Appeal No. UKEAT/0015/14/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 June 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MISS A ROMANOWSKA — APPELLANT

ASPIRATIONS CARE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS SARAH WILKINSON (Free Representation Unit)
For the Respondent	MR BRUCE FREW (of Counsel) Instructed by: Allpay Legal Services Fortis et Fides Whitestone Business Park Whitestone Hereford HR1 3SE

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

VICTIMISATION DISCRIMINATION - Protected disclosure

The Claimant, a worker on the permanent staff of a care home, asserted in her ET1 that her dismissal was because she had made protected disclosures, and not the purported reason (which was gross misconduct, for dragging a resident across the floor). An Employment Judge struck her claim out as having no reasonable prospect of success, despite holding that the Claimant might well establish that immediately prior her dismissal she had made protected disclosures. Held that she was not entitled to do so, since the reasons for dismissal were known only to the employer, such that they could be established by an Employment Tribunal only after hearing evidence, and could not be assumed. There was here a dispute of fact which needed to be resolved by a hearing, and not by pre-emptive strike-out.

The case raised the question whether a claimant who but for making a protected disclosure would not have been dismissed for misconduct, but merely warned, could assert a claim under section 103 **Employment Rights Act**, where it would have to be shown that the "principal" reason for dismissal was protected disclosure, or whether she would be restricted to making a section 47B (detriment) claim if at all. This was best resolved by reference to the particular facts of the case.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. A power to strike out a claim is often exercised by way of summary Judgment without hearing evidence. To hear evidence might defeat the purpose of using the power to save the time, expense and resources of the parties and that of the Tribunal in dealing with a claim which, on any reasonable view, will not succeed. Sometimes it may be obvious that, taking the facts at their highest in favour of the Claimant, as they would have to be if no evidence were to be heard, the claim simply could not succeed on the legal basis on which it has been put forward. Where, however, there is a dispute of fact, then unless there are good reasons, indeed powerful ones, for supposing that the Claimant's view of the facts is simply unsustainable, it is difficult to see how justice can be done between the parties without hearing the evidence in order to resolve the conflict of fact which has arisen.

2. Thus it was in **Ezias v North Glamorgan NHS Trust** [2007] EWCA Civ 330 that the Court of Appeal upheld the decision of the Employment Appeal Tribunal (Elias J) that the claim of the Claimant could not properly have been struck out. That was because there was a central dispute of fact: the employer said that the reason for dismissal was a total breakdown in trust and confidence, which came within the category of some other substantial reason for dismissal in section 98 of the **Employment Rights Act 1996**; the Claimant said it was because he had made allegations which amounted to protected disclosures. In the course of his Judgment, with which Moore-Bick and Ward LJJ agreed, Maurice Kay LJ accepted that there might be cases which embraced disputed facts which nevertheless might justify the striking out of those cases on the basis that they had no reasonable prospect of success (see paragraph 27), but went on to say that what was important was the particular nature and scope of the factual dispute in question. The nature of the dispute which I have just summarised was such that he

had no doubt that the power of summary strike-out should not and could not properly have been used.

3. He went on to observe at paragraph 29:

> **"It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by [the Claimant] were totally and inexplicably inconsistent with the undisputed contemporaneous documentation."**

4. At a Pre-Hearing Review, conducted at Bristol on 9 May 2013, Employment Judge Mulvaney struck out claims in the case presently before me that the Claimant's dismissal by her employers on 27 September 2012, purportedly for gross misconduct, was in fact for making a public interest disclosure or because of her race (she was a Polish national), and ordered a deposit in respect of that part of her claims which was to continue (unfair dismissal). The Judge directed herself in part by reference to **Ezsias** and to the earlier decision of **Anyanwu and Anr v South Bank Students Union** [2001] ICR 391 HL, in the course of the speeches in which Lord Steyn said at paragraph 24:

> **"Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."**

The Underlying Facts

5. The facts had not been established in evidence. No evidence was heard. Those which may be derived from the papers can only, therefore, tentatively be stated and may be shown, on later examination, not to be the case.

6. To set the scene, however, it is necessary to say something about them. The Claimant was a care worker on the permanent staff of a home for six adults who showed challenging behaviour, one of whom, A, was severely autistic and would or could not communicate. Many

who are severely autistic are particularly distressed if there are changes to their routine. That distress may be manifested by physical reactions, which can include causing biting and injury to members of the care staff. Handling can therefore give rise to significant difficulty.

7. The Claimant found A sitting at the top of the stairs, as I understand it, which he would often do until it was the usual time for him to go to his bedroom for the evening. She was concerned that agency staff were mishandling the situation and causing him to be distressed. In what may well have been an attempt to restore the familiarity of his usual regime at the time, she thought it necessary to move him physically to his room though he remained determinedly in a sitting position. The employer regarded this as dragging him to the room. The Claimant has been recorded in documents internal to the employer as accepting the word "pulled". Whatever the physical nature of the moving, which she has always maintained caused him no harm nor injury and was well-intended, she was suspended for it on 1 December.

8. At a subsequent disciplinary hearing and, critically, before she was dismissed, the Claimant made a number of complaints about the use of agency staff. The Employment Judge appeared to accept that this was, or was at least capable of being, a public interest disclosure, since the Claimant was concerned about the risk which agency staff with minimal training and familiarity with the residents posed to the residents and to other staff.

9. At the conclusion of the hearing, she was dismissed. She appealed. Pending the appeal, she complained to the Care Quality Commission about similar issues arising at the home. Her appeal was dismissed.

10. The Judge dealt with the issues between the parties as they arose from the ET1 and whatever other documents the Judge may have seen. In the first of what were two originating applications made within days of each other, the Claimant said, in a second paragraph 18, at the foot of 18(a):

> **"...the Claimant will say that the decision to dismiss her was as a consequence of the 'protected disclosures' she had made to the Respondent and to the CQC."**

11. She was thus asserting a claim either under section 47B (detriment short of dismissal "within the meaning of Part X") or section 103A (dismissal where "the reason, or if more than one, the principal reason is that the employee made a protected disclosure") leaving open, as an arguable question of statutory interpretation depending upon the relevant meaning for the purposes of Part X (as to which see **Melia v Magna Kansei Ltd** [2006] ICR 410, CA) the question whether section 47B applies where making the disclosure is a reason for dismissal, but not the principal one. However, in the argument before me the difficult questions that might arise as to whether section 47B is arguable did not arise, and the case is put as one under section 103A. I should therefore say only a little more about section 47B.

12. The Judge at paragraph 7 said this:

> **"The matters raised by the claimant on the 12 September 2012 [that was the date of the disciplinary hearing] might be found to amount to protected disclosures, the claimant stating that she considered that the matters she raised put staff, clients and the public at risk. However it is not disputed that the claimant had already been suspended for an event which occurred on the 1 September 2012 and which was reported to the respondent in writing by an agency worker. The claimant was informed of the investigation and invited to the investigatory meeting on the 12 September 2012 at which the claimant admitted to the conduct which had been reported. The respondent went on to dismiss the claimant, finding that her conduct amounted to gross misconduct. I am satisfied that the undisputed evidence supports the respondent's contention that the reason for the claimant's dismissal was the claimant's conduct and not the concerns raised by her at the investigatory meeting and that there is no prospect of the claimant being able to show a connection between her disclosure and her dismissal."**

13. For the Claimant Ms Wilkinson, who appears under the Free Representation Unit scheme, argues that there was a central dispute. Just as in **Ezsias**, it was about the reason for

the dismissal. Accordingly, just as in **Ezsias**, the Judge could not properly conclude what the actual facts were without hearing evidence and evaluating it.

14. Mr Frew, who like Ms Wilkinson did not appear below, argued that in paragraph 7 the Judge took a relatively uncomplicated approach to a relatively uncomplicated problem. Minutes the meeting of 12 September 2012 were put before the Judge. Those minutes record the Claimant agreeing that she had used force on the resident, putting her arms under the patient's arms and pulling him along the floor; that she conceded (the third page of the minutes) that when she was at work she would sometimes do things she was not supposed to do; and (at the top of the final page) explained that what she did could sometimes look like abuse. Given that, he submits, there could be no room here for the Claimant to succeed.

Conclusion

15. In my view, where the reason for dismissal is the central dispute between the parties, it will be very rare indeed that that dispute can be resolved without hearing from the parties who actually made the decision. Only the employer, through its relevant manager or managers, actually knows what the decision was. Some decisions may be obvious. This is as not as simple a case, necessarily, as that. The decision made on 12 September, as it appears to me, involved two stages. The first was establishing whether the employer believed that the Claimant had been guilty of misconduct. She said not. Even if it were to be accepted, as plainly the Judge did, that there was no dispute about her physically moving the resident who was in a sitting position at the time from the top of the stairs to his bedroom, she argued that in context this was not misconduct. She supported that submission that in similar situations other employees had not been criticised for misconduct.

16. The Judge at paragraph 8 dealt with that by suggesting that the individuals she relied on as comparators were in different circumstances. Of none of them was it said that they had dragged a service user from the landing to his bedroom or the equivalent distance, nor had there been a letter of complaint about them. That may be, but it misses the point that the actions of the Claimant were, she said, to be seen in context. She was therefore submitting that it was unfair or unreasonable for the employer to take the view of her actions which it purported to do. Although the primary role for such submissions is likely to be in considering the question of whether a dismissal was fair or unfair, it also must be relevant to whether such action may have been taken for some other and impermissible reason. An obvious possibility may, in the circumstances, have been what the Judge accepted were protected disclosures. This would not properly and adequately be resolved without hearing the evidence and determining what was a genuine dispute of facts.

17. The second step, however, moves beyond misconduct to the question of sanction. The sanction imposed was dismissal. The claim has been put to me as one in which the Claimant should be permitted to continue with a claim brought under section 103A of the **1996 Act**.

> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."**

The argument was not put upon the basis that the choice of sanction amounted to a detriment.

18. It seems to me a difficult issue whether, if a protected disclosure makes the difference between a final written warning and dismissal in the eyes of the employer, (as a question of causation within context, and taking into account whether a purposive approach to the legislation is appropriate,) that should not be regarded as meaning that the principal reason for the dismissal is the protected disclosure. If it were not, then (depending on the width given to

the words "[dismissal] within the meaning of Part X" in section 47B) there might be a lacuna, in that a real wrong would be done to an employee without any opportunity of redress, despite the statute appearing to single out dismissal for particularly effective remedy. I note that this the decision of the Court of Appeal in **Melia v Magna Kansei** could be argued to be decisive, but this also arguably remains an issue of law which may still need to be determined, if it arises, upon consideration of all of the facts and more detailed submissions than I have had here. I do not think that the argument was anticipated by either Counsel before coming into the hearing, and Mr Frew felt unable to assist beyond referring to the way in which the Judge dealt with the matter at paragraph 7. I raise it for future reference, given the conclusion which it will be obvious by now I have reached, that this is reasoning by the Judge which simply cannot stand.

19. Miss Wilkinson argues, further, that there was an appeal. By that time the Claimant had gone to the Care Quality Commission. She did so after the initial dismissal. She makes the point that, in effect, if the decision to uphold the dismissal was influenced by the disclosures, the Claimant would, on the way in which she put the claim in the ET1, have had a right to complain.

20. This is probably, if it is anything, a claim properly brought under section 47B though again I have not had developed argument upon it. The Judge thought it unnecessary to deal with the reasons for the dismissal of the appeal because the public interest disclosure additionally made, if it was indeed such a disclosure, to the Care Quality Commission was made after 12 September, the date when she was in law dismissed.

21. In conclusion, there was a real dispute of fact which did not fall within nor could be said to fall within one of the exceptional categories identified in **Ezias** as being a dispute which did

not depend upon what was made of evidence for its resolution. To know what was in the mind of the employer it was necessary for the Tribunal to be in a position to hear and evaluate evidence. Only then would it know what the principal reason for dismissal was. On that basis the decision cannot, in my view, stand. The last sentence of paragraph 7 does not hold water. The Judge could not herself determine, without hearing evidence, what the reason for dismissal was, as she purported to do.

22. The other matters which I have raised arise out of the unspecific way in which the Claimant pleaded her claim. Her first language is Polish. It is evident that she does not express herself easily in English, which is at best a second language for her. It may be necessary to take some care to know precisely what she is saying by way of complaint. I do not propose here to determine the scope of her claim and whether it is restricted to the claim for dismissal, though any Tribunal will want to give proper weight to the fact that that is the way it has been addressed before me through Miss Wilkinson. It may be that a Tribunal will wish to consider, if invited to do so by either party, what the scope of the public interest disclosure claim is. I am, however, clear that, on the basis of the error of law as I see it as made by the Judge, the matter as a whole will have to be remitted to a fresh Tribunal. It will be heard by a different Judge since, in my view, the Judge here has so firmly expressed her view as to the prospect of success as to disentitle her from sitting on this matter again. Though I do not myself doubt that she would be able to deal with the matter properly and professionally, the appearance would be otherwise.

23. Accordingly this appeal is allowed, with those directions.

24. It is almost inevitable that, as a consequence of the remission, there will be a further hearing for directions or a further preliminary review. It is likely to be necessary as a first step for the Tribunal to be clear as to the legal basis upon which the claim in respect of protected interest disclosure is put forward - whether it is intended to, and objectively does, cover section 47B as well as section 103A claims, and if so what. The Tribunal will wish to be open to any suggestion by the Respondent that permission to amend the claim may be needed if the former is to be the case. I make no determination of my own about that other than to mention the possibility. Similarly, without in any sense giving a steer, the Tribunal is entitled, should it wish, to consider any application for a further deposit order in respect of the claims as they then see them to be. That is a matter for it to determine entirely afresh on the merits as they strike that Tribunal.

25. With those observations, I would finally like to thank the parties for the succinctness and focus of their submissions and, in particular, recognise the considerable effort of Miss Wilkinson, supported as she is by the Free Representation Unit.