Appeal No. UKEAT/0359/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 December 2013

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR TREVOR GREENLY — APPELLANT

FUTURE NETWORK SOLUTIONS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Written Submissions
For the Respondent	Written Submissions

SUMMARY

VICTIMISATION DISCRIMINATION – Protected disclosure

Whether the Employment Tribunal erred in law in striking out part of the Claimant's claim of detriment on the ground of having made a protected disclosure. Specifically as to whether the Tribunal approached its task correctly in concluding that part of the Claimant's claim should be struck out on the basis that he had no reasonable prospects of successfully demonstrating he had made a disclosure of information rather than having simply made allegations or complaints so as to come within the protection of s.47B **Employment Rights Act 1996**.

HER HONOUR JUDGE EADY QC

1. For convenience I shall refer to the parties as the Claimant and the Respondent, as they were before the Employment Tribunal below.

Introduction

2. This is an appeal by the Claimant in these proceedings against a Judgment on a Pre-Hearing Review of an Employment Tribunal, under the chairmanship of Employment Judge Starr (sitting alone) – "the Starr Tribunal" - on 11 March 2013 at Leeds, with written Reasons having been sent to the parties on 1 May 2013. Both parties to this appeal chose not to attend the oral hearing of this matter but instead to rely on written submissions. I confirm that I have read these and taken them into account along, with the other documents in the EAT bundle, in reaching my Judgment in this matter.

Background

3. The background to this case was the subject of separate and prior consideration in earlier ET proceedings relating to the complaint of the Claimant and others of unlawful deductions from wages. That was a complaint determined by the Employment Tribunal, Employment Judge TR Smith, sitting alone – "the Smith Tribunal" - at Leeds, on 8 and 9 January 2012, with the reserved Judgment being sent to the parties on 7 February 2012.

4. In that earlier case, the Employment Tribunal held (relevantly) that the Claimant's complaint of unlawful deductions were made out for the period 5 December 2011 to 12 December 2011. In short, the Smith Tribunal's conclusion in this regard was based upon its findings that:

(a) there had been a series of transfers for TUPE purposes, initially from Skanska Construction Limited (Skanska) to Carillion Construction Limited (Carillion), and then from Carillion to the Respondent;

(b) that the Claimant had been contractually entitled to be paid for certain work, referred to by the Tribunal as the B and C claims, when employed by Skanska and Carillion and that contractual entitlement transferred under TUPE to bind the Respondent;

(c) the contract was lawfully varied by the Respondent in respect of the B claims as from 12 December 2011 but the attempt to unilaterally vary the contractual entitlement to the C claims was ineffective.

5. In rehearsing the background findings of fact, the Smith Tribunal noted (relevantly) that there had been a factual dispute between the parties to that case as to what had occurred on 12 December 2011, at a meeting with Mr Walton (a director of the Respondent), at which the Claimant and other workers employed by the Respondent, were present.

6. In relation to the issue to be determined by the Smith Tribunal (that is, whether there had been an effective variation of the contracts of employment as a result of this meeting) the dispute was largely resolved in the Respondent's favour. The Smith Tribunal did not, unsurprisingly, go into the detail of the factual dispute as to the meeting of 12 December 2011; as might have been necessary if it had been considering whether the Claimant had made a protected disclosure on that occasion, i.e. the issue live in the proceedings that have resulted in the current appeal. The Judgment does, however, allude to a discussion taking place about the matters in dispute and concludes that more had been said than had been referred to in the Claimant's written statement.

The hearing before the Starr Employment Tribunal

7. Turning then to the matters before the Starr Tribunal, the Claimant in this current matter was (relevantly) complaining that he had suffered a detriment for making a protected disclosure. The Employment Tribunal listed the matter for a Pre-Hearing Review, giving notice that the issues to be determined at this hearing were: (1) whether to order the Claimant to pay a deposit, if it seemed that any of the contentions put forward by him had little reasonable prospect of success; and (2) whether to strike out all or part of the claim because it had no reasonable prospect of success.

8. At the outset of the Pre-Hearing Review, there was clarification as to how the Claimant put his case, and it was recorded that he was contending that he had made full protected disclosures as follows:

(1) on 12 December 2012: that he had raised with the Respondent its failure to pay him according to his contract for cabling, rod and roping work (what had been referred to as the B and C claims in the Smith Tribunal) and holiday pay;

(2) on 13 February 2012: that he had raised with the Respondent those matters and additionally the breach, as the Claimant alleged, by the Respondent of the National Minimum Wage Regulations;

(3) on 17 March 2012: that he had raised with the Respondent the same breaches of the contract of employment; and

(4) that he had made a complaint to HMRC, about the breach he alleged the Respondent had committed of the National Minimum Wage Regulations.

9. I should note that the Claimant's case, as put to the Employment Tribunal, is set out slightly differently in the skeleton argument submitted on his behalf before me, but the substance of the three alleged disclosures that are in issue - i.e. that at the meeting of

12 December 2011 meeting, and those in writing of 13 February 2012 and 17 March 2012 - remain as I have summarised them above.

10. The Starr Tribunal heard no oral evidence but received representations from the parties' respective Solicitors. The Employment Judge also had a limited bundle of documentation to which reference was made during the Pre-Hearing Review (apparently comprising of letters dated 13 February, 1 March, 17 March, 1 and 21 May 2012, together with a one-page spreadsheet relating to the Claimant's pay and a copy of the Claimant's earlier witness statement as relied on before the Smith Tribunal). I further understand that the earlier Judgment of the Smith Tribunal and its Reasons were also available to Employment Judge Starr.

11. In relation to the alleged disclosure on 12 December 2011, the Claimant relied on paragraphs 6 to 8 of his Grounds of Complaint, as attached to his form ET1, and paragraph 47 of his earlier witness statement. In the latter, he had he related that, having been told that the Respondent was no longer going to pay B and C claims:

> **"We were extremely upset and cross, particularly given the fact that Carillion and Stephen Walton had personally promised us that no changes would be made to our terms and conditions. We told him it was not fair that he was changing our terms and conditions. After being questioned firstly by Jon Pound [another Claimant] and then me about his reasons for not paying us Stephen Walton [for the Respondent] stated that he 'I do not pay my existing employees these rates and I see no reason why I should pay you these rates'."**

12. Employment Judge Starr noted that there was nothing in the evidence or the ET1 to refine the nature of the protected disclosure of the information disclosed on that occasion (see paragraph 9 of his Judgment).

13. In respect of the 13 February 2012 alleged disclosure, Employment Judge Starr recorded that the Claimant had sent a letter to Mr Walton of the Respondent in the following terms:

"I would like to raise the following grievance against [Respondent]:-

- **Failure to consult on changes to our terms and conditions.**
- **Stopped paying [B and C claims], holiday and Bank Holiday pay not calculated correctly as per the TUPE rules and**
- **Finally not paying the National Minimum Wage for our 40-hour week as per TUPE and Government rules."**

14. The Employment Judge then records that in respect of:

> **"[…] March 2012, the suggestion is (and I put it no higher than that) that the Claimant had a complaint made to HMRC on his behalf by a colleague, Mr Darren Small."**

15. It is further noted that:

> **"The Claimant […] gave no evidence […] and we do not see this in his written statement. That description has been provided by his representative […] the evidence that we have in support is the ET1 at paragraph 12, which records that:-**
>
> > **'HMRC were also informed that it was believed that the Respondent was breaking the rules on National Minimum Wage by asking staff to carry out work that they would no longer be paid to do.'"**

16. At paragraph 12 of the Pre-Hearing Review Judgment it is further recorded that:

> **"Also in the letters (partly the letter of 13th February 2012 which refers to the NMW issue and partly in a letter of 17th March) the points were made that the contractual terms and conditions included rod and roping; that the holiday pay was based on an average of twelve weeks' previous pay from a previous employer and transferred over from Carillion to FNS (the Respondent) under TUPE. The 17th March letter went on as regards the NMW:-**
>
> > **'With regards to our 4-hour min pay you should be able to ask your wages department which members of staff are being paid less than £243.20 (£6.08 x 40). This should be easy for them to see.'**
>
> **The letter finished:-**
>
> > **'If we cannot resolve this I will have to take it to the next level and put in a grievance for unlawful deductions from wages.'"**

The Employment Tribunal's Judgment

17. The issue which occupied the Starr Tribunal, and which ultimately led that Tribunal to strike out the protected disclosure claim on all but the alleged disclosure of information to

HMRC (the fourth disclosure), was whether the Claimant had made a qualifying disclosure; specifically, whether he had disclosed any information which, in his reasonable belief, tended to show that a person had failed or was failing or was likely to fail to comply with any legal obligation to which the Respondent was subject.

18. The Starr Tribunal concluded (see paragraph 43) that the first three matters relied on:

> **"[…] are not protected disclosures because there is no disclosure of information […] Each is an approach to the Respondent couched, in respect of the first, as a matter of unfairness in changing payment terms and in respect of the second and third (on 13th February and 17th March 2012) expressly, in terms, as grievances; the context in each case was a complaint about the reduction in pay under the transferee. Even the NMW complaint to the Respondent did not convert that complaint into the disclosure of information. The NMW complaint as made to Mr Walton appears as an allegation and not as the provision of information."**

19. As indicated above, the Employment Judge took a different view in respect of the disclosure to HMRC accepting:

> **"[…] for PHR purposes that the Claimant will be able to support the suggestion […] that a complaint to HMRC was made on his behalf about the breach by the Respondent of the NMW Regulations."**

20. In reaching this decision, the Employment Judge had regard to the fact that:

> **"[…] prior knowledge does not affect the question (ERA section 43L(3))."**

Observing:

> **"[…] it would seem therefore that lack of prior knowledge cannot convert a complaint into information, nonetheless there is no suggestion that HMRC knew of the Respondent's pay practices. It is possible that information would be conveyed (maybe even through a communication couched as a complaint) by drawing to HMRC's attention the pay practices of the Respondent."**

The law

21. The relevant statutory provisions are contained within Part IV(A) **Employment Rights Act 1996**. The starting point is s.47B, which provides that:

> **"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."**

22. S.43A defines "protected disclosure" as:

> **"[…] a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."**

23. S.43B of the **Employment Rights Act 1996** provides, so far as is material:

> **"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—**
>
> **[…]**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;**
>
> **[…]"**

24. I pause at this stage to note that I am concerned, as was the Employment Tribunal, with this section as it was worded prior to the amendment - inserting a public interest requirement - to subsection (1) made by the **Enterprise and Regulatory Reform Act 2013**.

25. S.43C provides:

> **"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—**
>
> **(a) to his employer; or**
>
> **(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—**
>
> **(i) the conduct of a person other than his employer, or**

> **(ii) any other matter for which a person other than his employer has legal responsibility,**
>
> **to that other person."**

26. S.43F (which concerns cases where the disclosure is to a prescribed person) relevantly states that:

> **"(1) A qualifying disclosure is made in accordance with this section if the worker—**
>
> **[…]**
>
> **(b) reasonably believes—**
>
> **[…]**
>
> **(ii) that the information disclosed, and any allegation contained in it, are substantially true."**

27. And s.43L(3), setting out "Other interpretive provisions" provides:

> **"(3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention."**

28. Pursuant to s.43B, the disclosure must, therefore, be "of information". This expression has previously been the subject of consideration by a different division of this court (Slade J presiding) in **Cavendish Munro Professional Risk Management Limited v Geduld** [2010] ICR 325, in which a distinction was drawn between a "disclosure of information" and "an allegation". The EAT in **Cavendish** put the matter thus:

> **"24. […] the ordinary meaning of giving 'information' is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating 'information' would be 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around'. Contrasted with that would be a statement that 'you are not complying with Health and Safety requirements'. In our view this would be an allegation not information.**
>
> **25. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure**

> **of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43."**

29. In reaching its conclusion in this regard, the EAT in **Cavendish** noted that a distinction is drawn between "information" and "allegation" elsewhere in the legislation. Thus, at paragraph 20 it was observed:

> **"That the Employment Rights Act recognises a distinction between 'information' and an 'allegation' is illustrated by the reference to both of these terms in section 43F. […] It is instructive that those two terms are treated differently and can therefore be regarded as having been intended to have different meanings."**

30. The EAT in **Cavendish** also drew support for this distinction from the victimisation provisions of (then) the **Sex Discrimination Act 1975** and the **Race Relations Act 1976**, which made a separate provision in respect of "giving evidence or information" and "making an allegation" (now see s.27(2)(b) and (d) **Equality Act 2010**). The EAT in **Cavendish** went on to consider how the interpretive provisions of s.43L of the **Employment Rights Act 1996** might impact upon this analysis:

> **"27. […] The natural meaning of the word 'disclose' is to reveal something to someone who does not know it already. However section 43L(3) provides that 'disclosure' for the purpose of section 43 has effect so that 'bringing information to a person's attention' albeit that he is already aware of it is a disclosure of that information. There would no need for the extended definition of 'disclosure' if it were intended by the legislature that 'disclosure' should mean no more than 'communication'."**

31. The facts in **Cavendish** had been found by the Employment Tribunal after a full merits hearing, in which the Claimant - Mr Geduld - relied on a letter before action from his solicitors, which did not descend into any detail, as constituting a qualifying disclosure within the meaning of a section 43B(1) **Employment Rights Act 1996**. The relevant parts of the letter relied on stated:

> **"We have been instructed by Michael Geduld in respect of the recent discussions that have taken place between the parties. We have given full advice to our client regarding his rights as**

> **a shareholder, director and employee. Such advice includes the purported agreement between the parties signed immediately before the Christmas break but 'back dated'. There are a number of issues regarding the validity of such an agreement and the unfair prejudice to our client, taking into account the events leading up to and immediately after the signature of the Agreement. Our client's position is fully reserved regarding his rights and claims in this regard and we have advised him that such arguments are significant and are very likely to be successful in Court."**

And:

> **"Our client is putting forward this proposal as a means to bring a swift conclusion to the current position. If it is not accepted in its entirety then our client will take all steps that are necessary to protect his position including issues regarding the purported shareholders agreements; the actions of the company's accountant regarding the purported valuation and the various threats and circumstances surrounding the position our client finds himself in with the remaining two shareholders which has led to unfair prejudice upon our client as a shareholder by the company. Such unfair prejudice does raise the issue as to the future of the company."**

32. The Employment Tribunal considered that this amounted to a "disclosure of information" for the purposes of s.47B in that:

> **"64. The writer of the solicitor's letter does refer to legal obligations with which, they assert, [the other directors of the Respondent] were failing to comply. They state, for example that:**
>
> **'[…] the position our client finds himself in with the remaining two shareholders which has led to unfair prejudice upon our client as a shareholder by the company.'**
>
> **The test of being likely to disclose is, therefore, met."**

33. As the EAT noted, on appeal:

> **"The basis for the Tribunal's Judgment that the letter of 4 February 2008 amounted to a qualifying disclosure within the meaning of the legislation, appears to be […] [this] passage from the solicitor's letter […] If there were additional reasons for the Tribunal's conclusion that the letter of 4 February 2008 contained a qualifying disclosure within the meaning of the legislation, with respect, these are not apparent."**

34. Although not contained in the authorities bundle on this appeal, the Starr Tribunal also had regard to the subsequent decision of the EAT (Slade J again presiding) in **Smith v London Metropolitan University** [2011] IRLR 884 to the same effect.

Submissions

35. It is not suggested by either party to this appeal that the approach laid down by the EAT in **Cavendish** and **Smith** is incorrect. The argument before me is as to whether the Starr Tribunal properly applied that approach in the present case and, in particular, whether it reached a perverse conclusion in deciding that the claim should be struck out in these circumstances. On the second question, the Appellant relies on the approach to the Employment Tribunal's power to strike out a claim as set down in **Balls v Downham Market High School & College** [2010] UKEAT/0343.

36. The Employment Tribunal's understanding of the correct approach to the exercise of its power to strike out parts of the claim is set out at paragraphs 29 to 30 of its Judgment. At paragraph 29, it sets out rule 18(7) Schedule 1 of the **Employment Tribunals (Constitution of Rules and Procedure) Regulations 2004**, which provided that an Employment Judge:

> **"[…] may make a judgment striking out all or part of any claim on the grounds that it has no reasonable prospects of success."**

37. Then at paragraph 30 the case law is considered thus:

> **"*Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330 deals with the circumstances in which an employment judge could conclude that there was no reasonable prospect of success, Lord Justice Morris Kay saying: 'In a normal case where there is a crucial core of disputed facts, it is error of law for the Tribunal to pre-empt the determination of a full hearing by striking out.' The position is also the subject of recent Employment Appeal Tribunal guidance in *Balls v Downham Market High School & College* [2011] IRLR 217, Lady Smith referring to the power to strike out as draconian and saying its application must be very carefully considered and the facts of a particular case properly analysed and understood before any decision is reached. The 'no reasonable prospect of success' test is a high one. In *Tayside Public Transport v Riley* [2012] IRLR 755 Lord Justice Clark stressed that cases are fact-sensitive and, where central facts were in dispute, the claim could only be struck out in the most exceptional circumstances."**

38. The particular paragraph in the **Balls v Downham Market** case, upon which the Appellant places reliance, is at paragraph 6 of that Judgment, which provides as follows:

> **"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the Tribunal has to carry out is the same; the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."**

39. In the **Balls** case, at paragraph 7, Lady Smith went on to observe as follows:

> **"I would add that it seems only proper that the Employment Tribunal should have regard not only to material specifically relied on by parties but to the Employment Tribunal file. There may, as in the present case, be correspondence or other documentation which contains material that is relevant to the issue of whether it can be concluded that the claim has no reasonable prospects of success. There may be material which assists in determining whether it is fair to strike out the claim. It goes without saying that if there is relevant material on file and it is not referred to by parties, the Employment Judge should draw their attention to it so that they have the opportunity to make submissions regarding it but that, of course, is simply part of a Judge's normal duty to act judicially."**

Discussion and conclusion

40. In my judgment, the difficulty facing the Employment Tribunal in the present case was in analysing the factual matrix without hearing any oral evidence. While the distinction between the "disclosure of information" and the making of "an allegation" is a valid one, it can require the drawing of quite fine distinctions as between different statements, in circumstances where the broader context may be all important. A disclosure of information may well contain an allegation (as, arguably, does the statement "the wards have not been cleaned for the past two weeks") and vice versa. The raising of a grievance might, thus, amount simply to the making of a complaint or allegation but it might also - depending on the circumstances - be disclosing information.

41. Whistle-blowing cases, as has previously been observed (see **North Glamorgan NHS Trust v Ezsias** [2007] ICR 1126) have much in common with discrimination cases; in particular, in that they tend to be fact-sensitive and involve similar public interest

considerations. While there will obviously be exceptions, experience suggests that the evidence in such cases is generally viewed best as a totality at a full merits hearing, rather than trying to adjudicate on selected parts of the evidence at a preliminary stage.

42. Moreover, adopting the approach laid down in **Balls v Downham Market**, where it is being contemplated that part of a claim is to be struck out as having no reasonable prospects of success, the Tribunal must be satisfied that it can reach its conclusion that there are *no* such prospects on a careful consideration of all the available material. In the particular circumstances of this case, that would include the earlier findings of the Smith Tribunal.

43. Adopting and applying that approach in the present case, it is apparent that - in respect of the first disclosure considered by the Starr Tribunal - the Claimant was relying on oral statements he had made at a meeting on 12 December 2011. It is equally apparent from the decision of the Smith Tribunal that the entirety of what was said by the Claimant on that occasion was not contained within his witness statement. The decision of the Smith Tribunal further makes clear that there was a substantive dispute of fact as between the parties as to what was said at that meeting and that had to be resolved after hearing the evidence of both sides as to what was said.

44. In his witness statement, the Claimant had plainly expressed the fact that he was "extremely upset and cross", but there are no findings of fact made as to what the Claimant might then have communicated in this regard. It may be that this is, indeed, properly to be characterised as simply the making of allegations and complaints. It may also be the case that the evidence will demonstrate that the Claimant in fact disclosed information in the making of such allegations and complaints. In my judgment, that is a matter that will need to be explored on the evidence at a full merits hearing in this matter.

45. As for the written disclosures relied on - of 13 February 2012 and 17 March 2012 - it is, in my judgment, arguable that these documents contained disclosures of information (albeit disclosures made in the course of the making of a grievance or complaint). Much might depend upon the broader context in which the letters were written. Again, these are matters that will need properly to be assessed in the context of all the evidence at a full merits hearing.

46. For these reasons, I allow this appeal having concluded that the Employment Tribunal erred in law in treating these parts of the Claimant's protected disclosures claim as apt to be struck out solely on the basis of the material available at the Pre-Hearing Review. As was apparent from the background findings of the Smith Tribunal, this was a case which required consideration of the fuller evidence, particularly the oral evidence that would be available at a full merits hearing, in reaching a decision as to whether the Claimant had made relevant disclosures "of information".

Disposal

47. I understand that proceedings in this matter have been stayed pending the determination of this appeal. The Employment Tribunal remains, of course, seized of that part of the Claimant's claim in respect of the disclosure to HMRC in any event. The other parts of the claim that were the subject of this appeal can, therefore, be considered alongside the extant complaint before the Employment Tribunal at a full merits hearing. Should either party wish to make further submissions about the disposal of this matter, they should do so in writing to me within 21 days of the date on which the transcript of this Judgment is sent out.