Appeal No. UKEAT/0624/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 July 2013

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR J OWOLABI APPELLANT

(1) BONDCARE LTD
(2) SOUTHERN CROSS HEALTHCARE GROUP PLC
(3) MS A FELLOWS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR J OWOLABI (The Appellant in Person)
For the Respondents	MR S ENGLAND (Solicitor) Abbey Legal Services Corinthian House 17 Lansdowne Road Croydon Surrey CR0 2BX

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

Appellant complained of race discrimination by victimization by having a long suspension imposed on him. He had had the opportunity to complain about the matter in the context of earlier proceedings and offered no good reason for not doing so. In the circumstances the Employment Judge's decision that the complaint was an abuse of the process under the rule in **Henderson v Henderson** could not be faulted.

HIS HONOUR JUDGE SHANKS

Introduction

1. I have before me an appeal and a cross-appeal against the Judgment of Employment Judge Buchanan in the Newcastle Employment Tribunal, sent out on 5 September 2012. The appeal by Mr Owolabi, who acts in person though he was represented before the Tribunal, is against a decision of the Employment Judge that his claim for race discrimination by victimisation was an abuse of the process under the rule in **Henderson v Henderson** [1843] 3 Hare 100 in that it should have been raised in some earlier proceedings.

2. The cross appeal, which is argued by Mr England on behalf of Bondcare Limited, the First Respondent to the original claim, is against the Employment Tribunal's decisions, first, that time had not expired and, second, that if it had it would have been just and equitable to extend time.

Background facts

3. The Claimant is a nurse and he started working with Southern Cross Healthcare Limited, who are the Second Respondent and who famously went into liquidation a year or two ago, in October 2008. From November 2008 he started work at Ayresome Court Nursing Home. Angela Fellows, who is the Third Respondent, was a manager at that home.

4. On 15 June 2009, so some seven months after he had started work, he was suspended for alleged misconduct. At around the same time he started a grievance process, alleging race discrimination by his colleagues at work. On 2 October 2009 he started a claim in the Employment Tribunal in Newcastle alleging race discrimination; the claim form is to be found at page 91 in my bundle and it makes a number of allegations against his colleagues at work

and says that he has been suffering racial abuse and that he has been discriminated against on the grounds of his race.

5. On 13 April 2010 there was a Pre-Hearing Review in that case and the Employment Tribunal ordered Mr Owolabi to provide further particulars by 11 May 2010. Among the particulars ordered to be provided, the Claimant was to say whether it was contended by him that any disciplinary or similar action taken against him was taken on racial grounds and, if so, he was to identify each act relied on and give full details of his complaint. There were no relevant particulars supplied in response to that requirement.

6. On 3 November 2010 a three-day hearing of his claims started and in the course of that hearing the Claimant was asked about his present work situation and he replied that he remained suspended and that that was another case of victimisation at work: that comes from his own ET1 in the case that I am concerned with. On 26 November 2010 he got a Judgment which was either wholly or partly in his favour - I have not seen it - in those proceedings. On 10 January 2011, so at the end of the period an appeal would be allowed, Southern Cross, the Second Respondent in this case, appealed and, jumping ahead, on 2 February 2012, so over a year later, their appeal was dismissed. Meanwhile, the Claimant's suspension remained in place.

7. On 5 October 2011 there was a TUPE transfer of Southern Cross's business, so far as it related to the Claimant's place of work, to the First Respondent, Bondcare Ltd. There were then quite a lot of exchanges between the Claimant and Bondcare, which I need not go into. The net result was that he never went back to work and he was dismissed in due course for failing to turn up as instructed at another nursing home.

8. In the meantime, before his dismissal, he started the claim that I am concerned with today on 16 January 2012. The complaint, as set out in his claim form, included victimisation. The victimisation that he relied upon was the fact that he had been suspended and that he had remained suspended for so long. That claim, which I am concerned with today, was struck out by the Employment Tribunal Judge as being an abuse of the process under the rule in **Henderson v Henderson**, and the Judge's reasons for striking out that claim are at pages 14 to 16 of the bundle.

9. Given that the Claimant undoubtedly could have taken steps (through solicitors, no doubt) to raise the question of his suspension at the hearing in November 2010 by which time the suspension had already been in place for, I think, 16 months, the question obviously arises whether he should have done so, because if he should have done so, it is very likely to be considered an abuse of the process to do so later in the way that he has. I asked the Claimant a number of times today what it was that prevented him from raising this issue as a specific claim at the hearing in November 2010 and really the only matter that he could refer to was the fact that the suspension was a continuous act and that he was still waiting for it to be dealt with in November 2010 as, indeed, he was in October 2011.

10. It seems to me that the fact that the suspension was a continuous act which had already been going on so long made it really all the more important that the complaint was made about it at the point when it could have been when he was before the Employment Tribunal complaining about other related matters in November 2010, which might have brought it to an end much sooner.

11. Bondcare, through Mr England, suggest that the true reason that the Claimant did not raise it then was because he was being paid to be on suspension and he was perfectly happy and

did not want to bring an end to that state of affairs. The Claimant says that, in fact, he was not being fully paid because he was paying too much tax. No doubt he could have sorted out the tax position, but in any event it seems to me I do not need to make a finding as to why he did not raise it and whether that was the motive. The fact was there is really no good reason for saying he should not have raised the point and, indeed, the strength of the "should" is increased by the consideration that he had been ordered, as I have already described, in April 2010 quite specifically to give particulars of whether he was complaining about any disciplinary steps that had been taken and he did not give any such particulars.

12. Standing back, reminding myself that the decision should be a "broad merits-based" one, I am unable to see any fault of reasoning on the part of the Employment Judge and, in the absence of any error of law, his decision must be upheld. It follows from that the appeal is dismissed. In those circumstances there is no need for me to deal with the cross-appeal.