Appeal No. UKEAT/0093/15/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 July 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR O ODUKOYA — APPELLANT

WANDLE HOUSING ASSOCIATION LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR OLUREMILEKUN ODUKOYA (The Appellant in Person)
For the Respondent	No appearance or representation by or on behalf of the Respondent.

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

The Employment Judge struck out what remained of the Claimant's claim on the ground that it had no reasonable prospects of success. Held: appeal allowed. The Employment Judge ought not to have struck out the claim when there was a crucial core of disputed fact. **Anyanwu v South Bank Student Union** [2001] ICR 391, **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 and **Tayside Public Transport Company Limited v Reilly** [2012] CSIH 46 applied.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Oluremilekun Odukoya ("the Claimant") against a Judgment of Employment Judge Milton sitting in the London South Employment Tribunal dated 23 June 2014. The Claimant had brought proceedings for race discrimination and victimisation against Wandle Housing Association Limited ("the Respondent"). By his Judgment the Employment Judge struck out what remained of those proceedings.

2. The appeal proceeds today on amended grounds permitted by HHJ Serota QC at a hearing under Rule 3(10) when the Claimant had the benefit of representation by the Employment Law Appeal Advisory Scheme. Today the Claimant represents himself. The Respondent is not represented. Its then solicitors wrote to the Employment Appeal Tribunal on 5 May 2015 saying that it did not contest the appeal and would not appear. The Respondent has since changed solicitors. They have said that the Respondent has reluctantly decided not to change its stance.

3. I have decided that this appeal ought to be allowed. I will give my reasons as briefly as I can, conscious that I have not heard adversarial argument and conscious also that this matter will be remitted to the Employment Tribunal, which will be taking the case forward.

The Issues in Brief

4. The Respondent is a housing association operating in south London. The Claimant has, for some years, been a tenant of the Respondent. He had the status of "involved resident", under which he took an active interest in some aspects of the Respondent's business. He has worked as a paralegal. In July 2012 the Respondent was advertising a number of vacancies for

positions as customer relations officer ("CRO") and customer relations assistant ("CRA") advertised by the Respondent. The Claimant applied for these positions.

5. On any possible view the recruitment process was not well-handled. The Claimant was told that he had been unsuccessful in respect of both positions when, in fact he had been shortlisted for CRA. When this was put right and he was due to be interviewed, he was told that the positions had been filled. The Respondent's letter apologised for inconvenience and disappointment but did not explain beyond saying that there was "an unforeseen change in the number of people needed for this role."

6. The Claimant suspected and complained of race discrimination. He says he learned in late 2012 that the Respondent had reopened its recruitment for the CRO position without informing him. He suspects victimisation by reason of his complaint of race discrimination. He commenced proceedings on 25 February 2013.

7. In its written response, the Respondent accepted deficiencies in the way in which it handled the recruitment but denied race discrimination and victimisation, asserting that it employed a diverse workforce. It said that the Claimant did not have the requisite experience for the CRO role; that it ceased to recruit CRAs because a contractor would undertake some of the work which CRAs had been intended to undertake; and that it was under no duty to consider the Claimant any further for the CRO role. It sought to argue that the Claimant had brought proceedings out of time and that the proceedings had no reasonable prospect of success.

The Employment Tribunal Proceedings and Reasons

8. On 21 June 2013 a Pre-Hearing Review took place to consider the Respondent's contentions that the proceedings were out of time and had no reasonable prospects of success. It would seem that the Claimant gave what the Employment Judge described as a "reasonable quantity of evidence" and that he was "cross-examined thoroughly" by the Respondent's solicitors.

9. The Employment Judge's Judgment, insofar as relevant, was in the following terms:

> **"(1) The Claimant's case of race discrimination in respect of his job application for the job of Customer Relations Assistant is struck out on the basis that it is out of time and/or in any event has no prospect of success.**
>
> **(2) The Claimant's case for race discrimination in relation to his original application for the position of Customer Relations Officer may be included as part of any case pursued by the Claimant but as background only.**
>
> **(3) In any event the Claimant is ordered to pay a deposit of £100 under the Tribunal Rules of Procedure on the grounds that the claim has little reasonable prospect of success."**

There was no appeal against that Judgment.

10. The Employment Judge, however, considered that the Claimant "could have a potential arguable case" concerning recruitment to the CRO position during the period from September to December 2012. He said the following:

> **"6. There was however a period during September - December 2012 where there is plainly a degree of conflict of fact about various meetings, telephone conversations and discussions between the Claimant and members of the Respondent's staff about what precisely took place and what was said. It became clear during the course of my enquiry that during that period during which it is obvious there was a degree of friction between the parties that a CRO job again became available and the Claimant was on the face of the documents and the meetings not as such told about it.**
>
> **7. I came to the conclusion that the Claimant could have a potential arguable case about what happened during that autumn period and that it would be probably the fact that the Claimant either could have found out about it or was deprived of the opportunity of finding out about it at a date which would come within the three month time limit ending on 24 February 2013 (the date of presentation of the ET1). Further and in any event even if technically speaking the crystallisation date is outside the three month period in September (for example) it would be in my judgment just and equitable for time to be extended."**

11. The Employment Judge then made orders requiring the Respondent to give full Particulars and details about the recruitment process for a CRO over this period. He required the Claimant to provide final Particulars of his case thereafter. Although he made a deposit order, he seems to have envisaged that the question of striking out would be further addressed. The Respondent, indeed, gave what it regarded as full Particulars, although the Claimant emphatically disagreed that they amounted to such. Lengthy written submissions were provided by the parties. The matter came on again at a Preliminary Hearing on 29 May 2014. It was at this hearing that the Employment Judge struck out the balance of the Claimant's claim.

12. The Employment Judge directed himself that the sole issue he had to determine was "whether the Claimant suffered race discrimination in the non-selection of himself for short-listing and, above all, appointment to the CRO role in 2012" (see paragraph 11 of his Reasons). In the following paragraph of his Reasons he made findings based on what the Respondent told him of the recruitment process. Six out of fourteen candidates, he found, were "BEM" candidates including two or three black African and one black Caribbean. He said it would be "remarkably difficult" for a black African male to protest that he had suffered discrimination in such circumstances.

13. I will summarise key points from the succeeding paragraphs of the Employment Judge's Reasons. He said that there was "no contractual obligation" to inform the Claimant of the reopening of job interviews. He said no other applicant had been helped in that way. He said that although there had been a "degree of mix-up" in the earlier part of the recruitment process, he did not accept that the Claimant had raised a *prima facie* case of race discrimination. He found "as a matter of fact" that although the Claimant had demonstrated a history of legal experience and qualification, he gave virtually nothing which could assist a sifting panel in

advancing his case to be short-listed for the CRO position. He thought that the Claimant's whole approach would be likely to seem very unimpressive to a short-listing panel. He disregarded "comments and attitudes" expressed by the Respondent's staff in November and December, on which the Claimant relied as indicative of racial stereotyping or victimisation on the basis that decisions by that stage had been taken or were very well-advanced to appoint others. For those reasons the Employment Judge dismissed the claim on the grounds that it had no reasonable prospects of success

The Appeal

14. The Claimant's first and principal ground of appeal is that the Employment Judge erred in law in striking out the race discrimination claim at an early stage without evidence, by which the Claimant means properly tested evidence at a full hearing. As HHJ Serota QC made plain in his Reasons, the question is whether it was premature to dismiss the claim for discrimination when there were disputed issues of fact.

15. The principles applicable to striking out applications on the ground that a claim has no reasonable prospect of success are well established and ought to be very well known. Where the centrals facts are in dispute, a claim should be struck out only in the most exceptional circumstances. 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 disproved by relevant documents. However, in the normal case where there is a "crucial core of disputed facts" it is an error of law for the Tribunal to pre-empt the determination at 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 this summary of the law, **Anyanwu v South Bank Student Union** [2001] ICR 391 at paragraphs 24 and 37, **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 at paragraphs 29 to 32 and **Tayside Public Transport Company Limited v Reilly** [2012] CSIH 46 at paragraph 30.

16. I do not think the Employment Judge's Reasons are compatible with these principles. There was, without doubt, a crucial core of disputed fact. The Claimant did not accept the explanations given for his treatment throughout the period in question. He relied on comments and attitudes expressed by the Respondent staff as indicative of racial stereotyping throughout and he did not accept the case put forward by the Respondent about recruitment of staff. It was not satisfactory for the Employment Judge to accept major parts of the Respondent's case without a trial at which the Respondent's witnesses would be heard and cross-examined about it. It was not satisfactory to dismiss the Claimant's case concerning the comments and attitudes of the Respondent staff on the basis that his view that the recruitment exercise was apparently well advanced; even if this were the case the comments might be indicative of an attitude at an earlier stage of the process. Nor was it satisfactory to base a strong conclusion on untested evidence about the ethnicity of those appointed. The strength of the evidence about the ethnicity of those who were appointed might depend on the proportion of appointments to applicants.

17. I would add that I find it surprising that the application was postponed to allow the Respondents to put in evidence and that the Respondent's legal representative was allowed to "thoroughly cross-examine" the Claimant on such an issue. As I have explained, any kind of mini trial is objectionable in principle, but it is particularly undesirable to allow one side to be cross-examined in depth while the other side is permitted to adduce untested evidence. I

appreciate that there seem to have been time limit issues and that evidence might have been required on the question whether it was just and equitable to extend time, but it does not appear from the Employment Judge's Reasons that this was the purpose of cross-examination or that it was restricted to such an issue.

18. For these reasons the appeal will be allowed, the Judgment dated 23 June 2014 will be set aside and the matter will be remitted to the Employment Tribunal to continue the proceedings. I envisage that a Preliminary Hearing will be desirable to give case management directions, define issues and deal with any applications.

19. I should make the following points clear about the remitted proceedings.

20. Firstly, they should be heard by a different Judge or Judges. I am told that Employment Judge Milton has retired, but in any event given his expressed view adverse to the Claimant it is best that he adjudicate no further in this case.

21. Secondly, Employment Judge Milton expressed some views about amendment or proposed amendment in his Reasons; but these were not reflected in any Judgment or order. The Claimant is free to make applications for amendment or proposed amendment without being bound by those expressions of view. I make it clear that I am not encouraging or expressing any view of my own about applications to amend. I am simply making it clear that the Claimant is not precluded from making applications by views expressed in the Employment Judge's Reasons but not reflected in any order.

22. Thirdly, the Judgment dated 5 July 2013 was not appealed. Nothing in this Judgment affects the standing of the Judgment dated 5 July 2013. The Claimant tells me that he wishes out of time to make an application to the Employment Tribunal for reconsideration of their Judgment. I, once again, express no views about that at all. I simply make it clear that this Judgment does not affect the Judgment dated 5 July 2013.

23. So, the appeal will be allowed. The Judgment dated 23 June 2014 will be set aside and the matter will be remitted to the Employment Tribunal.