Appeal No. UKEAT/0308/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 January 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

THE CHIEF CONSTABLE OF KENT CONSTABULARY — APPELLANT

MR A BOWLER — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ROBERT GRIFFITHS (One of Her Majesty's Counsel) Instructed by: Kent County Constabulary Legal Services Department Sutton Road Maidstone Kent ME15 9BZ
For the Respondent	MS KATE ANNAND (of Counsel) Instructed by: Slater and Gordon Lawyers Haywood House North Dumfries Place Cardiff CF10 3GA

SUMMARY

PRACTICE AND PROCEDURE

1. The Respondent sought to challenge a case management order made by the Employment Tribunal following an appeal that remitted allegations of unlawful victimisation be redetermined. The order permitted the parties to adduce additional evidence on the issue of knowledge of the protected act.

2. The appeal failed. The order made by the Employment Tribunal did not exceed its jurisdiction. The Employment Appeal Tribunal's Judgment expressly anticipated the possibility of additional evidence being heard and the order did not limit this possibility.

3. Further, in the unusual circumstances of this case, the order was a permissible option and well within the case management discretion available to the Employment Tribunal.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This is, unusually, an appeal against a case management order, made by Employment Judge Wallis at a hearing on 22 September 2017, with reasons promulgated on 17 October 2017. The Employment Judge acceded to an application by the Claimant for permission to adduce evidence at a remitted hearing in relation to unlawful victimisation allegations against DS McClean, and in particular, as to whether DS McClean knew that the grievance raised earlier by the Claimant was a grievance about race and if so, whether he subjected the Claimant to the proven detriments because of that knowledge.

2. The application was resisted and is now challenged by the Chief Constable of Kent Constabulary (the Appellant on this appeal, but referred to as the Respondent for ease of reference). The Respondent has appeared by Mr Robert Griffiths QC and the Claimant, who resists the appeal, has appeared by Ms Kate Annand of counsel.

Background Facts

3. The circumstances leading to the disputed order can be summarised in the following terms. By a Reserved Judgment promulgated on 5 April 2016, the Employment Tribunal upheld certain claims of unlawful direct race discrimination and victimisation brought by the Claimant, a serving police officer. In particular, in relation to four allegations of unlawful victimisation against DS McClean, the Tribunal found as follows:

> **"145. Issues 9e to h refer to the way in which Mr McClean treated the Claimant. The Tribunal could find no other reason but the grievance. There was no justification for suggesting that the Claimant would need six months to learn a job he had done for years; neither was there any justification that he could not visit the French customs, no others had that restriction. The Respondent agreed that the arrest made by the Claimant was significant; it was unclear then why his manager would not want to commend him on it in his appraisal, and simply say that he could 'raise it himself'. The performance grade was an example of a pedantic approach that was not merited in the circumstances. The claim was upheld."**

4. The Respondent appealed against some of the findings made by the Employment Tribunal including those findings of unlawful victimisation made against DS McClean. I heard the appeal and, by a Judgment handed down on 22 March 2017, concluded that in relation to the four findings of unlawful victimisation by DS McClean, the Employment Tribunal had erred in law. I dealt with the points at paragraphs 80 to 98 inclusive of my Judgment.

5. I concluded that the Claimant did not establish a *prima facie* case of knowledge of the protected acts by DS McClean and, importantly, the Employment Tribunal failed expressly to address that question and made an error of law in concluding that the burden shifted to the Respondent to explain itself or that the Tribunal was entitled to infer such knowledge by way of a positive finding, if that is what the Tribunal had done. For that reason, I concluded that the findings of unlawful victimisation against DS McClean could not stand.

6. I considered whether in relation to those allegations the conclusion was obvious or inevitable in relation to any of them, but determined that it was not. It was therefore necessary to remit the case in order to enable those allegations, if they were pursued, to be determined again. At paragraph 101, I said this:

> **"101. … The Tribunal heard the evidence and I am confident that it will reconsider the issues required to be addressed in light of this judgment, and will do so fairly and professionally. Given that I am remitting to the same Tribunal, I would anticipate that no further evidence will be necessary, and any further hearing can be restricted to legal submissions. However, ultimately, it will be for the Tribunal to determine whether further evidence is to be entertained and it will no doubt wish to consider representations from the parties as to whether that should be done or not in this case."**

7. The order I made, dated 27 March 2017, remitted those allegations and others that are not the subject of this appeal for reconsideration. The order provided that once those allegations were redetermined, the conclusions contained in the Reserved Remedy Judgment, dated 3 August 2016, should also be reconsidered.

8. The Employment Judge dealt with the application in relation to the allegations against DS McClean at paragraphs 9 to 16 of the reasons for the order made. It may be that these are clumsily expressed, but on the face of it, she seems to have taken the somewhat surprising view that although causation was originally in issue in relation to the allegations against DS McClean, that the Tribunal had not been required at the original hearing to consider whether DS McClean knew that the grievance was related to race. She said:

> **"10. … There was no dispute that he knew about the grievance; his evidence was that he did not know 'the details'. He was asked one question about whether he knew that the grievance was about race, and he said 'no'.**
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> **11. The Tribunal was not addressed on his knowledge of the detail of the grievance, and specifically whether he knew it was about race, so our attention was not drawn to that; the emphasis by the Respondent at that stage was that the matters relied upon were not detriments. We found that they were detriments.**
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> **12. My understanding is that the EAT has in effect (although not in terms) asked the Tribunal to consider whether Mr McClean knew that the grievance was about race, and whether he acted in the way that we found he acted, because of that knowledge."**

Further at paragraph 15 the Employment Judge said:

> **"15. I indicated to the parties that it was never put to the Tribunal that it was necessary for Mr McClean to have known that the grievance was about race, and so this was not a question considered or addressed by the Tribunal at all, once the Respondent conceded that there had been protected acts. This was not a case where it was denied that Mr McClean knew about the grievance; neither was it denied that the grievance was a protected act. However, although there appears to be no case law on the point, the Claimant has accepted, and so must the Tribunal, that the EAT requires the Tribunal to consider whether he did know that it was about race."**

9. That approach, on its face and subject to the point that it may be clumsily worded, is wrong in circumstances where, although it is conceded that a claimant has done protected acts, there is a contested issue as to whether detriments are done because of those protected acts. In this case issue 10 of the agreed issues raised an issue of causation. It was for the original Tribunal to determine whether the alleged detriments done by DS McClean accordingly were done "*because the Claimant had done a protected act*". That meant it was necessary to decide, first whether there was detrimental treatment done by DS McClean as alleged and secondly, whether that treatment was done at least in part because the Claimant did a protected act; in

other words, brought a grievance based on race. A grievance unconnected with race or any other protected characteristic would not have been a protected act. Although in ordinary circumstances unlawful discrimination can be subconscious, it is to my mind difficult to see how a protected act can subconsciously influence a putative discriminator unless that putative discriminator is aware of the particular protected act or believes that the particular protected act was or might have been done. It is only if the latter issue is established that there is unlawful victimisation.

10. Here, as Employment Judge Wallis records in her reasons, at paragraph 5 of his witness statement DS McClean did take issue with the victimisation allegations saying that he was aware of the fact that there had been a grievance but did not know "*any of the details*". When questioned in cross-examination, he said he was not aware that the grievance was based on race. In those circumstances it seems to me that this was an issue in the case and although the parties and the Tribunal may have proceeded on the erroneous basis that it was not, that would have been an erroneous basis.

11. Notwithstanding those points and returning to the critical points in issue on this appeal, at paragraph 13 the Employment Judge observed that the Tribunal would not have sufficient evidence to come to a view about the extent of DS McClean's knowledge because it was never put forward as an issue and thus not explored.

The Appeal

12. There are three grounds of challenge taken in the Notice of Appeal, but only two were amplified orally by Mr Griffiths QC. Taking each in turn, he contends that in acceding to the application the Employment Tribunal erred in law by going beyond the scope of remission

which was limited by the Employment Appeal Tribunal and contrary to the principle recognised in **Aparau v Iceland Frozen Foods plc** [2000] ICR 341. The scope of the remission did not extend to permitting the Claimant to reopen the evidence and the Tribunal was not entitled to permit this.

13. Mr Griffiths submits that the wording of the order made by the Employment Appeal Tribunal remitting the case to the Tribunal confines or limits the jurisdiction of the Tribunal. Further and in any event, it is not open to an appellate body to remit a case in order to fill in gaps in the evidence where such evidence is not fresh evidence within the principles established by **Ladd v Marshall** [1954] EWCA Civ 1. He relies for that proposition, which he submits is trite law, on a passage in **Kingston v British Railways Board** [1984] ICR 781 at page 796A-C per May LJ. Here, he submits that the remission order was not an invitation to the Employment Tribunal to fill gaps in the evidence by allowing the Claimant to adduce evidence that was available but not adduced earlier, either in oral or documentary form. Rather it was a remission to reconsider, in light the Employment Appeal Tribunal's Judgment on the legal principles to be applied, whether the allegations were established on the basis of the evidence that was put before the Tribunal first time around.

14. Mr Griffiths accepts that there is power to remit to a Tribunal to make findings of fact on the basis of evidence already available that are supported by the existing evidence, but it is not permissible to go on a new fact-finding exercise in order to seek to find evidence to support findings that could have been made earlier but were not made.

15. It seems to me, in agreement with the written submissions made in her skeleton argument by Ms Annand, that **Aparau** is distinguishable on its facts from this case. In **Aparau**

A the Employment Appeal Tribunal remitted the case to a tribunal to reconsider one issue only; namely, whether a mobility clause had been expressly incorporated into the claimant's contact of employment. That point was conceded by the respondent shortly before the fresh hearing and the respondent sought permission to amend its response to the unfair dismissal claim pursued by the claimant by contending that that dismissal was fair. The tribunal in that case allowed the amendment and went on to determine that the dismissal was indeed fair. In the Court of Appeal it was held that the tribunal acted outside the scope of its remit and jurisdiction given the limited power of reconsideration that flowed from the Judgment of the Employment Appeal Tribunal. The further decision was accordingly a nullity.

D 16. Here, the issues that were remitted to the Employment Tribunal by the order I made on 27 March 2017, were the four allegations that formed the basis of grounds 6, 7, 8 and 9 of the appeal as set out at paragraphs 3b to 3e of my order. Reconsideration was directed on remission to the original Tribunal and, as the Employment Judge expressly acknowledged, that would involve consideration of two questions: first, whether DS McClean had knowledge of the fact that the Claimant pursued a race grievance; and secondly, whether the detrimental treatment done by DS McClean was done because of that race grievance or his knowledge of it. There is nothing in the Employment Tribunal's order to suggest that the Tribunal intends to or has strayed beyond those issues remitted to it.

G 17. The position is therefore different from that in **Aparau**. The word "reconsideration" does not, as Mr Griffiths conceded in the course of argument, tell one anything about whether or not the Tribunal, which now has jurisdiction to determine those four allegations again following appeal, must do so constrained by the evidence already adduced or has the ability to hear additional evidence. In this case, although the order does not deal with that point, my

Judgment at paragraph 101 made clear that although I anticipated that further evidence would not be necessary, I left open the possibility of circumstances emerging that might justify further evidence being adduced and expressly directed that the Employment Tribunal should have the power to determine whether further evidence should be entertained in those circumstances or not, subject to representations made by the parties. It seems to me in those circumstances that on a proper construction of my order, understood in light of my Judgment, there is nothing in my order that precluded the Employment Tribunal from taking the course adopted and that the Employment Judge did not act outside her jurisdiction.

18. Mr Griffiths submits that it is not open to an appellate body to remit a case in order to fill in gaps in the evidence where such evidence is not fresh evidence within the principles established by **Ladd v Marshall**. That is not clearly a point pursued in the Notice of Appeal, although Mr Griffiths contends that it goes to the Tribunal's jurisdiction. I have found that point a more difficult point to deal with on this appeal in light of the particular facts. I agree that ordinarily, where a case is remitted to the Employment Tribunal that does not afford an opportunity to parties on either side to make good any shortfall in the evidence adduced first time round or to have a second bite at the cherry, save in circumstances where the test in **Ladd v Marshall** is met: evidence that could and should have been adduced first time round will not normally be permitted, absent fulfilment of those conditions as the Court of Appeal has made clear.

19. Here, however, although there was some exploration of the question of DS McClean's knowledge at the original hearing, for whatever reason the Employment Tribunal proceeded on the footing that it was not necessary to decide this issue. That may have been an additional error of law by the Employment Tribunal, (albeit that it was unknown at the time of my

A Judgment) as the passages referred to above in Employment Judge Wallis' reasons appear to suggest.

B 20. That approach was compounded by the position adopted by the parties. For although DS McClean said in his witness statement that he had the limited knowledge to which I have referred, the knowledge point was not expressly pleaded by the Respondent nor was it a point that was argued, as Ms Annand has said. Indeed, in her submission the point was not raised by C either the Respondent or the Claimant and was not explored in the evidence or arguments advanced before the Employment Tribunal.

D 21. The situation is made worse by the issues regarding disclosure given by the Respondent before the original hearing. In particular, an email disclosed by the Respondent attaching an Occupational Health report which referred to the Claimant's grievance being a grievance on the grounds of race was redacted, so that the fact that DS McClean was a recipient of that email and E the report was not disclosed to the Claimant. The Claimant subsequently obtained an unredacted version of the email pursuant to a subject access request, but it is difficult to understand what proper basis there could have been for redacting the document in the first F place. Since DS McClean was denying the alleged victimisation and saying he had no knowledge of the fact the grievance raised race complaints, that email was plainly relevant and should have been disclosed on an unredacted basis. It could then have been put to DS McClean G in order to explore his evidence on this issue.

22. It seems to me in those unusual circumstances that the Tribunal was entitled to conclude H that additional evidence could permissibly be adduced. Whether or not to allow this was a matter of discretion for the Tribunal to be exercised in accordance with the law and the

overriding objective. This was pre-eminently a fact-sensitive question that involves no point of principle in light of the way in which both the Tribunal and the parties proceeded. The Employment Judge concluded that fairness required that the parties be permitted to reopen the evidence in the particular circumstances that I have described. That was a matter of case management and it seems to me that the Employment Judge acted well within the wide margin of discretion available to her in doing so and made no error of law.

23. The third ground of appeal, not developed orally by Mr Griffiths, argues that the Tribunal failed to take into account relevant matters such as the passage of time and the unfairness to the Respondent in allowing this issue to be reopened. This is an argument that it is in effect too late to raise new allegations. The difficulty with that argument is that the Claimant has not raised any new allegations. He has always alleged that DS McClean unlawfully victimised him in relation to the detrimental treatment relied on and proven, and by implication it has always been his case that DS McClean knew that the Claimant did protected acts including making a grievance based on race. The Tribunal expressly considered fairness to both sides. There was no evidence that DS McClean cannot recall the discussions relied on by the Claimant that took place in the summer of 2014. The Tribunal would have been well aware of the date of the conversations now relied on and there is no basis for concluding that this point was overlooked. It seems to me that the decision was well within the margin of discretion available to the Tribunal and not arguably in error of law on this basis either.

24. I also accept the point made in writing by Ms Annand in her skeleton argument that the discussions about which additional evidence is to be given, were not set out in the Claimant's original witness statement because, referring back to the matters to which I have already

adverted, it was not understood by anyone involved in the case that there was an issue as to DS McClean's knowledge that the grievance related to race.

Conclusion

25. In conclusion, the scope of the order for remission in this case is clear. The Tribunal did not go beyond the scope of its remit. So far as DS McClean is concerned, the hearing is confined to the four issues remitted to the Employment Tribunal. In making my order, I expressly left open the possibility that there might be a proper reason for allowing both sides to adduce additional evidence and directed that avenue should be left to the Tribunal itself to address in light of representations received. That is the approach the Tribunal adopted and, in the particular circumstances and in light of the particular history of this case, the Tribunal acted well within its case management discretion in allowing further evidence on this particular issue.

26. For all those reasons, and despite the forceful submissions made by Mr Griffiths on behalf of the Respondent, this appeal fails and is dismissed.