Appeal No. UKEAT/0625/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 June 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR B KENBATA — APPELLANT

UNISON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BENYAM KENBATA (The Appellant in Person)
For the Respondent	MR STUART BRITTENDEN (of Counsel) Instructed by: Messrs Thompsons Solicitors Congress House Great Russel Street London WC1B 3LW

SUMMARY

PRACTICE AND PROCEDURE

Striking-out/dismissal

Costs

No error of law in the Employment Tribunal's decision to strike out hopeless race discrimination claim against Claimant's union. Costs discretion triggered. However, no proper reasons given for not taking the Claimant's means into account. Appeal on costs allowed in part; costs reduced to £500. Both parties consented to the Employment Appeal Tribunal deciding the costs question; see **Jafri** and **Burrell** (CA).

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Watford Employment Tribunal. The parties are Mr Kenbata, Claimant, and Unison, Respondent. There is before me for an all parties Full Hearing an appeal by the Claimant against the PHR Judgment of Employment Judge Mahoney, promulgated with Reasons on 28 January 2013, striking out the Claimant's complaints of race discrimination brought against the Respondent and ordering him to pay the Respondent's costs in the sum of £2,160 inclusive of VAT.

2. The Claimant was employed by Hertfordshire County Council (HCC) in their Highways Department. His employment began on 29 November 2005. He joined the Respondent trade union on 25 May 2012, having been warned that he was unmatched to a post in a restructuring exercise then being carried out by HCC. In the event he was dismissed by reason of redundancy on 30 September 2012.

3. At the heart of this race discrimination claim brought against the Claimant's union, justiciable under section 57 of the **Equality Act 2010**, was an overheard conversation recorded on the Claimant's telephone, between two officers of HCC, Mr Patel, the Claimant's line manager, and Mr Hennessey, the Transition Manager. The relevant extract is recorded at paragraph 6.2 of the Reasons. It is there said that Mr Price, the Unison Branch Secretary, had raised the Claimant's case with Mr Hennessey and questioned whether the Claimant's non-assimilation into the new structure was to do with his race.

4. It is the Claimant's case that, in raising the issue of his race in connection with his position in the proposed restructuring exercise at HCC, without his permission, the Respondent through Mr Price was treating him less favourably than a white member of the union.

5. The detriment to him, he contended, lay in the adverse effect such an allegation might have on his attempts to avoid redundancy.

6. Judge Mahoney concluded that that claim had no reasonable prospect of success and he struck it out.

The Strike-out Appeal

7. In ground 1 of his Amended Grounds of Appeal, permitted to proceed at a Preliminary Hearing before HHJ Shanks on 12 February 2014, it is said that, at paragraph 9 of his Reasons, the Employment Judge misunderstood the nature of the Claimant's claim against Unison, that Mr Price assumed that the Claimant wished to raise race discrimination complaint against his employer without being asked to so and then made that complaint and eventually the Claimant was made redundant by HCC.

8. Based on those primary facts, it is contended that the Claimant raised a prima facie case of discrimination and further that he suffered a detriment because he was made redundant.

9. I reject that ground of appeal, as developed by Mr Kenbata in his written and oral submissions. The significance of the finding at paragraph 9 was that there was no evidence that the Claimant's non-assimilation to the new structure and hence his eventual redundancy was race-related. That was a permissible finding by the Judge. The fact that subsequently a

different Tribunal, sitting at Watford and chaired by Employment Judge Russell, rejected the Claimant's complaint of race discrimination in relation to his dismissal by HCC, upon which Mr Brittenden sought to rely at this hearing, is in my judgment immaterial to the appeal. The finding by Judge Mahoney at paragraph 9 stands.

10. More to the point, bearing in mind the way in which the Claimant put his case below and argues his appeal, is that prior to his joining Unison he had raised a grievance, albeit unrelated to the restructuring exercise, in March 2012, complaining of possible race discrimination. Further, as Mr Brittenden points out, in evidence before Judge Mahoney was the Claimant's appeal against the provisional decision not to slot him into the new structure at HCC. That appeal is dated 18 June 2012 and in two places complains of possible race discrimination in connection with the failure to slot him in to the new post of ITP Manager. Next, as the Judge notes at paragraph 6.4 of his Reasons, on 13 August 2012 the Claimant requested Unison representation at a debriefing meeting at HCC, giving the result of five grievances, including one against his line manager, Mr Patel, complaining of less favourable treatment than his white colleagues. Then, on 28 August, he presented his claim form ET1 against HCC complaining, among other things, of race discrimination (see Reasons, paragraph 7).

11. In these circumstances, assuming the facts alleged by the Claimant to be correct, in line with the guidance in **Anyanwu v South Bank Students Union** [2001] ECR 391, **Balls v Downham Market High School and College** [2011] IRLR 218 and **North Glamorgan NHS Trust v Ezsias** [2007] IRLR 603, referred to at paragraphs 11.3-5 of the Reasons, any assumption made by Mr Price was plainly correct. The Claimant was raising the possibility of race discrimination on the part of HCC both before and after Mr Price's conversation with Mr Hennessey.

12. In these circumstances, applying the approach of Mummery LJ in **Madarassy v Nomura International plc** [2007] ICR 867, paragraph 56, whilst it may be assumed that Mr Price would not raise the spectre of race discrimination in the case of a white British member of the union who was not slotted into a new post in this restructuring exercise, that does not, without more, raise a prima facie case of unlawful discrimination. No other material facts were advanced by the Claimant. Further, it cannot be detrimental for a trade union representative to raise the possibility of race discrimination on behalf of a black member who himself has consistently raised that allegation both before and after the conversation, as alleged, between Mr Price and Mr Hennessey.

13. For these reasons, in my judgment, the Judge was plainly and unarguably correct in striking out this claim.

Costs

14. The second part of the Claimant's appeal relates to the costs order made by Judge Mahoney. He ordered the Claimant to pay this Respondent's costs, limited to the costs of the PHR itself, I am told, in the sum of £1,800 plus VAT (a total of £2,160).

15. The first challenge is to the Judge's finding that the claim was vexatious. That is a higher test than that of no reasonable prospect of success; the basis on which the Judge struck out the claim.

16. At paragraph 17 of his Reasons Judge Mahoney referred to the passage in the Judgment of the National Industrial Relations Court in **Marler v Robertson** [1974] ICR 72, at 76E, where Sir Hugh Griffiths, presiding, said this:

> **"If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously..."**

17. Judge Mahoney found the claim vexatious; I infer that he had in mind, first, that the claim was hopeless and secondly (see paragraph 9.4) that in bringing it the Claimant had an improper motive, namely to explore the possibility of improving his potential case against HCC. Mr Kenbata denies saying any such thing below. However, that finding is not challenged in the Amended Grounds of Appeal and anyway is a finding of fact with which I cannot interfere on appeal.

18. In these circumstances, it seems to me, the Judge was entitled to characterise this claim as vexatious in the **Marler** sense

19. That leaves the third and final ground of appeal. The point, shortly put, is that the Judge failed to give any reasons for finding that it was inappropriate to take into account the Claimant's limited means, as set out at paragraph 23. At paragraph 24 the Judge refers to the Court of Appeal decision in **Arrowsmith v Nottingham Trent University** [2012] ICR 159, and Mr Brittenden has referred me particularly to the Judgment of Rimer LJ in that case at paragraph 37.

20. I accept entirely that the Judge had a discretion not to take into account the Claimant's means under the then Rule 41(2) of the 2004 ET Rules. However, as HHJ Richardson opined in **Jilley v Birmingham & Solihull Mental Health NHS Trust** (EAT 586/06 21 November 2007) at paragraph 44: if a Tribunal decides not to take into account the paying party's ability to pay, it should say why.

21. Mr Brittenden submits that the reason was plainly that the Judge found the claim vexatious. That is a trigger for exercising the discretion to order costs, but it is no more an automatic reason for ordering costs than is a finding, following a substantive hearing, that a Claimant has lied (see **Arrowsmith**, paragraph 33). Costs, I remind myself, is not a punitive sanction (see, for example, **Lodwick v Southwark LBC** [2004] IRLR 554, paragraph 23 per Pill LJ).

22. In these circumstances I uphold the appeal on ground 3. No proper reasons for not taking into account the Claimant's means are set out by the Judge. Applying the recent guidance in the Court of Appeal in **Jafri v Lincoln College** [2014] EWCA Civ 449 and **Burrell v Micheldever Tyre Services** [2014] EWCA Civ 716, I invited both parties to consent to my dealing with the question of the costs, rather than remitting it to the EAT. Both gave that consent.

23. In my judgment, this was a proper case for the award of costs. However, in the exercise of my discretion, I take into account the Claimant's means, as found by the Judge. Having done so, I shall limit the order for costs to £500 exclusive of VAT. In accordance with the decision of Slade J in **Raggett v John Lewis plc** [2012] IRLR 906, it will be for the Respondent to come back if the union is not registered for VAT in order to claim the additional VAT element on my award of £500 costs.