Appeal No. UKEAT/0126/12/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 November 2012

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MR K NAMOALE — APPELLANT

BALFOUR BEATTY ENGINEERING SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR SIMON SWANSON (Representative) Employment Consultants Malika House 81 George Street Lozells Birmingham B19 1NS
For the Respondent	MS REBECCA EELEY (of Counsel) Instructed by: Pinsent Masons Solicitors 141 Bothwell Street Glasgow G2 7EQ

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

JURISDICTIONAL POINTS – Continuity of employment

The Employment Judge erred in striking out part of the Claimant's claim. He was one of four men disciplined for breach of the safety regime so the judge held he had no reasonable prospect of showing unfair treatment. But he was different as he had made complaints about the others' breaches. The case was restored. The deposit order was also set aside. The finding on the Claimant's lack of one year's continuous employment was correct. An agency could not promise to add his service with it if the Claimant secured permanent employment with the end user.

HIS HONOUR JUDGE McMULLEN QC

Introduction

1. I will refer to the parties as the Claimant and the Respondent. This is an appeal by the Claimant in those proceedings against the judgment of Employment Judge Hughes sitting alone at Birmingham with judgment and reasons sent to the parties on 11 January 2012. The Claimant was represented by Mr Swanson, a legal executive/consultant and the Respondent by Ms Rebecca Eeley of counsel. The Claimant makes a number of claims and a PHR was ordered to determine whether the case should be struck out and/or a deposit order should be made. That was following a judgment given by Employment Judge Goodier at a case management discussion where orders and reasons were sent on 30 September 2011.

2. There was a challenge to that case management order in the form of an application for a review which was refused and so the jurisdiction given to Judge Hughes is not challenged. In other words, it was said at one stage, by way of a review but not an appeal, that the matter should not be sent to a PHR for the purposes of determining strikeout and deposit applications but that, what I might describe as procedural challenge, goes nowhere now and the decision on its face is the one which is challenged. The vehicle, therefore, were applications by the Respondent for the strikeout of certain parts of the claims and, for a deposit order to be made against the Claimant for such claims.

The issues

3. The essential issues to be determined by the judge, therefore, were those mapped out by Judge Goodier. The power to make such orders is set out in rule 18(7)(b) which is that a complaint or a whole claim may be struck out if it has *no* reasonable prospect of success. Separately, a deposit order may be made under rule 20 for any complaint or claim which has *little* reasonable prospect of success.

4. The judge decided partly in favour of the Respondent and partly of the Claimant. She decided that the Claimant did not have one year's continuity of employment so as to bring an ordinary unfair dismissal claim under section 98 of the **Employment Rights Act**. He raised claims relating to detriments and dismissal by way of having made a disclosure protected under the PIDA provisions of the Act and these were struck out. He made a similar claim for having raised a health and safety issue under section 100 of the Act and that was struck out.

5. The Claimant further claimed that he was directly discriminated against and/or harassed by reason of race in the conduct of a disciplinary investigation which ensued after, what is said for the purposes of the current state of the proceedings, to be protected acts. Those claims were not struck out and no deposit order was ordered in respect of them. That also includes dismissal on the ground of race and so the claims made under the race jurisdiction, which I take it is the **Race Relations Act 1976** applicable at the time, is going for a full hearing and so are the claims for breach of contract and holiday pay following his summary dismissal. The judge decided some parts of the claim had no reasonable prospect of success but did not form that view about others. The appeal, therefore, is against the strikeout of the two PIDA cases that the Claimant seeks to make.

6. In the course of her judgment, Employment Judge Hughes reflected on whether to make a deposit order in respect of the PIDA cases and decided that she would if she were wrong on her primary finding relating to the strikeout of those cases. But she did not assess how much the deposit would be or in respect of which particular claims within the claim form they would be ordered.

7. Directions sending this case to a preliminary hearing were given by HH Jeffrey Burke QC and at that preliminary hearing, HHJ Serota QC sent the matter to a full hearing. At the outset of today's hearing, I discussed with the representatives what powers should be exercised should any part of the appeal be allowed. It was agreed that the strikeout could be determined by me but as to the deposit, that could not be finally decided because the judge said she was going to look at evidence of means and the Claimant is not here today to give any.

The facts

8. The judge was scrupulous to make clear she was not making findings of fact. She was looking at whether there was no reasonable prospect of success in the claims. The first issue to be determined related to her finding that the Claimant did not have one year's service. The summary of the circumstances are these:

> **"5.1 The claimant's ordinary unfair dismissal complaint is based on the proposition that he had more than one year's service. It was common ground that if he did not, he could not pursue this claim.**
>
> **5.2 In the alternative, the claimant contends he was automatically unfairly dismissed by reason of making a health and safety disclosure and/or a public interest disclosure. The alleged disclosure is that the claimant raised a concern about whether a piece of electrical work should be undertaken without being properly isolated. His case is that he was overruled by a manager and the work went ahead. His claim is that he was subsequently disciplined and dismissed because that work was undertaken. The respondent disputes that version of events. However, taking the claimant's case at its highest for the purposes of the strike out application, his argument is that the fact that he raised a health and safety and/or public interest issue, caused his dismissal."**

9. The unfair dismissal case is predicated on his working for a year. In paragraph 7 of her judgment, described as the "ordinary unfair dismissal claim", it is said that Mr Swanson made the case that the Claimant was told by an agency, Pertemps, for whom he worked before he worked for the Respondent, that his service with that agency would count towards his length of employment with the Respondent in the event that he was taken on as an employee. He was taken on as an employee and sought to activate that assurance.

10. However, the judge accepted Ms Eeley's argument in the following way:

> **"7 […] Ms Eeley, argued that even if the claimant's evidence on this point was accepted, it would not assist him because Pertemps did not have any authority to decide the terms on which the claimant was employed by the respondent - Pertemps was not a party to it. In my view, that argument was wholly unassailable. Taking the claimant's case at his highest (i.e. that he was given the aforementioned information by an employee of Pertemps), as a matter of law any such statement did not bind the respondent. In the circumstances, I concluded that the claimant would fail to establish that he was an employee of the respondent prior to the start date set out in the contract of employment. Therefore, the contention that the claimant had sufficient service to bring an unfair dismissal claim had no prospect of success. It followed that there was no jurisdiction to hear the ordinary unfair dismissal complaint.**
>
> **8. I then dealt with the race discrimination complaints. The claimant alleges direct discrimination and/or harassment in relation to the disciplinary investigation and direct race discrimination in relation to the dismissal. The disciplinary investigation concerned the fact that electrical work had been undertaken in an unsafe manner. The claimant and three other people (two white employees and one Asian employee) were the subjects of the investigation. The claimant alleges that during the disciplinary investigation he was interviewed three times and that on one of those occasions he was held in a room for over three hours. He alleges that he was "brow-beaten" and that the way the investigation was conducted was oppressive. The claimant told me that he did not know whether the others were subjected to the same treatment, but that it was his belief that they were not required to make more than one statement. He alleges that the way he was treated during the investigation was direct race discrimination and/or harassment by reason of race. As regards dismissal, the claimant's case is that he and the Asian employee were dismissed whereas the two white employees received final written warnings. This is a complaint of direct discrimination by reason of colour. The claimant's representative submitted that the differential treatment of the white employees was evidence from which an inference could be drawn that the Claimant's colour had influenced the decision to dismiss him. The respondent's representative submitted that the race discrimination complaints were inherently weak. She argued that it was not enough for the claimant to point to less favourable treatment and a difference in race and/or colour and that he would fail to establish a prima facie case of discrimination or harassment."**

11. The judge then dealt with the contentions relating to race and accepted that the Claimant would be entitled, at a full hearing, to advance his argument that there was a *prima facie* case. She addressed herself to the correct test. It is common ground that the correct tests were those set out in the authorities to which she does not refer but that she made no error of law in her decision not to strikeout the race claims.

12. She then turned to the substantive issues on the protected act claims. The circumstances were that an investigation was conducted into the fact that electrical work had been undertaken in an unsafe manner and there were four people involved. Two were white and one Asian. They were all investigated and two were dismissed including the Claimant and two were disciplined and given a final written warning. The race claim is based upon the difference of

race and that is going ahead but the other claims were based upon the merits of the Claimant's case for having asserted either a health and safety issue or a public interest disclosure.

13. The judge said this:

> **"11 I then considered the merits of the health and safety and public interest disclosure complaints. Firstly, there is an automatically unfair dismissal complaint. It is put in two ways: that the claimant was dismissed contrary to section 100 of the Employment Rights Act 1996 (as amended) ("the 1996 Act") i.e. that it was a health and safety dismissal; or that he was dismissed contrary to section 103A of the 1996 Act i.e. that it was a protected disclosure dismissal. I have already set out my conclusions concerning the prospects of success of the contention that the dismissal was by reason of the claimant's race above. The first point to note regarding the two grounds on which the automatically unfair dismissal complaint is put is that it is not sufficient for health and safety or a public interest disclosure to be a factor in relation to the dismissal - it must be the reason, or principal reason, for it. That does not apply to the alleged detrimental treatment short of dismissal (i.e. the fact that a disciplinary investigation was initiated and the way it was carried out). The claimant does not have to prove the main reason for the detrimental treatment was the alleged disclosure and/or health and safety issue but he does have to prove it was a causative factor.**
>
> **12 The claimant's account is that he raised a concern about the manner in which the electrical work was to be carried out. He alleges that this amounted taking some form of action falling within section 100 of the 1996 Act although, by reference to the wording of section 100, it is rather difficult to see how it did. The claimant also alleges that by raising his concern, he made a protected disclosure (the latter proposition does appear arguable by reference to the applicable legislation). The respondent disputes that the claimant raised any concern whatsoever. For these purposes, I was prepared to accept the claimant's case which, taken at its highest was that he would prove he had made a public interest disclosure and possibly (although I rather doubted it) that by raising this concern he took action falling within section 100. The claimant's representative explained that the claimant's case is he raised a proper concern about health and safety and was disciplined and dismissed instead of being commended for doing so.**
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> **13. For the claimant to succeed with the detriment complaints he must demonstrate that he raised a health and safety concern which amounted to action under section 100 and/or to a protected disclosure (which is in dispute); he must also demonstrate that he was subjected to a disciplinary process (which is not in dispute) and/or that the disciplinary process was carried out oppressively (which is in dispute); and, finally, that is more likely than not that the alleged disclosure which is the causative factor in respect of the disciplinary process and/or the way it was conducted (which is in dispute). As regards the dismissal complaint, the claimant must demonstrate that he raised a health and safety concern which amounted to action under section 100 and/or to a protected disclosure (which is in dispute); he must also demonstrate that he was dismissed (which is not in dispute); and, finally, the tribunal must conclude that the alleged disclosure was the principal reason for dismissal (which is in dispute). In my judgement, the difficulty the claimant will face concerns the causation question. As noted already, the investigation was not restricted to the claimant - three other people faced disciplinary action, one of whom was also dismissed, and none of whom was alleged to have raised health and safety concerns. The existence of those comparators provides some assistant to the claimant in relation to the race complaints for the reasons noted above; however the opposite applies in relation to these complaints. Assuming for these purposes that the claimant succeeds in establishing that he made a protected disclosure and/or took action falling within section 100, I thought it highly unlikely that he would succeed in establishing the necessary causal link between that disclosure and the disciplinary action and/or dismissal because other people who had allegedly raised concerns were also disciplined and/or dismissed."**

14. On that basis, the judge decided that these claims would be struck out. She took the case at its highest for the Claimant but held that, on causation, he would not be able to prove his case. She then went on, very helpfully, to decide the issue of the deposit and said this:

> **"14 I gave thought to whether these claims had no reasonable prospect of success or whether there was little reasonable prospect of success, such that there were grounds to order a deposit. I concluded that I would be doing the claimant no favours by ordering a deposit in relation to claims which I considered to be virtually certain to fail on the causation point. In the circumstances I decided those claims should be struck out as having no reasonable prospect of success."**

The legal principles

15. There is no dispute before me as to the correct legal principles. They are to be found in the judgment of Lady Smith in **Balls v Downham Market High School & College** (UKEAT/0343/10), **Anyanwu v South Bank Student Union and South Bank University** [2001] IRLR 305 and **Ezsias v North Glamorgan NHS Trust** [2011] IRLR 550. Strikeout will not be justified where a core issue of fact has to be resolved and that can only be done at a trial and not at a PHR where no evidence is called.

Discussion and conclusions

16. Both representatives have been entirely focussed in their submissions. It is accepted that the judge decided the point against the Claimant on the basis of his highest case. That is that he would be able to show that he raised a health and safety issue or a protected disclosure under each part of the legislation. The weakness and, indeed, the fatal weakness in the case was as to causation and this was because of the relationship between the Claimant and the three other people. Four people were said to be engaged in this unsafe practice, all four were disciplined and so, as a matter of causation, the judge held there was no reasonable prospect of his succeeding in his claim of being singled out.

17. This judgment is exemplary in the detail provided but I respectfully disagree with the judge as a matter of logic and I accept Mr Swanson's argument that the judge missed the point. The point is that, of the four men, only the Claimant, on his case, is asserting the protected acts and health and safety issue. So it is wrong to categorise him as in the same position as the others. If this were an unfair dismissal claim in its ordinary sense, it would be unfair to treat people with different circumstances in the same way. As Mr Swanson correctly argues, the other men were not disciplined by the Respondent for raising health and safety issues but were disciplined for not following the health and safety regime. When the Claimant, on his case, objected to the breaches of the health and safety regime by the others, he was put in the same boat as them and disciplined.

18. The judge's thinking represents, in my view, flawed logic. The Claimant is entitled to put forward his case of dismissal and detriment for asserting the acts protected under PIDA or health and safety. It was the only ground upon which these claims were struck out and, in my judgment, the core issue in this case is one of fact, as to whether he did so make those assertions and whether the reason or principal reason for his dismissal was for that. The fact that others have been in breach of the safety regime is strictly irrelevant to that but the point can be put in argument. It was not a ground upon which it could properly be said that the case had no reasonable prospect of success.

19. I then turn to the secondary issue, the deposit order. I heard argument on the point before deciding whether to allow the ground of appeal to be argued. I have some criticism of Mr Swanson for not raising this in his Notice of Appeal so that it could be considered certainly by Judge Burke QC on the sift and of course before Judge Serota QC. It is raised in Ms Eeley's skeleton argument in that she says there is no ground of appeal against it. Mr Swanson

recognised that was the case but I have decided that it would be fair to allow this ground of appeal to be argued today.

20. Ms Eeley is not prejudiced because it is a very narrow point and I can see why this may not have been at the forefront of Mr Swanson's mind since it is the secondary finding of the judge, only to be resurrected if she is wrong on her first point which I have determined she was. Her finding in paragraph 14, Ms Eeley accepts, gives only one reason which is the causation point. Since the judge is wrong on causation for the purposes of strikeout and the high test there, it seems to me she is going to be wrong in respect of the slightly lesser test, *little* reasonable prospect of success, for the purposes of a deposit order.

21. It is inherently unsatisfactory to have two tests which do not differ appreciably but they do differ. If this were a reasons challenge, further reasons could have been given by the judge but it seems to me that those reasons would be the same as those applicable to the strikeout and there is only the causation reason. It cannot be said there was no reasonable prospect of success and it could not be said there was little reasonable prospect of success solely by reason of the causation point. In those circumstances, I will allow the new ground of appeal against the deposit order and set aside the alternative finding by the judge on this.

22. In doing so, I bear in mind Ms Eeley's point that there may be some inconsistency. She contends that the Claimant is asserting mutually inconsistent points in that the dismissal was for his protected acts and, at the same time, because of his race. I do not accept that. The Claimant will succeed in his race claims unless it can be shown that his race played no part whatsoever in his dismissal and detriment. He could still succeed in that and in his protected act dismissal claims. That, in itself, is not a reason for upholding the decision of the judge on causation.

23. I then turn to her decision to strikeout the ordinary unfair dismissal claim predicated, as it must be, upon one year's service. She was correct to do so because, as Ms Eeley argued, whatever Pertemps, his former employer, said to him about continuity of service, cannot help him in respect of his service with the Respondent. That is a simple matter which the judge was able to resolve. I very much doubt that the parties can agree to provide a longer period of employment so as to confer the statutory right to complain of ordinary unfair dismissal. Continuity of service is a statutory construct and cannot be in the hands of the two parties. The judge heard no argument on that point and nor have I. It is sufficient, for this purpose, to say that Pertemps could not confer jurisdiction and, for that matter, it would seem to me nor could the Respondent and so the strikeout of the ordinary unfair dismissal claim is upheld.

24. I would very much like to thank both Ms Eeley and Mr Swanson for their arguments today. The appeal is allowed in part. This goes back to the Tribunal for hearing.