Appeal No. UKEAT/0125/12/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 June 2013

Before

HIS HONOUR JUDGE SEROTA QC

MR D J JENKINS OBE

MRS M V McARTHUR FCIPD

MS A GHOSH APPELLANT

NOKIA SIEMENS NETWORKS UK LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS A GHOSH (The Appellant in Person)
For the Respondent	DEBARRED

SUMMARY

RACE DISCRIMINATION – Direct

The Employment Tribunal's exercise of its discretion in ordering the Claimant to pay costs of £5,000 to the Respondent on the basis what it found to be her unreasonable conduct of the proceedings could not be faulted.

HIS HONOUR JUDGE SEROTA QC

1. This is the hearing of an appeal in relation to a costs order in the sum of £5,000 made in favour of the Second Respondent against the Claimant at a remedies hearing in Southampton before Employment Judge Kolanko, who sat with lay members. The Claimant in the skeleton argument of 25 June has dwelt on the factual merits of her case both in relation to liability and remedy and has given the impression that she was in a position to re-argue those matters today. In fact, as I have said, the appeal is limited to the question of costs for reasons that I shall shortly come to.

2. During the course of her submissions the Claimant has constantly wanted to refer to her version of factual events and has been reluctant to accept that we are unable to re-visit factual findings of the Employment Tribunal in the light of the fact that her appeals against those matters have been dismissed.

3. It is perhaps helpful, therefore, to refer at this stage to the procedural history. The liability judgment of the Employment Tribunal is dated 6 January 2011. The Claimant had brought claims for discrimination on the grounds of her race against her line manager, Mr Peter Hellmonds and the Second Respondent, her employer Nokia. She had also commenced proceedings for unfair dismissal. The Employment Tribunal dismissed the claims based on allegations of discrimination but found that the Claimant had been unfairly dismissed. It directed a remedy hearing.

4. I think it was on 1 June 2011 that the matter came before Keith J, who directed the Employment Tribunal to supply further information. The remedy hearing took place on 2 February 2012. On that occasion the Employment Tribunal did not consider it just and

equitable to make either a basic or a compensatory award and, as we have mentioned, awarded £5,000 costs against the Claimant in favour of the Second Respondent. The Claimant appealed. Her appeal was presumably ruled upon by one of our colleagues under rule 3(7) and there was a preliminary hearing before HHJ McMullen QC on 22 June. We have a transcript of his decision but the Judgment is dated 25 July. HHJ McMullen dismissed all grounds of appeal in relation to remedy and in relation to liability save the costs issue, which he referred to a full hearing, with which we have been dealing today. The other grounds related to discrimination on the grounds of race, unfair dismissal and the **Polkey** deduction.

5. The proceedings in the Employment Tribunal took, I believe, about nine days and there is no doubt that the preparation and the costs of these proceedings for the Respondent, albeit a substantial company, have come to significant amount. On purely pragmatic grounds, and in order to avoid a hearing today, the Respondent wrote to the Employment Appeal Tribunal on 31 July stating it would not enforce the order for costs - that remains the position - and it asked the Claimant to withdraw the appeal in those circumstances. The Employment Tribunal wrote to invite a comment from the Claimant on 1 August. So far as I know there has been no response to this. The Respondent made it clear it was not going to participate in the proceedings and, indeed, on 10 August was debarred from doing so. The matter does not end there because the Claimant appealed against HHJ McMullen's order to the Court of Appeal, which on 26 February of this year refused the Claimant's permission to appeal.

6. I shall say something briefly about the factual background. The Claimant is described in the proceedings as a UK national of Indian origin. She was employed by the Respondent from 2004 until August 2009. I am not certain in what position she was employed but it was a relatively senior management position. She had occasion to complain about discrimination on

the grounds of race and harassment at the hands of the First Respondent, who was at one time her line manager. She also complained of unfair dismissal.

7. She has some history of employment disputes. In 2007 she had lodged grievances on the grounds of discrimination, which were dismissed; she had also, at about this time, been made subject to disciplinary proceedings and was suspended. I do not know whether she returned to work or not. In her previous employment she had also lodged grievances alleging discrimination on the grounds of sex, race and victimisation against ten senior employees of her past employer.

8. To take matters very shortly, relations between the Claimant and the First Respondent, Mr Hellmonds, became very strained. One of the issues appeared to be that the Claimant took a trip to India for some five weeks, which Mr Hellmonds maintained was unsanctioned. The Claimant asserted that approval had been given. This led together with other matters to a breakdown in the trust and confidence between the Claimant, Mr Hellmonds, and ultimately the Respondent, Nokia. The details do not matter; however, I do note that the Claimant's account of approval having been given was rejected by the Employment Tribunal. Disciplinary proceedings were taken against the Claimant who was dismissed for what is in shorthand referred to as SOSR, 'some other substantial reason', on 9 July 2009. The substantial reason was the breakdown in trust and confidence between the Claimant and Mr Hellmonds and the Respondent.

9. However, during the course of the dismissal proceedings the dismissing officer, Mr Greatorex, decided to make enquiries of previous managers of the Claimant and he received highly critical views about the Claimant which he took into account. However, he had never communicated to her the fact that he had spoken to and effectively taken information from the

Claimant's previous managers so the Claimant was not in a position to challenge the allegations made against her.

10. The Employment Tribunal went through the various allegations of discrimination raised by the Claimant. We note that it is generally considered extremely unpleasant to have allegations of racial discrimination made against an employee; it is a serious matter. Suffice it to say that every allegation made by the Claimant was roundly rejected. For example, if one turns to the decision of the Employment Tribunal at paragraph 15 one finds that this is in relation to an allegation that the Claimant had been refused an adjustment in her salary:

> **"The Claimant has failed to raise even a prima facie case in Mr Hellmonds' treatment in relation to this matter was potentially discriminatory on the grounds of her race. According, we dismiss this complaint."**

11. At paragraph 18 in relation to certain absences and leave, the Employment Tribunal found that the Claimant had failed to establish any less favourable treatment from which a Tribunal could conclude, absent an explanation from the Respondent, that it was discriminatory. It noted that there was no legitimate basis for the Claimant seeking information beyond that which was currently available to her then going on to paragraph 19 in relation to the alleged exclusion of the Claimant from certain meetings:

> **"The Claimant we find has failed to establish any less favourable treatment in this regard let alone less favourable treatment that a Tribunal could conclude absent an explanation from the Respondent that this was discriminatory."**

12. At paragraph 20, in relation to an allegation that the Claimant was required to produce unjustified and disproportionate monthly reports of annual leave. The Employment Tribunal said it had:

> **"[…] come to the clearest conclusion that the Claimant fails to establish any less favourable treatment in this regard let alone less favourable treatment that a Tribunal could coincide absent an explanation from the Respondent was discriminatory."**

13. Item 6 of the complaints was that the Claimant maintained that various comments with racial overtones were made by fellow employees about her accent and her origin. The Employment Tribunal rejected the Claimant's evidence in this regard. It noted that the Claimant's evidence to the Employment Tribunal was not consistent with her witness statement. And the Employment Tribunal was wholly satisfied that the comment allegedly made by Mr Hellmonds had not been made. The Claimant's behaviour immediately thereafter was quite inconsistent with her anticipated response had such demeaning comments been made by Mr Hellmonds. And, again, the Employment Tribunal concluded that not even a prima facie case has been made out.

14. At paragraph 27, again, in relation to an alleged disproportionate and unfavourable performance review, the Employment Tribunal again found that the Claimant had not established the primary facts for any less favourable treatment. At paragraph 28 there was an issue as to whether or not the Claimant was told at a meeting that her employment would be terminated. The Claimant maintained this is what she had been told by a Mrs Bates. Mrs Bates denied this. The Employment Tribunal found that at no time during the meeting was the Claimant's employment terminated by Mrs Bates. Again, the Claimant had failed to raise a prima facie case.

15. Paragraph 3; it was asserted that previously resolved issues raised against Ms Ghosh were used as factors resulting in her termination. The Employment Tribunal found that these matters were not well founded and did not indicate any less favourable treatment. There were no issues that could properly be said to have been previously resolved. There was no substance in the

Claimant's allegation she had been shouted at and insulted by Mr Hellmonds during a meeting on 24 July when she was dismissed. She then complained that she was dismissed for untrue reasons. The reasons given were, as I have said, the breakdown of trust and confidence. The Employment Tribunal listened to a three-hour tape of that meeting because Mr Greatorex's conduct was criticised and the Employment Tribunal, having listened to the tape, rejected unequivocally the suggestion that Mr Greatorex's conduct at the hearing could have been said to be improper in any way. The Claimant had simply failed to establish the primary facts of less favourable treatment on the grounds of race.

16. In relation to allegation 13: post dismissal unfavourable performance evaluation. The Employment Tribunal rejected this claim and claims of any direct discrimination or harassment made against either Mr Hellmonds or the company. The Employment Tribunal at paragraph 38 said:

> **"In view of the evidence we heard relating to the various complaints of discrimination, we should record that we were impressed with the manner in which Mr Hellmonds conducted himself throughout his dealings with the Claimant."**

17. At paragraph 39 they found in contrast to the way in which Mr Hellmonds behaved the Claimant was ready to challenge him "on a regular basis". The Employment Tribunal was:

> **"[…] wholly satisfied that the clear breakdown in the relationship between the Claimant and Mr Hellmonds was wholly the fault of the Claimant. We find that the complaints of discrimination which she has brought primarily against Mr Hellmonds were wholly unmerited, and we found the evidence she presented to the Tribunal on such matters wholly unconvincing."**

18. The Employment Tribunal then turned to consider the question of unfair dismissal. We can deal with this, I hope, fairly shortly. The Employment Tribunal accepted that there had been a breakdown in the trust and confidence and that this was potentially a fair reason for dismissal for some other substantial reason. The Claimant's criticism of the impartiality of

Mr Greatorex was wholly unfounded and there was ample material before Mr Greatorex which justified his belief that there had been a breakdown in trust and confidence occasioned by the Claimant.

19. However, the Employment Tribunal considered that the dismissal was unfair. The reason the dismissal was unfair because, as we have already mentioned, Mr Greatorex received information from other managers which was highly critical of the Claimant and she had no opportunity to challenge.

20. We now turn to the remedy judgment. The Claimant disputed the accuracy of what Mr Greatorex had been told by other managers, which, as we have said, was highly critical of the Claimant, but the Employment Tribunal (see paragraphs 13 and 14) concluded that Mr Greatorex faithfully recorded the comments made by those managers and had no reason to doubt what appeared to be the consistent comments made by them. Any representations made by the Claimant at a reconvened hearing would not have prompted Mr Greatorex to change his mind or decision in relation to the Claimant's dismissal which would in the judgment of the Employment Tribunal have been fair. The Employment Tribunal noted it was not relevant. It was common ground the Claimant came to Mr Hellmonds' department having been suspended from her previous post for alleged misconduct matters.

21. The Employment Tribunal then went on to consider the question of compensation. It drew attention to section 122(2) of the **Employment Rights Act 1996**, which refers to the power of an Employment Tribunal to have regard to a Claimant's conduct being such it would be just and equitable to reduce the amount of a basic award to permit the Tribunal to do that. The Employment Tribunal repeated what it had said in the liability judgment that it was wholly satisfied the clear breakdown in the working relationship between the Claimant and

Mr Hellmonds was wholly the fault of the Claimant and it satisfied the Employment Tribunal that the disciplinary process and the Claimant's eventual dismissal was wholly on account of the Claimant's conduct before the dismissal. This is a case, says the Tribunal, where it was satisfied it would be neither just nor equitable to make any basic award in favour of the Claimant in such circumstances. The Employment Tribunal went on to make a similar finding in relation to the compensatory award.

22. The Employment Tribunal then turned to deal with the issue of costs (see paragraph 17). In paragraph 17 it set out the submissions of the parties. Mr Perhar, who appeared on behalf of the Respondent, drew attention to the Judgment in **Daleside Nursing Home Ltd v Mathew** [2009] UKEAT/0519/08 in which Wilkie J had suggested that in a case where allegations made by a party are found to be wholly false, it might be perverse for a Tribunal to fail to conclude that the making of such false allegations did not constitute a person acting unreasonably.

23. The Claimant submitted that she honestly believed in the complaints she had made and they were not made for any perverse motive; she relied on the facts, she had sought legal advice and at no time did her legal advisers indicate that her claim was unfounded. This further proof of the fact that she had believed in the substance of her complaints was taking the matter further before the Employment Appeal Tribunal. We have noted that she also, in fact, took her complaint to the Court of Appeal. We note that the Employment Tribunal was not saying that it accepted the submission of Mr Perhar, nor did it state specifically whether it accepted or rejected the Claimant's case that that she honestly believed in the complaints. Indeed, it might fairly be said, having regard to the other findings of the Employment Tribunal, that it may have doubted this.

24. At paragraph 21 the Employment Tribunal correctly directed itself in relation to rule 41 of the 2004 Employment Tribunal's Rules of Procedure. Rule 41(2) was set out:

> **"[…] a Tribunal shall consider making a cost order against a party where in the opinion of the Tribunal any of the circumstances in paragraph (3) apply, and having so considered the Tribunal may make a cost order against the paying party if it considers it appropriate to do so."**

25. The Employment Tribunal then drew attention to paragraph (3) which described the circumstances when a Tribunal should consider making a cost order, and these included when a paying party had in bringing proceedings or in conducting the proceedings acted unreasonably. It also drew attention to rule 41 which deals with the amount of costs and the fact that an Employment Tribunal might have regard to the paying party's ability to pay when considering whether it should make a costs order or how much the order should be.

26. Paragraph 22 is the most important finding and I shall read it out in full:

> **"We remind ourselves that the Claimant has made a series of serious allegations against the Respondent and in particular her line manager Mr Hellmonds. We have rejected these allegations fully. We have concluded that Mr Hellmonds the primary subject of the Claimant's complaints had been, throughout his time as the Claimant's manager, wholly supportive of the Claimant, and had managed her with sensitivity at all times. We are satisfied that the pursuit of these serious claims primarily against Mr Hellmonds which we have rejected constitutes wholly unreasonable conduct."**

It then went on to note:

> **"[…] that an award of £10,000 would be wholly inadequate in the context of reimbursing the Respondent for the costs it has had to incur in defending** [what it described as] **these unmeritorious claims, which has taken a considerable amount of time both in the context of preparation and the conduct of nine Tribunal hearing days."**

27. The Employment Tribunal did take into account the Claimant's means, or rather lack of means, and limited the amount she was directed to pay to £5,000. We note, as the Claimant pointed out, there is no express finding that the Claimant was dishonest. Equally, there was no

finding that the Claimant did genuinely believe in the matters which she complained and we note, from the passages to which we have referred, that the Employment Tribunal specifically rejected the Claimant's evidence on a number of factual matters.

28. The Claimant's submissions. Despite frequent admonitions from this Tribunal, the Claimant insisted on trying to challenge factual findings, for example, she asserted that the Employment Tribunal had recorded things in the Judgment which were not true and that she had been the victim of procedural unfairness. We asked her why she was pursuing the appeal when the Respondent had made clear it would not be seeking to enforce the order for costs and her answer was that she wanted to establish she had not behaved unreasonably.

29. She submitted in some way that the hearing of the remedy hearing so long after the liability hearing rendered factual findings unsafe. This was an argument which, in our view, is not open to the Claimant, but even if it were we would reject it. The Claimant criticised the Employment Tribunal for saying that Mr Hellmonds was supportive of her and she took us, for example, to paragraph 44 of the liability decision, which she submitted showed contrary to the finding of the Employment Tribunal (paragraph 22 of the remedy hearing), showed the contrary. However, there are a number of references to the Employment Tribunal to the manner in which Mr Hellmonds dealt with the Claimant who was an obviously challenging subordinate. She told us that her human rights were violated and it was unfair. We asked her why. The only answer that the Claimant appeared to give was that the proceedings were unfair because the Employment Tribunal accepted the Respondent's case and rejected hers. That does not, in our view, amount to a breach of her human rights.

30. The Employment Tribunal, she submitted, proceeded on the basis it would be perverse not to award costs. However, as Mr Jenkins pointed out during the course of submissions, the

Employment Tribunal was not adopting the submission of Mr Perhar, it was simply setting it out, and the approach of the Employment Tribunal to the award of costs was wholly conventional after a correct self direction. It asked: was the Claimant's conduct unreasonable? It concluded that it was and then considered the exercise of its discretion and concluded that it was appropriate to exercise its discretion and make an order for costs. The Employment Tribunal took her means into account and made a very modest award. Finally, and towards the end of her submissions, the Claimant did not make what might be regarded as a proper point. She said: "Just because I lost my case that does not mean I was unreasonable". She went on to submit that the case set a precedent for making a costs order just because a party has lost and that would discourage other people from bringing claims.

Conclusions

31. The exercise of the costs jurisdiction is discretionary once the threshold of unreasonable conduct is crossed. In the light of the Respondent's concession we could see little point in pursuit of this appeal. The Claimant might wish to establish that for costs purposes she did not act unreasonably but the findings against her in the liability hearing, which are significantly damaging to her, remain in place in any event. In this case the Employment Tribunal was well entitled to find that the Claimant's conduct was unreasonable. There were a large number of allegations of discriminatory conduct - serious allegations, we say - which were rejected. Some were rejected on the basis that what the Claimant asserted had happened had not in fact happened. The Claimant's conduct in the proceedings and making these unsustained allegations was undoubtedly capable of amounting to unreasonable conduct.

32. In the circumstances, the Employment Tribunal was entitled to conclude that the number of wholly unsubstantiated allegations against a manager who in fact was supportive of her, that put the Claimant to great expense at the nine-day hearing, plus the considerable preparation,

justified it in exercising its discretion to make the order that it did. The suggestion that the order that we have made will somehow discourage litigants from pursing cases is wide of the mark. The only litigants who might be discouraged are those who are tempted to behave unreasonably. In all the circumstances, we consider that this appeal is without merit and it is dismissed.