Appeal No. UKEAT/0192/12/JOJ
UKEAT/0292/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 December 2012

Before

HIS HONOUR JUDGE BIRTLES

MR I EZEKIEL

MR P SMITH

CONTRACT SECURITY SERVICES APPELLANT

MR S ADEBAYO RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BERNARD WATSON (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR S ADEBAYO (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

UNFAIR DISMISSAL – Compensation

Appeal against a finding of race discrimination by an employer on the grounds of prevention of cross-examination dismissed on the grounds that (a) there was only limited intervention by the Employment Tribunal and (b) such intervention was justified as the questioning amounted to a case not pleaded by the employer nor referred to in its evidence.

Appeal allowed on three points of compensation assessment and remitted to the ET for further consideration: **Meek** applied.

HIS HONOUR JUDGE BIRTLES

Introduction

1. These are two conjoined appeals from the Judgment and reasons of an Employment Tribunal sitting at Watford. The first judgment appealed was a liability hearing on 23 June 2011, the Judgment and reasons were sent to the parties on 25 July 2011.

2. The Employment Tribunal found complaints of (a) unfair dismissal and (b) race discrimination well founded. This appeal is only against the finding of race discrimination.

3. The second judgment relates to the remedies hearing which took place in September and October 2011. The Judgment and reasons were sent to the parties on 6 January 2012. On the sift the Employment Appeal Tribunal ordered that grounds 3, 4 and 6 only of the grounds of appeal should go forward to a full hearing.

The appeal on liability

4. The Claimant, Mr Adebayo, was employed by the Respondent, the Appellant here. He gave evidence before the Employment Tribunal and made claims of unfair dismissal and race discrimination. There was a long employment history, which it is not necessary to rehearse, showing some number of disputes between Mr Adebayo and his line managers, including the owner of the business, a Mr Puvitharan.

5. The Tribunal, as I say, accepted his evidence and did so in quite strong language. They said this in their Judgment at paragraphs 8 through to 14 under the sub-heading "The Evidence":

> **"8. We make our findings of primary fact on the basis of the balance of probability. We have to hear the evidence and weigh it up on the balance of probabilities, determining what is more**

likely to have happened than not. We have been assisted in that process by our findings about the credit of the various witnesses.

9. We have found the Claimant to be a carefully honest, intelligent, hardworking, dedicated, and dutiful man who was passionate about his work for the Respondent. He has prepared his case meticulously and it has not changed while he has been giving evidence. Where there is a dispute on the facts we therefore have no difficulty in relying upon the evidence which he has given us although we do not always agree with his interpretation of the evidence.

10. By contrast we found that the Respondent's witnesses contradicted each other and contradicted themselves. For example it seemed to us that Mr Puvitharan tried hard to avoid saying that the Claimant was a hardworking and dedicated member of staff. Mr Horton however freely acknowledged those good qualities in the Claimant. It seemed to us that Mr Puvitharan very often failed to answer direct questions and made long speeches which were not relevant to the issue at hand. We found Mr Puvitharan evasive. We also formed the impression that he did not think the Claimant's complaint of race discrimination was something to be taken seriously. Mr Theba appeared to us to give evidence that was internally contradictory, in particular about the fingerprint recognition entry system. When first asked about it he told us that once it had been installed other people could have been added to it afterwards. Later he changed that evidence and insisted that it was impossible to add anyone new to it. We found that evidence confusing and unreliable.

11. Turning to Mr Horton, he was on the face of it an impressive and convincing witness. He is confident and highly articulate. However, we noticed that when we asked him questions ourselves about subjects that had earlier been the subject of cross examination, he gave us answers that were different to the answers he had given earlier. For example when asked early in his evidence what conclusion he drew from the fact that a holiday booking form had not been completely filled in by administration he said that he drew no conclusion from that whatsoever. However, when asked about it later by the Tribunal he for the first time gave a great deal of evidence about how frequently administration did not fill out these forms properly and how there had been a major problem six weeks before when they had not done so. We noted too that he told us that it was not his management style ever to target a particular individual with criticism, but he admitted having done just that on 16 March 2009 when, on his evidence, he placed a sheet of paper containing the Claimant's empty movement diary on a table before the Claimant and his colleagues to demonstrate that the Claimant had not filled in his diary.

12. Similarly, he gave us an account of the reason why he asked trainees to shorten their lunch break because of the individual circumstances of a *particular* day and said that they volunteered that they had finished their lunch and cigarettes and were ready to go back in to continue their training. That did not sit easily with the email which Mr Horton later sent round on 11 February 2009 giving a general instruction to keep lunch breaks to half an hour as this was more productive. We think that that tended to undermine his evidence about his actions on the particular day. Therefore although Mr Horton appeared to be a most compelling witness, when we examined the detail of what he was saying we found that we could not confidently rely on his evidence.

13. We have been told by Mr Puvitharan and Mr Horton that the reason why their witness statements were so sparse was because they simply provided answers in response to questions asked of them by Mr Ligard of Peninsula Business Services Ltd. We note however that we have received no independent information from Peninsula to confirm that that is the case; we have not seen Mr Ligard's attendance notes (and we do not think that they would be privileged if he is not professionally qualified) and nor have we heard from Mr Ligard to confirm this vitally important matter. Where a professionally qualified representative is aware that his or her own mistake is at risk of damaging a client's credit he or she is duty bound to confess that mistake frankly and fully to the court or tribunal. We do not know whether Mr Ligard is professionally qualified but we think that it is too a matter of commonsense that one would admit a mistake fully rather than let it damage one's client. Mr Watson is a consultant. Mr Watson in his submissions has said that this is not directly the fault of the Respondent in person but it really boils down to the inability of some of his colleagues to deal with the matter properly; however we are by no means convinced that that is all there is to it. Certainly we have not seen the detail that we would need to convince us.

14. We think that a Respondent who is the subject of a claim for race discrimination would - if it took the matter with appropriate seriousness, and if it had a confident detailed defence to the allegations - take steps voluntarily to put that defence in the hands of its representatives and would be anxious if it saw that the matter was not being set out properly and in detail.

We think a detailed defence would be readily volunteered in a case like this if it existed, but that does not seem to have happened. For all those reasons we find the evidence of the Respondent's witnesses unreliable."

6. The Tribunal had previously in its Judgment making its finding on credibility and detail said that this at paragraph 6 and 7:

"6. It appears that Mr Chan did not proof the witnesses or draft the witness statements in this case. We have heard that has been done by a Mr Ligard, and the representation has been carried out by Mr Watson. It is an unusual feature of this case that the Respondent's ET3 does not set out any positive defence in answer to the complaint of race discrimination. It deals with the allegation of dismissal and then denies race discrimination in very general terms. This point was noted by Employment Judge Southam in the case management discussion summary which was sent to the parties on 4 August 2010. Despite that feature having been drawn to the Respondent's attention, however, the Respondent's witness statements also did no more than to deny race discrimination in general terms. They did not at any point advance a positive case to the detailed allegations of fact made by the Claimant. The witness statements for the Respondent too dealt with the alleged dismissal and the events thereafter.

7. As a result, when Mr Watson came to cross examine the Claimant he accepted that he could not put to the Claimant any positive case which dealt with the matters set out in the claim form and which had not been set out in his witness statements because he did not have the necessary evidence. Therefore the Claimant did not have an opportunity to answer the Respondent's detailed positive case that emerged during cross examination. Nonetheless the Claimant very properly put his case to each of the Respondent's witnesses and a great deal of evidence was given setting out a positive case in response to the detailed allegations of fact made in the claim form and the Claimant's witness statement. Mr Watson did not apply for an adjournment or for an opportunity to produce new witness statements that would enable him to remedy the problem. The case proceeded therefore on that footing."

7. The grounds of appeal relate only to the finding of race discrimination. It appears in the grounds of appeal at paragraph 24. The ground of appeal is that the decision of the Tribunal was perverse additionally or alternatively mistaken in law and one no reasonable Tribunal should have reached. It then sets out in detail the ground of appeal in paragraphs 25 to 37.

8. In summary Mr Watson submits both in his skeleton argument and in his oral submissions this morning the submission that the Employment Judge acting on behalf of the three members of the Employment Tribunal stopped him from cross examining Mr Adebayo on a number of occasions and putting the Respondent's case.

9. Before dealing with that submission it is appropriate to refer to the case law on perversity. The best known authority is **Yeboah v Crofton** [2002] IRLR 634 at paragraphs 93 to 95 per Mummery LJ. The learned Judge sets out the fact that an appeal on the grounds of perversity is a very high hurdle for an Appellant to surmount. He also points out that it would be difficult in a case where the appeal is based on perversity to succeed where there are no notes of evidence before the Appeal Tribunal. It is also helpful to refer to the comments of Mummery J, as he then was, in the case of **Stewart v Cleveland Guest Engineering Ltd** [1994] IRLR 440 at paragraph 33 where he sets out a number of the tests for perversity.

10. This appeal is based upon the submission that the Employment Judge stopped Mr Watson from cross examining Mr Adebayo on a number of critical matters. We have had two authorities referred to us. It is sufficient simply to refer to the Judgment of HHJ Burke QC in **Mrs R Jones v London Borough of Havering & Another** UKEAT/1099/01/ST, judgment delivered on 29 April 2003. At paragraph 25 Judge Burke QC refers to Craig on the *Law of Evidence* and Cross & Tapper on the *Law of Evidence* and goes on to say this:

> **"These expressions of general principle are not, of course, intended to relate specifically to the proceedings of the Employment Tribunal which are conducted with a lower formality than in the courts and where the rules provide to the Tribunal a very wide discretion but that discretion must be exercised in accordance with the principles of justice and fairness and if, as we accept and regard as well established in general principle, cross examination on behalf of a party who has already given evidence in chief is not limited to matters which that party has put forward in evidence and is difficult to see, assuming the cross examination to go to a relevant issue, how the just and fair application of what was then the relevant rule of the Employment Tribunal Rules can permit the curtailment of such cross examination on that ground alone."**

11. We have also been referred to paragraph 35 of the same Judgment where Judge Burke QC says this:

> **"Having considered the authorities which were put before us, we return to this case which as we see it gives no rise to no novel point of principle. We entirely accept that the Tribunal Rules provide a very wide discretion as to the admission of evidence and cross examination by the Tribunal but as we have said in paragraph 32 that discretion must be exercised judicially, i.e. in accordance with the principles of fairness and justice."**

12. Mr Watson submits that in this case the Employment Judge overstepped the mark. The principal enunciated by Judge Burke in the **Jones** case is not in dispute. The question for us is whether the Employment Judge has overstepped the mark so as to either rulings or admonitions limiting cross examination were an error of law or in the circumstances perverse.

13. The essence of this case is that Mr Adebayo brought a claim for unfair dismissal and race discrimination; that is clear from his ET1 and he had put in a detailed witness statement, as the Tribunal noted, and gave detailed evidence about his allegations. It is clear also from the passages of the reasons that I have read was that there is effectively nothing in the ET3 nor were there in the witness statements very much, if anything, in answer to Mr Adebayo's allegations.

Discussion

14. We have now seen the affidavits of Mr Watson and Mr Adebayo, together with the written statements of all three members of the Employment Tribunal. We do not have the full notes of Mr Watson's cross examination of Mr Adebayo, which it is clear from the Employment Judge's notes went on on day one from 3.24 pm to some point when the Tribunal rose for the day. On day two Mr Watson's cross examination of Mr Adebayo went from 10.08 am to 1.25 pm which is a period of 3 hours 17 minutes.

15. We have carefully considered Mr Watson's submission but we can see nothing which begins to surmount the high hurdle set by **Yeboah**. We are not satisfied that Mr Watson was prevented in any material way from cross examining the Claimant on any relevant point. At best he can point to three instances referred to in the Employment Judge's comments to the EAT where, as is clear from her note, she pointed out on three occasions that there was no

factual basis for the question which he wished to ask Mr Adebayo in any of the Appellant's witness statements. In other words there was no factual matrix for the question he wished to ask.

16. As the Employment Judge said in paragraph 15 of her note to the EAT:

> **"I do not now recall my precise words but the gist of what I said to Mr Watson was that he was putting a positive case which had not been pleaded or set out in his witness statements and could not do so."**

17. We entirely agree that that this is a correct statement of the law. We have looked at the material before us. In our judgment each of the three interventions was justified, we have had no material in respect of any other intervention put before us.

18. The short fact of the matter is that if the Appellant's case had been properly prepared prior to the hearing then this issue would not have arisen. It arose because of the shoddy preparation of the Appellant's case. In our judgment the reasons at paragraphs 6 to 7 of the Tribunal are accurate. There is no error of law and there is no perversity. The appeal therefore in respect of the liability hearing is dismissed.

19. We turn to the remedies judgment. This is now limited because Judge Burke QC on the sift limited the issues to three only. They relate to paragraphs 64, 66 and 67 of the remedies reasons. Ground 3 of the Notice of Appeal relates to paragraph 64, ground 4 refers to paragraph 66 and ground 6 refers to paragraph 67.

20. Paragraphs 66 and 67 are calculation issues which are inextricably tied up with paragraph 64. What the Tribunal said is this:

"64 We calculate compensation for loss of earnings as follows:

1 December 2009 to 31 December 2010

13 months = 395 days at a daily rate of £58.14 = £22,966.43

Add 25% (£5,829.12) so that the total compensatory award is £29,145.54"

21. I should add that the 25% is a reference to what the Tribunal say in paragraph 63 when they made an uplift because of the Respondent's total failure to follow any procedure before dismissal. There is no challenge to the uplift. That was dismissed by Judge Burke at the sift.

22. The ground of appeal put forward by Mr Watson is a **Meek** challenge to paragraph 64. He says in the Notice of Appeal:

> **"There is no finding as to the Claimant's actual weekly net pay and there is no explanation of the daily rate of £58.14."**

23. We are told that the Tribunal did have in its bundle before it a number of pay or salary slips. Unfortunately those have not been included in the bundles before us and neither party has brought them to the Tribunal.

24. The method of calculation for compensation is well known. It is a net figure calculated by reference usually, if the figures are available, to the 13 weeks employment prior to dismissal or resignation and averaged out across that period of time. That material quite clearly was in front of the Tribunal but we have not seen it. We have no way of knowing how the Tribunal reached a daily rate of £58.14. There is therefore a failure of **Meek** explanation.

25. It follows also that the figures applied in paragraph 66 and 67 may also be suspect. There is simply no adequate explanation. We have discussed the question of disposal with the parties and our decision is that we must allow the appeal on grounds 3, 4 and 6 of the Notice of Appeal

in respect of the remedies hearing and remit the matter to the same Tribunal. We give permission to the parties to call further evidence on that limited issue of compensation and interest, and obviously they must have the opportunity of making further submissions. The actual procedure will be determined no doubt by the Employment Judge. We would suggest that a case management decision might well be appropriate in this case.

Conclusion

26. Our conclusion therefore is that the appeal on liability is dismissed, the appeal on remedies is allowed in respect of the three grounds before us, 3, 4 and 6, and the matter is remitted to the same Tribunal for re-hearing on those limited issues of compensation in accordance with this Judgment.