statute and summarised the claim. He recorded that Mr Neckles told him he and the Claimant were from the same trade union, which I understand to be a relatively small organisation not recognised by the Respondent. It was the Claimant's case that there was such animosity by the Respondent towards Mr John Neckles and his brother that they were barred from coming on the Respondent's properties.

11. The Employment Judge noted that it was not alleged that the Claimant had himself overheard any details of the race-related complaints. The Employment Judge said:

> **"18. Quite apart from the absence of particularity of what the protected act involved, I have very significant doubts that membership of the same Trade Union could give rise to the form of association necessary to found a complaint of associative victimisation. In my judgment, quite apart from the issue of Trade Union membership, awareness of the contents of a conversation subsequently repeated cannot, without more, amount to association for the purpose of the concept of associative victimisation."**

12. The Employment Judge also set out, in paragraphs 21 to 23 of his Reasons, certain facts which caused him to doubt whether there was any victimisation. It is sufficient to quote paragraph 23:

> **"23. As it happened, Mr Pat Mahon heard the Claimant's appeal against his dismissal and reinstated the Claimant. I considered it strange in circumstances where the Claimant alleged he had overheard a conversation which was clearly, on his account, to the detriment of Mr Pat Mahon, he as a Union member represented by Mr Paul Ainsworth, a Unite Representative, had not objected to the involvement of Mr Pat Mahon in his appeal, having regard to the contents of the alleged conversation he had overheard and had repeated to Mr Goodger. It did not seem to me that Mr Mahon's decision on the Claimant's appeal involving the reduction of the award to a final written warning, with 12 months special probation on all aspects of work, and 21 days unpaid suspension, involved "victimisation" of the Claimant."**

13. After setting out Rule 37 of the **Employment Tribunal Rules of Procedure 2013**, which makes provision for the striking out of all or part of a claim, the Employment Judge continued as follows:

> **"26. In the circumstances of this case I have reminded myself that it is always a draconian step to strike out a party's case, thereby denying the party concerned the opportunity of having**

their case heard, tested and determined through due process. I have also reminded myself that the power to strike out should be used sparingly, and that in cases involving discrimination, which are generally fact sensitive, the power to strike out should only be used in the most obvious cases.

27. However, in the circumstances of this case, I conclude that the Claimant has no prospect of success in his contention that the detrimental treatment was on the ground of associative victimisation. In my judgment any link or association between the Claimant and the individuals, the subject of the conversation was so tenuous that I am unable to accept that the Claimant was afforded the protection of the scope of associative victimisation, even if Section 27 has been properly interpreted as providing such protection.

28. In any event, in addition to the very real difficulties which I consider the Claimant would have in pursuing his complaint of associative victimisation, there are the additional difficulties in relation to the issue of a causal link between any protected act and the detriments which were substantially mitigated by the individual, Mr Mahon, whose activities were the subject of the alleged conversation.

29. In my judgment this is one of those rare cases in which it would be wholly appropriate to strike out pursuant to Rule 37 of the Employment Tribunals Rules of Procedure on the ground that it has no reasonable prospect of success."

14. The Employment Judge went on to make an order for costs against the Claimant in the sum of £850.

The Appeal

15. The Claimant's appeal proceeds on grounds which were refined following a hearing under Rule 3(10) before HHJ Eady QC. There is in addition to that Notice of Appeal a skeleton argument, which I understand the Claimant has been assisted to produce by Mr Neckles. This morning the Claimant on his arrival presented a written application for an adjournment. He says that he was told by the Employment Appeal Tribunal of the availability of representation under the EARS scheme, that he applied in May, that he followed it up at the beginning of July, that he presented a further form on 8 July when he was asked to do so and that he was told by the Free Representation Unit only on Friday last week that they could not represent him. I will return to this application later in the Judgment.

16. It is first convenient to summarise the Claimant's submissions as they are put out in the Notice of Appeal and skeleton argument. Firstly, he submits that the Employment Judge failed

to engage with the Claimant's case. It is argued that the Claimant had laid out a proper case in law and the Employment Judge dismissed it on essentially factual grounds when there was a factual basis to be determined at a Full Hearing. The facts had to be established to see whether the claim was made out. Secondly, it is submitted that the Employment Judge appears to have taken into account "absence of particularity" in the Claimant's pleading. This was unjustified. There had been no application for further Particulars on the Respondent's behalf and the Claimant had provided draft amended pleadings with greater particularity. Thirdly, it is submitted that the Employment Judge was wrong to suppose that for "associative victimisation" the Claimant had to show some particular relationship with the persons whose protected acts were relied on. The question is simply whether the Claimant was subjected to detriment because of the protected acts of others.

17. On behalf of the Respondent, Mr Russell Bailey accepts that the Employment Judge was not entitled to engage in factual evaluation save in limited circumstances provided for in **Ezsias v North Glamorgan NHS Trust** [2007] IRLR 603 at paragraph 29. He submits that the Employment Judge correctly assumed in the Claimant's favour that there was a conversation of the kind asserted with Mr Goodger. He says, however, that the inference the Claimant sought to draw of a causal connection is inconsistent with the undisputed contemporaneous documentation. He has taken me through the contemporaneous documents seeking to show that, certainly by the stage of the disciplinary appeal, the Claimant admitted that he was in the wrong as regards the high-visibility vest and was apologising.

18. Mr Bailey submits that the Employment Judge essentially took his decision to strike out on causation grounds. No link could be made between the Claimant's relaying of the conversation he heard and the detrimental actions in question. He accepts that the concept of

association does not involve any particular kind of relationship. In accordance with the best traditions of counsel, he drew my attention to **EBR Attridge LLP v Coleman** [2010] ICR 242 at page 257 on this question. He submits, however, that the more tentative the link, the less likely it is that causation will be made out. This, he submits, is all the Employment Judge sought to say in paragraph 27 when it is read properly in context.

Discussion and Conclusions

19. The power to strike out a claim on the ground that it has "no reasonable prospects of success" is contained in Rule 37 of the **Employment Tribunal Rules of Procedure 2013**. A similar provision was contained in the preceding Rules. The principles applicable to striking out applications on the ground that the claim has no reasonable prospect of success are very well established. Where central facts are in dispute a claim should be struck out only in the most exceptional circumstances. In such a case it is not for the Employment Tribunal to conduct an impromptu trial of the facts. There may be cases where it is instantly demonstrable that the central facts in the claim are untrue, for example, where the alleged facts are conclusively proved by relevant documents. But in the normal case where there is a "crucial core of disputed facts" it is an error of law for the Employment Tribunal to pre-empt the determination of a Full Hearing by striking out. This is a principle of general application, but it applies with particular force to cases of discrimination and public interest disclosure where there is a strong public interest in the careful determination of what are often fact-sensitive issues (see, for these propositions, **Anyanwu v South Bank Students Union** [2001] ICR 391 at paragraphs 24 and 37; **Ezsias v North Glamorgan NHS Trust** [2007] IRLR 603 at paragraphs 29 to 32; and I might add for completeness **Tayside Public Transport Company Limited v Reilly** [2012] CSIH 46 at paragraph 30).

20. It ought also to be said that the role of the Employment Appeal Tribunal is only to decide questions of law. If the Employment Judge has applied correct legal principles his decision on a striking out application is not to be impugned merely because the Employment Appeal Tribunal might have reached a different decision. It is to be impugned if, and only if, there is an error of law on the part of the Employment Tribunal.

21. I consider that the principal reason for the Employment Judge's striking out order is found in paragraph 27 of his Reasons. He thought that the links or associations between the Claimant and the individuals who did the protected acts were so tenuous that the Claimant was not afforded the protection of section 27. This in turn is linked to his doubt, expressed in paragraph 18 of his Reasons, that membership of the same trade union could give rise to the kind of association necessary for the purposes of section 27 of the **Equality Act**.

22. In my judgment, this reasoning was not open to the Employment Judge on a striking out application. It involved a prior assumption by the Employment Judge without hearing evidence as to what kind of association might suffice for the purposes of section 27.

23. Employment Judge Hall-Smith was required to be loyal to the earlier Judgment of Employment Judge Spencer. The question was whether the Claimant's treatment was by reason of the protected acts done by others. This test would require no particular relationship to be established between the Claimant and the others. It would be a question of fact for the Employment Tribunal whether the employer subjected to the Claimant to treatment by reason of the protected acts of others. The association might be wholly or in part in the mind of the employer.

24. Association is not a concept in itself found in European legislation. The issue is not whether there is in existence a relationship of some particular kind but whether in the mind of the putative discriminator the protected act of a third party was part of the reason for the treatment of the employee.

25. The position is explained in **EBR Attridge** at paragraph 16:

> **"16. I appreciate that my formulation does not use the language of "association". Although the phrase "associative discrimination" is a convenient shorthand, on my reading of the decision of the Court of Justice the concept of association is not central to its reasoning. What matters is that the putative victim has suffered adverse treatment on a proscribed "ground", namely disability, and the fact that the disability is not his own is not of the essence: see para 50 of the judgment … In practice it may be uncommon for an employee to be discriminated against on the ground of the disability of anyone with whom he is not in some sense "associated", indeed closely associated, but the fact of such association is not necessary to the unlawfulness; and I should prefer to avoid language which encourages tribunals to become bogged down in discussion of what does or does not amount to an "association", when that should not be the focus of the inquiry. (I should also note that I have used the phrase "by reason" that rather than "on the ground of" purely because it reads less clumsily: the two phrases are interchangeable in this field: see *Nagarajan v London Regional Transport* [1999] ICR 877, 886.)"**

26. I see no reason why the Employment Judge should have thought that membership of the same trade union could never give rise to the form of association necessary to found a complaint of associative victimisation. As I have said, the words "form of association" tend to suggest that the Employment Judge had the wrong test in mind. It is entirely possible to conceive of a situation where an employee's membership of an organisation, which had protested about protected acts, might cause an employer to treat the employee in a detrimental way. The question is fact-sensitive.

27. Mr Bailey submitted that the Employment Judge decided the case on causation. I am very doubtful whether he did. Paragraph 28, which refers to the "very real difficulties" which the Claimant would have in pursuing it, refers to "the additional difficulties" in relation to the issue of a causal link. It is unclear to me whether the Employment Judge would have struck the case out on that ground alone or why he would have done so. It, therefore, seems to me that the

Employment Judge has struck the case out on an incorrect legal basis. I cannot be sure whether, if the Employment Judge had applied the law correctly, he would have struck it out; and the application to strike out must be remitted for rehearing.

28. It is important when the matter is reheard that the claim should not be struck out if there is a crucial core of disputed fact. Mr Bailey submitted to me that there was no such core, and that the disciplinary appeal in particular demonstrated that the Respondent's actions were justified. That is a matter which the Employment Judge below will be entitled to explore, but if there is, in the end, a disputed core of fact, the claim must not be struck out. I am conscious that while the Claimant certainly made an admission and an apology at the appeal hearing, a rather different picture appears from what he said at an earlier stage. See, for example, Mr Goodger's record dated 15 October 2013 and the Claimant's own grievance dated 23 October 2013.

29. I should say a word about particularity. I do not read the Employment Judge as striking the claim out for want of particularity. If the Respondent wishes the claim to be struck out on that ground it would be wise to seek Particulars, but I do not regard the question of particularity at all central to the Employment Judge's reasoning.

30. This leads me back finally to the question of an adjournment. It seems to me that no useful purpose would be served by adjourning this appeal. The conclusion that I have reached is that there was an error of law, that the error of law requires remission, and I am sufficiently confident in that conclusion to consider that the overriding objective is against allowing the Claimant an application for adjournment. He had a similar difficulty at the time of Judge Eady's Rule 3(10) application and it has to be borne in mind that under the EARS scheme it is

by no means universally possible for representation to be afforded to a Claimant. There is, therefore, the chance that he might be in the same position next time. When I balance all the factors into account, even if I assume, as I will do for this purpose, that the Claimant was not himself guilty of delay I see no useful purpose in adjourning the claim when I am going to allow the appeal.