

Appeal No. UKEAT/0155/14/RN

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

At the Tribunal
On 7 November 2014

Before

THE HONOURABLE MRS JUSTICE SIMLER

(SITTING ALONE)

GAINFORD CARE HOMES LTD

APPELLANT

MRS J KENNEDY

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR ANTOINE TINNION
(of Counsel)
Instructed by:
Quantum Law LLP
Dean Court
22 Dean Street
Newcastle upon Tyne
NE1 1SR

For the Respondent

MRS JACQUELINE KENNEDY
(The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

Although not an invariable requirement, where a finding of fact on a point of significance not previously argued for or mentioned by either side occurs to an Employment Tribunal, it is usually desirable for that possible finding to be raised with the parties. That was not done.

Accordingly, in this unlawful discrimination case based on harassment, where conclusions about jurisdiction/time and constructive unfair dismissal depended on it, there was a serious procedural irregularity amounting to an error of law when the Employment Tribunal made a critical finding of fact regarding a disputed allegation of harassment on 6 October 2012 which (a) neither side contended for in their pleadings or witness evidence; (b) neither side put to the other during cross-examination; and (c) was not canvassed with the parties by the Employment Tribunal at the hearing in the sense that no notice was given that the Employment Tribunal was minded to make the finding that it did.

All other findings of fact and conclusions remained and none were challenged. The proportionate course in the circumstances was to remit to the same Employment Tribunal for that issue to be determined afresh.

THE HONOURABLE MRS JUSTICE SIMLER

Introduction

1. The Appellant in this appeal, (referred to as the Respondent for ease of reference, with the Respondent to the appeal referred to as the Claimant) runs care homes in the Northeast of England including one called Lindisfarne Home in Seaham in County Durham. The Claimant worked at Lindisfarne Home as a Senior Care Assistant from 13 December 2010 until she tendered her resignation on 6 October 2012. She is a gay woman and made claims following her resignation of unfair constructive dismissal based on allegations of harassment by Mohammed Tariq. Those allegations were disputed by the Respondent, but ultimately upheld by a Tribunal chaired by Employment Judge Pitt in a Judgment with Reasons sent to the parties on 10 September 2013. In that Judgment the Tribunal accepted the Claimant's claims that she had been subjected to unlawful harassment and that the Respondent had done nothing sufficient to prevent Mohammed Tariq from that course of conduct or to protect her. Accordingly the Tribunal found that she was unfairly constructively dismissed and that her harassment was on grounds of her sexual orientation.

2. Apart from an incident found by the Tribunal on 6 October 2012 the last incident of harassment alleged by the Claimant and found before that date took place on 1 August 2012. That was three months before her ET1 was filed with the Tribunal on 21 December 2012, so that what (if anything) happened on 6 October 2012 was critical.

3. The Respondent is represented before me and was below by Mr Tinnion. The Claimant is in person but has been assisted in putting forward her submissions by her friend, Miss Britton. Mr Tinnion has been anxious to ensure that he has drawn attention to those points

against him as well as to those points in his favour by reference to what the Claimant has sought to say, and that has been particularly helpful in the circumstances.

The Notice of Appeal

4. The Notice of Appeal raises a single issue. It is this: was it an error of law or a breach of the rules of natural justice for the Tribunal to make a critical finding of fact regarding a disputed allegation of harassment on 6 October 2012 which neither side contended for in their pleadings or witness evidence, neither side put to the other in terms during cross-examination, and which was not canvassed with the parties by the Tribunal at the hearing in the sense that no notice was given that the Tribunal was minded to make the finding it did? Although the appeal was rejected on the paper sift at a Preliminary Hearing, the President granted permission to appeal given that the conclusion about what happened on 6 October could be seen as critical to the Decision and critical to the reasoning that the unlawful harassment complaint had been presented in time, that the Respondent had breached its duty of care towards the Claimant by failing to take reasonable steps to protect her from that harassment, that she had been constructively dismissed, and that she had been unfairly dismissed as well.

The Employment Tribunal Decision

5. The principal factual dispute in this case was whether or not the Claimant was, as she alleged, subjected to a course of conduct by Mohammed Tariq which amounted to harassment, (paragraph 5.2). Before making factual findings about the disputed incidents in question, the Tribunal set out its assessment of the relevant witnesses at paragraph 5 and of their credibility. It dealt unsurprisingly with the credibility of the Claimant and of Mohammed Tariq. In addition it made credibility assessments of Joy Britton, Susan McAlear, Sheryl Goodfellow and Glenn Martin. The Tribunal did not, in that section, address the credibility of Nurse Kumari.

6. In dealing with its assessment of the witnesses the Tribunal found the Claimant to be a consistent and straightforward witness who was both credible and genuine. By contrast the Tribunal found a lack of consistency between Mohammed Tariq's witness statement and oral evidence, that his evidence was undermined by material comprising his postings on Facebook, that he was evasive and had a lack of understanding of the impact of his behaviour on the Claimant. The Tribunal concluded that he was not a credible witness, and where there was a conflict between his evidence and the Claimant's, the Claimant's evidence was to be preferred.

7. The Tribunal made findings of fact on the principle disputed issue and expressly did so on (i) the basis of that credibility assessment and (ii) because her evidence was supported to some extent by Miss Britton, who saw texts and Facebook postings and gave evidence that the Claimant told her of other allegations which showed consistency in the Claimant's account; and (iii) because there was evidence from Mrs Kennedy, the Claimant's mother, about her daughter's demeanour when she collected her on 6 October. The Tribunal found, in light of all of those matters, as follows:

- i. that Tariq told her she should not be working with old ladies because she could touch them,**
- ii. that Tariq told her he could get people the sack, that he told her the company do not like gay staff,**
- iii. that he made Facebook postings in relation to the claimant and Ms Britton; in particular that we have seen one where he has written the word "sorry" although it is unclear what that was for,**
- iv. that he sent text messages re the claimant's sexuality,**
- v. that the claimant was fearful of his presence in particular that he followed her into bedrooms and made comments about how she should not deal with personal care,**
- vi. he made comments to the effect that gay people are dirty**
- vii. Frequently whilst she was at work he would find her when she was alone and that she could not do anything about his behaviour because he was a family member.**
- viii. He [entered] Lindisfarne Home on 2nd August**
- ix. He [entered] Lindisfarne Home on 6th October"**

8. So far as the incident of entering Lindisfarne Home on 2 August the Tribunal expressly stated that it preferred the Claimant's account of events on that date and, in particular, it found that Mohammed Tariq entered the building knowing that he should not be there: see paragraph 5.4 of the Reasons.

9. So far as 6 October was concerned the Tribunal dealt with this at paragraph 5.3 (that paragraph is wrongly numbered, and there are two paragraphs numbered 5.4) where the Tribunal made the following findings, having first set out the conflicting evidence of the Claimant and Mohammed Tariq about events on that date:

"In relation to the events of 6 October, we heard evidence from both the claimant and Tariq Mohammed about these. The evidence of the claimant was that Tariq came into the building at 6:45, that he had only come into the building because he had seen a Facebook post concerning the claimant being back at work. In his witness statement evidence Tariq did not state a time but he did say that he had gone into the main part of the building and then come out of the kitchen. However, in oral evidence he says he came out of the main door. At the resumed hearing the respondent called a further witness, Premeela Kumari, in relation to those events; her account was at 8 o'clock in the morning Tariq had asked her as the nurse on duty if he could go to the toilet. She escorted him to the toilet and out of the building. Finally there is the witness statement of Mrs Kennedy who stated she had received a call from her daughter at 7:20am ..."

10. Pausing there, it is clear from that account that it was accepted by Mohammed Tariq that he entered Lindisfarne Home on 6 October 2012 but denied that he did anything by way of harassment of the Claimant on that occasion. His evidence, supported by Nurse Kumari, was that he asked if he could go to the toilet at Lindisfarne Home at 8am that morning and was escorted to the toilet and escorted out of the building by Nurse Kumari. The Claimant's account, on the other hand, was that he had entered Lindisfarne Home at 6.45 in the morning, that he had gone there deliberately having seen a Facebook post concerning the Claimant being back at work and knowing that she would be there.

11. At paragraph 5.3 the Tribunal continued by stating that it had found it difficult to reconcile the two accounts and that it concluded:

“... that in all probability on 6 October [Mohammed Tariq] in fact entered the building on two occasions ...”

It went on to say that it reached that conclusion for a number of reasons. These are as follows:

“The evidence of the nurse in charge Ms Kumari, was that there was a handover at 7:45 and it was following that that she saw Tariq. The claimant from as early as 8 October when speaking to Ms Goodfellow said he came in at 6:45. There is a statement from Mrs Kennedy which is not disputed, that she collected her daughter at 7:20. Therefore the Tribunal concluded that the staff members who were going on duty must arrive before 7:45 for handover in order to start their shift proper at 8:00am. Therefore the Tribunal concluded that Tariq Mohammed went into the building on two separate occasions and on the first occasion acted in the manner alleged by the claimant.”

12. That finding, described by Mr Tinnon as a compromise finding, represented a finding of fact which neither party had contended for and which was, as I shall explain, at least potentially critical to the Tribunal’s other findings of unfair constructive dismissal and whether the Claimant was in time or not. The question for me on this appeal is whether there was any error of law by the Tribunal in reaching that compromise finding, which did not involve rejecting the evidence of either the Claimant or Mohammed Tariq in relation to 6 October.

The Law

13. The applicable principles of law are uncontroversial and can be shortly stated. Where a point not previously argued or mentioned by either side occurs to a Judge or to a Tribunal, it is desirable for that possible finding to be raised with the parties. That is not an invariable requirement. There are cases where to do so may be regarded as unnecessary. For example, there may be little or no legal consequences of a finding of fact not previously raised or contended for which mean that it is obvious that there will be no injustice to either side in making such a finding without first giving the parties an opportunity to address it. Subject to that (or similar situations) it is generally good practice for a new or previously unidentified point to be drawn to the attention of the parties and for comment, argument or evidence to be permitted in relation to it. Once the parties have had that opportunity there can be no

procedural unfairness if a Tribunal thereafter relies upon it despite the fact that neither side has advanced it on their case.

14. As Elias J (as he then was) in the case of **B v A and C** [2008] UKEAT 0505/07/JOJ said, at paragraph 36:

“As a matter of principle, it is open to a tribunal, having heard all the evidence, to reach a conclusion on the facts which is inconsistent with the account advanced by either party: see, for example, the decision of the EAT in *Judge v Crown Leisure Ltd* ... upheld on this point by the Court of Appeal ... However, it is likely to be an exceptional case where this arises, and as the Court of Appeal noted in *Judge*, the parties should usually be given an opportunity to address the Tribunal on the legal implications of any such finding.”

What did Mohammed Tariq do between the time he entered Lindisfarne Home and the time he left?

15. Mr Tinnion submits, and the Claimant agrees expressly at the start of her Skeleton Argument, that there was no dispute between these parties that Mohammed Tariq entered Lindisfarne Home on 6 October 2012. The question for the Tribunal, and it was critical, was what did he do there between the time he entered and the time he left? The Claimant’s account of that issue in her ET1 was as follows:

“I decided to return back to work as [the] company advised they would ensure my safety. When I returned back to work Mr Tariq came into the building again looking for myself asking the staff where I was. He came in one door, attempted to talk to myself where another staff member asked him to leave, he was then waiting for myself outside where another member of staff escorted myself to my mothers property just round the corner.”

16. Although the Claimant did not produce a witness statement at the Tribunal hearing, Further and Better Particulars of her claim which she did provide in writing were permitted to stand as her evidence in chief. In those particulars she dealt with the incident on 6 October 2012 in these terms:

“I returned to work after a period of absence between August - October. Within the first week of my return Mr Tariq entered the building and I was informed by staff member Mr Tariq was on his way downstairs. I was taken into the office by staff member David Smith and Mr Tariq attempted to talk to me, but was encouraged to exit the building. He had gone in and out of different exits of the building looking for myself and then waited outside. I was then escorted out of the building by a colleague and was met by my mother.”

17. Against the evidence of the Claimant there was Mohammed Tariq's account and that of Nurse Kumari. Mohammed Tariq, in his witness statement, at paragraph 11 said the following:

"I understand that the Claimant has also accused me of harassing her or attempting to harass her on another occasion in October 2012. I completely deny this accusation. I was dropping off staff at Lindisfarne House and needed to go to the toilet. I got permission from the nurse on duty to come in to go to the toilet. I went to the toilet and then left straightaway through the kitchen entrance. I did not see any of the care staff during the brief time I was in the home."

18. That evidence was supported, as I have indicated, by Nurse Kumari's statement, which was in the following terms:

"2. On 6th October 2012 I had finished my nightshift. Mr Tariq who drives [for] the company was waiting to take me home.

3. He said he needed to go to the toilet but explained to me that he was not allowed to go into the building which is Seaham Lindisfarne Care Home.

4. He asked me if I would escort him to the toilet so I went back into the home with him and waited outside the toilet.

5. At no time did ... Mr Tariq or me see anyone else.

6. After he had finished I escorted him from the building and he took me home."

19. Unless it was physically possible for both accounts to be true, it would have been necessary for the Tribunal to assess the evidence and the credibility of those conflicting accounts and it would have been particularly important to assess the credibility of Nurse Kumari's account. Again, unless it was physically possible for both accounts to have been true, it would have been necessary for the Tribunal to make findings of fact about what happened as a matter of fact when Mohammed Tariq entered Lindisfarne Home. But without making those findings, and having expressly identified the difficulties it had in reconciling the two accounts, the Tribunal made findings on a basis advanced by neither side. Moreover the possibility of a finding of fact which was inconsistent with the account advanced by both sides was not raised with the parties and nor was there any invitation to comment or to make submissions or even to provide evidence in relation to it. Mr Tinnion submits that the Respondent was seriously prejudiced by that approach and the compromise finding because, without advance notice of it,

the Respondent was denied the opportunity of putting forward evidence to show that it was not physically possible for Mohammed Tariq to have entered Lindisfarne Home at 6.45am, to have been outside the home at 7.20am when according to Mrs Kennedy she saw him, and to have entered the home again at some point between 7.45am when he was escorted into the home by Nurse Kumari.

20. The Respondent has identified a number of matters that support its argument that it was not physically possible or at least that it was highly unlikely for Mr Tariq to have entered the home twice and therefore for this compromise finding of fact to be correct. Firstly the Respondent points to the evidence Mr Tariq gave about what he was doing on the morning of 6 October and how he came to go into Seaham, Lindisfarne Home. His evidence, (as summarised in the Respondent's Skeleton Argument) was:

"I went from Birtley in the morning, then Hartlepool. They were waiting for me in Hartlepool. I picked them up. Then I came to Seaham. I was sitting outside in a car outside [sic]. Then I told them I needed the toilet."

21. The Respondent has obtained driving distances and times for the road travel between Seaham, Birtley, and Hartlepool. Based on the AA driving times and a map of the area, none of which has been seriously challenged, suggest that it would have taken Mr Tariq about 90 minutes to drive from Lindisfarne Home in Seaham, to Birtley, then on to Hartlepool and from Hartlepool back to Lindisfarne Home. That 90 minutes represents average driving times and takes no account of any additional time to drop off and pick up staff or the additional time in driving from the A19 junction at Seaham to Lindisfarne Home itself, nor does it take into account the traffic conditions at the time, which might have made the journey longer or shorter depending on what time of day it was.

22. The Respondent submits that this evidence, if produced, would have supported its case that it was either not physically possible or that it was highly unlikely that Mr Tariq would have had sufficient time to make two visits to Lindisfarne Home at the times alleged and that it was on balance more likely that he entered only once. That would have required the Tribunal to resolve the conflict between the Claimant's account on the one hand and the account given by Mohammed Tariq, which was supported by Nurse Kumari. Moreover Mr Tinnion submits that there were other members of staff who had been carried as passengers that morning by Mr Tariq, both from Birtley and from Hartlepool, who could have been called to support his account had the Respondent realised and had its attention drawn to the possibility of the compromise finding.

23. There is also, of course, the evidence of Mrs Kennedy that the Claimant has particularly drawn attention to. Mrs Kennedy was telephoned on the morning of 6 October to come and collect her daughter, the Claimant, and her witness statement was not, the Claimant contends, disputed by the Respondent. In fact the Tribunal deal with Mrs Kennedy's witness statement at paragraph 3 of the Reasons as follows:

“... In relation to this final statement [that was Mrs Kennedy's statement] the Tribunal note that the respondent did not object to that going in as evidence as they did not challenge it save for one section which they disputed which was ‘Tariq was sitting in the car laughing and he opened his car window and was shouting to me ‘Excuse me’ and I said look just leave my daughter alone.’”

24. The Respondent's position was that that evidence was not put at any time to Mohammed Tariq during cross-examination and so, when it came to closing submissions, the Respondent submitted that that evidence could not be relied on at all. Despite that, and without dealing with that difficulty, at paragraph 5.3, the Tribunal recorded that the evidence of Mrs Kennedy that she collected her daughter at 7.20 was not disputed. It follows that according to her evidence

she saw Mohammed Tariq outside Lindisfarne Home at 7.20, after he had been seen inside by the Claimant.

25. The Claimant has also referred to other evidence that was available to the Tribunal but which is not addressed in relation to 6 October. In particular, she has referred me to the witness statement of Sheryl Goodfellow, which deals at paragraph 19 with what was said in a police incident report by the Claimant and also deals with a conversation she had with Nurse Angela Hutchinson, who saw Mohammed Tariq enter the building. The Claimant submits that that represented, potentially, a third occasion when Mohammed Tariq entered the building, but it was not addressed in the Tribunal's findings.

26. The points raised by the Respondent and indeed, to some extent, supported by what the Claimant has said seem to me to be compelling and to indicate that there was a lack of clarity and a failure to make adequate findings in relation to 6 October. Moreover the compromise finding was made against a background, at least potentially, of it having been either physically impossible or highly unlikely for it to have occurred.

27. Against that compelling submission the Claimant submits, very forcefully, that she saw Mohammed Tariq enter Lindisfarne Home at 6.45am and that the Tribunal was entitled, in the circumstances, to accept her evidence about that. She submits that, when Mr Tariq entered again at between 7.45 and 8am in the morning, either she did not see him, because by then she had already left and was unaware that he had entered a second time; or alternatively he was there throughout, having never left, but again she did not see him because she had left by then. There was no reason for her, having come back to work that day, to have left before her shift

ended unless she had seen him. She submits that in either case the two accounts can be rationally reconciled on that basis.

Conclusion

28. I accept that on different facts the Claimant might be right. But the difficulty with her submission is that, as she accepted realistically during argument, if Mohammed Tariq and Nurse Kumari's accounts were accepted as true, that he was delivering staff he had collected from Hartlepool and collecting staff including Nurse Kumari at Lindisfarne Home at 7.45 or soon thereafter, it becomes physically difficult or impossible for Mr Tariq to have been at Lindisfarne Home at 6.45 and then to have gone from there either directly to Hartlepool and back again or to have gone from there via Birtley and then to Hartlepool and back again. The difficulty or impossibility of that being a reality is compounded by Mrs Kennedy's evidence that she saw Mohammed Tariq sitting outside Lindisfarne Home at 7.20. Given the travelling time between Lindisfarne Home and the junction with the A19, which on the Claimant's account is about a 7-10 minute drive, and the driving time of 27 minutes from Seaham to Hartlepool, whichever account is accepted as true, it is at least difficult if not highly unlikely that there was time for Mohammed Tariq to be at Lindisfarne Home at 6.45, at 7.20 and again at 7.45.

29. In these circumstances, despite the very forceful points made by the Claimant and the sympathy inevitably felt for her, I am persuaded that there is a serious issue about whether the compromise finding made by the Tribunal was possible as a matter of fact. I say that, as already indicated, because of the evidence of Mohammed Tariq about his whereabouts before entering Lindisfarne Home that morning, which was not rejected by the Tribunal; because of the evidence of Mrs Kennedy that she saw him outside the home at 7.20; and because of the

evidence of Nurse Kumari, which was not rejected, about escorting him into the home. In light of that serious issue, it seems to me that it was incumbent on the Tribunal to afford the parties an opportunity to address the implication of the compromise finding and that the failure to do so, in the circumstances of this case, amounted to a serious procedural error which vitiates its findings about 6 October and what happened on that occasion.

30. It follows from that conclusion that the following findings made by the Tribunal, which are dependent upon the compromise finding, must be reconsidered and fall to be quashed. Those are as follows: (i) the finding that Mohammed Tariq entered Lindisfarne Home twice on 6 October and on the first occasion acted in the manner alleged by the Claimant; (ii) the finding that Mohammed Tariq harassed the Claimant on 6 October; (iii) the finding that the Claimant's harassment complaint was presented in time; (iv) the finding that there was a breach by the Respondent of its duty of care by failing to take reasonable steps to protect the Claimant from harassment by Mohammed Tariq on 6 October; (v) the finding that the Claimant was entitled to resign and claim constructive dismissal on 6 October; (vi) the finding that the Claimant was accordingly unfairly dismissed. All of the underlying findings of fact (apart from those relating to 6 October) of course stand. But the findings I have identified and the conclusions consequent upon them must be overturned.

31. As is common on appeals of this kind, the parties are not agreed about how remission for reconsideration should be achieved. The Respondent has urged me to remit this matter to a fresh Tribunal for findings of fact to be made as to what happened on 6 October 2012, and in respect of the legal conclusions that flow from that, on the footing of course that the Tribunal's other underlying factual findings, both as to credibility and in relation to the other incidents, would stand. The Claimant, understandably, wishes to have closure. She says, and I

understand, she wishes to get on with her life, and she is not in a position to do so with this case hanging over her.

32. I have reminded myself of the guidance given in **Sinclair Roche Temperley v Heard and Anr** [2004] IRLR 763. In particular I have considered questions of proportionality, the passage of time, whether there is a real risk of prejudgment dependent upon the extent to which the Tribunal's decision is flawed. The real point that has given me concern and has caused me to consider anxiously my approach is whether the original Tribunal has already made up its mind so firmly in relation to all the matters before it in relation to 6 October, for if it has, to use the words in **Sinclair Roche Temperley v Heard**, "it may well be a difficult if not impossible task to change it, and in any event there must be the very real risk of an appearance of prejudgement or bias if the case is remitted to such a Tribunal."

33. It seems to me that this appeal has a very narrow focus. There was careful analysis by the Tribunal and findings on all issues up to but not including 6 October, none of which is challenged on this appeal. I am satisfied that this Tribunal, which acknowledged the difficulty of reconciling the two accounts will behave professionally in following the directions of this Appeal Tribunal and that in considering what happened on 6 October will proceed with an open mind and a clean sheet. In those circumstances, the proportionate course to adopt is to remit this matter for reconsideration to the same Tribunal and not to a fresh one. The credibility assessment of Mohammed Tariq and the fact that he was disbelieved about incidents of harassment apart from 6 October will obviously be relevant; likewise the credibility findings in relation to the Claimant. But it is quite possible for the Tribunal to find Mr Tariq's account of 6 October to be truthful, particularly if it is supported by other corroborative evidence. Equally, it may decide that he has been untruthful about 6 October as he was about earlier events. The

Tribunal will need to make findings of fact based on his evidence about what happened on 6 October. It will need to make findings of fact in relation to what the Claimant says happened. There may be evidence from other members of staff and from Nurse Kumari about which findings will have to be made. It may also be necessary to consider Mrs Kennedy's evidence about 6 October and the evidence pointed out during the course of today's hearing of Sheryl Goodfellow about what Nurse Angela Hutchinson saw or did not see, perhaps even extending to the police incident report.

34. It seems to me that it would be sensible for the Tribunal to consider having a case management and directions hearing in order to identify what further evidence and submissions are likely to be required and to determine how long that is likely to take. I know that my decision will be disappointing for the Claimant, and I understand her frustration. However, the Appeal Tribunal cannot make substituted findings on disputed issues of fact. There is no alternative but to remit this matter for fresh consideration accordingly.

35. To that extent only, this appeal is allowed, and the matter is remitted to the same Tribunal for it to deal with the matters I have identified.