Appeal No. UKEATS/0006/14/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 27 May 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

NATIONAL OILWELL VARCO (UK) LIMITED — APPELLANT

MR JONATHAN VAN DE RUIT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GEOFFREY CLARK (Solicitor) Burness Paull LLP Union Plaza 1 Union Wynd Aberdeen AB10 1DQ
For the Respondent	MR ROWAN ALEXANDER (Solicitor) Instructed by: Stronachs LLP 34 Albyn Place Aberdeen AB10 1FW

SUMMARY

Expenses. The claimant withdrew all claims the day before a Pre Hearing Review at which time bar and disablement were to be discussed. He did so because he was concerned that despite having a case which he had been advised was arguable, he might have lost the case and be ordered to pay expenses.

The respondent argued that the claimant's conduct had been unreasonable, and sought an order of expenses. The EJ refused to make an award, holding that the claimant had not acted unreasonably.

The respondent appealed.

Held : appeal dismissed. The EJ was entitled to reach the decision to refuse to make an award. He did not err in law in doing so.

THE HONOURABLE LADY STACEY

Introduction

1. This is an appeal from a decision of EJ Hosie sitting alone in Aberdeen sent to parties on 14 November 2013. I will refer to the parties as claimant and respondent as they were in the Employment Tribunal (ET). Mr Alexander appeared for the claimant and Mr Clark for the respondent. The decision was to refuse the application by the respondent for an award of expenses.

2. It is important, as always in law, to take this decision in context. The context is that of the Employment Tribunal, which is broadly speaking a Tribunal in which expenses are not ordered to the successful party and is therefore in contrast to most courts. That being so, it is important that, as has been said by Mummery LJ in **McPherson v BNP Paribas (London Branch)** [2004] ICR 1398 that there is a balance to be struck between people taking a cold, hard look at a case very close to the time when it is to be litigated and withdrawing, on the one side of the scale, and others, on the other side of the scale, who do what his Lordship describes as raising a "speculative action", keeping it going and hoping that they will get an offer.

The Employment Tribunal decision

3. The case involved a claim of constructive dismissal, disability discrimination, race discrimination and unlawful deductions of wages. All claims were denied. The form ET1 was lodged on 28 February 2013. A Case Management Discussion (CMD) was held on 29 April, and a |Pre Hearing Review (PHR) was fixed for 19 June to consider time bar and the claimant's status as regards disability. On 18 June the claimant's solicitors intimated by email that the claimant wished to withdraw his claim. They stated

> "This is not the course of action our client wished to take. However after receiving two letters from the Respondent's solicitor threatening to seek an award of expenses against our client(copies of which are enclosed for information) our client has weighed up his

options and decided that, although this is a remote risk due to the fact that he did not raise these proceedings in a vexatious, abusive, disruptive or otherwise unreasonable manner for the sake of his own health and family life, he will withdraw his claim."

4. I cannot tell, of course, what the strengths and weaknesses of this case were. But it has been pointed out to me by Mr Alexander that E J Hosie did say, at paragraph 26, as follows:

> **"However, the claimant in this case had the benefit of legal advice from the outset and the averments in the paper apart to the claim form in support of the various complaints were reasonably detailed and appeared to present at least a stateable case. Further, I think it is reasonable for me to assume that as the claimant continued to instruct his solicitors that he was following their advice to pursue the claim otherwise the solicitors were likely to have withdrawn from acting; and of course his solicitors maintained in their written submissions that they remained of the view, notwithstanding the withdrawal, that the claim: 'had reasonable prospects of success.'"**

5. I accept that Employment Judge Hosie, who is an experienced Employment Judge, was entitled to take those matters into account in deciding that this was not, as it is called in the **McPherson** case, a speculative claim. That is not a matter for me to decide. What I have to look at is whether or not the Employment Judge was entitled to come to the view that he did and, as regards his view on that particular discrete question, I do find that he has set out in paragraph 26 factors that he was entitled to look at.

6. That being so, then, one has to consider whether the whole conduct of the case was unreasonable, and I accept from the detailed and helpful submissions that I heard from Mr Clark that "unreasonable" is to be construed in the normal English construction of that word and that it does not take colour from the words which appear before it in rule 40(3) which are "vexatiously, abusively, disruptively". I am told by Mr Clark that the authority for that is the unreported case of **Dyer v the Secretary of State for Employment** (EAT 183/83). It does seem to me that the construction which took into account those words might be one that would be argued for, but I can see that that has already been the subject of an EAT ruling, and I am perfectly content to proceed on the basis that unreasonably is construed simply as a word in the

English language. Therefore one has to ask whether this particular litigant acted unreasonably or rather, more accurately, one has to ask if E J Hosie was entitled to find that this particular individual did not act unreasonably, taken overall.

7. At paragraph 28 the EJ set out the explanation given to him for the late withdrawal of the claim. By using the verb "included", the Employment Judge indicated that there were other reasons given but not listed. The ones that he does list are possible prejudice to the Claimant's new employment, the impact on his family, and the risk at least of an award of expenses against him were he to be unsuccessful, notwithstanding the fact that he apparently had been advised that his claim had reasonable prospects. It seems to me that those are all matters that it is reasonable for a person to take into account when considering whether or not he should go ahead with litigation. I agree with the EJ's view that these are valid and understandable reasons for withdrawal; I share his concern at the lateness of that withdrawal. Therefore I found that the EJ's view was one he was entitled to come to. It would tend towards discouraging people from taking a cold, hard look at their case if matters such as that were thought to be not reasonable, because that would tend to suggest that departing from a case at the last minute will be regarded as unreasonable conduct. I notice, in the case of **McPherson** at paragraph 28, that there is a quotation from Thorpe LJ there, who said that the 'dawn of sanity' might lead to the withdrawal of cases. I prefer to describe it as "the cold, hard look at the case".

8. Therefore, looking at this overall, as I hold that the Employment Judge was correct to do, it does seem to me that the Employment Judge was entitled to find that it was not unreasonable conduct to proceed to withdraw the claim.

The Claimant's case

9. The relevant rule is rule 40 of schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure Regulations 2004. Mr Clark argued that it was for the Employment Judge to look and see whether there was unreasonable conduct and, if there was, he should then move to the second stage of the test, which is contained in rule 40(2), which is the discretionary part, and he should at that stage decide that, even if there had been unreasonable conduct, whether or not he considered it appropriate to make an award. I accept as correct that there is a two-stage test and that it is perfectly proper for an Employment Judge to decide that there had been unreasonable behaviour but that, on looking at rule 40(2), he will not make an award of expenses. But I find that, when an Employment Judge considers rule 40(3), which despite the numbering he will have to consider first, it is also perfectly in order and in accordance with the Rules for him to consider the whole conduct at that stage.

10. I do not accept any argument, if it were suggested, that the Employment Judge has simply to look at bits of behaviour and decide, when considering rule 40(3), whether or not each individual bit of behaviour is reasonable or unreasonable. That does not seem to me a correct construction of these Rules. It seems to me that an Employment Judge should look under rule 40(3) to see whether or not there is behaviour that should be categorised as unreasonable. If there is, he should then go on to rule 40(2) and decide whether or not to make an order. If he does not find that there is any behaviour that can be properly categorised as unreasonable, then he will not require to make any order and will not require to consider rule 40(2) separately. Lest I am not making that clear, it seems to me, in light of the Rules themselves and the cases, particularly **McPherson** and **Yerrakalva v Barnsley MBC** [2012] ICR 420, that it is for the Employment Judge to consider the whole conduct of the case rather than to consider individual bits of behaviour. That can be taken from the rule itself, in which the wording of the rule is as follows:

> **"(3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceeding by the paying party has been misconceived."**

11. It seems to me that by using the word "conducting", the Rules are looking at overall behaviour and the logical corollary of that is that it might even be possible that there is one piece of behaviour which is in itself unreasonable but overall the behaviour is not unreasonable, and that is before we even get to rule 40(2).

12. To try to summarize what I have said so far then, in considering whether or not the Employment Judge was entitled to proceed as he did, I bear in mind Mr Alexander's argument that I only have jurisdiction to consider errors of law and any facts that the Tribunal Judge has found are not open to me to reconsider. That, of course, is correct. I also bear in mind that, in the case last mentioned, that is **Yerrekalva v Barnsley MBC**, there is a useful admonition that the Employment Appeal Tribunal should not interfere lightly with discretionary decisions by the Employment Tribunal. Once again, that must be correct. Therefore I have to look at this judgment by the Employment Judge and decide whether or not he acted in a way in which he was entitled to act.

13. It is submitted before me by Mr Clark that the Employment Judge made a decision that no Employment Judge could make. With that I disagree. It seems to me that the Employment Judge was well entitled to hold that the Claimant was not acting unreasonably when he decided at what is agreed to be the last minute that he would prefer to withdraw the claim. Mr Clark's subsidiary argument is that this Claimant has acted unreasonably by not obtempering an order for production of documents. This is dealt with in paragraph 30 of the Employment Judge's Reasons, and it requires a little care I think. The Employment Judge noted that it was maintained before him that the Claimant had failed to respond properly to an

order for additional information, which was dated 5 June 2013. I have been informed by parties today and shown that this related to information concerning employment after the termination of the employment relationship between the parties.

14. It was disputed before the Employment Judge that there was a failure to respond properly. He did not determine that dispute, perhaps because that was not something that he could determine in the hearing on expenses. However, he noted that there was a dispute so that he knew that there was a question raised about it. He went on, in his written Reasons, to state that the additional information related to quantification of the claim and that was not an issue for consideration at the PH R and there was no apparent prejudice to the Respondent even if there was a failure by the Claimant in this regard. The PHR was not concerned with quantification.

15. I take the view that that is a decision that the Employment Judge was entitled to come to in light of all the information that was before him. It might be that I personally would take a different view of a person about whom it could be said he had not obtempered an order, because there is no point in making orders if they are not obtempered. But the question is not before me and the question is whether the Employment Judge was entitled to hold in all the circumstances that that was not such as to put the Claimant into the category of a person who acted unreasonably. It seems to me, without too much difficulty, that the Employment Judge was entitled so to find. So if, as is plain from his written judgment he did, he factored in what he found at paragraph 30, then I say that he was entitled to factor that in and to hold that that did not necessitate a finding of unreasonable behaviour on the part of the Claimant.

Conclusion

16. Therefore the appeal fails because I find that the Employment Judge was entitled to make the decision that he made and that he set out reasons for making that decision. Therefore there is no error of law, and the decision will stand.