Appeal No. UKEAT/0352/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 December 2013

Before

THE HONOURABLE MR JUSTICE SINGH

(SITTING ALONE)

MS M KAPOOR APPELLANT

THE GOVERNING BODY OF BARNHILL COMMUNITY HIGH SCHOOL RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS M KAPOOR (The Appellant in Person)
For the Respondent	MS ELAINE BANTON (of Counsel) Instructed by: London Borough of Hillingdon Legal Services Civic Centre High Street Uxbridge Middlesex UB8 1UW

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

The Employment Tribunal dismissed the Claimant's claim for race discrimination. It then made an award for costs against the Claimant in the sum of £8,900, which represented part of the Respondent's costs. It did so because it considered that the Claimant had put forward false evidence. It therefore concluded that the Claimant had conducted the proceedings unreasonably and said that it was as simple as that.

Held, The Tribunal had misdirected itself in its approach to the exercise of its discretion on costs, because it considered that the simple fact that the Claimant had lied meant that she had conducted the proceedings unreasonably. It should have considered all the circumstances of the case, including the procedural history and the extent to which the Claimant's lies had made a material impact on its actual findings. The case would therefore be remitted to the Employment Tribunal to be reconsidered according to the correct approach in law. It was not necessary in the interests of justice in this case to remit to a differently constituted Tribunal because this Tribunal was already familiar with the evidence which it had heard at a hearing lasting some 5 days.

THE HONOURABLE MR JUSTICE SINGH

Introduction

1. This is an appeal against one aspect of the decision of the Employment Tribunal at Watford, which was sent to the parties on 11 June 2012. The Tribunal comprised Employment Judge Ryan and two lay members. The only aspect of the decision which has been permitted to go forward to this full appeal hearing relates to the order as to costs. At paragraph 2 of its decision the Tribunal ordered the Claimant to pay a contribution to the Respondent's costs in the sum of £8,900.

2. On the substantive aspect of the case, the Tribunal at paragraph 1 dismissed the Claimant's complaints of race discrimination, victimisation and harassment.

The facts

3. The background facts, which are set out in more detail from paragraph 14 of the Tribunal's Judgment, arose out of the Claimant's application for a position with the Respondent as an invigilator for examinations in January 2007. She was offered that position and started in February of that year at the same time as a Miss Rushe and some five or six other people. By the end of the year, only Miss Rushe and this Claimant from that intake remained.

4. In April 2007, when the Claimant had been appointed for less than three months, Mr Speechley, who had been an invigilator, was promoted to the role of a senior invigilator.

5. That and various other matters formed the underlying basis of the substantive complaints before the Tribunal. The Tribunal spent some five days considering the evidence at a hearing and reached the conclusion as to the issue of liability which I have already outlined.

The rules on costs

6. I will consider some further aspects of the Tribunal's Judgment in due course. For present purposes, in this outline, it is important to record that from paragraph 78 to paragraph 86 the Tribunal turned to consider the Respondent's application for costs. At paragraph 79 the Tribunal recorded that the basis for the costs application was both that the case was misconceived and that the conduct of the proceedings was unreasonable. At paragraph 80 the Tribunal accepted that the Claimant had acted unreasonably and proceeded to make an order on that basis. At paragraph 82 the Tribunal bore in mind the regime set out in rules 40 and 41 of the Employment Tribunals Rules of Procedure. Those Rules of Procedure, which are set out in Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**, can be summarised here. Rule 40 provides, in paragraph (2), that a Tribunal shall consider making a costs order where, in the opinion of the Tribunal, any of the circumstances in paragraph (3) apply. Having so considered the Tribunal may make a costs order if it considers it appropriate to do so. Accordingly it is apparent that there is a duty upon the Tribunal to consider making a costs order where one of the circumstances set out in paragraph (3) has arisen, but then there is a discretion whether to do so or not. The circumstances set out in paragraph (3) are that, in bringing the proceedings or in conducting those proceedings, the paying party, has acted vexatiously, abusively, disruptively or unreasonably, or that the bringing or conduct of the proceedings has been misconceived. As is well known there is no general principle in the Employment Tribunal that costs follow the event, in other words that the losing party should pay the winning party's costs. It all depends on the exercise of the discretion to which I have already referred.

7. Rule 41 then addresses the question of the amount of a costs order. It is unnecessary for present purposes to set out the details of that provision, which is well known to the parties. It does include the provision, in paragraph (2), that the Tribunal may have regard to the paying

party's ability to pay when considering whether it should make a costs order or how much that order should be. Different rules apply if the Tribunal is going to specify a sum that does not exceed £20,000 as compared with when it is going to.

The Employment Tribunal's decision

8. The Tribunal took the view that costs should be awarded against the Claimant for reasons that I will set out in more detail later. It then considered the question of her ability to pay. It had regard to the fact that, in its view, she did have equity in her house, which at paragraph 85 it said was worth £200,000 and on which she had a £100,000 mortgage.

9. In the result, at the end of the Judgment at paragraph 85, as I have already indicated, the Tribunal ordered the Claimant to pay costs in the sum of £8,900, which was not the full amount of the costs incurred by the Respondent.

10. At paragraph 80 of the Judgment the Tribunal stated:

> **"We bear in mind in reaching our decision that the claimant has been found in this case, and it really cannot be dressed up, to have presented a case that she has put forward falsely, in other words she has not told the tribunal the truth. Without more, to conduct a case by not telling the truth is to conduct a case unreasonably, it is as simple as that..."**

11. At paragraph 83 the Tribunal reminded itself that the Claimant had not been represented. Nevertheless it took the view that she was not innocent as to discrimination litigation, having supported her brother's unsuccessful claim in the past. She must also be taken, in the Tribunal's view, on their findings, to have known that what she said about the case and about the witnesses who gave evidence against her was untrue.

12. Before leaving that aspect of the Tribunal's Judgment, I would wish to emphasise that the Tribunal directed itself, in particular at paragraph 80, that "without more" to conduct a case by not telling the truth is to conduct a case unreasonably and that it said "it is as simple as that". For reasons that will become apparent, in my judgment, that was a misdirection of law and has tainted the approach which the Tribunal took to the exercise of its discretion. Ordinarily this Tribunal would not interfere with the exercise of a discretion by the Employment Tribunal. However, where there has been an error of principle in the approach to be taken to the exercise of a discretion, this Tribunal may and will do so.

The case law

13. A number of authorities were drawn to my attention by the parties. The Appellant, who has represented herself, was assisted by a pro bono representative from the ELAAS Scheme at the rule 3(10) hearing in this case. As a consequence of that representation, as I understand it, Amended Grounds of Appeal were filed and the Appellant has sought in essence to advance the grounds as stated there by reference to her skeleton argument. As was mentioned by Judge Peter Clark at the rule 3(10) hearing, particularly by reference to the case of **HCA International Limited v JL May-Bheemul** UKEAT/0477/10/ZT, a Judgment of 23 March 2011, things are not necessarily as simple as the Tribunal thought in paragraph 80 of its Judgment in the present case. In giving the Judgment of this Tribunal in **HCA International Limited**, Cox J said, at paragraph 39:

> **"...a lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the Tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct."**

14. It is important to appreciate that neither this nor any other statement by the appellate tribunals or the courts has the effect of putting a judicial gloss on the statutory tests in rules 40 and 41. Reference can be made, for example, to the Court of Appeal decision in UKEAT/0352/13/RN

Yerrakalva v Barnsley MBC [2012] ICR 420, in which the main Judgment was given by Mummery LJ, who of course had vast experience in the field of employment and discrimination law. At paragraphs 39-41 he said:

> **"39. I begin with some words of caution, first about the citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion.**
>
> **40. The actual words of Rule 40 are clear enough to be applied without the need to add layers of interpretation, which may themselves be open to differing interpretations. Unfortunately, the leading judgment in** *McPherson [McPherson v BNP Paribas (London Branch)]* **delivered by me has created some confusion in the ET, EAT and in this court. I say 'unfortunately' because it was never my intention to re-write the rule, or to add a gloss to it, either by disregarding questions of causation or by requiring the ET to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as 'nature' 'gravity' and 'effect.' Perhaps I should have said less and simply kept to the actual words of the rule.**
>
> **41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited…from my judgment in** *McPherson* **was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."**

15. Because of what was said by Mummery LJ in that case, it is unnecessary in my view to set out a detailed citation from the authority of **McPherson v BNP Paribas** in which he also gave Judgment and to which he made reference in the later case. Suffice to say that in my view the issue that Mummery LJ was addressing, in particular at paragraph 40 of his Judgment in **Yerrakalva**, was to distinguish between what he called the principle of relevance, which means that the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion, from something which was quite different and which was not required, namely that the Respondent had to prove that specific unreasonable conduct by the Applicant caused particular costs to be incurred. That kind of dissection was expressly disavowed, both in **McPherson** and in **Yerrakalva**. Nevertheless, in my view, the principle of relevance remains important, as does the need, as Mummery LJ put it

at paragraph 41 of **Yerrakalva**, to look at the whole picture of what happened in a case and ask whether there has been unreasonable conduct by the Claimant.

16. Finally, in relation to the authorities, Ms Banton, who has appeared for the Respondent and made helpful submissions to this Tribunal, drew my attention to the decision of the Court of Appeal in **Arrowsmith v Nottingham Trent University** [2012] ICR 159, in which the main Judgment was given by Rimer LJ. In particular she drew my attention to paragraph 35 of the Judgment, where he said that it was a finding that Miss Arrowsmith had made a case that was materially dependent on the advancing by her of assertions that were untruthful, which, in Ms Banton's submission, led to the Employment Tribunal being entitled to make an order for costs in that case. Miss Arrowsmith's appeal was dismissed in the result (see paragraph 38 of Rimer LJ's Judgment).

17. In my view the decision in **Arrowsmith** itself is one on the particular facts: see in particular paragraph 36, where Rimer LJ said that this was a case where the Tribunal made an assessment as to the unreasonableness of Miss Arrowsmith's conduct based on the particular facts of the case, and that was an assessment which it was entitled to make and one against which an appeal to the Appeal Tribunal had no prospect of success.

Discussion

18. Each case must depend on its own facts, particularly in this area where, as has often been emphasised by the courts, there is a broad discretion which is vested in the Employment Tribunal. That broad discretion will of course be respected by this Tribunal and higher courts provided a correct approach in principle was taken to the exercise of it and provided the outcome is not perverse.

19. In the present case, in my judgment, the Employment Tribunal did fall into error, as a matter of approach, in particular at paragraph 80 of the Judgment. In my view, it directed itself that the case was as simple as saying that, without more, to conduct a case by not telling the truth is to conduct a case unreasonably.

20. For the Respondent, Ms Banton submitted before me that that was not the correct approach to regard its reasoning and that the Tribunal's Judgment should be read as a whole. Of course, as a matter of general principle, that is right. However, the specific passages to which she drew my attention earlier in the findings of fact by the Tribunal in the liability part of the Judgment and also in the introductory part, from paragraphs 1-13, were not matters which the Tribunal specifically reminded itself of when it came to address the particular question of the reason why an award of costs should made and in particular why the Claimant had acted unreasonably. Furthermore, I accept the Claimant's submission that often the reason why the Tribunal rejected a particular complaint of race discrimination was not as such based on the fact that the Claimant had told a lie. Rather, it was on conventional discrimination principles to do with the burden of proof, whether it had shifted or not, and also to do with whether, having found that there was a detriment, the Tribunal were satisfied that less favourable treatment against the Claimant was on racial grounds or not (see, for example, allegation 3.1, which was considered at paragraphs 67 and 68 of the Judgment). The Tribunal concluded that there was a detriment to the Claimant because Miss Rushe had been promoted temporarily to Senior Invigilator and Mr Speechley promoted to being Deputy Examination Officer. However it went on to conclude, having regard to Court of Appeal authority, that this was not less favourable treatment because the treatment was not of two people in comparable circumstances. Furthermore, at the end of paragraph 68 the Tribunal concluded that even if it was wrong about this, the Claimant had not, in respect of any allegation, demonstrated any evidence other than the mere fact of the difference of race to suggest the burden of proof passed to the Respondent

in respect of any of the allegations of direct discrimination. Similar points were made in respect of allegation 3.2 at paragraph 69 of the Judgment and allegation 3.3 at paragraph 70.

21. The point which has been made on behalf of the Appellant in writing is that such conclusions are not unusual in a discrimination claim in the Employment Tribunal. The fact that somebody has lost for those sorts of reasons is not necessarily concerned with whether they have given false evidence or anything of that sort. Furthermore the Appellant is entitled to point out, as she does, that this case had a lengthy procedural history. It is unnecessary for present purposes to rehearse that history in great detail. Suffice to say that there had been attempts by the Respondent to have the claim struck out, which had not always found favour with the Tribunal. The Tribunal also found, at least on occasions, that evidence which the Claimant had given before it was accepted by it, for example at paragraph 57 where it accepted that a letter had been posted to Mr Lobatto's home and the Claimant had produced a certificate of postage to that effect. Mr Lobatto said he did not receive the letter and the Tribunal believed him on that point. The Respondent is also entitled to point out in this context that the Tribunal was driven to accept its submission, summarised at paragraph 13, that the Claimant's evidence was not worthy of belief and the Tribunal should not trust anything that the Claimant said unless it was corroborated by cogent evidence. It is also entitled to point out, as it does, that at paragraphs 10 and 11 the Tribunal formed the view that the Claimant had falsified certain documents. Those were powerful factors which in my view might have well have been taken into account by the Tribunal if it had approached the exercise of its discretion correctly as a matter of legal principle. But the case has to be considered as a whole, for example the procedural history including the fact that the Respondent's efforts to have the claim struck out had not always found favour with the Tribunal.

22. In the result, therefore, the view to which I have come is that this appeal must be allowed on the Claimant's first and main ground. In those circumstances it is unnecessary to consider her second ground, which was a more specific complaint to do with whether the exercise of the discretion to award costs had been conducted fairly in the circumstances of this case, particularly where the liability Judgment came after a lengthy hearing on the morning of a day when, after a short adjournment, the issue of costs had to be dealt with. The Claimant also reminds this Tribunal that she was unrepresented and she submits that she found herself under stress and found it difficult to deal with the matter there and then. As I have said, it is not necessary for me to go into the merits of that second ground of appeal.

23. I have considered carefully what the outcome should be of allowing the appeal on the first ground. I have, in particular, borne carefully in mind the Claimant's submission, although it was not put in such a clear-cut way in the Amended Grounds of Appeal at paragraph 11, that the outcome should be that this Tribunal should substitute its own decision on costs for the Employment Tribunal. In the Amended Grounds of Appeal, at paragraph 11, in accordance with the conventional thinking, the alternative suggestion is made that, if the appeal were allowed, the matter should be remitted to the Employment Tribunal.

24. I take the view in the present case that, although I have found that the Tribunal erred as a matter of principle in its approach to the exercise of its discretion, it should have considered a number of relevant factors, taking the case as a whole, in the exercise of its discretion. It has not yet done so, in my judgment. It should therefore have the opportunity and indeed the duty to do so in accordance with the Judgment of this Tribunal.

25. I have also considered carefully whether, in the circumstances of this case, justice requires that the matter should be remitted to a different, differently constituted Tribunal. In

some cases that would be the appropriate course. However, in this case, I accept the Respondent's submission that the interests of justice would not be served by taking that course. First, there is no reason to believe, in my view, that the Employment Tribunal would not approach its task fairly and conscientiously with an open mind as a judicial body, having regard to the law as this Tribunal has stated it to be. I note in that context that an allegation of bias on the part of this Tribunal was rejected on an earlier occasion in the procedural history before this Tribunal (in his decision under rule 3(10) Judge Peter Clark refused the Claimant permission to resurrect a complaint of bias). The Appellant has not been permitted to raise such allegations on the full appeal. Secondly, and in any event, it seems to me that it is important, having regard to the history and complexity of this litigation, that the same Tribunal should if possible reconsider the question of costs. This is because it is familiar with the background and the details of the evidence which it heard at the substantive hearing over some five days. It would give rise to unnecessary time and costs, it seems to me, if a different Tribunal now had to grapple with the background and complexity of this litigation.

Conclusion

26. For the reasons I have given, this appeal is allowed. The case will be remitted to the Employment Tribunal to reconsider in accordance with the Judgment of this Tribunal. I do not direct that that has to be a differently constituted Tribunal.