Appeal No. UKEATPA/0659/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 June 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

F APPELLANT

G RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3 (10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	MR C LAW (Representative)

SUMMARY

PRACTICE AND PROCEDURE – Restricted reporting order

The Employment Judge correctly applied the principles in **ECHR** Art 8 in continuing anonymity orders in respect of the actors in this Employment Tribunal case, following earlier directions of the EAT.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about the order of a Judge to proscribe the publication of any identifying matter in relation to the Claimant and the Respondent and others who were the actors in an Employment Tribunal hearing at Birmingham. I have pre-read the papers, which are substantial, and the additional documentation provided to me this morning. I will refer to the parties as the Claimant and the Respondent in respect of whom anonymity still remains in place.

Introduction

2. My account of the facts can be the shorter because I have had the advantage of having read the Judgment of Underhill J, President in the same case, under the same title UKEAT/0042/11. The facts as set out by the President from the short chronology is that the Claimant made a claim of sex discrimination and constructive unfair dismissal in respect of events occurring in 2009. That case was heard by the Employment Tribunal in Birmingham in February 2011 and resulted in an award in the Claimant's favour, sent with reasons on 11 April 2011.

3. The Claimant appealed, she has been represented throughout by her family friend, Mr Law, and on 21 September 2011 Underhill P, as he then was, continued the orders in place and dismissed the grounds of appeal which were to do with the extent to which identifying matters could be promulgated. There remained one loose end as he put it from his conclusions which was: what would happen at the end of the proceedings?

4. The end of the proceedings was marked by a further hearing before the same three-person Tribunal in Birmingham where the Claimant was awarded sums by way of compensation for

unfair dismissal and sex discrimination totalling a little over £75,000, the reasons for which were sent on 9 February 2012.

5. The loose end was tied by Employment Judge Findlay sitting alone when she made an order effectively continuing the restriction on the publication of relevant details in an order sent to the parties on 14 March 2012. The Claimant was dissatisfied and made an appeal expressly in the name of herself and of Mr Law who were self identified as Appellants 1 and 2. As I understand it, the basis for Mr Law's engagement in the title of this case is that the order made by Judge Findlay applied to him in terms.

6. The appeal was put before HHJ David Richardson who found no prospect of success in it and he said this:

> **"In this case an anonymity order to protection the article 8 rights of students and staff was upheld by the Appeal Tribunal last year (*F v G*, 21 September 2011); the Appeal Tribunal itself made a similar order (see para.60 of the reasons); and it was anticipated that a further order might be made by the Tribunal (see para.61 of the reasons). The Appeal Tribunal's order was made in the full knowledge that the Claimant's claim had succeeded. It was not made to save the employer from embarrassment - it was made principally to protect extremely vulnerable students.**
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> **A further order was indeed made by Employment Judge Findlay on 5 March 2012. The Appellants say that the Employment Judge gave as his reason the article 8 rights of the Respondent's staff and students. The Appellants did not ask for written reasons as they should have done if they wished to appeal (see rule 30 of the Employment Tribunal Rules of Procedure). They waited until 23 April before lodging a notice of appeal; and they seek to appeal without having asked for written reasons.**
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> **I do not think there are any reasonable grounds for appealing. It seems to me that the Employment Judge was justified in making the Order for the purposes of protecting the article 8 rights of highly vulnerable students in the unusual circumstances of this case. The matter was aired fully in the Appeal Tribunal last year. Nothing on the face of the order made suggests any error of law on the part of the Employment Judge.**
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> **I have the power to request written reasons from the Employment Judge (see rule 30 of the Employment Tribunal Rules) for the purpose of seeing on what basis the Employment Judge's discretion was exercised. I see no reason to do so when (1) the issue has already been argued and has been the subject of a fully reasoned decision of the Appeal Tribunal and (2) the Appellants have not applied for reasons in good time and (3) the reason given orally - the protection of the article 8 rights of students and staff - is readily explicable in the light of the judgment of the Appeal Tribunal last year.**
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> **I fully sympathise with the Claimant's psychiatric condition - but I do not see how breaching the right of privacy of vulnerable students will ameliorate her psychiatric condition, and the one page psychiatric report dated 16 November 2011 attached to the Notice of Appeal does not suggest that it will."**

7. The matter then came before HH Jeffrey Burke QC at a rule 3(10) hearing where Mr Law again appeared and argued matters for about 45 minutes. The Judge then decided that Employment Judge Findlay should be asked for her written reasons and then the matter would be restored if practicable before Underhill J. This order was made on 8 February 2013. An amendment to that order was made by Judge Burke about the same time. The Employment Judge then produced her reasons which extend for ten pages and were sent on 7 May 2013.

8. The matter did not come before Underhill J because by now he had been promoted to the Court of Appeal, nor did it come back, as the word implies, before HH Jeffrey Burke QC, adjournment being in my view the treatment by the same Judge of the same matter on a different date. There has been no opportunity on the papers for the reasons of Employment Judge Findlay to be considered by Mr Law. However, having noticed this problem and raised it with Mr Law today, he has adventitiously been able to put before me a very detailed response to Judge Findlay's written reasons correlating by paragraph and pages in the trial bundle his criticisms on behalf of the Claimant and himself of Judge Findlay's written reasons. So I am satisfied that Mr Law has had a full opportunity in writing and orally to address the court on the now extant written reasons.

9. My approach to a hearing under rule 3 is set out in my Judgment in **Cheema** UKEATPA/0250/12 which should be read with this; I make my own decision on this oral reconsideration of the reasons given by Judge Richardson. I saw at once that part of Judge Richardson's opinion is superseded now by the giving of reasons but as will become clear Judge Richardson was able to give his opinion because Mr Law had set out the basis of his criticisms in clear terms in the Notice of Appeal.

The Claimant's case

10. Both the Claimant and Mr Law argue that it is unfair for the orders to be in place as they prevent them from engaging in activity which will, on their account, protect vulnerable students in the position of X in this case, and will provide a check on what he says are the unlawful activities of the Respondent college in carrying out its policy and in failing to adhere to its constitution.

11. The way in which this attack is mounted is partly in relation to the material that was before the President and partly in respect of new material coming from an organisation or paying attention to an organisation called Sexual Health and Disability Alliance (SHADA). The principal criticism is that the cat is out of the bag for the Respondent itself has shared its own policy, the subject of the criticism in this case, with this organisation. For that reason the anonymity orders, the restricted reporting orders and so on which are in place have effectively been breached by the Respondent. This is unfair for the Claimant cannot even discuss this matter with her children as she wishes to do.

12. The first thing to note is the way in which this is put in the Notice of Appeal. It correctly points out that the Claimant is the victim and that she has been awarded very substantial sums as a result of the wrongful treatment of her by the Respondent. The contention is that the order made by the Judge is for the sole purpose of preventing the Respondent being embarrassed because the Respondent has been guilty of breaking the law and financial miscounting and that the purpose of the Judge's order was to protect it. The contention is that there is no evidence that students of the college, other than X, have been affected, there is a further contention that the constitution of the college was not carried out and this is a breach of the law, and that the SHADA, a fringe association with, it is said, discreditable membership has already had access to the policy and these are new matters which were not before Underhill P.

13. The advantage given to Mr Law today is that he has been able to make very many criticisms of the extant reasons now of Judge Findlay. I do not propose to go through all of them but they can be categorised as an assertion of the right of the Claimant to be able to say what she wants about this problem, a criticism of the Judge for making factual errors, an assertion that there is unfairness as between the Claimant and the Respondent and that the effect of this order is all in favour of the Respondent.

Discussion

14. The first thing to note is that the reasons of the Judge carefully posit the engagement of Article 8 of the **ECHR**. The Judge was then required to do the balancing exercise which had been identified by Underhill P and the tests there. She said she followed them. She acknowledged that the student X in this case was vulnerable. She also acknowledged the rights of other students and the college itself in respect of Article 8 and of freedom expression under Article 10. She correctly noted that that is a balancing exercise. She also paid careful attention to the new matter which is the passing of the college's policy to SHADA and she deals with this in the following way:

> **"During June 2009, the claimant met with Ms P, who was carrying out the independent investigation. The claimant had clearly expressed the nature of her concern, page 174, when she expressed her reluctance to shower the student so soon after the assisted procedure, and that because was being asked to shower X so soon afterwards, that she felt that she was being involved in a sexual act. At page 175, she was asking for an agreed period of time to elapse before being required to shower a student in those circumstances. Ms P records that the claimant felt the college was not listening, yet Ms P herself did not directly address the claimant's concern regarding how soon after the process she was being asked to shower X in her conclusions, although we note that she does recommend that there should be consideration of introduction of timescales after known sexual activities at paragraph 2 of her Recommendations. See page 178."**

15. She returns to the matter when considering the arguments about the exposure of this material to SHADA but she formed the judgement that there were differences between the

policy at the school and SHADA's material. Even so there was in the balance nothing by reason of SHADA's involvement in favour of lifting the order.

16. As to the criticism's of the Judge for making factual errors, they do not raise questions of law to this court which may only hear questions of law and these are questions of fact. The Judge had fully in mind the live evidence which she heard from Mr C, the relevant officer of the Respondent and the way in which matters were put by Mr Law and the Claimant.

17. It was plain to the Judge and is plain to me that there is more to the Claimant's case than her vindication in the form of Judgments in her favour and substantial compensation. The Judge noted what was said on behalf of the Respondent that the Claimant wanted a public enquiry into the Respondent's practice. It was plain to the Judge that there was more to this than what the Claimant had advanced about her own employment rights.

18. There is one short matter I can deal with it on its own which is the repeated complaint by Mr Law that the Employment Judge did not mention Article 12. I am mystified by this for this case is nothing to do with the Claimant's right to marry.

19. In my judgment the Claimant has shown that she was treated badly and unlawfully by the Respondent, she had judgment in her favour, it has not been overturned by the EAT and she has obtained and been paid the sums awarded to her to vindicate her rights. In my opinion the Employment Judge was correct to make the orders which she did, I can see no error of law in her approach or to her principles, she carried out the balancing exercise as was required and the balance came down in favour of the protection of anonymity in favour of students, staff and the college itself. There is nothing wrong in principle in the exercise which she undertook or in the conclusion which she reached.

20. Finally, since Mr Law reminded me of it four times, I have borne in mind that he is a lay person running his own business and not a lawyer. It is no discredit to him that he has put this case most carefully in the written materials, his note on the Judgment today and in his very extensive skeleton argument. The Claimant in this case need feel no disadvantage at having been represented by Mr Law in the way that the material has been put forward.

21. The application is dismissed and with it the underlying appeal. The orders made by the Judge will remain in place.