Appeal No. UKEAT/0077/12/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 June 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR G LEWIS

MS P TATLOW

MR P TAKAVARASHA — APPELLANT

(1) LONDON BOROUGH OF NEWHAM
(2) MR R STEEL
(3) MR D CHUDGAR
(4) MR A BEATTIE — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHARLES PRICE (of Counsel) Direct Public Access Scheme
For the Respondents	MR JONATHAN BERTRAM (of Counsel) Instructed by: London Borough of Newham Legal Services Ground Floor – East Wing Newham Dockside 1000 Dockside Road London E16 2QU

SUMMARY

PRACTICE AND PROCEDURE

Appellate jurisdiction/reasons/Burns-Barke

Costs

Two out of three grounds permitted to proceed to full hearing at a preliminary hearing fell away in light of the Employment Tribunal answers to **Burns-Barke** questions then raised.

No error of law by ET in awarding costs against the Appellant reflecting his earning potential.

Costs ordered in the appeal, again taking account of his means and the **Burns-Barke** answers which wholly undermined the first two grounds of appeal.

HIS HONOUR JUDGE PETER CLARK

1. This case was heard by an Employment Tribunal chaired by Employment Judge Haynes sitting at the East London hearing centre on 12-14, 16 and 19-22 September 2011. The parties are Mr Takavarasha (the Claimant) and London Borough of Newham and three others, including a Mr Steel (the Respondents). The Claimant is black and of African ethnic origin. He brought complaints of race discrimination, victimisation, disability discrimination and unfair dismissal arising out of his employment with Newham. The three individual Respondents were also employed by Newham. All claims were dismissed by the Haynes Tribunal by a Judgment with Reasons dated 19 October 2011. The Claimant was ordered to pay a contribution to the Respondent's costs in the sum of £1,500.

2. Against that Judgment the Claimant appealed. The appeal was considered at a preliminary hearing held before a division presided over by HHJ McMullen QC on 13 June 2012. Three grounds of appeal out of eight, settled by Mr Price of counsel, were permitted to proceed to this full hearing. Our Judgment should be read in conjunction with that delivered by Judge McMullen on behalf of the EAT on that occasion. We gratefully adopt the summary there contained, and we now deal with the three grounds permitted to proceed. Two of those grounds were the subject of **Burns/Barke** questions formulated at paragraph 6 of the EAT preliminary hearing order dated 22 June. The third raises a challenge to the costs order (ground 4). We shall refer to the remaining two grounds as "the Steel issue" (ground 5) and "the internal appeal issue" (ground 8).

The Steel issue

3. In 1997 the Claimant brought a complaint of racial dismissal against Newham, then his employer, and two others, Messrs Hall and Norbury. That matter came on for hearing at the Stratford Tribunal before an Employment Tribunal chaired by Ms Lewzey. We have been shown the Tribunal decision promulgated with Reasons on 29 April 1998 in that case; the claim was dismissed. Mr Steel was also employed by Newham at that time. He dismissed the Claimant on 9 February 2009, on the Respondent's case due to his level of sickness absence.

4. The point now taken in this appeal on behalf of the Claimant is that Mr Steel was a witness before the Lewzey Tribunal in 1997/1998 and yet the Haynes Tribunal found at paragraph 37 of their Reasons that Mr Steel was not in any way involved in the 1997 proceedings. Reliance was placed on paragraph 37 of the Claimant's witness statement below at the preliminary hearing in this appeal. That led to the second of the two **Burns/Barke** questions in the EAT's preliminary hearing order, formulated, we see, with the assistance of Mr Price, in this way:

> **"In paragraph 37 of the Claimant's witness statement the Appellant stated that Mr Steel, his manager and dismissing officer in 1999 [sic; 2009] had been a witness in the 1997 hearing. Did the employment tribunal consider this unchallenged evidence when in paragraph 37 of the Judgment it says in relation to the 1997 proceedings: 'However, neither Mr Chudgar, Mr Beattie or [sic] Mr Steel [the three Respondents in this case] was in any way involved in those proceedings …'?"**

5. The Haynes Tribunal met on 10 September 2012 to consider that and the first question, to which we will return, raised by the EAT. It seems that the Employment Tribunal file had been lost and with it the Employment Judge's notes of evidence. However, one of his lay colleagues had taken detailed notes of evidence on her laptop computer, to which the members of the Tribunal were able to refer. The answer to the question is that, far from the Claimant's evidence that Mr Steel gave evidence as a witness in the 1997 Tribunal hearing being

unchallenged, Mr Steel disputed that fact. He said in cross-examination by the Claimant's brother, then representing him, that he did not give evidence as a witness in 1997, and his evidence was accepted by the Haynes Tribunal. Pausing there, that was the Haynes Tribunal's finding of fact at paragraph 24.2, hence the further finding at paragraph 24.54 that Mr Steel and his two co-Respondents, Messrs Beattie and Chudgar, were not in any way influenced by the 1997 proceedings, which then feeds into their conclusion at paragraph 37.

6. We raised with counsel during argument the question as to whether we were now required to make a finding as to whether Mr Steel (a) gave evidence in the 1997 proceedings and (b) told the Haynes Tribunal that he had not done so. However, we accepted Mr Bertram's submission that it would be wrong to adjourn this hearing, no application for live evidence to be heard having earlier been made by or on behalf of the Claimant, for that matter to be explored. We proceed on the basis of the **Burns/Barke** answers supplied by the Tribunal on 10 September 2012 in answer to the questions raised by the EAT. Mr Price submits that in providing this answer the Tribunal exceeded its remit under the **Burns/Barke** procedure, relying on the guidance of Mummery LJ in **Woodhouse School v Webster** [2009] ICR 818, paragraphs 23-29. We reject that submission. The question, properly asked by the EAT, was predicated, no doubt on Mr Price's instructions, on the Claimant's evidence being unchallenged. The Haynes Tribunal corrected that misapprehension by reference to Mr Steel's evidence before them and simply set out the relevant evidence it heard from both the Claimant and Mr Steel and its finding reflected at paragraph 24.2 of the Reasons. That is not an exercise in advocacy by the Employment Tribunal; it explains and deals with the question asked and no more.

7. In these circumstances, we see nothing in this point, following full examination.

The internal appeal

8. The complaint here is that the Haynes Tribunal did not consider an issue in the case, namely whether the internal appeal, which proceeded in the Claimant's absence, was itself an act of unlawful discrimination. The **Burns/Barke** question asked of the Employment Tribunal was in these terms:

> **"Was the failure to allow the Applicant [Claimant] to attend his own appeal hearing not considered by the Tribunal as an act of discrimination in its own right?"**

9. We note that at paragraph 4 the Tribunal record that it was agreed that the internal appeal was part and parcel of the dismissal; it was not a separate issue on its own. That accords with Mr Bertram's recollection, he having appeared below, but apparently not that of the Claimant and his brother. Leaving that issue aside, it is plain to us that the question of the internal appeal was considered by the Employment Tribunal – see their findings of fact at paragraph 24.58-24.60 – and is reflected in their conclusion at paragraph 33 that the reasons for dismissing the Claimant were entirely concerned with his absences and that his race and ethnicity had no influence on their decision. Again, this point goes nowhere.

Costs

10. The Respondent produced a costs estimate of £28,000, albeit not in the form of a written schedule. The Tribunal found that the race discrimination and victimisation claims were misconceived. That represented, in their view, 25 per cent of the costs, £7,000. They further reduced that figure to £1,500 in light of the Claimant's means; he was unemployed but, the Tribunal thought, was capable of finding employment (see their Reasons, paragraphs 71-75).

11. Mr Price attacks that finding on a number of grounds; first that the starting point should have been £10,000. We disagree. The starting point is the actual total-cost figure, which appears to us to be comparatively modest for an eight-day hearing and preparatory work. The £10,000 was simply the then limit for assessed costs, to which the Respondent limited its application. Next, he relies on the observation of Employment Judge Prichard at an earlier case management discussion that the Claimant had a "legally well-conceived complaint". As the Haynes Tribunal observed (paragraph 72), Employment Judge Prichard had not then heard the evidence; a legally well-conceived claim may then fail on the facts. That is what happened here. Finally, he submits that the award of costs, still exceptional in Employment Tribunals, was disproportionate given the Claimant's lack of employment. Again, we disagree. Impecuniosity of the paying party is not a complete answer to a costs application.

12. In these circumstances, as with the earlier surviving grounds of appeal, we can see no error of law by the Haynes Tribunal; accordingly, this appeal fails and is dismissed.

13. Following our Judgment in this case, Mr Bertram made an application on behalf of the Respondents for costs in the appeal. Following the preliminary hearing, as we indicated earlier, the **Burns/Barke** questions were posed and answered by the Tribunal on 10 September 2012. We agree with Mr Bertram's submission that once those answers came in really there was no reasonable prospect of this appeal succeeding. The other matter was the costs appeal, which, again, we saw no strength in.

14. In November of last year the Respondent offered to forgo the £1,500 costs order by the Employment Tribunal if the appeal was dropped by the Claimant. That offer was not taken up, and the matter proceeded to a hearing. On 13 March we are satisfied Newham wrote to the

Claimant advising him that a costs application would be made in the event that his appeal was unsuccessful. There is some suggestion that letter was not received, but we are satisfied that Newham did everything they could to approach the question of costs properly. The fee incurred today in respect of counsel's fees is £2,500 plus VAT; his solicitor attended at a cost of £406, no VAT; and we are told that the costs of preparation from February until now are £1,900. We enquired about the Claimant's means. He is now a part-time caretaker earning £324 per week gross. He tells us his rent his £2,500 per month and he has other outgoings of £500 a month. His wife is working as a midwife, and her earnings go into the family pot.

15. Taking all of those matters into account, we are satisfied that this is a proper case for costs in the appeal. The picture following a full hearing is very different from that which presented itself to the division that heard the preliminary hearing on an Appellant-only basis. Taking account of his means and the fact that he still has a debt of £1,500 for the Tribunal costs below, we shall order him to pay the Respondent's costs in the appeal in the sum of £2,500 inclusive of VAT.