Appeal No. UKEAT/0461/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 October 2013

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR S LANGFORD APPELLANT

BARKING & DAGENHAM PRIMARY CARE TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS CAROL DAVIS (of Counsel) Instructed by: Rawlison Butler 35 High Street Crawley RH10 1DQ
For the Respondent	MS JENNIFER EADY (One of Her Majesty's Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

PRACTICE AND PROCEDURE – Postponement or stay

Whether Employment Judge fell into error, as a matter of case management, in refusing to stay Employment Tribunal proceedings, which were complete subject to a further remedy hearing following remission by EAT, pending the outcome of High Court proceedings between the same parties. Answer; no.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. The problem of cases proceeding between the same parties in different jurisdictions is a common and longstanding one: should one set of proceedings be stayed pending the outcome of the other proceedings? The present case is unusual in my experience, since these Employment Tribunal proceedings in the East London Tribunal are almost at an end and a civil claim by Mr Langford, the Claimant, against his former employer, Barking & Dagenham Primary Care Trust ("the Trust"), now the legacy unit at the Department of Health on behalf of the Secretary of State for Health, the Respondent, has yet to be heard. Nevertheless, the Claimant made an application for a stay of proceedings in the ET on 19 August 2013, which application was refused by Employment Judge Goodman, first on paper and then following an oral hearing by an order with Reasons promulgated on 30 September 2013. It is that order that is the subject of the present appeal by the Claimant.

2. The appeal was initially considered on the paper sift by Langstaff P and rejected under Employment Appeal Tribunal Rules rule 3(7) for reasons given in the EAT's letter of 8 October. I permitted the matter to proceed to a full hearing with both parties present following an Appellant-only oral hearing under rule 3(10). It is that full hearing that is now before me. The Claimant is represented by Ms Carol Davis; Ms Jennifer Eady QC appears on behalf of the Respondent.

Background

3. I begin with the procedural history. The Claimant was employed as chief executive of the Trust until his summary dismissal in July 2011. He presented a complaint of unfair dismissal to the Tribunal on 14 October 2011, making it clear that he was not pursuing a claim

of wrongful dismissal in the Tribunal. The limit on such claims in the Tribunal is £25,000; his eventual claim for wrongful dismissal in the High Court is quantified at just under £700,000. That claim is in two parts, but that is the total sum claimed.

4. The claim was resisted and directions were given at a case management discussion held on 23 February for a final hearing in May to deal with both liability and remedy. In the event, that hearing before Employment Judge Goodman dealt principally with liability. The Judge held that the dismissal was procedurally unfair by a Judgment with Reasons dated 6 July 2012, and went on to find, first, that had a fair procedure been followed the result, dismissal, would have been no different. Applying the so-called **Polkey** principle (**Polkey v A E Dayton Services Ltd** [1987] IRLR 503), she made a nil compensatory award (Reasons, paragraph 112). In the course of that paragraph, she said this:

> **"The evidence […] showed lack of attention to detail which would have added up to a finding of misconduct sufficient to justify dismissal without notice."**

5. At paragraph 113 she turned to the question of the basic award and decided that it would not be just and equitable to make any deduction on account of the Claimant's contributory conduct under section 122(2) of the **Employment Rights Act 1996**. Accordingly, she awarded the Claimant compensation limited to a basic award of £1,800. Against the **Polkey** finding the Claimant appealed to the EAT, and against the contribution finding the Respondent cross-appealed. Both appeal and cross-appeal came before a division on which I sat for an all-parties preliminary hearing. The procedural difficulty that form of hearing gives rise to is adverted to at paragraph 5 of my Judgment. The upshot was that by consent and with the approval of the EAT the hearing was converted to a full hearing and both appeal and cross-appeal were allowed and the **Polkey** and contribution issues referred back for

reconsideration by the same Employment Judge for the reasons given at paragraph 7. We directed that no further evidence could be adduced on those issues, as opposed to evidence relating purely to the question of any revised award.

6. Before the remitted remedy hearing could take place, the Claimant's stay application was made on 19 August. Meanwhile, the Claimant had served Particulars of Claim in the High Court wrongful dismissal proceedings on 3 December 2012, to which the Respondent served a defence on 3 January 2013. It is material to note that at paragraphs 20 and 23 of the defence the Respondent seeks to raise an issue estoppel defence, namely that it is not open to the Claimant to argue in the High Court, among other things, that in light of the Tribunal's findings (see paragraph 112, referred to above) that he was not guilty of gross misconduct entitled the Respondent to summarily dismiss him. A seven-day trial of the High Court claim is due to start on 7 February 2014.

The Tribunal decision

7. The Judge's reasoning in refusing a stay following the oral hearing held on 18 September 2013 may be summarised in this way. Having been referred to HHJ McMullen QC's statement of the principles to be applied when considering an application to stay ET proceedings pending the determination of concurrent High Court proceedings between the same parties in **Mindimaxnox LLP v Gover** UKEAT/0225/10/DA, 7 December 2010 (see paragraphs 27-38) the Employment Judge reached the following conclusions. The core issue (paragraph 35) was the overlap between the two sets of proceedings and potential for issue estoppel. However, findings of fact had already been made in the ET proceedings that trespassed into the High Court area (paragraph 24). The Judge took

the view, again at paragraph 24, that it was not necessary for the ET to decide whether the Claimant was in fact guilty of misconduct for the purpose of deciding the **Polkey** issue:

> **"Only the likelihood that the employer would have decided (fairly, although it was still have been mistakenly [sic]) that there was sufficient misconduct to dismiss."**

8. She took account of the costs already incurred by the Respondent and what she describes as "the late in change tactics by the Claimant"; that is, in applying for a stay following remission of the remedy issues by the EAT. On balance, she refused the stay.

The appeal

9. I am conscious of the limited scope for interference by the EAT with a case management decision by the ET such as the refusal of a stay (see **Carter v Credit Change Ltd** [1979] ICR 919 CA, cited by the Employment Judge at paragraph 20 of her Reasons; and **Halstead v Paymentshield** [2012] IRLR 586, in which the Court of Appeal restored an ET decision lifting a stay on ET proceedings after it had been re-imposed by HHJ McMullen QC in the EAT on appeal. The principal factor, in the view of the Court of Appeal in that case, was that the Claimant had not then commenced High Court proceedings).

10. Nevertheless, I directed a full hearing of this appeal, having heard only from Ms Davis at the Appellant-only rule 3(10) hearing for the Reasons attached to my order dated 14 October. In essence, the concern was that if the effect of the EAT's order in the original appeal dated 10 May 2013 was to set aside paragraphs 112 and 113 of the original ET decision, ought the High Court Judge to have the opportunity to make a finding in the wrongful dismissal proceedings as to whether the Claimant was in fact guilty of gross misconduct entitling the Respondent to summarily dismiss him without any further finding by the Employment Judge on

remission of unfair dismissal remedy giving rise to a potential issue estoppel, as pleaded at paragraph 23 of the defence in the High Court proceedings?

11. Having had the advantage of full argument from counsel today, I have concluded that the true position is rather more nuanced. Ms Eady accepts that the effect of the first EAT consent order was to set aside the Employment Judge's conclusions both on the **Polkey** and contribution issues. However, she submits, correctly, and Ms Davis does not contend otherwise, that the Employment Judge in her original Judgment has made findings of fact that remain binding on the parties in the ET proceedings. How those findings are to be dealt with in the High Court proceedings will be a matter for the High Court Judge, not for me or the Employment Judge. However, that still leaves a question as to the status of the apparent conclusion by the Employment Judge at paragraph 112 of her original Reasons that the findings of fact there mentioned would have added up to a finding of misconduct sufficient to justify dismissal without notice.

12. That conclusion, in my judgment, cannot stand in the light of our earlier order that the **Polkey** issue is to be reheard. However, on remission I am satisfied that the Employment Judge is alive to the different question raised by her application of the **Polkey** principle when compared with the wrongful dismissal question, which will be before the High Court Judge and is not before her (see paragraph 24 of her Reasons for finally refusing the stay).

13. The question of contribution is potentially more problematic. It seems to me that there is a greater risk of overlap between that question and the wrongful dismissal issue in the High Court proceedings. However, as Ms Eady points out and the Employment Judge accepted, the High Court Judge is already faced with a large number of potentially relevant findings by the

Employment Judge that have not been undone by the May EAT order, and that is the inevitable result of the Claimant choosing to pursue his complaint in the Employment Tribunal first, for understandable tactical reasons. What the Employment Judge has decided as a matter of case management is that having come this far, all that she is required to do is to complete her task following remission by the EAT whilst taking particular care to express her findings on remission in such a way as to avoid so far as possible trespassing further on the High Court Judge's area for determination.

14. Standing back and taking her conclusions expressed at paragraphs 23-35 of the Reasons for refusing the stay, I am unable to say that the Employment Judge has taken into account any irrelevant factor, failed to take into account any relevant factor or reached a conclusion that is legally perverse (see the approach of Arnold J in **Bastick v James Lane** [1979] ICR 778 at 782, approved by the Court of Appeal in **Carter** per Stephenson LJ at page 918).

15. In these circumstances, there is no ground in law for interfering with the Employment Judge's exercise of discretion in refusing the stay. Accordingly, this appeal fails and is dismissed. The remitted remedy hearing may now be re-listed at the ET, the previous date of 14 October having been vacated pending the outcome of this expedited full appeal hearing.