Appeal No. UKEAT/0501/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 November 2014
Judgment handed down on 4 December 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR G MCKINNEY — APPELLANT

LONDON BOROUGH OF NEWHAM — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR DECLAN O'DEMPSEY (of Counsel) Bar Pro Bono Scheme
For the Respondent	MS KATE BALMER (of Counsel) Instructed by: London Borough of Newham Legal Services Ground Floor - East Wing Newham Dockside 1000 Dockside Road London E16 2QU

SUMMARY

JURISDICTIONAL POINTS - Claim in time and effective date of termination

UNFAIR DISMISSAL - Constructive dismissal

PRACTICE AND PROCEDURE - Costs

Whether time for bringing a whistle-blowing complaint (short of dismissal) commences under section 48(3) when the employer's decision is made or when the Claimant learns of it. Held; the former.

Mensah; **Virdi** (EAT); **Garry**; **Warrior Square** (CA) considered and followed. **Havill** and **Aniagwu** (EAT) not followed; **Barratt** (SC) on effective date of termination distinguished.

Constructive dismissal claim permissibly struck out and costs ordered.

The Claimant's appeal is dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the East London Employment Tribunal. The parties are Mr McKinney, Claimant, and London Borough of Newham, Respondent. The Claimant was employed by the Respondent in their Finance Department from 29 July 1985 until termination of the employment on 31 July 2012. He brought two complaints before the Employment Tribunal. The first, lodged on 11 January 2011, alleged detrimental treatment short of dismissal on the grounds that he had made protected disclosures (the whistle-blowing complaint). The second, following termination of the employment, was characterised by the Claimant as one of constructive unfair dismissal. The claims were resisted and came on for a Case Management Discussion before Employment Judge Major on 14 January 2013, at which stage the claims were combined. In his Case Management Order dated 31 January 2013 Employment Judge Major identified the issues in relation to the unfair dismissal claim (paragraph 2) as follows:

> **" (a) whether there was a fundamental breach entitling the Claimant to resign**
>
> **(b) whether there was a resignation or a redundancy dismissal [as the Respondent contended]**
>
> **(c) if there was a resignation whether the reason was a fundamental breach**
>
> **(d) whether in any case there was delay or waiver such as to affirm the breach of contract"**

2. The combined cases were set down for a Pre-Hearing Review on 18 February 2013 to consider whether (a) the whistle-blowing claim was out of time and (b) the claims ought to be struck out as having no reasonable prospect of success, alternatively whether a deposit order should be made.

3. The Pre-Hearing Review duly took place before Employment Judge John Warren on 18 February. He struck out the whistle-blowing claim as being time-barred and the constructive unfair dismissal claim as having no reasonable prospect of success. In addition, he ordered the

Claimant to make a contribution to the Respondent's costs in the sum of £7,750. His Pre-Hearing Review Judgment with Reasons was promulgated on 22 August 2013.

4. Against that Judgment the Claimant appealed. Up to that point he represented himself. On the paper sift HHJ Hand QC directed an Appellant Only Preliminary Hearing which came before me on 8 April 2014. On that occasion the Claimant had the advantage of representation by Mr Declan O'Dempsey of Counsel under the pro bono Employment Law Appeal Advice Scheme. I was persuaded that the appeal required full argument on three issues, set out in Amended Grounds of Appeal settled by Mr O'Dempsey, at a Full Hearing with the Respondent present. That is the hearing now before me. Ms Balmer appears on behalf of the Respondent, as she did below.

5. Having considered the submissions of Counsel, I now address each of the three heads of appeal, which may be summarised as limitation, constructive dismissal and costs.

(1) Limitation

6. The principal question before the Employment Tribunal was when did the three month primary limitation period begin to run for the purposes of the whistle-blowing complaint? Was it (a) when the Respondent reached the decision to reject the Claimant's third stage grievance on 8 October 2010, following a hearing on 6 October or was it (b) when the Claimant learned of that decision on 14 October, on receipt of the Respondent's outcome letter dated 8 October. The 8th October rendered the form ET1 lodged on 11 January 2011 out of time; the 14 October in time. The Respondent contended for the former; the Claimant for the latter. The Employment Judge agreed with the Respondent (Reasons paragraph 30). Was he correct in law?

7. At the Preliminary Hearing I formed the view that the Employment Judge was arguably wrong in light of the Supreme Court Decision in **Gisda Cyf v Barratt** [2010] IRLR 1073, a case concerned with the effective date of termination for the purposes of an unfair dismissal claim as defined in section 97(1)(b) **Employment Rights Act**; where a contract of employment is terminated without notice means the date on which the termination takes effect. In the case of summary dismissal by letter the EAT had held that the dismissal takes effect not when the letter is sent but when the employee read the letter or had a reasonable opportunity to do so; **Brown v Southall & Knight** [1980] IRLR 130. Constructive notice of the dismissal, unless the employee deliberately fails to open the letter, is not enough to complete an effective dismissal; see **McMaster v Manchester Airport plc** [1998] IRLR 112 (Morison P). On that footing, since Mr McKinney did not receive his grievance outcome letter until 14 October, time for his whistle-blowing claim began on that day, by analogy with the Supreme Court construction of the effective date of termination, submits Mr O'Dempsey.

8. Ms Balmer, however, points to a line of EAT authority which held that a detriment is suffered for the purposes of the anti-discrimination legislation when the detrimental act is done, not when the complainant has knowledge of it. See **Mensah v Royal College of Midwives** (EAT/124/94 unreported, Mummery P) and **Virdi v Commissioner of Police of the Metropolis** [2007] IRLR 24 (Elias P). In **Virdi**, Elias P declined to follow the contrary view expressed by Morison P in **Aniagwu v London Borough of Hackney and Owens** [1999] IRLR 303, that time does not begin to run until the Claimant is aware of the detrimental treatment by the Respondent of which he complains. Further, Ms Balmer submits that the **Mensah** / **Virdi** line of authority is consistent with the Court of Appeal approach in **Garry v London Borough of Ealing** [2001] IRLR 681 and more recently **Flynn v Warrior Square Recoveries Ltd** [2014] EWCA Civ 68 (4 February 2014). The question raised under section

48(3) **Employment Rights Act**, the whistle-blowing detriment limitation provision, is different from that raised by section 97(1)(b) and considered in **Barratt**. It is more akin to the discrimination limitation question raised by section 123(1) **Equality Act 2010**.

9. In order to resolve this interesting point of law I begin with the relevant statutory provisions.

10. Parliament decided to insert the protection for whistle-blowers originally to be found in the **Public Interest Disclosure Act 1998** into the **Employment Rights Act 1996**. There are two separate but related regimes. The first concerns detrimental treatment on the ground that a worker has made a protected disclosure; see for example section 47B. That protection extends to limb (b) workers as defined by section 230(3)(b) and as further extended by section 43K (see section 47B(3)). However, where the treatment complained of is dismissal, then section 103A applies. Dismissal of employees by reason of whistle-blowing is automatically unfair. The relationship between protection from action short of dismissal and dismissal and any parallels with the anti-discrimination protection now contained in the **Equality Act 2010** was considered by Elias LJ in **Fecitt v NHS Manchester** [2012] IRLR 64.

11. Section 48(3) **Employment Rights Act** provides that in a complaint brought, among others, in respect of detrimental treatment contrary to section 47B, the three month primary limitation period begins with "the date of the act or failure to act to which the complaint relates".

12. That formulation is reflected in section 123(1) **Equality Act**, which provides that discrimination complaints under the Act may not be brought after the end of:

"(a) the period of 3 months starting with the date of the act to which the complaint relates"

Ms Balmer also referred me to the similarity between section 48(4)(b) **Employment Rights Act** and section 123(3)(b) **Equality Act**.

13. I have earlier set out the effective date of termination provision contained in section 97(1)(b) **Employment Rights Act**.

14. Although, as Maurice Kay LJ observed in the strike-out case of **North Glamorgan NHS Trust v Ezsias** [2007] IRLR 603, whistle-blowing protection is a form of anti-discrimination legislation, it is necessary to analyse each provision separately. Thus, for example, the reverse burden of proof provision in the **Equality Act**, section 136, does not apply directly to a case of protected disclosure detrimental treatment (see **Fecitt**).

15. Bringing together the various statutory provisions and authority to which I have been referred my analysis of the law is as follows;

(1) There is no material difference between the detrimental treatment provisions under the **Employment Rights Act** and the **Equality Act** so far as limitation is concerned.

(2) Morison P was not referred, in **Aniagwu**, to the unreported Judgment of Mummery P in **Mensah**, which in turn did not consider the Judgment of Neill J in **British Airways Board v Clark and Havill** [1982] IRLR 238 (EAT) on which Morison P relied in **Aniagwu**.

(3) It was conceded in **Virdi**, see paragraph 24, that there may be cases where the relevant act is not done until it is communicated, Elias P agreed (paragraph 25). A similar concession was made on behalf of the employer in **Havill** (see paragraph 17).

(4) In **Garry** the Court of Appeal decided, without reference to authority, that a detriment could take place without the employee having knowledge of it; overturning the EAT Decision (Recorder Langstaff QC presiding) on that point. In **Warrior Square** the Court of Appeal upheld the approach of Langstaff P in the EAT in holding that, for the purposes of section 48(3) **Employment Rights Act** time begins to run from the date of the employer's act or failure to act rather than from the date when the detriment is first suffered (per Maurice Kay LJ, paragraph 6). Again, no relevant authority is referred to.

(5) The concept of effective date of termination, considered by the Supreme Court in **Barratt**, under section 97(1)(b) differs from the detriment provisions in section 48(3) **Employment Rights Act** and section 123(1) **Equality Act**. I note that Morison P did not refer to his Decision on the effective date of termination in **McMaster**, later approved in **Barratt**, when concluding in **Aniagwu** that time ran from the date on which the Claimant became aware of the relevant decision of the grievance panel, not when the panel reached its decision.

(6) It seems to me that the current state of the authorities is less than satisfactory. Nevertheless, a clear thread is now emerging (see **Mensah**; **Virdi**; **Garry**; **Warrior Square**) which points towards the counter-intuitive position that time begins to run against the Claimant relying on a detriment, both under the **Employment Rights Act** and the **Equality Act** whether or not he is aware that a detriment has been suffered. I agree that the wording of section 48(3) **Employment Rights Act** is focussed on the employer's action (or omission) and that a detriment may be suffered without the Claimant being aware of it. For example, a difference in treatment which may be on the grounds of race (see **Garry**). Indeed section 48(4)(b) provides that a deliberate failure to act shall be treated as done when it was decided on, not, I would add, when

the Claimant learned of the omission. That is consistent with the **Mensah** line of authorities in relation to the employer's act. Whilst the need for knowledge is reinforced by the Supreme Court in **Barratt** when considering the effective date of termination I accept that section 97(1)(b) **Employment Rights Act** raises a different question from section 48(3). The Claimant is entitled to know that he is dismissed before the dismissal takes place. He may suffer a detriment without that knowledge.

(7) In these circumstances, and being unimpressed by Mr O'Dempsey's public policy argument, I am driven, without enthusiasm, to accept Ms Balmer's submissions as a matter of construction and authority. The Employment Judge was right to treat time as running from the date of the Respondent's grievance decision, 8 October. By way of analogy, time runs for bringing an appeal to this Tribunal from the date the Employment Tribunal Judgment is sent to the parties, not when it is received by them. Thus, the section 47B complaint was out of time. The Employment Judge went on to consider the reasonable practicability escape clause and rejected it (paragraph 32); there is no extant appeal against that ruling.

16. It follows that I must reject ground 1.

(2) Constructive Dismissal

17. If the issue before the Employment Judge at the Pre-Hearing Review was the reason for dismissal; redundancy or the section 103A reason I would entirely accept Mr O'Dempsey's submission that the case raised factual issues which rendered a strike-out inappropriate; see **Ezsias**.

18. However, that was not how the Claimant put his case; see the Case Management Discussion list of issues. Despite being urged to seek legal advice by Employment Judge Major and by the Respondent he persisted in pursuing a hopeless constructive dismissal case. I do not accept, first that it makes no difference whether the claim for unfair dismissal was put on the basis of actual or constructive dismissal or secondly that the Employment Judge, either at the Case Management Discussion or Pre-Hearing Review, was under an obligation to recast the Claimant's case. It was for him, albeit acting in person, to advance his case.

19. In these circumstances Employment Judge Warren had no realistic alternative but to strike out the constructive unfair dismissal claim. Plainly there was an actual dismissal by the Respondent's letter of 8 May 2012.

(3) Costs

20. The Claimant having failed on the first and second grounds of appeal, it is clear that the discretion to award costs was triggered. The Claimant had been put on notice of a costs application by the Respondent's letter of 15 January 2013. I see no material irregularity in the Respondent serving the Claimant with the costs schedule on the morning of the Pre-Hearing Review. The **Employment Tribunal Rules** are silent on this practice. He did not ask for further time to consider it. The amount claimed totalled £20,386, exclusive of VAT. The Employment Judge ordered him to make a costs contribution of £7,750, having noted that the Claimant had some £20,000 in savings. Precisely how he arrived at that discounted figure is not spelled out in the Reasons but it seems to me that the costs award fell well within the Employment Judge's wide discretion. No error of approach is here made out.

Disposal

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