Appeal No. UKEAT/0491/12/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 April 2013

Before

HIS HONOUR JUDGE McMULLEN QC

MR M CLANCY

MR T HAYWOOD

MR SURESH PATEL — APPELLANT

(1) SOUTH TYNESIDE COUNCIL
(2) MS A GODFREY
(3) GOVERNING BODY OF MARGARET SUTTON SCHOOL — RESPONDENT

Transcript of Proceedings

JUDGMENT

PRELIMINARY HEARING – APPELLANT ONLY

APPEARANCES

For the Appellant	MR JONATHAN COHEN (of Counsel) Instructed by: Kingston Solicitors 141-143 Benwell Lane Newcastle-upon-Tyne NE15 6RT
For the Respondent	Written Submissions

SUMMARY

REDUNDANCY – Definition

RACE DISCRIMINATION – Direct

The Employment Tribunal did not err in dismissing the Claimant's 27 complaints of race discrimination and determining the correct reason for his dismissal was redundancy.

HIS HONOUR JUDGE McMULLEN QC

1. We begin this Judgment with two citations. The first is from the Tribunal's judgment in this case which is as follows:

> **"126. It will be appreciated that the claims all fail. Whilst we have not found it necessary to adjudicate upon every one of the claimant's race discrimination claims, by reason of the time, or lack of grievance points, we record, for completeness, that he would not have succeeded upon those in any event. We were regrettably driven to the conclusion that the claimant, a proud man with some obvious abilities and talents (we note his achievement of the NPQH) found his impending redundancy hard to accept and deal with, which has led him, consciously or otherwise, to see racially motivated conspiracy where we are quite satisfied there was none. We note (as recorded in the previous judgment in the 2007 claims) that until 2007 he did not consider that race was factor in his treatment. It only appears to us to become an issue in early 2007, when he realises that he is at risk of redundancy. Given his earlier claim in 1997 (against a different Head and Chair of Governors) it is surprising that despite matters allegedly occurring in 2002, 2005, and 2006, it was not until 2007 that he considered there was anything to complain about on racial grounds. Whilst we appreciate that victims of race (or any other) discrimination are not precluded from alleging it simply because they did not realise at the time what it was occurring, the victim's own perception is nonetheless a highly relevant factor to take into account, especially when that victim is an intelligent and sensitised individual with an obvious awareness of such issues.**
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> **127. Once the battle lines were drawn in 2007, it is hard to avoid the impression that thereafter something of a war of brinkmanship commenced. The claimant's approach to the appeal process was to raise whatever objection he could. Whilst we accept that it was legitimate to raise certain objections and seek a degree of information, the c1aimant's approach did appear to us to border on the hyper - critical. In particular we consider that the allegation of the racist member being on the appeal panel, raised as and when it was, was an ambush which produced the desired effect of de-railing the appeal. That it produced the effect of the appeal then being further delayed until September was perhaps an unlooked for consequence."**

2. The second is from the Judgment of Lewison LJ at paragraph 33 in **Davies v Sandwell** [2013] EWCA Civ 135 a self confessed stranger to our specialist jurisdiction.

> **"33. As a newcomer to this field, I cannot believe that it was intended that a claim for unfair dismissal should take some four weeks to hear, with witnesses producing witness statements hundreds of pages long and being subjected to cross-examination for days on end. In our case aspects (b), (c) and (d) of the overriding objective seem to have been largely forgotten. The function of the ET is a limited one. It is to decide whether the employer acted reasonably in dismissing the employee. It is not for the ET to conduct a primary fact-finding exercise. It is there to review the employer's decision. Still less is the ET there to conduct an investigation into the whole of the employee's employment history. … An appellate court or tribunal (whether the EAT or this court) should, wherever legally possible, uphold robust but fair case management decisions: *Gayle v Sandwell & West Birmingham Hospitals NHS Trust* [2011] EWCA Civ 924; *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743."**

3. We could add a third, noting with Hamlet the effect of the proud man's contumely and the law's delays, when we consider the case from the position of the Respondents, a governing

body of a small school, its Head Teacher and the local authority, engaged in the quadrangular relationship with a teacher. We now turn to the necessary ingredients of this appeal.

4. This case is about redundancy and race discrimination. The Claimant is Mr Patel, he is Indian, the Respondents are a school for 4 to 16 year olds with learning difficulties in Tyneside and the third Respondent is the Head Teacher at the relevant times. This is the judgment of the court to which all members have been drawn and contribute from their specialist experience.

Introduction

5. It is an appeal by the Claimant in those proceedings against a 55-page Judgment of an Employment Tribunal sitting under the chairmanship of Employment Judge Holmes over 22 days and a day in private extending over six months sent with Reasons on 9 April 2011.

6. The Claimant was represented by counsel, today by different counsel, Mr Jonathan Cohen, the Respondent by Mr Menan of counsel.

7. The Claimant made a very substantial number of complaints. Broadly speaking they were on the one hand to do with the decision by the Respondents to dismiss him by reason of redundancy, and on the other in respect of allegations of race discrimination he had made at various stage before and after the redundancy situation which the school alleged it was facing.

8. The Respondents contended that the decision to dismiss was by reason of redundancy, the dismissal was fair having followed a reasonable procedure and had nothing to do with the allegations of race discrimination he had made (victimisation); nor were the decisions made by reason of race discrimination. The Respondents also took jurisdictional points on time and on the Statutory Disputes Resolution Procedure, all of which succeeded.

The issues

9. The issues were to do with the investigation of 27 formal grievances and the dismissal of the Claimant for redundancy. All of the allegations failed; that is unfair dismissal in its ordinary sense, discriminatory dismissal by reason of race or having made allegations and race discrimination in respect of that dismissal and other matters. The Claimant appealed and the matter came before HHJ Peter Clark on the papers who said the following:

> **"Far from misunderstanding the case (skeleton, para. 159) it appears to me that, having listened to evidence and submissions over many days the ET concluded that the Appellant had been fairly dismissed by reason of redundancy and that there was nothing in the extant complaints of discrimination. No arguable point of law is raised in this appeal."**

10. Dissatisfied with that the Claimant through Mr Cohen appeared before HHJ David Richardson. The Judge was complimentary of Mr Cohen's argument, indicating in the note he has made for us that there were important arguments to be made but further material was to be acquired. Through the **Burns/Barke** machinery the Judge ventilated with Mr Cohen the gist of the questions the Judge wanted to raise and that they would subsequently be drafted by the Judge. Mr Cohen made no objection to the principle of a **Burns/Barke** referral nor to the gist of the questions being asked.

11. In due course the Employment Judge replied. Judge Richardson found these answers helpful but having adjourned the rule 3 hearing to the papers pending the answers by the Employment Judge, he did not send the matter to a full hearing; his note at that time was that this matter should be heard at a preliminary hearing and thus at face value he did not conclude that this case had reasonable prospects of success but that a preliminary hearing should decide these matters.

12. In fact, Judge Richardson's note about Mr Cohen's skeleton argument is not significant, it says that it called for some enquiry and so that is what we are doing today. However, Mr Cohen objects to a number of the answers the learned Employment Judge has given as going beyond his remit in answering **Burns/Barke** questions and we will turn to those in due course.

13. The answers of the Judge were made available to Mr Menan and for the purposes of the preliminary hearing written submissions were made by Mr Menan, taking into account the grounds of appeal as they were originally drafted and the Judge's additional note. A further submission has been made by Mr Cohen; this is the fourth iteration of this appeal: there were grounds of appeal, a cadaverous skeleton argument by previous counsel, Mr Cohen's skeleton argument before Judge Richardson and there are his further submissions following the Judge's note. It is slightly inconvenient that we do not have Mr Menan's written submissions on the whole of the Tribunal's conclusions for they do not include a response to the way in which the Claimant puts it after the Judge's note. It must be noted that there was no specific provision for this further layer to be completed. We consider that the Respondent is not at a disadvantage by their absence.

The legislation

14. We have not been taken to any particular part of the legislation in all of the submissions before; suffice it to say that the account given by the Employment Tribunal on the substantive law and on the authorities from paragraph 38 of the Judgment remain unchallenged, together with the approach to the exercise of discretion where time limits have been exceeded.

Discussion of the Claimant's case

15. We hope that we will be forgiven in this one-hour hearing for husbanding the resources of the court and focusing on the now narrow scope of Mr Cohen's submissions. The primary

contention relates to unfair dismissal by reason of redundancy. It is contended that the conditions in **Employment Rights Act 1996** section 98(1) and (2) and section 139 have not been met here for the reduced need or the expected reduced need for employees to do the work has not diminished or ceased.

16. It is rare, in our experience, for a challenge to be made on the basis that there was no redundancy. As Mr Menan makes clear in his written submissions, the nature of the challenge by the Claimant was that there was a conspiracy deliberately to engineer a redundancy in order to get rid of him. That was roundly dismissed by the Employment Tribunal.

17. Over about 20 pages it considered the financial situation and the social situation facing the school. The school has now closed. Its roll fell and fell. There is a minute examination of the paperwork and the monetary issues facing the school from about 2006 onwards. Originally the Claimant was to have been made redundant at the end of September 2007; in fact he survived until the end of September 2008. But our short answer is the one which Mr Menan gives, that is that the Tribunal addressed the statute correctly and was entitled to form the conclusion that the Respondents had faced a redundancy situation. It was writ large as a result of what happened after the dismissal of the Claimant. The terms of section 139 were met and so it was correct for the Respondents to say that there was the expectation of diminution in the work required. Redundancy was the correct label to give to the reason for the dismissal.

18. There is no basis in the challenge that there was a conflict between the findings and the budget. There is, in our judgment, sufficient explanation by the Tribunal of the reasoning behind the decision based upon the finances of the school, what was forthcoming from the local authority and elsewhere and the numbers of children matched against the work of the teachers. Although Mr Cohen points to the suggestion that supply and temporary teachers were brought

in after the Claimant had been dismissed, the Tribunal's finding in its additional note was that these did not occur immediately upon his dismissal. And so what might be a fair point to make when an employee leaves and finds a replacement in his job cannot be made here in the absence of clear findings. There are difficulties in the submission because the work of a temporary or a supply teacher is different or is likely to be thought to be different from that of a full-time teacher. In any event, the Tribunal was entitled to come to the conclusion that the reason for the dismissal was redundancy.

19. The second major set of complaints concerns the issue of redeployment. The Respondents were aware that shortly after his notice of redundancy the Claimant was able to secure alternative employment. The criticism is that South Tyneside is a big authority, there should have been an opportunity for him. The simple answer to this is given by the Judge in his additional note. This was not a "pleaded" point and therefore redeployment was not live before it. Mr Cohen who did not appear there asserts that a Tribunal is obliged to take the point and give it to the Claimant. We reject that. When counsel are instructed on both sides in a complex case lasting many days, there is not, or at least there was not in this case, an obligation to add yet another allegation to the Claimant's case. The redeployment argument must fail.

20. The third point relates to the fairness of the appeal. This involves Mr McFadyen. He was a governor and he had voted to adopt the redundancy criteria in March 2007 and then went on to consider the Claimant's appeal against his redundancy some substantial time thereafter; the Claimant objected to this. We accept from Mr Cohen, as indeed the Tribunal accepted from his predecessor, that generally speaking an appeal should be conducted by someone entirely independent. The Tribunal gave reasons why it was not unfair for Mr McFadyen to be involved. Indeed there was a time when Mr McFadyen was invited *by the Claimant* to continue to sit on the appeal panel. He had been criticised for being racist but the Claimant himself insisted on

Mr McFadyen rejoining; see paragraph 112. And so what might at first sight appear to be unfair was considered fully by the Employment Tribunal which held that it did not make the dismissal of the Claimant unfair that Mr McFadyen had sat upon appeal. That is a judgment which was open to the Employment Tribunal. It, of course, has considerable experience of knowing what is a reasonable workplace procedure and what is unfair. Its judgment on such matters should not be overturned unless there is clear evidence that it went wrong in principle. In our judgment the Tribunal had all the circumstances in mind when it decided that was no unfairness.

21. The fourth proposition advanced by Mr Cohen is that the Tribunal failed to consider the refusal to offer enhanced terms. There is an allegation of differential treatment of the Claimant in respect of his payments. It should be noted that very professionally Mr Cohen has not been able to advance an argument that a grievance on this matter was not properly dealt with by the Respondents. The treatment of the terms is found in the Employment Judge's **Burns/Barke** note. All staff were given the opportunity to apply for voluntary redundancy, they were given the same opportunity. The amount of the Claimant's redundancy entitlement was made known to him. The different treatment allegedly afforded to Mr Beaton simply does not stand up: they are not alike for Mr Beaton, the Claimant's peer on his hypothesis, was seeking voluntary redundancy whereas the Claimant was disputing his dismissal. We do not accept that there were any knock on circumstances of a discriminatory nature.

22. The fifth argument of Mr Cohen relates to what is described as race discrimination in the dismissal. Given the Tribunal's firm findings that this was for redundancy this ground cannot arise in respect of a complaint that the Tribunal refused to examine the Claimant's grievances. Mr Cohen makes some headway on this point but the point is dealt with by the Employment Tribunal in a way which follows a correct direction. No complaint is made by the Claimant

about the Governors or the Head. The simple argument is the local authority failed for reasons of race discrimination and victimisation to deal with his grievances. The mind of Mr Scott for the local authority should have been examined.

23. We have been taken to the way in which it was put by the Claimant's previous counsel but it has to be borne in mind that this is simply a submission: see para 36. It was not that he was a thorn in the side of the Respondent. The Tribunal gives a lengthy decision about the reason why his grievances were not dealt with and although the use of the word "motivation" occurs, this does not taint the correct self direction which was to look for whether or not there was an illegitimate reason for the failure to examine the grievances.

24. Because this is a point where Mr Cohen did make some headway with us we will recite the reasons of the Tribunal:

> **"118. The first issue for us, therefore is whether we accept the explanation given by the third respondent, namely that it was not considered worth the time and resources required to deal with those grievances. We do accept it. There was nothing to suggest that Mr Brian Scott, whose decision it was, was motivated by any racial considerations. What he was faced with was large number of grievances extending over a period of time, many of which had formed the subject of the previous Tribunal claims, and all of which formed the subject of the new 2008 claims. The same issues were being dealt with in the Tribunal proceedings, and hence responded to in the respondents' response thereto as were being raised in the grievances. The claimant had declined the modified procedure, and hence meetings would be required. His decision therefore not to follow, in tandem, a grievance procedure to deal with the same issues is therefore an understandable one. Whether it was right or wrong, of course, is not our concern. Our concern is whether it was on racial grounds, or by reason of the claimant's protected acts. We are satisfied that it was not for either of those reasons. We appreciate that there is (or rather was at the time, this being a pre - Equality Act case) a subtle distinction in terms of the burden of proof between the direct discrimination and harassment claims on the one hand, and the victimisation claim on the other (*Oyarce v Cheshire CC* [2008] RLR 653), but on either burden we are satisfied that the decision was not on racial grounds and was not because the claimant had done any protected acts. Given that both sides were heavily embroiled in the litigation, with frequent correspondence, applications and hearings, it is perhaps understandable that the decision not to deal with the grievances was never communicated. It is, however, very unfortunate, and the third respondent could probably have avoided this allegation if it had at some stage taken the simple and courteous step of explaining to the claimant or his representative that, in the circumstances, his grievances were not going to be actioned. In that context. however, it is perhaps worth noting that, whilst there was no obligation upon them to do so, the claimant's solicitors, up until the amendment in January 2010, which was first presaged by the claimant's solicitors' letter of 15 December 2009, had not further raised with the respondents their failure to deal with the grievances. This perhaps rather underlines how relatively unimportant, in the scheme of things, the grievance issue was.**
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> **119. It is worth observing that the grievances raised by the claimant were raised by him as a result of the 2007 claims failing for want of grievances. The Employment Act 2002 and the**

2004 Regulations were introduced in an attempt to require parties to seek to resolve their differences without recourse to Tribunals. That is particularly desirable where there is an ongoing relationship. It is clear in this case that the claimant did not really expect, or seek, any resolution that would have had any meaningful effect upon his relationships in the School. He was dismissed, and knew he was likely to be, in September 2008. His 27 grievances were therefore only a procedural necessity, the point of which was rendered rather nugatory once he had commenced these proceedings in September 2008. That the Council regarded responding to them specifically as pointless in these circumstances is entirely understandable.

120. Whatever the situation, we are satisfied that the failure to deal with the grievances by the Head Teacher and the Governing Body was simply by reason that they passed them to the third respondent (as they would have to, as there were already complaints about who could hear what), which then, in due course, took the non - discriminatory and non - victimisatory decision not to deal with them. The claimant's complaints in this regard therefore also fail."

25. In our judgment, the use of the word "motivated" is not helpful because motive is not the guiding test but in the context of the further statement by the Tribunal, see above, our concern was whether it was on racial grounds by the reason of the Claimant's protected acts. It is plain that the Tribunal was not looking at motive but was looking at the reason why, and an alternative reason is given. The Respondents were dealing with the Claimant in legal proceedings by responding to it. Secondly, part of the grievances that were being raised were, as the Tribunal put it, rendered nugatory because he had already commenced proceedings and therefore the statutory dispute procedure fell aside. We note that motivation did not strike down a discriminatory redundancy judgment in **A v B** [2010] EWCA Civ 1378 para 60.

26. The Tribunal having directed itself as to whether there was a reason which was discriminatory or by way of victimisation came to the conclusion that there was not and in Having carefully listened to Mr Cohen's succinct argument on this we consider it has no reasonable prospect of success. To adopt what Mr Cohen himself writes a year ago, the Tribunal has dealt with these matters in a superficially attractive way. We go further. It is dealt with them in a way which withstands the powerful analysis Mr Cohen has been able to draw to our attention. But in the light of the submissions made by Mr Menan in writing and the additional reasons of the Judge we consider there is no error of law.

27. The new contention by Mr Cohen that the Judge went beyond the remit of the **Burns/Barke** reference is unsustainable. The Employment Judge answered the question succinctly and given there was no objection by counsel to the gist and the framing of these questions, it is a perfectly acceptable response to the multiple facets of the **Burns/Barke** remission.

28. The appeal is dismissed. Permission to appeal refused [for reasons not transcribed].