Appeal No. UKEAT/0441/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 December 2014

Before

THE HONOURABLE MR JUSTICE MITTING

(SITTING ALONE)

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(1) COMPASS GROUP PLC
(2) ESS SUPPORT SERVICES LLP — APPELLANTS

(1) GUARDIAN NEWS AND MEDIA LTD
(2) MR K PABANI — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL OUDKERK QC (One of Her Majesty's Counsel) and MS JANE RUSSELL (of Counsel) Instructed by: DLA Piper UK LLP Victoria Square House Victoria Square Birmingham B2 4DL
For Guardian News and Media Ltd	MR JUDE BUNTING (of Counsel) Instructed by: Guardian News & Media Ltd Editorial Legal Services King's Place 90 York Way London N1 9GU
For Mr K Pabani	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE

Whether the Employment Tribunal applied the correct test to determine whether or not parts of the Claimant's witness statement were "admitted in evidence" for the purposes of Rule 44 **Employment Tribunal Rules of Procedure**, so that they were open for inspection to the public - no - remitted for redetermination.

THE HONOURABLE MR JUSTICE MITTING

Introduction

1. Mr Pabani was employed as Finance Director of a limited liability partnership in Kazakhstan, ESS Support Services Ltd, in which Compass Group plc had either a controlling or substantial interest. He was dismissed in December 2012. He brought a claim in time before the Employment Tribunal, claiming that he had been unfairly dismissed and that his dismissal had been automatically unfair because it resulted from the making of protected disclosures by him related to his employment and the activities conducted in Kazakhstan by ESS Support Services Ltd.

2. He brought his claim against both Compass Group plc and ESS Support Services LLP. By an order which I have not seen the Tribunal directed that five issues be determined as preliminary issues: (1) whether he was an employer or worker of Compass plc; (2) whether, if not, the Tribunal had territorial jurisdiction to hear his claim against ESS Support Services LLP; (3) whether any of his allegations of detriment were out of time and if so whether time should be extended; (4) whether his claim should be struck out as having no reasonable prospect of success; (5) whether he should be required to pay a deposit because his claims had little reasonable prospect of success. Two days were set down for the hearing of those issues. Unsurprisingly because issues 4 and 5 were to be determined, the Claimant put in a detailed witness statement of 166 paragraphs, setting out his full case both on the issues of jurisdiction and time and on the underlying merits of his claims. He did so because, if issues 4 and 5 were to be determined, the Tribunal would have to know what his case was on its merits. His so-called whistleblowing claim attracted the interest of the Guardian newspaper. A journalist working for, or at least supplying copy to the Guardian, attended the hearing.

The Employment Tribunal Hearing

3. At the start of the hearing, in what Mr Oudkerk QC describes as a housekeeping session, he and Counsel for Mr Pabani told the Employment Judge that they agreed it would not be possible in the time available to determine all five preliminary issues. They also agreed that the third issue as to time, and extension of time if necessary, should be dealt with at the principal hearing, if there was to be one. Accordingly, it was agreed that issues 4 and 5 should not be determined by the Employment Judge at this Preliminary Hearing. Instead he was invited to determine and did eventually determine issues 1 and 2. He decided that Mr Pabani was not employed by Compass Group plc. He was employed by ESS Support Services LLP, but notwithstanding the complex and contradictory terms of his many written contracts of employment, there was a sufficient connection between Mr Pabani's employment by that Kazakhstan limited liability partnership and the United Kingdom for it to be right that the UK Employment Tribunal should assume jurisdiction to hear his claims.

4. What then happened is not entirely clear. Mr Oudkerk and his opponent submitted to the Employment Tribunal that substantial parts of Mr Pabani's witness statement were not relevant to issues 1 and 2, and that he would not cross-examine upon them if no reliance was to be placed upon them by Mr Pabani. The witness statements relied on by the two Respondents did not address the substance of Mr Pabani's allegations at all. They dealt squarely and only with issues 1 and 2.

5. It seems that steps were then taken to excise the parts of the full witness statement which were not relevant to issues 1 and 2, and the Employment Judge, who had not read the full witness statement before he embarked on the hearing, retired to read the excised witness statement.

6. It is not clear whether any order was made by the Employment Judge under Rule 43, first sentence, which reads:

> **"Where a witness is called to give oral evidence, any witness statement of that person ordered by the Tribunal shall stand as that witness's evidence in chief unless the Tribunal orders otherwise."**

7. Nor is it clear whether he ruled or ordered that the excised parts of the witness statement were not to be admitted in evidence. It is undoubtedly the case that he was content that there should be no consideration of the merits of Mr Pabani's allegations, and so no cross-examination upon them. But it is not clear whether he decided that the excised parts should not be admitted in evidence at all. In his comprehensive and well-reasoned decision there are indications that he may not have treated the excised parts of the witness statement as not admitted in evidence. The clearest example of this is in paragraphs 45 and 46 of the Judgment, which state:

> **"45. Although no examination took place regarding the nature and validity of the alleged protected disclosures, the following chronology is relevant.**
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> **46. The claimant first raised concerns in writing with Mr Furlong in March 2013. In April 2013 the claimant raised concerns with Mr Kulkarni. This led to a meeting with both Mr Kulkarni and Miss Shulakova on 8 May 2013 at which the claimant was effectively suspended."**

8. The meeting of 8 May is referred to in the unexcised parts of Mr Pabani's statement. The concerns raised in writing with Mr Furlong in March 2013 and with Mr Kulkarni in April 2013 are not. They do, however, appear in the claim form at paragraphs 24.17, 24.22 and 25. I cannot tell from the material that I have or from the Employment Judge's Judgment from which source those comments came. If they came from the excised parts of the witness statement, it would suggest strongly that he did not think that he had made, and did not make, an order that those parts of the witness statement should not be admitted in evidence. If they came from the ET1 form it is at least consistent with the making of such an order.

9. The journalist to whom I have referred applied on 4 November 2014, the second day of the hearing, for a direction that he should be permitted to inspect the whole of the witness statement under Rule 44, which provides:

> **"Subject to rules 50 and 94, any witness statement which stands as evidence in chief shall be available for inspection during the course of the hearing by members of the public attending the hearing unless the Tribunal decides that all or any part of the statement is not to be admitted as evidence, in which case the statement or that part shall not be available for inspection."**

10. Mr Oudkerk, who was present, tells me that when that application was made the Employment Judge invited representations from the parties and reflected on them over the short adjournment, at the end of which he directed that only the unexcised parts of the statement be available to the journalist for inspection.

11. That decision, if it was a decision, prompted intervention by the Guardian on 10 November 2014. It wrote a letter to the Tribunal, which contained the following paragraph:

> **"Mr Goodley [the journalist] thanks the Tribunal for providing him with a copy of the ET1 claim form at the commencement of the hearing. During the course of the hearing he requested copies of the witness statement of the claimant, Mr Pabani and the witness statements of the respondents. I understand that you cited Rule 44 and were minded to give Mr Goodley access to the witness statements in full but that the respondent objected. Following this Mr Goodley was allowed to inspect parts of Mr Pabani's witness statement. …"**

The Application for Reconsideration

12. The Guardian invited the Employment Judge to reconsider his decision. He did so. By a Decision or letter of 26 November 2014 addressed to the parties and to the Guardian, he said the following:

> **"The tribunal has received the attached letters dated 10 November and 21 November with reference to the preliminary hearing on 03 & 04 November 2014. Having considered the scope of Rule 44 and in view of the Decision and Reasons promulgated on 17 November 2014. EJ Fowell is minded to grant the request, subject to any observations of the parties. Accordingly any objection to the provision by the Tribunal of copies of the witness statements sought is to be submitted in writing and received by 02 December 2014."**

13. Written submissions were made, and on 11 December 2014 his Decision was notified by the clerk to the Tribunal:

> **"Employment Judge Fowell has asked me to direct that the parties provide the Tribunal, within seven days of the date of this order, with a clean copy of their respective witness statement or statements in order to meet the request from the Guardian newspaper dated 10 November 2014.**
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> **This is necessary in order to meet the requirements of open and public access to the Tribunal proceedings. Although cross-examination was limited to certain sections of the Claimant's witness statement, the whole of that statement was submitted [my emphasis] in evidence and, having taken some time for further consideration and allowed the parties to make representations, there is no proper basis for refusing this request."**

Discussion and Conclusions

14. Mr Oudkerk submits that, contrary to the impression that the reader might first get from the second paragraph of that document, the word "submitted" is not a typographical error or a word treated simply as a synonym for "admitted" but a possible indication of an error of law in the approach of the Employment Judge. It is of course right that a witness statement can be "submitted", which is not "admitted in evidence". It can be given to the Tribunal and then ruled partially not to be admitted. In those circumstances there would be no right for a member of the public to inspect those parts which had been ruled should not be admitted in evidence. Because the facts are not pellucid, it would have been open to me to remit the matter to Employment Judge Fowell, for him to explain precisely what he meant by "submitted" and to set out the circumstances in which he had made his ruling on 3 or 4 November 2014 about the status of the rescinded parts of the statement. But at my suggestion both sides have agreed that because the decision letter indicates a possible error of law, I should treat it as if an error of law has been made and remit the matter for further decision by Employment Judge Fowell. That, as I think everybody agrees, is the most economical method of disposing of this appeal. I could not of course do it unless persuaded that there was an error of law in the approach of Judge Fowell. I am so persuaded because of the language that he has chosen to use, and because it is not clear to me whether, on 3 or 4 November, he did rule that the excised parts of the witness

statement were not to be admitted in evidence or simply ruled that he would pay no attention to those parts of the statement that dealt with the underlying merits of the allegations but did take them into account, as he may well have done in paragraphs 45 and 46 of his Judgment, to determine when and to whom complaints were made.

15. Mr Oudkerk has submitted that if I take that course I should make it clear that it is not necessary that there should have been a formal written and sealed order or even a written decision that the excised parts of the statement be not admitted in evidence. What is required for inspection to be precluded by Rule 44 is simply that an order or decision has been made that parts of a witness statement should not be admitted in evidence. No further formality is required. If, therefore, Judge Fowell decides when the matter is remitted to him that he did decide that parts of the witness statement should not be admitted in evidence, he must go on to decide that there should be no inspection of those parts of the witness statement. If, on the contrary, he recalls that all that he was doing was determining that no attention would be paid to the underlying merits of the complaints, then Rule 44 does not operate to permit the Tribunal to direct that the excised parts should not be available for inspection.

16. To permit this remitted matter to be determined economically and expeditiously I direct that the parties, including for this purpose the Guardian, are permitted to make written representations to Judge Fowell within 21 days of today and that Judge Fowell should redetermine the question in the light of this Judgment as soon as possible thereafter.