Appeal No. UKEAT/0388/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 March 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MISS N BIRRING APPELLANT

MICHAEL ROGERS AND CAROLYN MOORE T/A CHARITY LINK RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS HELEN BARNEY (of Counsel) Direct Public Access
For the Respondent	No appearance or representation by or on behalf of the Respondent

<u>SUMMARY</u>

JURISDICTIONAL POINTS

PRACTICE AND PROCEDURE - Chairman alone

An Employment Judge sitting alone heard a claim of unfair dismissal (which he should hear alone unless he exercised discretion not to do so) together with one in respect of detriment for trade union activity (which he could only hear with lay members, unless the parties agreed otherwise). He did not consider whether to exercise his discretion to sit with members in respect of the dismissal claim. <u>Held</u> that he should have done so; and that it was so unlikely that the discretion could have been exercised in this case other than by having a combined hearing of the claims, sitting with lay members, that the matter would be remitted to a fresh Tribunal for hearing on that basis, unless an Employment Judge with responsibility for the case later determined for good reason that the two claims (which were linked, though not entirely overlapping) should be heard separately. The fees paid for appealing were to be paid in full by the Respondent to the Claimant.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. The Claimant raised two claims against her former employer. The first, dated 15 February 2013, was in respect of unlawful deductions from her wages. The second, dated 9 April 2013, raised two claims: the first, that she had been unfairly dismissed; the second, ticking the box "Other complaints" in box 5.1 of the ET1, that she had been subject to a detriment because of her trade union activity. She asserted clearly, at subparagraph 12 under box 5.2 that her employers were "highly irritated" by her joining a trade union and by her being accompanied by her trade union representative at a disciplinary hearing. Their views had been made clear on this and the detriments were that they had presented "various trivial and unsubstantiated claims against me" and also "rearranged my work patterns such that my earnings were virtually halved". This was clearly a claim for detriment for trade union activity, which was separate and distinct from, though it might also have been factually related to, her claim that she had been unfairly dismissed.

2. Those claims came before a Tribunal at Reading. Employment Judge Hardwick sat on his own to determine the Claimant's claims in respect of all the claims. He dismissed each of them for reasons which he sent out on 10 June 2014. The appeal is not raised in respect of the complaint in the first ET1, only those in the second. The claim for suffering a detriment on account of trade union membership is in respect of the breach of a right conferred by Chapter IX Part III section 146 of the **Trade Union Labour Relations (Consolidation) Act 1992**. It is a breach in respect of which an employee may complain by virtue of section 146(5). Section 146(5A) provides that section 146 does not apply where the worker is an employee and the detriment in question amounts to dismissal. As I have said, that was not this case.

3. By virtue of section 4 of the **Employment Tribunals Act 1996** the claim of unfair dismissal, if separate, could undoubtedly be heard by a Judge sitting on his own. But it is clear that a claim in respect of detriment for trade union activities could only be heard by a Tribunal Judge sitting together with lay members unless the parties to the case had consented to the Judge sitting alone. The precise terms of section 4, so far as material to this appeal, are as follows, under the heading "Composition of a tribunal":

> **"(1) Subject to the following provisions of this section, proceedings before an employment tribunal shall be heard by -**
>
> > **(a) the person who … is the chairman [for that, now read Employment Judge], and**
> >
> > **(b) two other members, or (with the consent of the parties) one other member, selected as the other members (or member) in accordance with regulations …**
>
> **(2) Subject to subsection (5), the proceedings specified in subsection (3) shall be heard by the person mentioned in subsection (1)(a) alone or alone by any Employment Judge who, in accordance with regulations made under section 1(1), is a member of the tribunal."**

4. Subsection (3) sets out a list of proceedings. Amongst them are proceedings under section 111 of the **Employment Rights Act 1996**. Thus unfair dismissal complaints are to be heard by an Employment Judge alone subject only to subsection (5). Subsection (5) provides:

> **"(5) Proceedings specified in subsection (3) shall be heard in accordance with subsection (1) if a person who, in accordance with regulations … may be the chairman of an employment tribunal, having regard to -**
>
> > **(a) whether there is a likelihood of a dispute arising on the facts which makes it desirable for the proceedings to be heard in accordance with subsection (1),**
> >
> > **(b) whether there is a likelihood of an issue of law arising which would make it desirable for the proceedings to be heard in accordance with subsection (2)**
> >
> > **(c) any views of any of the parties as to whether or not the proceedings ought to be heard in accordance with either of those subsections, and**
> >
> > **(d) whether there are other proceedings which might be heard concurrently but which are not proceedings specified in subsection (3),**
>
> **decides at any stage of the proceedings that the proceedings are to be heard in accordance with subsection (1)."**

5. What is not contained in the list in section 4(3) is any reference to a complaint made under section 146(5) of the **Trade Union and Labour Relations (Consolidation) Act 1992**. It follows that, so far as that claim was concerned, the Judge was not entitled to hear it on his

own. The Tribunal was not properly constituted. There was no jurisdiction for the Judge alone to hear it. It follows that, insofar as that decision is concerned, the decision must be set aside and that matter, in any event, remitted to the Tribunal for determination in accordance with the law for the first time by a properly constituted Tribunal.

6. There have been a number of cases in the past which have considered the question whether or not a Judge hearing an unfair dismissal complaint or another complaint which comes within section 4(3) should, as a matter of law, actively seek representations from the parties before the Tribunal as to whether the discretion provided for by subsection (5) should be exercised. This case, so far as counsel is aware, is the first in which that question has arisen in the context of a case in which part of the allegations were not capable of hearing by a Judge alone. They came clearly within section 4(5)(d). At the outset, had a proper view been taken of the way in which the matter should proceed, there would have been a claim of unfair dismissal and of unlawful deductions from wages, both of which should be heard alone unless the Judge exercised his discretion otherwise, and issues in respect of the complaint of detriment for trade union membership and activity, which could only be heard by a Tribunal of three unless the parties otherwise consented, either under subsection (2), to reduce the membership from three to two, or subsection 4(3)(e) as:

> **"proceedings in which the parties have given their written consent to the proceedings being heard in accordance with subsection (2) (whether or not they have subsequently withdrawn it)"**

7. In resolving whether or not the Judge here was obliged to consider whether he had correctly exercised his discretion to sit alone in respect of the unfair dismissal claim, I have had the submissions on behalf of the Claimant from Ms Barney of counsel. She did not appear below. Below, the Claimant was represented by a Chartered Accountant, who was not a professional lawyer. Before the Tribunal the Respondent was represented by counsel. Counsel

did not draw to the Judge's attention the problem of sitting alone in this case. Before me the Respondent has chosen not to be represented. It has blown hot and cold as to whether it contests the appeal.

8. Thus, on 22 December 2014, Ms Farmiloe, who was the barrister, I understand, employed in-house by the Respondent, said in a letter both e-mailed and faxed to this Tribunal that she had received instructions from her clients that "after careful consideration, they do not wish to contest the Appeal lodged by the Claimant". That drew the response from this Tribunal, asking whether the Respondent would agree a consent order proposing how the appeal might be disposed of.

9. On 5 January Ms Farmiloe e-mailed to say:

> **"The [Respondent's] position is as set out in my previous email … The Respondent will not be opposing the Appeal nor entering a response to the Appeal."**

However this was later superseded by an e-mail of 22 January 2015, not from the email box of Ms Farmiloe, though purportedly signed by her, saying:

> **"To clarify the respondent's position, as discussed during our conversation, the respondent does not wish to participate in an Appeal hearing but does contest the Appeal."**

I have not heard further from the Respondent. Accordingly those who may wish to rely upon this Judgment as authority should bear in mind that I have heard submissions only from one party, and it may be that there are arguments which could have been addressed to me, which have not, though for the moment I cannot easily conceive them. Counsel for the Claimant has performed her duty in these circumstances with diligence.

The Tribunal Judgment

10. It is plain that the Judge did not consider at all whether he should exercise his discretion under section 4(5) of the **1996 Act**. That is apparent because, by determining the claim in respect of detriment, he showed he did not appreciate that there was any issue as to composition. It may be that he was not helped by the Tribunal Service itself, although it is a matter to which a Judge should have regard in every case. I say that because the case was originally set for hearing and a Notice of Hearing sent to the parties, which contained at the top both the case numbers of each of the applications. That was on 14 May 2013 in respect of a hearing which did take place. Only one was identified on the notice for the hearing before the Judge. But in any event the Judge plainly thought he was dealing with both claims. He set out, in the course of his Decision, the issues which arose in respect of detriment. There could have been no doubt that he was dealing with a claim which he had no jurisdiction to hear on his own if he but turned his mind to it.

11. I therefore conclude that it was one of those matters, often all too easily overlooked, which it simply was. Counsel did not draw his attention to the error. The lay representative on behalf of the Claimant might be excused for not doing so since in this case there was nothing in the Notice of Hearing or any of the Notices of Hearing to alert him to the possibility that there might be scope for representations as to the composition of the Tribunal. If there had been, then, in common with many litigants in person, he might have investigated the matter and made representations.

The Law

12. There is no case which is an exact precedent, so far as I am told. Counsel, in her researches, had come upon which she thought might be, the case of **Insaidoo v Metropolitan**

Resources North West Ltd UKEAT/0365/10/DA, a decision of the Appeal Tribunal, presided over by Cox J of 23 March 2011. But on consideration that was a case in which a claim for unfair dismissal could not be brought because of the expiry of the qualifying time limit unless it fell within the scope of unfair dismissal for asserting a statutory right. That was not a claim which fell within section 4(3). It accordingly had to be remitted. It was not therefore a claim in which part of the case could be heard and should normally be heard by a Judge alone (unless the discretion were exercised otherwise) which was combined with part of a case which could only be heard by a Judge and lay members.

13. The question of the exercise of the discretion was addressed authoritatively in the case of **Gladwell v Secretary of State for Trade and Industry** [2007] ICR 264 by Elias J. What he said between paragraphs 46 and 55 bears repetition. In particular, he noted (paragraph 46) that the starting point was to recognise that there is a discretion conferred upon the chairman and, like all discretions, "… it is one which he has to consider exercising in an appropriate case." The default position, however, in cases of unfair dismissal and other cases falling with subsection (3) was for the matter to be heard by a chairman alone and (paragraph 47) he saw nothing wrong in the Tribunal Office operating a standard practice that all cases in that category would be listed before a chairman alone:

> **"47. … but the parties are given an opportunity of making representations as to why a full panel should be constituted. Plainly if representations are made then the allocation direction will have to be reconsidered and brief reasons given for the decision. I also agree with the tribunal in *Clarke v Arriva Kent (Thameside) Ltd* that section 4(5) requires that the discretion is one to be kept under review.**
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> **48. It is important that the chairman charged with hearing the case should have regard to the possibility that the situation may have changed from when the original decision to have the matter heard by a chairman alone was taken. I have no doubt that in practice the chairman allocated the case will know of the practice and be alert to the continuing duty to consider calling a panel."**

It is a matter of regret that the Judge here was not so alert, nor alerted by others.

14. At paragraph 49 Elias J said:

> **"49. In practical terms there will be many cases for which a chairman sitting alone is qualified where there is nothing about the case which causes that chairman to consider that this might be a situation where the full panel would be appropriate. In those circumstances the discretion will be exercised if only in a negative sense … There is in my judgment no legal duty for the judge at the substantive hearing to invite any observations from the parties. Having said that, it would usually be prudent for the chairman to do so …**
>
> **50. … I do not consider that the chairman who fails to give reasons for not departing from the usual rule is thereby committing an error of law, unless the issue has been raised explicitly by one of the parties. If and when the decision (or apparent lack of it) is challenged on appeal, and the appeal raises a real issue as to whether a full panel should have been called or not, then it is open to the appeal tribunal to ask for reasons as to why the discretion was exercised as it was.**
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> **51. I would not, therefore, endorse the approach in *Clarke v Arrive Kent Thameside Ltd* based upon *Sogbetun* [1998] ICR 1264 that the failure of the chairman in that case to give reasons or canvass the views of the parties of itself amounted to an error of law which could not be remedied by reasons given later …**
>
> **52. I would, however, respectfully disagree with Lindsay J that the only circumstance in which a chairman is obliged actively to consider exercising his discretion is if the parties raise the issue. Litigants in person may occasionally be unaware of the possibility of a different constitution (although they should have been alerted to the possibility in the notice of hearing); perhaps more significantly, they may not appreciate the potential merits of that course. So there must be some cases where the chairman hearing the case should actively consider exercising the discretion even where the issue has not been drawn to his attention.**
>
> **53. Equally, I agree with Morison J that the fact that the parties have positively agreed to the jurisdiction of the chairman sitting alone does not inevitably and in all cases preclude a successful challenge …"**

15. I note that those principles have been confirmed and adopted by HHJ Peter Clark in the case of **Stirling Developments (London) Ltd v Pagano** [2007] IRLR 471. They were applied again in the case of **Weedon v Pinnacle Entertainment Ltd** 18 November 2011 UKEAT/ 0217/11 and 0218/11.

16. I too would endorse those statements of principle. But I would add to them and note that they were reached in the particular circumstances of a case in which there was, on the wording of the statute, a default position in favour of there being a chairman alone. They did not deal with the situation which is before me, which is where there is a claim, as there often nowadays is, before a Tribunal in which a claim in respect of unfair dismissal is combined with another claim. Some idea of the frequency with which that might occur may be given by two sets of statistics, though each is incomplete. The first personal communication is from the former

President of Employment Tribunals (England and Wales) to the effect that there are on average between two and three jurisdictions referred to in every claim heard. The second was obtained as a result of a suggestion by HHJ Serota on the sift in respect of this case as to the information, if there was any, as to the extent to which Tribunal Judges sat alone in cases of unfair dismissal.

17. The response received from the HMCTS Performance Analysis and Reporting Team was that in Full Hearings in claims accepted by the Employment Tribunal between 6 April 2012 and 31 December 2014, which included unfair dismissal as a jurisdiction, there were 10,600 cases in which the Employment Tribunal Judge sat alone. There were 5,000 in which the Judge sat with members. It may therefore be that there may yet be a number of cases in which a jurisdiction in respect of unfair dismissal is linked in the claim to a jurisdiction in respect of which a Judge has no choice but to sit with members. In such a case it is my view, having listened to the submissions of Ms Barney, that a Judge should actively consider with the parties whether he should exercise his discretion to sit with members insofar as the claim relates to a jurisdiction within subsection 4(3).

18. My reasoning is this. The statute provides for a discretion. The principles in **Gladwell** recognise that the discretion is not only to be exercised initially, though it may be negatively exercised, in effect, but also kept under review. I would add to Elias J's statement of law that the decision should be expressly and actively considered in any case in which there are combined jurisdictions, one of which requires a full Tribunal, one of which usually does not. Then the Judge will have to decide whether there should be a split hearing, one part of the claim to be heard by a full Tribunal, the other part or parts to be heard by a Judge alone. This so obviously requires good reason for it (since it will interact with the obligations of the Tribunal to apply the overriding objective) that in my view it demands specific consideration. Here, for

instance, if the Judge had appreciated that he should sit with lay members in respect of the detriment claim, it is difficult though not impossible to think that he would immediately have directed his mind to whether he should sit with lay members also in respect of the unfair dismissal claim. As I have said, there would have to be good reasons for his not doing so. That is particularly the case since, as Ms Barney points out, if one is looking for the rationale behind the particular matters referred to in subsection (5), the emphasis seems to be that, if there are factual matters which require determination, that argues in favour of there being a full Tribunal, as opposed to issues purely of law, which would argue against.

19. The distinction between the matters set out in subsection (3) and those which are excluded from it may well have something to do with Parliament's appreciation of the degree to which factual considerations requiring some knowledge and experience of the workplace come into play. For my part I would add that there is an importance in the legitimacy of a decision which may be conferred by there being lay members from both wings of industry, but that may simply be the consequence of the appreciation by those subject to the jurisdiction, both employers and employees, that there are matters of fact which may peculiarly be advantaged in their determination by being scrutinised by those who have experience from both perspectives at the workplace.

20. In my view, in a case like this, a Judge should be and is obliged to exercise his discretion. To that extent I differ from the view expressed in **Gladwell** that there was no such duty, but I do so whilst accepting entirely the correctness of **Gladwell** so far as the single case of unfair dismissal or other jurisdictions within section 4(3) are concerned. Even then that statement of principle was reached on the footing that the parties would at least know that they could make representations about the formation of the Tribunal (see paragraph 52). Litigants in person

have become a yet more familiar feature of the legal landscape in employment cases than they were in 2006 when Elias J determined **Gladwell**. Over the last six years, for example, in this Appeal Tribunal, even though its jurisdiction is reserved to matters of law, there has been a shift from those cases in which at least one party has been professionally represented from 60% in 2009 to 40% in 2014. That is a very considerable shift, requiring the courts to consider carefully the procedures that they should adopt. It is a pity in this case that the Notices of Hearing did not, as plainly they did at the time of **Gladwell**, draw attention to the fact that submissions might be made as to the composition of the Tribunal. It may be a matter for the President of Employment Tribunals (England and Wales) to consider afresh as to whether there should be any change in the wording of standard notices so that litigants in person know that they do not necessarily have to accept a Tribunal constituted as one or for that matter as three if there is good reason not to do so.

21. I accept that, as Ms Barney puts it, the discretion here was one which should have been exercised, and the exercise should not simply in this case have been apparent from the fact that the Judge did what was usual in cases of unfair dismissal and sat alone. That could not safely be inferred in any case in which there is a mixture of jurisdiction. Had the Judge had regard to the factors listed in subsection (5) it is difficult, but not impossible, to think that he would have concluded that there had to be a hearing in which he sat with members. Had he had regard to the overriding objective, he would have borne in mind that the parties might not have been on an equal footing in their appreciation of composition (Rule 2A); that in a case like the present, though it will not necessarily be so in all cases, it is likely to be proportionate that this case would be one that the claims should be heard together and in such a case it would be unrealistic to think that the lay members, though sitting in the Tribunal room, would be there to determine only part of the claim that they were in fact hearing; that delay should be avoided and expense

saved. Those considerations would argue strongly in favour of a relatively compact claim such as the present being heard in one go before a Tribunal.

The Consequence

22. The consequence is that in my view the Judge failed to consider whether to exercise his discretion. There was a discretion. He did not exercise it. Had he done so, it is highly likely that he would have determined that the claims should be heard together. So highly likely is that in this case that it seems to me that the appropriate order is that the appeal be allowed, and that the matters of unfair dismissal and detriment be remitted to a fresh Tribunal for determination. Plainly they cannot be determined by Employment Judge Hardwick who has already expressed himself as to the credibility of the Claimant and given his own view on the merits of the case. The Tribunal will sit as a Tribunal of three. The powers of this Tribunal allow me to make any order the Tribunal below might have done. I exercise it to order such a panel. But I expressly allow for the possibility that there may be a different exercise of the discretion by the Judge by saying that this direction as to composition may be departed from if, upon consideration, a Judge of the Tribunal thinks there is good reason to do so in respect of the "pure" unfair dismissal claim. This has to be a judicial decision, however, and not simply one which is administratively reached.

Costs

23. The Claimant, through no fault of her own, had to bring the appeal and pay fees totalling £1,600 in order that she could obtain a hearing before a properly constituted Tribunal. Under Rule 34A(2A)

> **"If the Appeal Tribunal allows an appeal, in full or in part, it may make a costs order against the respondent specifying the respondent pay to the appellant an amount no greater than any fee paid by the appellant under a notice issued by the Lord Chancellor."**

24. This was a case in which it was necessary to bring the appeal. In fact, it is a pity that the Respondent blew hot and cold as to the appeal, as I have demonstrated, since a formal order, without the need for the additional expense and inconvenience of attendance, would have been possible had the Respondent agreed, as plainly at one stage the Respondent seemed minded to do. As between the parties, therefore, the Respondent must, in my view, pay to the Claimant £1,600, representing the appropriate award under Rule 34A(2A). I see no reason for reducing it.

25. As to the Respondent's position, it may wish if it chooses, as to which it will have to seek its own advice, to consider whether, in the particular circumstances of this case, there may be any proper case for approaching the Tribunal Service for payment of all or part of the money which it will have to pay to the Claimant. But that is a matter between it and the Tribunal Service, arising out of the particular facts of this case, about which I should say no more.

26. Accordingly, the appeal is allowed, and costs are awarded as I have stated.