Appeal Nos. UKEATPA/1039/12/KN
UKEATPA/2037/12/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 May 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MS K M ATKINS — APPELLANT

CASTAWAYS (MR CHIPPY) LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	MR CHRISTOPHER PEARCE (Representative)

SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

There was no substance in tedious allegations of bias against an Employment Judge. The Employment Tribunal made substantial findings on the facts and on the out of time issues and there was no question of law in the appeal.

HIS HONOUR JUDGE McMULLEN QC

1. This is the second case in my list this morning, and it follows the generic directions I gave, which should be read with this: see **Cheema v Kumar**).

Introduction

2. This is an appeal by the Claimant in those proceedings against a Judgment of a three-person Employment Tribunal chaired by Employment Judge Harper on 8 and 9 May and a review hearing before the same constitution on 2 November 2012. The Claimant made a claim for constructive unfair dismissal and sex discrimination. The Respondent denied the claims. They were principally based upon allegations that the Claimant as a pregnant employee was treated unfavourably because of that condition and a number of other matters led to her resigning.

The issues

3. The issues were defined by the Employment Tribunal under both the **Equality Act 2010** (EqA) and the law relating to unfair dismissal in the **Employment Rights Act 1996** (ERA). No arguments have been addressed to me about the directions given in paragraphs 3-10 under the heading "The Law". The Claimant contended that a risk assessment had not been conducted, which is necessary where an employee is pregnant. When the appeals came in there was a stay so that the Tribunal could consider its findings in relation to time-bar on the risk assessment point. For that reason the Employment Tribunal convened and decided to allow the application for a review but held that the complaint in relation to the risk assessment was out of time, and that even if it were in time, there had been a risk assessment.

4. It is fair to say that a major criticism of the Claimant, represented there and here by her partner Mr Pearce, was that the leading actors, the Flowers, had given incorrect evidence in relation to the involvement of the local authority in a risk assessment. That matter was fully canvassed before the Employment Tribunal. It heard evidence from Mr Flower pursuant to a new witness statement for the purposes of the review and decided that he had made a mistake – an honest mistake – in considering that the risk assessment that was being conducted was by the local authority, whereas it was by a private-sector organisation called Work Boost. An explanation was given by Mr Flower to the Tribunal and the Tribunal upheld it, and there is nothing more on the risk assessment point, it seems to me. There was no reason why a claim could not have been made under the specific parts of the EqA and the ERA in respect of that.

5. As to the substance of the claims, these have gone now through a number of filters. First, in this court there was the rejection under rule 3 by HHJ Birtles, who said the following:

> **"The Notice of Appeal received at the EAT on 2/7/12 is an attempt to reargue the case again. The EAT can *only* consider an appeal on a point of law. The grounds of appeal raise no error of law. The ET reasons are thorough and reject the credibility of the Claimant.**
>
> **It preferred the evidence of the Respondents. It gave full reasons for doing so. That is its function.**
>
> **The Review Judgment and reasons does not alter the situation."**

6. That was reinforced when the Claimant, dissatisfied with Judge Birtles' opinion, came back to the EAT on the papers under rule 3(8), where the matter was dealt with by Langstaff P, and he formed the same view about this being essentially a factual matter.

7. The position now is that there has been case management, a two-day ET hearing, a two-day review hearing, an order by the EAT for a stay, orders by two appeal Judges here and a

complaint to the Regional Employment Judge about the conduct of Employment Judge Harper; and so I am the seventh judge to consider this matter.

8. At the outset of today's hearing I indicated to Mr Pearce, since he is not experienced in these matters, that I had read the material and he could add whatever he liked to it orally. He asked if I had any questions, and I did; it seemed to me that there was not an attack on the out of time jurisdiction point taken against the Claimant about matters that occurred before she went on maternity leave on 31 October 2010. Mr Pearce agreed that that was the case. In my judgment, there can be no challenge to the finding by the Tribunal that she was out of time.

9. It is suggested today – and this is the first time I have seen it in the papers – that there was what I pointed out to Mr Pearce is known as a continuing act linking the period prior to maternity leave and after it. But that does not seem to have been argued. In any event, the Tribunal found that it was out of time and that it was not just and equitable to extend time, for, among other reasons, she had put her case in July 2010 to a firm of solicitors and they had done nothing about it because the Claimant was dissatisfied with the matters that were to go in the letter of complaint to her employer. Lest it be wrong on the finding of time, the Employment Tribunal decided that there was nothing unfavourable about the treatment she received prior to that date, and the Tribunal is very critical of the Claimant in the presentation of her evidence and of Mr Pearce's representation on her behalf.

10. There is no doubt that the temperature was turned up very high in this Employment Tribunal. However, here we are in London looking at the matter dispassionately, and I am simply looking at questions of law. There is no question of law arising out of the time point.

11. After that there are issues to do with the Claimant returning to work and seeking flexible working. The Tribunal found that she had gone back to solicitors in 2011 and eventually a claim was presented to the Employment Tribunal on 14 November 2011. The issue before the Tribunal was whether there was a fundamental breach of contract. The Tribunal found that this was not established, applying the relevant law as it set out in paragraph 38. The Tribunal found that the Claimant had already been offered alternative work by Harvester Restaurant (she was a waitress at the Respondent), some days before she resigned and it was on the basis of working 20 hours when, it will be recalled, her complaint was that she wanted to work only 16 hours.

12. In my judgment, no error of law has occurred in this case. The Tribunal set out its findings of fact, did not accept the Claimant's account in many places in her evidence and found that the evidence of the Respondent through principally the Flowers, was to be preferred. That does not give rise to a question of law; that is what Tribunals are there to do, to make findings of fact.

13. In order to avoid that conclusion, Mr Pearce contends that he did not have a fair hearing and he cites EJ Harper, indeed, he has made a complaint about Judge Harper. The basis upon which this is put forward is that the Judge appears to have conducted the proceedings, which is of course is correct. But he contends that this was a disgrace to what can be called a fair trial and he criticises the way in which Judge Harper conducted the proceedings, by for example, what appears to me to be elementary case management at the opening of the case. It is contended that before any evidence was given the judge was talking about documents. There is

also a complaint that employment particulars were not provided but this does not arise since no award was made.

14. In my judgment, this is a wholly unsubstantiated complaint about the conduct of an Employment Judge. 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."**

15. 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. On the material presented to me there is no reasonable prospect that a hearing at first instance before a division of the EAT into the allegations of as it is put, actual bias, would succeed.

16. The plain facts of this matter are these. The Claimant having been a good worker and enjoyed working for the Respondent for a number of years, and was treated as though she was a daughter, found that things were going wrong and the relationship soured, and upon that basis attempts were made to contend that it was because she was pregnant. The Tribunal found that Mrs Flower was pleased about that and that it was for a number of other reasons. This is a falling out between people who worked very closely and it is sad to see it happen, but there has been two full hearings of this matter now before a three person tribunal; at an Employment

Tribunal and a number of, now three exercises by judges in this court, there is nothing in these claims to take to a full hearing. The Claimant and Mr Pearce will disagree and continue to disagree but the evidence of the Respondents was preferred to theirs and the Tribunal has given cogent reasons for it. This application is dismissed and with it the underlying appeal.