Appeal No. UKEAT/0285/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 September 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MR T W OTOBOR — APPELLANT

CROYDON COLLEGE & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ANNA BICARREGUI (of Counsel) Bar Pro Bono Unit
For the Respondents	MS HARINI IYENGAR (of Counsel) Instructed by: Gelbergs Solicitors 188 Upper Street Islington London N1 1RQ

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

On appeal, it was conceded that the Employment Judge erred in rejecting the Claimant's claim as he was not an employee or worker, for he can argue he was an agency worker.

It was held that the Claimant's claim did contain claims for age and race discrimination in respect of the Respondent's refusal to give him a reference and to appoint him to a vacancy.

The Employment Judge erred in holding the race claim had no reasonable prospects and the case would be restored for a full merits hearing. It is open to the Respondent to restore its application for a deposit order.

The Employment Judge did not err in striking out the age discrimination claims.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about the exercise of discretion in striking out race and age discrimination claims and an approach to amendment of such claims. I will refer to the parties as the Claimant and the Respondents.

Introduction

2. It is an appeal by the Claimant in those proceedings against the Judgment of Employment Judge Baron, sitting at London South, in a Pre-Hearing Review, sent with Reasons on 8 August 2012. The Claimant was represented by a friend, who does have minimal legal experience, and he also spoke for himself. Today he is represented by Ms Anna Bicarregui, who came into this case at a rule 3(10) hearing before HHJ David Richardson under the aegis of ELAAS. The Respondents were represented by counsel, and today different counsel, Ms Harini Iyengar, appears for them.

3. The Claimant sought to make claims of age and race discrimination in respect of the failure to provide him with references and the disposal of a vacancy that occurred and his application for it. The Respondent contended that these claims were hopeless, sought a strike-out and during the course of the PHR opposed the application made by the Claimant, I am prepared to assume, with some representation but largely as a litigant in person, to amend in order to make explicit claims on this footing. The Employment Judge allowed the strike-out application and refused to allow the amendment.

4. The Claimant's appeal came before the President on the sift, who formed the following view:

> **"1. The ET was right to hold that the Claimant could not succeed in a direct discrimination complaint by comparing himself with Patricia Heinemann. A comparator has to be in the same material circumstances as the Claimant. She no longer was by the date of the act of which the Claimant complained – 20 February 2012 – because she had by then been a fixed term employee for 5 months or so. The Claimant did *not* complain that he was discriminated against by not being appointed in September 2011.**
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> **2. A complaint of race or age cannot succeed just by showing a difference of race, or age, and a difference in treatment. That merely shows there could have been discrimination, not that there *was* (see *Madarassy v Nomura* [2007] EWCA Civ 33 per Mummery LJ at para 56).**
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> **3. Failure to give a reference cannot be claimed as an act of discrimination unless the person to whom it relates is, or was, an employee or worker of the person whose failure it is. An employee or worker is defined as someone who as a *contract* with the person who has the benefit of the work. Where a worker has his contract with an agency, which supplies his services to an end-user (as was the position here) it will only be in the most exceptional circumstances that he will himself, be in contract with the end-user (see *Tibson v Alsthom* [sic] *Transport* [2011] IRLR 169) such that it will be necessary to imply/infer a contract. That is not this case. *Hallam v Avery* does not deal with this principle.**
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> **4. Though I deprecate striking-out a claim of discrimination, on the material before the Judge it was no error of law for him to do so."**

5. HHJ David Richardson took a different approach and ordered a full hearing of this matter.

The facts

6. The Claimant was engaged as a lecturer by the college and on his last appointment there sought a reference. During the course of his career there he also sought a position as a full-time lecturer; the reference was not provided, and he did not get the job. The Claimant is self-described on his monitoring form in the Tribunal proceedings as having been born in Nigeria and being black African, and he is 55; he contends that he has been discriminated against. The claim came before the Employment Judge pursuant to a strike-out application; alternatively, a deposit order. The Judge examined the proceedings that were before him. He heard evidence from the Claimant and what I take to be some submissions from him, whom the Judge regarded as an articulate, intelligent person, obviously by reference to his profession and what the Judge heard. The Judge examined the claim form to see whether there was exigible therefrom a claim of race discrimination and/or age discrimination in the Particulars alleged.

The appeal

7. The focus of today's hearing is upon three amended grounds of appeal, which are these:

> **"1. The EJ erred in law in holding that the claim in relation to a reference was liable to be struck out because the only obligation to give a reference was a moral obligation. The true question was whether the first respondent had discriminated against the claimant by subjecting him to a detriment contrary to section 108 of the Equality Act 2010, the claimant having been a contract worker within section 41 of the Equality Act 2010.**
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> **2. The EJ erred in law in holding that the claim was a new claim having regard to the ticking of the boxes on the ET1 and also paragraphs 17c and 22 of the Claimant's Response to the ET3. Alternatively, the EJ erred in law in refusing an amendment in the circumstances of the case.**
>
> **Vacancy**
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> **3. The EJ erred in law by striking out a claim which was fact sensitive. It was wrong in principle for the employment judge to require the claimant in effect to disprove an assertion as to why the vacancy was withdrawn."**

8. Adventitiously, on seeing these grounds drafted under the approval of HHJ Richardson, the Respondent immediately conceded ground 1, and so what is before me is a dispute in relation to grounds 2 and 3. The Judge considered the material contained in the ET1, the ET3 and the written material in what is described as a response. It is actually a witness statement or a submission by the litigant in person of his case; it is written in the first person. No objection is taken before me as to its being used for that purpose, and thus there was a further opportunity for the Judge to see how the Claimant put his case in writing whilst speaking to it. This is the document which, it is accepted, was before the Judge, and I have allowed an application to amend the amended grounds to allow me to focus on the correct document.

9. The starting point for this analysis has to be the claim form itself. The claim provides tick boxes and shows the Claimant ticked "race" and "age" following, "I was discriminated on the grounds of …" Paragraph 5.2 allows the Claimant to expand, and he does that; and the succeeding references in paragraph 7 of the standard form are to the elaboration vouchsafed to a

Claimant by paragraph 5.2. The Claimant also ticked a box saying "Other complaints", which, as a matter of construction, means a complaint that does not fall within (a) to (d), the more common forms of complaint under an Employment Tribunal's jurisdiction. Then the Claimant set out the following:

> **"Complaints:**
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> **1. 21st February 2012: Refusal to give References; I found out on 21st February 2012 that Julie Percival, the new Curriculum Manager had turned down and continues to turn down reference requests from all prospective employers stating that she does not know me. It transpires that June During the curriculum manager whom I worked under was and is still on sick leave. I got in touch with June but despite her expressed readiness to write my references prospective employers/teaching agencies would not accept references from outside Croydon College portal. Lack of references from my last place of work (Croydon College) has served to keep me on the unemployment register since I left Croydon College, threatening my livelihood and very existence. I have since written to the Principal of the college, Frances Wadsworth, c/o her Assistant Pat Cole and have written severally to the HR director, Jo Bland with a view to a resolution to no avail.**
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> **2. 20th February 2012: Discrimination; I was put up for vacancy for the post of Lecturer in Business & IT (Levels 1 & 2) by Morgan Hunt (Teaching Agency) but Julie Percival would not consider my despite the fact I had previously undertaken similar role successfully at the college and inspite [sic] of my previous unblemished record, good relations with colleagues and students, and good works. I believe that my race and age were the factors taken into consideration in reaching the decision not to consider me for the role.**
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> **3. March 2012: Refusal to give References; Upon advice from June During I approached Andrew Roberts, Curriculum Manager (Business Studies) whom I worked under for the last two weeks of term for a reference (phone call) but he declined. His reason for declining my reference request was because Julie Percival showed him the contents of my email to her wherein I stated that I helped Andrew Roberts with marking Level 3 Business coursework at the zero hour from the 27th June to meet UCAS deadline which was only a few days away.**
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> **4. 25th April: Duty of Care/Negligence; The Principal has done nothing despite my attempts and effort in bringing the matter to her knowledge for amicable resolution. I continue to suffer unnecessarily on the unemployment register, my livelihood and very existence threatened due to her negligence and the discriminatory practices of her staff."**

10. Taking an analytic approach to the above, counsel accept before me that paragraph 2 is in relation to a straightforward claim of discrimination in relation to the vacancy issue. Here the Claimant asserts race and age were the factors taken into account in that decision. Paragraphs 1 and 3 relate to references, and there is no specific averment as to race and age in relation to those. Paragraph 4 is, in my judgment, a very vague assertion, and it links to the discrimination in paragraphs 1, 2 and 3. The language used in paragraph 4 is a replication of the language used earlier as to the effect on the Claimant, rather dramatic, of this practice and the practices

affecting his livelihood and his very existence. Nevertheless, this is a homemade complaint form, and the Claimant can put in it what he likes.

11. The first issue is to see whether there is an allegation of discrimination in the form. There plainly is in complaint number 2. What about the other two complaints? In my judgment, the whole of the form has to be read in context; see the Judgment of Waller LJ in **Ali v Office of National Statistics** [2005] IRLR 201 at paragraphs 39-41.

12. The argument of Ms Iyengar is that from this articulate writer and communicator it is not plain, as it is in complaint 2, that he is complaining of discrimination in a statutory sense in paragraphs 1 and 3, and, parasitic on that, paragraph 4. The Judge took the view that that was correct. With respect, I take a different view as a matter of construction. Included within the papers before the Judge was the Claimant's response form to the PHR. He asserts there the reasons why he was not given a reference or considered for the role and that the failure to give the reference was a departure from normal practice. The Respondent's position had two different parts. The first is that there was a policy in place not to give references; that is at the high end of the definition, which used to be under the continuous-act provisions, and the Claimant would have no difficulty in adopting that phrase in line with **Owusu** to show that there was a policy all the time up until the claim was presented of giving no references. As I shall show, he does not need to do that. What he contends is that there was a policy of state of affairs where references would not be given, and the second response of the Respondent is that references were not given, for reasons that differ; that is, the potential referee was away, or the potential referee did not know the Claimant.

13. So, on that basis there is a difference of explanation by the Respondent that the Claimant could not explore. This was a matter that did not attract the attention of the Employment Judge. The first issue to determine therefore was as a matter of construction: was there a claim of race and age discrimination in respect of references? In my judgment, there was. The point made by Ms Iyengar as to the clear expression of it in complaint 2 is a good one, but it does not take away the Claimant's assertion that he was, following the gateway opened by the tick box, complaining of age and race discrimination in respect of references.

14. It follows, therefore, that the Judge did not need to consider whether it was correct to make an amendment under **Selkent Bus Co Ltd v Moore** [1996] ICR 586 principles. He refused to allow such an amendment to make that point absolutely clear, and the reason I deal with it in a little more detail is because this affects the disposal of the case. The Judge made a plain error of fact in holding, as one of the considerations under **Selkent,** whether, on this footing, the new claim was made within time, and it is conceded before me that the Judge so erred in paragraph 10 of his Judgment because the last event was March 2012. As the Judge found in paragraph 2 of his Judgment, the claim was presented in May 2012. So, this is, in **Selkent** terms, paying attention to an irrelevant factor or, worse, a factor that is accepted to be wrong in fact.

15. It is also contended that the Judge failed to pay attention to the balance of prejudice. I have explained in **Elliott** that there is usually an equal and opposite balance of prejudice when a claim is struck out or allowed to go forward. But here there is very strong prejudice asserted by the Claimant as to his capacity to continue to work in the lecturing market without a reference; that is very strong. The Judge does consider in paragraph 19 that the Claimant was angry about this, and he noted those very strong feelings, but this is a case where there is a balance in favour

of the Claimant in respect of the prejudice. It is also worth noting the concession by the Respondent that all the factual allegations had been included in the original claim form, another feature pointing towards the discretion being exercised in the Claimant's favour on **Selkent** principles.

16. So, in my judgment, although the Judge did not need to decide the **Selkent** matters, when he did so against the Claimant and refused to allow the amendment he erred in law for the reasons that I have given above.

17. Then the Judge went on in paragraph 12, very helpfully, to consider whether or not the claims had a reasonable prospect of success and then decided they were struck out, and it is on this basis that I now consider the material. Doing all she could to support her client's contention, Ms Bicarregui was unable to persuade me that I should intervene in a matter of discretion by an Employment Judge in respect of the age claims. The finding by the Judge, having heard evidence from the Claimant, was that there was simply a vague allegation about a trend to appoint younger people. That is no basis for allowing a complaint in relation to the vacancy to proceed. There is no express finding in relation to the references, but Ms Bicarregui was unable to go any further with her submission, and, in so far is it might be implied that Judge Baron allowed the strike-out in respect of that, then I would uphold it. So, there is no reasonable prospect of success in the age allegations.

18. The references and the vacancy point *in relation to race discrimination* should be heard. I bear in mind that it is quite proper for a case that has no reasonable prospect to be struck out (see the speech of Lord Hope in **Anyanwu v South Bank Students Union** [2001] ICR 391 at page 404). The Claimant's contention in respect of the vacancy is made by a direct comparison

with a white female employee, and, in respect of that, the Claimant has the right to make his case. The Judge appears to have decided the matter on the basis of what the Respondent says about the post in September 2011. He did not hear evidence but accepted the assertion of counsel as to Ms Heinemann being on a fixed-term contract. In my judgment, those are matters for a trial. The Claimant has pointed to a white comparator treated differently, and an explanation is required. The Claimant is entitled to say that there is more to it than a difference of race and treatment and to call for an explanation, and that matter should not have been struck out at this stage.

19. I then turn to the references point. As I indicated, the Respondent has provided three different accounts of why a reference was not provided, and the Claimant is entitled to raise his claim of race discrimination about that. It seems to me that it would be wrong to strike that claim out on the material presently available as having no reasonable prospect of success.

Conclusion

20. In those circumstances, recognising as I do both the fact that a strike-out is usually described as draconian, yet it may properly be made in a particular case, on the one hand and that the claim may be weak and yet continue, and it is rare for the EAT to intervene in the exercise of discretion by a Judge, the errors in this case indicate that it is right to do so. What follows is the opportunity of the Respondents to raise again their contention that there should be a deposit order, and that matter can be put again if the Respondents are so advised. So, at the moment, having considered the errors in this Judgment, there is no point in my sending it back to the Judge or another Judge; I hold that the claim may go forward, subject to any decision the Respondent makes about an interim application for a deposit order. I have considered solely on this aspect whether or not it was right to say that this claim has no reasonable prospect of

success. It is not for me to decide here whether it has a good prospect, little prospect or a reasonable prospect; those are matters for the hearing or, alternatively, a deposit order hearing.

21. If this matter is to be considered as a deposit hearing, it should be determined by a different Judge. I appreciate that I have upheld part of Judge Baron's order, but he has expressed a firm view that the case has no reasonable prospect. It is conceded that he has made an error on the contract point and in his approach to the exercise of discretion under **Selkent**. It would be unfair to ask him even with all his professionalism to look again at the matter. There is no utility in reserving this to Judge Baron either. So, if the Respondent is advised to pursue the deposit order, it will go before a different Judge.