Appeal No. UKEAT/0229/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 March 2018
Judgment handed down on 1 May 2018

Before

THE HONOURABLE MR JUSTICE LAVENDER

(SITTING ALONE)

MR G NYATHI — APPELLANT

SECRETARY OF STATE FOR JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS BIANCA VENKATA (of Counsel) Bar Pro Bono Scheme
For the Respondent	MS ELIZABETH HODGETTS (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS

SUMMARY

PRACTICE AND PROCEDURE - Absence of Party

The Tribunal was not obliged to make any more adjustments to its procedure than it did for a disabled Claimant. The Tribunal erred in not considering whether to cause a telephone call to be made to enquire as to the Claimant's reasons for not attending a hearing. However, that error made no difference to the outcome.

THE HONOURABLE MR JUSTICE LAVENDER

(1) Introduction

1. This is an appeal against the decision of Employment Judge Hutchinson set out in a judgment dated 31 May 2017. The Judge decided:

(1) not to reconsider his decision of 20 March 2017 to strike out the Claimant's claims for race discrimination, disability discrimination, notice pay and holiday pay; and

(2) to strike out the Claimant's claim for unfair dismissal.

(2) The Claimant's Employment

2. The Claimant was born on 14 February 2016. He started working for the Respondent in 2006. He was diagnosed as having depression in October 2011. Starting in January 2013, he was off work through ill health on a number of occasions.

3. The Claimant first brought a claim against the Respondent in 2014. That claim was for direct race discrimination, harassment, victimisation and breach of section 10 of the Employment Relations Act 1999.

4. Meanwhile, the Claimant's health problems and his resulting absences from work continued. On 27 November 2014 a consultant occupational physician, Dr Syed Junaid Alam, reported that the Claimant's condition was unlikely to fall under the conditions of the Equality Act 2010, but that this might change if his symptoms did not improve over the next few months. In September 2015 the Claimant was referred to as psychiatrist. He was off work again from December 2015, never to return.

5. Meanwhile, his claim to the Employment Tribunal resulted in a 14-day hearing between 27 January and 18 February 2016. The Claimant represented himself at that hearing. During

A that hearing, on 9 February 2016 a consultant psychiatrist, Dr Josep Vilanova, reported as follows:

> **"Mr Nyathi does have a psychiatric condition with high levels of anxiety as a main symptom.**
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> B **I understand that he is representing himself in court. I have had the chance to have a conversation with Mr Nyathi and in my opinion his anxiety disorder is affecting his capacity to represent himself in court. Therefore, representing himself in court is likely to have a detrimental effect on his mental health."**

6. Notwithstanding this report, the hearing went ahead. The Claimant's 60th birthday was on 14 February 2016, which was also during the hearing before the Tribunal. 60 was his C retirement age.

7. In its judgment dated 11 March 2016 the Tribunal dismissed the Claimant's claims. The D Tribunal said that there had been several occasions when it found the Claimant's evidence and arguments to be wholly unreliable or simply implausible. The Tribunal also referred to the Claimant's ill health. It said as follows:

> E **"The suggestion that Ms Brown attempted to force him into ill health retirement is factually inaccurate. It was the Claimant who was in fact seeking ill health retirement and he signed the forms for the application. At the hearing he said that Ms Brown was seeking to pressurise him into early ill health retirement which is simply not the case. Ms Brown simply went through the forms with him as his Line Manager."**

8. On 4 April 2016 the Claimant was assessed by Dr Alan Scott, a consultant occupational F physician, as being unfit for work in any capacity and likely to remain permanently incapacitated for the normal duties of his employment. Dr Scott also expressed the view that it was likely that the Equality Act would apply to the Claimant's depression. The Claimant was dismissed on 16 June 2016. The Respondent says that the Claimant was dismissed on the G grounds of incapacity.

(3) The Claimant's Second Claim

H 9. The Claimant presented his second claim to the Employment Tribunal on 6 October 2016. As Employment Judge Hutchinson said in his judgment of 31 May 2017, it was very

difficult to make out what the basis was of the Claimant's second claim, but it appeared that the Claimant was referring to matters which had already been litigated in the first claim. His claim form gave the background and details of his claim as follows:

> **"I felt unfairly dismissed from my employment on what was described as dismissal on grounds of medical inefficiency by the Acting Governor Ian West on 16 June 2016. I had been subjected to too prolonged poor performance management by my former line manager Ms Nicola Brown which ran from 10 February 2014 until my dismissal. I was over punished. This was a breach of our work place procedures. The punishment was so severe to me. I became increasingly unsettled most of the time and suffered stress related illness which has had a serious psychological impact on me. Knowing very well I did not have any difficulties in carrying my duties – it is stressful and painful I got dismissed unceremoniously after a good service of slightly over 10 years and having gone past the minimum retirement age of (60). There was no consideration of medical advice given to them – and the fact I was under the care of a psychiatrist, a cardiologist, my GP, notes from our NOMS Employee Support Counsellor and reports from our Occupational Health Adviser. In the first place, I was continuously subjected to different forms of racial harassment by a work colleague of the same grade. He offended me with racial joke, called me a "mole" within the establishment due to being the only black employee, blocking my exit from the staff car park and circulating an embarrassing e-mail to my line manager and his other close associates did the same and therefore – inflicting serious pain on me and heavily discrediting me to a quite a big number of staff members – and thus made my working environment uncomfortable and unbearable. Top management did not protect me in anyway. All my grievances against the work colleague and my line manager were not investigated. I had difficulties in trusting the integrity of the Governor Mr Ian Telfer – as had one day met me along the corridors and made unkind remarks when I was about to greet him and also provided the HM Prisons – CEO Mr Michael Spurr – with misleading facts about my problems at work. At a time when it was known that I was taking the case to the Tribunal Court – there was too much hostility against me and top management, managers and other members – did everything to find faults in regards to my duties. I feel my dismissal was unfair, racial motivated and an act of institutional racism."**

10. A case management order was made on 14 November 2016. This required the Claimant to provide a schedule of loss by 12 December 2016. He did not do so.

11. A preliminary hearing was arranged. The Claimant asked for an adjournment on the basis that he had to take legal advice and needed additional time. This request was refused by Employment Judge Swann, who pointed out that the Claimant had not provided any medical evidence.

12. There was a preliminary hearing on 5 January 2017. The Claimant was 45 minutes late for that hearing, which he attended with his daughter. When asked why he was late, he said that he misread the notification to attend and thought that the hearing would not start until 3 pm. At the preliminary hearing, Employment Judge Hutchinson made a number of directions:

(1) He required the Claimant to provide by 2 February 2017 a schedule particularising his claims of race and disability discrimination. The Claimant did not provide this schedule.

(2) He also required the Claimant to provide by 2 February 2017 further details of the pay which he was claiming. The Claimant provided these details by 9 February 2017.

(3) He directed that there would be a hearing to consider certain preliminary issues, including whether the claims would be struck out as having no reasonable prospects of success.

13. The Judge informed the Claimant of potential sources of legal assistance and told him not to delay. The note taken by the Respondent's representative, whose accuracy was not disputed, states as follows:

> **"C observes that he prepared Claim Form without legal advice. I don't have resources to present case as should be. Trying to get legal representation. Condition is such that worrying to do work. Need legal representation to interview me and take everything I want to say. If Tribunal can get Legal Aid, appreciated.**
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> **EJ: Can't assist. Independent judicial body. Can't advise re merits. Give judgment. Certain bodies that give assistance – Law Centres. In Nottingham, Law Centre that assists people on free basis if think meritorious. Also enquire with local universities. Nottingham University has Free Representation Unit. They give assistance. Don't know about universities here but may be worth while to contact. There are certain barristers and solicitors who offer help on a pro bono basis. Or look at conditional fee agreement – some solicitors and barristers do work on a conditional fee agreement basis. Depends on their being satisfied that case is winnable. But do not delay in dealing with these matters."**

14. On 27 January 2017 Dr Tosar advised that the Claimant was not fit for work. On 14 February 2017 the Claimant applied for a stay of the proceedings until he had legal advice. He said that it was detrimental to his health to try to proceed with the cases without such assistance. He provided copies of some of the medical reports to which I have referred.

15. On 15 February 2017 Employment Judge Britton refused the application for a stay and made an unless order. He ordered that:

(1) The race and disability discrimination claims would be struck out unless the Claimant provided the particulars of those claims as ordered on 5 January 2017. The Claimant did not provide these particulars.

(2) The monetary claims would be struck out unless by 27 February 2017 the Claimant provided persuasive reasons to the contrary. The Claimant did not provide such reasons.

16. On 23 February 2017 the Claimant repeated his request for a stay. No stay was ordered. Instead, on 20 March 2017 Employment Judge Hutchinson decided to strike out the Claimant's claims for race discrimination, disability discrimination, notice pay and holiday pay for non-compliance with the unless order.

17. On 27 March 2017 the Claimant asked for this decision to be reconsidered. He enclosed copies of:

(1) Dr Alam's report of 27 November 2014.

(2) Dr Vilanova's report of 9 February 2016.

(3) Dr Scott's report of 4 April 2016.

(4) Dr Tosar's report of 27 January 2017.

18. As a result, the preliminary hearing was converted to a telephone hearing, which was conducted by Employment Judge Hutchinson on 3 April 2017, to assess the Claimant's current condition and his fitness to continue to pursue the claim.

19. On 3 April 2017 Employment Judge Hutchinson fixed the preliminary hearing for 31 May 2017 and ordered the Claimant to provide by 2 May 2017 medical evidence in support of

his application for a stay and his application for the reconsideration of the claims which had been struck out. He pointed out that the evidence provided so far was not current and did not comply with the Presidential Guidance on Seeking a Postponement of a Hearing. The relevant paragraph from that Guidance states as follows:

> **"Where medical evidence is supplied it should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease."**

20. On 4 April 2017 Dr Tosar advised that he could not see any return to work in the near future and that the Claimant's ongoing legal issues with the Respondent were contributing to his stress levels. On 25 April 2017 Dr Vilanova reported that the Claimant continued to suffer from chronic anxiety and that his grievances with his employers were having a progressively negative effect on his mental health.

21. The Claimant provided these two reports to the Tribunal on 2 May 2017. These reports confirmed that the Claimant was still unwell. They did not say that the Claimant was unfit to attend the preliminary hearing. Nor did they say that the Claimant was unfit to comply with the directions which had been made. On the other hand, they did not suggest that there had been any improvement from the position as set out in Dr Vilanova's letter of 9 February 2016.

22. On 22 May 2017 Employment Judge Hutchinson rejected the Claimant's application for a stay. On 30 May 2017 the Claimant repeated his application in an email to the employment tribunal, with a copy to the Respondent. He said:

> **"Mr poor health is quite concerning. I am less competent in handling this complex matter on my own."**

23. He went on to set out in 10 numbered paragraphs the reasons for his application. He then identified 8 alleged omissions from the bundle of documents prepared by the Respondent.

24. Employment Judge Swann dismissed the Claimant's application. In response, the Claimant sent a further email on 31 May 2017. The email did not specifically state an intention not to attend the hearing that day. However, it is consistent with his subsequent claim that he did not realise that he was expected to attend the hearing.

(4) The Hearing on 31 May 2017

25. The preliminary hearing took place on 31 May 2017. Employment Judge Hutchinson said as follows about the hearing in paragraphs 40 and 41 of his judgment.

> **"40. The Respondent was represented by Ms Hodgetts of Counsel and the Claimant did not attend and gave no explanation for his non attendance. I waited approximately 15 minutes to see if the Claimant would attend late but he did not. I heard representations from Ms Hodgetts and I considered the correspondence on the file and a bundle of documents produced by the Respondent's. I also considered an email from the Claimant dated 13 May which comprised an urgent application to have his employment matter postponed until he found legal representation. His correspondence still did not comply with the presidential guidance. He acknowledged that he had received the documentation from the Respondent's but did not feel he was well enough to attend.**
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> **41. I decided that I should proceed in the Claimant's absence."**

26. I note that:

(1) The email referred to in paragraph 40 must be the Claimant's email of 30 May, not 13 May.

(2) That email did not contain a statement that the Claimant did not feel that he was well enough to attend.

(3) The Judge appears not to have seen the email of 31 May 2017.

(4) The Judge did not suggest that:

(a) he considered whether to cause; or

(b) he in fact caused,

A a telephone call to be made to enquire why the Claimant had not attended.

27. In making the decision under appeal, the Judge said, amongst other things, the following in his judgment:

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> **(1)** (in paragraph 51) **"I am satisfied that there is no reasonable prospect of the original decision to strike out the claims being varied or revoked. The Claimant has been given ample opportunity to pursue his case and he has not done so. Whilst he says he needs legal advice because of his medical condition there is no evidence to support that contention. There is also no medical evidence to support any contention that he could not attend this hearing."**
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> **(2)** (in paragraph 54) **"I am satisfied that the Claimant has been unwilling to progress his claim and has failed to provide any good reason as to the lack of progress or indeed for his non attendance at the hearing today. …"**
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> (3) (in paragraph 55) **"… The Claimant has chosen not to attend the hearing and has not made any representations, written or otherwise. …"**

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(5) The Appeal

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28. In his notice of appeal dated 26 July 2017 and in documents produced thereafter, the Claimant has alleged that the reason why he did not attend the hearing on 31 May 2017 was a misunderstanding. The notice of the hearing referred to the Judge sitting alone (i.e. without lay members), and he misread this as meaning that the parties were not to attend. The Respondent was sceptical of this explanation, but did not seek to cross-examine the Claimant about it.

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29. On 4 October 2017 Dr Tosar advised that the Claimant remained unfit for work and would remain so until January 2018. Dr Vilanova saw the Claimant on 28 December 2017 and reported that the Claimant was feeling increasingly anxious, due to the stresses caused by his court cases against his former employers.

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30. The grounds of appeal concern two matters. The first is the Judge's consideration of the Claimant's medical issues. The second is the Judge's consideration of the reasons for the Claimant's failure to attend the hearing on 31 May 2017. The Respondent denies that the Judge made an error of law in either respect. In addition, the Respondent submits that, if there was an

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error of law, this is a case in which the Tribunal can substitute its own order striking out the claim, because it is clear that the claim has no prospect of success.

(6) Ground 1: Reasonable Adjustments

31. As for the Claimant's medical issues, it is accepted that he has a disability as defined in section 6 of the Equality Act 2010. The Claimant's various submissions amounted, in effect, to an argument that the Tribunal failed in its duty to make reasonable adjustments for the Claimant's disability, as provided for in section 20 of the Equality Act 2010, with particular reference to the Equal Treatment Bench Book 2013, which states, inter alia, that:

> **"Judges are responsible for the conduct of hearings and should ensure that people with mental disabilities can participate to the fullest extent possible whilst avoiding prejudice to other parties."**

32. The question of what adjustments are required in any particular case is, of course, fact-specific. In the present case, the medical evidence showed clearly that the Claimant was unfit to work, but that is not the same as evidence that he was unfit to present his case, either in writing or at a hearing. The Claimant was physically able to attend hearings, but he contended that he was unable effectively to present his case. The high-water mark of the medical evidence in this respect was contained in Dr Vilanova's report of 9 February 2016.

33. However, that report did not go so far as to say that the Claimant was unable to prepare written submissions or to represent himself at a hearing. The medical evidence did not support the only suggestion ever made by the Claimant as to the appropriate course to be taken in the light of his disability, i.e. his repeated application for a stay of proceedings until he could obtain legal advice. Miss Venkata rightly did not go so far as to argue that the Tribunal should have acceded to that application.

34. In addition to the medical evidence, there is the evidence of what the Claimant himself did. Following the preparation of Dr Vilanova's report of 9 February 2016, the Claimant

conducted the remainder of the hearing in his first claim and prepared a number of documents, including, for example, his email of 30 May 2016, with its 10 numbered paragraphs of submissions and its identification of 8 alleged gaps in the bundle of documents prepared by the Respondent.

35. It is also appropriate to consider the adjustments which were in fact made to the Tribunal's procedure in this case:

(1) On 5 January 2017 Employment Judge Hutchinson:

(a) made an order which informed that Claimant that he needed to provide particulars of his discrimination claims; and

(b) informed the Claimant of potential sources of legal assistance and encouraged him not to delay.

(2) On 15 February 2017 Employment Judge Britton made an unless order which informed the Claimant what he needed to do to avoid his claims being struck out.

(3) The preliminary hearing was converted to a telephone hearing on 3 April 2017 to assess the Claimant's current condition and his fitness to continue to pursue the claim.

(4) On 3 April 2017 Employment Judge Hutchinson:

(a) gave the Claimant more time in which to provide medical evidence in support of his applications for reconsideration of the decision of 20 March 2017 and/or for a stay; and

(b) fixed the preliminary hearing for 31 May 2017.

36. Against that background, I invited Miss Venkata to identify the further reasonable adjustments which she contended that the Tribunal was obliged to make. She made 8 suggestions, but I am unable to accept any of them She submitted that:

(1) The Tribunal should have directed that a report be provided of the kind directed in *Rackham v NHS Professionals Ltd* (2015) UKEAT/0110/15/LA, in which the Judge ordered that a report be obtained from the Claimant's general practitioner stating whether and, if so, how the Claimant would be able to participate in a Tribunal hearing and stating any reasonable adjustments which could be made to assist the Claimant.

In the present case, the Claimant had already conducted one Employment Tribunal claim, including a 14-day hearing. He produced medical evidence in the context of the present claim, but this did not state that he would be unable to present his claim. The Claimant was told that the medical evidence which he had produced did not support his application for a stay of proceedings. The Tribunal was not obliged to direct the production of a report as in *Rackham*.

(2) The Tribunal should have held an early ground rules hearing.

The purpose of the telephone hearing on 3 April 2017 was to assess the Claimant's condition and his fitness to continue to pursue the claim. No further hearing was necessary.

(3) The Tribunal should have reminded the Claimant of the availability of pro bono legal assistance, including McKenzie friends.

There was nothing to indicate that the Claimant was incapable of remembering, or had forgotten, what he was told on 5 January 2017.

(4) The Tribunal should have suggested that the Claimant obtain help from a relative.

The Claimant knew that he could be assisted by a relative. His daughter attended the hearing on 5 January 2017.

(5) The Tribunal should have made a direction requiring the provision of a McKenzie friend for the Claimant.

It was not for the Tribunal to direct anyone to act as the Claimant's McKenzie friend. He had conducted the hearing of his first claim. He had attended the hearing on 5 January 2017 with his daughter and he been advised as to potential sources of legal assistance, which might have included a McKenzie friend. He claimed that he had been trying to find legal assistance. If he had attended a hearing alone and had been seen to be unable to present his case effectively without help, then the Tribunal, which has a continuing duty to keep the position under review, would have had to consider how to deal with that situation. But that situation never arose.

(6) The Tribunal should have explained the meaning of the Presidential Guidance referred to in the order of 3 April 2017.

Employment Judge Hutchinson told the Claimant that the medical evidence which he had produced to date was insufficient. There was no reason to believe that further explanation was necessary. There was no evidence that the Claimant was unable to tell his doctors why he wanted reports from them.

(7) The Tribunal should have explained that the Claimant was required to attend the hearing on 31 May 2017.

The Claimant received notice of the hearing in standard form. He had attended the hearing on 5 January 2017 and hearings in his earlier claim. There was no reason to expect that he would misunderstand the notice as he says he did.

(8) The Tribunal should have adjourned the hearing on 31 May 2017.

I will deal with this hearing in connection with the Claimant's second ground of appeal. What was required was for the Tribunal to follow standard procedure, not to adjust its procedure.

37. Accordingly, the first ground of appeal is dismissed.

(7) Ground 2: The Hearing on 31 May 2017

38. I turn now to the second ground of appeal. The essence of this is that the Judge ought at the very least to have considered whether to cause a telephone call to be made to enquire why the Claimant had not attended the hearing. This is standard procedure, which should be followed except in the absence of very good reason see *Quashie v Methodist Homes Housing* (2012) UKEAT/0422/11/DM at paras. 20, 21 and 29.

39. Miss Hodgetts submitted that it can be inferred that the Judge did consider making such a call, but decided that it was unnecessary because he concluded that the Claimant had decided not to attend the hearing. I reject this submission. There is no evidence for it in the Judge's judgment. Moreover, the suggestion in paragraph 40 of the judgment that the Claimant had indicated in his email of 30 May 2017 that he did not feel well enough to attend the hearing was mistaken. Absent a clear indication in advance from a party that he does not intend to attend a hearing, the purpose of a telephone call is to inform any decision to be taken in the light of the party's absence. In those circumstances, it would be putting the cart before the horse for a

Tribunal to decide that a party had deliberately absented himself and only then to consider whether a telephone call should be made.

40. In the present case, there were a number of possible reasons why the Claimant might not have attended the hearing. One was illness, although there was no evidence that his mental condition was such as to make it physically impossible for him to attend. Another was mistake, which was certainly a possibility, since he had said that he was late on 5 January 2017 because of a mistake. A third was the sort of transport-related difficulty with which courts and tribunals are all-too familiar. Given those possibilities, there was no good reason for the Judge not to cause a telephone call to be made. In failing to do so, the Judge erred in law.

(8) Disposal

41. In those circumstances, the Claimant invites me to remit this case to the Tribunal. However, the Respondent submits that this is one of those cases where this Tribunal can be sure that the error of law has made no difference. I agree.

42. It is clear from his notice of appeal that, if he had attended the preliminary hearing, either on 31 May 2017 or following an adjournment, the Claimant's primary submission would have been to repeat his application for a stay of proceedings. Given the state of the medical evidence, that application had no prospect of success.

43. As for the merits of the case, Miss Venkata submitted that the Claimant would have stated what was set out in his form ET1. However, the Claimant had not by 31 May 2017, and still has not, provided:

(1) the particulars of his discrimination claims ordered on 5 January 2017;

(2) the reasons for not striking out his pay claims ordered on 15 February 2017; or

(3) any good reason for not striking out his unfair dismissal claim.

44. The claims brought in the Claimant's first claim before the Tribunal were dismissed. It was not open to the Claimant to revive them. He has not identified any discrete and specific allegations of discrimination arising since then. He was dismissed after his retirement age, having been off work though ill health from December 2015 to June 2016 and at a time when the medical evidence was clear that he was incapable of working. He has not identified any arguable basis for contending that his dismissal was unfair.

45. For those reasons, I dismiss this appeal.