Appeal No. UKEAT/0091/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 October 2013

Before

HIS HONOUR JEFFREY BURKE QC

MR P M SMITH

MR S YEBOAH

MR ANDREW MARTIN JONES — APPELLANT

MISS PHILIPPA OWEN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NICK ROBINSON (of Counsel) Instructed by: Aldridge Brownlee Solicitors Kingsway House 13 Christchurch Road Bournemouth Dorset BH1 3JY
For the Respondent	MISS PHILIPPA OWEN (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE – Appellate jurisdiction/reasons/Burns-Barke

The ET3 raised out of time issues; the Respondent did not attend the hearing; and the Tribunal did not consider those issues at all. They went to jurisdiction and had to be considered. Further, although the Respondent did not attend and there were reasons why the Tribunal would want to keep its reasons short, the reasons did not set out what acts of the Respondent amounted to a fundamental breach of contract so as to justify the Claimant in treating herself as constructively dismissed or what acts were found to have constituted discrimination or harassment sufficiently to enable the parties to know why they had won or lost and were not **Meek**-compliant.

Hence remission for rehearing.

HIS HONOUR JEFFREY BURKE QC

1. By this appeal the Respondent before the Employment Tribunal, Mr Jones, seeks to set aside a judgment of the Tribunal presided over by Employment Judge Cowling sent to the parties on 22 June 2012 after a hearing some two days earlier. By that judgment the Tribunal found that the Respondent had been guilty of sex discrimination and sexual harassment towards the Claimant, Miss Owen, and awarded her compensation of £10,000, that Miss Owen had been unfairly constructively dismissed by the Respondent and awarded her compensation of somewhere in excess of £3,500 and found that there were various sums of money due to Miss Owen which amounted to a figure in the hundreds of pounds. If we understood Mr Robinson correctly, there is no appeal against that part of the judgment, which will therefore stand. Whether that sum has been paid or not we do not know; but we hope, if it has not, that it will be paid very soon.

2. The Employment Tribunal did not give full reasons at the time of the decision; written reasons were sought by Mr Jones and were sent to the parties on 27 September 2012. However, before those reasons were sent out, Mr Jones made an application for a review. He had not been present at the substantive hearing in June; and his application for a review was, at least in part based on his absence from the hearing. It was not his case that he did not know of the date but that there were reasons why he could not attend. The application for a review failed. Mr Jones' Notice of Appeal originally appeared to contain an appeal against the refusal of his application for a review. Whether that appeal was ever put into a separate Notice of Appeal or not, we do not know, and it does not matter. We do know that that appeal did not pass the sift stage of the Employment Appeal Tribunal's procedures and is now dead.

3. Because we have reached the conclusion that this appeal succeeds at least in part and that the Claimant's claim must be remitted to the Employment Tribunal, a conclusion that will greatly disappoint Miss Owen, for reasons to which we shall come, we propose to say as little about the facts as possible. The Claimant by her first ET1 – that is to say, her first claim form – which was received by the Tribunal on either 1 June or 9 June 2011 – different dates appear on different documents within our bundle – claimed that she had been employed by a company called Aliquantum Ltd since June 2009 and that her manager and boss was Mr Jones. She described the Respondent to her claim as "Andy Jones Aliquantum Ltd". She also asked that another company, called "REAL People Solutions Ltd", should be an additional Respondent. She subsequently, for reasons not now relevant, put in a duplicate claim. That duplicate claim, once it had been identified as being the same as her original claim, was dismissed; and we say no more about it.

4. In her claim form she set out a history in which serious problems appear to have started in late February 2011 when she, another employee and Mr Jones were at a trade fair in Macau. Mr Jones sent the Claimant home from Macau because, he contends, she was drunk on duty, and when they were back in this country he simply dismissed her, allegedly on the grounds of gross misconduct, without going through any form of disciplinary process whatsoever. She appealed and raised a grievance about her dismissal and other matters relating to her treatment in the workplace. Before the appeal was heard, she was reinstated. The grievance was, to put it in lay language, contracted out by Mr Jones to the company called REAL People Solutions to which we have just referred; and that company purported to consider the grievance and rejected all of it except one matter which Mr Jones admitted. That was that, during the time when he, the Claimant and the other employee were in Macau, he had asked the Claimant to pay money

to a prostitute to provide her services to some third party. It seems that Mr Jones thought that that was some kind of practical joke; but that the Claimant was asked to do that was admitted.

5. The Claimant was not happy that her grievance had been dealt with in that way; nor was she happy about the fact that matters personal to her had been disclosed to a third party – that is to say, REAL People Solutions – in the manner I have described or with other matters which were going on between her and Mr Jones; and she was also unhappy that monies due to her were not paid; and she on 18 May 2011 resigned and claimed in her ET1 that she had been constructively unfairly dismissed. She claimed that there was sex discrimination, in particular in the way in which she had been sent home from Macau and then dismissed, whereas the male employee who was there with her and Mr Jones was not treated in the same way.

6. In her ET1 she also complained of what is described as inappropriate discriminatory treatment. Some of what is set out under that heading would fall under the head recognised to those experienced in the discrimination field as sexual harassment, which is of course another form of discrimination; and she made the money claims to which we have already referred. An ET3 was put in in the name of "Aliquantum Gaming Ltd". It was asserted that the Claimant had resigned from employment by that company. It asked that Mr Jones be struck from the record as a Respondent or alternatively that there should be an early case management discussion at the Tribunal to consider the issue of the identity of the correct Respondent. It went on to assert that the Claimant had been guilty of gross misconduct in Macau; her allegations were denied at length; the position of REAL People Solutions was described as that of contractors, to whom Mr Jones, not having an HR function within his organisation, had contracted out the grievance issue; and that there had been a grievance hearing, that the

grievance hearing had resulted in a fair result and that, in effect, the Claimant had nothing to complain about, apart from the prostitute incident to which we have referred.

7. On 5 December 2011 there was a case management discussion held by Employment Judge Grant at the Southampton Employment Tribunal. On that occasion, because they had been named as an additional Respondent by the Claimant, REAL People Solutions (REAL) were represented by a solicitor. Mr Jones did not attend, and nobody was present on behalf of either of the two companies to which we have referred. The Employment Tribunal on that occasion described the history of employment in this way at paragraphs 4-6 of their decision:-:

> **"4. The Claimant was recruited by Mr Andrew Jones who owned and managed the business in which she worked. The Claimant's understanding was that she was employed by Aliquantum Ltd but there is no record of this company's existence at Companies House. It could not have been her employer. The Second Respondent understood that it was instructed by Aliquantum Gaming Ltd. This company was dissolved on 5th October 2010. The position as to the companies referred to is inconclusive and incomplete.**
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> **5. The common denominator in respect of the business, the recruitment of the Claimant and the instructions given to the Second Respondent is Mr Andrew Martin Jones who owns and manages the relevant business for which they worked. Therefore the Employment Tribunal concluded that as the Claimant asserted, she was employed by Mr Jones and the name of the First Respondent should be amended accordingly.**
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> **6. Mr Jones has already been named by the Claimant in these proceedings and has received notice of them – because he asked the Second Respondent to assist him in dealing with them. However, the Second Respondent confirmed that it had not notified the First Respondent of this Case Management Discussion and the Employment Tribunal's records confirmed that the notice of this Case Management Discussion had been sent to the Second Respondent notwithstanding that it had come off the record."**

8. The Tribunal also concluded that the second Respondent – REAL – did hold the position that Mr Jones had described and therefore should not be a party to the proceedings; the claims against them were dismissed, and they ceased to have any interest in the case. In the order, which is Schedule B to the document which emerged from that hearing, at paragraph 1 the Employment Tribunal ordered under the hearing "Correction of Respondent's Name" that, "The name of the Respondent be amended to read as above", which plainly means that the

Respondent should henceforth be Mr Jones and not either of the companies to which we have referred, there having been before the Tribunal no record that Aliquantum Ltd ever existed and Aliquantum Gaming Ltd having been dissolved before the trip to Macau took place.

9. There then followed, as had been envisaged by the Employment Tribunal in December 2011, a further case management discussion before Employment Judge Kolenko and members on 19 March 2012. At paragraph A5 of Schedule A which emerged from that case management discussion the Tribunal said, "The Claimant acknowledges it cannot pursue claims against the dissolved companies", it having apparently by this time been discovered that there was an Aliquantum Ltd but that it had also been dissolved. She made clear that her claims were against Mr Jones. It was said that, in the event the Tribunal determined that her employer was one of the dissolved companies, she would allege that Mr Jones was personally liable. That statement by the Tribunal is not an indication that the correct Respondent had not already been identified and that there had not been a determination as to who the employer was, but it was anticipated that at the full hearing Mr Jones might try to say, "Well, I am not liable for this because one of my dissolved companies is", and it would have been pointed out that that was not, if Mr Jones so succeeded in establishing, a guaranteed escape route for him.

10. Other orders were made of a typical nature relating to exchange of documents, witness statements and the rest; and witness statements were exchanged; in our bundles, we have a lengthy and detailed witness statement of the Claimant and a lengthy and detailed witness statement from Mr Jones. It is clear from reading them that there were areas – and substantial areas – of disputed fact in the history of what had gone on between the Claimant and Mr Jones.

11. We can now turn to what happened in June 2012, when the Tribunal had a substantive hearing. As we have already said, Mr Jones did not appear and was not represented. The Claimant gave evidence; and that was the only evidence the Tribunal had. The Tribunal in reasons given by Employment Judge Cowling set out some of the history as to how the Claimant had commenced her employment in July 2009 in the Respondent's business, an online gaming website, how she was the only female employee; what had happened on 27 February in Macau; that she had been sent home with the other male employee on 3 March and had then been dismissed for gross misconduct, appealed against that and was then reinstated, how she had then raised her grievance, how REAL got involved, how she did not thereafter return to work and made the claim that she had been unfairly constructively dismissed. In paragraphs 12-14 the Tribunal addressed the claims of constructive dismissal and sex discrimination and continued to do so through to paragraph 19. We need to set out, so, that they are understood, paragraphs 16-18, which are as follows:

> **"16. In a constructive unfair dismissal claim the onus of proof is on the claimant. Until we are satisfied there has been a dismissal we cannot consider whether the dismissal is fair or unfair. There is a dispute in relation to the dismissal of the claimant. The claimant must show that there was a fundamental breach of contract on the part of the employer, that the claimant left in response to that fundamental breach and not for some other reason and that the claimant did not delay too long after the breach.**
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> **17. The claimant relies on a breach by the respondent of the implied term of mutual trust and confidence. We are satisfied having heard the claimant's evidence on oath that the way in which she was treated, both in the workplace and the way in which her employment was terminated by the respondent without any proper procedure, entitled the claimant to treat those matters as fundamental breaches of contract entitling the claimant to leave and to claim constructive dismissal. The unfair dismissal claim succeeds.**
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> **18. The claims of sex discrimination are brought under two heads namely sexual harassment and sex discrimination. Sexual harassment is defined in the Equality Act 2010. It is unwanted conduct of a sexual nature which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual. We have heard evidence on oath from the claimant. We have read the challenges in the notice of appearance filed by the respondent. We prefer the evidence given on oath by the claimant to the written observations made by the respondent. We have read the transcript produced by the claimant recording the sexist comments made to her by the respondent. We are satisfied that the claim of sexual harassment has been made out by the claimant and that claim succeeds."**

12. The Tribunal then turned to remedies; we do not need to summarise what they there said, having indicated earlier on, in rough terms, what the Tribunal ordered by way of compensation.

13. The appeal is now put forward on behalf of Mr Jones on three bases. The first is that the judgment is deficient in that there are insufficient reasons within it to enable the parties to know in respect of constructive dismissal, sex discrimination and sexual harassment on what basis the Claimant won and Mr Jones lost. The second basis is that there were issues as to jurisdiction arising out of time limits which the Tribunal simply did not consider. The third issue is that the identity of the employer was not dealt with by the Tribunal.

14. We are going to address those three points in reverse order; we are going to take the question of the identity of the Claimant's employer first. The argument of Mr Robinson, on behalf of Mr Jones, is that, in the decision to refuse the application for a review, which was in part based on the question of the identification of the employer, the Employment Judge said that the employer had been found to be Mr Jones by the Employment Tribunal at the CMD in March 2012. Mr Robinson pointed out that the Employment Tribunal did not appear to have made any such decision on that occasion. Leaving aside any question that may arise as to the extent to which one can examine for appellate purposes what is said in the judgment on the basis of what has been subsequently said by the Tribunal in a review decision, the point that Mr Robinson takes is technically correct; we agree that there was no decision as to who was the employer at the CMD or following the CMD on 19 March, but there was good reason for that, for, as we have already described, the employer had been identified and the name of the Respondent changed accordingly at the CMD in December 2011. At paragraph 5 of Schedule A which emerged in that hearing – and we do not apologise for repeating it – these words appear:

> **"Therefore, the Employment Tribunal concluded that, as the Claimant asserted, she was employed by Mr Jones, and the name of the first Respondent should be amended accordingly."**

15. It is not suggested that the Tribunal did not have power to make such a decision at that stage; and when we put to Mr Robinson that paragraph, together with the words of the first paragraph of the order in Schedule B to what emerged from that CMD, Mr Robinson accepted that he could not pursue this part of his appeal, and he took it no further. In our judgment, it is clear that, whatever happened on 19 March, the CMD in December decided who was the Claimant's employer; whether that means that Mr Jones was the employer before Aliquantum Gaming Ltd was dissolved some months earlier or not is not necessary to decide. The employer was determined, and that ground of appeal must fail.

16. We turn next, then, to the question of jurisdiction. Mr Robinson's point here is that there were complaints made by the Claimant of events which had taken place more than three months before the first of her ET1s was presented, either on 1 or 9 June 2011 (we do not for present purposes have to decide, and do not intend to decide, which of those dates is correct). The prostitute incident occurred on either 27 or 28 February; and, although Mr Robinson in his skeleton argument and submissions put that forward prominently, it is clear from what we have been told that Miss Owen's complaint of sexual harassment went back well before 1 March 2011 and indeed before the trip to Macau. She has shown us a printout of communications passing between her and Mr Jones through Skype starting on 17 June 2010 and, in the extract we have, going up to late January 2011, in which there would appear to be comments made by Mr Jones that could be taken – we do not want to put this any higher at this stage – as amounting to sexual harassment. If the Skype material ended at the end of January 2011, all of it would have been well before three months before the presentation of the

ET1. Miss Owen tells us that there is much more that went on after that time, as to which we make no comment; all we need to say is that it is clear that a great deal of material on which Miss Owen relied before the Tribunal pre-dated the date which was three months prior to the presentation of the ET1, and the same can be seen from reading her witness statement.

17. In the ET3 the point had been taken that some of the complaints, at least, were outside the primary time limit; but the Tribunal appears not to have considered any issue of time limits at all. If they had, they might well have come to the conclusion that acts within the time limit were part of or the end of a series of acts which went back before the time limit. They might have found that, in the circumstances of this case, it would have been just and equitable to have extended the time limit; but the difficulty is that the Tribunal did not consider time limits and therefore the routes around the primary 3-month time limit which might have been available to the Claimant were not considered at all. Of course, there were matters which she put forward in relation to constructive dismissal and sexual discrimination/harassment which came within the three-month time limit, if the Tribunal had concluded that some of the matters of which Miss Owen complained fell outside the three-month time limit they might either on the basis of a series of events argument or on the basis of the just and equitable extension concluded that those matters should be considered by the Tribunal. It is at least in theory possible that they might have reached a different result. We do not take the view that the ultimate result is so clear that it would be proper for us to say that, had the Tribunal considered the time limit issue they would inevitably have come to a conclusion in Miss Owen's favour, highly probable though that might have been; and therefore our conclusion necessarily is that to that extent Miss Owen's claim will need to be remitted to the Tribunal for reconsideration. That Mr Jones did not attend the hearing or send a representative did not absolve the Tribunal from considering time issues, which went to jurisdiction.

18. However, the problems do not end there. The third issue, the first as raised by Mr Robinson, is that the Tribunal's reasons for finding as they did on discrimination, harassment and constructive unfair dismissal simply are not sufficient to enable the parties to know what findings of fact the Tribunal made which constituted constructive dismissal on the one hand and sex discrimination and harassment on the other; and with extreme reluctance we have to agree with that proposition. It is, as we have already said, very plain from the witness statements and from the pleadings that there were many, many factual issues. Mr Jones did not turn up at the hearing in June, having also failed to attend both case management discussions. The Tribunal may have had, and obviously did have, little hesitation in accepting the Claimant's evidence, and in a situation in which Mr Jones was not present and was not represented, as part of a pattern of conduct throughout the proceedings, it is easy to see why the Tribunal thought that it was not necessary to make detailed findings of fact and was not necessary to go into enormous particularity as to the history which they found proved. We would agree with that; and we can understand why, in the circumstances a hard-pressed and overworked Employment Judge, as most Employment Judges are, would have wanted to have made his reasons as brief and as brisk as he could.

19. However, on this occasion, we regret to say that the Employment Judge, perhaps for wholly understandable reasons, did not go far enough. It is not possible to tell from the paragraphs we have set out earlier in this judgment – paragraphs 16-18 – what acts of the Respondent were found to constitute the constructive unfair dismissal or the fundamental breaches of contract on which the Claimant was relying. It is not possible to tell what were the acts of discrimination and what were the acts of harassment which the Tribunal found to have occurred. It would, it seems harsh to say, not have been difficult for the Tribunal concisely to

have set out what their findings were. Alas, they did not do so and have produced a judgment that does not meet the standards that are so familiar and were set out authoritatively in the Court of Appeal's decision in **Meek v City of Birmingham District Council** [1987] IRLR 250 and did not comply with rule 30(6) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations**. Therefore, for that reason too, this case must go back to the Tribunal.

20. The Claimant is entitled to be very distressed by this result. Mr Jones chose – he says that he was driven by other events, and we say nothing about that, but he chose – not only to stay away from the Tribunal but not to send anybody to represent him at the Tribunal; the Claimant believes that he has lied and lied about a number of matters, and he certainly does not seem to have wanted to move away from the opportunity to claim that various companies were responsible for what happened between him and the Claimant when those companies were not in existence or had ceased to be in existence. It is difficult for us to avoid expressing sympathy for the Claimant; we certainly are understanding of what her feelings are going to be. But we, I am afraid, have to apply the law, however hard the result is, and we have decided that we have no alternative but to reach the result we have set out. We therefore propose to allow the appeal and to remit these claims to the Tribunal to be reheard.

21. When we had reached the end of the argument, we asked Mr Robinson whether he was asking us to remit to a newly constituted Tribunal or the same Tribunal. Somewhat to our surprise, Mr Robinson seemed to be taken by surprise by that question. We therefore directed him to the relevant authority, and we shall now ask him to address us on that issue.