Appeal No. UKEAT/0126/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 December 2017

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR O OYESANYA — APPELLANT

THE PENNINE ACUTE HOSPITALS NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR PAUL LIVINGSTON
(of Counsel)
Bar Pro Bono Scheme

For the Respondent

MR JOHN CROSFILL
(of Counsel)
Instructed by:
Weightmans LLP
Pall Mall Court
61-67 King Street
Manchester
M2 4PD

SUMMARY

PRACTICE AND PROCEDURE - Case management

An Employment Judge did not err in refusing the Claimant permission to submit a further witness statement after an earlier statement was produced on the last day of the period allowed on an Unless Order. The Employment Judge correctly weighed the potential prejudice to each of the parties and his Order was well within the wide latitude allowed in case management matters.

HIS HONOUR JUDGE MARTYN BARKLEM

1. In this Judgment I shall refer to the parties as they were known before the Employment Tribunal ("ET"). This is an appeal by the Claimant against a Case Management Order made by Employment Judge Ryan sitting in Manchester on 9 December 2016, refusing him permission to serve a supplementary statement. No proposed statement was put before the Judge, which is unsurprising given the circumstances in which the Order came to be made. However, more surprising, none such has since been produced either to the Respondent, the Employment Tribunal dealing with the case in March 2017, or indeed this Appeal Tribunal.

2. Mr Livingston, of counsel, appears for the Claimant today. The Claimant has hitherto acted as a litigant in person. Mr Crosfill of counsel has appeared on behalf of the Trust Respondent which has been hitherto represented by Mr Allen in the firm of Weightmans. I am grateful to both counsel for their helpful skeleton arguments and their succinct arguments today.

3. The Claimant was employed by the Respondent as a consultant in obstetrics and gynaecology for just 17 months. His employment ended in 2013. As the chronology shows, the claim was commenced as long ago as October 2013. This case has a lengthy history which is apparent from the fact that the bundles before me amount to some three lever arch files, giving an indication of the number of issues that have been raised by the Claimant.

4. In October 2016 the case had been before Employment Judge Ryan. Given the relevance of the Order made on that occasion to the Order subject to this appeal, it is appropriate to set out what happened:

> **"1. This preliminary hearing was fixed on 13 May 2016 in order to confirm the list of legal and factual issues in this case and to consider whether the length of final hearing, which is currently set at 15 days, should be varied.**

2. These proceedings started in 2013. As long ago as September 2014 the claimant had been required to provide further information under 9 separate aspects so that the respondent would know the case it has to meet. They included: the protected disclosures upon which he relied and the detriments he maintained he was subjected to because of those disclosures; the detriments of direct racer age [sic] discrimination; the ways in which was treated less favourably as a fixed term employee; the detriments he allegedly suffered by not being allowed to be accompanied to a meeting and particulars of the sums he was claiming to which he was entitled as unpaid wages, expenses and unpaid holiday.

3. The claimant had done so in a document extending to 297 pages. In respect of the first matter alone, protected disclosures, he appears to have identified 71 disclosures and describe them in 133 pages of that document. In that form this claim is not capable of being managed and heard properly in accordance with the overriding objective.

4. Although I had ordered that witness statements be exchanged by 16 September 2016 the parties they informed me that they had agreed between themselves an extension to 30 September 2016 for compliance with that order. Notwithstanding that extension the claimant told me that he was still not ready to exchange his witness statement not that of any of the 7 witnesses who intends to call in support of his case. He tells me that he only has draft statements from 4 supporting witnesses. The respondent is ready to exchange statements immediately.

5. Mr Lewis explained that he was waiting until exchange of witness statements, believing that he would be better able to prepare a draft list of the legal and factual issues (which is an absolute necessity in this case) until he had seen how the claimant put his case in his witness statement. He considered he could then provide a manageable list of issues bearing in mind that a great deal of the claimant's further information is repetitive.

6. I do not in those circumstances level any complaint at the steps taken by Mr Lewis to try and progress the case in this way, although I would not normally expect parties to agree to a variation in a tribunal's order without at least informing the tribunal.

7. Given the matters set out above, I consider that the appropriate step is to make a further order for the claimant to produce witness evidence and an opportunity for Mr Lewis to attempt to prepare a list of issues and for that to be considered at a further preliminary hearing. Whilst I regret the need for such a hearing it was agreed by the respondent that it was the only sensible course. The tribunal cannot countenance the prospect of commencing a final hearing in this case without a definitive list of legal and factual issues having been established.

8. I asked the claimant how long he needed to prepare the witness statements. He told me that they can be done by 11 November 2016. Mr Allen did not object to the claimant been given [sic] until that date. I explained to the claimant that given the history of this case, which I do not propose to rehearse, I was going to make an order subject to an "unless" provision.

9. The claimant asked whether I would make the respondent's compliance subject to the same provision. I declined to do so. The claimant has a history of repeated default to the orders of the tribunal. He has had to seek relief from sanction on a number of occasions. He must remember that it is his claim. He must give priority to preparation of the case and compliance with the orders if he wishes it to be heard. Significant sums of public money have been and are being expended upon this case. The tribunal is required to manage this case in accordance with the overriding objective and the claimant is required to cooperate with the tribunal. In my judgment the incentive and threat provided by an "unless" order is both necessary and appropriate.

10. Once the statements have been exchanged I hope that the claimant will be in a position to agree to reduce the scope of this claim to manageable proportions. I have explained to him in graphic detail that a focused, limited range of allegations concentrating on his better points is much more likely to assist him in succeeding in his claim than a "scattergun" approach in which dozens of allegations are made in unnecessary and repetitive detail. The claimant thanked me most courteously thereby acknowledging that he understood what I was trying to explain."

5. The Judge made an Order that witness statements be exchanged by 4.00pm on 11 November 2016. This was an Unless Order.

6. On the last day permitted by the Order, the Claimant served his witness statement. One paragraph (paragraph 130), reads as follows:

> **"130. The particulars are detailed in the document produced further to the order of Judge Slater and will not be repeated here."**

7. Upon receipt of the witness statement and others served by the Claimant, on 6 December 2016, Mr Allen acting for the Respondent, as I have already said, wrote to the ET copied to the Claimant in the following terms:

> **"A number of the allegations pleaded by the Claimant and many of the detriments asserted are not evidenced in the statements exchanged by the Claimant at all. So, within the attached draft list, I have included in appendices two and three the allegations made and the detriments asserted which I cannot see are evidenced at all in the statements provided. I have divided the document in this way to assist the Tribunal. Of course, by including allegations in the core list of issues or appendix one, I am not accepting that they are made out or even that there is sufficient evidence for them to be upheld based upon what is said, but I have tried to divide the issues/detriments to show those where there is nothing whatsoever in the Claimant's evidence which supports them.**
>
> **Whilst it has been made clear to the Claimant on a number of occasions that the witness statements he exchanged needed to be the full and complete evidence that he (and his witnesses) would give at the hearing and that no additional evidence would be allowed, I would ask this to be re-confirmed at the forthcoming Preliminary Hearing. This has been clearly explained to the Claimant and Ordered on a number of occasions, see for example: Order 1.2 following the 11 October 2016 Preliminary Hearing; Order 3.5 following the Preliminary Hearing of 13 May 2016; and, in particular, Order 7 following the Preliminary Hearing of 4 September 2014.**
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> **The Claimant has provided a statement of his own evidence which runs to 43 pages and includes 233 numbered paragraphs. It does address in detail some of the claims raised. However, as is identified in appendices two and three of the attached, it does not address a great many of the other claims identified or the detriments it is asserted he has suffered.**
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> **I am particularly making this application because I note from a Judgment in the Claimant's previous claim against Gwent Healthcare NHS Trust (case number 1605549/2009) that in that case the Claimant had exchanged his witness statement, but subsequently attended at what was intended to be the final Tribunal hearing for the case with a very lengthy different/ expanded statement (as well as a supplemental bundle). As a result the hearing of that case had to be adjourned and costs were awarded against the Claimant. In case that is of assistance to the Employment Judge hearing this week's Preliminary Hearing, a copy of the relevant Judgment is enclosed (paragraphs nine and ten contain the core explanation of what occurred in that previous claim). I am concerned that the Claimant may intend to, or endeavour to, take the same approach to his current claim (particularly in the light of the gaps in the Claimant's own witness statement).**
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> **For completeness, I also enclose one page only of the Claimant's exchanged witness statement (page 33 of 43). My reason for doing so is to bring paragraph 130 to the attention of the Employment Judge due to hear this week's Preliminary Hearing. This one sentence cannot have the result of effectively converting 297 pages of pleadings into the Claimant's witness**

> **evidence (or at least 133 pages if restricted to the alleged disclosures pleaded). The pleaded case is of course very repetitious, whilst in many respects being vague and non-specific particularly in respect of dates and details. Please can it be confirmed at the forthcoming hearing that this one sentence does not do so.**
>
> **I thought it appropriate to seek clarity on this issue as it will have some significant impact upon the timetabling of the full hearing of the claim. The Respondent has previously highlighted the importance of there being some element of timetabling put in place for the three week hearing, as there are a number of Consultants in obstetrics and gynaecology due to give evidence and their rotas and on-call arrangements will need to be arranged to ensure that there is appropriate Consultant cover maintained."**

8. It is likely that the Claimant received that letter only just before the hearing on 9 December as he does not correspond with the Respondent other than by post or facsimile. I therefore turn to the Order under appeal:

> **"1. This preliminary hearing was fixed on 11 October 2016 in order to: consider the list of legal and factual issues, to resolve any outstanding dispute about the scope of the final hearing and to reconsider the allocation of time for the final hearing. The final hearing has already been listed at Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA to start at 10am or so soon thereafter as possible on 27 February 2017.**
>
> **2. This record should be read in conjunction with that produced after the hearing on 11 October 2016.**
>
> **3. After considerable discussion there was a broad measure of agreement between the parties as to the remaining interlocutory steps which are ordered below.**
>
> **4. The principal disputed issue before me today was the claimant's application to be allowed to submit a further witness statement due to the inadequacies identified in the witness statement exchanged by him in accordance with my previous order and as identified by Mr Allen in his letter of 6 December 2016. As noted below I refused that application.**
>
> **5. In summary I consider that the prejudice to the claimant is outweighed by that to the respondent. There are multiple disputes of fact in these proceedings. The claimant is seeking to raise matters that go back to 2011. It is clear that many of the claimant's allegations of detriment are out of time in any event. He will have to seek extensions of time from the tribunal unless he can establish acts extending over a period. These points serve to reduce the effect of the prejudice upon the claimant. These proceedings having been continuing since 2013. The claimant, though a litigant in person, is entirely the author of his own misfortune. Moreover he is an experienced and intelligent litigant in person. Throughout the proceedings he has known what was and would be required of him and he has simply failed to comply. Indeed, he volunteered that the gaps in his witness statement were entirely his own fault.**
>
> **6. There would be considerable prejudice to the respondent if the claimant were permitted to serve a further statement. He would be able to attempt to fill the gaps in the evidence contained in his witness statement having sight of and full knowledge of the evidence already tendered in witness statements by the respondent's witnesses. Moreover, these considerations are in the context of a claimant who has had to seek relief from sanction on two occasions having had unless orders made against him. One such was relief from sanction which I granted in relation to his failure to exchange witness statements at a much earlier stage.**
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> **7. Finally, upon consideration of the matters that the claimant had not included in his witness statement, which were helpfully summarised by Appendices 2 & 3 to the list of issues that Mr Allen had prepared, I identified a number of matters which the claimant could legitimately have added to the list of issues even without being given an opportunity to provide a further statement. This is because Mr Allen accepts that the respondent has already been able to set out its evidential case in answer to those assertions. Insofar as the additional matters include allegations of protected disclosures Mr Allen also agreed that where there were documents recording or repeating the disclosures allegedly made then there would be written evidence before the tribunal upon which the claimant might rely. The orders given below are intended**

to reflect these considerations and to direct the parties to be in a position to put before the tribunal at the final hearing a list of issues appropriately amended to reflect these decisions.

8. In all the circumstances I made the following orders.

ORDERS

9. The claimant's application to be permitted to prepare and rely upon a further witness statement is refused."

9. Although the matter was thereafter listed for a hearing - a liability hearing I assume - before Employment Judge Horne and lay members, due to their non-availability for some of the allocated days, the hearing scheduled for 1 March turned into a very lengthy directions hearing. Employment Judge Horne noted what happened, in the very lengthy Written Reasons that were requested by the Claimant and produced following that hearing:

"2. On 1 March 2017 the tribunal began what was supposed to be the final hearing of the claimant's claim. At the outset of the hearing the claimant made an application to adjourn the hearing. We refused the application.

3. Over the course of the ensuing days, the claimant made the following disputed applications:

3.1. to amend his claim to include a complaint of victimisation;

3.2. to amend his claim, and in particular his complaint under FTER so as to allege that he was treated less favourably than Rita Bhalla was treated;

3.3. for permission to give evidence in chief about matters not covered in his witness statement, which would be relevant to the allegations referred to in Schedules B and C;

3.4. for permission to ask questions in chief of witnesses about matters not covered in their witness statements;

3.5. for permission to rely on a supplemental witness statement;

3.6. for specific disclosure of patient notes of Patient L, Patient Z and other patients;

3.7. for specific disclosure of further rotas;

3.8. for a witness order for:

3.8.1. Mr Amu

3.8.2. Dr Maniaz

3.8.3. Edna Smith

3.8.4. Cathy Trinick and

3.8.5. Dr Thirwell

4. During the course of the claimant's submissions, it became clear that the claimant wished the tribunal to adjudicate on a great many allegations that did not appear in the List of Issues. This led us to spend several days trying to clarify with the claimant how he was putting his case in relation to those allegations. We indicated on the second day of the hearing that, once the claimant had been given the opportunity to clarify those allegations that did not appear in

the List of Issues, we would consider whether any of those allegations should be struck out on the ground that they had no reasonable prospect of success.

5. As the claimant continued to talk about the way he was putting his case, it appeared from time to time that what the claimant was actually doing was seeking to introduce allegations that were not even in the FBPs. In relation to these allegations, the tribunal had to decide whether an amendment was required and, if so, whether it should be granted.

6. The parties' submissions regarding these issues flushed out a further preliminary issue, namely whether paragraph 130 in the claimant's witness statement was admissible. That paragraph stated that the claimant made protected disclosures as set out in his FBPs. The respondent's position was that that paragraph was wholly unsatisfactory because of its attempt to import large sections of the FBPs wholesale into the evidence without setting out any of the factual detail. This was a point raised by the respondent at a previous preliminary hearing, without having been adjudicated.

7. One issue recorded in the List of Issues was whether or not the claimant would be required to amend his claim in order to rely on protected disclosures and to allege detriments which, in each case, had been specifically alleged for the first time in the FBPs. Was the claimant introducing new allegations or merely providing further particulars of existing ones? The parties agreed that this question should be determined at the outset of the hearing along with the claimant's applications."

10. In the course of that hearing, there was a renewed application for a supplementary written statement, this is dealt with at paragraphs 104 to 105 of those Reasons:

"104. We refuse the claimant's renewed application for permission to rely on a supplemental witness statement. There has been no material change of circumstances since the Refusal Decision. The claimant argues that the two days spent clarifying his case are a material change. We disagree. Employment Judge Ryan did not base his Refusal Decision on the lack of clarity in the FBPs.

105. Even given a free hand, we would make the same decision as Employment Judge Ryan, for the following reasons:

105.1. The claimant's submissions on this point included an explanation of his reason for not having prepared a more complete witness statement in the first place. Here is how the explanation goes. Based on his experience of having sat on a jury at Harrow Crown Court, he thought that he would give his evidence in chief orally and there was no need for all his evidence to be in his witness statement. For the reasons we have already given we simply cannot accept this account. Once again, we stress that we have not reached any conclusions about the credibility of the claimant's evidence generally.

105.2. Refusing a supplemental statement still leaves the claimant with a long list of allegations supported by the existing witness statements and documents in the bundle.

105.3. Granting permission would, as Employment Judge Ryan pointed out, give the claimant an advantage over the respondent because he would be able to tailor any supplemental evidence to fit the respondent's witness statements which he has now had for several months. It would also add to the length of the case, by increasing reading and cross-examination time. Finishing the re-listed hearing within the allotted time is going to need very careful case management as things already stand. Any substantial supplemental evidence risks derailing that process."

11. That refusal was the subject of an appeal to this Appeal Tribunal. Grounds 1 and 2 were virtually identical terms to those advanced in the current appeal. The Notice of Appeal was

dated 8 May 2017, which is shortly after HHJ Eady QC had granted leave for this appeal to proceed to a Full Hearing on the amended grounds dated 26 April 2017, drafted by counsel then acting under the aegis of the ELAAS Scheme:

> **"1. The Judge erred in law in refusing the Appellant's application to be allowed to submit a supplementary witness statement, in that he:**
>
> > **1.1. failed to take into account that hardship/prejudice to the Appellant of not being allowed to give evidence in respect of key aspects of his claim (namely discrimination and protected disclosures), the effect of which was to essentially strike out those parts of his claim (as demonstrated by Schedules B and C of the full Judgment of EJ Horne dated 13 March and sent to the parties on 28 March 2017);**
> >
> > **1.2. failed to consider whether or not a fair trial of the Appellant's claims was still possible, given the effect of the decision to exclude the statement (as demonstrated by Schedules B and C of the Judgment of EJ Horne referred to above)."**

12. That appeal was rejected by Langstaff J, formerly a President of the EAT, as wholly without merit in the following terms:

> **"The Decision was a case management one, as to which wide latitude is permitted to the Judge.**
>
> **As to Ground 1, the Claimant had no right to be allowed to make a supplementary witness statement, especially so late in the proceedings. There is no error of law in the Judge refusing him permission to do so. It should be pointed out that the Court of Appeal in *Kalu v Brighton* refused to allow parts of a witness statement made by a Claimant to be given in evidence, for reasons which resonate with those in this case.**
>
> **As to Ground 2, the Judge expressly considered the prejudices and came to a permissible conclusion.**
>
> **As to 3, the same applies.**
>
> **As to 4, no argument/ground has been advanced for the assertion of error of law: I can see none.**
>
> **The Reasons are, overall, clear and cogent - see especially *Chandhok v Tirkey*. A case has to be kept within reasonable bounds, so that it can be tried efficiently. This case cried out for an approach such as the Judge adopted.**
>
> **I consider the appeal wholly without merit, and refuse under rule 3(7ZA), having read the Reasons given by the Judge. In particular, the Claimant must have known throughout what his complaints were. He cannot reasonably now seek to add to them, in the way he has tried to do, and have proper Grounds to complain that a court has refused to allow him to do so."**

13. It seems to me that it is strongly arguable that this decision, made in respect of a decision made by the Employment Judge who is shortly to conduct the liability hearing, renders this appeal moot, as being an attack on a decision on an identical point made by this same

A Tribunal which, is well established, cannot overrule itself. However, despite those doubts I go on in any event to consider this appeal on its merits.

B 14. The issue in the case is clearly whether, in the circumstances of the case, it can be said that the Reasons set out by the Employment Judge demonstrated that he has considered the two questions, namely of prejudice and whether a fair trial is possible. It is not disputed that the Order which he made is one which he was entitled to make. It seems to me that it is C appropriate, given paragraph 2 of the Reasons under appeal, that I should look in addition at the Order made on 11 October.

D 15. As far as prejudice is concerned, it is self-evident what the prejudice would be to the Claimant by reason of his, having failed through his own fault, to adduce evidence in relation to some of his claims when submitting a witness statement at the last possible day permitted under E an Unless Order, some three years after commencing his claim.

16. The Judge noted that he was weighing the prejudice to the Claimant against that to the Respondent. It seems to me a non-starter to argue that he did not have the prejudice to the F Claimant very much in mind. This is so particularly given the history of the case and the fact that Unless Orders have previously been made.

G 17. I am referred by Mr Crosfill to the well-known dictum of Lord Russell of Killowen and **Retarded Children's Aid Society Ltd v Day** [1978] ICR 437, *"I think care must be taken to avoid concluding that an experienced industrial tribunal by not expressly mentioning some* H *point or breach has overlooked it*" (page 444). I am equally alive to the point made by Mr Livingston that the ET is required to set out its reasons for the key issues relevant to its

decisions (see **English v Emery Reimbold & Strick Ltd** [2003] IRLR 710). Finally, of course, this is a case management decision and is well settled (see **O'Cathail v Transport for London** [2013] ICR 614) an ET has exceptionally wide case management powers and its decisions can only be questioned for error of law and this Tribunal will not, in the absence of an error of law, interfere. It is accepted on behalf of the Respondent that the question whether a fair trial remained possible was something the Employment Judge had to have regard to. It seems to me a valid question has to be "a fair hearing for whom?": meaning both parties.

18. Plainly the matter was going to continue, at least on the basis of the already lengthy statements served, and I note that it took several days in March 2017 for Employment Judge Horne and the lay members to iron out what would be the live issues before them. Could a hearing be "fair" when, as the Judge set out, the Claimant would be able to produce a statement which was tailored to the evidence already served. Fairness from the Claimant's perspective necessarily included consideration of the background to the application, and the fact that his statement had to be secured by an Unless Order. To an extent, a hearing will almost always be possible if someone produces the evidence at the eleventh hour, even though an adjournment might be necessary.

19. Given the procedural history of this case and the need under the overriding objective for the trial to conclude without further delay, the Judge demonstrated by his short Reasons, taken together with the earlier Reasons which he incorporated by reference, that he had the question of a fair hearing firmly in his sights. It is perhaps unfortunate that he did not use that expression, but having regard to the Reasons read as a whole in my judgment it is plain that he had the key considerations in mind.

20. For all those reasons I reject this appeal.