Appeal No. UKEAT/0576/12/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 December 2013

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR S OSAGHAE — APPELLANT

UNITED LINCOLNSHIRE HOSPITALS NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR MARCUS PILGERSTORFER (of Counsel) (Free Representation Unit)
For the Respondent	MR ANDREW SUGARMAN (of Counsel) Instructed by: DAC Beachcroft LLP 7 Park Square East Leeds LS1 2LW

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

Employment Judge was wrong to dismiss claim in accordance with earlier order following settlement at court; but that outcome was plainly and unarguably correct given that the Claimant had then withdrawn his claim under ET r.25 (2004 Rules).

Claimant's appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This appeal raises questions of settlement and withdrawal of Employment Tribunal proceedings. It is brought by Mr Osaghae, the Claimant before the Nottingham Employment Tribunal, against the Judgment of Employment Judge Maidment, promulgated with Reasons on 13 August 2012 (the August Judgment) dismissing his remaining complaint of unfair dismissal brought against his former employer, United Lincolnshire Hospital NHS Trust, the Respondent.

Background

2. The Claimant was employed by the Respondent Trust as a locum consultant in the Urology Department of Boston Pilgrim Hospital from 24 May 2007 until his dismissal effective on 14 December 2010.

3. In 2010 the Trust decided to appoint a permanent consultant in Urology. The post required that the post-holder was listed on the GMC Register of Specialists. The Claimant was not so registered. He applied for the post but was unsuccessful. The consultant appointed, who was registered, was of Asian origin. He was on the list. The Claimant self-describes as Black African. On 11 March 2011 he presented his Form ET1 to the Tribunal, complaining of unfair dismissal and unlawful race discrimination. The claims were resisted.

4. Those claims came on for a Pre-Hearing Review before Employment Judge Hutchinson on 8 December 2011. That Judge declined to strike out the claims but made a deposit order requiring the Claimant to pay a deposit of £500 as a condition of allowing him to proceed with the race discrimination claim, which the Judge considered had little reasonable prospect of success. No deposit was ordered in respect of the unfair dismissal claim. In the light of the deposit order, the Claimant did not proceed with his complaint of race discrimination.

5. The unfair dismissal claim was listed for substantive hearing before a full Tribunal chaired by Employment Judge Maidment on 2 May 2012. On that occasion the Claimant appeared in person; the Trust was represented by Mr Adam Ohringer of counsel, instructed by DAC Beachcroft LLP, solicitors (the Respondent's solicitors).

6. Before the hearing began on 2 May, the parties had engaged in negotiations, leading to an agreement in principle to settle the Claimant's complaint (see the August Judgment Reasons, paragraph 1). They were then allowed a significant period of time in order to give them the opportunity to reach agreement. Those further discussions culminated in a handwritten document headed "Agreement" (the Agreement). It contained ten clauses, was dated 2 May 2012, and was signed by a representative of the Respondent and by the Claimant. A copy of that document was lodged with the Tribunal.

7. At a later date the Claimant suggested that the document was in fact headed "Agreement in principle." That contention was rejected by Employment Judge Maidment (see his review decision dated 13 September 2012).

8. On the basis of the Agreement the Tribunal made this Judgment dated 21 May 2012 and sent to the parties on 28 May (the May Judgment):

> **"Terms of settlement having been agreed between the parties, proceedings are hereby stayed until 30 May 201 to allow the terms of settlement to be put into effect. The parties shall then until 3 June 2012 have liberty to apply to restore the proceedings failing which the Claimant's complaints are hereby dismissed without the need for any further application, Order or judgment."**

9. Pausing there, the Agreement provided among other things for:

(1) payment of various identified sums of money by the Respondent to the Claimant within 28 days

(2) a reference, described at clause 5, thus:

> **"The Respondent agrees to provide future prospective employers of the Claimant with a professional reference within a reasonable time following a reasonable request. The reference shall be in the same or similar terms to that provided to NHS professionals, dated 31 December 2010, a copy of which is attached to this agreement."**

(3) by clause 7, that his ET claim be stayed for 42 days from 2 May. Unless the claim is restored during that period the Claimant agrees to withdraw his claim and further consents to the Tribunal dismissing the claim upon withdrawal.

(4) the Agreement represented a full and final settlement of his ET claim and any other claims arising out of his employment and its termination (clause 8).

10. It is common ground that the Agreement did not conform to the requirements of a compromise agreement under section 203(1) of the **Employment Rights Act 1996** (ERA), nor was it conciliated through ACAS. No such agreement was ever reached between these parties.

11. On 28 May the Respondent's solicitors e-mailed the Tribunal, copied to the Claimant, stating that the Respondent had paid the monies due under the Agreement and asking that the proceedings be formally dismissed.

12. The Claimant responded on 29 May. Put simply, he sought to alter the terms of the Agreement, which he described as an agreement in principle (see above). In particular, although he had received the reference specified at clause 5 on 28 May, he now wanted an expanded reference. He contended that he signed the Agreement "under distress" (presumably, duress). He objected to the claim being dismissed.

13. The Respondent's solicitors responded in detail by letter dated 1 June, taking issue with the Claimant's complaints about the circumstances in which the Agreement came to be signed. They also pointed out that he had received the monies due under the Agreement and the reference as provided for in Clause 5.

14. This correspondence was placed before Employment Judge Maidment who, on 27 June, directed that a telephone CMD be held to discuss the issues. He added:

> **"The Tribunal proceedings were stayed on the basis that an agreement had been reached – not an agreement 'In Principle'. Indeed it is clear that an agreement was reached. No breach of the agreement which was reached is evident from the correspondence."**

15. The Claimant responded by e-mail sent on 11 July. He said that he would not attend a CMD, which he believed would not take matters any further forward and would be a waste of the time and costs of the Tribunal and all involved, so, he added:

> **"I have reluctantly accepted that the matter may be closed, despite serious concerns about those who represented the Respondent in this matter",**

concerns which he may raise elsewhere.

16. Having raised various complaints about the events of 2 May he concluded, in his email to the Tribunal:

> **"I thank you for your assistance in this matter, as I <u>was</u> a litigant representing myself."**

On that same day, he had emailed the Respondent's solicitors, copied to the Tribunal, continuing his complaints against the Respondent's legal advisers, concluding with this paragraph:

> **"I also believe that the first page of the handwritten agreement was replaced, as the handwritten agreement I signed was headed 'agreement in principle'. Sadly, I cannot prove that, so in all the circumstances, despite being very poorly treated by you and your Barrister at tribunal, I shall withdraw from the telephone case management discussion directed by the Employment Judge. Nevertheless, I am still considered reporting this matter to your regulators, i.e the SRA [Solicitors Regulation Authority], and the BSB [Bar Standards Board], so I would appreciate no further contact from you, or I will consider that to be further harassment and victimisation of me as a 'litigant in person'."**

17. On 12 July the Respondent's solicitors emailed the Tribunal, copied to the Claimant, and under the heading "Application for proceedings to be dismissed", whilst denying the Claimant's allegations of any impropriety on their part or that of counsel, they noted that the Claimant had said he did not wish to participate in a CMD and had stated that he now considers the matter closed. They requested the Tribunal to formally dismiss the proceedings in accordance with the Tribunal's order dated 21 May (the May Judgment).

18. The Claimant responded on 18 July, asking the Tribunal to reinstate the proceedings and requested a full hearing for the reasons given; in particular, he asserted that there was no final agreement on 2 May; it was an "agreement principle" (sic).

The August Judgment and Reasons

19. Employment Judge Maidment considered the matter on paper, signing his Judgment and Reasons on 10 August 2012. It was sent to the parties on 13 August, as I have indicated.

The Judgment reads:

> **"1. The Claimant's complaints are dismissed pursuant to the Tribunal's Judgment dated 21 May 2012."**

That is the May Judgment.

20. In his Reasons he set out the history, noted that the Respondent had made or sought to make the payments due under the Agreement to the Claimant. He found that the Agreement was just that; it was not termed an agreement in principle (paragraph 3). There was no evidence of duress on the part of the Respondent's advisers. The Claimant confirmed to the Tribunal on 2 May that agreement had been reached. He characterised the issue over the reference as a matter for the civil courts and concluded (paragraph 13):

> **"In all the circumstances the Tribunal is not satisfied that there are any grounds upon which this Tribunal complaint should not be dismissed in accordance with the terms of the Tribunal's earlier Judgment."**

21. I pause to observe that, although the Judge referred, at paragraph 7, to the Claimant's email to the Tribunal of 11 July where he "reluctantly accepted that this matter may be closed", nowhere does he address the question as to whether or not that e-mail amounted to a withdrawal of proceedings by the Claimant within the meaning of rule 25 of the **Employment Tribunal Rules 2004**, then in force.

The appeal

22. The Claimant drafted his grounds of appeal in person. Having them on the paper sift I directed an appellant only preliminary hearing with written representations from the Respondent, and I note that I directed the preliminary hearing should take place on an ELAAS day: that is, a day when pro bono representation under the ELAAS Scheme was available should the Claimant desire it.

23. The preliminary hearing came before Slade J on 5 June 2013. On that occasion the Claimant had the advantage of ELAAS representation by Mr Marcus Pilgerstorfer of counsel, who again represents him today. I am grateful to him for his valuable assistance in this case. The Respondent lodged written representations in answer to the original grounds of appeal,

settled by Mr Andrew Sugarman of counsel, who now has conduct of the appeal on behalf of the Respondent in succession to Mr Ohringer.

24. Mr Pilgerstorfer presented recast grounds of appeal, as he terms them, in substitution for those originally drafted by the Claimant. On the basis of those recast grounds Slade J permitted the appeal to proceed to his full hearing, for the reasons which she gave in a Judgment since transcribed.

25. The recast grounds of appeal raise essentially two issues: first, it is contended (grounds 1 and 4) that, absent a valid compromise agreement, the Judge was wrong to dismiss the Claimant's claims pursuant to the May Judgment, since the trigger for dismissing the claims was not activated. Secondly, the Judge is criticised for dismissing the claims without considering whether the Claimant's email of 11 July amounted to an effective withdrawal of the proceedings under rule 25(1) and (2) of the 2004 Rules; had he turned his mind to that question, submits Mr Pilgerstorfer, the Judge would have concluded that there was no effective withdrawal (see grounds 2 and 3).

26. In their Answer, the Respondent supports the Judge's finding, dismissing the claims in accordance with the May Judgment and, in the alternative, contends that the Claimant's e-mail of 11 July amounted to an effective withdrawal of the proceedings from which the Claimant could not later resile, entitling the Employment Judge to dismiss the claims, I infer, under ET rule 25(4).

27. I shall deal separately with the Judge's reason for dismissing the claims and the question of withdrawal.

The effect of the May Judgment

28. The fact that the Agreement does not comply with section 203(1) ERA (the time-line in this case predates the coming into force of the new settlement agreement provision in **ERRA 2013**, section 23) will not prevent a settlement at the door of the Tribunal effectively terminating the proceedings in certain circumstances. Thus, for example, a Tribunal was entitled to dismiss a complaint after settlement was reached between the parties, notwithstanding that the agreement did not comply with the equivalent provisions to section 203(1) ERA in the then **Sex Discrimination Act** and **Race Relations Act 1977**; see **May-Deman v University of Greenwich** [2005] IRLR 845 (EAT). In addition Mr Sugarman has drawn my attention to the cases of **Times Newspapers Ltd v Fitt** [1981] ICR 637 and **Carter v Reiner Moritz** [1997] ICR 881. However, those were cases in which a final order was made by the Tribunal by consent. In my judgment, that was not the effect of the May Judgment in this case. Instead of dismissing the claims on settlement on 2 May the Tribunal made what is akin to a **Tomlin** order in the civil jurisdiction, staying the proceedings so as to allow the terms of the Agreement to be put into effect. True it is, on the Judge's finding, that, contrary to the Claimant's position, the Respondent fulfilled all its obligations under what he held to be a binding agreement rather than, as the Claimant contended, an agreement in principle, nevertheless, the only provision in the Judgment allowing for the proceedings to be dismissed was not that the terms had been put into effect, but if the Claimant failed to apply to restore the proceedings by 3 June 2012. That he did on 29 May. As I put to counsel during the discussion, that is similar to an unless order made under the old ET rule 13(2) where, if there is non-compliance, the claim or part of it will stand dismissed without more, although in practice a formal order recording that the claim stands dismissed for non-compliance was routinely made by Tribunals.

29. In my judgment, that default position was not triggered. By his e-mail of 29 May the Claimant was indicating that the matter should proceed. The automatic dismissal provision in the Judgment was therefore not engaged, and I cannot construe the Judgment as meaning that if the terms are complied with, then the proceedings will be dismissed. In these circumstances what power did the Tribunal have to dismiss the proceedings "pursuant to the Tribunal's May Judgment"? Mr Sugarman was unable to point me to any ET Rule giving the Tribunal power to dismiss the claim absent the trigger event, non-application to restore the proceedings under the terms of the May order. In my view the answer is there was no power.

30. In these circumstances I agree with Mr Pilgerstorfer that the basis on which the Judge based his August Judgment is legally flawed and cannot stand. However, that brings me now to the question of withdrawal.

Withdrawal

31. Again, I am concerned with the provision of the old ET rule 25 and not rules 51-52 of the 2013 Rules, which seek to address some of the problems which arose under rule 25 of the old Rules. I note that, in her Judgment at the preliminary hearing in this case, Slade J referred to the old rule 25A (see paragraph 5) but, as she there observed, rule 25A is not triggered because there has been no rule 203(1) compromise agreement nor ACAS-conciliated settlement in this case.

32. Rule 25(1) allows a Claimant to withdraw all or part of his claim at any time, either orally at a hearing or in writing. By rule 25(2) withdrawal in writing means writing to the ET office.

33. By rule 25(4), where a claim has been withdrawn, a Respondent may make an application to have the proceedings dismissed. If granted, the Claimant may not resurrect the claim, subject to review or appeal.

34. I agree with Mr Pilgerstorfer that, on the face of the May Judgment and Reasons, Employment Judge Maidment does not appear to have considered in terms whether or not the Claimant withdrew his proceedings, specifically by his e-mails of 11 July: one to the Tribunal, copied to the Respondent, and one to the Respondent, copied to the Tribunal.

35. In fairness to the Employment Judge, the application by the Respondent's solicitors dated 12 July does not in terms invoke rule 25(4), asking instead that the claims be dismissed in accordance with the May Judgment. That said, the e-mail does refer to the Claimant's observation in his e-mail to the Employment Tribunal of 11 July that he now considers the matter closed.

36. At all events, given the alternative ground advanced by the Respondent in support of the August Judgment, dismissing the claims, I am now invited by both parties to construe the true meaning and effect of the 11 July e-mails. That is a matter of construction of the documents; no oral evidence is required.

37. I begin by referring to two authorities which I have been shown by counsel. First, **Smith v Greenwich LBC** [2011] ICR 277, in which I gave the Judgment of the EAT, and secondly, the Judgment of Langstaff P in **Segor v Goodrich Actuation Systems Ltd** (UKEAT/0145/11, 10 February 2012).

38. In **Smith** the claimant applied for a postponement, which was refused. He then walked out of the Tribunal hearing room, saying that he would appeal. The Tribunal then proceeded to dismiss the claim, purportedly on withdrawal under rule 25(4). They considered that rule 27(5) did not apply because he had attended the hearing. We took the opposite view on appeal, holding that his words and conduct did not amount to a withdrawal since his indication that he would appeal was inconsistent with his withdrawing the claim whereas rule 27(5) may have been engaged.

39. In **Segor** the question was whether the claimant's lay representative had abandoned a claim which she had advanced. As to that the President emphasised (paragraph 34) that the factual question, which was remitted to the Tribunal, was whether the Claimant, orally through her lay representative at the hearing, had "clearly, unambiguously, and unequivocally abandoned part of her claim".

40. On the facts of the present case, as Mr Sugarman accepts, had the 11 July e-mail stopped at the Claimant's stating that he would not attend a telephone CMD, that would not amount to a clear, unambiguous and unequivocal withdraw of his claims (see **Smith**). It may simply be an indication that he wished the matter to proceed to a further full hearing, as he sought on 18 July.

41. However, he went on to say, "I have reluctantly accepted that this matter may be closed and later added, "I thank you for your assistance in this matter, as I was a litigant representing myself."

42. The finality of his position at that stage, having received all monies due and the clause 5 reference under the Agreement, was further evidenced, in my view, by his closing remark in the

e-mail of 11 July to the Respondent's solicitors, copied to the Tribunal, "I would appreciate no further contact from you", which is consistent only with the litigation being at an end.

43. True it is that he made complaints about the conduct of the Respondent's advisers, disputed by them, but he further indicated that he would take these up with the external disciplinary bodies, the SRA and BSB.

44. On these plain facts, I have no hesitation in concluding that e-mails of 11 July, without more, amounted to a withdrawal of the proceedings and on that basis the proceedings ought to be dismissed under rule 25(4), given that an Agreement was reached on 2 May and the Respondent fulfilled its obligations under that Agreement.

45. The fact that the Claimant sought to resile from his position on 18 July, by requesting reinstatement of the proceedings is nothing to the point. See **Khan v Heywood & Middleton PCT** [2007] ICR 24 (CA).

46. However, Mr Pilgerstorfer advances a further point, which I have considered, notwithstanding Mr Sugarman's objection that it is not specifically in the recast grounds of appeal. It is submitted that if, as I have found, the e-mails of 11 July amounted to a clear, unequivocal and unambiguous withdrawal of the remaining claim of unfair dismissal, nevertheless the Claimant was induced into withdrawing his claim by a material misrepresentation by the Respondent's solicitors that he had, on 2 May, entered into a binding settlement agreement, described in the Respondent's solicitors' letter of 1 June as a compromise agreement, when in truth it was not a compromise agreement within the meaning of section 203(1) ERA.

47. Having considered that argument on its merits I reject it. It seems to me that the misrepresentation, referred to by the Claimant in his original grounds of appeal (see page 10 of the EAT bundle) was his claim, rejected by the Employment Judge as a matter of fact, that the Respondent's advisers had represented the Agreement, later said to be binding, as an agreement in principle, which he believed could later be varied. That was the "misrepresentation" complained of in the 11 July e-mails. But it was a true representation. The parties did reach a final agreement on that day. Had the claim then, by consent, been dismissed on withdrawal on the terms agreed, then the matter would have been closed. Instead, the stay was ordered. That has led to the technical consequences with which I dealt in considering the first issue in the appeal. But I have no doubt that the question as to whether or not the Agreement complied with section 203(1) ERA did not operate on the Claimant's mind when he, as I find, withdrew his claim on 11 July.

Disposal

48. It follows that, in my judgment, the Judge was plainly and unarguably right to dismiss these proceedings, not pursuant to the May Judgment, but in accordance with rule 25(4) of the 2004 Rules. On that basis this appeal and is dismissed, a result which in my view not only applies the law strictly but also does justice as between these parties.