Appeal No. UKEAT/0472/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 29th October 2013
Judgment handed down on 8th November 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

SITTING ALONE

CD APPELLANT

HM REVENUE AND CUSTOMS RESPONDENT

JUDGMENT

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APPEARANCES

For the Appellant	MR PAUL TROOP (of Counsel) Instructed by: Slater & Gordon UK LLP 50-52 Chancery Lane London WC2A 1HL
Special Advocate	MR CHARLES CORY-WRIGHT QC (of Counsel) Instructed by: Special Advocates Support Office Treasury Solicitors One Kemble Street London WC2B 4TS
For the Respondent	MR KEITH BRYANT QC (of Counsel) Instructed by: HM Revenue and Customs Solicitors Office 100 Parliament Square London SW1A 2BQ

SUMMARY

PRACTICE & PROCEDURE: NATIONAL SECURITY

Three linked claims, between the same parties, involved issues of national security. At a case management hearing, a judge concluded that an order in respect of the first claim that evidence relating to national security issues should be heard in closed session would apply to the second and third claims insofar as they raised the same issues, but made no wider order in respect of such material which arose only in respect of the two later claims. It was argued on appeal first that at a subsequent CMD a different EJ could not lawfully depart from this order without there being a change of circumstance, which it was argued there was not: and second that upon their true construction the Rules did not permit a judge to look at material, publicity for which was said to endanger national security, in closed session in order to determine if it should be heard in closed session at the trial of the claim.

Both arguments (and therefore the appeal) were rejected: in particular, the Employment Judge at the first CMD had not expressed any final decision on the matter, since she expressly regarded any decision as premature at the time she was invited to make it.

Topic numbers: 35, 8.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. On 24th January 2013 Employment Judge Potter made a case management decision in respect of three consolidated claims.

2. All three claims arose out of the employment and eventual dismissal of the Claimant from his work for the Respondent at Heathrow Airport. In his first claim (brought in July 2003) he complained that he had failed his counter-terrorism clearance check, and had to move from working airside. His I.D. Card was removed; he had been required to meet representatives of HM Government, he complained about the way the meeting had been conducted by them and the dismissal of internal appeals against the decision. He claimed that the cause of these was that he had been discriminated against on the grounds of race.

3. He continued working at the airport, until suspended by a letter of 29th October 2009, written by J.C. It had been proposed that some of those working for the Respondent should transfer to the service of the UK Border Agency. The Claimant's lack of security clearance was relied on by the Respondent as precluding this. The Claimant contended this caused him to be discriminated against on the grounds of race, religion or belief, and victimised for his earlier actions. He made a claim.

4. In 2010 he was dismissed. In an action begun in February 2011 he complained that that had been on grounds of race, religion or belief, and constituted both direct discrimination and victimisation on those grounds, and unfair dismissal. The reason for his dismissal, and failure to deploy his services elsewhere was that his continued employment created an unacceptable risk to the security of departmental data.

5. On 17th December 2008 Employment Judge Pearl made an order pursuant to Rule 54 of the Employment Tribunal Rules 2004 that all future hearings be in private and that CD and his representatives should be excluded from all hearings where evidence, the revelation of which might risk national security, was to be presented. Rule 54 of the Tribunal Rules was the relevant Rule at the time of the decision with which I am concerned, though it has now been superseded by Rule 94 of the Employment Tribunal Rules 2013. Rule 54 provided, under the heading "National Security Proceedings" as follows:

> **"(1) A Minister of the Crown (whether or not he is a party to the proceedings) may, if he considers it expedient in the interests of national security, direct a Tribunal or Employment Judge by notice to the Secretary to:-**
> **(a) conduct proceedings in private for all or part of particular Crown employment proceedings**
> **(b) exclude the Claimant from all or part of particular Crown employment proceedings**
> **(c) exclude the Claimant's representative from all or part of particular Crown employment proceedings;**
> **(d) take steps to conceal the identity of a particular witness in particular Crown employment proceedings.**
>
> **(2) A Tribunal or Employment Judge may, if it or he considers it expedient in the interests of national security, by order –**
> **(a) do in relation to particular proceedings before it anything which can be required by direction to be done in relation to particular Crown employment proceedings under paragraph (1);**
> **(b) order any person to whom any document (including any judgment or record of proceedings) has been provided for the purposes of the proceedings not to disclose any such document or the content thereof:-**
> **(i) to any excluded person…**
> **(c) take steps to keep secret the reasons for all or part of his judgment**
>
> **The Tribunal or Employment Judge (as the case may be) shall keep under review any order it or he has made under this paragraph…**
>
> **(4) When exercising its or his functions, a Tribunal or Employment Judge shall ensure that information is not disclosed contrary to the interests of national security."**

6. The order that Judge Pearl made was in respect of the first claim. By then neither of the other two claims had been issued. When they were, the Claimant applied to revoke Judge Pearl's order. The Respondent sought the extension of the order to the second and third claims. The matter came before Employment Judge Lewzey. For reasons given on 19th September 2012 she refused the Claimant's application in respect of the first claim. In respect

of the second and third claims she ordered that all future hearings should be held in public provided that those aspects of the two claims that truly raised national security issues which were known to the Claimant and the Respondent should be held in private; and that

> **"(b) The Claimant and his open representative shall be excluded from such part of any future hearings in [the second and third cases] during which closed evidence and/or submissions in relation to [the first claim] which also apply to [the second and third claims] are concerned.**
> **(c) It is premature to extend the order made at (b) to other aspects of [the second and third claims] at this stage.**

7. Her central reasoning is at paragraph 13, in which she acknowledged that the burden rested with the Respondent to show that there was national security evidence and that it was relevant to one of the live issues in cases two and three; and at paragraph 17:-

> **"Mr Bryant…"[Counsel for the Respondent before her, as he was before me] "..relies on the fact that the Respondent relies on the national security defence in all three cases. Mr Troop…" [Counsel for the Claimant, as he also was before me] "…argues that asserting the defence of itself is insufficient to comply with the requirements for a Rule 54 Order. At the present time, the Employment Judge has insufficient information about what national security material is necessary to cases two and three."**

8. At paragraph 21 the Judge referred to what she called the 'secrecy aspect', by which she meant material which would be heard only in "closed session" – i.e. a hearing or part of a hearing from which the Claimant and his representative were excluded. She said:

> **"At present, the Employment Judge has no information as to what national security material is relevant to case two and case three. In these circumstances, it would be premature to extend the Rule 54 Order in its entirety to cases two and three. However, the Employment Judge is satisfied that closed material in case one is likely to become relevant to the issues in cases two and three. In these circumstances, the Employment Judge is satisfied that it is appropriate to make an order under Rule 54(2) insofar as closed material in case one comes into cases two and three."**

9. At the hearing before Judge Potter which followed on the 24th January 2013, Mr Bryant again represented the Respondent; Mr Cory-Wright QC appeared as special advocate in all three cases, but the Claimant was represented by Counsel other than Mr Troop. The application before her was made by the Respondent and was to permit further documents to

be put before the Tribunal in the second and third claims in the absence of the Claimant and his open representatives ("in closed session"). The Claimant argued that she should not do so because this would be to re-visit a case management decision without there being any material change of circumstance.

10. The Judge took the initial decision that it was expedient in the interests of national security to make what she called a "five minute order" for the sole purpose of seeing the documents at issue and hearing from the Respondent to enable her to consider their content and relevance for the application being made. When she had done that, she called back the Claimant's representatives and special advocate and said that she had decided it was appropriate to make a further "five minute order" to hear from the special advocate on the documents. After that had been done she expressed her decision in these terms:

> **"17. The Employment Judge's decision was that it was expedient in the interests of national security to extend the scope of the Rule 54 order in relation to a defined category of documents namely the Claimant's CTC application in 2010 and/or the assessment of that application. There was to be no blanket order. However, relevant closed material that had come into the Respondent's possession since the May hearing should be available to the special advocate and the Tribunal. …The facts surrounding this application were not on all fours with the Farooq case…" [Farooq v Commissioner of Police of the Metropolis, UKEAT/0542/07, a decision of 20th November 2007 of Burton J] "Challenging the appropriateness overall of a Rule 54 Order was very different from considering admission to proceedings of closed material that had come to light after the Tribunal's previous ruling. To vary the Order in such circumstances was consistent with the obligation to keep under review set out expressly in Rule 54 (2) Employment Tribunal Rules 2004.**
> **18. The Employment Judge emphasised that the order would be kept under review. In particular the Special Advocate needed the opportunity, which he had not so far had, to scrutinize the new closed material in the context of the other closed material and to consider whether any applications were appropriate."**

The Appeal

11. A case management decision is an interlocutory decision. Such decisions usually involve the exercise of a discretion by an Employment Judge. It will not be often that an appeal against such a decision will succeed, for discretion exercised particularly at a preliminary stage in proceedings must be afforded a very wide latitude. It is only if a clear error of approach, or error of law can be identified that an appellate court has any right to

interfere. It is not sufficient that the Appeal Court should feel - however strongly it may hold the view – that it would have made a different order. This principle applies both to the decision made by Judge Lewzey and that made by Judge Potter.

12. Mr Troop, for the Claimant, argues nonetheless that there are two errors of approach and principle which justify appellate interference in the present case.

13. The first ground is that there is only a limited range of circumstances in which a case management decision can be reviewed, or changed. His initial submissions were that there had to be a material change of circumstance, though in argument he accepted that this approach might not afford sufficient flexibility, and was inclined to think that a more flexible approach might be appropriate whilst maintaining that there were limits to the circumstances in which a decision once made could be altered subsequently. In **Goldman Sachs Services Ltd v Montali** [2002] ICR 1251 Judge Clark, in a hearing at which only the Respondent appeared to argue the position, accepted the proposition advanced by the Respondent that in civil proceedings generally interlocutory orders ought not to be altered on a later occasion without good cause (paragraph 2). The Court of Appeal had recognised that making repeated applications to the same point would produce uncertainty and repetition rather than clarity and finality (paragraph 24) though if there was a true change of circumstances the Civil Procedure Rules would plainly allow a change of view as to the procedural orders which should be made; and that the position under the CPR should apply to Employment Tribunals such that (paragraph 26) an Employment Tribunal "will not reverse any interlocutory order, which has dictated the parties' preparation of their cases, in the absence of a material change in circumstances."

14. In **Hart v English Heritage** [2006] ICR 655, Elias P took a broader view, expressed between paragraphs 31 and 36. There was jurisdiction to re-visit a previous case management decision. In theory there was no limit to the number of times a tribunal could do so, though good practical reasons why it should not. He quoted Keene J in **Maurice v Betterware UK Ltd** [2001] ICR 14, 22, (paragraph 22):

> **"We are satisfied that the power to re-visit a case management issue is not a power to be used in order to have a second or third or further bite of the same cherry, when there has been no material change in facts or in the law, nor is it a procedure to be used to enable a party to go, as it were, chairman shopping, moving from one chairman to another until it can find a chairman who can come up with a decision in its favour."**

Elias P observed that that was very important guidance albeit not a limitation found in the Rules themselves. He thought it akin to the principle of issue estoppel – a bar which was not absolute, though exceptions to it were limited. The obvious distinction between cases where there had been a determination of an issue or argument, and one where a party wished to advance an argument which ought reasonably to have been deployed at the earlier hearing but had not been, was analogous to the principle in **Henderson v Henderson** (1843) 3 Hare 100 – the ultimate question being whether it was an abuse of process to allow the matter to be raised afresh. He thought that principle applied to Employment Tribunals.

15. It was in reliance upon those authorities that Burton J in **Farooq** applied their reasoning, which had not involved proceedings in which any issue of national security arose, to one in which it did. The decision under appeal was a decision that a hearing should be held in private. The Judge had maintained an order made 18 months before, which had been subject to an unsuccessful appeal. There had been no material change in circumstance. The appeal was rejected. In an extempore judgment Burton J said there was no basis for asserting there was any error: there were no material changes in circumstance, or the law.

16. Although Mr Troop was inclined to think that the more flexible test in **Hart** (asking, in effect, whether the attempt to persuade an Employment Judge to change a case management order tended on the abusive) might be more appropriate than the requirement that there must be a material change of circumstance he submitted that neither approach advantaged the Respondent's argument. The Judge here thought (see paragraph 17) that closed material had come to light after the Tribunal's previous ruling: that there had been a change of circumstance. Although the material which Judge Potter looked at had not been in the hands of the Respondent's representative at the hearing before Judge Lewzey (they had not then had access to it since its security was tightly controlled) Judge Lewzey had not considered it: but the material was in the hands of the Respondent at the time. It was not as if there was a change of circumstance because new material had come into the Respondent's possession. It was material already in their hands. Judge Lewzey had held that the Respondent, upon whom fell the burden of showing that the material they wished to consider in closed session was "closed" material, and relevant, had failed to satisfy that onus.

17. The second ground was that the Judge was wrong to adopt the procedure she did in looking at the sensitive documents. This argument depended upon a close analysis of the wording and consequences of Rule 54. Mr Troop argued that an Employment Judge could only make an order contemplated by Rule 54 (2) if the Judge considered it expedient in the interests of national security to do so. He argued that the Judge's consideration of expediency in this context could not itself be conducted in secret (paragraph 30). A secret hearing cannot lawfully be heard in order to determine an application for secrecy: all applications for an order for secrecy must, he submitted, be made in the first instance on an inter-parties basis. The power to conduct secret hearings should be construed narrowly, and not broadly: see **Al Rawi v Security Service** [2012] 1 AC 531, SC. There were sound reasons why this should be so: secrecy was an exceptional case. There was a real risk to the fairness of hearings if it was too

readily adopted. Once a tribunal was entitled to consider material which was not available to the Claimant or his advocate, they would not know the limits to which that information extended, and whether or not any submissions they were making might be controverted by information in the hands of the Tribunal which it would not reveal, but would take into account. This created a chilling effect. He drew from **Bank Mellat v Treasury [No. 1]** [2013] UK SC 38 the propositions that an Employment Tribunal should take a robust approach to applications for hearings in secret; firstly, that advocates should articulate convincing reasons for such a hearing; secondly, the advocate for a party should carefully consider whether to make such an application; and (Mr. Troop would add) a tribunal should comment if having heard the application and considered the material it thought the material did not merit the application; thirdly a judge who conducted a secret hearing should say as much about the secret material as was possible; and fourthly where he reached a decision wholly or partly on the basis of closed material he should say that was what he had done.

Discussion

18. Critical to the first ground of appeal is the question whether Judge Lewzey in fact considered and rejected an application by the Respondent that the hearing be in closed session to consider documentation not just arising out of the first claim, but which was specific to the second and third claims. It is clear to me she did not definitively do so. Her order expressly indicated it would be "premature" to reach that conclusion. At paragraph 21 of her decision she set out why that was: she had no information as to what national security material was relevant to the claims. She did not regard that as a matter which, because of the burden of proof, entitled her to reject the claim for good and all. The declaration of prematurity carries with it an understanding that when the time is ripe the matter may then be properly considered and determined. A decision that the time has not yet come to make a decision cannot, in my view, be regarded as a settled decision so as to be subject to the same principles as apply to

clear case management decisions reached after a contested hearing, the subject of cases such as **Montali** and **Farooq**.

19. In my view, therefore, Judge Potter was entirely free to make such decision as she wished in respect of the secrecy of the hearings in respect of claims two and three, insofar as those hearings considered material which went beyond that already held "closed" because of its relevance to claim one.

20. The fact that the view that the closed material had come to light after the Tribunal's previous ruling (referred to in paragraph 17) was expressed only in the sense that it had come into the hands of the Respondent's representatives (as distinct from the Respondent itself) does not in this case make any difference (and in oral submissions it was not specifically argued that it should): this is sensible, since material considered closed as a result of national security is likely to be carefully reserved within an organisation even such as the Respondent for sight by only those eyes which should properly have sight of it, and access to it may be granted only cautiously and over time. This is not a case in which the failure to reveal the material before Judge Lewzey could be considered at all abusive (adopting, for the moment, the **Hart** approach). I would be inclined, if necessary, to regard it as a material change of circumstance that it was, for the first time before a tribunal hearing, in the hands of the legal representatives of the Respondent – though my decision principally rests upon the fact that Judge Lewzey made no concluded decision on the point.

21. If necessary, I would hold that **Farooq** was a case that turned on its particular circumstances. Mr Justice Burton recognised **Hart** as an authority, whilst deriving his expression of principle ("material change of circumstance") in the light of the case before him. For my part, I would be inclined as a general principle to think that the regime

applicable to cases in which decisions about privacy and closed sessions are made should be more flexible even than that generally adopted in respect of case management discussions, as to which in a case not involving national security there is an expectation that decisions and orders will accommodate to new circumstances, and that what constitutes a "circumstance" is likely to be read broadly, rather than restrictively. This is particularly so given the obligation to keep such decisions under review which is set out expressly in Rule 54(2) of the Rules. Mr. Troop accepted this applied equally to any application by either party as well as to an obligation upon the Tribunal itself. Any decision by a previous Judge must, whether in the national security field or outside it, be treated with great respect. It should be departed from only for good reason, but the existence of Rule 54(2) shows that in the national security field such good reason may occur more readily. There is no express equivalent of Rule 54(2) applicable to the generality of case management decisions in cases not concerning national security.

22. As to the second ground of appeal, the starting point must be the legislative provisions. Rule 54(2) provided a discretion to an Employment Judge to order that which a Minister of the Crown might direct under Rule 54(1)(a) and (d). That arises from the words "a tribunal or Employment Judge may….by order…do anything…". The power may only be exercised if the pre-condition is satisfied that the Judge considers it expedient in the interest of national security to do so. The way in which he is to determine what is "expedient" is not defined. It calls for a judgment. An Employment Judge is entitled within the bounds of perversity and logic to make such a judgment having considered all the matters which he thinks relevant to the decision. How he considers a matter expedient must be a matter for him. I see no difficulty in the Employment Judge considering it expedient in the interests of national security to conduct part of the proceedings before him, not only in private but also to exclude the Claimant from that part of the proceedings, where that part of the proceedings

concerns the Judge looking at material in order to determine whether that material truly justifies its being considered later by the Tribunal at a closed rather than open hearing. As Mr. Bryant observed, the position Mr. Troop seemed to be adopting was that whatever was put to Judge Potter in open session in the present case would not give her the power to decide to go into closed hearing. To do so would be to deny the Judge the power conferred in wide terms by 54(2).

23. I would observe, further and separately, that Mr. Troop suggested that the "route out" of a difficulty his construction might cause was that the Employment Judge could call upon a Minister of the Crown to direct the Tribunal to conduct proceedings in closed session in order to determine whether there should be a closed hearing, before the Tribunal finally heard the evidence in a closed hearing before the Judge for that purpose. That would empower the Judge to be in a position in which he could consider it expedient without being in open session. I see no need for this approach, which seems to me unduly and unnecessarily sophisticated. To construe the provision as does Mr. Troop would render it so exceptionally difficult for an Employment Judge ever to make an order under Rule 54(2) that it is difficult to see that Parliament could have contemplated it.

24. Mr. Troop points out that Rule 94 of the Employment Tribunal Rules 2013 contains at paragraph 3 words which expressly empower an Employment Judge to hold such a hearing as did Judge Potter in the present case. This does not, in my view, carry with it the implication that there was a lacuna in the previous Rules which required legislative intervention. It plainly avoids any current doubt about the matter: for my own part I would have held it free from any reasonable doubt under the previous Rules.

Conclusion

25. It follows that no error of law has been identified in Employment Judge Potter's decision. Neither ground succeeds.

26. Finally, for completeness, I should note that Mr. Troop argued that the Judge had not given any justification why a secret hearing to consider the alleged sensitive material was justified: the Respondent had not argued though it might have done that only by looking at the documents themselves could their relevance be understood. As Mr. Bryant observed, this comes close to a "reasons" challenge. A "Meek" ground was not identified as such in the Notice of Appeal, nor argued as such before me. These points were made in emphasis of, and by way of support for, the arguments which I have rejected for the reasons given above: they were not separate grounds of appeal.