

Appeal No. UKEAT/0515/13/KN  
UKEAT/0516/13/KN

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 14 October 2014  
Judgment handed down on 7 November 2014

**Before**

**HIS HONOUR JUDGE PETER CLARK**

**(SITTING ALONE)**

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MRS PINNOCK

APPELLANT

(1) BIRMINGHAM CITY COUNCIL

(2) THE GOVERNING BODY OF WATTVILLE PRIMARY SCHOOL

RESPONDENTS

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Transcript of Proceedings

JUDGMENT

**PRELIMINARY HEARING - ALL PARTIES**

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Revised

## **APPEARANCES**

For the Appellant

MS ALISON PINNOCK  
(Lay Representative)

For the Respondents

MISS SOPHIE GARNER  
(of Counsel)  
Instructed by:  
Birmingham City Council  
Legal Services  
10 Woodcock Street  
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## **SUMMARY**

### **PRACTICE AND PROCEDURE**

#### **Striking-out/dismissal**

#### **Bias, misconduct and procedural irregularity**

The Claimant failed to comply with an unless order to exchange witness statements. Through her representative she maintained that position at the Preliminary Hearing held to consider her relief from sanction application. Relief permissibly refused.

The bias allegations directed to the Employment Judge were unarguable.

Consequently the appeals are dismissed at the Preliminary Hearing stage.

## **HIS HONOUR JUDGE PETER CLARK**

1. This case has been proceeding in the Birmingham ET. The parties are Mrs Pinnock, Claimant, and (1) Birmingham City Council and (2) The Governing Body of Wattville Primary School, Respondents. Throughout the proceedings the Claimant has been represented by her daughter, Ms Alison Pinnock (Ms Pinnock), who self-describes in her affidavit sworn in these appeal proceedings dated 21 February 2014 (paragraph 2) as a “freelance HR Consultant and Employment Advisor under the trading name Yab Services”. She has experience of conducting ET cases, including claims in the Birmingham ET brought against Birmingham CC. By way of example I was referred to her application dated 15 July 2014 in a case, **Deanne Smith v Birmingham CC** (ET No. 1305609/2013), for EJ Goodier to recuse himself from sitting in that case. That application begins at page 967 in a supplementary bundle lodged in the present case by Ms Pinnock. That bundle is paginated 386-2081. It is apparent to me that Ms Pinnock is very familiar with the Tribunal process, although I accept that she is not legally trained. Her industry and commitment to her cause cannot be doubted. What is in issue in these appeals, material to the outcome below, is her tactical judgment, on which the Claimant relied and by which she is bound.

### **The Appeals**

2. The first appeal in time (EAT/0516/13) is brought by the Claimant principally against the case management order made by EJ Goodier at a case management discussion held on 21 December 2012, that unless the Claimant complied with an order for the parties to exchange witness statements by 4pm on 29 March 2013 (later extended to 2 April, due to the Easter holiday) her claim would be struck out under Rule 13(2) of the **2004 ET Rules** then in force.

That order is dated 27 December 2012. The Claimant also appeals against the EJ's refusal to stay the proceedings and an order for £180 costs against the Claimant.

3. The second appeal (EAT/0515/13) brought by the Claimant lies against the same Employment Judge's orders, following a Pre-Hearing Review held on 2 May 2013, (a) refusing the Claimant's application to review his earlier unless order and (b) dismissing her application for relief from sanction in respect of her failure to comply with the earlier "unless" order. It is the relief from sanction challenge which is central to the outcome of these appeals. That challenge is put on two broad bases: wrong exercise of discretion and bias or, more accurately, the appearance of bias on the part of EJ Goodier.

4. The first appeal was rejected under EAT Rule 3(7) on the paper sift by HHJ Richardson for the Reason given in the EAT letter dated 22 May 2013; the second by HHJ Shanks by the EAT letter of 5 August 2013.

5. Dissatisfied with those opinions the Claimant exercised her right to an oral hearing under Rule 3(10). Those combined applications came before HHJ Birtles on 13 December 2013. It appears from that Judge's Reasons for allowing the application to proceed further he did not find it necessary to engage with the merits of the appeals; instead he ordered affidavits and Judge's comments on the bias allegations and put the case through to a Preliminary Hearing at which the Respondent was permitted to attend.

6. That is the hearing before me. Strictly, the question is whether all or any of the various grounds of appeals ought to proceed to a Full Hearing on the basis that they are reasonably arguable; if not, the appeal(s) may be dismissed at this stage. Since the Respondent is

represented before me by Miss Garner and has not taken the opportunity to lodge affidavit evidence in response to that lodged by the Claimant and Ms Pinnock (Miss Garner relies on the detailed comments made by the EJ), I am in the same position as would be a Judge conducting a Full Hearing. In these circumstances, having heard oral submissions occupying a full day of court time (Miss Garner addressed me for 45 minutes), I have reserved my decision in order to fully consider the parties' submissions in the light of the voluminous written material placed before me.

### **Procedural History**

7. The Claimant, having been employed at the school as a teaching assistant from July 1985 until June 2011, brought complaints of unfair dismissal, religious and disability discrimination and protected disclosure detrimental treatment and other money claims by a Form ET1 on 1 September 2011. The claims were resisted.

8. The ensuing procedural chronology is helpfully set out at paragraphs 3-18 of EJ Goodier's Reasons following the 2 May 2013 PHR (the PHR Reasons). The upshot was that by 4pm on 2 April 2013 the parties were required to exchange witness statements. The Claimant was then subject to an unless order in light of previous non-compliance with orders and directions of the ET, summarised in the written submissions of Counsel then appearing for the Respondent, Mr Livesey, at page 270 of the EAT core bundle before me.

9. The events of that afternoon are recorded at paragraph 19 of the PHR Reasons.

10. In short, the Respondent's solicitor missed the 4pm deadline by five minutes, due to scanning problems, having been asked to exchange by Ms Pinnock at 15.36 hours. Five witness

statements were then received by Ms Pinnock at 16.05; however one minute earlier she had e-mailed the Respondent's lawyer, at 16:04 to say:

**"I do not feel on behalf of the Claimant in a position to exchange after 16.00. I also have commitments so I am now not available. I will revert to you tomorrow."**

11. Pausing there, during our discussion I asked Ms Pinnock, hypothetically, what would have happened had the Respondent's lawyer sent her their witness statements at five minutes before 4pm, rather than five minutes after the deadline. She replied that she would have sent "what we had": that was three witness statements, one from the Claimant, one from her husband and one from another witness, Jennifer Smith. The first two of those statements were subject to further disclosure by the Respondent, then the subject of a separate appeal to the EAT (EAT/185/13/MC) to which I shall return.

12. The Respondent then gave notice to Ms Pinnock that they would seek a debarring order preventing her from adducing evidence at the forthcoming substantive hearing listed for seven days in June 2013. Still the Claimant, through her representative, failed to serve her witness statements. On 17 April the EJ caused a letter to be written to Ms Pinnock pointing out that:

**"If the Claimant has not yet complied with the order for exchange of witness statements she should do so without delay."**

13. At the same time a notice was sent to the parties, arranging for the PHR to take place on 2 May.

14. On that day Ms Pinnock and Mr Livesey appeared on behalf of the parties. Still, the Claimant had not served her witness statements. Ms Pinnock advanced as her reason for not doing so the fact of an outstanding appeal to the EAT (eventually heard by Judge Richardson and members on 24 May).

15. At paragraph 34 of his PHR Reasons EJ Goodier records this exchange at 11:15am:

**“I put to Ms Pinnock a simple question; if she had had the statements ready for exchange on 3 April, presumably she still had them and could exchange them now. If I adjourned until 12pm she would have an opportunity of sending the statements and remedying the default; that would be a very important consideration in the application for relief. Did she want that opportunity? She said that she did not. Her reasons were essentially a repetition of the points noted above.” (See paragraphs 31-33)**

16. During our discussions I indicated to Ms Pinnock that I attached some significance to that opportunity to retrieve the situation, even at that late stage. Her response was that it did not happen as the EJ there describes it. She referred to the affidavit evidence before me. I have re-read that evidence. The Claimant was not present in the ET room on 2 May (see paragraph 42); Ms Pinnock does not deal with the point in her affidavit. Accordingly I accept the account recorded by the EJ at paragraph 34 of his Reasons. She was given an opportunity to remedy the breach and consciously took the decision not to do so. In the event she has never disclosed her side’s witness statements and further, she tells me, she has not read those disclosed by the Respondent. The effect of neither side seeing the other’s witness statements in advance of a seven-day hearing on the question of a fair trial is a matter to which I shall return.

### **The power to strike out**

17. Ms Pinnock relied on the principles set out by HHJ Richardson in **Weir Valves and Controls (UK) Ltd v Armitage** [2004] ICR 371. In deciding whether or not to strike out a claim or response for non-compliance with ET rules or orders the ET must consider the magnitude of the default, whether the default was the responsibility of the party or (in that case) its solicitor. I would apply that question to a representative in the position of Ms Pinnock, what disruption, unfairness or prejudice has been caused and whether a fair hearing is possible. I would add the purpose of any procedural sanction is to encourage compliance wherever possible, so that a fair trial to all parties can take place. See the later Court of Appeal cases of



**Blockbuster Entertainment Ltd v James** [2006] IRLR 630 and **Abegaze v Shrewsbury College of Arts and Technology** [2010] IRLR 238. Strike-out is a draconian step. Discrimination cases are fact-sensitive. Normally they should be heard on the evidence: see **Ezsias v North Glamorgan NHS Trust** [2007] IRLR 603.

18. Strictly, this is a case of breach of an unless order leading to automatic strike-out under what was Rule 13(2) of the **2004 Rules**. I am satisfied that that unless order was properly made in this case in light of the earlier history of non-compliance by the Claimant. The need for such an order is fully explained in EJ Goodier's CMD Reasons of 27 December 2012; see paragraph 6.4; as was the consequences of non-compliance: i.e the claims would be struck out.

19. Thus the real question is whether relief from sanction was permissibly refused. The review application was without merit.

20. As to relief, the leading authority is **Neary v St Albans Girls School** [2010] ICR 473, a case with which I am familiar, having allowed Mr Neary's appeal and granted relief, applying the **Maresca v Motor Insurance Repair Research Centre** line of authority (see [2005] ICR 197 by reference to CPR Rule 3.9(1) to be later reversed by the Court of Appeal; see paragraph 65, per Smith LJ). That conclusion reminds me of the limited circumstances in which it is right to interfere with an EJ's exercise of discretion in deciding whether to not to grant relief from sanction.

21. In the present case the critical question is whether the EJ could, on 2 May, have imposed a lesser sanction so as to allow the case to proceed to a Full Hearing. He thought not (PHR Reasons paragraph 41). In my judgment that was a permissible conclusion.

22. It seems to me axiomatic that each party should see the other's oral evidence, in the form of witness statements, which is to be called at trial. A fair hearing cannot otherwise take place. In this case it is no answer to the Claimant's failure to serve her evidence that she was awaiting the outcome of her disclosure appeal to the EAT. The need to serve statements was highlighted by EJ Tucker in her letter to the parties dated 7 September 2012 (page 122) even before disclosure was finally resolved; a point echoed by Keith J at paragraph 53 of his Judgment at the Rule 3(10) Hearing held on 12 April 2013 in the earlier appeal. In any event, the Claimant was ready to exchange had the Respondent done so before 4pm on 2 April. The five-minute delay did not excuse total non-compliance by the Claimant thereafter. Nor did the outstanding disclosure issue. The fact is that, whether the continuing default is to be characterised as wilful or, to use the old word, contumelious, Ms Pinnock took a deliberate decision not to serve her witness statements. That prevented a fair hearing. The refusal to grant relief was not simply permissible; after giving Ms Pinnock a last chance (see PHR Reasons paragraph 34) the EJ was left with no realistic alternative. Ms Pinnock submits that he had an alternative: adjourn the matter. But how would that help? What was needed was a resolution of this wholly unnecessary procedural impasse. Ms Pinnock's lack of co-operation with the process was the sole reason for her mother's claim being dismissed. I can see no arguable ground for appealing the refusal to grant relief.

### **Bias**

23. Although the affidavit evidence raises generalised allegations of corruption on the part of the ET Judges, Ms Pinnock made clear in her submissions that the complaint against EJ Goodier is one of apparent bias. I apply the **Porter v Magill** [2002] 2 AC 357 test. I am wholly unpersuaded by the evidence lodged on behalf of the Claimant and the submissions of Ms Pinnock that there is any prospect of showing that the fair-minded and informed observer

would conclude that there was a real possibility that the EJ was biased. On the contrary, despite a degree of provocation (see paragraph 2 of the EJ's CMD Reasons dated 27 December 2012), I am satisfied that he approached a difficult case management challenge professionally and fairly. The opportunity given to Ms Pinnock to recant at the 11<sup>th</sup> hour (PHR Reasons, paragraph 34) is a clear example.

### **Conclusion**

24. The appeals fail on the strike-out and bias points for the Reasons I have given. For completeness, the stay appeal is rendered moot. The costs appeal is dismissed. The costs order was made at the 21 December 2012 CMD in respect of time wasted by the Respondent's solicitor, Mrs Dhillon, on the earlier aborted hearing on 19 December.

25. Accordingly these appeals fail and are dismissed.