Appeal No. UKEAT/0328/13/BA
UKEAT/0329/13/BA
UKEAT/0388/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 August 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MISS Y DOZIE APPELLANT

ADDISON LEE PLC RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MISS Y DOZIE (The Appellant in Person)
For the Respondent	MS B CRIDDLE (of Counsel) Instructed by: Collyer Bristow 4 Bedford Row London WC1R 4TF

<u>SUMMARY</u>

PRACTICE AND PROCEDURE

Disposal of appeal including remission

Postponement or stay

Approval of consent order allowing appeal – paragraph 18.3 of 2013 Practice Direction – reasons why a hearing is generally required in respect of such orders – approval given on a basis explained in the Judgment.

Refusal by Tribunal to adjourn a hearing – Tribunal evidently intending to proceed as if consent order allowing appeal already made – refusal set aside – reconsideration of whether it was in the interests of justice to continue the hearing below – hearing below adjourned.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. I have two matters before me today. The first is the hearing pursuant to paragraph 18.3 of the Employment Appeal Practice Direction (2013). It concerns appeals by Miss Yvonne Dozie ("the Claimant") against a judgment and a deposit order. Addison Lee ("the Respondent") has put forward a consent order, the effect of which would be to allow these appeals and the hearing has been listed, urgently, in circumstances that I will explain in a moment. The second is the hearing of an appeal by the Claimant against a decision of the Employment Judge dated 9 August, last Friday, refusing to postpone a case due to begin in the Employment Tribunal yesterday. These two matters have emerged at very short notice from a thick and tangled procedural undergrowth. I will explain the procedural background at Tribunal level then at the Employment Appeal Tribunal level.

Employment Tribunal level

2. The Claimant was employed by the Respondent as a homeworker telephonist. Her employment commenced on 23 July 2007 and ended with her resignation and claim of constructive dismissal. The Claimant has brought altogether four claims to the Employment Tribunal. Within those claims a number of different legal complaints have been identified. For the purposes of exposition I can group them as follows.

3. Firstly, there are complaints concerning: (1) flexible working under Part XIIIA of the **Employment Rights Act 1996**; (2) indirect associative disability discrimination, for which permission to amend is required; (3) race discrimination; (4) victimisation by reason of a protected act; and (5) direct associated disability discrimination. These complaints were all

dealt with in a judgment of Employment Judge Smail dated 30 July 2012. (1) and (3)-(5) were struck out. Permission to amend in respect of (2) was refused. Written Reasons were given.

4. Secondly, there is a complaint concerning indirect sex discrimination. This was made the subject of a deposit order. The intention to make a deposit order was set out in the judgment dated 30 July 2012, but the deposit order was actually made on 29 August 2012. The deposit was not paid, and a judgment was issued on 24 September 2012 recording that the claim was struck out by reason of non-payment of the deposit.

5. Thirdly, there is a claim of direct disability discrimination. This claim was struck out on 21 November 2012 by reason of non-compliance with an "unless order" relating to consent for medical records.

6. Fourthly, there are claims that survived these various procedural steps and that were listed for hearing commencing yesterday. These are claims of victimisation by reason of protected acts and constructive unfair dismissal. Until a few days ago these were the only claims that either party or the Tribunal envisaged being dealt with in August.

<u>The Employment Appeal Tribunal level</u>

7. There are seven appeals before the EAT that are to some extent presently alive.

8. It is first convenient to mention appeals UKEAT/0328/13 and UKEAT/0329/13. These appeals concern, respectively, the judgment following the Pre-Hearing Review and the deposit order - in other words the first two groups of complaints that I have already listed. These

appeals were found on paper to disclose no reasonable ground for appealing. However, the Claimant exercised her right to a hearing under rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, which came before HHJ McMullen QC on 27 June 2013. With the assistance of an ELAAS representative, the Claimant put forward amended grounds of appeal that were sent forward to a full hearing. The amended grounds challenge all five aspects of the striking-out decision and the making of the deposit order.

9. On about 15 July, however, the Respondent decided that it did not wish to contest these appeals. It brought forward a consent order, which provides for both these appeals to be allowed, for the judgment dated 30 July 2012 to be set aside, for the applications for strike-out and/or a deposit order to be dismissed, for each of the Claimant's claims to proceed to a full hearing, and for an amendment to be allowed pleading a claim of indirect associative disability discrimination. Subject to the question of whether these matters can properly be heard in August, the Claimant is of course content with such an order and has signed a consent order to this effect.

10. The Employment Appeal Tribunal, however, does not routinely allow appeals by consent. I shall explain some of the reasons why later in this judgment. The EAT Practice Direction stipulates that a hearing will usually be necessary to determine whether there is good reason for making the proposed order (see paragraph 18.3 of the new Practice Direction). HHJ Peter Clark determined in this case that there should be such a hearing.

11. In the meantime, however, the Respondent had pressed ahead towards the hearing listed to start yesterday, apparently with the intention that all claims made by the Claimant should be

dealt with at that hearing. It did not apply for a hearing pursuant to paragraph 18.3 prior to this week and (when one was ordered) rejected dates given by the Employment Appeal Tribunal in this week. However, upon the Employment Appeal Tribunal pointing out that the striking-out order stood until it was set aside, the Respondent applied yesterday for the matter to be considered today.

12. I shall now turn to the other appeals that are to some extent live. Some of these should have been progressed by the Employment Appeal Tribunal earlier. I express regret on behalf of the Employment Appeal Tribunal that they have not been. Recent letters by the Registrar to the parties have explained the position.

13. Appeal UKEATPA/1785/12 concerns an application that the Claimant made for review of the Pre-Hearing Review judgment. The application was refused on 24 September 2012. The appeal was found to disclose no reasonable ground for appealing, but the letter under rule 3(7) was sent by the Appeal Tribunal to the wrong address. This was put right recently. The appeal is potentially still live. However, if the consent order allowing the appeal against the Pre-Hearing Review judgment is granted, this appeal will fall by the wayside; the Claimant will have been successful in any event.

14. Appeal UKEATPA/1786/12 concerns the judgment dated 24 September, which recorded that the indirect sex discrimination claim was struck out by reason of non-payment of the deposit. The appeal was found to disclose no reasonable ground for appealing, but again the letter under rule 3(7) went to the wrong address. Again, this was put right recently, and the appeal is potentially still live. However, if the consent order allowing the appeal against the

Pre-Hearing Review judgment is granted, this appeal too will fall by the wayside; the Claimant will have been successful in any event.

15. Appeal UKEATPA/0017/13 is an appeal against the striking-out Judgment dated 21 November 2012. The appeal was lodged two days out of time. Some but not all correspondence concerning this appeal was again sent to the wrong address. By order dated 17 July 2013 the Appeal Tribunal gave the Claimant a last opportunity to apply to extend time or else the appeal would be struck out. The Claimant applied by email dated 23 July seeking an extension of time for appealing. Submissions are being sought on both sides before the Registrar decides whether to grant an extension of time for appealing.

16. Appeal UKEATPA/0137/13 is an appeal in respect of a case management discussion order dated 7 January 2013. It was ruled that the Claimant could not allege unlawful race discrimination in her fourth claim in respect of matters struck out by the judgment dated 30 July. Again a rule 3(7) letter was sent to the wrong address. Again, however, this appeal will fall by the wayside if the consent order is granted, for the unlawful race discrimination claims will come back in again in any event. There was also an issue relating to the listing of a hearing that has been overtaken by events.

17. Finally, of course, there is the appeal listed before me today, concerning the recent refusal of an adjournment. Those are the live appeals.

18. For the sake of completeness, I should mention that there are two others that are no longer live, for reasons set out in a letter of the Registrar dated 16 July 2013.

UKEATPA/1787/12 was an appeal against the unless order dated 24 September 2012; this appeal was out of time, and an extension was refused by the Registrar's order dated 22 January 2013, against which there has been no appeal. UKEATPA/1831/12 related to the question of whether proceedings should have been stayed in 2012; there was no obvious decision by the Tribunal, and this appeal was struck out on 11 January 2013. Again, there has been no appeal.

The consent order

19. Emerging from the undergrowth, I turn to the first question that I must decide today, namely whether to accede to the terms of the consent order and allow appeals against the judgment dated 30 July and the consequent deposit order.

20. The Appeal Tribunal does not allow appeals by consent without scrutiny. There are good reasons for taking this course. Firstly, judgments and orders of the Employment Tribunal and of Employment Judges are entitled to respect. It is in the interests of justice and good order that they should stand unless there is good reason for upsetting them. Secondly, parties sometimes agree to the setting-aside of judgments or orders for purely tactical reasons. These are not in themselves good reasons for setting aside judgments and orders. Thirdly, parties do not always think through the consequences of allowing an appeal. There may easily be a misunderstanding as to the effect of doing so or the scope of what the Tribunal will decide after the appeal is allowed. Two issues of this kind have arisen today, and I shall mention each of them in a moment. Fourthly, there is sometimes a wider public interest in a judgment beyond the interests of the parties to the litigation in question. This is something the Appeal Tribunal will wish to consider.

21. I have carefully considered the judgment and deposit order by reference to the grounds which HHJ McMullen QC allowed through to a full appeal hearing. There is real substance in those grounds. In many respects I doubt whether striking-out was a permissible option as regards flexible working, race discrimination, victimisation and direct associated disability discrimination. These are cases that should, on well-established principles, be tried out on the facts. The Employment Judge decided these issues largely on a view of the facts put forward by the Respondent's counsel or otherwise understood by the Employment Judge at the hearing. There is real substance in grounds of appeal to the effect that this was not an appropriate course for the Employment Judge to take. I therefore have no hesitation in allowing the appeal by consent on those issues.

22. As regards indirect associated disability discrimination, the Employment Judge decided the striking-out application on the basis that no such claim existed. It seems that the claim itself arose in the course of discussion at the hearing, was framed partly by the Employment Judge and perhaps also partly in the course of argument and was then dismissed. On the wording of section 19 of the **Equality Act 2010** the Employment Judge's decision was plainly correct. However, it was argued at the rule 3(10) hearing by the Claimant's ELAAS representative that European law required recognition of such a claim. This point is arguable, but no more; it is a point of considerable importance.

23. In these circumstances I would not allow the appeal on the basis that such a claim existed, as the amended Notice of Appeal argues. I would, however, allow it on the basis that a point of law of this kind should not be decided on an interlocutory application. It is much better

that the facts relied on should be set out properly, with a view to the Tribunal finding whether the facts are established and deciding the question of an indirect associated disability discrimination claim if it arises on the basis of sound findings of fact. The appeal will be allowed by consent on that basis; it will be a matter for the Employment Tribunal to make appropriate findings and to decide any question of applicable law in the light of its findings of fact. This was one matter that plainly required careful clarification before the appeal could be allowed.

24. As regards race discrimination, the Claimant has noted that in a draft list of issues time points are still being taken by the Respondent. She says that her claims were in fact in time, but she questions how, if the appeal is allowed, the Respondent can still take time points. I think the Respondent is entitled still to take time points, and even if the Respondent did not do so, the Tribunal would be required by law to consider them itself. The Pre-Hearing Review judgment did not address time points. They were taken in the ET3, identified in an early case management discussion and simply remain outstanding. It seems to me desirable that the race discrimination claims, which were not further defined before they were struck out, should be clearly defined and any time points identified. If there are any time points, the Claimant understandably does not appreciate what they are at the moment.

25. On that basis, therefore, the Claimant's appeal will be allowed by consent as regards the Judgment dated 30 July and the consequent deposit order.

Other outstanding appeals

26. As I have said, UKEATPA/1785/12 is no longer necessary. It will be dismissed, not because the Claimant has been unsuccessful, but because she has already been successful in a prior appeal. Precisely the same applies to UKEATPA/1786/12. Likewise, that will be dismissed, because the relief is effectively being granted in the appeal that is being allowed. The same also applies to UKEATPA/0137/13: I am satisfied that the result of allowing the appeal by consent is to render that appeal no longer necessary. The Claimant will be able to argue her race discrimination claims; and the other issue concerned, which was to do with the timing of a hearing, no longer arises. The Claimant was concerned that something in that case management discussion order might limit her right to adduce in evidence a letter dated 19 October. Nothing in the case management discussion order in any way restricts her right to use that letter in evidence.

27. UKEATPA/0017/13 will simply be dealt with in due course. If there is any appeal from a Registrar to a Judge, I shall ensure that there is a note on file that the appeal should be expedited. The parties should bring to an associate's attention the existence of that note should it be necessary to do so.

The adjournment appeal

28. This brings me finally to the question of whether an adjournment should have been granted and should now be granted by me of the hearing that is taking place this week. The Claimant, following the hearing on 27 June, promptly applied to adjourn the hearing that was listed for five days in August. That application was refused by the Employment Tribunal. The Respondent then applied to submit a consent order concerning the Pre-Hearing Review

judgment and the deposit order. This, if granted, would have materially extended the issues for consideration by the Employment Tribunal. The Claimant applied again to adjourn the hearing. By 8 August 2013, when the hearing was apparently going ahead on Monday, despite the fact that the earlier appeals had not been allowed, she renewed the application once more. The reply was:

> **"Employment Judge Southam has considered your request to postpone the hearing and has refused it.**
>
> **The Judge's reason for refusing the request is: the Claimant appealed against the striking-out of her claims. The Respondent consents to those claims being heard. The Tribunal is willing to hear them and has allocated five days for the hearing. The hearing will go ahead on Monday."**

29. While I fully appreciate the difficulty in which the Employment Judge was placed, these are not sound reasons for refusing the application for an adjournment. Firstly, the reasons overlook the fact that the Employment Tribunal could not simply press ahead to hear claims that had been struck out. A hearing before the Employment Appeal Tribunal was necessary first. By 9 August 2013 there was no longer any opportunity to list that hearing. Listing it was plainly going to disrupt the week that the Employment Judge had to hear the case, as in fact it has done. That matter was simply left out of account in the determination that he gave on 9 August. He was, with respect, wrong in principle to suppose that the Tribunal could hear those claims unless and until the appeal against the order the previous year had been heard and determined. I have already explained why it is necessary for this course to be taken. Even if neither the Respondent's solicitors nor the Employment Judge understood the reasons why the course had to be taken, the Practice Direction explains that it will usually be necessary to do so, and HHJ Peter Clark had ordered such a hearing. The reasons that the Employment Judge gave also failed to consider the potential impact of introducing a number of new issues at this stage.

30. To my mind, therefore, the reasons for refusing an adjournment are flawed. I have to consider the position today in the light of the changed circumstances. The practical effect of these is that even if the Employment Tribunal has read its way into the papers, as I understand it will have done, it has only three days left to hear a case that was originally listed for five days when the five-day listing was given in order to address significantly narrower issues. The Claimant argues that any hearing would be rushed and unsatisfactory and that there are outstanding appeals to be heard and determined. The Respondent argues that save for the outstanding appeal relating to the Claimant's own disability all matters can now be dealt with by the Tribunal, and, while it might be difficult to complete the whole hearing in three days, it ought at least to be possible to complete the evidence. I note, however, that Ms Criddall envisages cross-examining the Claimant for the best part of a day, and I raised the question of whether the Claimant or anyone has really thought about the time issues in the discrimination claim and whether there needs to be evidence relating to those issues and any possible extension of time. I also am left in considerable doubt whether the issues of race discrimination have actually been listed out in a way that all the parties understand.

31. I have reached the conclusion that it would be deeply unsatisfactory to have a rushed three-day hearing of these enlarged claims. It is only necessary because the Respondent, having made a wide-ranging striking-out application, has now acceded to an appeal on the basis that that strike-out order should never have been made in the first place. The Claimant should not be left with a truncated and rushed hearing in circumstances such as these. I am not satisfied that it is possible to deal with all the issues properly at such a hearing, and, as I have said, there is one outstanding appeal that has not been determined. Again, if it had really been necessary

to do so and there had been a prompt application by the Respondent, it might have been possible to expedite it.

32. For all of these reasons, the appeal will be allowed, the decision refusing an adjournment will be set aside, and there will be a direction that the hearing of all of the remaining claims should be adjourned and that a case management discussion (or, more accurately, now a preliminary hearing for case management) should take place before they are re-listed.

33. There is one final point to mention. In her skeleton argument Ms Criddall took the point that the Claimant, having brought this appeal at short notice, was not entitled to pursue it without making a payment of an appropriate fee. New regulations requiring the payment of fees have recently come into force. So far as their consequences upon an appeal are concerned, new provisions have been inserted in the **Employment Appeal Tribunal Rules 1993** by the **Employment Appeal Tribunal (Amendment) Rules 2013**. Where an appeal is properly instituted, as this appeal has been, it will be liable to be struck out if a fee is not paid within due time after notice is given (see the new rule 17A of the **Employment Appeal Tribunal Rules**). But in the meantime a properly instituted appeal is extant. No doubt in the vast majority of cases the Employment Appeal Tribunal will take no action on the appeal until questions of fee and fee remission are resolved, but the Employment Appeal Tribunal in an urgent case such as this has jurisdiction to deal with the appeal as I have done. The Claimant will be expected still to deal with the question of fee or fee remission in due course. If she finds that she is liable to pay a fee, she is entitled to make an application to the Employment Appeal Tribunal for an order that the Respondent reimburse it (see the new rule 34A(2A)).