Appeal No. UKEAT/0088/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 October 2017

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR M Z NAWAZ APPELLANT

BG CONSULTING GROUP LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SUSAN CHAN (of Counsel) Direct Public Access
For the Respondent	MS OLIVIA-FAITH DOBBIE (of Counsel) Instructed by: Messrs Marriott Harrison Solicitors Staple Court 11 Staple Inn Buildings London WC1V 7QH

SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The Employment Tribunal rejected claims by the Claimant of discrimination, harassment and victimisation based on race.

Certain sections of the Judgment were taken verbatim from the Respondent's Word submissions.

Although unfortunate that the Employment Tribunal had "copied and pasted" in this way, on analysis the EAT was satisfied that the Employment Tribunal engaged sufficiently with the Claimant's case and that he lost the case "on the facts" and had suffered no injustice which required the appeal to be allowed. **Crinion & Anor v IG Markets Ltd** [2013] EWCA Civ 587 applied.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by Mr Nawaz against the Decision of the Employment Tribunal sitting in London South (Employment Judge Hyde, Ms Leverton and Ms Bird) which was sent out on 13 January 2016. The ET rejected claims made by Mr Nawaz of discrimination, harassment and victimisation based on his race, in particular his Asian descent.

The Legal Context

2. This appeal was allowed through on a Rule 3(10) Hearing by HHJ Clark on one issue, which was set out at paragraph 25 of the Notice of Appeal under the heading "*Unfair Hearing*". The paragraph says as follows:

> **"25. The ET failed [in] its obligations under the [Rules of Procedure], giving undue balance of power to the Respondent as demonstrated by the copy paste nature of the judgement (see Appendix A). Not once in 211 points does the judgement even acknowledge or favour the Claimant's position and not once in the 211 points finding any fault with the Respondent's case. This is evidenced further by the fact that the ET accepts wholesale the Respondent's position without due consideration of the evidence or the Claimant's submissions, including on issues such as the Claimant's alleged sensitivities, upbringing and ethnicity … [there is a reference to a number of paragraphs in the Judgment]. The ET abdicated its core judicial responsibility to think through for itself the issues and it slavishly adopted the Respondent's arguments as its own. …"**

There is then a reference to a case called **Crinion & Anor v IG Markets Ltd** [2013] EWCA Civ 587. In that case, the Judge had adopted words which were taken straight from submissions made by the Respondents to the appeal in 94% of the judgment. Underhill LJ said at paragraphs 16 and 17:

> **"16. In my opinion it was indeed thoroughly bad practice for the Judge to construct his judgment in the way that he did … I agree with Mr Cherry [who was the counsel for the Appellant] that appearances matter. For the Judge to rely as heavily as he did on … [the] written submissions did indeed risk giving the impression that he had not performed his task of considering both parties' cases independently and even-handedly. I accept of course that a judge will often derive great assistance from counsel's written submissions, and there is nothing inherently wrong in his making extensive use of them, with proper acknowledgement, whether in setting out the facts or in analysing the issues or the applicable legal principles or indeed the actual dispositive reasoning. But where that occurs the judge should take care to make it clear that he or she has fully considered such contrary submissions as have been made and has brought their own independent judgment to bear. The more extensive the reliance on material supplied by only one party, the greater the risk that the judge will in fact fail to do**

> **justice to the other party's case - and in any event that that will appear to have been the case. …**
>
> **17. However, to say that the judgment was defective, even seriously so, is not necessarily to say that there has been an injustice which requires the appeal to be allowed. [Then he does refer to *English v Royal Mail Group Ltd* UKEAT/0027/08.] The judgments in the three cases considered by this Court in *English* were very seriously defective, but the Court was able in the end, by careful analysis of the judgment in the context of the evidence and submissions made, to satisfy itself that the judge had in each case properly performed his or her judicial function. Likewise in this case, if it is possible to demonstrate that, whatever the first impression created by the way he constructed his judgment, the Judge did in fact carry out a proper judicial evaluation of the essential issues and did not simply surrender his responsibility to counsel, then the judgment should stand. This involves no qualification of the principle that justice must be seen to be done; but in deciding whether that is so it is necessary, at least in a case like this, to go beyond first impressions."**

The appeal was dismissed in that case because Underhill LJ and his colleagues decided that the Judgment showed "*when examined carefully in the context known to the parties, that the Judge performed his essential judicial role and that his reasons for deciding the dispositive issues in the way that he did are sufficiently apparent*" (paragraph 18). At paragraph 28 he dealt with some remaining issues and he said:

> **"28. … In relation to these the Judge makes no express reference to Mr Stewart's [who must be the counsel for the Appellant] submissions, written or oral. The Appellants submit that that demonstrates that they had simply not been considered at all. I do not think that that can be inferred simply from the absence of any express reference. Although it is generally better to do so, it is not essential that a judge should refer explicitly to the submissions of a party if it is in fact clear from his or her expressed reasoning why they are not accepted. …"**

3. In the **English** case - to which I have referred, decided in the EAT by Bean J and members - Bean J said this:

> **"6. It is very common for courts or tribunals to reproduce in their judgments passages from a party's written argument. The document may conveniently set out … the law applicable to the case. Or there may be an uncontentious recital of the facts, or the history of the litigation itself. There is nothing objectionable in a court doing this. But it is a matter of degree: and particularly where the material is contentious it is important to distinguish findings from submissions."**

And at paragraph 12, it is expressly said:

> **"12. The Tribunal [in that case] owed it to Mr English to deal specifically with at least the principal points made in his closing written submissions. Explaining to the loser why he has lost, in accordance with the principles of *Meek v City of Birmingham District* Council [1987] IRLR 250 … involves telling him, unless it is entirely obvious, why at least his main points in argument have been rejected. …"**

A little further on:

> **"12. … the more closely the Tribunal adhered to the submissions of the respondents, the more necessary it was for them to deal specifically with the competing submissions of Mr English. We regret to say that by simply copying out one document and wholly ignoring the other they brought the case substantially below what Frankfurter J in [an American case] called the "Plimsoll line of due process". …"**

4. That is the legal background to this appeal.

Factual Background

5. The background to the claim is as follows. The Respondent Company provided technical training to financial institutions around the world. The Claimant was employed as a Client Relationship Manager from 4 June 2013 to 14 February 2015, having been placed on garden leave on 13 November 2014. He had specific responsibility for developing the Respondent's business in the Middle East. Other personnel involved in the case were Ms Anderson (the Managing Director of the Respondent based in London), Ms Beverley (a Director of Sales and Marketing based in London) and Mr Grant (who was the part owner of a subsidiary of the Respondent called BG Credit Limited, which provided training specifically on the topic of credit).

6. Mr Grant was the Managing Director of BG Credit Limited and senior to the Claimant in the hierarchy. He was based in Dubai. The relationship between Mr Grant and the Claimant got off to a bad start on 23 November 2013 before a training session which Mr Grant was about to give in Kuwait and which was attended by the Claimant. Complaint number 1 in these proceedings was that the Respondent had failed to take appropriate action following the Claimant's complaint arising out of that altercation.

7. The other complaints covered various incidents during the course of his employment which culminated in his dismissal. The ET found, at paragraph 185 of the Judgment, that the Respondent's reason for terminating the Claimant's employment was unrelated to nationality, ethnic origin, skin colour or any other aspect of race. It was simply based on their perception, which was genuine, that his performance was not good enough and that it did not justify his significant salary.

The ET's Decision

8. The ET rejected all his complaints on the merits - i.e. deciding either that there had been no detrimental action on the part of the Respondent or that whatever happened was not by way of discrimination - and they also found that they had no jurisdiction in relation to those complaints arising pre-22 October 2014. In dealing with the latter time bar point, they rejected a submission that the earlier complaints were part of a continuing course of affairs and they also stated that there was no application for an extension of time on the basis of the just and equitable provision in section 123 of the **Equality Act 2010**.

Procedure Adopted

9. The hearing of the Claimant's complaints took place over three days - 28, 29 and 30 September 2015 - when evidence was heard. At the conclusion of the evidence, the ET asked for written submissions from both sides. I am told today that they specifically asked for those to be provided in Word format and they also asked for submissions to be first exchanged and then for replies to be served on each side after the first exchange. They perhaps made a mistake on both scores: by asking for submissions in Word format they gave rise to the temptation to adopt the submissions or parts of the submission wholesale, and, it seems to me, asking for a reply on both sides was perhaps a case of "overkill".

10. The Claimant's original submissions were, as Ms Dobbie for the Respondent points out, not chronological and did not have paragraph numbers. I should say they were prepared by the solicitor/advocate Mr Jackson who appeared for the Claimant at the hearing. Ms Dobbie suggests that that may be the reason that her submissions were the ones that were "cut and pasted" in preference to what had been produced by Mr Jackson.

11. The reply submissions document from the Claimant incorporated the Respondent's submissions and inserted underlined text immediately after the relevant points made by the Respondent; they are to be found in my bundle at pages 193 to 241. The document was criticised by the ET at paragraph 7 of the Judgment, where they say:

> **"7. Regrettably, whilst acknowledging that Mr Jackson intended it to be helpful to the Tribunal, the Tribunal did not find the format of the Claimant's submissions in response to be so. In his response document Mr Jackson set out the text of Ms Dobbie's submissions in full. At the beginning of this 58 page document he indicated that in response to Ms Dobbie's submissions he would set out his comments as tracked changes that were underlined. Despite that stated intention, it was not easy to ascertain which were his comments, and the wholesale repetition of the Respondent's submissions in the format of tracked changes and underlined text created an unwieldy document."**

That criticism was perhaps a little unfair, but it is right to say when we were going through it this morning there were parts where both sets of text were underlined which was potentially confusing. In addition, what the ET say at paragraph 7 may indicate that the contents of the Claimant's reply submissions were not given the attention they might otherwise have been. That was the background to the decision of the ET which, as I have already said was sent out on 13 January 2016.

The Judgment

12. The Respondent has helpfully produced a copy of the Judgment in which the parts which are taken from the Respondent's submissions to the ET are highlighted. Those highlights are based on the Claimant's Annex A, which is referred to in the Notice of Appeal.

It is right to say that there are some further parts, particularly at the very end of the Judgment, which were also taken from the Respondent's submissions which are not highlighted.

13. In any event, the total Judgment is 211 paragraphs long and comprises four sections. First, there is a substantial introductory section which does only contain formalities, at paragraphs 1 to 37; that is entirely the ET's work. Second, there is a section with decisions on two discrete money claims for holiday pay and commission, paragraphs 38 to 45; again, that is entirely the ET's work. Third, the specific allegations of race discrimination, harassment and victimisation are dealt with. Allegations 1 to 6 and 8 contain quite a lot of material taken straight from the Respondent's submissions by way of "cut and paste". Allegations 7 and 9 are dealt with entirely in the ET's words. As for allegations 10 to 14, which relate to the Claimant's dismissal, a small section of those is by way of cut and paste from the Respondent's submissions, in particular paragraphs 160 to 163, 170, 171 and 181. The fourth section of the Judgment deals with time and paragraphs 205 to 211 are also apparently taken word for word from the Respondent's submissions (although in fairness to Ms Dobbie, I should say she has not had an opportunity to check that because, as I have mentioned, that part of the Judgment did not feature on Annex A).

14. Of the total Judgment about a quarter, roughly speaking, is taken from the original Respondent's submissions prepared by Ms Dobbie. That is significantly less than the 94% which I have already mentioned in the **IG Markets** case. It is also clear that in contrast to that case, the ET has incorporated parts of the submissions into its Judgment rather than, as in **IG Markets**, using the submissions as the very basis for the decision. Furthermore, the "cut and paste" parts relate almost entirely to allegations 1 to 6 and 8 and the associated time points and to a small degree to the allegations relating to dismissal. It seems to me that it is necessary

therefore to focus in on those parts of the decision. Ms Chan, who appeared for the Claimant/Appellant, particularly referred to allegations 1 and 6 and the associated time points and I therefore turn to those first.

Allegation 1

15. Allegation 1 was, as I have already mentioned, that the Respondent failed to take appropriate action following the altercation between the Claimant and Mr Grant on 23 November 2013. The Respondent's submissions as to the correct findings for the ET to make were repeated at some length, as demonstrated by the marked copy of the Judgment prepared by the Respondent which I have mentioned. It is right to say, however, that the cut and paste is also interspersed with independent work by the ET which demonstrates that they have taken note of what is said rather than just adopting it without further thought. The final basis for the decision on allegation 1 is contained in paragraphs 62 and 63 of the Judgment: which do not derive at all from the Respondent's submissions:

> **"62. We concluded in short that Ms Anderson took appropriate action following the altercation having regard to the information that was given to her at the time by the Claimant in particular about what had occurred as set out in his contemporaneous email. Further the Tribunal was satisfied that this matter was discussed after Mr Nawaz's return to the UK and that the parties had attempted to speak to each other before his return but were unable to do so. The fact that Ms Anderson sided with Mr Grant and asked the Claimant to apologise appeared to the Tribunal to be a response which was properly open to her having regard to the account given by the Claimant to her of seeking to raise relatively trivial matters with a colleague shortly before an important training event commenced.**
>
> **63. The Tribunal could also see no basis for suggesting that the Claimant had raised a prima facie case that the response to the altercation was in any way related to race, however, defined. The Tribunal accepted the submissions made by the Respondent as to the background of antipathy from the Claimant towards Mr Grant who he saw as encroaching on his desired career path."**

16. I have seen the submissions the Claimant made about this part of the case, which are at pages 151 to 153 in his original submissions and at pages 205 to 208 in his reply submissions (those page references are to my bundle). They are not, it is true to say, expressly referred to by the ET in the section of the Judgment dealing with allegation 1 but I am quite satisfied that the

essence of them is addressed in the reasoning that I have referred to. In the end the issue is one of fact, the ET had the evidence and the findings at paragraphs 62 and 63 seem to me to be findings of fact based on the evidence that they heard.

Allegation 6

17. Allegation 6 was that the Respondent had not properly addressed the Claimant's grievances about the two matters which featured in other allegations; namely allegation 2 (that he had been described as looking like a terrorist) and allegation 5 (that he was told that Mr Grant was his superior). In relation to allegation 6, paragraphs 124 to 129 of the Judgment are indeed largely taken straight from the Respondent's submissions. There is a bare reference to the Claimant's initial submissions about the matter at paragraph 131 which simply says that Mr Jackson, the solicitor, had dealt with this part of the claim at pages 17 to 18 of his initial submissions.

18. Again the parts of the paragraphs dealing with allegation 6 which are lifted from the Respondent's submissions contain input from the ET and again the decision is summarised in a separate paragraph which is all their own work - if I can put it that way - in this case paragraph 134, where the ET say:

> **"134. In summary therefore in relation to the grievance, we found that:-**
>
> > **1. The Respondent dealt with the issues when they were raised by the Claimant promptly and appropriately by a discussion with Ms Anderson and then referral of the issue to Mr Parritt and that the Claimant indicated his agreement to matters being dealt with in the way they were by the Respondent as set out in Mr Parritt's email and the Claimant's email in reply at the end of July 2014. There was no subsequent resurrection of these issues by the Claimant until much later after his dismissal.**
> >
> > **2. There was nothing in the way in which the Respondent dealt with this issue to raise a prima facie possibility that it was related to the Claimant's race however defined. The Tribunal took into account that this was a small employer and that procedures appeared to be quite informal. Despite that however they dealt with these matters promptly and at an appropriate level of seniority."**

19. Again I have looked at the Claimant's submissions in relation to this, which are at pages 154 to 156. Again, in substance, those submissions are engaged with and again this was ultimately a decision of fact based on influence.

Allegations 10-14

20. The next set of allegations I deal with are those at numbers 10 to 14. I have already set out the paragraphs in that section of the Judgment which are taken from the Respondent's submissions. They include input from the ET itself and, as far as I can see, none of the adopted parts are actually matters that are controversial at all. They are simply recitals of evidence and facts. I have already mentioned the basic finding which the ET made at paragraph 185, which disposed of the claims relating to dismissal. In short, the reason that the Claimant was dismissed on the ET's finding was that his performance was not up to scratch and it had nothing to do with his racial origins.

Time Limits

21. The question of time limits was dealt with at paragraphs 204 to 211 of the Judgment. Paragraph 204, under the heading "*Time Points*", says this: "*There was no evidence led by the Claimant addressing this issue*", then in square brackets it says, "*[check Claimant's submissions and reply]*". It looks as if the writer, which is presumably the Employment Judge, has either not checked the submissions and reply or has done so and forgotten to delete a reminder to herself. I accept that that is an unfortunate thing to have left in the Judgment and one can see that it would not inspire confidence.

22. After paragraph 204, the remainder of the paragraphs in this section are (subject to Ms Dobbie checking) from the Respondent's submissions. Paragraphs 205 to 208 effectively set

out the legal position, although paragraph 205a refers to the facts of this case but, in any event, there is nothing, as far as I can see in paragraphs 205 to 208 which could be considered controversial or which could be criticised, except that paragraph 206 starts with the statement:

> **"206. The Claimant did not advance arguments to establish a continuing act of discrimination, but nonetheless, the Tribunal may consider this. …"**

They did consider it at paragraph 210 and I will come back to that in a moment.

23. Paragraph 211 said this:

> **"211. As for extending time, the Claimant neither applied for such an extension nor did he provide evidence in support. Accordingly, there was no material before the Tribunal to support the exercise of this discretion in the Claimant's favour."**

The Claimant's submissions on this part of the case were in the reply to the Respondent's submissions, at pages 234 through to 236 of my bundle. At page 234 the Claimant effectively dealt with what became paragraph 206 in the Judgment and what was said was this:

> **"It is implied from the facts pleaded that the Claimant sees the discriminatory instances as "an act extending over that period". The discriminatory culture to which the Claimant has referred continued throughout.**
>
> **It is also clear that the grievance that was outstanding and referred to on 10 November 2014 in Claimant's email to Clare Anderson referred to specific bullet point matters in the July grievance that occurred even earlier. I [the solicitor] am referring to the "superior" comment and the comment about the Claimant being a terrorist.**
>
> **The general position reflected in the case law on limitation in discrimination claims is liberal in favour of Claimants rather than the other way round."**

Looking at those three points, the middle one arose after the settlement agreement, which ultimately led to the dismissal, had been sent to the Claimant and arose from a without prejudice communication, and the ET had expressly said they were not going to go into that. The first one just talks about a discriminatory culture and the third one says that the case law on limitation was liberal. It does not seem to me that any of those points really needed to be addressed in a Judgment in any kind of detail at all.

24. On the next page, 235, there is this submission in relation to extensions of time:

> **"I submit that there is no specific requirement for me to address the extensions of time. All matters are covered by the continuing discriminatory state of affairs extending over a period. If the Tribunal is persuaded of the merit in some or all of the Claimant's claims I do not believe there is a specific additional submission that is required to be made on limitation."**

That, so far as extension of time, obviously did not require to be dealt with and confirms what the ET say that there was no application for an extension of time.

25. That brings me to paragraph 210, the opening words of which were:

> **"210. The Tribunal accepted the Respondent's arguments that the Claimant could not successfully assert that there was a continuing act which created a discriminatory state of affairs when he plainly informed Ms Anderson in August 2014 that he liked working for the Respondent and liked the staff, in the same meeting in which he discussed the alleged "terrorist" comment … [There is a reference, presumably to a page in the bundle before the ET at page 106]. …"**

The Claimant made submissions about that sentence which the ET lifted, as I have said, straight from the Respondent's submissions, in these terms at page 236. He said:

> **"It is possible to discriminate against someone unconsciously or for charitable or benevolent reasons. There is no reason why the Claimant should to borrow the Respondent's phrase "harbour animosity" to anyone including those who might otherwise appear to be his enemies. This is a clear line of thinking in Christianity as well as many other faiths. It would be possible for the Claimant to like his job and enjoy the companionship of his colleagues and clients while disliking some behaviours which we might classify as racist.**
>
> **The reality is that the Claimant wished to succeed in his job and was continuing to work for better prospects for all in the future. He had every expectation that in the long run things might improve. That was his aim. To facilitate this he made every effort to get on with his colleagues. If raising a grievance was a complete waste of time the Claimant would not have done so and would presumably have left. That does not negate a continuing act particularly while the Claimant was hopeful that Clare Anderson was going to implement the necessary change."**

It is right that there is no reference to those submissions in the Judgment and they are not expressly addressed. Furthermore, Ms Dobbie accepted that the point made by the ET in the first sentence of paragraph 210 was not a particularly strong point. The fact that the Claimant said he liked working for the Respondent really did not mean in any sense that there was not a

A continuing act of discrimination. Has the failure to specifically address what is said at page 236 led to any injustice?

B 26. I do not think it has. First, the point at page 236 did not go much further than challenging the conclusion in the first sentence of paragraph 210. Second, there is a second sentence in paragraph 210 which is much more pertinent and is an adequate reason for the ET's finding that there was no continuing act, where they said:

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> **"210. … there was nothing of substance to link the matters which were out of time (the alleged one-off comments and handling of the grievance) to the decision to dismiss and the process followed in dismissing Mr Nawaz. Therefore, the acts complained of were not linked to one another, nor did they create a discriminatory state of affairs."**

D Third, more importantly, as I have indicated, all the complaints were, in any event, rejected on the merits so that the question of time limits was, in any event, not determinative. This point was, as far as I could see, the high point of the Claimant's case on this appeal; in my view it did not come close to indicating that he may have suffered any injustice.

E

Conclusion

27. Overall, although it is unfortunate that the ET "copied and pasted" from the

F Respondent's submissions in the way that they did, I am quite satisfied that they engaged sufficiently with the Claimant's case, that he basically lost on the facts and that he has suffered no injustice. Accordingly, for all the reasons above I dismiss the appeal.

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H