Appeal No. UKEAT/0545/11/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 November 2012
Judgment handed down on 12 February 2013

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

MISS Y MILLS — APPELLANT

LONDON BOROUGH OF BRENT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOE SYKES (Representative) Employment Law Centres 107 Fleet Street London EC4A 2AB
For the Respondent	MR SAUL MARGO (of Counsel) Instructed by: London Borough of Brent Legal Services Town Hall Annexe Forty Lane Wembley Middlesex HA9 9HD

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

Allegations of apparent bias by an Employment Judge dismissed on the facts. The Employment Judge was entitled to strike out the Claimant's third claim against the local education authority when she had withdrawn her first two claims against her employer school based on the same facts.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the Judgment and reasons of Employment Judge Liddington sitting at Watford on 17 March 2011. The hearing was a Pre-Hearing Review (PHR). Both parties were represented by counsel.

2. The Employment Judge refused the Claimant's application for postponement of the Pre-Hearing Review and struck out her claims under the **Race Relations Act 1976** and Part IVA (Protected Disclosures) of the **Employment Rights Act 1996**.

3. The Appellant is represented by Mr Joe Sykes, representative, and the Respondent is represented by Mr Saul Margo of counsel. I am grateful to both for their written and oral submissions.

The factual background

4. The factual background to Ms Mills' claims is set out in paragraphs 1-20 of the reasons. In summary, the Appellant, a teacher, presented two claims of race discrimination in the Watford Employment Tribunal (cases numbered 3300342/2009 and 3302545/2009) against her employer, the London Borough of Brent. Employment Judge Manley, of her own motion, substituted as a Respondent the school where the Claimant then worked. This was Mitchell Brook Primary School.

5. The trial took place at the Watford Employment Tribunal on 11-13 January before Employment Judge Ryan and two lay members. On the third day of that hearing, the Claimant who had given her evidence and been cross-examined on it, upon the advice of her lay representative, withdrew her claim.

6. On 16 April 2010, Employment Judge Ryan refused the Claimant's application for a review, and the Respondent's application for dismissal was stayed to be considered some two months later in order to preserve the Claimant's rights.

7. On 17 May 2010, the Appellant issued a third claim against the London Borough of Brent in the Watford Tribunal with the case number 33019244/2010. She reclaimed race discrimination on the same facts against the London Borough of Brent and added a claim of public interest disclosure on the same facts. On the same day, she submitted a letter of complaint about the alleged "harassment and bullying" of the Claimant by Employment Judge Ryan at the hearing. That letter was sent to Regional Employment Judge Gay and was supported by a statement from the Claimant and her former lay representative, Mr Lewis. These statements are substantially the same as those put in as affidavit evidence in this appeal.

8. Having investigated the Claimant's allegation (by reading the file and obtaining responses to those statements from Employment Judge Ryan, the lay members of the Tribunal and counsel and solicitor for the Respondent), Regional Employment Judge Gay wrote a detailed letter to the Claimant setting out her conclusions and dismissing the complaint on 14 July 2010. The letter concluded by informing the Claimant that if she was dissatisfied with the letter from Regional Employment Judge Gay, she could complain to the Judicial Appointment and Conduct Ombudsman ("the Ombudsman").

9. The Claimant did make a complaint to the Ombudsman, and her complaint was rejected by letter dated 29 November 2011.

10. A notice of the Pre-Hearing Review was sent to the parties on 22 November 2010 to decide whether the claim ought to be struck out as an abuse of process. An application for an adjournment to await the Ombudsman's report was refused.

The pre-hearing review

11. The application for an adjournment was again made by Mr Ward and refused by Employment Judge Liddington. That refusal is not in issue in this appeal.

12. The Tribunal noted in paragraphs 22-25 what had occurred at the hearing. The Employment Judge read the written statements of the Claimant and her former legal representative, Mr L Lewis. The Employment Judge commented that they "were of little assistance to the Tribunal today". She referred to the bundle of documents and written submissions from both parties. She referred to a number of well-known cases. She then summarised the law at paragraphs 26-28.

13. Her conclusions were as follows:

> **"29. The judgment of this Tribunal is that the claimant's claim should be struck out for the following reasons:**
>
> **(1) The reason for the claimant having withdrawn her complaints at the Hearing in January 2010 is not supported by the evidence uncovered during the Regional Employment Judge's investigation. The claimant was represented. She had clearly had an uncomfortable time giving her evidence and being cross examined, but that is not unusual in Tribunal cases. Her representative advised her to withdraw and she agreed to do so. There was no evidence of any 'duress'. The claimant alleges that the Respondent's representative indicated that if the claimant did not withdraw they would be asking for costs. This, again, is not unusual and does not, in these circumstances, constitute duress. The claimant had the option either to proceed to the last day of the hearing or, upon the advice of her representative, to withdraw. She chose the latter.**
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> **(2) The interests of justice are also best served by striking out this claim. There is no evidence that the claimant is not allowed to put her case at the full Hearing. Indeed, she had done so, she had been examined, cross-examined and re-examined and the Employment Judge, as is very common, had asked questions as well. It is also the fact that the application to withdraw, unlike, for example, in the case of *Khan v Heywood Middleton Primary Care Trust* [2006] EWCA Civ 1087, was extremely late in the day. Mr Khan had withdrawn his claim weeks before the tribunal, the claimant did so here on the third of four days.**
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> **(3) The issues that would have to be determined are now very stale indeed, and memories will inevitably have faded in the course of the six years from the first act complained of by the claimant.**

(4) It would be against public policy for the claimant to be allowed to re-run her original claim. In the expression used by counsel for the Respondent, this would represent a 'second bite at the cherry' in that a party, seeing his case is not progressing as anticipated, could withdraw and start afresh hoping for a different outcome from a different tribunal. This would not only lead to a waste of public time and money but would incur disproportionate costs for both parties.

(4) In summary, having carefully considered the evidence, the submissions and the case law in order to determine the relevant facts, it is clear to this tribunal that this claim is as clear an abuse of process as it has seen. It is accordingly struck out."

14. The Judgment and reasons were sent to the parties on 12 May 2011.

Subsequent developments

15. Following receipt of the Notice of Appeal, HHJ Pugsley operated paragraph 11 of the EAT Practice Direction. The Appellant filed an affidavit dated 11 January 2012 and, in due course, comments were received from Employment Judge Ryan and the two lay members. I have not seen any affidavit from the Respondent.

Evidence of Ms Mills

16. Ms Mills gave evidence on oath before me at the Employment Tribunal. I found her to be an unsatisfactory witness for the following reasons, which are not exhaustive:

(1) Internal consistency and consistency with documentary evidence:

(a) In her oral evidence to me, but after her representative had withdrawn her claim in front of the Ryan Tribunal, she said she wanted to ask him why he thought she should withdraw. That is contradicted by the account given by Mr Lewis in his witness statement at appeal bundle page 56, and by lay member Elkeles, at appeal bundle page 100. They both say that she wanted to tell the Tribunal her reasons for withdrawal (my emphasis).

(b) In cross-examination, she said that Employment Judge Liddington's Judgment and Reasons were "okay" and "I have not given the whole document a lot of thought." Yet that is the Judgment she is appealing.

(2) Inherent probability:

(a) The Claimant first complained about the alleged bias of Employment Judge Ryan some four months after the hearing before him. I got no satisfactory explanation for this delay.

(b) The allegations of bias are against two separate Employment Judges and are similar in nature.

(c) Employment Judge Liddington did not refuse to permit the Claimant to give evidence. She was represented by counsel, and he made no application for her to give evidence. It is not for the Employment Judge to dictate to counsel how to conduct his client's case.

(d) Each of the matters alleged to give rise to an appearance of bias in the case of both Employment Judges is capable of an alternative explanation.

(e) No complaint had been made by the Claimant about any alleged bias on the part of Employment Judge Liddington until the Notice of Appeal was received at the EAT on 23 June 2011. No separate complaint has been made about Employment Judge Liddington.

(f) In re-examination, the Claimant said, "I did not understand what withdrawal meant". The Claimant is a mature woman who is a school teacher. I find it impossible to accept her answer.

(3) Demeanour:

I found the Claimant to be an assertive witness who has convinced herself of her apparent ability to smell out apparent bias against her from innocuous or robust remarks made in her presence. She is not a witness who likes to be contradicted in her views. She clearly finds it almost impossible to see an alternative explanation.

The Notice of Appeal

17. The Notice of Appeal contains a number of grounds of appeal, but, in his oral submissions, Mr Sykes reduced them to three. I take them in the order in which they argued before me.

Ground 1: apparent bias (Notice of Appeal: paragraph 7.8)

18. Mr Sykes relies on a number of matters including:

(a) Not giving any weight to the Appellant's written evidence as to her reasons for withdrawal;

(b) Not calling her to explain her reasons orally;

(c) Relying on secret evidence (i.e. the Regional Employment Judge Gay investigation); and

(d) Not disclosing that evidence to the Claimant or her representatives. So far as not calling the Claimant to give evidence is concerned, Mr Sykes relies on the oral evidence given to me by Ms Mills about the apparent bias of Employment Judge Ryan which she would have given (if asked) to Employment Judge Liddington and that would have affected the result of the PHR.

19. I have already indicated that I found Ms Mills to be an unreliable witness. I do not accept her allegations of apparent bias against either Employment Judge Ryan or Employment Judge Liddington, for the reasons I have given. It is not for the Employment Judge to call a witness. Mr Ward made no application to Employment Judge Liddington to call the Claimant as a witness. He was clearly content to rely on the witness statement of the Claimant and on the bundle of documents produced for the PHR. Finally, there was no secret evidence. I can see how that suspicion arose from a comment made by Employment Judge Liddington at paragraph 29(i) of her reasons. However, in her letter dated 22 August 2012 to the Employment Appeal Tribunal, at paragraph 15, she says this:

> **"I do not know what the applicant is referring to when she says that I relied on 'evidence seen by the Regional Judge' but which was not disclosed to the appellant. I am, of course, aware that the appellant's complaint about EJ Ryan had been investigated by Regional Employment Judge Gay whose conclusions had been appealed by the appellant to the Ombudsman. I assume that there may be confidential documentation relating to that investigation and appeal, but I imagine these would be kept in a separate file. The only documents I have seen relating to this matter are those contained in the agreed trial bundle which must have been supplied by the Appellant's representative."**

20. The legal test for apparent bias is well set out in *Harvey on Industrial Relations and Employment Law Vol. 3*, at paragraph 9.11, where it says this:

> **"The third category is where there is a real possibility of bias. This test was originally formulated by Lord Goff of Chieveley in *R v Gough* [1993] AC. In *Re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700 at 726-727, and by the House of Lords in *Porter v McGill* [2002] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465, so as to bring it into line with the decisions of the European Court of Human Rights when construing Art 6 of the Human Rights Convention. In *Re Medicaments and Related Classes of Goods (No. 2)*, Lord Phillips of Matravers MR giving the Judgment of the Court of Appeal, stated:**

> **'The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It was then asked whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the Tribunal was biased.'**
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> **That test was proved by the House of Lords in *Porter v McGill* with the deletion of the reference to 'a real danger'. As Lord Hope of Craighead, with the approval of all the Lordships, explained (at para 103):**
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> > **'Those words no longer serve a useful purpose here and they are not used in the jurisprudence of the Strasbourg Court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.'"**

21. I stand back and look at all of the evidence, which I have heard and read, as well as the submissions of Mr Sykes. I am more than satisfied that the complaint of apparent bias is not made out, and no fair-minded and informed observer could conclude that there was a real possibility that Employment Judge Liddington was biased.

Ground 2 of Notice of Appeal: lack of jurisdiction to dismiss

22. Mr Sykes submits that the Employment Judge was in error in striking out the third claim for abuse of process when that claim was against the London Borough of Brent, whereas the first two withdrawn claims were against Mitchell Brook Primary School. In support of that, Mr Sykes makes a substantial number of submissions in paragraphs 8-17 of his skeleton argument and in his oral submissions. Mr Margo submits that there is no such restriction and refers me to the fact that there is a close relationship between the school and the London Borough of Brent as a matter of fact; there is privity of interest, and the fact that the facts upon which all three claims are based are identical. The only difference is in the third claim that is now a claim for public-interest-disclosure discrimination. He refers me to **Ashmore v British Coal Corporation** [1990] ICR 485 at E-H and 496 D-E per Stuart-Smith LJ. He distinguishes **Khan** as not being an abuse of process case. Finally, he submitted that Employment Judge Liddington gave a clear reason in paragraph 29(1) of her reasons as to why she rejected the Claimant's case that she had been put under duress to withdraw her first claim.

23. In my judgment, the Employment Judge was entitled to take the view that there had been no duress and that the withdrawal of the first two claims was voluntary. She was entitled to take into account the fact that the third claim was almost identical to the first two claims save that the identity of the Respondent was different. She was entitled to take into account the fact that there was a privity of interest between the school and the local education authority. The reality is if there had been a judgment against the school, the local education authority would have paid any compensation. Finally, the Employment Judge was entitled to take into account that this claim was withdrawn on the third day of a four-day hearing after the Claimant had completed her evidence. This was not an estoppel case because there had been no judgment by the Ryan Tribunal. The rule in **Henderson v Henderson** [1843] 3 Hare 100 has no application to this case.

24. Finally, in his reply to Mr Margo's submissions, Mr Sykes sought to persuade me that there was an error on the part of Employment Judge Liddington in striking out for abuse of process because rule 18(7)(b) of the **Employment Tribunal Rules 2004** provides for a strike-out on the grounds that a claim "is scandalous, or vexatious, or has no reasonable prospect of success", and that was not the language used by the Employment Judge, who specifically referred to abuse of process. There is no substance in that submission. The short answer to it is contained in the Judgment of Stuart-Smith LJ in **Ashmore** at page 494E-H and also **ETM Marler Ltd v Robertson** [1974] ICR 72.

Ground 3: Notice of Appeal paragraph 7

25. Mr Sykes submitted that Employment Judge Liddington erred in law in striking out the third claim because it was not an abuse of process to re-litigate a withdrawn but not dismissed employment claim (**Khan** at paragraphs 68-77), and in any event the Employment Judge gave

no weight to the written evidence of the Claimant explaining her reasons for withdrawal. He repeats his submissions in respect of the failure to allow the Claimant to give oral evidence.

26. Mr Margo submits that the school was the only correct Respondent in the first two proceedings. Even if it was not the correct Respondent, that does not affect the validity of those proceedings. That withdrawal was effective as against the school. It was therefore proper for the Employment Judge to consider what had happened in the first two claims when considering to strike out the third claim.

27. I agree with Mr Margo. There is a considerable overlap between Mr Sykes' submissions, and I can see no reason why as a matter of law the Employment Judge was not entitled to consider the nature of the first two claims against the governors of the school and take notice of the fact that those two claims were factually indistinguishable from the third claim, brought against the London Borough of Brent. I do not regard the passages in **Khan** as determinative of this issue. The Employment Judge gave more than adequate reasons in paragraph 29 of her reasons as to why she was going to strike out the third claim.

Conclusion

28. For these reasons, the appeal is dismissed.