Appeal No. UKEAT/0185/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 May 2013
Judgment handed down on 13 August 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR B BEYNON

MR J MALLENDER

MRS B PINNOCK — APPELLANT

(1) BIRMINGHAM CITY COUNCIL
(2) THE GOVERNING BODY OF WATTVILLE PRIMARY SCHOOL — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ALISON PINNOCK (Representative)
For the Respondents	MS E CUNNINGHAM (of Counsel) Instructed by: Birmingham City Council Legal Services Ingelby House 11-14 Cannon Street Birmingham B2 5EN

SUMMARY

PRACTICE AND PROCEDURE

Disclosure

Costs

Appeal concerning various issues of disclosure and costs. Appeal allowed in respect of one issue of disclosure and in respect of the Tribunal's approach to the question of ability to pay. Appeal dismissed in all other respects. Application to amend Notice of Appeal refused.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Mrs Brenda Pinnock ("the Claimant") against a judgment of the Employment Tribunal sitting in Birmingham dated 10 October 2012. She had brought proceedings against Birmingham City Council and The Governing Body of Wattville School ("the Respondents") claiming unfair dismissal, disability discrimination and discrimination on the grounds of religion and "whistleblowing" detriment. By its judgment the Tribunal ordered her to pay costs in the sum of £4,050. It is also evident from the Tribunal's reasons that it had rejected an application by the Claimant for disclosure of documents, although this is not in terms recorded in the judgment dated 10 October or any other judgment.

2. The appeal has been expedited by reason of the order of Keith J who dealt with an application under rule 3(10) on 12 April 2013. He identified some points in the Notice of Appeal which in his judgment disclosed reasonable grounds for appealing, and directed a full hearing of those grounds. They may be summarised as follows. Did the Tribunal err in law when refusing disclosure of documents generated by an investigation into malpractice made by the Claimant (see paragraph 6 of his judgment)? Did the Tribunal err in law when refusing disclosure of documents generated by an investigation into an allegation by a former colleague of the Claimant (see paragraph 7 of his judgment)? Did the Tribunal err in law in deciding to award costs against the Claimant or in the way in which it took her means into account (see paragraphs 11 and 12 of his judgment)?

3. In addition Keith J made an order requiring the Employment Tribunal to write to the Appeal Tribunal to clarify two other aspects of disclosure. These have proved not to be controversial: we will explain the position later in this judgment.

4. There has been one important recent development in the case. By judgment dated 7 May the whole claim has now been struck out by the Employment Tribunal because the Claimant was in breach of an "unless order" concerning the exchange of witness statements. Ms Pinnock, the Claimant's daughter who represents her today, sought to amend the Notice of Appeal in this case to appeal against that decision. We explained to her that this was not the correct procedure. If the Claimant wishes to appeal against that decision she should institute an appeal properly in accordance with the **Employment Appeal Tribunal Rules 1993** after which it will be considered and case-managed. It is not appropriate to introduce new grounds relating to a different (and later) decision during the course of a final appeal against an earlier decision. The application for permission to amend is refused.

The background

5. The Claimant was employed as a teaching assistant at Wattville Primary School in Handsworth, Birmingham from 14 October 1985 onwards. It was her case that from 2007 onwards she began to be treated unfairly and in a discriminatory fashion. She raised grievances. She was absent through ill health from August 2008. Her grievances were progressed slowly: whether this was, or was not, the fault of the Claimant is in issue between the parties. There were prolonged exchanges over the question whether she would submit to an occupational health referral.

6. On 17 June 2010 she was suspended. The grounds of her suspension were that she had failed to co-operate and engage with a return to work process, failed to follow reasonable management instructions and caused a breakdown in professional relationships. A disciplinary process took place. On 2 June 2011 she was dismissed with notice, in consequence of which

her employment terminated on 2 September 2011. An internal appeal against dismissal was unsuccessful.

7. The Claimant brought her claim on 1 September 2011. On 1 February 2012 a case management order was made. Disclosure was to take place by 2 April 2012: the ambit was "all relevant documents which are or have been in that party's control including documents on which that party relies and documents which adversely affect that party's case". A bundle was to be agreed by 30 April. The Respondents were to be responsible for producing an agreed bundle by 7 May. Witness statements were to be exchanged by 25 June 2012. The hearing was set to commence on 10 September 2012 for several days.

8. There was slippage in the preparation of the bundle. A bundle was delivered by the Respondents to the Claimant on 10 July. There were by this time disputes about disclosure, two of which are the subject of this appeal. The Respondents' solicitors were not ready to exchange witness statements until 8 August. At this time there were repeated efforts by the Respondent to encourage the Claimant's representative to exchange witness statements. They were unsuccessful: the Claimant's representative took the stance that she was not in a position to do so until outstanding issues of disclosure had been addressed.

9. On 7 September Employment Judge Tucker caused the following letter to be written to the parties:

> **"The parties are to ensure that they are ready for the hearing which is due to commence on Monday. It is <u>not</u> appropriate to make an unless order in respect of witness statements without determining the merits of the disclosure application. However the Claimant is to prepare her witness statement and to exchange it. If necessary, after specific disclosure she may apply for leave to serve an additional statement to address matters arising out of these documents. The disclosure application will be considered at the start of the hearing."**

10. On 10 September, the first day of the hearing, a case management discussion took place. The parties then appeared on 11 September before the Tribunal.

11. The Claimant applied for an order disclosing four categories of document, two of which are the subject of this appeal. This application was refused. As we have said, two of the issues with which this appeal is concerned relate to this refusal.

12. It transpired during the case management discussion that the Claimant's representative had a further lever arch file of documents which she had never disclosed. But, even more fundamentally, there was no witness statement at all for the Claimant. The Claimant's representative asked for a further 3 weeks to prepare it. Further the Claimant's representative, having refused to disclose any statement by the Claimant, had not seen the Respondent's witness statements.

13. The Tribunal considered, contrary to the submissions of the Respondent, that the interests of justice required an adjournment. The Respondent applied for an order against the Claimant for the costs thrown away by the adjournment. This application was granted in the reserved order dated 10 October 2012. This too is the subject of the appeal.

Disclosure (1): Investigation into malpractice

14. During the course of 2011 the Claimant made a complaint of her own, alleging malpractice against eight named individuals who were employees of one or other of the Respondents. Investigation meetings were held in November and December 2011. The outcome was made known by a letter dated 27 January 2012. We have not seen the material concerning this complaint or its outcome but we are told that in broad terms it concerned allegations of a pattern of discriminatory behaviour over a substantial period.

15. The letter dated 27 January 2012 was within the bundle prepared for trial. Other relevant documentation, running to about 33 pages, was also within that bundle. The material disclosed by the Respondents and contained in the bundle included the record of the answer of one interviewee obtained during the course of the investigation.

16. At the hearing on 10 September the Claimant was seeking further disclosure of documents relating to the investigation – specifically, the recorded answers given by other persons interviewed. It is her case that there was a pattern of discriminatory behaviour during her employment and that the answers given by persons interviewed are relevant to that case.

17. The Tribunal rejected this application for the following reasons:

> **"We were told by Mr Livesey that the allegation of malpractice post dated the presentation of this claim and therefore as a matter of law it could not be relevant to the allegations of discrimination in that they post dated the matters complained of and the claimant's dismissal."**

18. In our judgment this reasoning contains an error of law. Documents are not necessarily irrelevant merely because they arise after the event: they may still support the case of one party or the other as to the events in question. There is no principle of law which would render documents irrelevant merely because they post-date the matters of complaint or even dismissal.

19. We would add the following. Ms Cunningham, who appeared for the Respondents, said that Mr Livesey does not recall putting the matter in the way which the Tribunal had recorded. And it is evident that the complaint was made prior to dismissal and related to events prior to dismissal.

20. Ms Cunningham made two submissions to us.

21. Firstly, she submitted that even if the Employment Tribunal erred in law, it reached what was plainly and obviously the right conclusion. At this point, however, we must keep in mind the limited role of the Employment Appeal Tribunal. We do not have the documents which might be placed before the Employment Tribunal on this question: for example, we do not have the Claimant's complaint or the letter of outcome dated 27 January 2012. We are in no position to reach a conclusion on this point. As a matter of principle we ought only to substitute our conclusion for that of the Employment Tribunal where, on a correct application of the law, the result is plain. We are in no position to conclude that the documents in question are plainly irrelevant. The Claimant's complaint in 2011appears to be closely related to issues which she raised in her ET1.

22. Secondly, having taken instructions, Ms Cunningham said that there were either no documents or relatively few documents of the class in question. Ms Pinnock disputes that this is the case. Once again, this is not a matter for the Appeal Tribunal to determine: it is a matter for the Tribunal.

23. If the proceedings below were live we would remit the matter to the Employment Tribunal for reconsideration. The Employment Tribunal would decide whether the Claimant's case for relevance was made out. If the Employment Tribunal ordered disclosure the Respondent would then disclose the material it had and put in evidence to confirm that there was no other relevant material.

24. Since the proceedings below are not live, it is sufficient for us to set aside the Employment Tribunal's decision on this point. If the proceedings should at any stage be re-

instated it will be open to the Claimant to apply again for disclosure, in which case the matter should be decided afresh on correct principles.

Disclosure (2): investigation relating to former colleague

25. The Claimant is in possession of a quantity of documents which have been given to her by a former colleague, Ms Raju, at some time in the past. The documents are listed in a letter dated 6 July 2012: see paragraph 3(b)(ii)-(vi) of that letter. We have not seen those documents but we are told that they concern at least in part a complaint made by Ms Raju about discrimination on the grounds of her Christian faith. The Claimant considers that those documents are relevant to her case, which includes the proposition that there was at the school a pattern of discrimination on the grounds of Christian faith.

26. Although Ms Pinnock told the Respondents about these documents in her letter dated 6 July, and although the Respondents called for their disclosure if the Claimant wished to rely on them (see the Respondent's email dated 23 July 2012) the Claimant did not disclose them. Ms Pinnock told us today that Ms Raju had not authorised the disclosure of the documents for the purposes of tribunal proceedings; and the Claimant was concerned that there might be a breach of confidence or data protection law.

27. Ms Pinnock told us that at the hearings in September she did not apply to the Employment Tribunal for the Respondents to disclose the documents. Rather she sought from the Employment Tribunal permission for the Claimant to disclose the documents. She was concerned, as we have said, about issues of breach of confidentiality or data protection law. Her complaint is that the Employment Tribunal did not address this application.

28. There is a short answer to this point. What Ms Pinnock was seeking was in effect an advisory ruling or permission concerning documents which she and the Claimant had in their possession. It is no part of the function of the Employment Tribunal to give such a ruling. In respect of disclosure the Employment Tribunal has the same powers as the County Court: see section 7(3)(e) of the **Employment Tribunals Act 1996**. The County Court's powers to grant disclosure are to be found in the Civil Procedure Rules (part 31). It is no part of the function of the County Court to give such an advisory ruling or permission.

29. The appeal on this ground therefore must fail. We would only add that the Employment Tribunal recorded Ms Pinnock as making a more ordinary application for disclosure and dealt with the matter on that footing. Ms Pinnock criticised the Tribunal for dealing with the matter in that way and affirmed strongly that to us that the ruling she sought was the one which we have described. It is sufficient for us to say that on appeal we must deal with the submissions which are made to us. For the reasons we have given her submission to us on this point cannot succeed.

Disclosure (3): handwritten notes concerning 1 February 2011

30. This was an issue in respect of which Keith J asked a question of the Employment Tribunal. At the hearing before us it was no longer controversial what course should be taken. If the case becomes live again (i.e. if the striking out order or the refusal to review it is overturned on appeal) the Respondents will file an affidavit confirming what if any handwritten notes of the meeting on 1 February 2011 exist. The Claimant will be entitled to inspect and have copies of any handwritten notes which exist.

Disclosure (4): personnel file

31. This was a further issue in respect of which Keith J asked a question of the Employment Tribunal. Again at the hearing before us it was no longer controversial what course should be taken. If the case becomes live again the Respondent will permit the Claimant and her representative to inspect her personnel files at a mutually convenient date and time. The Claimant may flag with a post-it any documents not already disclosed which she considers to be relevant to the issues in the proceedings. If there is any dispute as to disclosure or inspection of these documents, the Tribunal will resolve it.

32. As we explained to Ms Pinnock, this is a sensible course, quite often taken between litigants, to resolve a question of this kind. The Tribunal could hardly order disclosure or inspection of the whole personnel file when it will stretch back many years and will inevitably contain many documents which are irrelevant to the issues in the case. Voluntary inspection of this kind enables the parties to focus on whether there are any real outstanding issues about documents on those files.

The decision to award costs

33. As Ms Pinnock explained to us, there was some discussion of the question of costs at the case management discussion on the telephone on 10 September. She was aware that an application for costs was to be made at the hearing on 11 September. But she received no advance skeleton argument, bill of costs or the like. The question of costs was then dealt with on 11 September. This, as we shall see, included the giving of some evidence as to means.

34. The Tribunal dealt with the question of costs in paragraphs 28 to 70 of its reasons. In paragraph 30 it set out correctly rule 40 of the Employment Tribunal Rules of Procedure, which it was required to apply. In paragraphs 31 to 39 it set out Mr Livesey's submissions,

interleaving with them some of the history of the proceedings. It is important to note that Mr Livesey was seeking only the costs of his wasted brief fee, one refresher and one further attendance at a case management discussion which would be required – essentially costs caused by the postponement. In paragraphs 40 to 49 it set out Ms Pinnock's submissions.

35. The Tribunal's conclusions begin at paragraph 50 of its reasons. In paragraphs 50-61 it dealt with the question whether an order for costs ought to be made; in paragraphs 62 to 65 with the level of costs and in paragraphs 66 to 70 with ability to pay.

36. As to the question whether an order for costs should be made, the T's conclusions are in paragraphs 58 to 61:

> **"58. In the light of these matters we are satisfied that had the respondent unilaterally provided its witness statements the claimant would not have done so nor was she in a position to do so.**
>
> **59. In our judgment the reason for the postponement was the failure to exchange witness statements and further the claimant's failure to disclose documents (see paragraphs 15 and 17). Further we found that the claimant in any event was in no position to proceed (see paragraph 16) and this was notwithstanding the matters raised by the claimant that we relay at paragraph 57 above.**
>
> **60. We find the failure to exchange was caused by the refusal of the claimant to do so, and that based on the examples we give above of the claimant's refusal to adhere to tribunal orders that even had the respondent provided its witness statements unilaterally to the claimant that that would have had no effect on the hearing. The claimant was not ready to do so notwithstanding any breach by the respondent.**
>
> **61. In our judgment the claimant's refusal to exchange was unreasonable in the circumstances and accordingly in our judgment the claimant has behaved unreasonably in the conducting of the proceedings. It is thus appropriate in our judgment that a costs order should be made in the respondent's favour."**

37. Ms Pinnock made wide-ranging submissions to us on the question whether the Employment Tribunal erred in law in awarding costs. The following were the main themes in those submissions.

38. Firstly, she submitted that it was procedurally irregular for the Tribunal to have heard the application for costs on 11 September. She submitted that it was not a "costs hearing"; that she

did not have advance notice of the case which she had to meet; that she did not have a bill of costs to consider; and it was not fair to address costs on that day.

39. Secondly, she submitted that the Tribunal left out of account an important factor – namely the defaults of the Respondents, who were themselves late in giving disclosure, preparing the bundle and preparing witness statements.

40. Thirdly, she submitted that the Tribunal was wrong to hold that the Claimant should have prepared a witness statement prior to receiving full disclosure. She gave three main reasons for this submission. She said that the additional documents which were expected were of such importance that any statement would have contained many gaps and would have been difficult to prepare. She said that if she disclosed the Claimant's statement the Respondents would be able to alter documents in the light of what the statement said. And she said that if the Claimant then sought to add to her evidence, she would require permission from the Tribunal which, she thought, the Birmingham Tribunal might not be inclined to give.

41. Fourthly, she submitted that the Tribunal misunderstood the position concerning an additional bundle of documents which she had brought to the hearing. The Tribunal evidently thought that they were not ready, whereas they were.

42. Fifthly, she submitted that the Tribunal did not take means into account properly: having decided to take means into account, it was wrong to criticise the Claimant for failing to give more particulars, given that the application had only been listed the previous day and there had been no order requiring the provision of any specific information.

43. The relevant statutory provisions are to be found in the Employment Tribunal Rules of Procedure (Schedule 1 to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**. It is sufficient to cite the following.

44. In rule 38:

> **"(9) No costs order shall be made unless the Secretary has sent notice to the party against whom the order may be made giving him the opportunity to give reasons why the order should not be made. This paragraph shall not be taken to require the Secretary to send notice to that party if the party has been given an opportunity to give reasons orally to the [Employment Judge] or tribunal as to why the order should not be made."**

45. In rule 40, which sets out when a costs order may be made:

> **"(2) A tribunal or [Employment Judge] shall consider making a costs order against a paying party where, in the opinion of the tribunal or [Employment Judge] (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or [Employment Judge] may make a costs order against the paying party if it or he considers it appropriate to do so.**
>
> **(3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived."**

46. In rule 41, which concerns the amount of a costs order:

> **"(2) The tribunal or [Employment Judge] may have regard to the paying party's ability to pay when considering whether it or he shall make a costs order or how much that order should be."**

47. We shall take in turn the main themes which we have identified in the argument of Ms Pinnock.

48. As to procedure, rule 38(9) does not require that a hearing be designated specifically as a "costs hearing" or that written notice necessarily be given of it. Rule 38(9) requires only that the party against whom an order is sought has an opportunity (which no doubt means a fair and reasonable opportunity) to give reasons why an order should not be made.

49. It is not at all unusual for an oral application to be made for a costs order. Where, as here, the order related to the costs of a specific postponement, it is usually in the interests of all parties for the matter to be addressed while the circumstances are fresh in their minds. Generally speaking an oral application will inform the party concerned why the application is being made and in what amount; and usually it will be sufficient to permit the party concerned to reply on the day of the application.

50. In this case Ms Pinnock was aware from the previous day that costs would be an issue at the hearing. We are entirely satisfied that she was in a position to and did reply on the question of an order for costs. She listened to the submissions of the Respondent's counsel and was then afforded a short break before her submissions: see paragraph 40 of the Tribunal's reasons. We have no doubt that the requirements of rule 38(9) were met.

51. In the course of her submissions Ms Pinnock drew to our attention an order dated 10 September 2012 apparently giving directions for a costs application to be heard in the future, providing a timetable for a written application and response by 22 October. The order is signed by Employment Judge Perry but bears no heading connecting it with any particular set of proceedings. Ms Pinnock argued that it was applicable to this case. On behalf of the Respondent it was suggested that the order related to a different case: and the fact that the Claimant is referred to as "he" and "his" tends to bear this out. We think that the order relates to a different case; but even if it relates to this case it was plainly overtaken by events. As we have said, rule 38(9) was sufficiently complied with.

52. As to the defaults of the Respondents, it is plain that the Employment Tribunal accepted that there had been some fault on the part of the Respondents: see paragraphs 31-33 of its

reasons. It was a matter for the Tribunal to evaluate. The Tribunal identified that the real and substantial cause of the postponement was the failure by the Claimant to exchange witness statements. There is no error of law in this conclusion.

53. We have in one respect allowed the appeal as regards disclosure. This does not to our mind call into question the reasoning of the Tribunal on the question of costs. Issues about disclosure arise from time to time. A party is not entitled to ignore orders to prepare and exchange a witness statement merely because there is some outstanding issue as to disclosure. The hearing should proceed. Often an issue as to disclosure is resolved during a case; what does not appear relevant to a Tribunal at the start appears relevant later as the case develops and the Tribunal understands it better. The hearing in September ought to have proceeded and the Tribunal was entirely right to consider whether the postponement was caused by unreasonable conduct on the Claimant's behalf.

54. As to the preparation of a witness statement, in our judgment the Tribunal was plainly correct to say that the Claimant should have been in a position to exchange witness statements. On any possible view the vast majority of the witness statement could and should have been prepared: as Keith J said, all the Claimant needed to do was to set out in her witness statement her account of the facts which are relevant to the issues which the Tribunal had to decide (paragraph 10 of his judgment). Even if Ms Pinnock believed that there should be some further disclosure it was incumbent upon her to comply with the case management order. The Tribunal was in our judgment fully justified in saying that it was the absence of this witness statement which was the real and substantial cause of the adjournment.

55. As to the additional bundle of documents, we do not think there was any material error by the Tribunal. The Tribunal thought that at worst the additional bundle could be disclosed

within a week. What was fatal to the continuation of the hearing was that the Claimant's witness statement had not been prepared at all.

56. This brings us finally to the issue of ability to pay. As to this the Tribunal said:

> **"66. Ms Pinnock raised the matter of *Doyle v North West London Hospitals NHS Trust* UKEAT/0271/11 at the outset of her submissions but made no further reference to the claimant's ability to pay. Despite the Claimant and Ms Pinnock having been put on notice of costs application the previous day and that she wished to raise Doyle no schedule of income, outgoings, assets or liabilities was provided."**

57. The Tribunal went on to record, in paragraphs 67 to 68, what it was told about the Claimant's means. She was not working. Her husband was earning about £18,000 per annum but in poor health and in negotiations to retire early. They had a home with an equity of £70,000 to £80,000. They had approximately £10,000 in savings. However the mortgage was due to end in a year or so with a shortfall in the endowment policy.

58. In its reasons the Tribunal appears to criticise the Claimant for not providing more information. We have referred to the comment about a lack of schedule of means. The Tribunal also commented that no evidence was provided about the state of health of the Claimant's husband or about his attempts to retire or his anticipated pension, or whether it would be possible to take out a loan or further mortgage on the property: see paragraphs 68 and 69.

59. In conclusion the Tribunal said:

> **"70. We have considered the client's [sic] ability to pay as a matter that we can take into account in exercising our discretion as to the level of costs. In our judgment taking into account the level of the claimant's savings, the equity in the house and the financial information she provided. In the absence of full particulars of means evidencing an inability to pay that we consider that the full amount of the costs sought by the respondent should be paid by the claimant."**

60. The tenor of these passages in the Tribunal's reasons is to be critical of the Claimant for not providing full evidence as to her inability to pay. We do not think that is a rational criticism given the very short timescale over which the issue of adjournment arose. The Tribunal appears to have thought it would be helped by a full schedule of income outgoings assets and liabilities, and by information about the pension and health of the Claimant's husband and their ability to raise a mortgage or loan. We do not think it was realistic to expect the Claimant to provide information in this depth in the time available. Speaking for ourselves we are not sure that this level of detail was required in considering a relatively small order for costs. But it is not to our mind a proper approach for the Tribunal to suggest that this level of detail was required and (while saying that it is taking means into account) to criticise the Claimant for failing to provide it in such a short time.

61. We think the basic principles relating to rule 41(2) are well known. A Tribunal is not bound to take ability to pay into account: if it decides not do so (as it may if it thinks that it does not have sufficient information, or if an investigation is required which it cannot realistically undertake) it should briefly explain why. If the Tribunal does take means into account, it should set out succinctly what findings it makes and explain how it has taken those findings into account.

62. We will therefore allow the appeal on the question of costs to the limited extent of remitting the matter to the Tribunal for the Tribunal to reconsider whether to take ability to pay into account and if so how. The Tribunal should give a direction to the Claimant affording the Claimant an opportunity to provide any further information it specifies – which might include the information to which it refers in paragraphs 66 and 68-70. It should then afford both parties an opportunity to make submissions on the question of ability to pay before reaching its judgment.

63. In summary therefore (1) the decision recorded in paragraph 13.2 of the Employment Tribunal's reasons is set aside (so that if the underlying proceedings ever become live again the underlying application may be renewed and determined); (2) the Employment Tribunal's order for costs is set aside solely in respect of its consideration of ability to pay, and that question is remitted for it to re-consider in accordance with this judgment; (3) in all other respects the appeal is dismissed; and (4) the application to amend the Notice of Appeal is refused.