Appeal No. UKEAT/0064/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 May 2013

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR A AHMED — APPELLANT

BEDFORD BOROUGH COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ABOU KAMARA (Representative) Free Representation Unit
For the Respondent	MRS HILARY WINSTONE (of Counsel) Instructed by: Bedford Borough Council Legal Services Borough Hall Caldwell Street Bedford MK42 9AP

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

Claimant failed to undergo medical examination necessary for disability claim. Further claims of race and religious discrimination also brought.

All claims struck out by Employment Judge under ET rule 18(7)(c). No consideration apparently given to (a) whether a fair trial was possible or (b) a lesser sanction, e.g. unless order/separating out race and religion claims (see rule 18(8)). **Anyanwu**, **Blockbuster v James** and **Abegaze** considered and applied.

Claimant's appeal allowed. Respondent's strike-out application remitted to a different EJ for reconsideration.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Bedford Employment Tribunal. The parties are Mr Ahmed, Claimant and Bedford Borough Council, Respondent.

The claims

2. The Claimant commenced his employment with the Respondent as a street ranger in January 2006. In August 2008 he complained of bullying and harassment at work and raised a grievance in this respect in January 2009. His grievance was rejected, and on 5 October 2009 he presented his first form ET1 to the Employment Tribunal alleging discrimination on the grounds of his religion or belief and/or race ("claim 1"). He is an Islamist of British-Asian origin.

3. In December 2009 he received a written warning following a disciplinary hearing and on 16 February 2010 presented his second claim to the Tribunal complaining of discrimination on the same grounds as alleged in the first claim, together with a complaint of disability discrimination based on work-related stress and depression ("claim 2").

4. His employment was terminated on 2 September 2011 and on 20 December 2011 he presented a third claim claiming unfair dismissal and a redundancy payment. As Mrs Winstone pointed out this morning, that claim was strictly presented one day out of time, and I understand that time was not extended and that claim has accordingly been struck out on limitation grounds.

Procedural history

5. All these claims are resisted by the Respondent. At a case management discussion held on 14 April 2010 before Employment Judge Metcalf claims 1 and 2 were combined and a pre-hearing review was fixed for 24 September 2010 in order to determine whether the Claimant was disabled and also questions of limitation. Judge Metcalf directed that on or before 9 June 2010 an appropriate medical expert was to be jointly instructed. On 23 June 2010 the Respondent applied for a strike-out order for non-compliance with the case management orders made on 14 April. On 28 June the Claimant served his witness statement setting out the effects of his illness.

6. A potential joint expert, Dr Pradhan, who is based in Birmingham, was identified. She provided an estimate of her fees which was sent by the Respondent's solicitors to those acting for the Claimant with a draft letter of instruction. On 29 June the Claimant's solicitors replied saying that he was in Pakistan visiting his sick mother and would not return until August. It seems that the Claimant's solicitors were in contact with him by email and they wrote to the Tribunal saying that in the light of Dr Pradhan's hourly rate they were seeking an alternate expert. No alternate expert has ever been put forward by the Claimant's side.

7. On 6 September 2010 the Respondent again applied for a strike-out order, the first application still not having been considered. On 15 September the Claimant's solicitor said that he had a problem funding half the cost of the joint expert, and the following day they requested financial assistance in respect of the expert's fees. On 20 January 2011 the Tribunal agreed to cover the Claimant's share of that cost. No appointment was made by the Claimant to see Dr Pradhan. On 2 August 2011 she offered to see the Claimant at his home, travelling there on a Saturday from her base in Birmingham, but for no apparent good reason he declined that generous offer.

8. On 3 April 2012 the Respondent made a third application to strike out claims 1 and 2, no action having previously been taken by the Tribunal in respect of the earlier applications. On 27 April 2012 the Tribunal listed the Respondent's strike-out application for determination at a PHR to be held on 2 August. On 5 July the Claimant's solicitors asked Dr Pradhan for an appointment before 2 August. Her office responded by saying that that was not possible but offered alternative experts who could comply with that timescale. The offer was not taken up and the PHR took place before Employment Judge Adamson on 2 August.

9. By a Judgment dated 8 August the Judge struck out claims 1 and 2 under ET rule 18(7)(c); that is, on the grounds that the manner in which the proceedings have been conducted by the Claimant has been scandalous, unreasonable or vexatious. I have not been provided with the Judge's written reasons for that decision, no application for reasons having been made in time. However, following the direction given by HHJ Shanks in his sift order in this Tribunal dated 13 February 2013, the Judge has approved the Respondent's note of his short Judgment which is before me. I understand that that note is not verbatim.

10. The Judge found that there had been substantial delay in the Claimant's co-operating in having a medical examination. He concluded that the Claimant's non-co-operation was a wilful failure to comply with the Tribunal's order for such examination. He noted that the first claim contained allegations dating back to 2006 and that two of the Respondent's potential witnesses had retired and one was abroad, and that memories were likely to fade as a direct result of the Claimant's non-co-operation in connection with the medical examination, which, I would add, is a necessary prerequisite to the pre-hearing review originally listed for 24 September 2010. In these circumstances, the Judge concluded that a strike-out was the most appropriate remedy, and he so ordered. It is against the strike-out judgment that the Claimant brings this appeal.

Striking-out

11. It is recognised on high authority that discrimination claims ought to be heard on their merits unless there is a very good reason not to do so (see, for example, **Anyanwu & South Bank Student Union** [2001] ICR 391). That principle appears to have influenced the Court of Appeal's reluctance to endorse strike-out orders. By way of example, see **Blockbuster Entertainment Ltd v James** [2006] IRLR 630 and more recently **Abegaze v Shrewsbury College of Arts & Technology** [2010] IRLR 238. The facts of **Abegaze** are stark. Having succeeded on liability in his complaint of unlawful racial discrimination against the College, Dr Abegaze still had not brought the case on for a remedy hearing six years later. The Tribunal finally struck the claim out, holding that a fair trial was no longer possible and the EAT dismissed his appeal.

12. The Court of Appeal took a different view. A proportionate order would have been an unless order, coupled with the automatic sanction of strike-out under ET rule 13(2), subject to an application for relief from sanction (as to which see **Governing Body of St Albans Girls' School v Neary** [2010] IRLR 124 CA). In giving the leading Judgment in the Court of Appeal in **Abegaze**, Elias LJ identified the relevant legal principles, drawing on the Court's earlier decision in **Blockbuster** and the approach of Burton J, then President in this Tribunal, in **Bolch v Chipman** [2004] IRLR 140, a rule 18(7)(c) case where one party was said to have intimidated the other party to the Tribunal proceedings. His response was not struck out in that case.

13. The principles are these. First, was the conduct complained of scandalous, unreasonable or vexatious? Second, was the result of that conduct that there could not be a fair trial? Third, is the sanction of strike-out proportionate (see paragraph 15 of **Abegaze**)? On the facts of

Abegaze, it appears Elias LJ did not accept that a fair trial could not take place (see paragraph 49). In setting aside the strike-out order he indicated that the Tribunal on remission could appropriately make an unless order (paragraph 52).

The appeal

14. I have had the advantage of very careful and helpful skeleton arguments, both from Mr Kamara and from Mrs Winstone, which I have had the opportunity to assimilate before this hearing has taken place. The following questions arise in this appeal. First, was it open to the Judge to find that the Claimant in relation to the question of a medical examination was guilty of at least unreasonable conduct so as to trigger the power to strike out under rule 18(7)(c)? Secondly, what of the requirement on the basis of the authorities to which I have referred that an Employment Judge should consider and conclude that no fair trial was possible (I interpose an additional ground for striking-out under rule 18(7)(f)? Third, was consideration given to a lesser sanction than strike-out, in particular an unless order or alternatively the possibility of striking out the disability discrimination claim, which depended in the first instance on a medical report being obtained, and not the race and religious belief claims also forming part of the combined claims 1 and 2?

15. Having now heard oral submissions from counsel, I am quite satisfied that the answer to the first question is in favour of the Respondent. Like Employment Judge Adamson, I am unimpressed with the Claimant's failure to co-operate with the basic requirement of pursuing his claim of disability discrimination that he should undergo an examination by an appropriate expert. The fact that in the past the proposed joint expert had offered to travel to the Claimant's home in order to see him, an offer which he did not take up in circumstances that are not satisfactorily explained, seems to me strong evidence in support of the Judge's finding that

there had been a wilful failure to comply with orders of the Tribunal, a particular order being that there should be an examination by a jointly appointed expert.

16. However, in relation to the two remaining questions, I am persuaded by Mr Kamara with some reluctance that the Judge's reasons are defective, first in that although he refers to witnesses retiring, being beyond the sea and memories fading, he does not in terms address in the note of the Judgment which is before me the critical question as to whether or not a fair trial is possible.

17. Finally, Mr Kamara referred me specifically to the written submissions made by counsel (not Mrs Winstone) appearing before Judge Adamson at the PHR. Although counsel very properly, having put forward the primary case that the claim should be struck out, said in terms that if that application was unsuccessful, then the Tribunal may wish to make unless orders, there is no indication that Judge Adamson considered that possibility before moving to strike-out. Further, there is no indication that consideration was given to the possibility of taking a draconic line in relation to the disability claim which initially depends on a medical examination taking place as opposed to the race and religious belief claims which are of course not in any way dependent on that step being taken (see ET rule 18(8)).

Conclusion

18. In these circumstances, as I say with some reluctance, but having I hope paid proper attention to the learning in the Court of Appeal, I shall allow this appeal. I do not propose to substitute this Tribunal's view of the appropriate course to take. Having identified the relevant principles, it seems to me the proper course is to remit this matter back to the Employment Tribunal for a further PHR, if necessary accompanied by a CMD, before a different

Employment Judge to consider the strike-out application in accordance with the principles to which I have referred. Accordingly, the appeal is allowed on that basis.