Appeal No. UKEAT/0331/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 February 2015

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MS S RAZAK	APPELLANT
IHS GLOBAL LTD	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR JASON FRATER (Advocate) and MR DAMIAN McCARTHY (Advocate)
For the Respondent	MR DAVID CUNNINGTON (of Counsel) Instructed by: R Felstead Solicitors 2 Akehurst Street London SW15 5DR

SUMMARY

JURISDICTIONAL POINTS - Extension of time: just and equitable

Although there were aspects of the procedure adopted by the Employment Tribunal which were not ideal, the appeal was dismissed as there was no error of law disclosed:

(i) In their decision that the Claimant had not put forward a case that her dismissal (which took place less than three months before the ET1) was part of a continuous course of conduct involving sex discrimination which otherwise ended more than three months before the ET1;

(ii) In their decision that it would not be just and equitable to allow her claims based on that course of conduct to proceed.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal against a Decision of the Employment Tribunal sitting in London (Central) for which Reasons were sent out on 28 March 2014. The decision was that all claims brought by the Claimant, other than those arising out of her dismissal, were out of time and that accordingly the Employment Tribunal had no jurisdiction to deal with those claims. That decision followed a hearing stretching over some four days, at which the Claimant was represented by Mr McCarthy, assisted by Mr Frater, who are both lawyers. At the hearing of this appeal Mr Frater has represented the Claimant attended by Mr McCarthy, although he is not here for this Judgment. Mr Cunnington has represented the Respondent throughout.

2. I say at the outset that the Claimant sought to place before this Tribunal a witness statement from Mr McCarthy dated 28 January 2015 dealing with aspects of what happened before the Employment Tribunal. That statement was only lodged last week, with no kind of direction having been sought from the Employment Appeal Tribunal. That, in my view, was completely unsatisfactory and I have paid no regard to the contents of that statement.

The Claim

3. The Claimant was employed by the Respondent from 30 April 2007, latterly as a Principal Researcher. On 20 December 2011 she started a second period of maternity leave, and she returned from that to work on 9 July 2012. Her line manager was a Dr Leta Smith. She was dismissed, ostensibly for redundancy, on 25 March 2013.

4. On 11 June 2013 she started Employment Tribunal proceedings. Attached to her ET1 was a document headed "Summary of Complaint", which is at pages 49 to 55 in my bundle. That document alleged that the dismissal was unfair because there was no redundancy situation, there was inadequate warning and consultation, her selection was unfair and the Respondents did not try to find her suitable alternative work. It was also said that the decision makers, primarily a Dr Peter Jackson, were tainted by the views of Leta Smith, which had been set out in a performance rating which Dr Smith had carried out, and which the Claimant had appealed against. That performance rating was apparently put forward on 11 February 2013.

5. There were also allegations of less favourable treatment, harassment and sex discrimination arising under the **Equality Act 2010**, which appeared to be based on a series of events set out in paragraph 18 of the Summary of Complaint document. That series of events named Dr Smith as being the perpetrator and were in chronological order. The last entry giving a date was paragraph 18(4)(j), which said:

> **"In February 2013, Leta Smith accused the Claimant of not sending her email notifications for expense approvals. …"**

There was also a letter (k), which said this:

> **"It appeared that the Claimant's managers were clearly trying to engineer her dismissal from the Respondent."**

6. Between the section of the Summary of Complaint dealing with the unfair dismissal claim and the other three types of claim I have mentioned, there was a heading which said "Automatic unfair dismissal ([**Employment Rights Act 1996**, section] 99)". That stated:

> **"16. The Claimant was dismissed because she had been pregnant, given birth or taken maternity leave and she relies upon facts and matters set out above and below."**

The introduction to the "Less favourable treatment" section, which came immediately afterwards, said in paragraph 18:

> **"The Claimant relies upon facts and matters set out above and below, including the following:**
>
> **..."**

Then appear the chronological series of events I have already referred to.

The Employment Tribunal Decision

7. The matter was listed for a six-day hearing starting on 27 January 2014. There were witness statements from the Claimant, from Dr Smith, from Dr Jackson and from another manager. Dr Smith had apparently come from the United States to give evidence. There was a bundle, apparently of 1,000 pages, and there was an agreed List of Issues, which I have not seen but which I understand to include this issue:

> **"In the event that the matters referred to above are prima facie time barred, are they within such other period as the employment tribunal thinks just and equitable or forming part of a course of conduct extending over a period, in accordance with S123 of the Equality Act 2010?"**

8. Unfortunately, instead of getting on and hearing the case and resolving the issues, including the one I have just referred to, the Employment Tribunal raised the question of the adequacy of the Claimant's pleadings, both as to discrimination and as to how, if at all, the earlier discrimination linked to the dismissal. That led to adjournments to enable the Claimant to clarify matters. According to paragraph 15 of the Judgment:

> **"… the tribunal indicated the detail needed so that the allegations could be identified to include: the alleged discriminators; as far as possible, the dates; and the circumstances relied on. It was agreed that the claimant should have a further opportunity to set out the issues and to deal with the shortcomings."**

9. On Day 3 of the hearing the Claimant's lawyers produced a third version of the List of Issues. That document is before me in my bundle at pages 97 to 105. It is undoubtedly a confusing and unhelpful document. It includes 31 so-called separate allegations of

discrimination (presumably put in that form to satisfy the Employment Tribunal's request for detail). Those 31 allegations broadly reflect the existing allegations against Dr Smith, though by no means precisely. Overall the document is more confusing than the Summary of Complaint document I have already referred to.

10. At the Employment Tribunal's prompting, the Claimant's lawyers amended the document again to put in an allegation number 32, which read as follows:

> **"The claimant was dismissed by Peter Jackson on 25 March 2013 and relies on the facts and matters set out in paragraph two under Unfair Dismissal above and allegations 1-31 above."**

As they say at paragraph 26, the way allegation 32 is put is unclear, whether having regard to either the claim form or any part of the draft issues. It is certainly not clear from the document how the 31 allegations relate to the dismissal.

11. Faced with this state of affairs, it seems that the Employment Tribunal then decided at the Respondent's behest to consider whether the 31 allegations of discrimination were *prima facie* out of time and, if so, the question of whether it would be just and equitable for them to be heard. Before I turn to the appeal, it is worth remembering what section 123 actually says. Section 123(1) **Equality Act 2010** says:

> **"Proceedings on a complaint within section 120 [that is basically a complaint to the Employment Tribunal] may not be brought after the end of -**
>
> > **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
> >
> > **(b) such other period as the employment tribunal thinks just and equitable."**

Then subsection (3):

> **"(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **…"**

12. The Employment Tribunal recorded that it was agreed by the Claimant that allegations 1 to 31 were only put against Dr Smith. It was also, according to the Tribunal, common ground that the last act by Dr Smith was done on 11 February 2013. That appears at paragraph 39 of the Judgment. The issue that the Tribunal identified was therefore whether the dismissal on 25 March 2013 was part of a "continuing course of conduct" with the earlier 31 allegations, which would mean that, assuming the 31 comprised a course of conduct, they could all be considered to be in time. The Employment Tribunal's conclusions on this main issue were at paragraphs 65 and 66:

> **"65. … we have come to the conclusion that this is one of those cases where, on the basis of the case put forward by the claimant, it is not possible for this claimant to argue that the dismissal itself was part of a continuing act. There is no reasonable prospect of establishing that.**
>
> **66. It is clear that it can be argued that there were consequences of the decision of Dr [Leta] Smith in relation to the ongoing consideration of the claimant's performance and that those consequences fed into the dismissal. That indeed is the submission made by Mr McCarthy on behalf of the claimant. That in our view is a clear confirmation that what in fact occurred at its height, is a continuing act up to 11 February and thereafter a consequence. However, the dismissal is not part of that continuing conduct and there is no basis set out before us on which we could find it was."**

13. So the Tribunal decided that the 31 allegations were out of time. They went on to decide it was not just and equitable to extend time, having heard evidence from the Claimant about her health and the reasons she did not act sooner. The consequence of that is that the Claimant is therefore only allowed to pursue her claims relating to dismissal, which incidentally include claims that the dismissal itself was based on discrimination. This means in practice that she will not be able to claim for injury to her feelings relating to her treatment during 2012 and early 2013 but unfortunately, because of the way the dismissal claims are put, relying in particular on Dr Smith's input, it does not really narrow the scope of the evidence.

The appeal

14. The Claimant appeals against the Tribunal's Decision that the 31 allegations were out of time and that it was not just and equitable to extend time. The basic thrust of the appeal on the

first of those points is that the Employment Tribunal should not have reached any conclusion about time limits and whether the dismissal was part of an overall course of conduct including the 31 allegations without hearing all the evidence in the case and presumably drawing any inferences that were permissible from it. In particular, as Mr Frater put it today, the Employment Tribunal should have heard the evidence to see if there was an "overarching state of affairs" indicating a course of conduct based on the Respondent's disapproval of the Claimant taking maternity leave for the second time.

15. It is right, of course, that an Employment Tribunal should be slow, particularly in discrimination cases, to reach any kind of disputed conclusion without hearing evidence, if relevant. However, in this case the Claimant's lawyers were being asked to formulate the claim in such a way that it was arguably in time. The Employment Tribunal gave them the opportunity to do that, and the Tribunal based its decision on what was being put forward in documents the lawyers had prepared. There was nothing in the List of Issues or the pleading that came before it, even by way of assertion, that really assisted the Claimant in establishing this "overarching state of affairs". The Employment Tribunal expressly recorded at paragraph 5 of their Judgment that there was no allegation of general discrimination or a generally discriminatory atmosphere within the Respondent. The case was not put on that basis.

16. When I asked Mr Frater about the matter in the course of the hearing in this Tribunal, it appeared that the high-points of the Appellant's case were the cross-referencing of the allegations relating to dismissal and discrimination in paragraph 18 of the Summary of Complaint to which I have referred, and the statement in the Summary of Complaint to the effect that it appeared that the Claimant's managers were trying to engineer her dismissal from the Respondent. In the context of the documents as a whole, and the way matters had

proceeded at the hearing, in my judgment even if those two points were drawn to the Employment Tribunal's attention, they provided too thin a basis for saying that the Claimant was making an arguable claim of a continuous conduct going all the way up to her dismissal. I can see no error of law in the Employment Tribunal's conclusion on this point, and I would dismiss the appeal relating to that.

17. The Claimant also says that the Employment Tribunal should not have decided the "just and equitable" issue as they did. Again, it is said that all the evidence in the case should have been heard before any decision was made. It is not clear to me that that was suggested before the Employment Tribunal, but it surely cannot be an error of law to resolve the "just and equitable" issue as a matter of case management before hearing the substantive case. In any event, in this case, evidence was led by the Claimant as to her health and her reasons for not making any claim earlier. On those matters the Employment Tribunal reached conclusions which they then took into account when deciding the "just and equitable" issue. There can be no complaint about the factual findings they made, and the findings were clearly relevant to the issue.

18. The Tribunal also took into account a number of other things including the length of delay (I note that the allegations went back to the beginning of 2012) and the relevant prejudice to the parties of allowing the claim to proceed. In this connection they made this finding at paragraph 75:

> **"The next question is the extent to which the cogency of the evidence is likely to be affected by the delay. We have received submissions from the respondents that there are a number of witnesses who have been identified as potential witnesses for the first time during clarification of the issues before this tribunal that is a submission made by Mr Cunnington, and a submission which actually has not been rebutted by the claimant. In any event we find that it is correct. The issues have been set out so poorly that this respondent could not have reasonably been expected to identify all the individuals who could give relevant evidence. It does not help the claimant to say that in the view of the claimant those witnesses are only of limited relevance. …"**

I should say for the record that at page 7 of the Respondent's Skeleton Argument for this hearing the relevant allegations are set out, and there are a number of individuals identified as doing things which are said to amount to acts of discrimination on behalf of Dr Smith. They are, in particular, Mr Hobbs, Mr Sagers, Mr Hem and a Mr Patel.

19. Having reached the conclusion I have read out, the Tribunal went on to say:

> **"… We therefore find there is a serious risk of a reduced cogency of evidence in this case and a serious risk that this respondent will have difficulty obtaining the relevant evidence to rebut these extensive allegations."**

That conclusion is criticised by the Claimant. I confess I find it a slightly odd one given that the Respondents were and remain emphatic that all the earlier allegations were made only against Dr Smith personally. However, given the course of events before the Employment Tribunal at the hearing and the decision made by the Claimant's lawyers to start naming and involving new individuals in the 31 allegations, I can understand why the Employment Tribunal should have reached the view they did.

20. Overall, bearing in mind that the "just and equitable" decision is one on which different conclusions can legitimately be reached on the same facts, I am also satisfied that no error of law is involved in that part of the decision.

Disposal

21. I therefore dismiss this appeal. I hope very much that this case, which has been set back by a full year, will now be rapidly heard and resolved in relation to the Claimant's dismissal.