



Case Number: 2301130/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs J Oates

and

Respondent

Canterbury City Council

Preliminary hearing held at Ashford on 6 July 2017

Representation

Claimant:

Mr C Vincent, solicitor

Respondent:

Mr P Glencross, solicitor

Employment Judge Wallis

JUDGMENT

The judgment of the Tribunal is to strike out the part of the claim which relates specifically to the Respondent's decision to serve a planning notice on the Claimant.

Reasons

1. Oral reasons were given at the end of this preliminary hearing. The Claimant requested written reasons.
2. In a claim form presented 19 April 2017 the Claimant claimed unfair constructive dismissal; unfair constructive dismissal in relation to a protected disclosure; and the balance of her notice pay.
3. The Respondent presented an application for the claims to be struck out as an abuse of process.
4. Both parties presented written submissions. There was a bundle of evidence from the Claimant. The Respondent produced copies of the decisions in *Ashmore v British Coal Corporation* 1990 IRLR 283; *O'Reilly v Mackman* 1983 2AC237; *Cocks v Thanet District Council* 1982 3 All ER 1135; *Roy v Kensington and Chelsea and Westminster family practitioner committee* 1992 1 AC 624; *Trim v North Dorset District Council* 2011 1 WLR 1901; *London Borough of Waltham Forest v Martin* EAT/0069/11.
5. The parties' representatives addressed me in respect of their written submissions.
6. On behalf of the Respondent, Mr Glencross referred to the *Ashmore* case to show that a Tribunal could strike out for abuse of process under the rules of procedure on the basis that such a claim was vexatious. He noted that the basic premise of the Claimant's claim was that the Respondent had exercised its statutory duties in

respect of issuing a planning notice. Therefore, the question of whether the Respondent had reasonable and proper cause for the action interacted with the Respondent's statutory powers. He provided extracts from the Town and the Country planning act to show the public law duty on the Respondent as a planning authority. He noted that the Claimant could appeal to the Secretary of State (which she did, although they stated that she "may not have an interest in the land") and would have to show that she had an interest in order to appeal the notice. She did not have that interest so that appeal went no further. In addition, there was a possibility of seeking judicial review as a remedy. In addition, she could have gone to the local government ombudsman who could investigate, at their discretion, even if there were other remedies available.

7. Mr. Glencross addressed me in respect of exclusivity and suggested that what the Claimant wanted to do was to challenge the Respondent's public law action. He referred to the cases of O'Reilly and Cocks (as above).

8. In respect of the case of Roy (as above) the general rule posited in the cases of O'Reilly and Cocks was reiterated, although the House of Lords said that it may be appropriate to depart from it. In the case of Roy, he was able to do so because he claimed wages and that included looking at the statutory duty of the Respondent in that case and their decision to reduce his wages. Mr. Glencross distinguish the Roy case from the present case, as the public law issues in the present case did not impinge upon the employment rights of the Claimant. He suggested that public law was at the forefront of Mrs. Oates' claim, and it was incidental in the Roy case.

9. Referring to the case of Trim, he noted that a claimant could not challenge a Respondent's public law action by bringing a private law action.

10. He submitted that achieving preferential treatment amounted to an abuse of process if the Claimant was using her employment status to place her in a stronger position than that of a member of public.

11. In respect of the Martin case, the claimant there had been prosecuted by the local authority for benefit fraud. The local authority was also his employer and subsequently issued him with a disciplinary warning. The court there noted that Parliament could not have intended to give him additional rights compared to a member of the public when he sought to challenge all of the Respondent's actions in one set of proceedings. The decision of the employer in that case to prosecute was made as a local authority and not as an employer and therefore that decision was not brought within the employment field. Mr. Glencross submitted that it was important to distinguish between acts as an employer and acts not as an employer. Any knock-on impact of the latter on the Claimant would be coincidental and did not make it an employment matter, even if there was an impact on the Claimant as an employee.

12. He submitted therefore that all of the claims should be struck out. In the alternative, he suggested striking out the parts that hinged on the planning notice, which left the grievance itself.

13. He responded briefly to the Claimant's skeleton argument which he had seen the previous day.

14. On behalf of the Claimant, Mr. Vincent pointed out that the case would turn on the facts and whether there had been a breach of trust and confidence. He submitted that the cases referred to on behalf of the Respondent were not on point because all of the examples given were where a claimant directly challenged the public law action by using a private law claim to do so. He referred to the history of challenges to public body decisions and how judicial review had developed.

15. He pointed out that O'Reilly noted that although there was a general rule, there would be exceptions. As far as the case of Roy was concerned, he submitted that this could be read against the Respondent, because Dr. Roy was challenging a public law decision because of the way it impinged on his private laws rights.

16. As far as exclusivity was concerned it was noted in Roy that this broke down when private law right is engaged.

17. As far as the case of Trim was concerned, that claimant was unsuccessful because he tried to directly challenge a public law act when there was no private law right engaged.

18. He submitted that the validity of the planning notice was not an issue because the Respondent had already said, after the Claimant resigned, that it would be taking no action against the Claimant for non-compliance.

19. In respect of the case of Martin, that was a case involving the correct forum in which to bring the claims; the claimant could not bring all claims to the Employment Tribunal. In this case the Claimant was a senior council officer with some 27 years exemplary service. She had separated her professional life from the activities of her husband and his dealings with the planning department. She was entitled to have her employment issues considered and decided.

20. Mr. Glencross responded to a couple of points.

Conclusions

21. I spent some time reading the authorities provided. I noted that the case of Ashmore did indeed provide that the term "vexatious" in the rules would include abuse of process, which in itself could be construed in a number of ways. I considered that O'Reilly was an indication of the general law that remedy for impingement of a right protected by a public law could be obtained by judicial review, but that general rule might be affected by exceptions particularly where the invalidity of the decision arises as a collateral issue, for example, within a claim involving a private law right.

22. The case of Cocks suggested that the general rule applied where a public law decision was a necessary condition precedent to establish a private law right. In such a case, a claimant would have to seek judicial review. I noted that if the Claimant was suggesting that the planning notice and the issue of it was itself a breach of trust and confidence, then arguably such a suggestion would be caught by this case.

23. However, the case of Roy indicated that a claimant with a private law right could seek to enforce that right by ordinary action, notwithstanding that proceedings would involve a challenge to a public law act or decisions. I disagreed with Mr. Glencross that the Roy case could be distinguished from the present case. I considered that pay was predominant factor in the Roy case. I noted that the court said that the general rule “may be subject to many exceptions based on the nature of the claim and the undesirability of erecting procedural barriers”.

24. As far as the case of Trim was concerned that, I noted that a purely public act should be challenged exclusively by judicial review and it is only where there is an overlap with private law principles that procedural exclusivity may become difficult to maintain.

25. The case of Martin indicates that a claimant has to use the correct forum in order to bring a challenge in respect of decisions by the employer as employer, compared with decisions by the employer as, in that case, the benefits authority.

26. Turning to the facts of this case, and noting that I have heard no evidence about the matter, there was no dispute that the planning notice issued by the Respondent and served on the Claimant, together with others, was a public law act. The Claimant sought to refer to the decision to issue that notice as one of the breaches of contract contributing to the alleged breach of trust and confidence. I considered that challenging a public law act was something that could not be brought to the Tribunal. In other words, it was an act of the Respondent not as the Claimant's employer. In addition, the Respondent's actions surrounding the issue of the notice were not acts of the Respondent as the Claimant's employer.

27. I accepted however, that Roy suggested that private law rights may involve a challenge to a public law act, although in Roy the public law act had a direct impact on his employment rights, his pay. I was satisfied that there was no direct impact on the Claimant's employment rights by the Respondent's decision to serve a planning notice about land owned by her husband on her and on others. I accepted however that the way the service of the notice was handled by the Respondent had arguably some impact on the Claimant as employee. I considered that it was possible to disentangle those two matters.

28. I concluded that the Claimant may bring a claim in respect of the acts of the Respondent that affected her as an employee, albeit some of those acts may have flowed from a public law act (the planning notice).

29. I considered that there was a distinction between the “why” of the planning notice, involving the grounds for the decision to serve the notice, and which was not relevant to whether the claimant was an employee or not; and the “how” that was executed against an employee, which might be relevant to the employment relationship. I was satisfied that there was a potential connection between the latter and the Claimant’s employment, given that she claimed that she was affected as an employee by the way in which the notice was served and in the way in which the Respondent handled its responses to her questions about it.

30. I mentioned to the parties that I was unaware of how much of the mechanics of the process related to any statutory procedure. It may be that if the Respondent followed statutory procedure in respect of the service and correspondence in respect of the notice, then it would be unlikely that the Claimant could show that they amounted to breaches of trust and confidence of the employment relationship. I noted that the Claimant argued that she was treated differently from others in that she had not received any prior notice of the decision to be served, so it seemed to me that those matters would need to be investigated so that findings of fact could be made by the Tribunal.

31. I concluded therefore that the constructive unfair dismissal claim could proceed but with amendments to the list of alleged breaches. The amendments were discussed with the parties and are set out in the case management order accompanying this judgment. I concluded that the protected disclosure claim could proceed. The question for the Tribunal will be whether the grievance amounted to a protected disclosure; whether the Respondent behaved as alleged in the constructive dismissal claim; and if they did, whether the sole or principal reason for their conduct was the protected disclosure itself. I was satisfied that none of this amounted to a challenge of a public law act.

32. The final claim relates to the balance of notice pay, which may proceed.

Employment Judge Wallis

7 August 2017