Appeal No. UKEAT/0274/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 November 2012
Judgment handed down on 16 January 2013

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MISS M FOX AND OTHERS — APPELLANT

BASSETLAW DISTRICT COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NIRAN DE SILVA (of Counsel) Instructed by: Thompsons Solicitors 4th Floor City Gate East Tollhouse Hill Nottingham NG1 5FS
For the Respondent	MR SEAMUS SWEENEY (of Counsel) Instructed by: Weightmans LLP First Floor St Phillips Point 47 Cannon Street Birmingham Warwickshire B2 5EF

SUMMARY

PRACTICE AND PROCEDURE- Striking-out/dismissal

Equal pay claim withdrawn, to be replaced by a fresh equal pay claim. Whether first claim ought to be dismissed under rule 25(4) and second claim an abuse of process. ET answered both questions in the affirmative. Appeal dismissed. **Verdin** and **Johnson v Gore Wood** followed and applied.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This is an appeal by Miss Fox and others, Claimants, against the Judgment of Employment Judge Rostant, sitting alone at a Pre-Hearing Review held at Sheffield Employment Tribunal on 13 December 2011, dismissing the first set of proceedings following withdrawal, brought against the Respondent Council under ET rule 25(4) and dismissing a second set of proceedings as an abuse of process. That Judgment, with reasons, was promulgated on 29 December 2011.

Background

2. The First to Third Claimants were, at all relevant times female Housing Needs Officers employed by the Respondent; the Fourth Claimant was a female Housing Needs Manager. They were members of the trade union, Unison.

3. On 15 August 2008 four Housing Needs Officers including Miss Fox wrote to Mr Len Hull, the Respondent's Head of Human Resources, a grievance letter headed 'EQUAL PAY CLAIM' complaining that they were not receiving equal pay for equal work in respect of emergency call out rates when compared with male officers working in (a) Environmental Health and Building Control and (b) Pest Control within the Respondent.

4. At para 5 of his reasons the Employment Judge noted that Mr de Silva was instructed that neither Unison, nor the union's solicitors Thompsons were involved in the bringing of that grievance. The Respondent doubted that the union was not involved in the grievance but the Employment Judge appears to have proceeded on the basis that there was no evidence to

suggest that the Claimants had advice from anybody, either Thompsons or the union, in composing that grievance.

5. In a footnote to his skeleton argument prepared for the purpose of this appeal Mr de Silva has very properly corrected the position. It is now accepted that Unison regional office advised on that grievance.

6. The equal pay grievance was not resolved in the Claimants' favour and on 9 March 2010 the first set of proceedings were issued in the ET. In their Form ET1 the Claimants contended that they did work of equal value to four male comparators holding the posts of Business Support Officer (Environmental Services); Telecom Network Analyst; Senior Legal Assistant and Senior Legal Assistant (Conveyancing) but that those comparators received back pay and pay protection payments not given to the Claimants. On that basis they brought claims under, principally s1(2)(b) and (c) of the **Equal Pay Act 1970** (Eq PA). The claims were resisted.

7. A Case Management Discussion was held on 8 June 2010 and a stage 1 equal value hearing took place on 5 October 2010 and was adjourned. On 14 October the Respondent was ordered to give particulars of any defence relied upon under s2A(2A) Eq PA. Those particulars were provided on 24 November, contending that the jobs done by Miss Fox and three other named Claimants were not of equal value to those performed by their identified comparators.

8. Further CMDs took place on 28 January and 15 March 2011. On the latter occasion it was agreed that the stage 1 equal value hearing would resume on 31 August 2011.

9. Before that hearing could take place the Claimants, through Thompsons, notified the ET (copied to the Respondent's solicitor) by letter dated 22 July 2011 that the claims of Miss Fox

and three others were withdrawn and that those Claimants now wished to bring new equal pay claims in respect of higher on call duty payments to a 'male dominated comparator'. Accordingly, any application by the Respondent for an order dismissing the first proceedings under ET rule 25(4) would be opposed.

10. The Respondent did make that application on 2 August. The Claimants provided their grounds for opposing the application on 17 August, stating that the new claims related to a different element of pay, relied on the same cause of action (namely equal pay) and relied also to a certain extent on the same factual matrix. They referred to the doctrines of res judicata, issue estoppel and the rule in **Henderson v Henderson** (1843) 3Hare 100.

11. On 7 September the Claimants issued the second set of equal pay proceedings in the ET. In the Form ET1 the comparators were said to be Pest Control Officers and the complaint related to alleged less favourable terms as to payment for call out and standby allowance. Pausing there, it will be recalled that the original grievance in August 2008 made a comparison between call out payments made to the Claimants' group and, among others, Pest Control Officers. I also note that in a review application dated 12 January 2012 following the PHR Judgment of 29 December 2011 now under appeal, Thompsons informed the ET that in relation to the 2008 grievance the Claimants received advice from the union at branch level, but the regional officer was not involved at that stage. That position has now been corrected by Mr de Silva; the regional office was advising the Claimants in 2008. That review application was dismissed by Employment Judge Rostant on 26 January 2012.

12. At a CMD held on 7 October 2011 before Employment Judge Rostant the following issues were identified for determination at a PHR;

(a) whether the tribunal should exercise its discretion to dismiss the first proceedings following withdrawal under rule 25(4) and

(b) whether the second proceedings were barred by rule 25(4) as an abuse of process.

13. It was those questions which came before Employment Judge Rostant at the PHR held on 13 December 2011.

The law

14. The first proceedings were withdrawn by the letter of 22 July 2011 in accordance with ET rule 25(2). That brought the first proceedings to an end as against the Respondent (rule 25(3)).

15. Rule 25(4) provides, so far as is material;

> **"Where a claim has been withdrawn, a respondent may make an application to have the proceedings against him dismissed… If the respondent's application is granted and the proceedings are dismissed the claimant may not commence a further claim against the respondent for the same, or substantially the same cause of action [subject to a successful review or appeal]"**

16. It was common ground between the parties below, and before me, that the principles to be applied when considering the operation of rule 25(4) are to be found in the Judgment of HHJ David Richardson in **Verdin v Harrods** (2006) ICR 396. I note that that approach was approved by the Court of Appeal in **Fraser v Hlmad Ltd** (2006) IRLR 687, para 46. It further seems to me that the express prohibition on the Claimant commencing a further claim for the same, or substantially the same cause of action, added by SI 2008/3240 from 6 April 2008, reflected the **Verdin** approach, namely (a) were the Claimants in withdrawing the first proceedings intending to bring a halt to all proceeding against the Respondent? Plainly they were intending only to bring a halt to the first proceeding; they made it clear that they intended

to bring fresh proceedings (and did so) in the form of the second proceedings, and (b) would it be an abuse of process to allow them to bring the second proceedings?

17. In this context abuse of process encompasses the old rule in **Henderson v Henderson** applied by the Court of Appeal in **Divine-Bortey v London Borough of Brent** (1998) IRLR 525 in the employment setting. However, the somewhat prescriptive approach in **Divine-Bortey** may be thought to be subject to the later general comments of Lord Bingham of Cornhill in **Johnson v Gore Wood** (2002) 2 AC 1. That was the view expressed by HHJ Hand QC in **Parker v Northumbrian Water** (2011) IRLR 562, para 70. In **Divine-Bortey** the Claimant issued fresh proceedings alleging racial discrimination as a result of evidence given on behalf of his employer in his claim of unfair dismissal proceedings before the ET. The Court of Appeal held that he could and should have applied to amend his pleadings to add the complaint of racial discrimination at the original hearing.

18. At all events. Employment Judge Rostant directed himself in accordance with the well-known passage in Lord Bingham's speech in **Johnson v Gore Wood** at P31 (see reasons paras 17-18). In short, the question is not simply whether the second set of proceedings could have been raised in the original proceedings, but whether they should have been. What is required is a broad, merits-based Judgment which takes account of all the facts of the case and the public (finality of litigation) and private interests (justice between the parties) involved.

19. Drawing the threads together, it seems to me that where a Claimant seeks to terminate the first set of proceedings by withdrawal with a view to bringing a second set of proceedings raising the same or substantially the same cause of action or otherwise in circumstances amounting to an abuse of process in the sense identified by Lord Bingham, the ET will be

entitled to dismiss the first proceedings and bar the Claimant from bringing the second proceedings.

The Employment Tribunal decision

20. The Employment Judge acknowledged (para 22) that in dealing with the abuse of process argument it was necessary for him to say with confidence that not only could the Claimants have bought the second claim in the first proceedings, but that they should have done so. That requires the Respondent to show a little more than mere negligence or inadvertence on their part. There was no evidence of ill-will on the Claimants' approach to the proceedings, nor even recklessness (para 23), however he found that, following the procedural history of the matter, this late change of attack, changing the basis of the equal value claim in terms of the comparator and particular element of pay in issue amounted to harassment of the Respondent, using that expression as a 'term of art' (para 25). He was unimpressed by the suggestion that the new claim could have been introduced by way of amendment to the first claim. I understand the Judge to have had in mind the well-known **Selkent** principles (see **Selkent v Moore** (1996) ICR 836 Mummery P) when he formed the view that permission to amend at that late stage would probably not have been granted. At all events, the Claimants, with the advantage of representation by a large trade union and highly experienced solicitors, chose the withdrawal followed by fresh proceedings route in preference to an application to amend.

The appeal

21. In his closing reply Mr de Silva submitted that this case is about abuse of process. I shall return to that general issue, but first I must consider whether it can properly be said, in accordance with rule 25(4) that the second proceedings raised the same or substantially the same cause of action as the first proceedings.

22. Mr de Silva argues, by reference to the Judgment of Elias P in **Bainbridge v Redcar** (No2) (2007) IRLR 294), approved on this point by the Court of Appeal (2008) IRLR 776, that where the second proceedings relied on a different comparator and different pay element from the first proceedings different causes of action were engaged.

23. **Bainbridge** (No2) did not consider the effect of rule 25(4) as it was then framed and, of course, could not consider it as it is now framed, the case having been decided before the 2008 amendment. It is not therefore helpful on this particular point.

24. The question therefore, as Mr de Silva had submitted, is whether the Employment Judge was entitled to conclude, taking a broad merits-based approach, that the second proceedings have amounted to an abuse of process. If so, his order must stand.

25. I have considered the various ways in which that finding is attached by Mr de Silva but am unable to conclude that any error of law is made out.

26. Dealing with the grounds of appeal in turn. First, it is clear to me that the Employment Judge understood the expression 'unjust harassment' as a term of art as explained by Lord Bingham. It will be an abuse to raise in fresh proceedings a claim which should have been raised in the first proceedings. Secondly, it is apparent from para 22 and 25 of his reasons that the Judge placed the onus firmly on the Respondent to establish abuse of process. Thirdly, I cannot accept that the finding of abuse of process is perverse in the legal sense. Indeed the facts now favour the Respondent more than was the position before the Employment Judge. He found there was no evidence that the Claimants had been advised by the union when raising the 2008 grievance. It now turns out that they were then advised not simply by the branch (as suggested in the review application) but by the region. Thus the complaint about call out rates

in comparison to the rates paid to Pest Control Officers, the subject of the second proceedings, was one which was raised on the advice of the union regional office in the original grievance. In these circumstances the Judge was plainly entitled in my judgment, to find (para 26) that not only could the Claimants have pursued the second set of claims in the original proceedings, they should have done so.

27. Finally, I am satisfied that the Judge has fully explained his reasoning. His reasons are '**Meek**-compliant'.

Disposal

28. In these circumstances I can see no grounds in law for interfering with the order made by the Employment Judge. This appeal fails and is dismissed.