Appeal No. UKEAT/0532/12/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 May 2013
Judgment handed down on 10 July 2013

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

DR C DEER — APPELLANT

UNIVERSITY OF OXFORD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR OLIVER SEGAL (One of Her Majesty's Counsel) Instructed by: Manches LLP 9400 Garsington Road Oxford Business Park Oxford OX4 2HN
For the Respondent	MS JANE McCAFFERTY (of Counsel) Instructed by: Simmons & Simmons LLP City Point One Ropemakers Street London EC2Y 9SS

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

Further claims permissibly struck out, one as an abuse of process and three other claims as having no reasonable prospect of success in circumstances where the principal issue, knowledge in a victimisation claim, was resolved in favour of the Respondent following a full Employment Tribunal hearing.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. The Claimant, Dr Cecile Deer, was a PhD student at Oxford University between 1996 and 2000. She was then employed as a Research Fellow until March 2008. In 2007 she brought a claim in the Reading Employment Tribunal against the University alleging unlawful sex discrimination arising out of her membership of its women's football club. That claim was later compromised under the terms of an ACAS COT3 agreement in June 2008. The terms of settlement included an agreed reference. Those settled proceedings constituted a 'protected act' for the purposes of a complaint of victimisation under the then **Sex Discrimination Act 1975** (SDA).

2. Subsequently she brought 5 further separate complaints of victimisation in the same ET. Those claims arose out of a refusal by Professor Walford to provide the Claimant with a reference, at her request, in connection with her application for a Fellowship at the University, in December 2008.

3. Claim 1 named Professor Walford and the University as Respondents. It came on for a full merits hearing before an ET chaired by Employment Judge John Warren (the Warren ET) sitting at Reading on 9-12 February 2010. By a Judgment dated 12 February claim 1 was dismissed. Written reasons for dismissing the claim and for ordering the Claimant to pay the Respondents' costs were provided on 17 March 2010. I note that, at para. 47, the Tribunal record that the Claimant's then counsel, Mr Quinn, conceded that the Respondents' costs application could be dealt with on the basis that the Claimant has unlimited means.

4. Claims 2-5, against the University only, were struck out by EJ Barrowclough following a Pre-Hearing Review held on 13-14 June 2012 by a Judgment with reasons dated 19 July 2012. It is against that strike-out Judgment, made under ET rule 18(7)(b), that the Claimant now brings this appeal. The Claimant is represented by Mr Oliver Segal QC; the Respondent by Ms Jane McCafferty. I am grateful to both for the depth and clarity of their respective submissions, both oral and in writing. For the purposes of this Judgment I also gratefully adopt the careful analysis by EJ Barrowclough of the procedural history leading to his decision at paras. 1 (Background) and 2 (The Facts) of his reasons. I shall draw on that history in explaining to the parties why they have won or lost in this appeal.

Claim 2

5. Having considered the arguments put before me by counsel at a full day's hearing it seems to me that the real issue here is whether, as the Judge held at para. 3.7 of his reasons, the Claimant's wish to pursue claim 2 after claim 1 had been dismissed by the Warren ET, appeals against that decision having been dismissed by the EAT (Underhill P and members, 20 April 2011) and by Elias LJ at an oral permission hearing on 26 January 2012, was an abuse of process.

6. It is now generally understood that the test for abuse of process is that set out by Lord Bingham in his speech in **Johnson v Gore Wood** [2002] 2 AC 1, 31. In considering the traditional rule in **Henderson v Henderson** (1843) 3 Hare 100, Lord Bingham noted the public interest in finality in litigation; that a party should not be twice vexed in the same matter. However, he warned that it is not enough that a matter could have been raised in earlier proceedings; the question is whether it should have been raised. What is required is a broad merits based judgment which takes account of the public and private interests involved and all the facts of the case, focussing attention on the crucial question whether, in all the

circumstances, a party is misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before.

7. That this approach is to be followed by ETs, in preference to the rigid application of the **Henderson v Henderson** principle in this jurisdiction by the Court of Appeal in **Divine-Bortey v LB of Brent** [1998] ICR 886 (a case not cited to or by their Lordships in **Johnson**) is suggested by HHJ Hand QC in **Parker v Northumbrian Water Ltd** [2011] ICR 1172, para. 70. I respectfully agree that insofar as the CA approach in **Divine-Bortey** is inconsistent with that of the HL in **Johnson** the latter necessarily must prevail.

8. Did EJ Barrowclough reach a permissible broad merits based judgment on the abuse issue? To answer that question I must first set the context.

9. The thrust of the Claimant's victimisation claim in claim 1 is summarised at para. 21 of her Particulars of Complaint attached to her Form ET1 in this way:

> **"21. I believe that Professor Walford's refusal to provide a reference and his hostile response in general was an act of victimisation in connection with the claim of sex discrimination that is referred to above** [i.e. the claim settled in June 2008, referred to at para. 6 of the Particulars]**. I believe that the University are vicariously liable for his discriminatory conduct."**

10. In is axiomatic that knowledge on the part of the alleged discriminator of the protected act is a pre-condition to a finding of victimisation: see **Scott v LB of Hillingdon** [2001] EWCA Civ 2005, para. 19 per Keene LJ.

11. Thus, applying the statutory framework of the SDA, what was alleged was that Professor Walford knew of the protected act (the earlier claim settled in June 2008) and by reason of that protected act he had treated her less favourably than he would treat a person who had not done a

protected act, contrary to s.4 SDA. Plainly, Professor Walford's actual knowledge of the protected act was a key ingredient of the statutory tort for which, it was said, the University was also liable as his employer (SDA, s.41(1)).

12. Claim 1 was presented to the ET on 27 February 2009. At the same time the Claimant raised a grievance with the University concerning her reference request. However, prior to its repeal on 6 April 2009, the provisions of s.32(3) **Employment Act (EA) 2002**, applied to claim 1. Not less than 28 days must elapse between a claimant lodging a written grievance in accordance with the statutory grievance procedure (SGP) and presentation of the claim. That provision applied to the claim against the University, although not to Professor Walford personally. Thus a fresh claim was necessary as against the University.

13. Claim 2 was lodged at the ET on 1 June 2009. Only the University was there named as Respondent. Insofar as it repeated claim 1, the s.32(3) EA grievance condition was met. The real question, as EJ Barrowclough appreciated (see reasons para. 3.4) was what if anything was left of claim 2 once claim 1 had been determined by the Warren ET? First, claim 2 added a separate allegation (Particulars, para. 22) that the University had wrongfully accessed her email account (the email allegation). That allegation was later withdrawn on 18 May 2012 (reasons, para. 3.3).

14. Para. 21 of the Particulars of claim 2 read a little differently from the equivalent paragraph in claim 1. It said:

> **"21. I believe… referred to above. I believe Professor Walford acted in collusion with others within the University. I believe that the University are responsible for his discriminatory conduct in that they are either vicariously liable for his actions as his employer or else he was acting as their agent (sections 41(2) and 41 (3) SDA)."**

15. Asked by the Respondent for clarification of her case the Claimant's solicitors replied on 21 August 2009, alleging that the terms of Professor Walford's reply to the reference request was influenced by someone within the University who was aware of the earlier (settled) case. They added:

> **"Our client is reviewing her evidence in relation to this allegation. She will provide further details in due course, otherwise the allegation will be dropped from these proceedings."**

16. I pause to observe that at this stage no individual is named as having influenced Professor Walford. That remained the position as at the date of the PHR before EJ Barrowclough (reasons, para. 3.4).

17. Claims 1 and 2 were combined and came on for a PHR/CMD before EJ Chudleigh on 2 October 2009. That Judge ordered the Claimant to pay a deposit in respect of both claims (Barrowclough reasons, paras. 2.9-2.10). In making case management orders, including listing claims 1 and 2 for a 4 day full hearing commencing on 9 February 2010, the Judge also formulated the issues for that hearing. I have been shown the list of issues prepared by both the Claimant and Respondent for the Chudleigh hearing. In addition to the email allegation, specific to claim 2 only, I note that in the Claimant's list, para. 3, it is said:

> **"(3) Is the [University] vicariously liable for any act of victimisation by [Prof. Walford]:**
>
> **(a) under s.41(2) SDA**
>
> **(b) under s.41(3) SDA"**

18. On reflection, it seems to me that the pleading ought to read s.41(1) (employer's vicarious liability) and s.41(2) (agency). Section 41(3) deals with the employer's statutory defence, but that point is immaterial.

19. I have been shown the Claimant and Respondent's notes of the submissions put before EJ Chudleigh by Ms Natasha Joffe, then appearing for the Claimant and Ms McCafferty for the Respondents. According to the Claimant's note, in line with the Claimant's Further Particulars of 21 August 2009, Ms Joffe submitted that until the evidence is explored the Claimant raised whether Professor Walford could have been influenced. She referred to para. 21 of claim 2. Ms McCafferty contended that the claim against Professor Walford in claim 1 did not contain the additional point.

20. The Respondent's note records Ms Joffe as saying:

> **"I believe he (Prof. Walford) was influenced by the protected act in collusion (para. 21 [second claim])."**

21. In the event EJ Chudleigh formulated the relevant issue in her case management order dated 19 October 2009, at Appendix A (the protected act being admitted by the Respondent) in this way:

> **"2. Whether [Prof. Walford] knew or suspected that the Claimant had done the protected act… before [his rejection of her reference request].**
>
> **3. If so, whether [Prof. Walford] or [the University] (by colluding with [Prof. Walford]) treated the Claimant less favourably by reason that she had done the protected act…"**

22. Mr Segal submits that too much may be made of the words 'if so' in para. 3 above; I disagree. Having heard the parties' submissions EJ Chudleigh deliberately formulated the issues in both claims 1 and 2 in such a way that the allegation of collusion by the University in claim 2 (the separate agency allegation) was dependent also on Professor Walford having the necessary knowledge of the protected act when he was influenced by other, unnamed members of the University to refuse the Claimant a reference. That formulation has stood; it was not

appealed nor was any application made by the Claimant for it to be varied. I bear in mind that she has been professionally represented throughout.

23. What happened procedurally was that, following an order on 4 January 2010 combining claims 1, 2 and 3 (issued on 29 October 2009) at a CMD held before EJ Hardwick on 15 January 2010 claim 1 was deconsolidated from claims 2 and 3. Claim 3, to which I shall return, raised a complaint of victimisation in relation to the investigation carried out by the University into the Claimant's original grievance arising out of Professor Walford's refusal to provide her with a reference. It is right to say that the Respondents pressed for deconsolidation; the Claimant opposed it. As appears from EJ Hardwick's reasons dated 25 January 2010, the reasons for separating off claim 1 for hearing alone at the 9-12 February hearing listed by EJ Chudleigh were, first, that 4 days would not be sufficient to hear all 3 claims; secondly, claim 1 raised the core issue in relation to Professor Walford and thirdly because Professor Walford had retired; only the first claim named him as a respondent and he was entitled to a speedy resolution of the claim against him personally. In fact, EJ Hardwick misdescribed the nature of claim 2 in his original reasons (para. 4) and he issued a correction, on the Respondent's application, dated 12 February 2010.

24. It is against that procedural background that claim 1 only came before the Warren ET on 9-12 February 2010. In dismissing that claim the Warren ET found unequivocally (paras. 40 & 44) that at the relevant time Professor Walford did not know that the Claimant had done a protected act when he refused her request for a reference. Additionally, in relation to certain serious allegations of collusion between members of the University and its legal advisers and Professor Walford contained in her witness statement, the Warren ET rejected any such suggestion (para. 37). In dealing with the Respondent's costs application (para. 47), in addition to finding that EJ Chudleigh's deposit order was engaged, the Warren ET held that the

Claimant's behaviour in relying on allegations of collusion and conspiracy, later abandoned by her counsel, Mr Quinn, was scandalous.

25. It is convenient at this point to consider EJ Barrowclough's alternative (and principal) finding in relation to claim 2, that the claim is barred by issue estoppel because the Warren ET not only had to decide the 'knowledge question' in relation to Professor Walford in claim 1, it also found that the real reason for his actions was a genuine one unconnected with the protected act and that that was a necessary finding for that ET to make, thus satisfying the issue estoppel principle, as explained by Elias LJ in **Bon Groundwork Ltd v Foster** [2012] EWCA Civ 252, paras. 4-6 (para. 3.6). That point arose for determination because EJ Barrowclough accepted Mr Segal's submission (paras. 3.4, 3.5) that the wording of para. 21 of the claim 2 Particulars was sufficient to allow of an alternative case that Professor Walford, even without knowledge of the protected act, could be an unknowing agent of an act of victimisation perpetrated by some unidentified colleague or colleagues employed by the University. In other words, an innocent conduit for the victimisation of the Claimant by others.

26. I have some difficulty with that analysis. If the alternative claim, that Professor Walford was an innocent conduit, lies inchoate in claim 2 it is certainly not present in claim 1. It was only necessary for the purposes of deciding claim 1, the only claim before the Warren ET, to determine that Professor Walford had no knowledge of the protected act. That disposed of claim 1. I raised the question during argument whether the Warren ET's rejection of any collusion between Professor Walford and other members of the University or its advisors was a necessary finding for the purposes of the Respondent's costs application but was told that is not relied on by the University in this appeal.

27. In these circumstances I agree with Mr Segal that the 'reason why' question, as it is characterised by Ms McCafferty, was not a necessary finding by the Warren ET. Consequently, I do not uphold the decision below on claim 2 on the basis of issue estoppel. Where I part company with Mr Segal is his submission that the Judge's finding on issue estoppel somehow infected his finding on abuse of process. I do not accept that it did. The abuse finding (para. 3.7) stands separately and requires separate analysis.

28. As to that, I agree with Ms McCafferty that pursuing claim 2 on the basis that Professor Walford was an innocent conduit for acts of victimisation by others is a plain abuse of process. I am much impressed, in the present case, by the observation of Sedley LJ in **Stuart v Goldberg and Hinde** [2008] EWCA Civ 2, para. 77, where he said:

> **"Secondly, as *Aldi* (*Aldi Stores Ltd v WSP Group Plc* [2007] EWCA Civ 1260) again makes clear and as the Master of the Rolls stresses, a claimant who keeps a second claim against the defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process. Moreover, putting his cards on the table does not simply mean warning the defendant that another action may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides."**

29. Mr Segal suggests that there is an inconsistency between EJ Barrowclough accepting (not without some hesitation) that para. 21 of the claim 2 Particulars is sufficiently wide to include the Claimant's alternative case of Professor Walford as an innocent conduit, to use my own expression and his finding at para. 3.7 that this alternative case was not made clear by the Claimant until her solicitor's letter of 1 June 2012. I disagree. It seems to me, for the reasons articulated at para. 3.7, the Claimant, if she knew that this was an alternative case she wished to advance within claim 2, wholly failed to make that clear to the Respondents and to the ET during the case management process. In particular, she did not challenge EJ Chudleigh's formulation of the issue (Appendix A, para. 3) in both claims 1 and 2, then combined, that the agency claim in claim 2 was dependent on a finding of knowledge of the protected act on the part of Professor Walford. Nor did she raise the alternative claim as a reason for not decoupling

claim 1 from claim 2 at the Hardwick CMD; a move which she opposed. Moreover, she abandoned, through her counsel, the collusion allegations before the Warren ET without mentioning her alternative case that others were guilty of victimisation in relation to Professor Walford's reference refusal, even if he was not. She maintained her position, failing to show her hand, until after she had lost on the Walford knowledge point before the Warren ET, the EAT presided over by Underhill P and Elias LJ on the permission application.

30. I return to the observation of Sedley LJ in **Stuart**. If the Claimant wished to pursue her alternative claim, that Professor Walford was an innocent conduit, it behoved her to do so before EJ Chudleigh and even more so before EJ Hardwick at the 'decoupling' CMD, a course which she opposed. Keeping that option up her sleeve at the case management stages and throughout the Warren hearing where collusion with others is alleged (necessarily involving, in my judgment, knowledge on the part of Professor Walford as well as his co-conspirators) is an abuse of process.

31. As the Master of the Rolls pointed out in **Stuart** (para. 82) although the question of abuse of process is not one of discretion, I can only interfere with the lower Tribunal's ruling if it is wrong in law. In my judgment, for the reasons given at para. 3.7, it is not.

32. Accordingly, the appeal in relation to claim 2 fails and is dismissed.

Claims 3 and 4

33. Claim 3 alleges that the University's rejection of the Claimant's grievance about Professor Walford's refusal to provide her with a reference and in claim 4 the rejection of her appeal against that decision by Professor McKendrick were motivated by her earlier protected act. The grievance appeal dealt also with her email account complaint, since withdrawn.

34. EJ Barrowclough considered those claims at paras. 3.11-3.14. He concluded that they had no reasonable prospect of success on two grounds. First, that a hypothetical comparator bringing an unfounded grievance would have been treated no differently (the less favourable treatment point) and secondly that a reasonable employee (Claimant) would not consider that she had suffered a detriment where both the grievance and appeal were without foundation.

35. Mr Segal submits that this analysis confuses less favourable treatment and detriment. I disagree. The structure of the SDA requires a finding that the Claimant has suffered less favourable treatment than a comparator who has not done a protected act by reason that the Claimant has done so. In order to complete the statutory test the Claimant must also have suffered a detriment as a result of the less favourable treatment. In my judgment the EJ correctly appreciated that distinction in concluding that there was no reasonable prospect of either less favourable treatment or detriment being found at trial.

36. Separately, Mr Segal challenges the no detriment finding on the basis that detriment may lie in the way in which a grievance or appeal against the grievance decision is handled, as opposed to the outcome. In his grounds of appeal (para. 55) he prays in aid the decision of the EAT (Morison P) in **Goold (Pearmark) Ltd v McConnell** [1995] IRLR 516. The point was not developed in his written skeleton argument or in oral submissions, and **McConnell** is not included in the agreed bundle of authorities. Nevertheless I should deal with it. **McConnell** was a constructive dismissal case in which the EAT accepted that there is to be implied into a contract of employment a term that employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress for any grievance they may have.

37. In the present case the Claimant was no longer an employee of the University when she lodged her initial grievance. She was obliged to do so due to the SGP regime then in force. Here the question is not whether the University was in breach of contract but whether (a) her treatment was less favourable than an appropriate comparator and (b) she had suffered a detriment in the way in which her grievance was progressed. In my judgment the EJ was entitled to conclude that her claims had no reasonable prospect of success on the less favourable treatment point, regardless of the detriment point. However, as to the detriment point, I agree with Ms McCafferty that the thrust of the Claimant's grievance was the University's failure to investigate Professor Walford's knowledge of her earlier protected act. Since it is now established that he did not have that knowledge she suffered no detriment.

Claim 5

38. This claim relates to the Claimant's attempts to ensure that certain documentary material relevant to claims 1-4 was preserved by the University. She followed that up with a **DPA** request. The University took the line that both requests would be the subject of the disclosure process in the existing litigation. That stance was said to amount to an act of victimisation.

39. The EJ held (paras. 3.15-3.16) that the Respondent took a reasonable position in their conduct of the litigation in this respect and that there was no reasonable prospect of the Claimant establishing any detriment in this claim, relying on the approach of the EAT presided over by Underhill P in **Pothecary Witham Weld v Bullimore** [2010] IRLR 572. I note in particular the President's reference, at para. 16, to an extract from the speech of Lord Neuberger in **Derbyshire v St Helen's MBC** [2007] ICR 841, para. 68.

40. In my judgment the EJ was entitled to conclude that there was no reasonable prospect of the Claimant establishing a detriment in claim 5, particularly in circumstances where the sub-

stratum of the claim 5 complaint has gone; the question of disclosure falls in circumstances where claims 1-4 stand dismissed, unless it be regarded as an impermissible 'fishing expedition'.

Conclusion

41. Stepping back from the fray my overall assessment of this protracted litigation from an appellate perspective is as follows. Having successfully pursued her original sex discrimination claim to a conclusion in June 2008 the Claimant was understandably suspicious of Professor Walford's motivation in refusing her a reference in December 2008. Hence she sought to establish the necessary link in claim 1. Despite a costs warning in the form of EJ Chudleigh's deposit order she deployed her 'unlimited means' in pursuit of that link, bringing in allegations of collusion with other members of the University and its advisers, variously described as scandalous (Warren ET, para. 47) and wholly improper allegations to be made in a public forum (Elias LJ, para. 16). Undeterred by losing on the principal issue of Professor Walford's knowledge of the protected act up to CA level she now wishes to pursue an alternative claim on the basis that, contrary to her primary case, Professor Walford was the innocent conduit of acts of victimisation by others in not providing the reference and in the way in which her ill-founded grievance was treated and in relation to the preservation of documents by the University, all complaints arising directly out of her initial allegation which proved to be unfounded.

42. There is a tendency to treat the observations of Lord Hope of Craighead in **Anyanwu** [2001] IRLR 305, para. 37 as meaning that discrimination claims, including victimisation, must always be permitted to run their full course. That is too generalised an approach. Each case must be viewed on its own facts and circumstances. Here, the principal issue has been tried on the evidence and determined in favour of the Respondents. ET rule 18(7)(b) is there for a purpose. It is to prevent respondents being unnecessarily vexed with ongoing claims which

ultimately lead nowhere. That is the position in this case, as EJ Barrowclough permissibly found (with the exception of the issue estoppel point in claim 2; a finding which does not affect the result). This appeal is dismissed.