Appeal No. UKEAT/0517/12/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 July 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

DR S DOSANJH — APPELLANT

NOTTINGHAMSHIRE HEALTHCARE NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS CLAIRE McCANN (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR TIM SHEPPARD (of Counsel) Instructed by: Mills & Reeve LLP Solicitors 78-84 Colmore Row Birmingham B3 2AB

SUMMARY

PRACTICE AND PROCEDURE – Amendment

The Claimant applied for permission to amend her claim to allege disability discrimination and race discrimination. The Employment Judge, in refusing permission (1) exercised his discretion on a misapprehension of fact, in that the Claimant had, contrary to his understanding, raised disability discrimination in the course of the disciplinary process, viz on appeal, (2) overlooked email correspondence in September 2010 when the Claimant told her union that she wished to claim race discrimination and (3) overlooked or gave no reasons in respect of the Claimant's explanation for delay, including in particular the state of her health during the relevant time. The application was remitted for reconsideration by a differently constituted Tribunal.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Dr Shavnam Dosanjh, the Claimant, against a Judgment of Employment Judge Hutchinson, sitting in Nottingham, dated 1 February 2012. By his Judgment the Employment Judge refused the Claimant's application to amend her claim to add complaints of disability and race discrimination to her existing claim of unfair and wrongful dismissal.

The existing claims

2. The Claimant was employed by the Nottinghamshire Healthcare NHS Trust, the Respondent, with effect from 30 December 1996. She had been employed as a Clinical Psychologist from 3 March 2008, having recently qualified in that field. She was dismissed with effect from 19 August 2010. She raised an internal appeal against her dismissal. That appeal was eventually heard over two days in April 2011. It was dismissed shortly thereafter.

3. In the meantime, on 17 November 2010, the Claimant brought a claim of unfair and wrongful dismissal in which she was represented by solicitors instructed by her union. It is relevant to summarise the case of each party in respect of that claim.

4. The Respondent's case may be summarised as follows. In September 2009 there had been concerns that the Claimant's files had not been kept up to date. She was subject to a performance review, signed off after a period of supervision. However, she commenced sick leave in November 2009 and during this period further concerns about her record keeping were identified. In January 2010 she was informed that a formal investigation would be commenced. This investigation found evidence to be considered by a disciplinary panel; a disciplinary hearing took place on 30 June 2010; further investigation was required; a disciplinary hearing

was reconvened for 19 August 2010; the Claimant was dismissed with effect from that date. It is the Respondent's case that there were serious concerns about the Claimant's record keeping leaving to concerns about her management of clinical risk.

5. The Claimant's case, as set out in her claim form, may be summarised as follows. She had not been given appropriate information, support and assistance as regards the Respondent's expected standards, particularly of record keeping. There was no fair investigation. Patient files were not made available to her; inaccurate information was presented to the disciplinary panel; the Respondent failed to take into account mitigating circumstances relating to her "personal circumstances"; the Respondent being well aware of her "personal difficulties".

The application to amend

6. On 14 September 2011 the Claimant wrote to the Employment Tribunal asking to add claims of race discrimination and disability discrimination. She sent a further letter dated 29 September entitled "Re Disability Discrimination". These and other documents were ordered by Employment Judge Caborn to stand as her application for amendment. Employment Judge Caborn told the Claimant to note that it would be necessary for her to identify the basis of her alleged complaints by identifying the matter of the complaint, the date or dates, the person or persons involved, how the alleged treatment is said to constituted discrimination under the legislation, identifying the relevant provisions. She was advised to take legal advice.

7. The Claimant instructed new representatives who wrote to the Employment Tribunal on 16 December, seeking leave to serve a race relations questionnaire. This document set out a summary of her complaints. It is too long to set out in this Judgment, but was relied on before the Employment Judge. The application to amend came before the Employment Judge with other matters on 1 February 2012. The Claimant was represented by counsel. The Claimant's

skeleton argument referred to the race relations questionnaire and, again, summarised her case. Once again, the passage is too long to quote conveniently in this Judgment but was plainly considered by the Employment Judge.

8. The skeleton argument of her counsel referred to the prejudice she would suffer if she was not permitted to raise the heads of claim in question and contained the following paragraph, 39:

> **"The Claimant's condition makes it difficult for her to function on a day to day basis. Whilst it is acknowledged that these claims are out of time, the Claimant urges the Tribunal to consider the fact that she has not been well for some time and that her previous solicitors did not advance these claims in the manner that they should have. The Claimant's current solicitors were not instructed until 24 November 2011. Any failures of the Claimant's legal representatives ought not to be visited upon her."**

9. The Employment Judge did not have any witness statement from the Claimant setting out the factual basis for her assertion that it would be just and equitable to extend time for making her complaints and granting permission to amend. He was not asked to receive oral evidence. He received submissions at considerable length from the Claimant's counsel and from the Respondent. It is plain that he was referred to a substantial amount of documentation in the two bundles.

The Employment Judge's reasons

10. The Employment Judge's essential conclusions are set out in paragraphs 6.1 to 6.8 of his reasons:

> **"6.1 I am satisfied that the nature of this amendment is not minor. It still, as at the time of this Pre-Hearing Review, has not been particularised properly but these are new allegations being made and it is not simply a question of adding or substituting labels to facts already pleaded**
>
> **6.2 Claims of race discrimination and disability discrimination are entirely different from claims of unfair dismissal.**
>
> **6.3 I take into account the relevant statutory time limits. These allegations all predate the date of dismissal, i.e. 19 August 2010. The application is made today, 1 February 2012, almost 18 months after the date of dismissal. Such matters are governed by the appropriate statutory**

time limits and clearly claims of race and disability discrimination should be lodged within 3 months of the date of the act complained of. I would only have jurisdiction to hear such complaints if I consider it just and equitable in this case to extend time.

6.4 Apart from the issue of the considerable delay I also take into account that throughout the process the Claimant was represented by a senior Trade Union Official and no issue of discrimination was ever raised during that process.

6.5 I also take into account that when the Claimant submitted her claim she was represented by a firm of solicitors and I cannot believe that any allegation of discrimination was placed before them otherwise they would have made the claim.

6.6 The Claimant is a professional person and there is no reason for her delay in submitting these claims to the Tribunal.

6.7 I am also satisfied that these are new allegations that have not previously been made and it causes prejudice to the Claimant that she cannot proceed with these claims. If I allowed them to proceed there would clearly be considerable prejudice to the Respondent bearing in mind the length of time since the incidents occurred.

6.8 The refusal of leave to amend does not in my view cause hardship to the Claimant since it does not prevent her from pursuing her claim of unfair dismissal. It could be argued that she would suffer greater hardship if the amendment was granted because of the increased costs that would inevitably be incurred."

The appeal

11. The appeal was originally on wider grounds than those which have been permitted to proceed to today's hearing. On 3 April 2013 His Honour Judge McMullen QC allowed the appeal to proceed insofar as it concerned the application for permission to amend, largely for reasons set out in paragraphs 8, 9 and 10 of his Judgment. He did not, however, restrict the grounds of appeal in the Notice of Appeal and Ms McCann has put her case more widely today.

12. I remind myself immediately before I come to consider individual grounds of the limited role of the Employment Appeal Tribunal which is concerned only with questions of law. This is an appeal against what is essentially a discretionary case management decision. The test to be applied in considering whether to overturn it were stated by Henry LJ with whom Beldam LJ and Thorpe LJ agreed in **Noorani v Merseyside TEC Limited** [1989] IRLR 184:

"[…] These decisions are entrusted to the discretion of the court at first instance. Appellate courts must recognise that in such decisions different courts may disagree without either being wrong, far less having made a mistake in law. Such decisions are, essentially, challengeable only on what loosely may be called Wednesbury grounds, when the court at first instance exercised the discretion under a mistake of law, or disregard principle, or under a misapprehension as to the facts, where they took into account irrelevant matters or failed to

take into account relevant matters, or where the conclusion reached was 'outside the generous ambit within which a reasonable disagreement is possible'."

13. I will begin with the points which were identified by HHJ McMullen. I start first of all with paragraph 6.4 of the Employment Judge's reasons in which he said that "no issue of discrimination was ever raised during that process". If by that process he meant the disciplinary process, it is common ground today that the Employment Judge was wrong. The issue of disability discrimination was raised during the disciplinary process at the appeal stage. The point had been made in the Claimant's email dated 29 September, which was part of the application to amend.

14. Ms McCann submits that the Employment Judge indeed referred to the disciplinary process; and that this error was a material misapprehension as to the facts so that he exercised his discretion on a wrong basis, ignoring the fact that the disability discrimination had indeed been raised in the appeal process. Mr Sheppard submits that the Employment Judge was referring only to the Tribunal process and, further, and in any event, that any misapprehension was immaterial and would have made no difference to the outcome.

15. I am satisfied that the Employment Judge indeed referred to the disciplinary process. To my mind it is clear that at this point he was accepting a submission made by the Respondent's representative (see paragraphs 4.4 and 4.5 of his reasons) with the reference to the Claimant having been advised by her union representatives throughout the disciplinary process.

16. In the result the Employment Judge, no doubt influenced by the Respondent's representative, misapprehended the facts. To my mind this misapprehension was material. It is potentially a significant factor to be borne in mind under the **Selkent** principles that an allegation of discrimination sought to be raised by amendment had been raised during the

disciplinary process and, therefore, potentially, may be in play in unfair dismissal proceedings which were already before the Tribunal. This factor may impact upon the extent to which one party or the other is prejudiced by the grant or refusal of an amendment.

17. I turn then to paragraph 6.5 of the Employment Judge's reasons. He said there that he could not believe that any allegation of discrimination was placed before the firm of solicitors instructed by the Claimant's union, otherwise they would have made the claim. There was in the papers prepared for the hearing an exchange of emails between the Claimant and her trade union dated 1, 2 and 3 September 2010. In that exchange of emails she complained of behaviour by the Respondent's management, which was "unprofessional, abusive and, at worst, racist and/or bullying". She was asked if she wished to make a claim of race discrimination. She replied yes to that question.

18. The Claimant's case, supported by contemporaneous attendance note, is that the Employment Judge was expressly referred to this documentation. The Respondent is unable to confirm that this was so or to deny it. It is not necessarily inconsistent with paragraph 6.5 of his reasons that the Employment Judge should have been referred to the emails, but the sting would have been taken from paragraph 6.5 of his reasons if the Employment Judge had regard to the emails. The material was in the bundle; and I conclude that when taking into account the factor mentioned in 6.5 of his reasons without reference to that material the Employment Judge must have overlooked an important factor.

19. I turn then to paragraph 6.6. Here, the Employment Judge remarked that the Claimant is a professional person and said that there was "no reason for her delay" in submitting these claims to the Tribunal. This paragraph entirely fails to deal with the central thrust of the Claimant's case put in the skeleton argument to which I have referred. There was substantial

material indicating the extent of the Claimant's ill health over a substantial period of 2009 and 2010. The Employment Judge does not evaluate this material or, indeed, make any reference to it at all. Either he has overlooked entirely a significant feature of the case or he has failed to give reasons for the manner in which he has dealt with it.

20. For these reasons I am satisfied that the Employment Judge's decision cannot stand and that the matter must be remitted for reconsideration entirely afresh. Ms McCann made other points in the course of a wide-ranging attack on the Employment Judge's procedure and reasons. I am not satisfied that any of the other points were made good, but I am satisfied that these points of importance are made out.

21. I am told that the unfair dismissal claim, which was made the subject of a deposit order, is extant but stayed pending this appeal. To my mind, the first task for the Employment Tribunal will be to determine the applications for permission to amend. I have the following comments relating to that matter. Firstly, I think it is desirable that there should be directions for the Claimant to set out in a single document, which cannot be misunderstood, particulars of the kind which Employment Judge Caborn identified. The Employment Judge who hears the matter again should not be left to divine the claim from the application, the racial relations questionnaire and a skeleton argument.

22. Secondly, I consider that the Claimant should prepare a witness statement which sets out those matters on which she wishes to rely by way of explanation for the delay in bringing the claim and otherwise so far as questions of prejudice are concerned. Next time round the matter should not be left to oral argument and documents.

23. Thirdly, I would comment on one submission which Ms McCann made – namely, that the Employment Judge should have considered the allegations individually. It is not an error of law for an Employment Judge to fail in his reasons to address each individual allegation within an application for permission to amend. It is, however, true to say that different considerations may apply to amendment in respect of disability discrimination and race discrimination, and further, that different considerations may apply depending on the extent to which the application to amend relates to the underlying unfair dismissal claim and the extent to which it raises matters which are extraneous to that claim. I make it plain that all these are matters for the Employment Judge to whom the matter is remitted; I am not expressing either way any opinion on the question whether leave to amend should be granted. It should, however, be considered entirely afresh.