Appeal No. UKEAT/0106/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 December 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MISS O PHELAN — APPELLANT

ROLLS-ROYCE PLC AND OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondent	MS NAOMI ELLENBOGEN (of Counsel) Instructed by: Eversheds LLP Solicitors 1 Callaghan Square Cardiff CF10 5BT

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

HARASSMENT - Conduct

Appeal permitted to proceed on two grounds. First, having found a potentially fair reason for dismissal (SOSR), did the Employment Tribunal consider fairness under section 98(4) **Employment Rights Act**? They did. Secondly, did they treat a remark about pregnancy as a complaint of sexual harassment as well as direct discrimination? They did. Appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Nottingham Employment Tribunal. The parties are Miss Phelan, Claimant and Rolls-Royce Plc and eight named individuals, Respondents. I am now concerned only with the Claimant's case against her employer, Rolls-Royce. Mr Storer, to whom I shall refer later, was not a named Respondent in any of the seven separate claims lodged by the Claimant at the Employment Tribunal. All claims were combined and came on for hearing before an Employment Tribunal chaired by Employment Judge Britton between 9 and 31 July 2012. Following consideration in private the Tribunal delivered a Judgment with Reasons running to 64 pages on 8 October 2012. All claims were dismissed, save for one complaint of victimisation in respect of which the Claimant was awarded injury to feelings compensation of £2,000. Subsequently, on the Respondents' application, the Claimant was ordered to pay costs in the sum of £10,000. The Respondents' estimated their total costs in defending this claim at £300,000.

2. Against both the Liability and Costs Judgments the Claimant appealed. Her original Notice of Appeal on liability was rejected by Mitting J on the paper sift by letter dated 25 February 2013. Further appeals against both the Liability and Costs orders were rejected under Rule 3(8) by HHJ Richardson by letters dated 13 June. Dissatisfied with those opinions the Claimant exercised her right to an oral hearing under Rule 3(10) which came before Slade J on 21 February 2014. In a full Judgment that Judge rejected all Grounds of Appeal save for two which were permitted to proceed to the full hearing now before me; see paragraphs 19 and 20 and the Amended Grounds of Appeal permitted by Slade J. This hearing was first listed for 17 July 2014 on 29 May. Three adjournment applications were made by the Claimant and refused by the Deputy Registrar on 17 June and by me on 24 June and 1 July. Meanwhile, the Claimant

had sought permission to appeal to the Court of Appeal. On 16 July Elias LJ directed that the Employment Appeal Tribunal hearing fixed for the following day be adjourned pending consideration of the Claimant's permission application in respect of those grounds rejected by Slade J at the Rule 3(10) stage. His Lordship indicated that the appeal should be restored for hearing as soon as the Court of Appeal had dealt with that permission application. By order dated 31 July that same Lord Justice ruled that the Grounds of Appeal to the Court of Appeal were totally without merit, leaving only the two grounds identified by Slade J to proceed to this full hearing, listed for today by a Notice of Hearing dated 6 October.

3. Again the Claimant, acting through her partner Mr Sheppard, has sought to have this date vacated. Her applications were dismissed by the Deputy Registrar on 16 October and by me on 7 and 13 November for the reasons given in letters of those dates.

4. A final application for an adjournment was made yesterday and renewed this morning on paper. The Claimant does not appear and is not represented this morning. Ms Ellenbogen QC, now appearing for the Respondent, Mr Barklem, Junior Counsel as he then was having appeared below, opposes the application. She submits that there is no medical evidence that the Claimant is incapable of attending, including the recent head injury for which treatment was received at her local Accident & Emergency on 9 November 2014. Secondly, her attendance is not required; no evidence is required at this hearing. Further she has in the past instructed Counsel, Mr James Dawson, who appeared at the Rule 3(10) hearing before Slade J and Mr Sheppard has pointed out in correspondence that the Claimant has travelled to Manchester for a consultation with Mr Paul Gilroy QC on 27 May 2014. This appeal was lodged on 19 November 2012. Justice delayed is justice denied. I am required to consider the interests of both parties. I agree with those submissions. In these circumstances, I directed that the hearing

today would proceed. I have therefore taken into account the papers, in particular the observations of Slade J in her Rule 3(10) Judgment and the Amended Grounds of Appeal, and taken account of the submissions made by Ms Ellenbogen this morning conscious of her duty owed to the court particularly where the Appellant is unrepresented and not present today.

5. By way of background I gratefully adopt the summary provided by Slade J at paragraphs 2 to 7 of her Rule 3(10) Judgment. For present purposes it is necessary only to place in context the two extant areas of appeal.

Unfair Dismissal

6. It was the employer's case accepted by the Employment Tribunal as Slade J records at paragraph 20 of her Judgment that the Claimant was dismissed for some other substantial reason, namely that having been placed on medical redeployment for nine months, no alternative employment could be found for her in circumstances where, the Tribunal found, she had failed to engage with the redeployment process; see paragraph 146. At paragraph 20 of her Judgment, Slade J states that the Tribunal did not then go on to consider the reasonableness of the decision to dismiss for that reason under section 98(4) **Employment Rights Act 1996**. Having now had the advantage of submissions by Ms Ellenbogen on behalf of the employer I am unable to share that assessment. Simply reading on to paragraph 147, the Employment Tribunal there say:

> **"Stopping there, was this dismissal unfair within the range of reasonable responses? Given all the history of this matter and our findings, it follows that we find the dismissal was fair within the range of reasonable responses. …"**

Thus, the Tribunal did ask themselves and answer the reasonableness question, under section 98(4) **ERA**. Ms Ellenbogen has carefully referred me to those findings by the Tribunal which lead inexorably to that conclusion. For completeness, the Tribunal then returned to that

question in answering the agreed list of issues (plus one) in their concluding paragraph (paragraph 163).

7. At paragraph 163(g) they say:

> **"Was the act of dismissal fair? - yes? [sic]"**

That would appear to dispose of the appeal point identified by Slade J in her Rule 3(10) Judgment. However, in her order, seal-dated 14 March 2014 at paragraph 5, the Judge granted leave (permission) to amend the Notice of Appeal in accordance with the draft produced to the Employment Appeal Tribunal at the Rule 3(10) hearing when the Claimant was represented by Counsel, Mr Dawson.

8. Turning to the Amended Grounds of Appeal under the heading 'Unfair dismissal' at paragraphs 2 to 7, the pleader refers to the Tribunal's observations at paragraph 146 of the Reasons about the doctrine of frustration of contract.

9. True it is, on a fair reading of paragraph 146, that the Tribunal speculate as to the possibility of frustration arising had the employer done nothing at the end of the nine month redeployment process. However, that is not what happened on the findings of fact. Instead, the Claimant was dismissed by a letter dated 29 September 2011; see paragraph 145. It follows, in my judgment, that there is no substance in the unfair dismissal point either as identified by Slade J or in the Amended Grounds of Appeal and I therefore move to the second ground for which permission was granted.

The Storer Pregnancy Remark

10. Among her many and various claims the Claimant raised allegations of sexual harassment contrary to the **Sex Discrimination Act 1975**, then in force. The principle allegations were directed towards two male employees, Mark Lee and Paul Gamble. Those allegations, described by the Tribunal as "malicious", were rejected as a matter of fact; see paragraph 36.

11. During her employment the Claimant embarked on a three stage grievance process. A grievance hearing took place before Mr Andy Storer, General Manager, on 16 April 2009. Also present was Ms Caldwell of HR and the Claimant's Trade Union representative, Mr Ian Bestwick.

12. In the first of her seven forms ET1, presented on 18 September 2009, the Claimant said this in her particulars of complaint:

> **"During the grievance hearing AS [Mr Storer] asked me inappropriate questions about my personal life. AS asked me if I had just had a baby. I felt that this was sexual discrimination."**

13. At paragraph 19, page 21 of the Reasons, the Tribunal having heard from Mr Storer in evidence, found him to be impressive and consistent. He did not deny that in the course of his grievance investigation he might have asked the Claimant as to whether she might be pregnant or words to that effect. The Tribunal then add:

> **"This is one of the Claimant's claims of sexual harassment/discrimination."**

14. Thus the Tribunal was alive to the alternative ways in which the Claimant's complaint about the Storer pregnancy remark was made.

15. Pausing there, this second ground of appeal before me for full hearing, is summarised by Slade J at paragraph 19 of her Rule 3(10) Judgment in this way:

> **"… Although originally in the ET1 this allegation [the Storer remark] had been pleaded as direct sex discrimination. Following an enquiry for particulars made by solicitors for the Respondent, in a letter of 21 October 2011 particulars were given in which it was made clear that this, as well as other allegations, were being put as harassment as well as direct discrimination. The Employment Tribunal did not consider this allegation as one of sexual harassment and, in my judgement, for that reason this appeal in this regard is fit to proceed to a full hearing. The grounds of appeal on this issue are to be amended."**

At paragraph 19 of her Judgment Slade J refers only to paragraph 39, at page 26 of the Reasons.

16. The Amended Grounds of Appeal, under the heading 'Sexual Harassment' (paragraphs 8 to 10) avers that the Tribunal failed to determine the Claimant's claim of harassment arising out of its findings at paragraph 39 (referred to by Slade J as above) and further, that on the facts the Tribunal ought to have found the Storer remark to be discriminatory on the ground of sex and/or sexually harassing.

17. It is tolerably plain to me that Slade J, at her Appellant only hearing, was not referred to paragraph 19, page 21, of the Reasons as Ms Ellenbogen has taken me to the passage referred to earlier. Had that passage been drawn to the Judge's attention, it is unlikely that she would have concluded, at the permission stage, that the Tribunal did not consider the Storer complaint as an allegation of sexual harassment. Plainly they did; see paragraph 19 of their Reasons.

18. Again, that disposes of the point as articulated by Slade J at paragraph 19 of her Judgment. However, since permission was granted for the wider complaint raised at paragraphs 8 to 10 of the Amended Grounds of Appeal, I must consider that complaint on its merits.

19. Before turning to the Tribunal's findings page 26, paragraph 39 of the Reasons, I note that at paragraph 37 the Tribunal direct themselves as to the guidance of Underhill P, as he then was, in **Richmond Pharmacology Ltd v Dhaliwal** [2009] IRLR 336, paragraph 15, as to a Tribunal's approach to the statutory tort of harassment under the **pre-Equality Act 2010** anti-discrimination legislation; see **SDA** section 4A under Part 1 Discrimination. In particular, the objective question as to whether a Claimant reasonably felt that her dignity had been violated by the act complained of, here the Storer pregnancy remark at the grievance hearing.

20. It is in that context that paragraph 39 must be read together with the following paragraphs 40 to 43.

21. In my judgment, consistent with paragraph 19 of their Reasons, the Tribunal were well aware that the Storer complaint was put both as an act of direct sex discrimination and sexual harassment. The key, it seems to me, lies in this observation by the Tribunal at paragraph 40:

> **"… Again it is back to an objective assessment therefore of whether it was discriminatory, in one shape or form [emphasis added], for Mr Storer to enquire about any other underlying causes for the Claimant's concerns and indeed by now already lengthy absence. …"**

22. They then deal in detail with the direct discrimination complaint and, it seems to me, reject the harassment complaint on the basis that objectively it was not reasonable for the Claimant to feel that her dignity had been violated by Mr Storer's question. That is why, in my judgment, the Tribunal repeat at paragraph 43 their finding as to Mr Bestwick's e-mail following the 16 April grievance meeting in which he thanked Mr Storer for his time and professionalism at the meeting which he, Mr Bestwick, thought went very well and was conducted in an extremely fair, reasonable and considerate manner. As the Tribunal observe at paragraph 43, why would Mr Bestwick, a most energetic Trade Union representative, send that e-mail if Mr Storer's remark had been inappropriate? Put another way, was the Claimant's

complaint a reasonable one when her representative found nothing amiss? To that question the Tribunal, as a matter of fact (see **Dhaliwal**) answered in the negative.

23. Finally and again for completeness, in their concluding paragraph, 163, at sub-paragraph (b) the Tribunal resolved the following issue between the parties in this way:

> **"Was the three stage grievance procedure tainted by discriminatory acts? - no."**

24. That deals with the sexual harassment point identified by Slade J at paragraph 19 of her Judgment. As to the apparently separate challenge in the Amended Grounds of Appeal to the finding of no direct discrimination arising from the Storer remark, I cannot improve on the Tribunal's reasoning at paragraphs 40 to 42 (pages 26 to 27) of the Reasons. They ask and answer Lord Nicholl's reason why question in favour of the Respondent employer. This challenge, it seems to me, is hopeless.

Disposal

25. It follows that, on a full consideration of the Tribunal's Reasons, the two grounds permitted to proceed to this full hearing fail and are dismissed. It is therefore unnecessary for me to consider the separate limitation point raised by Ms Ellenbogen had I concluded that the sexual harassment complaint in respect of the Storer remark had been made out.