Appeal No. UKEAT/0395/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 July 2014

Before

THE HONOURABLE MR JUSTICE MITTING

(SITTING ALONE)

MR U ALUKPE APPELLANT

SOUTH THAMES COLLEGE CORPORATION AND OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellant	MR MITCHELL (of Counsel)
For the Respondent	MR OLIVER ISAACS (of Counsel) Instructed by: Berry Smith LLP 1 Northumberland Avenue Trafalgar Square London WC2N 5BW

SUMMARY

PRACTICE AND PROCEDURE

Striking-out/dismissal

Preliminary issues

Employment Tribunal judgment on preliminary issues on individual topics in complex and barely manageable cases should be upheld except in case of patent legal error.

THE HONOURABLE MR JUSTICE MITTING

Introduction

1. The overriding objective, set out in the **Employment Tribunals Rules of Procedure** at Rule 2, is "to enable Employment Tribunals to deal with cases fairly and justly" and that:

> **"Dealing with a case fairly and justly includes, so far as practicable –**
>
> **...**
>
> **(b) dealing with the in ways which are proportionate to the complexity and importance of the issues".**

The facts of this case tests that laudable objective to the extreme.

The Facts

2. The Claimant is 55. He was employed as a lecturer in Business Management by the South Thames College Corporation from 1 September 2009 until 18 November 2011. He had episodes of ill-health during the first 16 months or so of his employment in 2009 and 2010. On 29 December 2010 he was diagnosed as suffering from anxiety, panic attacks and depression. He was on sick leave from then until he was summarily dismissed on 18 November 2011. At the time that the Tribunal made the Decision which I have to consider, he had filed four ET1 forms on 21 March 2011, 13 October 2011, 3 November 2011 and 12 February 2012. They were filed against South Thames College Corporation and several named individuals. I am told that since filing those four forms he has filed a fifth, about which I know nothing beyond the fact that it has been filed.

3. His claims raised manifold issues. After much effort on both sides, they were reduced, if that is the right word, to a 24-page list containing 98 paragraphs. That list was agreed by the parties during a case management conference on 2 July 2012. The principal issues raised by the

claims were as follows: (1) breaches of Articles 6 and 3 of the European Convention on Human Rights; (2) breach of contract; (3) unauthorised deduction of wages; (4) disability discrimination; (5) whistleblowing; (6) victimisation; (7) racial discrimination; (8) unfair dismissal.

4. In an effort to narrow down the issues with which it had to deal, South Thames College Corporation made requests for further particulars of the ET1 forms and of the issues identified in the 24-page list. The Claimant did his best to provide the particulars requested, but as any reasonably experienced employment lawyer would realise, his best was inadequate.

5. A Pre-Hearing Review was held on 10 and 11 December 2012. The Claimant represented himself. The College Corporation was represented by Mr Isaacs of Counsel. That gave rise to a number of decisions for the future conduct of the case and decisions on some of the issues raised by the case. A 28-page document, containing 105 paragraphs related to issues to be decided and a further 21 paragraphs of directions, was sent to the parties on 15 January 2013. Some of the decisions were unfavourable to the Claimant and some favourable. He appealed all of those that were unfavourable to him. The College Corporation cross-appealed two specific decisions that were unfavourable to them.

6. A Pre-Hearing Review was held, and both a limited number of the grounds of appeal relied on by the Claimant and the limited grounds relied on by the College Corporation were ordered to be determined at a Full Hearing. This is my Judgment consequent upon the submissions that I heard at that Full Hearing.

The position faced by the Employment Judge

7. I start with the position faced by the Employment Judge. She was faced with a vast array of claims and sub-claims and required to consider about 2,000 pages of documents. Any Appeal Tribunal must respect legitimate efforts made by the first-instance Judge to try to control and ultimately to determine a case of that nature. This Tribunal should be slow not merely to interfere in case management decisions but, in my judgment, also to interfere in the exercise of judgment and discretion by the Employment Judge on preliminary matters for the simple reason that it is the Employment Judge who has ultimately to determine this case. She must have a better understanding of where the case is going than can any appellate Tribunal. Accordingly, in my judgment, unless in any preliminary determination she has made a patent error of law, this Tribunal should not interfere with her judgment on specific issues.

8. This is not a case, as will be apparent when I turn to the individual items challenged, in which her decisions have determined the case for or against the claimant or have so altered the shape of the case as to skew it heavily in favour of one party or the other. She, it must be remembered, is charged with the task of achieving the overriding objective and dealing with the case in a way which is proportionate to its complexity and importance. She is entitled to simplify it when confronted with manifold opportunities for exercising judgment on individual issues. She is entitled to a wide measure of leeway in the reasoning and outcome leading to the exercise of that judgment.

The Claims for Breach of Contract

9. Against that background I turn, therefore, to the three topics which now remain live to be determined on this appeal. The first is one in which the Employment Judge made a patent error of law. The Claimant made three claims for breach of contract, which he persisted in. He had

abandoned one. They were that he had been denied lunch breaks, that the College Corporation had not paid him £5,000 by way of annual market supplement and that it had failed to conduct and complete a probationary review.

10. The Tribunal had jurisdiction to entertain and determine those claims if the conditions set out in the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**, Article 3(c), were satisfied. They were. This was a claim outstanding on the termination of the Claimant's employment on 18 November 2011. When she determined they were not, as she did, the Employment Judge made a patent error. It is one which should be corrected. The Claimant is entitled to have those claims determined as a matter of jurisdiction.

The Claim for Disability Discrimination

11. The next aspect of the claim in which the Claimant says that the Employment Judge erred in her Judgment was in determining that his claim of disability discrimination had no reasonable prospect of success and so should be struck out. As now explained, that claim is based on a single foundation, that in the course of grievance and disciplinary hearings on 8 June, 28 October 2011, 31 January 2012 in the case of grievance hearings; and 7 November 2011 and 25 January 2012 in the case of disciplinary hearings, he should have been allowed to be represented by a lawyer. The basis for that claim is, he says, that by reason of the medical condition which I have described (anxiety, panic attacks and depression) he was unfit to represent himself at those hearings. Accordingly, it is his case that the College Corporation should have made a reasonable adjustment to its normal practice of not permitting legal representation at such hearings by allowing him to be represented by a lawyer.

12. The College Corporation asked that he specify the provision, criterion or practice about which he was complaining and which he said should have been the subject of reasonable adjustment under section 20 of the **Equality Act 2010**. This prompted a 5-page reply, in which he set out a number of his complaints about the conduct of the hearings. They included that he had been denied access to his computer and printing and photocopying facilities, that management had withheld documents and information which should have been supplied to him, that when considering his complaints the management case only had been considered and not his own; and so forth.

13. It is true that, in each of the cases upon which he relied, he did say that his request to be allowed legal representation had been refused. He did not identify expressly that it was the College Corporation's practice not to allow legal representation at such hearings and instead to require him to rely on his statutory right to be accompanied by a workplace companion or a union representative.

14. It is at least arguable that an Employment Judge dealing with a litigant in person, and bearing in mind the first of the overriding objectives of ensuring that the parties were on an equal footing, should treat particulars such as those as containing within them the implicit statement that there was such a provision or practice. In a case which turned just on that issue, it may well be that this Tribunal could and should interfere in the decision, if the Employment Judge failed to tease out the implicit claim from the express allegations.

15. What the Employment Judge did was to rule as follows. I cite paragraph 94 of her Decision:

> **"With regard to the Claimant's claim for *disability discrimination* the Claimant was asked to set out further particulars of this claim for failing to make reasonable adjustments set out at paragraphs 82 to 86 of his list of issues. As presently pleaded, the claims provided no**

indication as to what provision, criterion or practice he relied upon, the allegation was an assertion that various people had failed to make reasonable adjustments to the disciplinary process and grievance process but no PCP had been identified. The Claimant also failed to set out what substantial disadvantage he suffered. The Claimant's further letter setting out the provision, criterion or practice was seen at [and she then identifies the pages in the bundle] and was dated 20 October 2012. In this letter the Claimant again failed to provide an indication as to how the Claimant put his case for failing to make a reasonable adjustment, he stated that further action was taken by management that he believed denied him access to document and printing facilities. He referred to conduct by various people in the various hearings he attended. [She then sets them out.] This document again fails to provide clarification of the Claimant's claim for failing to make reasonable adjustments as it fails to specify the PCP and makes no reference to substantial disadvantage caused by the PCP. As the Claimant has failed to clarify as to how his claim is put on the evidence before me this head of claim has no reasonable prospect of success and will be struck out."

16. It is to be noted that the Employment Judge did not strike out the claim because of a failure to comply with an order of the Tribunal. She made a judgment that it had no reasonable prospects of success, evidently because of the difficulty which the Claimant had experienced in identifying the provision, criterion or practice on which he was relying. If he was unable to state it clearly in his own words and to identify it in his own mind, then it is reasonable to infer, she concluded, that he cannot have much of a case on this issue.

17. That is not reasoning which will commend itself to every Employment Judge or Appeal Tribunal on every occasion, but in a case of this nature it just passes muster. Accordingly I dismiss the appeal on that ground.

The Victimisation Claims

18. The Claimant made a number of victimisation claims. They were identified in paragraphs 27-35 of the agreed list of issues. In his responses to requests for particulars of how he put those claims, it is plain that in his own mind he thought that what was being sought was particulars of the acts of victimisation which he alleged. And, although he paid lip service to the requirement ordered by the Tribunal that he identify the protected acts which he claimed gave rise to the acts of victimisation, the order required him:

> **"… to provide the Respondent … by 15 October 2012 with details of the protected act relied upon in paragraph 29 of the list of issues including date, description and detriment, whether in writing or oral, and supporting documents."**

19. The document which he provided in response to that order, under the heading "Protected act relied upon", set out a formulaic answer "because I complained about race discrimination against and racial harassment of me..." while failing to identify, save in one respect, the precise date upon which the race discrimination or racial harassment had occurred or the date upon which he had complained about it and to whom he had complained about it. What he did was to set out the specific acts of victimisation upon which he relied, as if they were the protected acts, and identified the dates upon which acts of victimisation had occurred as if they were protected acts. That was plainly unhelpful.

20. The Employment Judge was required to consider six specific acts of victimisation upon which the Claimant relied and reached differential conclusions in relation to them. As to the first, there is no challenge to her Decision. She concluded that the act of victimisation was a one-off act, not part of a series, and was out of time. She then went on to consider whether or not it was just and equitable to extend time. She decided that it was, essentially because the Tribunal would, in any event, have to consider the evidence which gave rise to the complaint and in her view it was simply a relabelling of a head of claim which she would in any event have to consider, direct race discrimination.

21. As to the second, she reached the same conclusion. As to the third and fourth, she concluded that they had no reasonable prospect of success. And as to the fifth, she reached the same conclusion as she did in relation to the first and second.

22. I deal first of all with the two which she struck out as having no reasonable prospect of success, against which the Claimant appeals. The protected act was not identified. Mr Mitchell, who appears for the Claimant today, submits that if one searches around earlier in the document giving the particulars and cross-references them to the grounds of claim supporting the ET1 forms, it is just about possible to discern what might be the protected act relied on: a complaint made to a member of staff on 12 April 2010, which is said to give rise to acts of victimisation occurring before that date on 6 April 2010 and long after on 6 October 2010, all by different people.

23. But in reality the Claimant's case is that, because he was the victim of race discrimination by staff at the College Corporation and complained about it, so anything with a racial colour thereafter should be treated as an act of victimisation. I have been shown the e-mails on which he relies to prove victimisation. All three simply report what the author records by way of complaints by students taught by the Claimant. The only way in which those e-mails can amount to an act of victimisation by the Claimant is if they are part, as the Claimant would put it, of a campaign of victimisation against him, not truthfully recording complaints but in effect inventing them to get at him.

24. The Employment Judge's approach to these issues was set out in paragraphs 101 and 102 of her Decision:

> **"101. Turning to paragraph 2.3 this is an incident that is alleged to have occurred on 6 October 2010 and this is referred to in the Claimant's ET1 presented on 13 October 2011 … and he refers to an e-mail sent by Ms Fenton to others. There is no reference to any protected act and it is not pleaded in the ET1 as being an act of victimisation. The Claimant's submission that this is what was said about him in his oral submission but he did not refer to a protected act or being subjected to a detriment because of a protected act. This cause of action at paragraph 2.3 is struck out to the extent that it purports to be an act of victimisation as it has no reasonable prospect of success."**

25. Thus in relation to paragraph 2.3 the Employment Judge's reasoning can be analysed as follows: (1) The Claimant has not referred to a protected act. It is not pleaded in his ET1 form as being an act of victimisation, which is true. (2) In his oral submissions to her at the hearing, he did not refer to a protected act or being subjected to a detriment because of a protected act. Those were, it seems to me, just about, sufficient reason to take the view that she did that the victimisation in this respect had no reasonable prospect of success. Had she gone on to analyse the e-mail referred to in this paragraph, as I have done, that would no doubt have reinforced her conclusion. As in the case of the failure to make adjustments claim, this seems to me to be an issue upon which the Employment Judge, applying the standards I have indicated at the beginning of this Judgment, was entitled to reach the conclusion to which she came.

26. She reached a similar decision for identical reasons about the two e-mails of 5 and 12 October 2010 referred to in paragraph 2.4 and it is unnecessary for me to repeat the reasoning which I have analysed in respect of paragraph 2.3. For the same reasons, I uphold her Judgment in that respect.

The Cross-Appeal

27. I now turn to the College Corporation's cross-appeal. Mr Isaacs submits that, on settled case-law, the Employment Judge has gone wrong in concluding that it was just and equitable to extend time. It should first of all be recalled that her discretion in the victimisation claims is a broad one, broader than in standard unfair dismissal claims. It is simply whether or not it is, in the circumstances, just and equitable to extend time. Mr Isaacs submits that it is necessary to attempt to analyse the Employment Judge's "thought processes" and, having done so, to conclude that they must be based upon an error of law because, he submits, no evidence was led to justify extending time; the protected acts, as in the case of paragraphs 2.3 and 2.4, were not

precisely identified; and because she said she had in mind the requirements of superior courts, where possible without injustice, to hear discrimination claims rather than to deal with them summarily.

28. I do not accept that submission. Given the breadth of the discretion available to the Employment Judge, she was entitled to reach the conclusions that she did. I have already summarised her reasoning, and it is not necessary for me to set it out verbatim. If the case had turned just on that issue, so that had she declined to extend time, the whole claim would have failed, then it may be that her decision would be open to challenge successfully on appeal. But, in the overall context of this case, this is but a small part of it, and to interfere with her careful overall decision-making on how this claim should go forward would not be to further the overriding objective. It would be to encourage the expenditure of yet more legal effort and money on minor points in a case which any Tribunal will struggle to cope with. Above all else, that is to be discouraged.

29. The patent error made here in relation to the contract claim is one that should have been put right by the College Corporation, as they have done properly on this appeal, conceding that the point which they had taken was a bad one. It could therefore have been reinstated in the list of issues that had to be decided without the need for an appeal. As to the remainder, it is important, in my judgment, that this Appeal Tribunal does not interfere in the task of the District Judge in eventually determining a claim, which has now lasted twice as long as the Claimant's employment and is still nowhere near being heard.

30. For those reasons, the appeal is allowed on the contract issue only, and the appeal and cross-appeal are otherwise dismissed.