Appeal No. UKEAT/0004/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 June 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

GLOUCESTERSHIRE PRIMARY CARE TRUST — APPELLANT

MS M F SESAY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ALISON FRAZER (of Counsel) Instructed by: DAC Beachcroft LLP Portwall Place Portwall Lane Bristol BS99 7UD
For the Respondent	MR ALISDAIR HENDERSON (of Counsel) Instructed by: Royal College of Nursing Legal Services 3 Capital Court Bittern Road Sowton Industrial Estate Exeter EX2 7FW

SUMMARY

PRACTICE AND PROCEDURE

Amendment

Striking-out/dismissal

Costs

An Employment Judge exercising discretion on out of time claims, amendment and deposit order made no error of principle and his judgment would not be disturbed.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about case management directions and decisions in the exercise of discretion by an Employment Judge. The background is a claim of race discrimination and discriminatory unfair dismissal brought by the Claimant, a nurse, against the Respondent whose name is corrected in accordance with the title above. I will refer to the parties as the Claimant and the Respondent.

Introduction

2. It is an appeal by the Respondent in those proceedings against the Judgment of Employment Judge Owen sent to the parties on 21 November 2012 after a one-day hearing in Bristol. The hearing was caused by applications made at a case management discussion conducted by Employment Judge Harper for which reasons were sent to the parties on 9 October 2012. This set out the tramlines upon which the PHR was to be conducted. Judge Owen made directions following the orders which he had made and the case was set up for hearing in February 2013 over a period of five days. The outcome of Judge Owen's PHR was that broadly speaking applications made by the Respondent were rejected. At the hearing before Judge Owen and today the parties have been respectively represented by Mr Henderson and Ms Frazer.

3. Directions sending this to a full hearing were given by HH Jeffrey Burke QC on the papers. He did not hold out a lot of hope on certain aspects of the appeal but felt it was disproportionate to carve it up and send some matters away under rule 3(7) bearing in mind that the hearing at the Employment Tribunal would depend upon this. The hearing was vacated and now awaits the outcome of this appeal.

The facts

4. The Respondent was at the time a primary care trust and the Claimant was a nurse. Much of her working life was dedicated to the care of vulnerable patients, many of whom had dementia or early stages of it. The Claimant is black.

5. The case which she wishes to present is long, complicated, fact sensitive and stretches back a period of ten years or so. Ultimately she was dismissed from the employment.

6. Her work there began on 16 November 1997. She made allegations of third-party harassment. This a technical term arising from section 40 of the **Equality Act 2010** which makes an employer liable for the acts of third parties in connection with employment provided that the condition set out in section 40 is met which is that there were reasonably practicable steps it could have made in order to prevent the harassment.

7. The Claimant was the subject of disciplinary hearings. It is to be noted that the incidents of which she complains as amounting to third-party harassment ended, on her case, in June 2011 - objectively it is said by the Respondent. In April 2011 the Claimant was suspended, there was a disciplinary hearing and she was dismissed on 16 May 2012. She submitted her claim form on 15 August 2012. An internal appeal had intervened on 17 July 2012, and further particulars of her claim were given on 24 September 2012.

8. It is common ground that those Particulars raised for the first time complaints of victimisation and indirect discrimination. The issues to be determined were as set out by Judge Harper as follow:

> **"The claimant has since provided further and better particulars of Claim (on 24th September 2012) which includes a claim of victimization and indirect discrimination. The respondent objects to the application to amend the claim to include these claims. In addition the further**

particulars refer to incidents of harassment, some from patients over a period of years commencing in 2002. The respondent contends that all these complaints are out of time. The respondent requests a Pre-hearing review. I consider that this is appropriate. A Pre-hearing review is therefore listed as set out below to consider the following matters:

1) Whether to allow the claim to be amended to include a claim of victimization and indirect discrimination.

2) Whether any parts of the claim of discrimination as currently pleaded in the claim form and in the further particulars have been presented out of time and if so, whether it is just and equitable to extend time.

3) Whether the claimant should be ordered to pay a deposit not exceeding £1000, if the Employment Judge consider that the claim or any part of it has little reasonable prospect of success."

9. Very substantial case management orders were made both at that hearing and then at the end of the hearing of the PHR conducted by Judge Owen.

10. There emerged at the CMD an application by the Respondent that a deposit order should be made. Although the Respondent had applied to the Tribunal for the strike out of her claims or some of them, that was not pursued any further. The Judge decided to allow amended claims for victimisation and indirect discrimination to be pursued; this is under the doctrine in **Selkent Bus Company Ltd v Moore** [1996] IRLR 661 for the Judge accepted that the factual basis of the new claims was already in the claim and this was a re-labelling exercise.

11. The Judge refused to order a deposit. He allowed the claim of third-party harassment to go ahead, finding that it was in time and insofar as any claims were out of time he exercised the just and equitable jurisdiction given to him to extend time.

The appeal

12. The substance of the complaint can be divided into six with the help of both counsel but principally by the succinct submissions made by Mr Henderson and I will deal with each of the arguments in turn.

13. The first is a challenge to the lack of reasons given by the Judge. Mr Henderson rather unpromisingly says this is not a model judgment and does not seek to advance that it is the most carefully worded and it could have been made fuller. However, he does submit that the parties know what the reason is for the decisions the Judge made and this is directed principally at the finding in relation to the third-party harassment claim. Here the Judge made the following finding:

> **"5. Thirdly, the third party discrimination allegation (if I can summarise it as such) is based upon the behaviour of the hospital patients. They are contended to have assaulted and abused the claimant on various occasions because of her race, of which is that of a black African person. The allegation in that context is that the respondents did not take effective action. That, I find is very similar to the policy (PCP) noted by Employment Judge Harper. The third party, discrimination claim was <u>not</u> out of time in my view, but if I am wrong then it would be just and equitable to extend the time in that respect, since the delay was not a significant one and was not prejudicial for reasons I will also deal with."**

14. As can be seen that is an emphatic rejection of the Respondent's case that the complaints the Claimant made were solely to do with patients abusing her, they are the third-parties, and that the incidents of which she complains do go beyond June or even April 2011 and so were between 11 and 14 months out of time.

15. The Judge indicated that he had considered prejudice but he does not go back specifically to look at the balance. What Mr Henderson submits is that jejune as this reasoning is, it was plain to the parties that the Judge was making a decision based on there being a continuing discriminatory state of affairs as set out by Mummery P in **<u>Hendricks v Metropolitan Police Commissioner</u>** [2003] ICR 530.

16. The Claimant had pleaded the continuing state of affairs in her claim and particulars and in her evidence, for she gave live evidence to the Employment Judge. She spoke specifically of an ongoing state of affairs over a period of time which suggested a general culture of

discrimination and harassment which was still prevalent at the time she was dismissed: see page 35 of the supplementary bundle, paragraph 29.

17. I agree with Ms Frazer that there is no explanation in the text of this Judgment and that of course propels her into an argument about lack of reasons. We, however, have to take a generous approach. The Court of Appeal said in **English & Emery Reinbold**, 2002 EWCA Civ 605 at paragraph 118 in a passage which is often not cited:

> **"The Judgment created uncertainty as to the reasons for the decision. That uncertainty was resolved but only after an appeal which involved consideration of the underlying evidence and submission. An unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless despite the advantage of considering the judgment with knowledge of the evidence given in submissions made at the trial that party is unable to understand why it is that the Judge has reached an adverse decision."**

18. Applying that broad approach to the reasons, I hold it is obvious why the Judge decided that the claim for third-party discrimination was in time. Ms Frazer argues that the Judge misdirected himself because section 40 requires there to have been two occasions by a third party prior to the duty coming into effect, which is to take reasonably practicable steps to prevent the third party doing so; see section 40(2) and section 40(3).

19. As a matter of law that has to be seen in the light of the judgment of the Employment Appeal Tribunal in **Norouzi**. I myself do not consider that it is correct that the duty only arises and is self-contained and ceases on each separate occasion when a third party harasses a person with a protected characteristic. In my judgment the duty is there once it has been triggered by the complaints, as they have here. There continues to be a duty owed by the employer to the employee to see to it by reasonably practicable steps that such harassment is prevented. So it is open to the Claimant to say that there is a state of affairs where patients harass black nurses, there are specific examples where that has occurred and there is an overriding requirement on

the employer to take reasonably practicable steps to prevent. That continues while employment continues.

20. Thus I consider that the Judge committed no error in that subsidiary basis for the finding of third-party harassment for the purpose of it being argued at a full hearing. The Judge was correct now that we have seen the pleadings and the evidence. His conclusion must have been that there was a continuing state of affairs such as to allow this point. It is put emphatically by the Judge in respect of his finding and in my judgment no error has occurred.

21. Employment Tribunals are not to be subjected to an over fussy or pernickety critique of their reasons; see **London Borough of Brent v Fuller** [2011] ICR 806 CA per Mummery LJ in the majority at paragraphs 26 to 30, and so I reject the submissions that the Judge erred in allowing this point to be raised at the substantive hearing.

22. The fallback position which he adopted was that if he were wrong about it, it was just and equitable to allow the claim to proceed out of time. As to that, again giving a generous interpretation to the Judge's reasons, he does set out matters to do with prejudice. This is the language of treatment of an application to amend under **Selkent** which he was of course dealing with too. Nevertheless, these reasons are apt to be applied to the fullback position. Lest the Judge were wrong he would exercise his discretion and he says so:

> **"9. I do not make a deposit order; I have already alluded to the complex history of the case. The Tribunal will need to hear a considerable amount of evidence from the claimant and other employees, and the sequence of events is a relatively long one. The claimant was suspended in September 2011 and the appeal, as already noted, was not concluded until 20th July 2012. In my view it would be improper to say that the claims had no reasonable prospect of success at this stage. However, the claimant does need to be warned that once all the evidence in this case is heard, and the Tribunal reaches its decision, some or all of her claims may be dismissed. In that case, costs may become a relevant issue. There may be several reasons for this, but there are two obvious ones. Firstly, the Tribunal might conclude that it was a case where the claimant had little reasonable prospect of success. Secondly, it may find that the claimant acted unreasonably in pursuing some or all of the allegations. The fact that I have not made a deposit order at this stage shall not mislead the claimant into thinking that costs may not be an issue at a later stage."**

23. He entered into that discussion having expressly directed his mind to the balancing exercise; see paragraph 8 where we can see the thinking that informed his Judgment. Mr Henderson points out from the facts in the **Hendricks** Judgment that what the Court of Appeal did was to allow a very substantial ancient history of grievances to be raised by the Claimant in that case putting the Respondent to requiring 100 witnesses to be called and to be cross-examined by leading counsel, in a case over three months. Nevertheless, the amendments were allowed and Mr Henderson in our case draws attention to the fact that substantial orders made both at the CMD and the PHR for the onward transmission of a much regulated limited case to be put in accordance with the overriding objective.

24. I also bear in mind that there may be arguments to be raised about the potency of the third-party discrimination claim given the evidence of the protocols that were in place for dealing with complaints. But that is a matter which would have to be argued at a trial and the Judge formed the view, having looked at the papers that at least in respect of the deposit order he would not make an order because there was a lot of material to be adduced. I will return to the deposit order.

25. The second matter relates to the **Norouzi** (UKEAT/0497/10) point I have dealt with.

26. The third ground of appeal is what is said to be a conflation of the legal approach to third-party harassment on the one hand and to indirect discrimination by way of a PCP. There was a PCP to ignore complaints made by staff. Mr Henderson argues that there was no conflation, the Judge regarded the points as similar, he said so, but not the same. In my judgment the Judge was right and Mr Henderson is correct to say that individual examples of the third-party

harassment claim do not prevent there being separate treatment of an ongoing state of affairs in which there was a failure to act upon complaints made by staff.

27. Fourthly, it is contended by Ms Frazer that the Judge conflated the treatment of time with the application to amend under **Selkent**. Under that authority the passage of time is a factor. But given that the Judge had decided without error, I hold, that the claim was in time there cannot be a criticism that he conflated that approach. The point is whether it is looked at as prejudice to the Respondent or another factor to be considered. The Judge did have in mind the chronology. That is why he made the order limiting the amount of material that could be produced. Again I see no legal argument that could be raised about the way in which he approached this.

28. It has to be said to succeed that he was unaware of the difficulties produced for the Respondent about the passage of time and the size of the case. As to that, clear submissions, one can understand why, were made by Ms Frazer. This is going to be a five-day case with many witnesses. The Respondent will be put to answering a case; in this case the third-party harassment case, relying on two witnesses who have either left or retired from the Trust. But the Judge was alert to that too in the orders that he made.

29. The fifth ground relates to indirect discrimination. This is the proposition that the policy works only when it is triggered by the application of the policy or practice to a particular case. Mr Henderson adopted the proposition I had put to him from authority relating to a glass ceiling; a woman who will not get a seat on a board because of a glass ceiling suffers on each occasion when there is a vacancy as she is not appointed; and also for having to live under a state of affairs by which she will not get appointed to the board. That is the same here. It is open to the Claimant to say that there was a PCP which was in place so as to prevent

complaints being made by staff being taken seriously. Since the complaints in this case are focused upon racist attitudes by elderly vulnerable patients to a black nurse, such a person is the more likely to make complaints and therefore is the more likely to be a complainant of indirect discrimination.

The deposit order

30. Finally, I turn to the deposit order. Here Ms Frazer made some headway because the Judge uses the wrong test in the passage which I have cited; that is no reasonable prospects. Nevertheless he, in my judgment, rescues himself by stating the correct test three lines further on. In **Jones v Mid Glamorgan Health Authority** [1997] IRLR 685 CA at paragraph 30 Waite LJ said this:

> **"The guiding principle, when it comes to construing the reasons of the Tribunal at an Appellate level, must be that if the Tribunal has directed itself correctly in law and reached a conclusion which is open to it on the evidence, the use in other passages of its reasons of language inappropriate to the direction it has properly given itself should not be allowed to vitiate the conclusion unless the relevant words admit of no explanation save error of law."**

31. That is not the case here. First, the Judge is firm in that he was asked to make a deposit order. That is in the executive part of the order at paragraph 3 and at the beginning of paragraph 9. He cites the deposit order three times in that paragraph. There is no doubt that that is what he is dealing with. He also had in front of him Judge Harper's agenda which properly sets out the test; *little* reasonable prospect of success. There was not before him an application as there was at a stage before the CMD by the Respondent seeking a strike out. In my judgment a fair reading of paragraph 9 is that the Judge was considering whether the Claimant had *little* reasonable prospect of success.

32. He was obviously troubled by it but these decisions by Employment Judges on deposit orders have to be made robustly and a long period of time is not allowed for this summary

exercise. The Judge here felt that there was not on the material before him enough for him to say that it has little reasonable prospect. He knew that there was a good deal more to come before that judgment could be made and yet, alert to that, he pointed out to the Claimant, no doubt in order to mollify the Respondent, that if she ran some of these points and the Tribunal in due course found against them, or she behaved unreasonably, she might be liable for costs. It was a fair point for the Judge to make to her and no objection is taken to it.

33. In my view the Judge here made permissible decisions in relation to case management and discretion. I draw attention to several matters; the Practice Direction at 11.6.2 says the following:

> **"The EAT recognises that employment judges and Employment Tribunals are themselves obliged to observe the overriding objective and are given wide powers and duties of case management (see Employment Tribunal (Constitution) and Rules of Procedure) Regulations 2004 (SI No. 1861), so appeals in respect of the conduct of Employment Tribunals, which is in exercise of those powers and duties, are the less likely to succeed."**

34. The exercise of discretion, that is deciding not to make a deposit order and deciding whether something is just and equitable, should not lightly be interfered with by the EAT; see the judgment of the Court of Appeal in **CIBC v Beck** [2009] EWCA Civ 619 approving my own judgment in this court, at paragraphs 23, 25, 26. Further Longmore LJ with Ward LJ and Sedley LJ agreeing in **Chief Constable of Lincolnshire Police v Caston** said this:

> **"I reiterate the importance that should be attached to the Employment Judge's discretion. Appeals to the EAT should be rare, appeals to this court from a refusal to set aside the decision of the EJ should be rarer, allowing of such appeals should be rarer still."**

35. So much was most recently confirmed by the Court of Appeal restoring the ET's judgment which had been rejected by the EAT in **O'Cathail v TfL** [2013] IRLR 310.

36. Mr Henderson draws attention to the test set by the Court of Appeal in two judgments; **Davies v Sandwell** [2013] EWCA 135 CA in the judgment of Lewison LJ at paragraph 33 and of Mummery LJ in **Gayle v Sandwell** [2011] EWCA Civ 924 at paragraph 21 which are to do with support being given to case management and PHR decisions made by Employment Judges unless they are demonstrably wrong in principle. In my opinion this case does not cross that threshold. There was an auxiliary argument by Ms Frazer that the Judge's decision was perverse. That, as she appreciates, is a very high hurdle successfully to mount; see **Yeboah v Crofton** [2002] IRLR 634. It is not met in this case so I see no error.