Appeal No. UKEAT/0171/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 November 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR C EDWARDS

MR I EZEKIEL

GAINFORD CARE HOMES LTD APPELLANT

(1) MS G TIPPLE
(2) MS M A ROE RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant

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For the Respondents

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SUMMARY

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

Respondent struck-out for intimidating behaviour at the Employment Tribunal; particularly a driving incident outside the building.

Appeal limited to questions of **Meek**-compliance. ET reasons sufficient. Appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

1. An Employment Tribunal sitting at North Shields under the chairmanship of Employment Judge Hesselberth convened on 5 November 2012 to hear the claims of, first, Gemma Tipple and, secondly, Margaret Ann Roe, Claimants, against their former employer, the Respondent, Gainford Care Homes Ltd.

2. What happened on the Tribunal premises and grounds that day was the subject of careful fact-finding by the Tribunal in what we shall call the strike-out Judgment, promulgated with Reasons on 14 November. The Tribunal concluded that Ms Roe had been subjected to intimidation by two representatives of the Respondent, that a fair trial was not possible and the Respondent was debarred from taking part in a subsequent joint liability and remedies hearing into both Claimants' complaints. That hearing took place on 8 November 2012. The Claimants were questioned at some length by the members of the Tribunal. The claims of unfair dismissal and direct discrimination on the grounds of the sexual orientation brought by Ms Tipple was upheld, as were the claims of constructive unfair dismissal and victimisation brought by Ms Roe. The Tribunal then went on to assess compensation by way of remedy in each case. Their second Judgment, following that hearing, was promulgated with Reasons on 27 November.

3. An application to review the strike-out Judgment was dismissed at a hearing for reasons given in the Tribunal's Judgment and Reasons dated 23 July 2013.

4. Against the strike-out Judgment, but not specifically the merits Judgment, this appeal is brought by the Respondent. It was considered on the paper sift by Langstaff P, who concluded that the first five grounds of appeal had no reasonable prospect of success and applied a

rule 3(7) direction to those grounds. An application for an oral hearing under rule 3(10) by the Respondent was later withdrawn.

5. That left only grounds 6 and 7, which the President directed should proceed to this full hearing with both parties present.

6. Ground 6 contends that the Tribunal failed to provide adequate reasons, contrary to the **Meek** principles and/or rule 30(6) of the ET Rules 2004, in failing to address the question as to whether it was proportionate to permit the Respondent to take part in the remedy phase of the combined hearing held on 8 November. Ground 7 alleges that the Tribunal's reasons again fell short of **Meek**-compliance in not addressing the question as to whether some response short of strike-out under rule 18(7)(c) was sufficient and/or proportionate to deal with the Respondent's intimidatory behaviour towards Ms Roe, which the Tribunal characterised as scandalous and/or unreasonable. Reference is made specifically to paragraph 45 of the strike-out Judgment Reasons.

7. The Tribunal read and considered the Judgment of Elias P, as he then was, in **Force One Utilities v Hatfield** [2009] IRLR 45. They identified the three questions posed by Elias P, by reference to **Bolch v Chipman** [2004] IRLR 140 (Burton P presiding), at paragraph 20 of **Force One** (see strike-out Judgment Reasons, paragraph 35).

8. It is plain to us that the Tribunal had in mind the observation of Elias P (paragraph 24) that in **Force One** the Tribunal considered whether the Respondent should be debarred from attending both the liability and remedy hearing. They took account of the submissions of counsel (set out at paragraph 37-39 of their Reasons). At paragraph 45 the Employment Tribunal say this:

> **"The second question is whether the conduct made it impossible to hold a fair trial and the third question, whether there was some response short of barring the wrongdoing party which would be proportionate. These two questions are inter-related.**
>
> **The Tribunal has made its findings as to the effect of the treatment on Ms Roe, who of course is a Claimant in her own right, and a key witness in the case of Miss Tipple. The Tribunal refers to its finding about the effect on Ms Roe, but in summary she was fearful for her safety and a very frightened lady. She expressed reservations about being able to give evidence, and the Tribunal found that she would have the greatest of difficulty in being cross-examined. The Tribunal has concluded that Ms Roe will be unable to manage her fear. This Tribunal recognises that it is an extreme step, a draconian step, to take in striking out the Respondent's response, but it is a consequence brought upon the Respondent by itself. The Tribunal has very carefully considered whether there was some response short of barring the Respondent. It has been suggested by Mr Tinnion that we might invite Mr Imran Khaliq not to attend and not to give evidence. We do not think that this would address the ability to have a fair trial in all the circumstances, and as such a step is not proportionate to deal with the prejudice to the wronged party."**

9. The question for us is whether the reasoning at paragraph 45, in the context of the whole of the Tribunal's Reasons, is **Meek** and/or rule 30(6)-compliant.

10. In advancing the case that it is not, Mr Tinnion's submissions may effectively be summarised in this way. Nowhere in the Reasons, particularly at paragraph 45, does the Tribunal distinguish between the cases of Ms Tipple and Ms Roe and in particular why it was that it was necessary and proportionate to extend the strike-out order to any remedy hearing in Ms Tipple's case at which, he contended, Ms Roe's evidence was not required, although he accepts it was relevant to liability in Ms Tipple's case. Nor, he contends more generally, is there any consideration of case management orders short of a strike-out which would ensure fairness to both parties. He prays in aid the recent Court of Appeal decision in **Duffy v George** [2013] IRLR 883, decided after November 2012 when this Employment Tribunal heard the present case.

11. We are unable to accept those submissions. As Mr Legard points out, Ms Roe's experience as Operations Manager of the Respondent's antipathy to Ms Tipple on grounds of her sexuality was relevant to the latter's claim for compensation for injury to feelings following her discriminatory dismissal. The Tribunal considered and rejected Mr Tinnion's proposal that

Mr Imran Khaliq be barred from giving evidence. . They looked at the proportionality question and determined that only a total strike-out would meet the justice of the case, bearing in mind the intimidatory behaviour of the Respondent, particularly Imran Khaliq's action in driving very close to Ms Roe as she crossed a pedestrian crossing, he driving contrary to the well-publicised one-way system in the grounds, outside the Tribunal building and the effect that action had on her. That the Respondents were struck out was something for which they had only themselves to blame, as the facts found by the Employment Tribunal made clear. Further, we note that at the ensuing merits hearing, in the absence of participation by the Respondents, although their solicitor attended as an observer, the Tribunal adopted an inquisitorial approach, thus ameliorating the effect of the strike-out order on the Respondent.

12. Finally, we think that **Duffy** is a very different case, there having been no strike-out order made or indeed applied for in that case.

13. We are satisfied that this Employment Tribunal sufficiently explained its reasoning for concluding that only a full strike-out order would meet the justice of the case. Accordingly this appeal fails and is dismissed.