Appeal No. UKEAT/0125/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 March 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MRS NANCY Z FAIRCHILD — APPELLANT

WM MORRISON SUPERMARKETS PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID PETER (of Counsel) Free Representation Unit Ground Floor 60 Gray's Inn Road London WC1X 8LU
For the Respondent	MR EDWARD NUTTMAN (Solicitor) Gordons LLP Riverside West Whitehall Road Leeds LS1 4AW

SUMMARY

JURISDICTIONAL POINTS – Claim in time and effective date of termination

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

Whether Employment Judge entitled to rely on last act of discrimination relied on by the Claimant in evidence for limitation purposes, although later incident mentioned in Form ET1. **Held**: he was. **Segor v Goodrich** (EAT/0145/11/DM) and **Mensah v E.Herts NHS Trust** [1998] IRLR 531 (CA) considered.

HIS HONOUR JUDGE PETER CLARK

1. The parties before the Bristol ET in these proceedings were Mrs Fairchild, Claimant, and WM Morrison Supermarkets plc, Respondent. By a judgment with reasons promulgated on 17 December 2012, following a Pre-Hearing Review held on 16 November 2012, Employment Judge Housego dismissed the claim. A review application by the Claimant was rejected by letter dated 2 January 2013.

2. The Claimant appealed. The appeal came on for full hearing before HH Jeffrey Burke QC on 24 September 2013. That hearing was adjourned so that the Employment Judge could answer certain questions, set out in an order seal dated 4 October 2013 under the **Burns/Barke** procedure. He did so by a document dated 12 November 2013 ("The further reasons"). The matter now returns before me for final determination.

Background

3. The Claimant, who is of Chinese origin, commenced her employment with the Respondent as a checkout operator at their Bristol store on 23 May 2008. In June 2010 she was granted three months unpaid leave of absence in order to adopt a child in China. In the event she did not return to the UK until 11 November 2011. She then read a letter of dismissal sent by the Respondent to her home dated 13 September 2010. The reason for dismissal was said to be her failure to return to work from unpaid leave.

4. She then submitted an application dated 14 November for a position as a checkout operator. On 28 November 2011 Ms Daniels, Personnel Manager, informed her that her application was unsuccessful. The Claimant then wrote a letter of complaint dated

1 December 2011 to the Respondent, which I have not seen, to which Ms Wraith responded on 21 December.

5. On 26 April 2012 the Claimant wrote to the Chief Executive, Mr Phillips. Rosina Tariq, from the Respondent's Employee Relations Department, responded on his behalf on 11 May. On 9 June the Claimant made a further job application for a checkout position, to which she received no response. It was the Respondent's case that no such vacancy then existed at the Bristol store.

6. The Claimant lodged her form ET1 at the Tribunal on 7 September 2012, complaining of unfair dismissal and race discrimination. She also ticked the "other complaints" head of claim.

7. By their form ET3 the Respondent resisted the claims on their merits but also took limitation points. Hence the case was listed for a PHR.

The Tribunal decision

8. By his PHR Judgment the Judge proceeded on the basis that dismissal took place when the Claimant read the dismissal letter on 11 November 2011 and that the last alleged act of discrimination occurred on 26 April 2012, the date of the Claimant's letter to Mr Phillips, because that was the last act relied on by the Claimant in her evidence.

9. On that footing the claims were out of time. He concluded that the Claimant had not shown that it was not reasonably practicable to present the unfair dismissal claim within time and, further, that it was not just and equitable to extend time for the discrimination claim.

10. Further, the Judge would have struck out both the unfair dismissal and race claims on the grounds that they had no reasonable prospect of success, had he not ruled them time-barred (see paragraph 5 of the reasons).

The appeal

11. I note from his skeleton argument in the appeal Mr Peter, who did not appear below, took a point on behalf of the Claimant that she had advanced claims of victimisation and protected disclosure detriment in relation to her unsuccessful job application on 9 June 2012, rendering those claims in time, the form ET1 having been lodged, as I say, on 7 September 2012.

12. That contention was not accepted by the Respondent and led to the adjournment of the last hearing and the questions to the Judge. In his response to those questions, by reference to his Notes of Evidence, the Judge confirmed that in evidence the Claimant relied on 26 April letter as the final act of discrimination. She did not rely on the application of 9 June as forming part of a discriminatory act.

13. Today Mr Peter pursues his challenge to the PHR judgment on the following basis. There was, he submits, a clear complaint in the form ET1 of victimisation in the Respondent's failure to respond to her application of 9 June 2012, something which the Claimant re-asserted in her review application. Accordingly the Judge fell into error in the particular circumstances of this case where communication, albeit with an interpreter present, was difficult. Had he appreciated that the Claimant was not clearly and unequivocally abandoning her pleaded allegation in relation to the 9 June job application, he would have taken it into account and, at the PHR stage, have found that her discrimination claim, including victimisation, relied on a series of continuing acts culminating in an event falling within the primary three-month

limitation period. He relies on the observations of Langstaff P in **Segor v Goodrich Actuation Systems** EAT 0145/11/DM, 10 February 2012, at paragraph 11.

14. In response Mr Nuttman, who did appear below, points out that the 9 June application was discussed at the PHR but was not relied on by the Claimant as the final act of discrimination (see the Judge's Notes of Evidence). He submits that it is not now open to the Claimant, through her new representative, to raise a point which was not pursued below; what may be called the "**Kumchyk** principle".

15. In light of **Segor** and the issue between the parties in the appeal, I drew the attention of the advocates to the Court of Appeal decision in **Mensah v East Herts NHS Trust** [1998] IRLR 531 and, following a short adjournment, received submissions on the effect, if any, of that authority.

16. The point in **Mensah**, which is not cited in the Judgment in **Segor**, was that although Mrs Mensah, the claimant, raised allegations of race discrimination in relation to her application for vacancies in the neo-natal unit at one of the respondent's hospitals in her form ET1, she did not pursue that part of the complaint at the ET hearing. Instead she pursued only complaints relating to maternity unit job applications. Those complaints were dismissed by the ET.

17. On appeal, the EAT (Morison P presiding) upheld Mrs Mensah's appeal on the basis that, unless expressly abandoned, the Tribunal ought to deal with all complaints raised in the ET1. Mrs Mensah was a litigant in person.

18. On further appeal by the Trust, the Court of Appeal restored the ET judgment. Peter Gibson LJ (see particularly paragraphs 15 and 28) took the view that, whilst strongly encouraging Tribunals to be as helpful as possible to litigants in formulating and presenting their claims, it is a matter for the judgment of the particular Tribunal whether it should investigate any particular pleaded complaint with the litigant.

19. Applying the Court of Appeal's approach in **Mensah**, I am satisfied that this Employment Judge, without descending into the arena, took great care to establish from the Claimant, with the benefit of an interpreter, what was the last act of discrimination relied on. As the Notes of Evidence make clear it was her letter of 26 April 2012. Even if the Respondent's response to that letter of 11 May is taken into account, the claim is still out of time. In these circumstances, I am unable to find any procedural unfairness which vitiates the conclusion that the claims fell outside the primary limitation period. I accept, of course, that post-termination victimisation claims are justiciable under the **Equality Act 2010** following the recent Court of Appeal Judgments in **Jessemy v Rowstock Ltd and Anr** [2014] EWCA Civ 185 and in **Onu v Akwiwu and Akwiwu** UKEAT/0283/12/RN.

20. In these circumstances Mr Peter's principal submission fails. The Judge was entitled, on the cases put before him, to hold that the claims were out of time. Further, I can see no grounds in law for interfering with the Judge's findings on reasonable practicability and the just and equitable extension of time (see paragraphs 2-4 of his reasons). In these circumstances it is unnecessary for me to consider the Judge's alternative ground for striking out claims under what was then ET rule 18(7)(b) of the 2004 Rules (paragraph 5).

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