Appeal No. UKEAT/0130/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 July 2013

Before

HIS HONOUR JUDGE SHANKS

MR B BEYNON

DR D V FITZGERALD MBE LLD FRSA

MS MARIA GRAHAM — APPELLANT

UNIVERSITY COLLEGE LONDON HOSPITALS NHS FOUNDATION TRUST & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS MARIA GRAHAM (The Appellant in Person)
For the Respondents	MR ADAM OHRINGER (of Counsel) Instructed by: DAC Beachcroft LLP 100 Fetter Lane London EC4A 1BN

SUMMARY

RACE DISCRIMINATION

The appeal had proceeded on two grounds:

(1) That the Employment Tribunal had failed to deal expressly in its judgment with one identified issue relating to a complaint of race discrimination: that was so but it was also clear that the Claimant had not produced any evidence to support her complaint; the EAT therefore formally recorded that the particular complaint was dismissed under section 35(1)(a) of the **Employment Tribunals Act 1996**;

(2) That costs should not have been awarded against the Claimant: although there was jurisdiction to award costs and there could be no criticism of the amount, the justifications relied on by the ET in exercising that jurisdiction were irrelevant and/or or based on an unfair criticism of the Claimant; the EAT accordingly set aside the ET's decision and allowed the Respondent to renew its application for costs; the EAT rejected the application on the basis that the EAT did not find her culpable in continuing with her claims; the EAT took into account that she was self-represented and that the claims were allowed to proceed at a CMD but no general principle was laid down: the EAT's decision turned on the particular circumstances of this case including the impression the Claimant made on the EAT.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by the Claimant relating to two aspects of a Judgment of the Employment Tribunal sitting at London Central following a four-day hearing in February and March 2012. The Employment Tribunal rejected all the Claimant's outstanding claims, which included unfair dismissal, wrongful dismissal and race discrimination. The Reasons were sent out on 21 May 2012.

Background

2. The background was that the Claimant was a medical secretary employed by the First Respondent, the University College London Hospitals NHS Foundation Trust. She worked there from 16 August 2003 until her dismissal for gross misconduct on 17 June 2011. The reasons for which she was dismissed were excessive internet use, inappropriate use of email and getting behind on her work during the period March to May 2011 to the extent of failing to complete amendments of 200 clinical and post-operative letters, which were found in her drawer.

3. She put in two ET1s to the Tribunal, one before her dismissal, on 9 June 2011, and one after her dismissal, on 19 July 2011. Those claims were consolidated, and there was a Pre-Hearing Review on 2 December 2011. At that hearing the Tribunal rejected a claim that she was disabled and allowed other claims to go forward to a full-merits hearing. As well as the claims for unfair and wrongful dismissal and for dismissal on the grounds of race, there were five specific allegations of race discrimination identified by the Tribunal at the Pre-Hearing Review, which are set out at pages 45 and 46 of the EAT bundle.

4. The first of those, which is the only one relevant today, arose out of a complaint that the Claimant was required to work in departments other than her own in order to clear backlogs of work and in particular in the Trauma and Orthopaedics Department from July 2008. The Claimant complained on a number of occasions, and most recently in May 2011, that her colleague Joanna Webb only moved once and had a lesser workload. Ms Webb was named as a comparator for the purposes of this complaint. The particular issue was recited by the Tribunal in its Reasons at paragraph 1 on page 2 of our bundle in exactly the same terms as after the Pre-Hearing Review. When the Tribunal came to deal with it in their judgment at paragraph 47 on our page 11, they said this:

> **"We have come to the following conclusions. We reject the allegation that the Claimant was over-worked because she was required to clear backlogs of work. There is no indication that there was any excessive demands made of the Claimant. As a result of it being discovered that she was not producing at the target speed she was given assistance by being provided with a lower target rate. In our view, she was being treated more leniently than her colleagues who were required to achieve the target rate. We could not see that there was any indication that the Claimant was either being harassed on the grounds of her race in having her work rate investigated given her low level of performance."**

5. As well as that particular claim, all the Claimant's other claims were rejected. It was found that the dismissal was fair and that it was not based on racial discrimination, and at the end of the judgment the Employment Tribunal said that the claims were misconceived and ordered the Claimant to pay costs of £1,500.

6. The appeal to this Tribunal was allowed to proceed after a rule 3(10) hearing on two grounds: first, that the Tribunal had failed to deal properly and fully with the issue identified in relation to being required to work in other departments; and secondly, on the question of costs.

Failure to deal with an issue

7. So far as the issue that was not dealt with fully is concerned, information was sought by the EAT from the Employment Judge in relation to this, and the Employment Judge replied in a document that is in our bundle at pages 57 and 58. In summary, the Tribunal Judge said that no evidence at all had been given about the comparator, Ms Webb, and that nothing had been said of substance about being moved around different departments by the Claimant but that at the end of Mr Couzens' evidence Mr Ohringer, who represented the Respondents, was granted permission to put the allegations to him, and Mr Couzens had answered to the effect that there never was any discrimination and that Joanna Webb moved as often as the Claimant.

8. Ms Graham accepted today that she did not give evidence about Ms Webb and that she did not really highlight the point about being moved around from department to department at the Employment Tribunal. She said that she was more concerned about what happened in the run-up to her dismissal, when she was working in the Trauma and Orthopaedic Department and that this is what she had concentrated on before the Employment Tribunal.

9. It seems to us that the appeal on this point must be rejected; if there was no evidence put before the Employment Tribunal to support the Claimant's case on it, it inevitably follows that it should have been dismissed. In so far as is necessary, this Tribunal therefore exercises its powers under section 35(1)(a) of the **Employment Tribunals Act 1996** and records formally the decision that this particular complaint is rejected. We note that the Claimant herself did not really pursue this point with any enthusiasm at this appeal, and we have the impression that it was really what I would describe as a "pure ELAAS point", so we do not have any difficulty with rejecting that ground of appeal.

Costs

10. That brings us to something of more substance, namely the costs appeal. The Tribunal's reasons for awarding costs against the Claimant are at paragraphs 63-69 of their judgment, pages 13 and 14. Before looking at the reasons in any detail, we remind ourselves that an appeal on costs, like any other appeal in this Tribunal, can only succeed on the basis of an error of law. That, in relation to costs, would include taking into account something irrelevant or something that is clearly wrong in the exercise of the discretion. The Employment Tribunal's power to award costs is familiar to practitioners. If proceedings are misconceived, i.e. have no reasonable prospect of success, and the Employment Tribunal considers it appropriate to do so, they can make an order for costs. They can specify the sum, as long as it is under £20,000, and they can, if they see fit, have regard to the payer's ability to pay when they come to decide whether to make an order and what the sum should be.

11. In this case the Employment Tribunal found in the first sentence of paragraph 63 of their Reasons that the "application" stood no reasonable prospect of success, i.e. that it was misconceived. We assume that when they say the "application" they mean everything that was left of the various claims that had to be dealt with at the hearing. That conclusion is a judgment made by the Employment Tribunal in retrospect, of course, having heard all the evidence. We see no reason to doubt it as a conclusion, but the mere fact that a claim was misconceived does not result in a costs order by itself. The Tribunal had to go on and decide that a costs order is appropriate as a matter of discretion.

12. As we read paragraphs 63 and 64, they record the main reasons for the decision of the Tribunal that a costs order was appropriate in this case, and what they appear to be saying is that the Claimant knew or ought to have known that her case was misconceived or hopeless and

that it is therefore appropriate that she should now pay costs. We have some concerns about both the reasons put forward in paragraphs 63 and 64, which we will record.

13. So far as paragraph 63 is concerned, it says this:

> **"The Claimant could have, but chose not, to investigate whether a woman of her own ethnicity that she was proposing to call on a witness order agreed with her assertions that the Claimant had been discriminated against on the grounds of race. We find that omission to be surprising because it was entirely foreseeable that the Respondents in cross-examination would ask a witness, called by the Claimant of the same ethnicity of the Claimant, as to whether or not she had observed there to be any racism within the organisation."**

We should refer at this point to paragraph 59 of the judgment, where the Tribunal dealt with the witness that they are referring to, who was a Ms Maureen Williamson. The Tribunal said this about Ms Williamson:

> **"Finally, we ought to mention the two witnesses that were called on witness orders. The Claimant obviously considered that their evidence would assist us and it did. The first was Ms Maureen Williamson. She described her ethnicity as being black British Caribbean, the same as we understand the Claimant describes herself. When she was cross-examined, she indicated that the workplace that she and the Claimant had worked in was a massive open office. There were times when she had walked across the office and seen the Claimant was happily talking to other people. When asked about racism she said: 'I have not see [sic] anything of racism, not heard anything, not been told anything about racism'. We found that evidence helpful in corroborating the conclusions we had reached."**

14. The Claimant told us this morning that she had called Ms Williamson because she, Ms Williamson, had been given the job of managing her for a period some time before her dismissal and that the purpose of calling Ms Williamson was to show that she, the Claimant, was a good, hard-working medical secretary. Ms Williamson happened to be black, but the Claimant did not call her in relation to any racism claim, and indeed she worked in a different department, she being the manager of the clinical receptionists and not part of the Trauma and Orthopaedics Department. The question about racism was in fact asked by the Tribunal themselves. Mr Ohringer accepted, we think, that it was not entirely appropriate for the Tribunal to have themselves started asking the witness questions along these lines just because

she was black, and we do not think that the Employment Tribunal are right to say that it was incumbent on the Claimant to seek the views of a witness from a different department in relation to something she was not called to give evidence about in order to test the strength of her, the Claimant's, own case that she had been discriminated against on grounds of race.

15. That brings us to paragraph 64, where the Tribunal said this:

> **"Secondly, it is misconceived because it proceeds on the basis of there being no responsibility on the part of the Claimant for her work performance being in the region of about 50% of the target that was set by the Respondents for medical secretaries. The Claimant appears to have taken no responsibility for her excessive internet use that correlated with her diminished work performance. It seems to us that this failure to take any responsibility is actually wholly and completely unreasonable."**

The criticism here is that the Claimant failed to take any responsibility for her poor work performance and excessive internet use, which was what led to her dismissal. We are not sure what the relevance of these observations is in the context of the costs application. They seem to us to be a general reflection by the Employment Tribunal on the Claimant's work performance and her attitudes as a person, but we cannot see how they properly relate to the question of whether bringing the claim for unfair dismissal should have been obviously hopeless to the Claimant. If it was right that failure to take responsibility for her poor work performance was a relevant factor, it seems to us that almost any claim for unfair dismissal based on poor work which fails on the facts is going to result in an award of costs.

16. At paragraph 65 the Employment Tribunal record certain evidence given by the Claimant as to her means, which on any basis were modest, though at that stage she was in work as a temporary secretary. At paragraphs 66 and 67 the Tribunal deal with three letters sent by the Respondents in the run-up to the hearing which were marked "without prejudice save as to costs" and which refer to the steadily increasing costs incurred by the Respondents. Those

letters are certainly of some relevance though, I think Mr Ohringer would accept, of marginal relevance.

17. At paragraphs 68 and 69 the Tribunal said this:

> **"68. Mr Ohringer has indicated that his brief fee gathered with his refreshers come to £4,250 plus VAT, that is £5,100. He limits the claim for costs to that amount.**
>
> **69. Having taken into account the Claimant's circumstances and agreeing:**
>
> **(a) that the claim was misconceived, and**
>
> **(b) the Claimant had ignored three letters that would have allowed her to withdraw her claim without incurring the risk of an adverse costs order,**
>
> **we order her to pay costs in the sum of £1,500."**

We can see no justifiable criticism of the reasoning and the award of costs other than the points on paragraphs 63 and 64. Once having decided to make an order, the Employment Tribunal were, in our view, entitled to adopt a broad-brush approach and to award what was a modest amount, at least from the Respondents' point of view, even if the Claimant may not have had an immediate prospect of paying it, and without giving any kind of detailed reasons for how they got to the particular figure in question.

18. That brings us back to paragraphs 63 and 64 and the criticisms we have made in relation to them. We have come to the view, narrowly, that the Employment Tribunal did take into account considerations that were either irrelevant or wrong when they brought these two reasons into play, and we read those two reasons as basically being the justification for the appropriateness of an order for costs. We have therefore reached the view that the order for costs cannot be sustained and must be set aside. Given the relatively small amounts at stake, we are of the firm view that if there is a discretion to be exercised, the proper course would be

for us to exercise it, and if Mr Ohringer wishes to make or renew the application, we will decide whether to make an order for costs.

[Further submissions were heard as to whether a costs order should be made]

19. As explained, we now exercise this discretion afresh. Mr Ohringer has made strong submissions that we should make an award for costs. The Claimant, he says, knew she was at risk of costs, not least because of the three letters. She knew or should have known that her claims were hopeless. She took a gamble, and the weaknesses in her position were drawn to her attention, but she pressed on.

20. We think it is right in this case to make some kind of judgment about her subjective culpability for carrying on. Of course, the claims have been found to have been hopeless, so there is the jurisdiction, but in considering whether it is appropriate to make an order we feel it is right to look at her subjective state of mind. We find that in this case it was subjectively excusable for the Claimant to carry on. We take account in particular the fact that she is self-represented, we take account of the outcome of the case management discussion, and we take account of what we have seen and made of her today, which are all factors we are entitled to take into account. We think she may have produced a better impression with us than she did with the Employment Tribunal, though the Tribunal did not expressly rely on anything related to the way she conducted herself in front of them.

21. We conclude that this particular Claimant in her particular circumstances is not to be found so culpable in carrying on that an order for costs should be made. However, we do not want anyone to get the impression that we are laying down any general proposition that just

because a claim gets through a case management discussion or a Pre-Hearing Review no order for costs can be made or that just because they are self-represented no order can be made, or that a combination of those things means no order can be made. We are not laying down any general principles; we make that very clear.