Appeal No. UKEATPAS/0046/14/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HS

At the Tribunal
On 20 March 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MISS A CRANWELL — APPELLANT

MR C CULLEN — RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	MR JAMES TIMOTHY YOUNG (Appearing under the Scottish Employment Appeal Legal Assistance Scheme)

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. This is a renewed application for appeal under Rule 3(10) in respect of a claim which the Claimant, Miss Cranwell, wishes to bring against the Respondent, a Mr Cullen. As to the claim itself, the facts have not been heard. But if the evidence supports the claim, then the Claimant has been most appallingly badly treated by her former employer, has been subject to sexual harassment, and in a summary which accurately describes her complaints, produced by Mr Young in his submissions on her behalf today, was treated in a way described as demeaning, derogatory and discriminatory, culminating in a physical assault. That may not do justice to the full picture but is certainly an appropriate summary.

2. The claim was rejected by Judge Gall before whom it came on or just before 4 June 2014. He did so because he considered the Claimant had not complied with the requirement which had just then come into force that she should contact ACAS before instituting relevant proceedings. He noted that the claim was defective because:

> **"you have indicated that you are exempt from early conciliation but none of the exemptions apply to your claim."**

The very thought of conciliation for someone with her particular claim would be problematic. It would involve her talking to someone who had treated her in the manner she described. Further, she says in her claim that her former employer had been subject to an interdict which prohibited him from contacting her. If so, she simply could not conciliate with him. It may very well be that she did not appreciate that, under the way in which the scheme for early conciliation works, if she had put forward those points to an ACAS Early Conciliation Officer, he was highly likely to have concluded that there was no point in further conciliation and would

have granted her the appropriate certificate in any event without her needing to come into contact in that context with a man with whom she had so badly fallen out.

3. It is impossible, therefore, not to have sympathy with her position. The question, however, is not one of sympathy; the question is one of the law which is applicable.

4. I am satisfied that I have been treated by Mr Young to one of the best arguments that I have heard sitting in this capacity in the Employment Appeal Tribunal, and he is particularly to be commended because he gives it under the terms of the SEALAS Scheme. It is carefully prepared, well-researched, well-thought-through, but entirely unremunerated. The Appeal Tribunal and I have no doubt Miss Cranwell herself will be very grateful to him for his efforts.

The Law

5. He accepts that the claims made were all claims to which the conciliation procedures applied. The statutory materials which are relevant begin with section 18A of the **Employment Tribunals Act 1996**. So far as relevant, that provides:

> **"(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.**
>
> **This is subject to subsection (7)."**

Subsection (7) provides that a person may institute relevant proceedings without complying with the requirement in prescribed cases. It sets out the general scope within which such cases may be prescribed. Subsection 10 defines "prescribed" as meaning "prescribed in employment tribunal procedure regulations".

6. "Employment Tribunal procedure regulations" include the early conciliation exemptions and the **Rules of Procedure Regulations 2014**. They provide, by Regulation 3, for some exemptions from the general rule that a person must comply with the requirement for early conciliation which is contained in the statute. Five exceptions are set out. None apply to this case, as Mr Young accepts. "Employment Tribunal procedure regulations" are also capable of covering the general rules of the Tribunal, scheduled to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**. The Rules include the overriding objective, which is to enable Employment Tribunals to deal with cases fairly and justly. That involves, so far as practicable, dealing with cases in ways which are proportionate for the complexity and importance of the issues but it is all subject to the overall requirement that the Tribunal should seek to achieve justice and fairness.

7. It is within those rules that Rule 10 provides as follows:

> **"(1) The Tribunal shall reject a claim if -**
>
> **…**
>
> **(c) it does not contain all of the following information -**
>
> **(i) an early conciliation number;**
>
> **(ii) confirmation that the claim does not institute any relevant proceedings; or**
>
> **(iii) confirmation that one of the early conciliation exemptions applies."**

8. As a matter of strict form the Claimant ticked the box which suggested that one of the early conciliation exemptions did apply. Thus far, so good for her claim. But under the heading "Rejection: substantive defects", Rule 12(2):

> **"The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a), (b), (c) or (d) of paragraph (1)."**

Paragraph (1)(d) of Rule 12 describes a claim:

> **"(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply"**

Accordingly here, Judge Gall was acting in accordance with Rule 12(1)(d) and 12(2). The effect was just as if Rule 10 had applied.

The Claimant's Case

9. The submission by Mr Young comes in essence to this. The rule as it is drafted is a strict rule. On the face of it, it permits of no exception so far as the Tribunal is concerned. It obliges the Tribunal Judge, whatever his personal feelings in the matter may be, to take a certain course. Thus where has been no early conciliation, within the meaning of the statute and the regulations relating to it, he has no choice, on the face of it, but to say that the claim cannot be heard and must be ruled out. Mr Young argues, however, that that is to take a very strict approach to what are essentially procedural requirements. The purpose of those requirements is to encourage early conciliation. There may be situations such as the present which are few and far between but which may be real and genuine exceptions to the general run of cases.

10. A rule which simply excluded ruled them without the possibility of further consideration, without there being a discretion to do so, would be a rule which was too harsh and which ultimately might not pay sufficient tribute to the requirement that there should be access to justice or, for that matter, that the overriding objective which covered all rules should be honoured. He argues that it might be possible to apply Rule 6 of the **Employment Tribunal Rules** to the mandatory exercise which otherwise Rules 10 and 12 would require of Judge Gall such that he should at least have considered whether he should waive or vary the requirement. Rule 6 provides as follows:

> **"A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal … does not of itself render void proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following -**
>
> > **(a) waiving or varying the requirement;**
> >
> > **…"**

(There are then three further possibilities.)

Conclusions

11. The difficulty, as it seems to me, with asserting that this gives a discretion to a Tribunal Judge is, in my view, threefold. First, it has to read this rule as modifying the requirements which are otherwise laid down in statute at the outset of the **Employment Tribunals Act 1996** and in respect of which the word "prescribed" appears. If there is to be an exemption from the regime set out in the Act, then it must be a prescribed one. "Prescribed" suggests an element of targeting, and an element of focus. There is nothing in Rule 6 which gives that necessary focus. Secondly, Rule 6 is, in the way it is constructed, plainly designed to allow a Tribunal to relieve litigants of the consequences of their failure to comply. It makes little sense to construe it as entitling the Tribunal to avoid having to satisfactory an obligation which is placed upon the Tribunal itself in absolute and strict terms. To say in one part of the Rules "The Tribunal has no option but to do X" and then to read is as subject to the proviso "except where it does not want to" is incoherent. But thirdly, the failure to comply envisages that there is non-compliance in the first place. There has been no non-compliance here because the Tribunal has complied with its obligation. On that view of the rule, the occasion for its exercise simply does not occur.

12. For those three reasons, tempting though it is in the particular circumstances of this case, I cannot construe Rule 6 as providing the necessary discretion to avoid the consequences of

Rule 12(1)(d) and Rule 12(2). It follows that in this case the Claimant's claim was rightly rejected by Judge Gall because there was nothing else he could do. The fact that the merits of the case might suggest that an exception for conciliation might be made have nothing to do with the case.

13. A practical answer would be that the Claimant could have spoken to or written to ACAS, as required by the Regulations, and explained to the ACAS officer that conciliation was pointless in the circumstances of the case. It would be anticipated that the officer would agree with that and therefore that he would then provide the requisite certificate or number which would entitle the Claimant then to proceed with her claim. She still may do this, and seek to satisfy the Tribunal that her claims are not to be struck out by a stringent application of the time limit. A Tribunal may well look on that application with considerable sympathy in the particular circumstances of her case, and bearing in mind the fact that she may not have appreciated that the early conciliation certificate did not necessarily involve her first having to have had contact with the man who had treated her so badly, assuming her claims to be correct.

14. However, despite the very considerable and impressive efforts of Mr Young, I simply cannot see that there is here, even arguably, an error of law in the decision which Judge Gall took. Though I might have wished to have been able to reach another conclusion, I cannot do so and therefore this claim is dismissed for the reasons I have given.