Appeal No. UKEAT/0116/12/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 June 2013
Judgment handed down on 4 September 2013

Before

HIS HONOUR JUDGE PETER CLARK

MRS C BAELZ

MR D NORMAN

MR P PAN — APPELLANT

PORTIGON AG LONDON BRANCH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PATRICK GREEN (One of Her Majesty's Counsel) Direct Public Access Scheme & MR JAMES WILLIAMS (of Counsel)
For the Respondent	MR JAMES LADDIE (One of Her Majesty's Counsel) Instructed by: Simmons & Simmons LLP City Point 1 Ropemaker Street London EC2Y 9SS

SUMMARY

RACE DISCRIMINATION – Direct

UNFAIR DISMISSAL – Constructive dismissal

PRACTICE AND PROCEDURE – Appellate jurisdiction/reasons/Burns-Barke

Appeal in relation to discrimination and constructive dismissal findings by Employment Tribunal dismissed. **Burns-Barke** procedure considered.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding before the London (Central) Employment Tribunal. The parties are Mr Pan, Claimant, and Portigon AG London Branch, Respondent. We have before us for full hearing an appeal by the Claimant against the reserved Judgment and Reasons of an Employment Tribunal chaired by Employment Judge Sigsworth dated 18 October 2011 dismissing his complaints of unlawful racial discrimination, harassment, victimisation and constructive unfair dismissal. The Respondent has entered a conditional cross-appeal on which, in the event, it is unnecessary for us to rule.

Procedural history

2. The Claimant, who is of Chinese nationality and ethnic origin, commenced employment with the Respondent bank as a leverage loan credit analyst on 15 January 2007. He resigned from his employment on 6 December 2010.

3. During his employment he presented his first form ET1 to the Employment Tribunal on 15 March 2010 complaining of racial discrimination, victimisation and harassment. Following his resignation he presented a second form ET1 on 12 December 2010 complaining of further acts of discrimination and contending that he resigned in circumstances amounting to constructive unfair dismissal.

4. Both claims were resisted by the Respondent. They were combined and came on initially for hearing before an Employment Tribunal chaired by Employment Judge Wade on 10 January 2011. That hearing was adjourned until July 2011. In the meantime the Claimant applied to the Employment Tribunal for Employment Judge Wade to recuse herself. She agreed to do so. The Respondent applied for a review of that decision, which she rejected. The Respondent then

appealed the Judge's decision to recuse herself. The appeal was allowed by HHJ David Richardson on 19 July 2011; however Employment Judge Wade had been allocated to a different case and so the case restarted before the Sigsworth Employment Tribunal on 20 July 2011. Following a hearing and deliberations in chambers over 9 days that Employment Tribunal delivered its Judgment on 18 October, having rejected a recusal application by the Claimant (Reasons paragraph 2).

5. Up until the end of the Sigsworth Employment Tribunal hearing the Claimant was represented by Mr Charles Mannan of counsel, instructed under the Bar Direct Public Access Scheme. It seems that the Claimant parted company with Mr Mannan following that hearing but before judgment was delivered (Reasons paragraph 4). Since that time and throughout the appeal process the Claimant has been represented by Mr Patrick Green QC again under the Direct Access Scheme, leading Mr James Williams. The Respondent has been represented throughout by Mr James Laddie QC, instructed by Simmons and Simmons LLP, Solicitors.

6. The Notice of Appeal in the present appeal was lodged on 29 November 2011. The grounds of appeal were organised under eight headings, A to H. On the paper sift HHJ Serota QC permitted ground B only to proceed to a full hearing. The remaining grounds were subject of a rule 3(7) direction by letter dated 22 February 2012. The Claimant applied for a rule 3(10) oral hearing in relation to the rejected grounds which came on for hearing before HHJ Richardson on 15 June 2012. On that occasion Mr Green withdrew grounds G and H (procedural irregularity and apparent bias). Grounds A, C, D and E joined ground B for full hearing, as did parts of ground F (perversity) at paragraphs 38(b) and 46 only. The Claimant appealed to the Court of Appeal in relation to one complaint of perversity only (paragraph 42). That appeal was not opposed and a consent order was made on 13 November 2012.

7. The Respondent lodged an Answer to ground B of the appeal on 8 March 2012 and then an amended Answer and cross-appeal on 2 July 2012 following the rule 3(10) order dated 18 June. Arising out of that pleading HHJ Richardson made a **Burns-Barke** order (BBO) dated 3 September 2012, posing two questions to the Employment Tribunal.

8. On 16 September the Claimant applied to discharge the BBO. HHJ Richardson granted a stay on that order and the parties lodged detailed written submissions as to why the order should or should not be discharged. In the event that issue came before Langstaff P on paper and he lifted the stay and refused to discharge the BBO by an order dated 6 December 2012. He refused permission to appeal.

9. Against the President's order the Claimant appealed. Permission was refused on paper by Sir Richard Buxton on 24 January 2013 and at an oral hearing on 12 March 2013 Mummery LJ stayed the permission application pending the outcome of this full appeal hearing now before us.

10. The Employment Appeal Tribunal pleadings were completed by amended grounds of appeal lodged on 25 March, an amended Answer lodged on 3 May and a re-amended reply dated 29 May.

11. Arising out of the further pleadings and a sequential exchange of notes of the cross-examination of the Respondent's witness, Mr Doyle, an issue arose which led to the Respondent, on 30 May, applying for the Employment Judge's notes of that cross-examination. I indicated that that issue would be dealt with at this full hearing.

The Employment Tribunal's Judgment

12. The essential structure of the Employment Tribunal's reasons follows, in our judgment, that which is required by Employment Tribunal rule 30(6). Having dealt with certain preliminary matters (including the Claimant's recusal application and its rejection (paragraphs 2 to 3), now no longer pursued, the Employment Tribunal set out the issues including that of constructive dismissal, limitation so far as the earlier discrimination complaints were concerned and finally the 28 extant allegations of race discrimination, victimisation and harassment.

13. In their findings of fact (paragraph 8) the Employment Tribunal set out the progress of the Claimant's employment. His immediate line manager was Mr Suica, his boss was Mr Doyle. During the employment the Claimant raised four formal grievances; the first, complaining about Mr Suica crystallised on 16 December 2009. He was suspended by Mr Doyle the following day on full pay. He never returned to work before his resignation on 6 December 2010. Disciplinary proceedings for misconduct, said to be undermining Mr Suica's authority were commenced and then 'parked' pending the outcome of his grievance. Further grievances followed on 27 January, 2 March and 14 July 2010. Meanwhile, he presented his first ET1 on 15 March; attended a grievance meeting with Ms Blumenstein (who ultimately produced the outcome letter dismissing his various complaints on 22 November 2010) and Ms Morris, Head of HR. Following the grievance outcome the Respondent wrote a "Return to Work" letter on 3 December 2010. The Claimant did not return, instead he resigned on 6 December and presented his second ET1 on 12 December 2010.

14. Additionally, the Employment Tribunal made findings of primary fact on each of the 28 allegations (with one exception) said individually or cumulatively to amount unlawful discrimination in one or more of the three ways involved, direct racial discrimination, harassment and victimisation. In so doing we are satisfied that the Employment Tribunal

followed the guidance of Sedley LJ in **Anya v University of Oxford** [2001] ICR 847. We shall return later to the Claimant's ground of appeal (B) "Fragmentation" when considering whether the Employment Tribunal failed to adopt a holistic view of the facts as they are exhorted to do by Mummery P in **Qureshi v The Victoria University of Manchester** [2001] ICR 863 (Note), approved by the Court of appeal in **Anya**.

15. In short, the Employment Tribunal made findings of fact adverse to the Claimant's case in respect of all 28 allegations, save for allegation 5 (the democracy remark by Mr Doyle) and in respect of the Winkler incident (allegation 2). It was in relation to those two allegations that HHJ Richardson directed his **Burns/Barke** questions to the Employment Tribunal. We should also indicate at this point that the three remaining perversity allegations in Ground (F) in the amended grounds of appeal relate to certain findings by the Employment Tribunal at paragraph 8.8 of their Reasons (exclusion from social gatherings); timekeeping (para 8.12) and informal grievances (para 8.26).

16. At paragraphs 10 to 15 the Employment Tribunal direct themselves as to the law, both statutory and in authority. Mr Green does not challenge their self-direction, properly in our view; his attack is directed to the Employment Tribunal's application of the legal principles to the facts found, subject to an underlying challenge to certain of those findings which we shall analyse in the next sections of this Judgment.

17. Finally and critically, the Employment Tribunal applied the law to the facts found, expressing their reasoned conclusions on the claims before them at paragraph 16. Paragraphs 16.1 and 16.2 deal with the discrimination claims; paragraphs 16.3 - 16.6 with the question of constructive dismissal. Again, we shall return to that reasoning when considering the outstanding grounds of appeal; but first, the **Burns/Barke** issue.

Burns/Barke

18. The so called "**Burns/Barke** Procedure" (BBP) derives its nomenclature from an amalgam of the Judgment of Burton P in **Burns v Royal Mail Group (Formerly Consignia Plc (No.2)** [2004] ICR 1003 (EAT) considered and approved in the result by different reasoning in **Barke v SEETEC** [2005] ICR 1373 (CA). Those dates suggest that it is a comparatively recent addition to this appellate tribunal's case management powers. It is not; it goes back almost to the beginning of time which, in the context of this particular jurisdiction, may be taken to be 1 December 1971, on which day the first (and only) President of the National Industrial Relations Court (NIRC), Sir John Donaldson, gave his inaugural address (1972) ICR 1. However, the procedure has proved controversial over the years.

19. In explaining to a sceptical industrial tribunal (IT) in **Yusuf v Aberplace Ltd** [1984] ICR 850 why he considered that the Employment Appeal Tribunal had power to refer a case back to the IT for further reasons before determining the appeal which was before it, Nolan J cited four earlier authorities (853 G to H), the first of which was **Alexander Machinery (Audley) Ltd v Crabtree** [1974] ICR 120 (NIRC) in which the then President and members "remitted" the case back to the IT for further reasons without determining the appeal. Phillips J, sitting in the Queen's Bench Division during the hiatus between the demise of the NIRC and the birth of the Employment Appeal Tribunal, in **Beardmore v Westinghouse Brake & Signal** [1976] ICR 49, also remitted the case to the IT for further reasons without either allowing or dismissing the appeal (section 3(e)). He appears to have taken that course without being referred to **Alexander**.

20. Those two cases seem to accord precisely with what is now the BBP. Conversely, the two further EAT decisions cited by Nolan J in **Yusuf**, **Gorman v London Computer Training**

Centre Ltd [1978] ICR 394 (Phillips, J) and **Portsea Island Mutual Co-operative Society Ltd v Rees** [1980] ICR 260 (Kilner Brown J) are both cases in which the appeal was allowed and the matter remitted to the IT for further consideration.

21. It will be apparent from **Yusuf** and the IT's query as to the EAT's power to make a reference back for further reasons that the EAT's power to make such a direction was not free from doubt.

22. That doubt surfaced dramatically in the case of **Reuben v Brent London Borough Council** [2000] ICR 102. At an interlocutory hearing in that case I put certain questions to the IT Chairman (para 8). At the substantive hearing of the appeal, Morison P deprecated the use of the reference back procedure (para 14) and declared (para 15) that **Yusuf** was wrongly decided. He relied on the observations of May LJ in **Leverton v Clwyd County Council** [1989] ICR 33, 46 there cited.

23. Following **Reuben** the reference back procedure fell, temporarily, into desuetude until its revival by Burton P in **Burns (No.2)**.

24. It is right to say that during that interim period in **Tran v Greenwich Vietnam Community Project** [2002] ICR 1011 a majority of the Court of Appeal (Brooke and Arden LJJ) appeared to approve the reasoning of Morison P in **Reuben**, although those observations were not necessary for the decision in **Tran**.

25. Those observations were considered by Dyson LJ, giving the judgment of the court in **Barke** (para 14) but in the event the court doubted the approach of Morison P in **Reuben** (para

25) and sanctioned the use of the BBP; a practice since adopted during the subsequent presidencies of Elias and Underhill LJJ, as they now are and currently under Langstaff P.

26. We have set out the history to provide context to the submission advanced by Mr Green in seeking the discharge of the BBO in the present case. He contends that the EAT has no jurisdiction to make such an order, as he did as counsel in a related case before the Court of appeal in **Barke** (see para 10) and in the *Manual of Employment Appeals* (1st Edition) which he co-authored and to which we have been referred. However, Mr Green acknowledges that for present purposes, in light of the President's ruling on his BBO discharge application, currently the subject of the stayed permission application in the Court of Appeal, as well as the binding authority of **Barke**, we are not required to express our view in this appeal on the jurisdictional issue, whilst reserving his position for the Court of Appeal (and possibly beyond). We therefore express no view upon it.

27. However, that is not the end of the matter. The application of the BBP has been considered by the Court of Appeal in at least two cases post-**Barke**; **Woodhouse School v Webster** [2009] IRLR 568 and **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2011] EWCA Civ 187. In the latter case Maurice Kay LJ declined to interfere with a BBO raising no fewer than 55 questions; in **Webster** Mummery LJ gave guidance, again not necessary for the decision in that case, as to the limits of the BBP (paras 25-29).

28. In the present case Mr Green does not challenge the BBO questions posed to the Employment Tribunal by HHJ Richardson; rather his fire is directed at the answers provided by the Employment Tribunal and dated 7 January 2013, following a meeting of the members of the Sigsworth Employment Tribunal held on 18 December 2012. It is convenient to deal now with

that challenge and the application by the Respondent for the Employment Judge's notes of evidence.

29. The questions posed in the BBO were as follows:

> **"(i) Please consider issue 6.2 (the Winkler allegation) …**
>
> **Did you make any findings as to whether the incident occurred and as to the involvement of Mr Winkler and Mr Doyle? If so, what were they?**
>
> **(ii) Please consider issue 6.5 (the democracy allegation)**
>
> **Did you make any findings as to whether the conduct of Mr Doyle amounted to discrimination or harassment on the grounds of race? If so what were they?"**

30. Dealing first with the "Winkler allegation" the Employment Tribunal made findings about that issue at paragraph 8.4. The Claimant alleged that on 21 November 2007 Mr Winkler, a fellow credit analyst, stated that Chinese people couldn't speak English and he made an offensive facial expression which amused Mr Doyle. The Claimant recorded that incident in an email to himself on that day. He did not raise it in his first grievance, although that was directed at Mr Suica, not Mr Doyle. It is raised in his first ET1 on 15 March 2010 and was raised by him at the grievance meeting held on 28 April 2010. That was his evidence before the Employment Tribunal; Mr Doyle denied that the incident took place in his witness statement (para 38).

31. The reason for the **Burns/Barke** question was that it was not clear from paragraph 8.4 of the reasons whether the Employment Tribunal had made a positive finding of fact that the Winkler incident had taken place.

32. The short answer to the question by the Employment Tribunal was that they made no finding one way or the other. On arriving at that position they state:

> **"This issue was not put to Mr Doyle in cross-examination of him by the Claimant's Counsel."**

33. Put shortly, an issue has arisen in this appeal as to whether that is correct.

34. The separate note taken by two representatives of the Respondent's Solicitors accord with the Employment Tribunal's statement; a note produced by the Claimant indicates that questions were put to Mr Doyle on this topic in cross-examination. He, the note records, maintained his denial.

35. We do not find it necessary to seek the Employment Judge's note of Mr Doyle's cross-examination, first because even if the Claimant's note was accepted (contrary to the Employment Tribunal's position in the **Burns/Barke** response) it would have no impact on the Employment Tribunal's conclusion that it could not make a finding of fact. We are satisfied that was a position properly open to the Employment Tribunal; see **Morris v London Iron & Steel Company** [1987] ICR 85; **Ashraf v Akram** (unreported 22 January 1999 CA). The effect is that the Claimant has failed to discharge the burden of proving this factual assertion. The relevance of the failure to cross-examine on the point goes to Mr Laddie's submission to the Employment Tribunal that in the absence of such challenge the Claimant could not rely on the allegation. The result is the same. But secondly, for reasons which we shall come to when examining the substantive challenge to the Employment Tribunal's discrimination findings at paragraph 16.1, the point is rendered academic by the Employment Tribunal's ultimate conclusion.

36. Turning to the second question, the democracy allegation is dealt with at paragraph 8.7. The Claimant's evidence was that at a meeting on 11 April 2008 Mr Doyle, having spoken to Mr Suica, turned to the Claimant and, staring fiercely at him said, "Now I give you democracy, you can talk now." The Claimant linked that remark with a conversation he had with Mr Doyle

the previous day about a recent intervention by the Chinese Government in Tibet. Mr Doyle did not recollect the incident but believed that it was consistent with his practice of inviting junior employees to contribute to discussion. The Employment Tribunal accepted that the incident took place more or less as the Claimant described it.

37. The purpose of the second question was not to discern the Employment Tribunal's finding of fact; that was clear, the Claimant's evidence was accepted (cf. question 1), rather the enquiry was as to whether the Employment Tribunal had gone on to decide whether or not that remark in itself amounted to an act of discrimination or harassment.

38. The Employment Tribunal's answer illustrates the parameters of the Employment Tribunal's role in responding to a **Burns/Barke** question identified in **Webster**. At paragraph 27 Mummery LJ observed that it is not desirable for the Employment Tribunal to do more than answer the request. Here the short answer by the Employment Tribunal to the question, carefully framed by HHJ Richardson, was no; they had not considered that question when reaching their original judgment. However, they went on to say, in their response that if they were being asked to do so now, they concluded that the remark amounted to harassment. They do not go on to explain why they now reach that conclusion.

39. That further 'finding' by the Employment Tribunal has given rise to much debate before us. Mr Green, temporarily setting aside his root and branch challenge to the legitimacy of the BBP, contends that, having answered the harassment question, he is now able to rely on that finding as part of the Employment Tribunal's decision. Mr Laddie, on the other hand, submits that it was not open to the Employment Tribunal to go beyond the specific question posed; its 'finding' of harassment is inadmissible in this appeal; anyway, no proper reasons are given for the finding; it is not **Meek** compliant. Further it is a legally perverse finding.

40. As a matter of practice, we agree with Mr Laddie that the further finding is strictly inadmissible in the appeal. Secondly, it is not properly reasoned; we express no view on the perversity argument.

41. However, again the point becomes immaterial in light of the Employment Tribunal's conclusion at paragraph 16.1 to which we now turn substantively.

Discrimination

42. The Employment Tribunal's reasoning at paragraphs 16.1 and 16.2 may be summarised as follows, (1) 26 out of the 28 allegations brought by the Claimant fail on the facts. Thus stage 1 of **Igen v Wong** is not passed; (2) as to allegation 2 (Winkler) and 5 (democracy) even if they amount to instances of direct discrimination or harassment they are time-barred as stand alone allegations; (3) the 14 month time gap between allegations 1 to 8 (all out of time) and the subsequent allegations cannot be linked so as to provide for a continuing act which brings all complaints in time (see **Hendricks v Metropolitan Police Commissioner** [2003] ICR 530 (CA); (4) it is not just and equitable to extend time; (5) the later allegations are concerned with the suspension, disciplinary process and more particularly the grievance procedure. The Employment Tribunal found that the delay in the grievance procedure to which both parties contributed (and from which the Claimant withdrew in July 2010) was for wholly non-discriminatory reasons; (6) accordingly all discrimination complaints were dismissed.

43. In challenging those conclusions in the appeal, Mr Green puts at the forefront of his submissions the proposition that the ET failed to appreciate the significance of the strained relationship between the Claimant and Messrs Suica and Doyle. That is central to the continuing act issue addressed at paragraph 16.1 of the reasons. We disagree. The

Employment Tribunal proceeded on the assumption at paragraph 16.1 that the Winkler and democracy allegations were made out and amounted to discrimination/harassment but nevertheless went on to find, permissibly in our view, that following suspension any failings in the grievance process were for wholly non-discriminatory reasons.

44. Turning to the specific grounds of appeal; (1) we have considered the three outstanding perversity grounds (ground F) identified at paragraph 6 above. Having heard the rival submissions we accept that, in relation to the social gathering complaint (paragraph 8.8) the ET was in error in referring to only one contemporaneous document, the email to self by the Claimant on 27 March 2008 when in fact there were two further notes. That does not vitiate the factual conclusion at paragraph 8.8. More generally, we accept Mr Laddie's submissions on the detail of the three complaints. There was evidence to support the Employment Tribunal's conclusions; see **Piggott v Jackson** [1992] ICR 85. We reject the perversity grounds. The high hurdle set by the Court of Appeal in **Yeboah v Crofton** [2002] IRLR 634 is not crossed.

45. We reject the suggestion that the Employment Tribunal took a fragmented approach to the 28 allegations of discrimination in its various forms. Having made the relevant findings of fact, as per **Anya**, the Employment Tribunal then stood back and took precisely the holistic view commended in **Qureshi**. They found that even if the Winkler and democracy allegations were made out and were tortious that did not cause them to conclude that there was a case of discriminatory conduct amount to a continuing act (see Ground A). Thus the whole of the discrimination claim failed partly on limitation (there is no challenge to the finding that it was not just and equitable to extend time for allegations 2 and 5, even if they were made out) and partly on the primary facts. The comparator ground D was not pressed by Mr Green; we are not surprised. Applying the approach of Elias J in **Bahl v Law Society** [2003] IRLR 640, pressed upon us by Mr Laddie, see paragraph 163, we are quite satisfied that the Employment Tribunal

asked themselves Lord Nicholls' 'reason why question' and answered it resoundingly in favour of the Respondent, save for the two allegations on which this appeal has focussed which, if made out, amounted to single acts which did not infect what followed, in the Employment Tribunal's judgment. Similarly, we can see no error in the Employment Tribunal's approach to the burden of proof provisions, properly identified at paragraph 11 and applied at paragraph 16.2. In short, the discrimination appeal raises no error of law.

Constructive dismissal

46. The Employment Tribunal plainly had in mind the relevant legal principles (Reasons, paragraph 12). The questions for determination were; (1) was the Respondent in breach of the implied term of mutual trust and confidence? (2) if so, did the Claimant affirm the contract or waive the breach (we agree with Mr Laddie that in the context of constructive dismissal the concepts of waiver and affirmation amount to a distinction without a difference) by delaying purported acceptance of the breach and (3) if not, was the breach a cause (not necessarily the sole cause: see **James v Sirl** [1997] IRLR 494 (EAT) and we would add **Nottingham City Council v Meikle** [2005] ICR 1 (CA)), of the Claimant terminating the employment.

47. As to the first question it is not entirely clear as to whether the Employment Tribunal found a fundamental breach of the implied term by the employer. Paragraph 16.3 sets out the alleged breach without expressly accepting that it was made out. However, the Employment Tribunal went on to find (a) that the contract was affirmed and/or the breach was waived; (b) alternatively, that in any event the Claimant did not resign in response to the breach.

48. We would uphold the Employment Tribunal's finding of no constructive dismissal on the basis of the Employment Tribunal's finding as to the Claimant's reason for resignation. It was not the alleged breach but simply because he was being asked to return to work with no

disciplinary charge outstanding. The return to work letter was, the Employment Tribunal was entitled to find, 'innocuous' insofar as the Claimant relied upon it as the last straw entitling him to regard himself as discharged from further performance, applying the Court of Appeal guidance in **London Borough of Waltham Forest v Omilaju** [2005] ICR 481 (Reasons paragraph 16.6). The Employment Tribunal found that he resigned because he did not want to return to work after almost a year's suspension on full pay, which he used to complete his MBA and visit his sick mother in China, having disengaged from the grievance process in July 2010. He wanted to leave with a pay-off.

49. It therefore follows that we shall not interfere with the Employment Tribunal's finding that the Claimant was not constructively dismissed.

Disposal

50. It follows that this appeal fails and is dismissed. We make no order on the cross-appeal.