Appeal No. UKEAT/0309/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 December 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MRS J AFOLABI APPELLANT

LONDON BOROUGH OF BARKING AND DAGENHAM RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR NICHOLAS EDWARDS
(Employment Law Advocate)
Taylor Rose Law LLP
7 Moorgate
London
EC2R 6AF

For the Respondent

MR PAUL STADDON
(of Counsel)
Instructed by:
London Borough of Barking &
Dagenham Legal Services
The Legal Practice
1st Floor Annex
Civic Centre
Dagenham
Essex
RM10 7BN

SUMMARY

JURISDICTIONAL POINTS - 2002 Act and pre-action requirements

PRACTICE AND PROCEDURE - Costs

Statutory Grievance Procedure compliance was raised for the first time at the start of the substantive hearing by the Respondent. The Employment Tribunal allowed the point to be taken and upheld it. Permissible approach; see **Glasgow v Cross**; **Fraser**, cf. **Sandwell** (Elias J) *obiter* remarks. Appeal dismissed.

Point raised in the appeal arguable. No costs ordered in the appeal despite the Respondent's offer not to enforce the Employment Tribunal costs award if the appeal is withdrawn.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. It might now be thought that, having been repealed in April 2009, the so-called rebarbative statutory disciplinary and grievance procedures introduced by the **Employment Act 2002** and the **2004 Dispute Resolution Regulations** (DRR) made thereunder would no longer trouble ETs and the EAT. Indeed I note that the learned editors of *Harvey on Industrial Relations and Employment Law* have removed the text covering the law relevant to the present appeal as "obsolete": see volume 1 AII/319/347.

2. This week, in December 2014, I have heard two cases raising points on the former statutory regime. The present case is an appeal by Ms Afolabi, the Claimant before the East London ET against part of the Judgment of an ET chaired by Employment Judge O'Rourke, promulgated with Reasons on 4 April 2013. It raises yet again the question as to when and how a Respondent must raise a jurisdiction issue under the Regulations.

The Background

3. By way of background the Claimant began working for the Respondent Council as an Agency Worker in February 2006. She attained employee status as a Floating Support Team Leader on 14 January 2008. On 30 May 2008 she tendered her resignation, which took effect on 30 June.

4. By a Form ET1 lodged on 27 September 2008 she raised claims against the Respondent of constructive unfair dismissal, protected disclosure detrimental treatment (the whistleblowing claim), age-related harassment and racial harassment.

5. The Respondent lodged an ET3 on 29 October 2008 denying the claims but taking no jurisdictional point on the **DRR** in relation particularly to the whistleblowing claim. Indeed, compliance with the SGP was admitted at paragraph 2.5. Equally no such point was taken at a CMD before Employment Judge Goodrich held on 1 June 2009 (see paragraph 16 of the CMD order dated 11 June).

The Employment Tribunal Hearing

6. The case came on for substantive hearing before Judge O'Rourke's Tribunal on 28 February 2013. It continued until 8 March. Mr Daniel Matovu of Counsel was then instructed on behalf of the Respondent. The Claimant was represented by Mr Hendron of Counsel.

7. At the outset of the hearing Mr Matovu raised the jurisdictional question as to whether the Claimant had raised the necessary grievance in relation to the discrimination and whistleblowing complaints. He later limited his objection to the latter complaint only.

8. Mr Hendron was taken by surprise. The point had not been taken before that morning. In these circumstances (see Reasons, paragraph 8) the Tribunal adjourned the hearing until the following morning to allow him to prepare his response. In fact, argument on the point was heard on the second and third days of the hearing.

9. Having considered section 32(6) of the **Employment Act 2002** and the EAT cases of **Plummer v DMC Business Machines plc** (UKEAT/0381/06/MAA 21 December 2006, a reserved Judgment of Underhill J, as he then was); **Glasgow City District Council v Stefan Cross and Others** (UKEATS/0007/09/BI June 2009, Lady Smith presiding); and **Fraser v SW London St George's Mental Health Trust**, reported at [2012] ICR 403 (Underhill P again),

the Tribunal concluded that they could and should entertain the Respondent's new jurisdiction point, ruled that no compliant grievance had been raised in respect of the whistleblowing complaint and dismissed it on that basis.

The Proceedings in the EAT

10. Against the Tribunal's Judgment the Claimant, then representing herself, lodged a Notice of Appeal. The original Grounds of Appeal are not entirely easy to follow and the appeal was initially rejected under EAT Rule 3(7) by HHJ Eady QC on the paper sift. Dissatisfied with that opinion the Claimant exercised her right to an oral hearing under Rule 3(10). That Appellant-only hearing took place before HHJ Richardson on 3 September 2014. On that occasion the Claimant was represented by Mr Edwards, who appears on her behalf today. Judge Richardson was persuaded to allow the appeal to proceed to a Full Hearing on four amended grounds, settled by Mr Edwards. That is the hearing now before me. The appeal is resisted by the Respondent for the detailed reasons advanced in the Respondent's Answer. Mr Staddon now appears on behalf of the Respondent.

The Law

11. The relevant line of authority begins with my Judgment in **Holc-Gale v Makers UK Ltd** [2006] IRLR 178, considered by Lady Smith in the **Glasgow** case at paragraph 20 and following, where I held that it was sufficient for the Respondent to raise the SGP point for the first time at a CMD, it not having been raised in the Respondent's Form ET3. After **Plummer v DMC** the next case in time is the Judgment of Elias J in the **Sandwell** equal pay case: see **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** [2009] IRLR 12 at paragraphs 82 to 84, considered by Lady Smith in **Glasgow** at paragraphs 25 to 26. I note that, in his reasons for allowing this appeal to proceed, Judge Richardson was assisted by Elias J's

(as he then was) reference to the need for an ET to apply ordinary amendment (that is **Selkent**) principles in exercising its discretion before allowing the late point to be taken. In the final case, **Fraser**, the circumstances were similar to the present case. The Respondent took an SGP point for the first time on the first day of the substantive hearing. Underhill J reviewed all the above authorities (see paragraph 11) and agreed with the approach taken by Lady Smith. The point may be taken at any time before the ET commences its consideration of the substantive issues (see paragraph 12). That was the position in **Fraser**, as it was in the present case. The real question was one of fairness. Has the Claimant had a proper opportunity to consider and address the ET on the point? If so, it is open to the Tribunal to consider and adjudicate on the SGP point on its merits.

The Claimant's Case

12. By his Amended Grounds of Appeal Mr Edwards argues that the point determined by the EAT in the **Glasgow** case, namely whether it is necessary to apply to amend the Form ET3, was wrongly decided, Lady Smith having found that it was not necessary to do so and reverse the ET decision on that ruling. He seeks to distinguish **Fraser** on the basis that it was decided solely on the question of fairness, rather than the question as to whether an amendment to the ET3 on **Selkent** principles was necessary before the Tribunal could properly consider the point.

Conclusions

13. As a matter of practice in the EAT, where there are apparently conflicting earlier decisions, although not bound by earlier decisions, we will normally follow the most recent decision, provided the relevant earlier decisions have been considered, unless it appears that that later decision was plainly wrong.

14. Here the most recent decision is **Fraser**, which approved **Glasgow**. Were those cases plainly wrongly decided? In my opinion they were not; on the contrary, I respectfully agree with both decisions. I have carefully considered the reasoning of Elias J in the **Sandwell** case at paragraphs 82 to 84, as did Lady Smith and Underhill J in the cases which followed. First, it is to be noted that the comments of Elias J were strictly *obiter*, since he held in **Sandwell** that the Claimants had raised a compliant grievance (see paragraph 82). Accordingly it was strictly unnecessary for him to determine the procedural point which did arise directly for determination in certainly the **Glasgow** if not the **Fraser** case and in the present case.

15. Secondly, Elias J goes no further at paragraph 84(2) than to say that normally the procedural bar should be raised in the Form ET3. I respectfully agree. At paragraph 84(3) Elias J opined that, even if a formal amendment to the ET3 was not required, then before permitting a Respondent to take the point orally, ordinary **Selkent** principles should be applied.

16. It is at this point that I, with great diffidence, part company with the former President.

17. In **Selkent**, Mummery P (as he then was) was concerned with a late application by the Claimant to add to his complaint of ordinary unfair dismissal a claim that his dismissal had been for an inadmissible reason, namely his trade union activities. The Tribunal allowed the amendment, a ruling which was reversed on appeal to the EAT. In the course of his Judgment, see [1996] ICR 836, Mummery P said, where a wholly new claim is sought to be raised, as in **Selkent** itself, then time limits must be considered and the Tribunal must consider the balance of prejudice between the parties in allowing or refusing the amendment including the lateness of the application and the reasons for that delay.

18. In this instance, plainly the question of time limits does not arise. Secondly, and importantly, the Respondent here sought to raise a jurisdictional bar. As to the balance of prejudice, that is essentially the question of fairness addressed by Underhill J in **Fraser** and indeed by Elias J in **Sandwell** at paragraph 84(4) where he said this:

> **"However, on the particular facts of the case it does appear that the solicitor acting for the employers had made it plain that he was not in a position to argue the question of amendment, and indeed his application was for the issue to be postponed and be considered at a later stage. In the circumstances … I think the employment judge ought to have adjourned that aspect of the case to ensure that principles of natural justice were properly complied with. …"**

19. I respectfully agree with that approach. Ultimately it is a question of fairness as between the parties. In **Fraser**, at paragraph 12, Underhill J noted that the fairness point raised in the Notice of Appeal, that Counsel for the Claimant had been prevented from developing his submissions on the SGP point, was no longer live before the Underhill division hearing the full appeal.

20. Similarly in the present case there is no extant Ground of Appeal before me contending that Mr Hendron did not have a proper opportunity to respond to Mr Matovu's late procedural point. That is unsurprising. The point having been taken at the outset of the hearing on 28 February the Tribunal, very properly in my view, adjourned that question to the next day in order to allow Mr Hendron time to prepare himself, and then heard argument over the next two days (see paragraph 10).

21. In short, having considered the Tribunal's reasoning at paragraph 17, I am satisfied that they took a correct approach in law, following **Glasgow** and **Fraser** and permissibly allowed the jurisdictional point to be taken without formal amendment, despite it being raised very late in the proceedings, having first ensured that the Claimant's representative had a fair opportunity to deal with it.

22. Finally there is a challenge to the substantive finding by the Tribunal (see paragraphs 6 and 7) that the Claimant had not complied with step 1 of the Statutory Grievance Procedure in relation to the whistleblowing compliant. Having been taken to the source documents by both Mr Edwards and Mr Staddon, I am satisfied that again the Tribunal reached a permissible finding at paragraph 7.

23. It follows that this appeal fails and is dismissed.

Costs

24. Following my Judgment in this case, Mr Staddon makes an application for costs on behalf of the Respondent and has put before me a costs schedule totalling £4,550.39 for the costs of both Counsel and solicitors, which I regard as entirely reasonable. The question is whether in principle I ought to make an order for costs. First, as to the merits of the appeal Judge Richardson thought there was a point to argue. Having heard the argument on both sides, I am persuaded by Mr Staddon to dismiss the appeal, but that is not to say it is misconceived. It required an investigation into precisely what was decided in the line of cases referred to in my Judgment, and I would not order costs under Rule 34A on that basis. But Mr Staddon points to an offer made without prejudice save as to costs by the Respondent to forgo enforcing the ET's order for the Claimant to pay £10,000 costs to the Respondent if the Claimant dropped the appeal. That is a less generous offer than might at first appear because no agreement was reached, the appeal proceeded and therefore it remains open to the Respondent to take such steps as it is advised to take to enforce that costs order. I do not regard this as an offer of the type where refusing to withdraw the appeal amounted to unreasonable conduct on the part of the Claimant.

25. In these circumstances I shall dismiss the Respondent's costs application.