

Appeal No. UKEAT/0111/13/RN

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

At the Tribunal
On 22 July 2013
Judgment handed down on 6 August 2013

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MS G ANDREW

APPELLANT

(1) CLEDOR LTD
(2) CLUTTONS LLP

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MS G ANDREW
(The Appellant in Person)

For the First Respondent

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(Representative)
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For the Second Respondent

MR EDWARD CAPEWELL
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SUMMARY

UNFAIR DISMISSAL

The Claimant was ordered to supply particulars of her claim for sex discrimination against both Respondents. When she did so the Respondents maintained that the particulars went beyond the claim as set out in the ET1 and attachment and that she would therefore need leave to amend in order to include the particulars in her claim. The Employment Judge agreed that the particulars went beyond the ET1 and refused leave to amend. The appeal was allowed to proceed solely on whether the EJ was correct in his reading of the ET1. The EAT decided that on a proper reading of the ET1 it contained one particular claim for sex discrimination/harassment which could be pursued, but that the EJ's decision to refuse leave for any amendment adding any other claim would be upheld.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal by the Claimant, Georgia Andrew, against a judgment of Employment Judge Emerton sent to the parties on 29 November 2012 following a pre-hearing review on 15 October 2012 whereby he found among other things that certain particulars provided by the Claimant under an order dated 11 May 2012 amounted to an attempt to widen the scope of the Claimant's sex discrimination claims and required his leave, which he refused. The President of the EAT ordered that the appeal be set down for a full hearing on the sole ground "... whether the Judge correctly exercised discretion in refusing amendment to the claim of sex discrimination on the basis that no act other than dismissal was pleaded in the claimant's ET1."

2. The Claimant represented herself before me as she has throughout the proceedings. Although she is an intelligent and articulate woman she is obviously at a disadvantage in preparing documents and appearing in court; it is clear that she genuinely believes she has been the victim of a grave injustice at the hands of the Respondents. The Respondents are of course professionally represented.

The background

3. The Claimant's employment started on 7 January 2008 with Quintain Ltd, a subsidiary of the Second Respondents, Cluttons LLP. She was Building Manager of a block of flats owned by the Crown Estates and managed by Cluttons. As such she was provided with a flat in the building. On 1 December 2010 the Claimant was, according to her own ET1, "TUPE'd" to the First Respondents, Cledor Ltd, a facilities management company.

4. By a letter dated 28 September 2011 Cluttons instructed Cledor to remove the Claimant from the building on the grounds (they stated) that she was difficult to work with and not

providing an adequate service. That instruction eventually led to her dismissal by Cledor on 7 November 2011.

5. The Claimant started her Employment Tribunal claim on 6 February 2012. Her ET1 and the attached Particulars of Claim are at pages 27 to 44 of the EAT bundle. It is fair to say that the contents of these documents are somewhat diffuse and unclear. However, there is no dispute following the pre-hearing review that she has arguable claims which she is entitled to pursue against Cledor for unfair dismissal and sexually discriminatory dismissal and against Cluttons for sex discrimination in respect of the dismissal. Cledor's case is that Ms Andrew's dismissal was for "some other substantial reason" (namely the instruction that she be removed from the building by Cluttons) and that the dismissal was fair in all the circumstances; they deny that it was an act of sex discrimination. Cluttons deny that their instructions involved any sex discrimination.

6. Given the undoubted lack of lack of clarity as to the scope of the sex discrimination claims Ms Andrew was seeking to pursue it was ordered on 11 May 2012 that the Respondents should send "detailed request[s] for particulars of her claim of sex discrimination" to her within 14 days, that she should respond to them within a further 14 days and that the Respondents should then make any appropriate applications. Both Respondents sent requests which, in effect, sought details of every act or incident relied on as sex discrimination (see pp 83 and 92 of the EAT bundle). The Claimant's responses are at pp 45-54 and 55-77 respectively. The particulars refer to acts and incidents said to amount to sex discrimination taking place between 24 September 2010 to 1 December 2011 in relation to Cluttons and between 16 November 2010 and 5 January 2012 in relation to Cledor.

7. The Respondents maintained at the pre-hearing review before Employment Judge Emerton that the Claimant's particulars in effect raised new claims which were not raised in the ET1 and that, if they were to be maintained, the Claimant required leave to amend. The Judge, rightly in my view, looked in detail at the contents of the ET1. He decided that the only sex discrimination claims raised in it related directly to the dismissal and that the Claimant therefore required leave to amend. Exercising his discretion in accordance with the guidance in the well known Selkent case he decided that it would not be in the interests of justice to allow any such amendment. It followed that Ms Andrew's claims were limited to those I refer to in paragraph 5 above.

The issue on the appeal

8. The central issue on the appeal is whether the Judge was correct in his reading and analysis of the ET1. The position is not made easier by the fact that the body of the ET1 contains several pages of "details of claim" while the attached "Particulars of Claim" appear to repeat much or all of what is in the body of the ET1. Since the Particulars of Claim are easier to read and they appear to be somewhat longer and fuller I have concentrated my attention on them as the Judge appears to have done.

9. The Judge noted that the Particulars of Claim are divided into three sections, headed "Introduction", "Background" and "The Claims". The Introduction refers to the TUPE transfer; it states that the Claimant's role had begun to be diminished even before the transfer and states that after the transfer Cluttons continued to perform functions at the property and to instruct Cledor about the management of staff in the building. It ends with a paragraph explaining that the dismissal resulted from an instruction issued by Cluttons which is the reason for Cluttons being named as a co-Respondent. The final sentence says: "I believe Cledor followed discriminatory instructions from Cluttons".

10. The Background section, which covers pages 36 to 40, is basically a chronological narrative of events from July 2009 up to the dismissal and appeal and it ends with the sentence: “My employer has been trying to evict me from the property and acting in a threatening manner towards me.” The Judge states at paragraph 43 of the judgment that “...although various facts are referred to [in this background section], there are no allegations that any of these matters amount to discrimination.” The Respondents were forced to concede that this was not right. At page 39 of the Particulars there is a section dealing with Nick Regnier of Cledor who became the Claimant’s line manager. It states: “His treatment of me from the outset was discriminatory and his constant micro-management of me led to intimidation and harassment. His actions included treating me differently from my male colleagues ...” There are throughout the Particulars numerous references to Mr Regnier bullying and intimidating the Claimant (see in particular pages 38, 39, 40 (including the reference to eviction), 42 and 44).

11. The Claims section starts by listing what appear to be eight heads of claim including “Unfair Dismissal” and “Instructions to discriminate” but unfortunately it does not then exactly follow that list in the body of the text and in particular there is no sub-heading “Instructions to discriminate” though there is a sub-heading under “Unfair Dismissal” which says “Discriminatory dismissal (Cluttons LLP, Cledor)”. On page 43 there is however a heading “Principal (Cluttons llp) and Agent (Cledor)” under which appear the words “Cledor discriminated against me following the instructions from Cluttons”. Later on that page there are a number of references to “24 hour cover” and it states that Cluttons gave instructions requiring 24 hour cover in the building shortly before the TUPE transfer which led to the Claimant’s position (or role) becoming virtually redundant. Page 44 contains an allegation that a wish to remarket her flat appears to be the motive for Cluttons’ instruction or request to remove her from the building and that it is in Cledor’s financial interest to have temporary staff

providing 24 hour cover rather than the Claimant being employed full-time as a live-in manager. Finally under the heading “Failure in Duty of Care” on page 44 it is said that Cledor through Messrs Regnier and Crofton had failed in their duty of care to the Claimant and instead she had been bullied resulting in stress which led to a breakdown on 18 September 2011 and clinical depression.

12. Standing back from the detail and making due and fair allowance for the Claimant’s disadvantage in representing herself, it seems to me that, on a fair reading of the Particulars of Claim (in particular at pages 39 and 44), she was claiming that she had been subjected to sex discrimination and harassment which did not arise directly out of her dismissal but which did arise out of her (alleged) treatment by Cledor acting through Mr Regnier. In submissions to me she further clarified matters in this regard by stating that Mr Regnier as a man had behaved in a hostile and aggressive way towards her which she did not believe he would have if she had been a man. Not only was the Judge not right in what he said at paragraph 43 of his judgment (as noted above at paragraph 11), but, with respect, I think his reading of the “Claims” section of the Particulars of Claim (as described at paragraph 47 of the judgment) was rather too strict and that he overlooked the complaints about Cledor and Mr Regnier on page 44 of the Particulars of Claim.

13. In her submissions the Claimant also drew my attention to a point about 24 hour cover: her position as I understood it was that Cluttons in requiring 24 hour security cover were making her role as a live-in manager redundant and that in the nature of things such cover was likely to be provided by men rather than women. I am afraid that, even making due allowance, I cannot read the Particulars of Claim as advancing any claim for sex discrimination against Cluttons arising from an instruction about 24 hour cover; although the instruction is referred to a number of times there is nothing to indicate that it was regarded as a “discriminatory request”;

the only such request referred to is Cluttons's request that she should be removed from the building. Nor am I able to see anything else arguably amounting to a claim for sex discrimination in the Particulars of Claim or the ET1.

Disposal

14. It follows from my conclusion at paragraph 12 above that, in my view, the Judge was, to the limited extent there set out, wrong in his construction of the Particulars of Claim and wrong to conclude that no claim for sex discrimination other than one arising directly out of the dismissal was being advanced in it. It follows that to that extent the Claimant did not, as the Judge decided, require leave to amend at all.

15. It further follows from this conclusion that the Claimant was and is entitled to put forward particulars of the treatment referred to in paragraph 12 above but that, in so far as her particulars went beyond that, she did indeed require leave to amend. The Judge's exercise of his discretion whether to grant leave is explained at paragraphs 49 to 56 of his judgment and, on the premise that the Claimant needed leave for *all* the particulars, cannot be faulted. It is clear, however, that my conclusion about the claims being made in the Particulars of Claim significantly alters the picture on amendment because (a) the extent of the amendment and the factual allegations it will introduce is significantly reduced and (b) the likely difference in the length of the full hearing with or without amendment is also significantly less than the Judge anticipated.

16. I have considered whether in those circumstances I ought to remit the question of amendment back to the Judge. I have reached the conclusion that I should not and that the Claimant should be confined to the claims she has made already in the Particulars of Claim. My predominant reasons are, first, that on any view any new claims would only have been

UKEAT/0111/13/RN

introduced long after they had been *prima facie* time-barred and, second, that I was not able, even with the benefit of the Claimant's oral explanations, to see that she has any other viable basis for alleging sex discrimination against either Respondent. This means that the Judge's ruling that the only claim against Cluttons which needs to be resolved is the allegation that the instruction to remove the Claimant from her role at the building was an act of sex discrimination which caused her dismissal, stands.

Future conduct of case

17. Having spent several hours on the case (and a related appeal brought by Ms Andrew which I rejected), it may be helpful if I give some guidance as to how it might proceed from here. In accordance with my conclusion at paragraph 12 about the scope of the pleaded claim I think it would be helpful if the Claimant now set out in a new document details of any specific examples of direct sex discrimination or harassment by Mr Regnier acting on behalf of Cledor on which she relies; I would not expect there to be reference to any specific incident that is not already referred to in the ET1 or the Particulars of Claim or the (effectively disallowed) particulars. She also indicated to me during the hearing that she wishes to claim that the reason for her dismissal was connected with the TUPE transfer and thus potentially automatically unfair under reg 7 of the **TUPE Regs 2006**; I would suggest that, if that is her intention, she sets out in writing exactly how she says the transfer is connected to the dismissal, hopefully by reference only to facts that already feature in the ET1 and the Particulars of Claim.

18. It seems to me there will then need to be another preliminary hearing at which the Judge may want to consider (a) whether any allegations against Cledor based on Mr Regnier's conduct are *prima facie* out of time (it may amount to "conduct extending over a period") and how and when to deal with any question of extending time and (b) whether leave is required to introduce the TUPE point and, if so, whether it should be granted and (c) whether any further

directions are required before a full hearing. I would suggest, and the parties agreed, that on any view the full hearing of the case is likely to take substantially more than two days. I would also observe that it may be difficult fairly to restrict the Claimant's evidence in a way which prevents her telling her full story as outlined in the Particulars of Claim. It is clearly in everyone's interest (not least the Claimant's) that the case is now heard on its merits at the earliest opportunity.