Appeal No. UKEATS/0023/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 7 August 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR TIMOTHY HENRY JONES — APPELLANT

STANDARD LIFE EMPLOYEE SERVICES LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR R EADIE (Solicitor) Morisons LLP Erskine House 68 Queen Street Edinburgh EH2 4NN
For the Respondent	MS G ROSS (Solicitor) Pinsent Masons LLP Princes Exchange 1 Earl Grey Street Edinburgh EH3 9AQ

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

PRACTICE AND PROCEDURE – Disclosure

An application, made shortly before a Tribunal hearing was due, for disclosure of documents was rejected by the Tribunal. Several grounds were argued on appeal against that decision. Each was rejected. The Judge was held entitled to exercise his discretion as he did.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. On the 30 January 2013 Judge Macleod, sitting in Edinburgh, ruled against an application that had been made by the Claimant for the disclosure of documents with a view to their deployment in a Tribunal that was then scheduled to be heard starting on 4 February. The background is important, but first a number of general propositions must be stated. First, this is an appeal against the exercise of a discretion by an Employment Judge. Appeals against the exercise of discretion very rarely succeed. That is because in relation to procedural orders in particular there is a very wide ambit within which reasonable disagreement is possible, and the appellate courts are very reluctant to interfere in such orders. They may do so only if it is shown that there is an error of law.

2. That brings me to my second point: that is that a decision of a Judge can only be attacked as being an error of law by reference to the material that was before the Judge at the time that he made the decision. The fact that in the light of further material or argument that was not put before the Judge a different decision might very well have been made by him is beside the point.

3. Thirdly, in respect of documents, the general test, which Mr Eadie did not dissent from, is that of necessity: is it necessary in the interests of justice that documents sought to be disclosed should be?

4. Against the background of those propositions I have to consider the exercise of discretion by the Judge in the present case. The factual background was this. The Claimant was employed as a customer relations adviser by the Respondent from 1 January 1998 until his

resignation on 17 August 2012. His case was that whilst he was at work he was, in a role that he had recently adopted, treated dismissively by his manager, Ms Redmond. She set him impossible targets. He was subject to quite unreasonable pressures. It was implied by her that he had deliberately falsified records to make it appear that he had done more work than he actually had. These matters were such that by 1 March 2012 he was suffering from the adverse health effects of stress. On that day he left work.

5. It is not disputed, as I understand it, that he took with him a substantial quantity of documents that contained confidential information that it was in breach of the employer's protocols to take. He had a reason for doing so, which related, he says, to his disputes with his line manager. He claimed when he resigned that he had been constructively dismissed. He feared that such was Ms Redmond's involvement in the disciplinary processes relating to his taking documentation containing confidential information without the consent of his employer and more generally both by her being involved in the investigatory stage and potentially in the decision that was due to be made, that he anticipated that he was going to be dismissed. He chose to jump rather than wait to be pushed.

6. Further, he was disabled at the time, he claimed, suffering from depression. It would have been a reasonable adjustment in respect of that disability if the disciplinary procedures had been adjusted so as to make proper allowance for his condition.

7. The hearing to determine those matters was set down for five days beginning on 4 February. There had been previous hearings, in particular a case management discussion on 31 August followed by a Pre-Hearing Review on 2 November 2012. The full hearing was fixed by a notice dated 13 November 2012. It was not until 23 January, therefore only some 12 days

prior to the anticipated date of the hearing, that an application was made on behalf of the Claimant by Mr Eadie, who appears before me today, for documents.

8. He asked for four classes of document to be supplied. First were copies of complaint sampling checklist documents that had been in the possession of the Claimant but had been returned to the employer three weeks after the Claimant left, redacted as necessary, or a representative sample of them. The purpose of that was said to be to allow the Tribunal to understand their content. The Claimant's position was that the documents were only to be used by him for the purpose of pursuing his grievance against his line manager and only by the Tribunal having access to those documents would that be able to be assessed. Second, he asked for a document print list from the Respondent's printer used by the Claimant to print out documents on 1 March 2012. It had been suggested, but refuted by the Claimant, that he had been seen busy printing off documents on the day he left ill never to return again to work in health. The third set of documents were copies of email correspondence between the Claimant and Ms Redmond during a period that spanned some eight months, from August 2011 to 17 April 2012, the entirety of the period during which she was his line manager until he resigned. Finally, copies of the email correspondence from 1 January 2012 until 17 April 2012 between his line manager and Martin Wilson, and a Pauline Robertson and Mr Wilson, including discussions about the Claimant's performance of his role, absence from work and disciplinary action being taken against him.

9. The justification for those documents being sought at this stage was that the production of those documents would be "of assistance to the Tribunal in considering the terms of the Claimant's case". They were said to assist understanding. The documents in the second class, verifying exactly what he did while at work, were said to be needed to demonstrate the

inadequacy of the Respondent's investigation (it must be borne in mind this had not been completed, because there had been no disciplinary hearing; the Claimant resigned before that could take place). The email correspondence was sought to demonstrate "the deteriorating relationship" between him and his line manager that resulted in his lodging a grievance. It was acknowledged that he could give evidence about the process but copies of the emails would provide further and independent evidence to support his allegation. In respect of those it was noted that he had previously asked for copies but had not been given them. The fourth category was to support his argument that the Respondent was "aware of the issues raised by the Claimant about his performance, his relationship with his line manager and the investigation".

10. There was a response within two days of that email from the Respondent. That dealt with each of the items in turn. It noted that the sample documents contained client-confidential information. It reminded the Judge that there was apparent agreement that the Claimant had taken documents that contained such information from the office. Secondly, it said that the second class of documents had been sent to the Claimant. Thirdly, the email request was "very wide". It was argued that it was not relevant to the claim as stated to discuss the relationship with Ms Redmond in detail and that the evidence was liable to extend the hearing time considerably. Fourthly, it noted that it was not clear what would be added by the emails between Ms Redmond and Martin Wilson, and Ms Robertson and Mr Wilson. The summary from the Respondent was that all the documents requested were therefore irrelevant or unnecessary. An objection was also taken to the late timing of the request.

11. The Judge before whom that request came gave his Reasons, which were sent by letter on his behalf to the parties on 30 January. They are that:

> **"[…] the Employment Judge considers that the application comes too late and too close to the commencement of the hearing. It is not clear to the Tribunal why the documents sought are relevant to the claims before the Tribunal and therefore it is not in the interests of justice that the Order be granted."**

12. Accordingly, the Judge took two central points: one was timing; the second was relevance. Mr Eadie argues that that decision is both perverse and unlawful in that in exercising his discretion as he did the Judge failed to take into account matters that the law required him to take into account. If that is so, then the exercise of his discretion was flawed. I should emphasise that my role in this hearing is not to ask what order I would have made, in particular had I had full argument before me, but to ask whether on the material before the Employment Judge he made an error of law in the way in which he dealt with the application.

13. As to time, Mr Eadie argues that the Judge failed to take into account that an application may be made according to the Rules not less than ten days before the date of the hearing (see rule 11(2)). Therefore, this application, having been made 12 days before a hearing, should not have been ruled too late. I do not accept this argument, for a number of reasons. First, Ms Ross points out that rule 11(2) is not drafted in terms of an order being made in respect of a forthcoming hearing; the order relates to an application for an order not less than ten days *before the date of the hearing at which it is to be considered*. That, she submits, therefore links the application to the date of its consideration. Here it happens that if the application had been considered ten days after it had been made, it would have been considered over the weekend before the hearing of the proceedings. More centrally, she argues that this must be seen in context, and there had been two previous interlocutory hearings, the case management discussion and a Pre-Hearing Review, and it had been known since mid-November when the full hearing was due to be heard. There had been ample time for making an application earlier.

14. I make these observations. First, the overriding objective makes it clear that dealing with a case justly includes so far as practicable ensuring that it is dealt with expeditiously. It does not help the hearing expeditiously and fairly of the case if in context applications are made late. Secondly, there must be no general view that applications can be made at any time up until ten days before a hearing; that is only to encourage last-minute applications, "last-minute" being viewed, as it necessarily must be, in context. This does not exclude applications that may have to be made as a matter of urgency because of a sudden appreciation of events or a sudden turn of events, but that is not this case. In this case, the relationship between the Claimant and his line manager had been central throughout. If necessary to support his case beyond his own testimony there seems to be no sensible reason why the documents might not have been required earlier. I acknowledge that Mr Eadie in his letter told the Judge that there had been a request made of the Respondent at an earlier stage, but it seems to me the Judge was entitled to take account of the fact that a late application for documents might adversely affect the hearing and it was a proper basis for him to consider as one of the factors relating to the decision being made.

15. In respect of documentation, it is unlikely ever to be the sole factor in a case. This brings me to the second matter upon which the Judge relied, that of relevance. Here, I have little doubt that if Mr Eadie had in his letter identified a specific chain of correspondence about a specific time with a specific focus that was identified in correspondence, the application would have been a very different one for the Judge to consider. I observe that that possibility remains open, an application of that targeted sort not having been made previously and this application having been rejected in part because of the unspecific width of the request. A Tribunal would not then be in a position when it could simply refer back to Judge Macleod's decision and say that the matter had been already and conclusively decided. But, looking at the decision that the

Judge made, the conclusion was that relevance had not been clearly demonstrated to him. That, in my view, was a permissible conclusion.

16. I turn to deal with the way in which Mr Eadie sought to attack it. First, he argued that the Tribunal ought to have taken into account that the Claimant could and should have been given the opportunity to make further submissions to the Tribunal to allow the matter to be decided on the basis of full information. This is not a factor that the Judge was obliged to take into account. The application was made to him; he was entitled to take it as containing all the essential elements such an application should have. It is not sufficient for a party to say, "Well, I could give you a fuller application, but I haven't done so; but you must take it into account that I might have something to add".

17. The second ground is that the Respondent suffered no prejudice, because if the documents turned out to be irrelevant, the Tribunal could then exclude them. As to that, Ms Ross objects there would be a prejudice. I accept prejudice to this extent: not that the documents would necessarily be difficult to recover, but that they might well, and probably would, contain confidential information the redaction of which would require some effort. Secondly, for a Tribunal to deem documents irrelevant is to ask the Tribunal to undertake a task that might not be necessary. It is for the applicant for disclosure of documents to make out a case that the documents are necessary, returning to the underlying test, in the interests of justice. The second ground amounts only to the Judge failing to take into account the fact that they might be relevant; that is not a sufficient basis.

18. The third is that the Claimant would suffer prejudice in terms of his success. Here, there may be more to be said at a later time. If, for instance, the line manager did not accept that she

had spoken in certain terms to the Claimant, which she averred, the fact of an email in very much those terms from her to him would be highly relevant. But the matter was not put on that specific basis to the Judge. He had to deal with it on the general basis upon which it was put, in which, as I have indicated, it was thought to be of general assistance only, and that, in my view, allowed the Judge the scope to come to a view which is not perverse namely that the documents had not been shown to be sufficiently relevant.

19. The fourth was that shortly before considering the question of documentation the Tribunal had confirmed that there would be a witness order for the Claimant's line manager. That had been sought by the Claimant; it had been granted earlier by the Tribunal. The Respondent sought to revoke it; it was not revoked. This takes the matter, as it seems to me, no further without knowing more as to what she was likely to or might well say in evidence, against which one might assess the potential relevance of the documentation. I should add that Tribunals operate under considerable pressure of evidence and documentation in the modern world. There are other demands on the time of a Tribunal. It is important that a focus be kept upon the facts of the particular case and what is relevant to it. It is too easy to be diverted from that by being sucked into a morass of documentation. That may not be this case; I cannot for the moment form a judgment upon that. But it is a real danger of which all Employment Judges are aware. It is easy to accede to a request for documentation but to do so is sometimes inviting a rod for one's own back without there being any benefit to the system of justice: indeed, often the reverse.

20. As to the fifth, the matter argued there was time, with which I have already dealt. As to the production of emails, it is said that the Judge should have taken into account the fact that the documentation had been requested months earlier and been refused. This was something that

was before the Judge. He, however, did not have any material that showed that that refusal had been one that was unanticipated and recent. It might have been a relevant consideration had, for instance, the letter of 23 January been able to say that it had been thought that the request would be granted and it had suddenly been denied in the week before 23 January. But that is not this case.

21. Accordingly, as it seems to me, each of the factors specifically relied upon by Mr Eadie is not a factor that the Judge was required by law to take into account in exercising his discretion. I return to the question of relevancy. He did not say in terms that the trawl of documentation by email from Ms Redmond throughout the entirety of her line management of him was too wide. But without it being specific and targeted, it would be difficult to reach any conclusion other than that the relevance was so general as to make it unnecessary for the resolution of this hearing that it should all be disclosed. As I have said, that does not in my view preclude an application that is specific and is made at a later stage to this Tribunal, if necessary pending a hearing, but it is not a reason for rejecting this Judge's exercise of his discretion on the material before him in the light of the law as I have set it out.

22. For those reasons, this appeal, attractively though it has been presented by Mr Eadie, must be, and is, rejected.