Appeal Nos. UKEAT/0365/13/SM
UKEAT/0366/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 February 2014

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

(SITTING ALONE)

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(1) MR D DENTEH
(2) MS O ADEDAYO
(3) MS P BAFFOUR
(4) MR T MUTAH
(5) MS J DENNIS APPELLANTS

SOUTH LONDON AND MAUDSLEY NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR LEONARD OGILVY (Representative) Ogilvy Ogilvie & Associates 253 McLeod Road London SE2 0YJ
For the Respondent	MR TOBY KEMPSTER (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

PRACTICE AND PROCEDURE

Striking-out/dismissal

Withdrawal

The issue is whether the application for dismissal made to the Employment Tribunal following the Appellant's withdrawal of their earlier claims for race discrimination had to be in writing for the purposes of rule 25 of Schedule 1 to the 2004 Regulations and whether the ET erred in failing to appreciate this. The EAT, following the decision in **Drysdale v Dept. Transport (The Maritime and Coastguard Agency)** (UKEAT/0171/12, 13 February 2013), found that the ET correctly concluded that there was no jurisdiction to hear the complaints of race discrimination. There is no valid purpose in requiring a written application to the ET office when the parties are present at a hearing and the matter can be addressed there and then. To require a written application, with the possibility that a further hearing may then be necessary, would be inimical to the overriding objective, which includes dealing with cases expeditiously and saving expense. The ET may deal with the question of dismissal on an oral application made at a hearing when a claim has been withdrawn. Accordingly the appeal failed.

THE HONOURABLE MR JUSTICE SUPPERSTONE

Introduction

1. This is an appeal against the judgment on a pre-hearing review of Employment Judge Kurrein made on 28 December 2012 and sent to the parties on 2 January 2013 that the Employment Tribunal has no jurisdiction to hear the Claimant's claims and they were struck out pursuant to rule 18(7) of the **Employment Tribunals Rules 2004** on the ground that they had no reasonable prospect of success.

2. On 23 July 2013 the President, Langstaff J, having heard from Mr Ogilvy, who appeared at the hearing, as he does today, on behalf of the Appellants, granted leave to appeal in relation to the single issue of whether the application for dismissal made by the Respondent on 19 December 2011 before Employment Judge Wallis, following the Appellant's withdrawal of their earlier claims of race discrimination, had to be in writing for the purposes of rule 25 of Schedule 1 to the 2004 Regulations and whether the Employment Judge erred in failing to realise this.

The facts

3. The background facts are that each of the Claimants is a registered Mental Health Nurse, who was formerly employed on the Respondent's Norbury ward, a forensic psychiatric intensive care unit, at the Bethlehem Royal Hospital. They were each, in various capacities and at various times, responsible for the care of the patient WE, who had a tendency to smear himself and his room with his own faeces, which is commonly referred to as a "dirty protest" when denied his preferred drug regime. They were each found guilty of gross misconduct as a consequence of what was found to be the neglect and abuse of WE over the period 18-21 March 2011 on the basis that he had engaged in a dirty protest and had been left in his room

throughout that period. The Appellants were each dismissed and reported to the Nursing and Midwifery Council.

4. In August 2011 they filed complaints, claiming unfair dismissal and race discrimination in relation to their dismissals between May and June 2011 and the reporting of them by the Respondents to the NMC. On 19 December 2011 there was a case management discussion, chaired by Employment Judge Wallis, at which these five Appellants withdrew their claims of race discrimination and those claims were dismissed. This was confirmed by a case management order sent to the parties on 4 January 2012.

5. Following a hearing on 30 January 2012 the unfair dismissal claim of Mr Mutah, the Fourth Appellant, was dismissed, the Tribunal having no jurisdiction to hear the claim. The unfair dismissal claims of the other Appellants were heard by a Tribunal (Employment Judge Kurrein presiding) between March and May 2012 and they were each found to have been unfairly dismissed. In September 2012 each of the Appellants lodged a second Employment Tribunal claim alleging race discrimination in respect of their dismissals and their referral to the NMC. On 10 December 2012 there was a Pre-Hearing Review before Judge Kurrein, sitting alone, to determine whether the Tribunal had jurisdiction to consider their second set of claims of race discrimination. Judge Kurrein held that the Tribunal had no jurisdiction as a result of claims having previously been dismissed upon withdrawal and the claims were accordingly struck out. On 7 January 2013 Employment Judge Wallis rejected the Appellant's application to review her earlier decision of 19 December 2011.

The Employment Tribunal decision

6. I turn, first, to consider the decision of Judge Kurrein, made on 28 December 2012 following the hearing on 10 December 2012. The Judge noted, at paragraph 4 of the decision:

> **"All the Claimants made claims solely of race discrimination arising out of the events that took place involving WE, the disciplinary process thereafter (including their dismissal) and the fact that they were reported to the NMC. Each of the Claimants expressly avers they are unable to bring these claims, which were presented between 16 July and 26 September 2012, because they were unaware that a former colleague, Paul Allen, who had been charged with the same offences of gross misconduct as them at or about the same time, but had not been disciplined until after late June 2012, had been given a warning and neither dismissed nor reported to the NMC."**

7. At paragraph 7 the Judge said in relation to the first set of claims that:

> **"It is clear from the consideration of the original claims that each of these claimants was well aware of the existence of Ms Bristow and/or Miss Webber as potential actual comparators and that they and/or their representatives at the time of the case management discussion in December 2011 were well aware of the ability of a Claimant to rely on a hypothetical comparator in a claim alleging race discrimination."**

8. At paragraph 8 of the decision the Judge stated:

> **"It is similarly clear from a consideration of the original claims and the claims now before me that the causes of action relied on by the Claimants are precisely the same. The allegations of race discrimination arise from the treatment of the Claimants by the Respondent in the course of the disciplinary proceedings in dismissing them and in reporting them to the NMC. Those referrals were made shortly after each of the Claimants was dismissed. There is no suggestion in the current claims that any of the Claimants is relying on any other post-termination cause of action."**

9. The Judge referred to the provisions of the Rules in the 2004 Regulations, with which she was concerned, which included in particular rule 25, "right to withdraw proceedings", which reads, insofar as is material, as follows:

> **"25.—(1) A claimant may withdraw all or part of his claim at any time – this may be done either orally at a hearing or in writing in accordance with paragraph (2).**
>
> **(2) To withdraw a claim or part of one in writing the claimant must inform the Employment Tribunal Office of the claim or the parts of it which are to be withdrawn. Where there is more than one respondent the notification must specify against which respondents the claim is being withdrawn.**

(3) The Secretary shall inform all other parties of the withdrawal. Withdrawal takes effect on the date on which the Employment Tribunal Office (in the case of written notifications) or the tribunal (in the case of oral notification) receives notice of it and where the whole claim is withdrawn, subject to paragraph (4), proceedings are brought to an end against the relevant respondent on that date. Withdrawal does not affect proceedings as to costs, preparation time or wasted costs.

(4) Where a claim has been withdrawn, a respondent may make an application to have the proceedings against him dismissed. Such an application must be made by the respondent in writing to the Employment Tribunal Office within 28 days of the notice of the withdrawal being sent to the respondent. If the respondent's application is granted and the proceedings are dismissed, the claimant may not commence a further claim against the respondent for the same, or substantially the same, cause of action (unless the decision to dismiss is successfully reviewed or appealed).

(5) The time limit in paragraph (4) may be extended by an employment judge if he considers it just and equitable to do so."

10. The Judge was satisfied that the order of Employment Judge Wallis, by which he dismissed the claims on them being withdrawn, complied with rule 28(1)(a) and rule 29(1) and he concluded that the Claimant's original claims alleging race discrimination had been the subject of a final judgment where, following the Claimants' withdrawal of their claims, the claims were dismissed.

11. Rejecting the application for review, Judge Wallis, referring to the case management discussion on 19 December 2011 stated in a letter dated 7 January 2013 from the Employment Tribunals as follows:

"Upon hearing these withdrawals, the representative on behalf of the Respondent applied for those claims to be dismissed. Employment Judge Wallis asked whether there was any objection to that application. The only response was from Mr Ogilvy, who said that the claim should not be dismissed by reference to their merits, but only because they had been withdrawn. Employment Judge Wallis pointed out that they could not be dismissed by reference to their merits, as no evidence had been heard in respect of those claims. There being no objection, the claims were then dismissed upon withdrawal by those Claimants."

Then the letter continues:

"Employment Judge Wallis is satisfied that following the clear withdrawal of those claims by the Claimants, there was an oral application by the Respondent's representative to dismiss those claims and the Claimant's comments were sought, as set out above. She can therefore see no breach of Rule 25, as alleged in the review application."

The application for permission on the Judge's dismissal of the claims made by Mr Brown

12. Before turning to the single ground of appeal in respect of which the President granted permission, I should deal with one matter that arose during the course of Mr Ogilvy's submissions today. He submitted that there had been no oral application for a dismissal of the claims made by Mr Brown, the solicitor appearing on behalf of the Respondent at the hearing before Judge Wallis on 19 December 2011 and that the Judge had dismissed the claims of her own volition. Mr Ogilvy applied for permission to pursue this point. He said that there were a number of persons, including the Appellants and a solicitor who was then appearing for another Claimant, who would give evidence in support of this submission. Mr Kempster, who appears for the Respondent, opposed this application. He said that Mr Ogilvy was aware, since receipt of the letter of 7 January 2013 refusing a review of the decision of 19 December 2011, that Judge Wallis stated that it was a representative of the Respondent who made the application upon hearing of the withdrawals to dismiss the claims. Mr Ogilvy must have appreciated that there was a dispute between what he says occurred on 19 December 2011 and what Judge Wallis says occurred. In his application for a review, made on 17 December 2012, Mr Ogilvy refers, on a different issue, to "my notes" of the hearing on 19 December 2011, yet no notes have been produced at this hearing to support the case that is now being put forward. Mr Ogilvy merely asserts that persons will give evidence, but he produces no statements despite the time that has elapsed since he knew of this factual dispute. Mr Ogilvy has made no application for permission to pursue this new ground since the President granted the permission that he did on the single ground over six months ago. I do not understand from what Mr Ogilvy told me of the hearing before the President that he had clearly articulated the ground on that occasion. I reject the application to pursue this new ground. It is far too late to take this point. I refuse permission, essentially for the reasons put forward by Mr Kempster.

The Claimant's case

13. Turning then to the sole ground of appeal, Mr Ogilvy submits that it is a mandatory requirement of rule 25(4) that the application for dismissal be made in writing. It is common ground that the application that was made to Judge Wallis on 19 December 2011 on behalf of the Respondent to have the claims dismissed was not made in writing. That being so, it must follow, Mr Ogilvy submits, that there was no Judgment in accordance with the Rules dismissing the Claimant's claims of race discrimination. Accordingly, Judge Wallis erred when making her decision on 19 December 2011 in failing to appreciate the application had to be in writing and Judge Kurrein made the same error in his decision of 10 December 2012.

14. In support of his submission, Mr Ogilvy relies on the statement of Wall LJ in **Khan v Hayward and Middleton PCT** [2006] EWCA Civ 1087 at paragraph 70:

> **"In the first place, in my judgment, the ET is a creature of Statute and its procedure is specifically governed by the 2004 Regulations. It is much used by litigants in person. Its procedures are governed by what is meant to be an informal, but clearly understood code. Thus, whilst at first blush, and particularly given the tight time-limits for instituting proceedings, it might seem sensible to have a procedure by means of which a litigant who had mistakenly withdrawn a claim should be allowed to revive it, I am satisfied that, for such a procedure to exist, it would need to be set out expressly in the rules. I therefore regard the absence of any such express provision in the rules as important."**

15. Mr Ogilvy submits that the Tribunal is not permitted to depart from the terms of rule 25(4), which require the application for dismissal to be made in writing.

16. The starting point for Mr Kempster is the difference between rule 25(3) and 25(4). At paragraph 73 of his Judgment in **Khan**, Wall LJ said:

> **"...it seems to me that the construction of the rule favoured by the ET Chairman and the judge is consistent with the CPR, and maintains the well-established distinction between a claim which has been withdrawn, but on which there is no judicial determination, and a claim which has been dismissed by means of a judicial act. The first does not, of itself, create either issue or cause of action estoppel: the latter does. Thus, if respondents to a claim in the ET wish to secure their position, they must apply to the ET for the claims against them to be dismissed. If**

they do not, they have the possibility that the claimant may bring a second claim on the same facts."

17. In **Verdin v Harrods Ltd** [2006] ICR 396, a decision of this Tribunal, approved by the Court of Appeal in **Khan** [2007] ICR 24, HHJ David Richardson stated at paragraphs 39 and 40:

> **"39. So a party who receives a notification of withdrawal of the whole proceedings, and wishes to establish once and for all that there is to be no further litigation on the same questions, may apply for dismissal. The subsequent hearing will then concentrate on the question, which Mummery LJ identified in Ako. Is the withdrawing party intending to abandon the claim? If the withdrawing party is intending to resurrect the claim in fresh proceedings, would it be an abuse of the process to allow that to occur? If the answer to either of these questions is yes, then it will be just to dismiss the proceedings. If the answer to both these questions is no, it will be unjust to dismiss the proceedings.**
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> **40. I agree with a submission made by Mr. Nicholls, that where one party withdraws the other party will generally be entitled to have the proceedings dismissed. This is because the party who withdraws will generally have no intention of resurrecting the claim again, or if he does will generally have no good reason for doing so. There is sometimes a temptation for a litigant, as the day of battle approaches, to withdraw a claim in the hope of being better prepared on another occasion. That will be unacceptable. Tribunals will no doubt be astute to prevent withdrawal being used as an impermissible substitute for an application for adjournment. Occasionally, however, there will be good reason for withdrawing and bringing a claim in a different way."**

The observations of Judge Richardson in **Verdin** encapsulate the purpose of section 25(4).

18. Judge Wallis went through the same process with the parties in the present case before acceding to the application to dismiss the claims. This is plain, in my view, from those parts of the review decision to which I have referred.

19. In **Drysdale v Department of Transport (The Maritime & Coastguard Agency)** (UKEAT /0171/12, 13 February 2013) this Tribunal specifically addressed the issue of whether, for the purposes of rule 25(4), it was necessary for the Respondent to make a written application to the Employment Tribunal within 28 days of the notice of withdrawal to the Respondent. HHJ Richardson stated at paragraphs 81 to 83:

> **"81. The purpose of dismissal under rule 25 was explained by the Appeal Tribunal in a passage in *Verdin v Harrods Limited* … [see full quote at para 17 above]**
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> **82. Once granted, as we have held, that the withdrawal of the claim by the Claimant's chosen representative was not vitiated by any unfairness or error of law on the part of the ET, it inevitably follows that the Respondent was entitled to an order dismissing the claim. The Claimant's representative indeed intended when withdrawing the claim to abandon it: this was not a case where she withdrew the claim in order to advance it in other proceedings, and it would have been an abuse of the process for the Claimant to do so. It is true that dismissal of the proceedings in this case followed hard upon the confirmation by the Claimant's representative that she did indeed withdraw them. In this case, however, dismissal was inevitable and it was no injustice to the Claimant or his representative to deal with the matter there and then.**
>
> **83. This leaves the submission of Mrs Drysdale that the ET should not have entertained the application to dismiss because it was not made in writing to the ET office within 28 days. The drafting of rule 25 is – as we have already observed – problematic in places. But we think it is plain that the second sentence of rule 25(4) is intended to impose a time limit on an application to dismiss, not to prevent an application to dismiss being made orally at the hearing where the claim has been withdrawn. We can discern no valid purpose in requiring a written application to the ET office when the parties are present at a hearing and the matter can be addressed there and then. To require a written application, with the possibility that a further hearing may then be necessary, would be inimical to the overriding objective, which includes dealing with cases expeditiously and saving expense. Construing rule 25 in accordance with the overriding objective (see reg. 3(3)(b) of the 2004 Regulations) we consider that it does not preclude the ET from dealing with the question of dismissal on an oral application made at a hearing when a claim has been withdrawn. If we had thought there was any substance in Mrs Drysdale's submission we would at least have entertained an application to amend the grounds of appeal: but we consider that it has no force."**

20. There was no suggestion that Mr Ogilvy was preserving the position of the Appellants. In the present case the Appellants were represented by solicitors or employment consultants. In her review decision Judge Wallis stated that, before dismissing the race discrimination claims on 19 December 2011, she first enquired from the Appellant's representatives whether they had any objection to the application to dismiss. No objection was raised save for the Appellants, or some of them, through their representatives indicating, as I have said, that the withdrawal was not a reflection of or based upon the merits of the race discrimination claims.

21. There was no indication by the Appellants, either on 19 December 2011 or within the period relevant to review or appeal, that the purpose of withdrawal was for a reason that required the cause of action to be kept alive and that therefore the claims should not be dismissed. That being so, there was in my view nothing to be gained by, for example, adjourning the hearing on 19 December to allow for a written application to dismiss. To

require a written application in such circumstances would, in my view, be inimical to the overriding objective, which includes dealing with cases expeditiously and saving expense.

22. Mr Ogilvy referred to rule 11 of the 2004 Rules in support of his submission that applications made to Tribunals have to be in writing and made within certain time limits, albeit those time limits can, he said, be waived by consent. However, Mr Kempster prays in aid that part of the Rule which gives the Judge a discretion to waive the requirement that the application must be in writing. That too, he submits, supports his general submission. Mr Ogilvy submits that **Drysdale** was wrongly decided. Mr Kempster informs me that the Claimant is pursuing an appeal in that case but not on the issue with which we are concerned.

Conclusion

23. In my judgment, the decision in **Drysdale** was correct. I follow it, for the reasons given by Judge Richardson, and I accept the submission of Mr Kempster in this regard.

24. One final point – Mr Ogilvy submitted that there was no Judgment or order made by Judge Wallis. Section 25(4) does not require there to be a Judgment. There has to be a judicial act; there plainly was. Judge Wallis had a discretion whether to dismiss the proceedings. She decided, having considered the matter and heard from the Appellant's representative, to do so, and she made an order to that effect.

25. It follows that, in my judgment, Judge Kurrein correctly concluded that there was no jurisdiction for the Tribunal to hear the complaints of race discrimination as contained in the second set of ET1s. Accordingly this appeal fails.