Appeal No. UKEATPA/1207/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 July 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

DR C OSONNAYA APPELLANT

QUEEN MARY - UNIVERSITY OF LONDON RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	MS NABILA MALLICK (of Counsel) Bar Pro Bono Unit

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

The Employment Judge was entitled to strike out the Claimant's claims for unreasonable conduct, failure to observe the orders of the Tribunal and for stultifying a fair trial.

Observation that a request for a transcript of a judgment upholding an Employment Tribunal judgment made on established principles is an indulgence which must be supported by proper reasons, particularly where there is no application for permission to appeal and the party is represented by a lawyer under a duty to take a note.

HIS HONOUR JUDGE McMULLEN QC

Introduction

1. This case is about the strike-out of discrimination claims. I will refer to the parties as the Claimant and the Respondent. I pre-read a goodly number of the documents, which are extensive in this case. In particular, I re-read the Judgment that I gave in an earlier stage of this litigation (see UKEAT/0225/11) and followed up the allusions I made at the end of the Judgment to the other litigation that the Claimant is conducting. It includes, as between these parties, the sequence of cases and appeals which ended in the Court of Appeal (see **Queen Mary University of London v Osonnaya** [2012] EWCA Civ 1858). I understand the Claimant was refused permission to appeal to the Supreme Court and has now made an application to that Court.

2. Another part of the litigation that is in the bundle of authorities before me today produced by the Claimant's previous adviser is **Osonnaya v South West Essex Primary Care Trust** [2012] UKEAT/0629/11, a Judgment of Langstaff P. The outcome was to remit the case to the same Tribunal to continue the hearing that the Employment Judge had aborted. I am assured today that that hearing has been completed and a Judgment is awaited.

3. This is an appeal by the Claimant in those proceedings against a Judgment of Employment Judge Ferris sitting at a Pre-Hearing Review at East London hearing centre over some nine days, sent with reasons on 18 June 2012 extending over 35 pages. The Claimant represented herself and was represented by her husband, Dr Kingsley Osonnaya (the Claimant continues to the end, and despite my earlier ruling on it, to dispute that depiction). The Respondent throughout had been represented by counsel. The Notice of Appeal, the vehicle for today's hearing, was drafted by Mr Ogilvy, her previous adviser, and today she has the

considerable advantage to be represented by Ms Nabila Mallick of counsel, giving her services for free. She was at a disadvantage in producing some arguments today, for she had not seen some of the material that I have referred to above, but I can assure Dr Osonnaya that she is herself at no disadvantage, for Ms Mallick has put forward every matter that could rationally be put forward. It has to be said that much of this is different from that which is contained in the very substantial Notice of Appeal. In particular, there is an allegation of apparent bias, which is not made in the Notice of Appeal and for which Ms Mallick contends she should have a full hearing. Before deciding whether to allow that amendment I decided to hear her on the point, and I operate on the basis that the point is live.

The issues

4. The essential issue in the case was whether the Judge should accede to an application by the Respondent to strike out the Claimant's claims. The Judge decided on four grounds that the claims should be struck out. These correspond to rule 18, and the Judge concluded the following:

> **"The claims are struck out because:**
>
> **(a) it is no longer possible to have a fair hearing; and**
>
> **(b) the claims have been conducted by or on behalf of the Claimant in ways which are scandalous unreasonable and vexatious; and**
>
> **(c) there has been repeated non-compliance with Orders; and**
>
> **(d) the Claimant has failed actively to pursue the claims."**

5. The tramlines for the PHR had been set by other Employment Judges, and they included the following:

> **"(1) Whether a fair trial is still possible and if not, whether to strike the claim out**

> **(2) In view of the parties' conduct of proceedings whether either party's conduct is such that the claim or response should be struck out in whole or in part having regards to the events leading up to this postponed hearing.**
>
> **(3) Whether the claim is being actively pursued and if not to strike it out.**
>
> **(4) Whether either party should be made liable to pay some or all of the costs of the other."**

6. Because an issue has arisen throughout this as to whether or not the Respondent has been co-operating, the language of paragraph (2) is neutral; in other words, it was part of the remit of Judge Ferris to consider the strike-out in the light of such findings he may make about the Respondent's conduct as well. The Claimant appealed in a substantial Notice of Appeal, which came before HHJ Peter Clark on the sift. He concluded as follows:

> **"The history of this litigation, as set out in detail by the Employment Judge and his findings as to the Claimant's conduct of the proceedings lead me to conclude that this was a proper case to apply the draconic order of a strike-out. The EJ was entitled to apply the dictum of Pill LJ in *Terry v Hoyer*, cited at para. 157 of his reasons."**

7. Dissatisfied with that opinion, the Claimant sought a rule 3 hearing. This was listed before me six weeks ago, but the case was vacated because of illness by the Claimant and directed to come back before me today. I refer to the directions I gave in **Cheema v Kumar** UKEATPA/0258/12 as to how these matters are concluded, and I note that the Court of Appeal has approved both the law and the practice that I set out (see, for example, **Evans v University of Oxford** [2010] EWCA Civ 1240).

The legislation

8. The legislation is not in dispute; it is summarised in the strike-out order above relating to rule 18.

The facts

9. I take a summary of the facts from Ms Mallick:

> **"2. The Claimant was employed by the Respondent from about September 1999 until the termination of her employment on 29th April 2007, when her contract was terminated on grounds of lack of funding. [§3 & 5 ET Judgment]. She was employed initially as a part-time clinical lecturer providing locum maternity leave cover in the Department of General Practice and Primary Care. [§3 ET Judgment].**
>
> **3. The funding for the post was provided in part by an organisation called International Academy for Educational Studies ('IAES') which the Respondent alleges is part of an organisation then run by the Claimant's husband [§4 ET Judgment].**
>
> **4. During the course of her employment, issues had arisen. In 2003, it was alleged that the Claimant did not have a PHD and she was requested to provide formal confirmation of the PHD which she claimed had been awarded by Bucharest University in 1992. [§6 ET Judgment].**
>
> **5. In March 2007, a fellow academic alleged that the Claimant was guilty of serious and extensive plagiarism and academic fraud in her academic publications. [§6 ET Judgment]**
>
> **6. In October 2006 the Claimant entered her first grievance against her employer complaining of allegations which had been made against her: a second grievance was entered in April 2007 [§8 ET Judgment]."**

10. The procedural background is set out on a number of occasions by Judges in the ET and the EAT. In short, the Claimant had issued claims in 2007 seeking to allege discrimination on the grounds of sex, race, disability and detriment having made a disclosure in the public interest. Very substantial case management directions were given over the course of the ensuing years, leading, of course, to an appeal before me, which I have cited, and subsequent steps so that the PHR which eventually began to take place on 7 February 2012 was the organisation of the Claimant's claim made years earlier.

11. The Judge decided that the Claimant's claims should all be struck out for the several reasons that he gave. The first was that a fair trial is not possible. That is a self-contained rule, but it is also a matter that must be considered when looking at the other rules. Here, the Judge made findings that the Claimant had deliberately and persistently failed to co-operate with the Respondent in preparing for the hearings and that it was unlikely she would co-operate honestly in the future, for she had wilfully ignored various matters. The passage of time was relevant in

this consideration, because the Claimant was introducing documents said to be grievances from 2003 which the Respondent contended were fabricated.

12. On the Respondent's contention that it had spent a lot of money and time trying to respond to these allegations, the Judge bore in mind that the Claimant was a litigant in person (see paragraph 160) and that the Respondent would have very serious difficulty meeting these claims, for not only were there funding matters. In my judgment, the more important issue is the difficulty envisaged by the Judge in paragraph 162: how can the Respondent be expected to defend allegations about correspondence and other documents said to have been in existence up to nine years ago and which the Respondent believes are a fabrication?

13. The Judge also considered the Claimant's conduct, which he criticised as being dishonest. The Judge set out his reasons for finding that she had lied; one has been drawn to my attention in particular, which is about the delivery of bundles. Another is correspondence that is written after the date that appears on the document. Those are matters of fact for the Judge to appreciate. He gave cogent reasoning for his finding about the Claimant lying about the delivery and about the post-dating of documents. He held that there was wilful conduct and there would be future misconduct of the same nature. It was proportionate, notwithstanding the claims were for discrimination, to strike them out.

14. The second basis was that the Claimant had unreasonably conducted herself and not complied with orders of the Tribunal and did not actively pursue the claims. The Judge gave many examples fitting all of those headings (see paragraph 167 and following). The Judge acknowledged that perfect efficiency is not required, particularly of a litigant in person and one who is disabled or ill. But what he found here was deliberate misconduct by the Claimant.

15. The Judge also paid attention to the impact of this case on the administration of justice in the East London Tribunal and set out a very instructive bird's eye view of the problems facing an Employment Tribunal district when a very substantial case is taken out of the list and where parties are not complying with orders leading up to it. The Judge does devote a lot of time to that, but in my judgment that is a secondary matter. There will be disruption, but the Judge is entitled to take account of the queue of people waiting for their cases to be determined. The disproportionate allocation of resources to a litigant who does not comply is a relevant factor. The Judge noted from his experience that cases in the Employment Tribunal in comparison to other parts of the justice system attract a higher proportion of persons who litigate extensively.

16. The Judge came to a conclusion based on the facts. Two particular issues have been drawn to my attention about the Judge's conduct. It is contended, in what is proposed to be an amended ground 1, that the Judge should have recused himself for he gave the appearance of bias. Applications for an adjournment, that is to say a recusal of the Judge either permanently or temporarily, were made by the Claimant from the outset. The basis was that a complaint had been made about Judge Ferris to the Regional Employment Judge, and it was said that while this was outstanding Judge Ferris should not judge the case. I note that this appeared to be a complaint made by the Claimant from the outset but not a word of it appears in the Notice of Appeal. Nevertheless, it is sought to amend to include this.

17. In my judgment, this aspect of the case cannot get off the ground. I drew to Ms Mallick's attention the primary authority on this subject, which is **Ansar v Lloyd's TSB Bank PLC** UKEAT/0609/05. In that case on a preliminary hearing I set out what I thought was the law on recusal. Burton P, as he then was, heard the case on a full hearing and adopted what I had said,

although he departed and disagreed with an approach I had taken in another case and disagreed with an approach taken by Cox J in a further case, which I had followed. This case then went to the Court of Appeal, which set out the directions on the law applied in the EAT: [2007] IRLR 211.

18. The Tribunal must be robust in the face of applications for recusal. The Judge has set out the difficulty facing him. Ms Mallick, I think unfairly, criticises the Judge for failing to take control of his own courtroom, but the Judgment itself is full of examples of practical problems facing this Judge from the conduct of the Claimant and her representative, her husband – indeed, he had to be barred from the Tribunal for a while. It is not surprising to me that in the light of the difficulty presented to the Judge and his response to it, the Claimant should feel a sense of injustice. However, more is required than a sense of injustice, because, as Moses LJ said in the Judgment I cited at the beginning of this at paragraph 12, that is not enough. Elias LJ, giving permission in that case, said it was, but this was distanced by Moses LJ (see paragraph 12). The new argument, therefore, that the Judge should have recused himself because of the complaint is without substance. The law does not require a Judge in the face of a party behaving in the way that this one did to recuse himself.

19. I then turn to the second aspect, which was that there were specific complaints about his conduct of the case. I refer to Rimer LJ upholding my rejection of an appeal on grounds of bias by an Employment Judge in **Kennaugh v Lloyd Jones** [2013] EWCA Civ 1

> **"17. The applicant also informed me that he regarded the employment tribunal has having been biased against him. That was, as I followed it, apparently because the tribunal generally preferred the respondent's evidence to his.**
>
> **18. Assertions by self-represented litigants of judicial bias are tediously common. They are rarely founded on anything that might be said to amount to supportive evidence. In this case, no evidence has been put before the court of any judicial bias by anyone; there is merely a**

complaint that the proceedings did not go the applicant's way. With respect, his assertions of bias should not have been made."

20. It is yet again disappointing to me that appellants in this court have not read, or not paid attention to, the warnings I gave against unfounded bias allegations against the judiciary in **Whyte v Lewisham** UKEAT/0256/12.

21. One complaint is to do with his finding that the Claimant appeared to be dissembling as to her loss of eyesight – she is registered blind. The Judge made a clear finding on his appreciation of what was going on that the Claimant could read, to the extent that she interrupted her husband's cross-examination of a witness and documents were read. In my judgment, this did not form part of the Judge's reasons for the strike-out. It may have affected his view of her credibility, but there was much more to her credibility than this simple finding about glasses and her ability to read.

22. The second matter specifically raised in this application to amend is to do with the delivery of the documents. Again, the Judge made sound findings sufficient to enable him to come to the conclusion that the documents were not being produced in the way the Claimant said they were. So, I will not allow the amendment, but if I were to allow it, then I would hold it had no reasonable prospect, and I will not activate the procedure in Practice Direction paragraph 11 to seek the Judge's comments about this. There is no prospect of the Claimant being able to persuade a judge of this court applying **Porter v Magill** [2002] 2 AC 357, 494 at para 103 per Lord Hope, that Employment Judge Ferris was biased or appeared to be so.

23. Indeed, I invited Ms Mallick to consider the Judgment I gave on the last occasion when this case was before me and pointed out that I was asked to decide as to the credibility of

Dr Osonnaya. She wanted to introduce a document that had not been before the Employment Tribunal and which therefore had in this court to pass the **Ladd v Marshall** [1954] 1 WLR 1489 test of being apparently credible. I accepted the submission of the Respondent that it failed that test. It was, I held, an example, of which Judge Ferris has found many, of the Claimant producing a document either backdated or that did not exist. I refused permission for that document to be adduced, holding that it was not apparently credible. This is not the principal reason why I reject this application today, but it is noteworthy that Judge Ferris, in a much more systematic way and over much more material, has formed the conclusion that I myself formed when she was represented by counsel before me last.

24. I then turn to the two grounds that Ms Mallick says she does not need permission to advance by way of amendment because they are in the original Notice of Appeal. The second ground begins unpromisingly; it is headed "Decision at variance with the facts". A number of examples are given. This together with what is said to be a perversity ground, form now ground 3.

25. There is a very high hurdle for a successful Claimant to mount (see **Yeboah v Crofton** [2002] IRLR 634). The Judge went through all of the matters with great care. Simply saying that the decision is at variance with the facts is to raise a question of fact and not a question of law. It does not reach the standard of a question of law unless it is perverse. I have considered the grounds set out in the Notice of Appeal and do not see that any of them constitutes a fact sufficient to mount the hurdle of an overwhelming case set by Mummery LJ in **Yeboah**. The Judge was aware that he was striking out discrimination claims and how rare that is and was aware of the high standard required: **Anyanwu v South Bank Students Union** [2011] UKHL 14. In the Notice of Appeal there is reference to **Anyanwu** about the high public interest set

out by Lord Steyn in his speech (at para 24). That of course is instructive, but one must read on in that speech and in the speech of Lord Hope (para 39), because it is clear that in a plain case, strike-out is there and should be used even in a discrimination case.

Conclusion

26. In my judgment, the Judge was right to strike out the case. That is not a decision I need to make. It is sufficient for me to say that on the material presented to him he considered correct directions on the law and made a judgment that was open to him, but I do say the judgment was unarguably correct.

27. I would like to thank Ms Mallick for her attendance today and for her very succinct and clear arguments. The application is dismissed and with it the underlying appeal.

Postscript

28. This transcript is produced at the renewed request of the Claimant. The Practice Direction provides for that without charge. But I did point out that her husband and her counsel had made notes of the oral judgment (in accordance with a legal representative's duty), no application had been made for permission to appeal, and there is substantial public cost and judicial time in producing a judgment. This judgment simply upholds that of a judge below, made according to established principles. It is a waste of money to dedicate more expense to record in full yet again another of the wholly unsuccessful strands of the Claimant's diffuse litigation. Given the austerity, I make clear that proper reasons must be given in my court for this indulgence to be exercised.