Appeal No. UKEAT/0425/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 March 2014
Judgment handed down on 31 March 2014

Before

HIS HONOUR JUDGE SHANKS

MR I EZEKIEL

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(1) MISS E ROBINSON
(2) MR O OJO — APPELLANTS

HALL GREGORY RECRUITMENT LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Miss E Robinson	MR O A GUMBIYI (of Counsel)
For Mr O Ojo	DR T OGUNSANYA (Solicitor) Taylor Wood Solicitors Suite 705 150 Minories London EC3N 1LS
For the Respondent	MR C HALL (Representative)

SUMMARY

PRACTICE AND PROCEDURE – Costs

Costs orders were made against both the C and her rep following dismissal of her claims. Appeals were brought against both orders. Both appeals allowed and costs applications remitted to same ET.

On order against C, ET had not considered whether an order was "appropriate" or given C an opportunity to put forward evidence and representations on her means.

On order against her rep, ET had found him negligent in failing to advise the claims be abandoned on the basis of a waiver of privilege by C and his failure to present evidence of advice given but no such waiver was clear and the rep had not been invited to present evidence himself; further, the ET made no finding as to the effect of any such negligence; and the ET found that the claim was brought on the initiative of the rep on the same flawed basis as their finding of negligence.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal by the Claimant, Miss Robinson, and her solicitor, Mr Ojo, who is a partner in the firm Taylor Wood, against a decision (by a majority) of the Employment Tribunal in Watford sent out on 10 July 2013 ordering them to pay costs of £5,025 and £10,050 respectively to the Respondent, Hall Gregory Recruitment Ltd, following the dismissal of the bulk of Miss Robinson's claims in December 2012.

2. Unfortunately Ms Tinsley who was to have sat on the appeal was unwell but the parties agreed to Judge Shanks and Mr Ezekiel sitting alone. Happily Miss Robinson and Mr Ojo were separately represented, Mr Ojo by his partner Dr Ogunsanya and Miss Robinson by Mr Ogumbiyi of counsel. Mr Hall represented the Respondent in his capacity as a director.

Factual background

3. The Claimant was employed by the Respondent as a business administration apprentice from 20 November 2011 until her dismissal which took effect on 2 May 2012. She was 17 years old.

4. Around mid-January 2012 she became pregnant. The Tribunal found that the Respondent learnt of the pregnancy some time between 28 February and 5 March 2012 and that they were supportive and allowed her time off. Unfortunately she suffered a miscarriage on 25 March 2012 following which she was off work until her return on 4 April 2012.

5. The Claimant was informed that she was to be dismissed on 25 April 2012. The Employment Tribunal accepted Mr Hall's evidence that the reason for the dismissal was that she was not a hard worker and that it had nothing to do with her pregnancy or sex.

6. On 28 June 2012, the Claimant brought a claim in the Tribunal with the assistance of Mr Ojo. At that stage he was a consultant with another firm of solicitors (Blackstones) but on 4 October 2012 he informed the Tribunal that he had moved to Taylor Wood, giving details of his new firm and contact details. In her ET1 the Claimant claimed unlawful deductions from her wages, six allegations of pregnancy and sex discrimination or harassment which took place in February and March 2012, automatically unfair dismissal on grounds of pregnancy or sex, and unpaid contractual notice. The ET1 also stated: "The Claimant lost the pregnancy as a result of the stress she went through in the hands of the Respondent".

7. In due course there was a three-day hearing on 4, 5 and 6 December 2012. All the claims except that in respect of notice pay (which amounted to £285) were dismissed. Two of the allegations of discrimination or harassment were effectively abandoned in that they did not feature in the evidence put before the Tribunal by the Claimant and the Respondent's witnesses were not cross-examined about them. As for the claim that the Claimant had suffered a miscarriage as a consequence of stress at work caused by the discrimination she was suffering, the Tribunal rejected this part of the case not only because the allegations of discrimination were rejected for various reasons but they also stated in para 5.8 of the reasons:

> **"… the Claimant has accused the Respondent of causing her so much stress that it resulted in her miscarriage. This is a very serious allegation indeed and one for which there is absolutely no supporting evidence. The first step would be to establish that the Claimant was suffering from "stress" which has a wide variety of meanings and degrees. However, we would expect an employee who was suffering from such a high level of stress would have some absences due to that stress, or would have made complaints to the employer or that there would be some medical evidence. None of that happened in this case. A fortiori, there is no evidence that any stress caused this miscarriage. We have seen two specialists' reports neither of which establishes that the Claimant was suffering from stress or that any such stress was linked to her miscarriage. In other words the Claimant has made a very serious assertion for which she has provided no evidence."**

The costs applications and orders

8. At the end of the hearing applications for costs were made against the Claimant and Mr Ojo on the basis set out in written submissions dated 6 December 2012 from counsel then acting on behalf of the Respondent which were provided to us during the appeal hearing by Mr Hall. The applications were put off to a full hearing which ultimately took place on 24 April 2013.

9. At the hearing Mr Hall represented the Respondent and gave evidence. Mr Ojo and the Claimant were both represented by Mr Ogunsanya although the Tribunal recorded that there appeared to be a conflict of interest between them. There was a signed statement from the Claimant (as well as Mr Hall, Mr Ojo and Mr Ogunsanya) but the Claimant did not attend the hearing; the Tribunal recorded this latter fact but said no more about it; we were informed during the appeal that the Tribunal had been informed that the Claimant had had to go to Spain urgently in order to care for her grandmother who was unwell. Mr Hall told us that he produced at the hearing before the Tribunal (as he did for us) a copy of a Facebook entry by the Claimant which appeared to indicate that she had said on 18 April that she was off to Spain "… ***to look for a job :)***". So far as the Claimant's statement was concerned it would have been clear that this had been drafted by Mr Ojo and placed before her for signature, as she confirmed at the hearing before us. The statement said that it had been explained to her that the Respondent had threatened to make an application for costs if she did not withdraw her claim for "personal injury" on the basis that there was no evidence to support it in her medical records but that she did not instruct her solicitor to withdraw it because she strongly believed that the stress caused by the Respondent was responsible for the loss of her pregnancy. The statement said nothing about her means.

10. The Tribunal made detailed findings of fact following the hearing. The Respondent had initially been represented by Ms Jones who was an HR consultant; her fee for conducting the whole case would have been between £2,000 and £5,000. The initial Schedule of Loss and draft list of issues produced by Mr Ojo contained no reference to any claim in respect of the miscarriage although it had been mentioned in the ET1. At the CMD on 3 October 2012 (which also took place in the absence of the Claimant) Mr Ojo was asked by the Employment Judge if the Claimant was going to be pursuing a claim for personal injury in respect of the miscarriage. After first saying he did not know and had not been advised Mr Ojo later in the hearing said that she was and the Judge accordingly made an order that the parties were at liberty to call one expert each relevant to the issue whose reports were to be exchanged by 20 November 2012.

11. Following the CMD Mr Hall and Ms Jones realised that "the stakes had been raised." Ms Jones did not feel sufficiently experienced to deal with the miscarriage claim and was concerned about the possible financial consequences for a small recruitment company with only four employees. Mr Hall took the decision to instruct Teacher Stern, a London firm; their total fees for conducting the case for the Respondent were £18,075. In an attempt to avoid costly litigation before instructing them he rang Mr Ojo on 10 October 2012. During the conversation he offered to pay the Claimant £1,500 to bring an end to the case; Mr Ojo said that would not even cover her legal bills. Mr Hall said that the amount being claimed could send the company under; Mr Ojo replied (wrongly) to the effect that as a director Mr Hall would be held personally responsible. Mr Hall also said that the allegation concerning the miscarriage was not true and could not be proved to which Mr Ojo replied (again wrongly) that it did not have to be proved, the onus being on the Respondent. Mr Hall told Mr Ojo that they would pursue the Claimant for costs.

12. On 25 October 2012 Mr Ojo sent the Respondent an updated Schedule of Loss which had increased the compensation being sought by £15,000 in respect of the miscarriage claim. Around the same time he received the Claimant's GP records which were disclosed to the Respondent: they did not evidence any stress on the part of the Claimant. In due course expert reports were exchanged: they too did not support the Claimant's case on the miscarriage.

13. In the light of those findings and those made after the substantive hearing the Tribunal made orders for costs against the Claimant and Mr Ojo which were clearly designed to compensate the Respondent for the extra costs he had incurred as a consequence of instructing Teacher Stern. In relation to the Claimant they found:

(1) that she had made "… a number of false statements to the Tribunal …" about what Mr Hall had said to her or her mother which were made to bolster her case and induce the Respondent to make a substantial offer of settlement (**para 59.1**);

(2) that it was unreasonable of her to have continued to run the miscarriage claim (referred to by the Tribunal as "the personal injury claim") in the absence of evidence to support it and having been told she was at risk of costs (**para 59.2**);

(3) that although they had not been able to ask her about her means and although she was unemployed at the time, she should be able to obtain alternative employment and a costs order was therefore merited (**para 59.3**);

(4) that the claim had had a bad effect on the Respondent's financial position and Mr Hall personally (**para 59.4**);

and ordered her to pay the Respondent £5,025. In relation to Mr Ojo they found:

(1) that he was not (as he asserted) acting *pro bono* **(para 60.1)**;

(2) that he was negligent and unreasonable in not advising the Claimant to abandon the personal injury claim (**para 60.2 and 60.3**);

(3) that he took the initiative in bringing and pursuing the claim which was also unreasonable conduct (**para 60.2**)

(4) that as a partner in a law firm he had the means to meet a wasted costs order (**para 60.4**).

He was ordered to pay £10,050.

The Claimant's appeal

14. The costs order against the Claimant was made under rule 40 of the 2004 Rules of Procedure. This provides so far as relevant:

> **"(2) A tribunal … shall consider making a costs order against a paying party where, in the opinion of the tribunal … , any of the circumstances in paragraph (3) apply. Having so considered, the tribunal … may make a costs order against the paying party if it … considers it appropriate to do so.**
>
> **(3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively … or otherwise unreasonably …"**

Rule 41 provides that that Tribunal can specify a sum to be paid of up to £20,000 and at rule 41(2) that the Tribunal "… may have regard to the paying party's ability to pay when considering whether it … shall make a costs order and how much that order should be."

15. It seems to us that the Tribunal has unfortunately omitted an important stage in the process of deciding to make a costs order against the Claimant, namely that of considering whether it was "appropriate" to do so. There may be cases where, having found abusive or unreasonable conduct, it almost inevitably follows that an order is appropriate but this is not one of those cases. We are concerned in particular that the Claimant was 17 years old and that, on the Tribunal's findings in relation to Mr Ojo, she had not been properly advised: the Tribunal does not appear to have had regard to those matters which may well have been

relevant to whether it was appropriate to make an order against her. Furthermore, it should have been obvious that, particularly given her age, her means were likely to be of relevance both in deciding whether to make an order and as to how much it should be, but there was nothing in her statement about her means and she did not attend the hearing, which resulted in the Tribunal deciding simply that a costs award against her was merited. However, the Tribunal was aware that she was 17, that there was a obvious conflict of interest between her and the firm of solicitors who had prepared her witness statement and that (at least in Mr Ojo's case) there was an issue as to their competence. In those circumstances we think the Tribunal ought not to have made findings against her at para 59.3 in relation to her means without giving her an opportunity to make representations or present evidence; in saying that we are conscious of the fact that the Tribunal may have considered it had been misled as to her ability to attend the costs hearing but, if they did, they did not say so.

16. In those circumstances, we think the appeal against the costs order made against the Claimant must be allowed and the matter remitted to be considered again. There are also two particular points which concern us relating to the findings of the Tribunal at paras 59.1 and 59.2. The implication of paragraph 59.1 is that the Claimant had put forward a dishonest case in some respects; as we understand it the Tribunal was referring to the two allegations which were effectively abandoned at the substantive hearing because no evidence was given about them. We are not sure that there was any basis for a finding that they had been advanced dishonestly; in any event we consider that the Tribunal should reconsider its findings at para 59.1.

17. As to para 59.2, the Tribunal referred to the Claimant's written statement which said she had been told of the threat to make an application for costs, stated that they considered that she had waived privilege in relation to any other advice she was given, and went on to find that she

had behaved unreasonably in pursuing a claim for which there was no evidence in support. In the same way as we are concerned about the findings made against her in her absence in relation to means at para 59.3 we are concerned that the Tribunal reached the view that she had waived privilege and made a consequential finding that she had behaved unreasonably in her absence. We therefore consider that the Tribunal should also reconsider the findings at para 59.2. We should say in this context that the Claimant, who did attend the appeal hearing, made it clear through Mr Ogumbiyi that she does now unequivocally waive privilege in relation to the advice given to her by Mr Ojo but that it was evident that her account of what he told her and the advice she was given is likely to be rather different to what is set out in the statement prepared by Mr Ojo and what was found by the Tribunal in her absence.

Mr Ojo's appeal

18. The order against Mr Ojo was made under rule 48 which provides so far as relevant:

> **"(1) A tribunal … may make a wasted costs order against a party's representative.**
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> **(2) In a wasted costs order the tribunal … may**
>
> > **(a) … order the representative … to meet the whole or part of any wasted costs of any party …**
>
> **(3) "Wasted costs" means any costs incurred by a party;-**
>
> > **(a) as a result of any improper, unreasonable or negligent act or omission on the part of any representative; or**
> >
> > **(b) which, in the light of any such act or omission occurring after they were incurred, the tribunal considers it unreasonable to expect that party to pay.**
>
> **(4) In this rule "representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to those proceedings. A person is considered to be acting in pursuit of profit if he is acting on a conditional fee arrangement.**
>
> **…**
>
> **(6) … The tribunal … may also have regard to the representative's ability to pay when considering whether it shall make a wasted costs order or how much that order shall be."**

19. Mr Ogunsanya challenged the Tribunal's finding of fact at para 60.1 that Mr Ojo was not acting for the Claimant *pro bono*. That was clearly a finding of fact open to the Tribunal and

the suggestion that it was perverse was hopeless. We have no hesitation in rejecting that ground of appeal. He also sought to attack the conclusion at para 60.4 that as a partner in a law firm Mr Ojo had the means to meet a wasted costs order. No material was placed before the Tribunal as to Mr Ojo's or Taylor Wood's financial position and we consider that it was perfectly reasonable for the Tribunal to decide that as a partner in a firm of solicitors he could meet a wasted costs order in this case. Again, we reject this ground of appeal.

20. Turning to the more substantial issues whether "wasted costs" had been incurred by the Respondent and whether it was appropriate for the Employment Tribunal to make a wasted costs order against Mr Ojo, Mr Ogunsanya referred us to the case of **Mitchells v Funkwerk Information Technologies York Ltd** [2008] PNLR 29, a decision of this Tribunal, which itself contains extensive citations from the House of Lords case relating to wasted costs orders, **Medcalf v Mardell** [2002] UKHL 27. We were reminded: (1) that the Tribunal had to approach this jurisdiction with caution, bearing in mind the constitutional position of the advocate and the fact that from his point of view the jurisdiction is penal; (2) that it had to consider the possibility that issues of privilege might prevent a representative mounting a proper defence and that he should be given the benefit of any doubt; (3) that a representative can (and indeed must) argue a case which he considers hopeless and which he has advised is hopeless if those are the instructions of his client; and there is a distinction between this and a representative lending his assistance to proceedings which are an abuse of the process; (4) that the Tribunal must consider whether any improper, unreasonable or negligent conduct by the representative had *caused* the receiving party to incur extra costs. Our attention was also drawn to the following words of Lord Hobhouse in **Medcalf** at para [56]:

> **"… it would appear that the inclusion of the word *negligent* … is directed primarily to the jurisdiction as between a legal representative and his own client. It is possible to visualise situations where the negligence of an advocate might justify the making of a wasted costs order which included both parties, such as where an advocate fails to turn up on an adjourned hearing so that a hearing date is lost."**

Based on this passage Mr Ogunsanya submitted in effect that it was not open to the Tribunal to make a wasted costs order in favour of the Respondent based on Mr Ojo's negligent advice (or non-advice) to his own client. We agree that it may be rare for a wasted costs order to be made on this basis but we do not consider there is an absolute bar on such an order, provided the causative link is established between the negligence and the extra costs incurred by the receiving party. In other words, it would have to be established in this case that if proper advice had been given the personal injury claim would have been abandoned by the Claimant and that the Respondent would not have incurred extra costs.

21. Having regard to these principles, it seems to us there are a number of problems with the approach taken by the Tribunal in this case:

(1) The finding that Mr Ojo had been negligent by failing to advise the Claimant that her claim was hopeless and should be withdrawn was based on inference from the fact that the Claimant had waived privilege in respect of advice given and Mr Ojo had produced no evidence (whether a file note or a letter) demonstrating that such advice had been given. We have already indicated in paragraph 17 above our unease at the finding that the Claimant had waived privilege in her absence; further, as we understand it, it was not suggested to Mr Ojo at the hearing before the Tribunal that he was expected to produce evidence about what he had advised the Claimant whether in cross-examination or otherwise. In the circumstances we do not think that the finding of negligence can properly stand without further investigation. In that context we would note that at the hearing before us, once it had been made quite clear that the Claimant was indeed waiving privilege, there was no suggestion that there is in fact a file-note or letter containing proper advice, so

that on any reconsideration the Tribunal will want to scrutinise any evidence which is produced by Mr Ojo carefully;

(2) The Tribunal made no finding as to what the result would have been if proper advice had been given; in principle, it is possible that the Claimant would have insisted that the case continue and Mr Ojo would have been obliged to carry on. In the absence of a finding that the case (or particular claim) would have been abandoned we do not think that the wasted costs order based on negligent advice could properly succeed;

(3) The Tribunal also found that Mr Ojo was the one who took the initiative in bringing and pursuing the personal injury claim; this may have been a conclusion open to the Tribunal in light of the Claimant's age and the impression they formed of the whole case from seeing it unfold but the basis for it as set out by the Tribunal at paragraph 60.2 is the same as that used by the Tribunal to find that he was negligent (i.e. waiver of privilege and Mr Ojo's failure to produce evidence of the advice given); in the circumstances we do not consider that this finding or a wasted costs order based on it can stand either.

22. For those reasons we consider that the Tribunal went wrong when they made a wasted costs order against Mr Ojo and that his appeal should also be allowed and the matter of wasted costs remitted.

Disposal

23. We therefore allow both appeals and remit the costs applications to the same Tribunal to be considered afresh. It is obviously far preferable that any issue in relation to costs continues

to be dealt with by the Tribunal which heard the substantive case and Mr Ogumbiyi and Mr Ogunsanya both agreed to that course.

24. There will clearly need to be a further hearing at which it will be open to the parties to present evidence and argument (a) as to the advice (if any) that Mr Ojo did give the Claimant (b) as to the advice he should have given her (c) as to the effect such advice would have had (d) to establish (if it is the Claimant's or Respondent's case) that Mr Ojo was the "driving force" behind the claim and (e) as to the Claimant's means. But we consider that in general the findings of fact already made by the Tribunal should stand save for those in paras 59.1, 59.2, 59.3 and 60.2 and 60.3.