Appeal No. UKEAT/0534/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 May 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR P DOUGHTY — APPELLANT

THE SECRETARY OF STATE FOR WORK AND PENSIONS
(JOBCENTRE PLUS) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS HELEN GOWER (of Counsel)
For the Respondent	MISS LAURA PRINCE (of Counsel) Instructed by: Treasury Solicitors The Employment Group One Kemble Street London WC2B 4TS

SUMMARY

PRACTICE AND PROCEDURE - Amendment

The Employment Judge refused an application for permission to amend the ET1 to claim victimisation. She approached the application on the footing that there was no clear legal basis for the amendment. Held: there was a clear legal basis for the amendment; for this and other reasons the Employment Judge's approach to the application was flawed; and if she had approached the application correctly in law she would have granted it. Permission to amend granted (**Jafri v Lincoln College** [2014] EWCA Civ 449 considered and applied).

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Peter Doughty ("the Claimant") against part of a judgment of Employment Judge Sharp, sitting in the Employment Tribunal at Cardiff. The Claimant had brought against the Secretary of State for Work and Pensions ("the Respondent") a complaint of detrimental treatment due to trade union activities contrary to provisions within Part III of the **Trade Union and Labour Relations (Consolidation) Act 1992**. He sought permission to add a claim of victimisation under the provisions of the **Equality Act 2010**. By her judgment dated 31 August 2012 the Employment Judge refused this application.

The Background

2. The Claimant was a long-serving employee of the Respondent and Branch Secretary for the Northwest Wales branch of the PCS union. In that capacity he had been acting for a member who had been absent from work through ill-health. He was representing her in proceedings for disability discrimination. While those proceedings were ongoing, he was also in communication with her line manager, seeking an adjustment in the way the attendance procedure applied to his member. On 16 February 2012 they exchanged e-mails and he then telephoned her at her invitation. In that telephone call he pressed his member's case. On 6 March the line manager made a formal complaint under the Respondent's harassment, discrimination and bullying policy. She did not suggest that the telephone call was rude or aggressive, simply that she felt harassed and put under pressure by it. The Claimant's case is that he was doing no more than representing his member and that he did nothing inappropriate. This was indeed the conclusion which the Respondent's investigation reached.

3. That investigation began on 30 April 2012. The complainant was interviewed on 16 May. The Claimant was informed of the investigation on 25 June 2012, when he was given formal notification and details of the complaint. He was interviewed on 10 July 2012. He was informed on 23 July 2012 that the complaint was not upheld.

The Employment Tribunal Proceedings

4. The Claimant presented his ET1 claim form on 10 July 2012. He alleged that he had suffered detriment on grounds relating to trade union activities. He said that informing him of the investigation caused him to be shocked and upset and that he continued to be very worried until it was resolved. This was especially so since he had to attend his member's tribunal hearing on 3 and 4 July with the prospect of the investigation looming over him, which he found both stressful and distracting. The Respondent presented its ET3 denying liability on 15 August 2012.

5. On 20 August 2012 the Claimant applied to amend his claim to include a claim of victimisation. The precise terms of the amendment he sought were as follows:

> **"That the H1 complaint made by Wendy Roberts on or about 6/03/2012 was an act of victimisation against the Claimant who was both a potential witness and the Claimant's representative in the ET claim made by Deilwen Griffiths (Case No.1605050/2011). Thereafter the Respondent has used this act of victimisation as the grounds for instigating a HRMIS investigation against the claimant which ultimately caused the claimant to suffer detriment for the period 25/06/2012 to 10/07/2012."**

6. The Respondent opposed the application. It was refused by the Employment Judge after receiving submissions during a telephone hearing. Her reasons are brief. They are as follows:

> **"The Claimant's application to amend his ET1 and bring a claim for victimisation in relation to the act of Ms Roberts raising a grievance in respect of his conduct is dismissed on the basis that the Claimant was unable to provide a legal basis for the claim and specify how this claim was different to detrimental treatment for trade union activities. Also, the claim on the face of it appeared to be more of a claim to be brought by a third party, not the claimant. In any event, the claimant could have brought the claim when he issued the ET1 originally and disclosed no reason why he required an extension of time or why such an extension would be in the interests of justice."**

Statutory provisions

7. As I turn to the parties' submissions, it is convenient to have the key statutory provisions in mind.

8. Victimisation in the employment field is prohibited by virtue of section 39(4) of the **Equality Act 2010**, which prohibits an employer from victimising an employee "by subjecting that employee to any detriment". Victimisation itself is defined by section 27 of the Act. It is sufficient to read section 27(1) and (2):

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

9. Section 120 confers on Employment Tribunals jurisdiction to determine complaints relating to prohibited conduct including victimisation in the field of work. Section 123(1) and (3) makes the following provision about time limits:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of—**
>
> **(a) the period of 3 months starting wi th the date of the act to which the complaint relates, or**
>
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **(2) Proceedings may not be brought in reliance on section 121(1) after the end of—**
>
> **(a) the period of 6 months starting with the e act to which the proceedings relate, or**
>
> **(b) such other period as the employment tribunal thinks just and equitable**

Submissions

10. The appeal was originally brought on much wider grounds, but at a hearing under Rule 3(7) Langstaff P allowed it through to a Full Hearing on an Amended Notice of Appeal containing essentially four points, which Miss Gower has developed today on the Claimant's behalf.

11. Firstly, she submits that there was a clear legal basis for the challenge, which in substance was set out in the proposed amendment. The Claimant's case was that as representative for and supporter of the Claimant in her disability discrimination claim he was doing acts protected by section 27(2); that the manager's complaint about him and the subsequent investigation of that complaint amounted to acts of victimisation; and that the Respondent itself adopted and used the complaint to instigate an investigation against him. She submits there was no justification for the Employment Judge saying that the Claimant was unable to provide a legal basis for the challenge. She suggests tentatively that the Employment Judge may have thought that only the person asserting discrimination could bring a claim for victimisation. She has referred me to points in the papers before me which, while not in any way conclusive, might lend themselves to that interpretation.

12. Secondly, she submits that the Employment Judge's reference to specifying "how the claim was different to detrimental treatment for trade union activities" was beside the point. They were different claims, but both were claims the Claimant was entitled to make. The closeness of the link between them was a reason for granting the application not a point in favour of the Respondent.

13. Thirdly, she submits that the Employment Judge erred in thinking that the claim was "more of a claim to be brought by a third party". This was not so - for he was the person who had suffered the detrimental treatment.

14. Finally, she submits that the claim was in time, not late. The Claimant, she submits, was not only complaining about 6 March. He was complaining about a series of acts up to and including and beyond 25 June. She points to an agreed statement, made as a result of an order of Langstaff P, as to how the case was put to the Employment Tribunal. The agreed statement reads:

> **"The Employment Tribunal was asked to allow an application to amend the claim being that the Appellant had been treated less favourably for the period 25/06/2012 to 10/07/2012 by being subjected to a HRMIS investigation and a reason for this treatment was that the Appellant had made a protected act."**

So, she submits, the claim was not so narrow as to relate only to 6 March.

15. On behalf of the Respondent Miss Prince reminds me that the principles governing questions of amendment are set out in **Selkent Bus Company v Moore** [1996] IRLR 661. She further reminds me that a decision whether or not to grant permission to amend is essentially discretionary, and there are strict limits to the extent to which an appellate court may intervene. As to the first ground, she submits that the Employment Judge was entitled to take into account that the Claimant was unable to provide a legal basis for his challenge. As to the second, she submits that the Employment Judge was entitled to take into account that the Claimant could not say how this claim was different to detrimental treatment for trade union activities. This goes to the extent of the prejudice he might suffer if the amendment were not allowed. As to the third ground, she submits that the Employment Judge was responding to the Claimant's explanation of his claim, which appeared to have to do with its impact on his representation of his member at the Employment Tribunal. She submits, in any event, that these factors were not

decisive. The Employment Judge would in any event have determined the matter against the Claimant on time points.

16. Miss Prince has concentrated her submissions on the fourth ground. She argues that the Employment Judge was correct to find the claim out of time. The act of victimisation occurred on 6 March 2012. This was "the act to which the complaint relates" (section 123(1)(a)). If the complaint by the line manager was in itself a detriment, the fact that the Claimant, the victim of the complaint, did not learn of it until later is immaterial. She relies on **Garry v London Borough of Ealing** [2001] IRLR 681 and **Virdi v Commissioner of Police for the Metropolis** [2007] IRLR 24 for the proposition that an employee may be subjected to a detriment before he or she knows about it.

Discussion and Conclusions

17. This is an appeal against a case management decision. The test to be applied in considering whether to overturn was stated by Henry LJ, with whom Beldam LJ and Thorpe LJ agreed, in **Noorani v Merseyside Tec Ltd** [1999] IRLR 184, at paragraph 32:

> **"I am satisfied, contrary to what the Employment Appeal Tribunal found, the ET were here exercising the classic discretion of the trial judge in the issue of witness summonses and in like matters. Such examples of such a discretion lie not only in the issue of witness summonses but whether to grant an adjournment or whether to order the trial of a preliminary issue etc. These decisions are entrusted to the discretion of the court at first instance. Appellate courts must recognise that in such decisions different courts may disagree without either being wrong, far less having made a mistake in law. Such decisions are, essentially, challengeable only on what loosely may be called *Wednesbury* grounds, when the court at first instance exercised the discretion under a mistake of law, or disregard of principle, or under a misapprehension as to the facts, where they took into account irrelevant matters or failed to take into account relevant matters, or where the conclusion reached was 'outside the generous ambit within which a reasonable disagreement is possible', see *G v. G* [1985] 1 WLR at 647.**

18. In **Selkent Bus Company v Moore** [1996] IRLR 661 Mummery J, the President, gave general guidance as to how applications for leave to amend should be approached. **The Selkent** principles, as they are generally known, include the following:

> **"(4) Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.**
>
> **(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.**
>
> **(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.**
>
> **(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978 .**
>
> **(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time — before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."**

19. I will first consider ground 1. I do not understand why the Employment Judge thought that the Claimant had been unable to provide a legal basis for the claim. It may be that the Employment Judge was concerned that the detriment was suffered by the Claimant's client not the Claimant. It may be that the Employment Judge took too narrow a view of the ambit of section 27 - the Employment Judge's Reasons for refusing reconsideration may point to this conclusion. But I do not think the precise nature of the Employment Judge's mistake matters. To my mind, the draft proposed amendment plainly raised a valid claim of victimisation. The Employment Judge should have approached the application to amend on this basis. It was an error of law not to do so.

20. I turn to the second ground. I see no force, as a point against granting permission to amend, in the observation by the Employment Judge that the Claimant was unable to say how

the victimisation claim was different to the claim for detrimental treatment by reason of trade union activities. Both were viable claims. The victimisation claim ought to have been considered on its own merits. If relevant at all, the point was relevant to the question of prejudice. Here, to my mind, the factor pointed in the Claimant's favour, not against her. To the extent that the claims were closely linked, as they were, there was little if any prejudice to the Respondent in having to face both of them. There was, to my mind, potential prejudice to the Claimant. The test under section 146 of the 1992 Act is a "sole or main purpose" test - very different to the test in a claim for victimisation.

21. I turn then to the third ground – the Employment Judge's remark that the claim appeared to be more of a claim to be brought by a third party. This was, to my mind, simply misconceived. The claim was plainly one which the Claimant was entitled to bring. He had alleged upset and distress which he had himself suffered due to the investigation.

22. I turn finally to fourth ground. I do not find it entirely easy to see what the Employment Judge was driving at when she said that the Claimant could have brought the claim when he issued the ET1 originally. The complaint by Miss Roberts was more than three months prior to the presentation of the ET1. I find myself wondering whether she was dealing with the delay in bringing the victimisation claim as a general question of discretion rather than as a strict time limit point.

23. If she was dealing with the question of delay as a time limit point, then it is true that a claim for victimisation in respect of Miss Roberts' complaint on 6 March would have been out of time (see **Garry** and **Commisioner of Police for the Metropolis v Virdi** at paragraph 25). The Employment Judge would, however, then have had to consider whether subsequent acts

such as the commencement of the investigation, the effective charging of the Claimant in June and the interviewing of the Claimant were also acts of victimisation. It is plain from the agreed list of issues that this hearing encompassed that question. To my mind, therefore, as a separate ground for refusing amendment, the time point has no substance.

24. It follows from what I have said that the Employment Judge's refusal of permission to amend was vitiated by error of law. The question arises, what should the Appeal Tribunal now do? Miss Gower submits that the Employment Appeal Tribunal is a position to substitute its own view. She says that this is right on established principles and also that, if necessary, her client would consent to doing so. Miss Prince submits that the Employment Appeal Tribunal is not in a position to substitute its own view and that her client does not consent to the Employment Appeal Tribunal approaching the matter for itself.

25. The principles which I must apply have recently been set out afresh by the Court of Appeal in **Jafri v Lincoln College** [2014] EWCA Civ 449. Once granted that there is an error of law, the Employment Appeal Tribunal must send the case back unless the Employment Appeal Tribunal is able to conclude what the result must have been without the error. It is not for the Employment Appeal Tribunal to make any factual assessment for itself. In agreeing with this approach, Underhill LJ said (in a judgment with which Sir Timothy Lloyd agreed) that the disadvantages of it could be mitigated to some extent if the Employment Appeal Tribunal always considered whether the case is indeed one where more than one answer is reasonably possible.

26. I have reached the conclusion, applying **Selkent** principles, that this is not a case where more than one answer was reasonably possible. In my judgment, if the Employment Judge had

approached the matter correctly in law, she would inevitably have granted the application for permission to amend.

27. Dealing with **Selkent** principles briefly, the Employment Judge had to take into account the nature of the amendment. This was not purely a matter of substitution of a label, but it was far from raising new factual allegations on any significant scale. The amendment, while raising a new claim and requiring the actions of the Respondent to be assessed for another reason, was close to the existing claim in most respects. If the Employment Judge had considered the applicability of time limits properly, she might have concluded that the complaint on 6 March was out of time. She would then have to consider the impact of the investigation as well. But she would also have had the compelling point to bring into account, namely that the Claimant was not aware of the complaint or the investigation until 25 June, had brought his claim within a very short time, and was making his application for amendment within two months. That, to my mind, was a factor of very great force for the Employment Judge to take into account. It relates to the timing and manner of the application. This was a prompt application, made as I have said, within two months of the Claimant discovering the essential facts in issue.

28. Bearing all those points in mind, I have no doubt that, if she had applied the law correctly, the Employment Judge would have, and should have, granted this amendment. It follows that the appeal will be allowed. Permission to amend will be granted, and the matter will be returned to the Employment Tribunal probably for further case management before any hearing.

29. On behalf of the Claimant Miss Gower has submitted that any further case management would be much better undertaken at a hearing rather than over the telephone. I see the force of

that, but it is not possible for the Employment Appeal Tribunal to know the many circumstances which may bear on the question whether to deal with the matter on the telephone or at an oral hearing. It is properly a matter for consideration by the Employment Tribunal.