Appeal No. UKEAT/0039/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 July 2017

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MR A KWELE-SIAKAM APPELLANT

THE CO-OPERATIVE GROUP LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	DR ROLAND IBAKAKOMBO (Representative)
For the Respondent	MR GARETH GRAHAM (of Counsel) Instructed by: TLT LLP 3 Hardman Square Manchester M3 3EB

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

The Employment Judge erred in striking out claims of direct race discrimination by conducting more than a mini-trial into the main issue in the case, the reason for the acts of which complaint was made. The Claimant gave evidence and was extensively cross-examined in a two-day hearing. The Employment Judge failed to apply the principles in **Ezsias v North Glamorgan NHS Trust** [2007] IRLR 603. Observations on the dangers of conducting a strike out hearing at which findings on the credibility of the Claimant are made which are central to the main issue in the claim. **Qdos Consulting Ltd v Swanson** UKEAT/0495/11 and **Chandhok v Tirkey** [2015] IRLR 195 considered.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Mr Kwele Siakam, the Claimant, appeals from the striking out, under Rule 37 of the **Employment Tribunals Rules of Procedure 2013**, of his claims of direct race discrimination and victimisation as having no reasonable prospect of success. These were struck out by Employment Judge Butler by a Judgment sent to the parties on 18 May 2016.

2. As before the Employment Judge, the Claimant is represented by Dr Ibakakombo and the Respondent (The Co-operative Group Ltd) by Mr Graham of counsel.

3. The Claimant has been and continues to be employed by the Respondent as a Warehouse Operative, largely involved in picking goods in the warehouse ready for onward transportation. His employment commenced on 25 July 2005. By an ET1, presented on 19 November 2015, the Claimant claimed direct and indirect discrimination over a period from 2007 to 2015. He also claimed he was subjected to victimisation. The claims are resisted. The Particulars of the claim run to 37 pages.

4. Following a case management hearing on 15 January 2016, Employment Judge Findlay ordered that there be a pre-hearing review with a time estimate of one day to determine various matters. These included the following:

> **"3.1. Whether to strike out all or part of the claim because it has no reasonable prospect of success;**
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> **3.2. Whether to order the claimant to pay a deposit (not exceeding £1,000.00) as a condition of advancing an allegation or argument if it seems that any of the allegations [or] arguments put forward by the claimant have little reasonable prospect of success,**
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> **3.3. Whether, having regard to the time-limit contained in Section 123 of the Equality Act [2010], some of the claimant's complaints are out of time and if so whether time should be extended or whether they should be dismissed because the tribunal has no jurisdiction to consider the claimant's discrimination complaint(s)."**

5. Various Orders with regard to the conduct of the Preliminary Hearing were made. Employment Judge Findlay made Orders for the exchange of documents and preparation of bundles of documents relevant to the preliminary issues. By paragraph 5.1 of the Order, she ordered that:

> **"5.1. by 4.30pm on 23 February 2016 witness statements of all witnesses on whom the parties wish to rely in relation to the preliminary issue (including the parties) are to be prepared and exchanged.**
>
> **5.2. No witness will be permitted to give evidence, without leave of the tribunal, unless a witness statement has been prepared and exchanged in accordance with this order."**

There were further Orders made in regard to witness statements which one would expect to see for a Full Hearing.

6. The Preliminary Hearing came before Employment Judge Butler who heard the strike out application over two days, on 7 and 23 March 2016. The Claimant was represented by Dr Ibakakombo on the first day. The representative was unable to attend on the second day but submitted written submissions to be considered.

7. The Employment Judge directed himself in law and did not in the course of his self-direction refer to cases on strike out such as **Ezsias v North Glamorgan NHS Trust** [2007] IRLR 603. However, he referred to **Igen Ltd v Wong** [2005] IRLR 258 and in particular **Madarassy v Nomura International plc** [2007] IRLR 246. At paragraph 13 of his Judgment, the Employment Judge summarised the relevant effect of **Madarassy** as follows in which the Court of Appeal said that:

> **"13. … the burden of proof does not shift to the employer merely because the claimant establishes a difference in status such as race and a difference in treatment. Those bare facts are not without more sufficient material from which a tribunal could conclude that the respondent had committed an unlawful act of discrimination. It further stated that although the burden of proof provisions involve a two-stage process of analysis, it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination."**

8. The Employment Judge at paragraph 14 set out the basis upon which he considered the application to strike out. He said:

> **"14. In considering this application, I have heard the evidence of the claimant who was cross-examined by Mr Graham. I have also considered a very substantial bundle of documents which included claim forms and some judgments in respect of a number of other claims brought by claimants also employed or formerly employed by the respondent. …"**

9. At paragraph 16 of his Judgment, the Employment Judge recorded a bare outline of the complaints, summarising them and giving their dates. The Claimant made a witness statement and gave oral evidence. No written witness statement was produced by the Respondent and no oral evidence was given on their behalf. The Employment Judge held at paragraph 19:

> **"19. The claimant gave evidence on which he was cross-examined by Mr Graham at considerable length. I did not find him to be a credible witness. His answers to questions were often vague and frequently evasive. They lacked detail and he could not point to documents in the bundle which corroborated his allegations …"**

Then examples were given.

10. The Employment Judge continued at paragraph 25:

> **"25. On several occasions I had to remind the claimant to answer the question put to him by Mr Graham. He was often vague and evasive and would invariably put everything down to race discrimination. …**
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> **26. I was also concerned that the claimant did not seem to know exactly what his case was. He was prone to explaining every meeting and disciplinary hearing which was critical of him by saying it was because of race discrimination. …**
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> **30. The overwhelming impression given by the claimant throughout this hearing was that he was pursuing a claim which he did not understand and had been produced by a third party. …"**

11. The Employment Judge observed at paragraph 31:

> **"31. As Mr Graham submitted, the facts in this case are largely not disputed. What is in dispute is the reasons for those facts arising and this is the central issue in this case. In relation to that issue, as to whether there was discrimination against the claimant, I find the following facts:**
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> **…"**

A The Employment Judge then, under seven numbered sub-paragraphs, made a number of findings of fact including the following (there are two paragraphs numbered (ii), in the second numbered (ii)):

> **"(ii) Due to his poor performance, the claimant was not given the opportunity to rotate his duties, this being afforded to those who met the KPI's set by the respondent.**
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> **(iii) In respect of the claimant's performance reviews, he was treated in the same way as other warehouse operatives regardless of their race.**
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> **(iv) With the exception of the verbal warning given to the claimant in February 2015, which was for a conduct issue, the claimant's disciplinary record consisted of warnings for poor performance. He blames each of these warnings and the dismissal of his appeals against them together with the findings that his grievances had not been upheld on continuous race discrimination by the respondent. There is no evidence that this was the case or that the claimant was treated any differently to other black and white colleagues. The claimant only raised race discrimination in response to disciplinary issues but it is clear he consistently failed to meet the KPI's set by the respondent's management."**

12. The Employment Judge reached the following conclusions, paragraph 39:

> **"39. I do not accept Dr Ibakakombo's submission that this is a case containing a crucial core of disputed facts. There is a wealth of documentation to support what happened. The dispute is about why they happened.**
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> **40. I remind myself that I must determine whether these claims have reasonable prospects of success and that to strike them out I must be sure that they do not. I have asked myself whether there is sufficient evidence to support the claimant's allegations and to establish the possibility that discrimination has taken place so as to pass the burden to the respondent to show that it did not discriminate.**
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> **41. I find that the claimant has presented a confused claim and gave the impression throughout the two days of this hearing that he had been encouraged to bring his claims based on nothing more than an allegation that everything that happened to him was because of race discrimination. The fact is that the claimant was subjected to performance reviews because he could not achieve the KPI's set out by the respondent's management. He admitted that white employees were given picking duties; that they were subjected to the same assessment as him; and when he used white employees as comparators he failed to recognise that he was not comparing like for like.**
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> **42. The claimant was vague and evasive in his evidence. When pressed by Mr Graham to be specific in relation to his allegations he resorted to his mantra-like response that it was because of race discrimination by the respondent. …**
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> **43. Beyond the single allegation that he was discriminated against because of his race, the claimant has singularly failed to show any evidence of any act of discrimination by the respondent. …"**

The Employment Judge reached the following conclusion, paragraph 46:

> **"46. … in relation to the evidence I heard and the documents produced, I find that the claims of the claimant have no reasonable prospect of success. They are lacking in any substance and there is no evidence that a tribunal could find that any of them could have been due to race discrimination. …"**

A **The Grounds of Appeal**

13. The representative for the Claimant produced a Notice of Appeal containing eight pages of grounds. Following their rejection by His Honour Judge Peter Clark on the sift as disclosing no arguable point of law, at a Rule 3(10) Hearing His Honour Judge Hand QC ordered the appeal against the striking out of direct discrimination claims and victimisation claims (but not that of indirect discrimination) to proceed to a Full Hearing. He gave permission to amend the grounds of appeal. An amended Notice of Appeal has been produced which properly encapsulates the real issue on this appeal.

14. Dr Ibakakombo contended that the Employment Judge erred in failing to have regard to the judgment of the Court of Appeal in **Ezsias v North Glamorgan NHS Trust** [2007] IRLR 603. At paragraph 31 of the Judgment of the Employment Tribunal, the Employment Judge held that what was in dispute was the reasons for the facts as to which the Employment Judge held there was largely no disputes. So too in **Ezsias**, Maurice Kay LJ held that there may be cases in which discrimination claims may be struck out, that, however, the particular nature and scope of such claims - in that case, that of a whistleblower - has to be approached with care.

15. In that case, the Court of Appeal held that the reasoning of the Employment Judge contained an error of law. At paragraph 29, he held:

> **"29. It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. …"**

16. The Court of Appeal in the judgment of Maurice Kay LJ went on to refer, at paragraph 31 in the judgment in **Ezsias**, to the well known case of **Anyanwu v South Bank Students' Union** [2001] IRLR 305. In **Anyanwu**, Lord Hope of Craighead said at paragraph 37:

> **"37. … I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly**

> **fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence. …"**

17. The representative for the Claimant also relied on the case of **Odukoya v Wandle Housing Association Ltd** UKEAT/0093/15 in which His Honour Judge David Richardson held at paragraph 16:

> **"16. … It was not satisfactory for the Employment Judge to accept major parts of the Respondent's case without a trial at which the Respondent's witnesses would be heard and cross-examined about it. …"**

18. The Claimant's representative also referred to the judgment in **Qdos Consulting Ltd & Others v Swanson** UKEAT/0495/11 in which His Honour Judge Serota QC, in the Employment Appeal Tribunal, held at paragraph 49:

> **"49. … applications to strike out on the basis that there is no reasonable prospect of success should only be made in the most obvious and plain cases in which there is no factual dispute and which the applicant can clearly cross the high threshold of showing that there are *no* reasonable prospects of success. Applications that involve prolonged or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of witnesses should not be brought under rule 18(7)(b) [that is the predecessor of the current rule] but must be determined at a full hearing. Applications under [the rule] that involve issues of discrimination must be approached with particular caution. In cases where there are real factual disputes the parties should prepare for a full hearing rather than dissipate their energy and resources, and those, I would add, of Employment Tribunals, on deceptively attractive shortcuts. Such applications should rarely, if ever, involve oral evidence and should be measured in hours rather than days."**

19. Despite the Claimant's representative having referred to **Ezsias** in his written submissions before the Employment Tribunal, the Employment Judge did not refer to those submissions or appear to have taken them into account. Dr Ibakakombo contended that the Employment Judge erred in determining the strike out application in a way that was a trial of the Full Hearing. It was more than a mini-trial as the Claimant gave evidence and was cross-examined over two days. The Employment Judge reached his conclusion without hearing evidence from the Respondents or enabling the Claimant to test it. In effect, it is said that the

A Employment Judge conducted a mini-trial without the balance which would be expected of a Full Hearing.

B 20. Mr Graham for the Respondent contended that the Employment Judge was not in error in striking out the claims. He was right, it is said, to hold that there was no dispute over the central facts. Counsel contended that as a matter of law, as the Claimant had not established more than a difference in treatment and a difference in race, and in the absence of something C more - as referred to in **Madarassy** - the Employment Judge was right to conclude that in accordance with the guidance in that case, the claims of race discrimination and victimisation could not succeed.

D 21. Mr Graham drew attention to the judgment of Mr Justice Langstaff in **Chandhok v Tirkey** [2015] IRLR 195 in which, having referred to **Anyanwu**, the President stated at paragraph 20:

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> **"20. This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out - where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ in paragraph 56 of his judgment in *Madarassy v Nomura International plc* [2007] IRLR 246 CA):**
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> > **'… only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'"**

G 22. However, Mr Graham fairly recognised that the basis upon which the claim of Ms Chandhok was struck out was very different. She had brought a claim based on discrimination because of her caste. It was held that caste was not a protected characteristic within the **Equality Act** and therefore her claim could not succeed and it was struck out on that very H technical basis. Mr Graham was unable to draw the Court's attention to any appellate authority in which a discrimination claim had been struck out on **Madarassy** principles.

Discussion and Conclusion

23. ET Rule 37(1)(a) provides that a claim may be struck out on the ground that it has no reasonable prospect of success. Striking out a claim is a draconian measure which should only be taken in the clearest cases. Whilst there is no rule of law that discrimination cases cannot be struck out - where the basis of the application to strike out is not one of jurisdiction (as in the **Chandhok** case), limitation or other clear point of law - extreme hesitation should be exercised in doing so. This Employment Judge felt able to strike out the Claimant's claims on the basis that the facts in the case are largely not in dispute. Although he did not expressly refer to **Ezsias**, the Employment Judge may have had in mind paragraph 29 of that case in which Maurice Kay LJ held in that case that where there was a crucial core of disputed facts that was not susceptible to determination otherwise than by a hearing and evaluating the evidence, there should not be a strike out.

24. In my judgment, the Employment Judge erred in proceeding on the basis that the facts of the case before him were largely not disputed. What is at the heart of the claims is the reason for the Respondent's actions. An Employment Tribunal in this claim would have to decide the reason for the actions. That requires a finding of fact. Similarly in an unfair dismissal claim, facts surrounding the dismissal may not be in dispute but the reason for the dismissal is. For example, an employee may say that his trade union activities were the reason for his dismissal. The employer may say that the reason for dismissal was redundancy. An Employment Tribunal would have to decide as a matter of fact the reason for dismissal. As in this case, the employee would be inviting the Employment Tribunal to draw inferences from facts which may be undisputed. Such claims as this where a fact at the heart of the claim is in issue would be most unlikely to be susceptible to decision on a strike out application.

25. Further, in my judgment, the procedure adopted by the Employment Judge in this case was unsuited to a strike out application on the basis that the claims have no reasonable prospect of success. Employment Judge Findlay in the case management directions made Orders for witness statements and evidence. This may be entirely appropriate for the hearing of a discrete preliminary issue such as whether the claim is in time. However, in my judgment, it is entirely inappropriate where in effect the main issue in the claim will be determined on this strike out application. To have oral evidence, and bundles of documents submitted on a strike out application would be replicating in anticipation of what would occur at a Full Hearing. This has its obvious dangers. To what extent would findings of fact be binding on the Employment Tribunal at a Full Hearing if the strike out application were to fail?

26. Dr Ibakakombo complains that the Respondent did not give evidence and their witnesses could not be cross-examined. Absent a witness Order, a party is not obliged to call any evidence. However, if a Respondent does not call evidence, it may be appropriate for the Employment Tribunal to ask themselves why and whether adverse inferences should be drawn from not calling evidence. In this case Employment Judge Findlay ordered witness statements to be produced if oral evidence was to be called. This is understandable on the time point, a discrete issue. However, it may be that she anticipated on the main issue, oral evidence would be needed. If so, that would lead to a suspicion that the Employment Judge considered that the main strike out application could only be determined fairly having heard oral evidence. That, in my judgment, would lead to the risk of a trial within a trial with all the consequential difficulties if the claim were not struck out.

A 27. The procedure adopted whereby the Claimant was subjected to lengthy cross-examination on a strike out was not appropriate and led to a risk of injustice. The appeal is allowed.

B 28. I have considered the appropriate course to adopt in light of the fact that the appeal has been allowed and the strike out of the claim set aside. There are two remaining preliminary issues to be determined at a Preliminary Hearing. The Order for directions in relation to those C made by Employment Judge Findlay remains in place. There is to be a remission to an Employment Judge to determine those two remaining preliminary issues.

D 29. I have considered whether the strike out application decision which has been set aside should also be remitted for reconsideration and I have considered that it should not. The Order striking out the claims has been set aside, save for that of indirect discrimination in respect of E which His Honour Judge Hand ordered that the Order of the Employment Tribunal remain in place. I have regard to the observation of Maurice Kay LJ in **Ezsias** in which he held at paragraph 34:

> **"34. Finally I add this observation: I regret that a second appeal from the Employment Appeal Tribunal to this court against an interlocutory order refusing to strike out or F upholding a decision refusing to strike out an application is available on satisfaction of the relatively low criterion of a real prospect of success in this court. As this case shows, a great deal of time and expense can be consumed by the prolongation of what turns out to be no more than a preliminary skirmish. In my view consideration should be given to the introduction of a more demanding criterion where the order of the Employment Appeal Tribunal is an interlocutory and not a final order. …"**

G 30. In my judgment, it would not be in accordance with the overriding objective or in accordance with the observations of Maurice Kay LJ to remit to an Employment Tribunal the application to strike out of the claims of direct discrimination and victimisation for H reconsideration. Accordingly, that part of Employment Judge Findlay's Order in respect of which there has been a successful appeal will not be remitted.

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31. In my judgment, there is a real risk of a perception that if the matter were remitted to the same Employment Judge, he may, and this is mere perception rather than actuality, seek to reach a conclusion consistent with his original view of the claim. Accordingly, the claims are remitted for hearing of the preliminary issues to a different Employment Judge.

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