Appeal No. UKEAT/0125/14/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 September 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR A BHAM — APPELLANT

2GETHER NHS FOUNDATION TRUST GLOUCESTERSHIRE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ABOU KAMARA (Appearing through the Free Representation Unit)
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE

Striking-out/dismissal

Bias, misconduct and procedural irregularity

The Employment Judge made a determination of time limit issues and struck out Further and Better Particulars at a Case Management Discussion. He should not have done so: see rule 17(2) of the **Employment Tribunal Rules of Procedure 2004** then applicable. He should have considered (1) whether leave to amend was required in respect of any of the allegations in the Further and Better Particulars and (2) whether leave to amend should be granted, having regard to principles familiar from **Selkent Bus Company v Moore** [1996] ICR 836 and **Ali v Office of National Statistics** [2005] IRLR 201. Matter remitted for reconsideration along with other interlocutory issues presently in abeyance.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Mr Ahmed Bham ("the Claimant") against part of an order of Employment Judge Owen dated 27 June 2013. For reasons which I will explain in a moment the appeal is not opposed. I can deal with it quite shortly.

The Background

2. The Claimant was employed by 2gether NHS Foundation Trust Gloucestershire ("the Respondent") from 10 June 2008 until his dismissal with effect from 25 May 2012. The Employment Judge was concerned with three sets of proceedings which he brought during 2012. The allegations related broadly to unfair dismissal, "whistleblowing" detriment, race discrimination and disability discrimination. It is not necessary to describe them in detail.

3. On 14 June 2013 the Claimant served Further and Better Particulars of his disability and race discrimination claims. He asked that where the claim had not yet been pleaded he be allowed to amend his claim. The Further and Better Particulars were considered at a telephone Case Management Discussion on 26 June 2013.

The Case Management Order

4. As regards these Particulars, the Employment Judge said in his order:

> **"1. The claimant has supplied a statement of impact. The Tribunal has received the Further Particulars dated 14 June 2013 and these are accepted in substitution for the earlier particulars.**
>
> **2. The Particulars include allegations under paragraphs 6 being subparagraphs (a) (b) (c) (d) and (e). Having heard submissions from the claimant, his representative and the respondents' solicitor I strike out these allegations for the reasons set out below under 'Reasons'. ..."**

5. The Employment Judge's reasons for striking out these subparagraphs may be summarised as follows. He said that subparagraph 6(b) did not contain any allegations; that subparagraph 6(a) had been made in earlier proceedings and was out of time; that the other allegations were out of time; and that it was not just and equitable to extend time.

Why the appeal is not opposed

6. This appeal is not opposed for a simple reason identified by HHJ Peter Clark at a hearing under rule 3(10) of the **Employment Appeal Tribunal Rules 1993**. The Employment Judge was conducting a Case Management Discussion. Under the **Employment Tribunal Rules of Procedure 2004** there was an express provision as to what could and what could not be dealt with at a case management discussion. Rule 17(2) stated that:

> **"Any determination of a person's civil rights or obligations shall not be dealt with in a Case Management Discussion.... Orders and Judgments listed in rule 18(7) may not be made at a Case Management Discussion."**

7. The orders listed in rule 18(7) included orders relating to the entitlement of a party to bring proceedings (rule 18(7)(a)) and striking out a claim or part of a claim which has no reasonable prospects of success (rule 18(7)(b)). Paragraph 2 of the Employment Judge's case management order is an order of a kind which the Employment Judge was expressly prohibited from making at a Case Management Discussion. The Respondent accepts that this is so. It has not filed an Answer and has made it clear that it does not oppose the appeal and would have consented to it.

Discussion and Conclusions

8. I am puzzled by the procedure which the Employment Judge followed. If the claims made in the Particulars were new claims, not previously encompassed in the ET1s, then the question for the Employment Judge would appear to have been whether to grant permission to

amend. One would have expected him to apply principles derived from **Selkent Bus Company Ltd v Moore** [1996] ICR 836 and **Ali v Office of National Statistics** [2005] IRLR 201 where the question whether the claims were new and out of time would have been a relevant consideration. This the Employment Judge could have done at a Case Management Discussion, although speaking for myself, I would have thought it much more sensible to have heard an application for permission to amend with other matters at a Pre-Hearing Review which the Employment Judge was in any event ordering because the Respondent wished to apply to strike out other aspects of the Claimant's claim.

9. What the Employment Judge actually did was to say that the Further and Better Particulars were "accepted" and then to strike them out by determining time limit issues, a course which seems to me inappropriate and which, in any event, he could not take at a Case Management Discussion.

10. The appeal against paragraph 2 of the order will therefore be allowed. As HHJ Peter Clark suggested at the rule 3(10) hearing questions relating to these particulars can be considered at the next Preliminary Hearing. These questions may include (1) whether leave to amend the claim is required in respect of some or all of the allegations in the Particulars. (Mr Kamara suggests to me today on the Claimant's behalf that leave to amend is not necessarily required but that can be argued at the hearing); (2) whether leave to amend should be granted; and (3) whether the allegations have no or no reasonable prospect of success.

11. There were two other grounds of appeal relating to time limit points. On behalf of the Claimant Mr Kamara says that the Particulars contained allegations which were part of a continuing act and in one respect involved post-termination discrimination. He argues that,

when these points are taken into account, time did not begin to run until late September or early October 2012. If so, and if any of the claims in the Particulars are new claims, they would only be six months out of time not ten months out of time as the Employment Judge appears to have thought. It is a fair point to make that the Employment Judge does not appear to have considered these issues. I am not, however, in any position to decide them in the Employment Appeal Tribunal, which deals only with questions of law. Questions relating to time limits will be for the Employment Judge to consider on remission.

12. I order that future aspects of this case be conducted before a different Judge. The Employment Judge has expressed firm opinions on time limit questions and it would not be appropriate for him to deal with the matter again.

The need for a hearing

13. I would finally point out that this appeal did not necessarily require a hearing. Where, as here, both parties agree that an appeal should be allowed, it is sometimes possible to avoid a hearing. The matter is dealt with in paragraph 18.3 of the Employment Appeal Tribunal's 2013 Practice Direction:

> **"If the parties reach an agreement that the appeal should be allowed by consent, and that an order made by the Employment Tribunal should be reversed or varied or the matter remitted to the Employment Tribunal on the ground that the decision contains an error of law, it is usually necessary for the matter to be heard by the EAT to determine whether there is a good reason for making the proposed order. On notification by the parties, the EAT will decide whether the appeal can be dealt with on the papers or by a hearing at which one or more parties or their representatives should attend to argue the case for allowing the appeal and making the order that the parties wish the EAT to make."**

14. In this case HHJ Peter Clark had identified the key point in his Judgment given at the Rule 3(10) Hearing. The point was unanswerable. The Respondent consented, and it seems to me that the matter could have been dealt with on paper if the Claimant had been willing.