

Appeal No. UKEAT/0238/17/JOJ

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

At the Tribunal
On 22 March 2018

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

SUCCESSION GROUP LTD

APPELLANT

MR M BECKWITH

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR NICHOLAS SMITH
(of Counsel)
Instructed by:
Foot Anstey LLP
Senate Court
Southernhay Gardens
Exeter
Devon
EX1 1NT

For the Respondent

MR TIM KENWARD
(of Counsel)
Direct Public Access

SUMMARY

PRACTICE AND PROCEDURE - Right to be heard

PRACTICE AND PROCEDURE - Case management

The wide discretion given to Employment Tribunals to make case management decisions is not to be interfered with on appeal save in limited circumstances. This was one. The refusal by the Regional Employment Judge to be taken by counsel on behalf of the Respondent applicant to passages in the ET1 and witness statement of the Claimant sought to be redacted was so unreasonable that the decision on the application cannot stand. Counsel was inhibited from making submissions on material which was at the heart of the application. Rejection of the application for redaction set aside. Application remitted to the Regional Employment Judge for rehearing.

A THE HONOURABLE MRS JUSTICE SLADE DBE

B 1. Succession Group Ltd (“the Respondent”) appeals from the case management Order by
Regional Employment Judge Parkin, following a telephone hearing on 2 December 2016. By a
Judgment sent to the parties on 5 December 2016, the Regional Employment Judge refused an
application by the Respondent, made in an email of 29 November 2016, for further editing and
redaction of the particulars of claim in the ET1 and witness statements of the Claimant and his
C wife.

D 2. The Respondent is a national wealth management financial services company, regulated
by the Financial Conduct Authority. Its business model is to acquire a small financial services
business and incorporate them into their company.

E 3. The Claimant worked for and had shares in Westminster Financial Planning Ltd. The
Respondent acquired Westminster Financial Planning Ltd on 28 January 2014. The Claimant
was employed by the Respondent from 1 February 2014 as Director of Professional
Connections to build relations with professional third parties. The Claimant also had a separate
F working arrangement as a Financial Planning Advisor under a registered individual consultant
agreement, as a self-employed person.

G 4. The Respondent contends that the Claimant’s contract of employment terminated by
mutual agreement on 13 June 2014 at a meeting with Simon Chamberlain of the Respondent,
recently deceased. The Claimant disputes that his contract of employment was terminated on
H that date or by consent. The Respondent pleads in the ET3 an alternative consensual

A termination date of 22 October 2014. Alternatively, it is said that the contract terminated on 31 March 2015.

B 5. The Claimant contends that the contract of employment terminated by dismissal on 28 July 2015, when he received a letter from the Respondent's solicitors claiming that his employment had been terminated on 31 March 2015.

C 6. The Claimant lodged an ET1 on 17 September 2015, claiming unfair dismissal on 28 July 2015. He attached grounds of complaint, which included paragraphs which were the subject of the Respondent's application for redaction on 29 November 2016. Although the
D Claimant referred to disclosures in the particulars of his complaint, he purported to reserve his right to bring a claim for protected disclosure. No such claim was, in fact, made.

E 7. The Respondent lodged an ET3 with detailed grounds of resistance, including answers to some of the paragraphs in the ET1 to which they took objection and wished to have redacted.

F 8. Witness statements were exchanged, including one dated 16 August 2016 from the Claimant. Objection was taken in the application of 29 November 2016 to some paragraphs of his witness statement and that of his wife, Lynne Rowland, who also has an ET claim against the Respondent.

G 9. At the background of these ET claims, there is an issue of entitlement of the Claimant and his wife to payment for shares, to which they would be entitled if they were good leavers.
H They would be classed as such if they had been unfairly dismissed. The value of such a claim is considerably more than could be recovered by them in ET proceedings.

A 10. The procedural history of the Claimant's claim is lengthy. At a Preliminary Hearing on 11 January 2016, Employment Judge Roper identified the following issues in dealing with the claim. There were six in number and they were:

B 1. What was the effective date of termination of the Claimant's employment?
2. How did the Claimant's employment end? Was it by dismissal or by mutual termination of employment?

C 3. What was the reason for the dismissal? The Respondent asserts that if there was a dismissal, it was for some other substantial reason such as to justify dismissal, which is a potentially fair reason for section 98(2) of the **Employment Rights Act 1996**.

D 4. Was the decision to dismiss a fair sanction? That is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

E 5. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

F 6. In the event that the Respondent's procedure was unfair, can the Respondent prove that, if it had adopted a fair procedure, then the Claimant would have been fairly dismissed in any event? If so, to what extent and when?

G 11. A hearing of the Claimant's claim, which was to take place on 12 September 2016, was vacated due to judicial illness. On 7 November 2016, there was a Preliminary Hearing before Regional Employment Judge Parkin. It was adjourned to 10 November 2016 to allow more time. That Preliminary Hearing was to decide whether three pieces of evidence were considered to be without prejudice and bound by that privilege and were inadmissible, or
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A whether privilege could not be claimed in them because of unambiguous impropriety. The Respondent alleged that those pieces of evidence contained evidence of blackmail by the Claimant.

B 12. Insofar as that application is concerned, the Regional Employment Judge held that all of the documents were privileged, save for a passage or passages in a letter written by a non-practising barrister on 30 June 2015. In addition, the Regional Employment Judge held
C that there was no unambiguous impropriety in that material. The case management hearing took place on 10 November 2016, Written Reasons were sent to the parties on 28 November 2016, giving this outcome.

D 13. On 29 November 2016 (the next day), a letter of application for redaction was made asking for an Order which is the subject of this appeal. That letter made reference to the fact
E that there were whistleblowing activities referred to in the documents to which objection was taken, and of protected disclosures in the ET1 and in statements. It was said that those matters were not relevant to the issues which the Employment Tribunal was to decide.

F 14. The email of 29 November 2016 was followed by other emails on 30 November 2016, in which the Respondent's solicitors listed those paragraphs in documents which were the subject of their application for redaction. The email was sent to the Claimant's solicitors at
G 17.19 and to the Employment Tribunal later that day. It is not known whether the Regional Employment Judge saw that email on that day or not.

H 15. A telephone Directions Hearing was listed for one hour to hear and decide the application by the Respondent. That took place on 2 December 2016, by Regional Employment

A Judge Parkin. The Claimant was represented by Mr James Laddie QC, and the Respondent by Mr Smith who appears before me today.

B 16. Mr Smith asked the Regional Employment Judge to look at paragraphs to which objection was taken. The account of what happened is set out in paragraph 1 of the grounds of appeal as follows:

C **“1. The learned Regional Employment Judge did not wish to be taken to the paragraphs of the Claimant’s witness statement which related to alleged regulatory breaches and/or allegations of bribery in order to determine the decision it reached. He confirmed that he had not read the documents in question.”**

D 17. It would have been preferable if the Claimant’s solicitors had been asked to agree this recollection and, if it were not agreed, to submit it to Regional Employment Judge Parkin. This was not done. However, no objection has been taken to its accuracy by the Claimant.

E 18. Further, the draft grounds of appeal, including this ground, were shown to Regional Employment Judge Parkin on 5 December 2016, at the start of what was to be a Full Hearing. These were shown during the course of an application for an adjournment made by the Respondent. The Regional Employment Judge did not object to or challenge what was said in **F** paragraph 1 of the grounds of appeal.

G 19. The Judgment of the Regional Employment Judge which was sent to the parties on 5 December 2016, recorded that a new bundle of documents had been delivered to the Tribunal for the hearing of the application for redaction. It was said that the Regional Employment Judge ascertained that although he had not received the bundle or the index, the Respondent’s **H** counsel had indeed seen all the documents within it. It is said that it should be assumed that the

A Regional Employment Judge had, in addition to the application, the list of documents and paragraphs within them to which the Respondent took objection.

B 20. The Regional Employment Judge recorded the contention on behalf of the Respondent that the paragraphs to which objection was taken were not relevant to the issues to be determined. It was said that they raise whistleblowing allegations against the Respondent, yet no whistleblowing claim had been made. The Judgment also records that it was submitted on behalf of the Respondent that the allegations could cause reputational damage and were being made to put pressure on the Respondent in these proceedings.

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D 21. At the telephone hearing, counsel for the Claimant contended that narrative of events up to 28 July 2016, which the Claimant asserted resulted in the termination of his contract by the letter of that date, was relevant. Other points were made but this is the one which is relevant to this appeal.

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F 22. In rejecting the Respondent's application, the Regional Employment Judge referred to the overriding objective in the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. As to reasons for rejecting the application, Regional Employment Judge Parkin said "*The Judge concluded that the claimant's arguments in respect of these case management matters were overall the stronger*" (paragraph 5). He observed that the lateness of the application by the Respondent could not determine the outcome of the application. The Regional Employment Judge referred to paragraphs in the ET3 in which the Respondent themselves raised concerns regarding the Claimant's compliance breaches and poor performance. The Regional Employment Judge further referred to the fifth issue identified by

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A Employment Judge Roper on 11 January 2016; contributory fault by the Claimant towards his dismissal, if he was dismissed.

B 23. The Regional Employment Judge concluded that, in all the circumstances, whilst concerns of the Claimant may have accounted for protected qualifying disclosures, a claim in respect of those had not specifically been made. Nonetheless, the Regional Employment Judge held that those concerns were not wholly irrelevant. Accordingly, he dismissed the Respondent's application.

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Submissions of the Parties before this Appeal

D 24. The principal point taken on appeal by Mr Smith, counsel for the Respondent, is that it was a denial of natural justice for the Regional Employment Judge to refuse to look at and consider individually the listed paragraphs in the ET1 and the two statements which were the subject of the application for redaction before him. Mr Smith initially contended that the challenged passages, referring as they do to matters which could be said to be protected disclosures, were not relevant to the Claimant's claims as he had made no claim of detriment for having made protected disclosures. However, wisely, counsel subsequently concentrated on his contention that there was a denial of natural justice in that the Respondent, through him, was not able to advance the application made by not being able to refer to the very passages to which objection was taken and which the Respondent wished to have redacted. It was further said that the Regional Employment Judge failed to consider, or to properly consider, those particular passages. Mr Smith says that when the Regional Employment Judge heard the application to adjourn on 5 December 2016 and was willing to look at a paragraph sought to be redacted, he realised the importance of the point (reference is made to paragraph 68 at pages 17 and 18 of the supplementary bundle for this appeal).

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A 25. Mr Kenward for the Claimant does not challenge the account given by Mr Smith of what occurred during the telephone hearing. He was not counsel at the hearing, but no objection has been made by solicitors for the Claimant, or by anybody, as to the account given
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26. Mr Kenward submits that, if he did so, the Regional Employment Judge was entitled to take a broad-brush approach to the application. It was said that he was very familiar with the
C case, having recently heard the Claimant's application regarding without prejudice on 10 November and he had given his judgment on that application as recently as 28 November. The Regional Employment Judge had received a list of paragraphs to which objection was taken and
D he took the correct approach to the relevance of the events leading up to the date of dismissal, as alleged by the Claimant, 28 July 2015. In this regard the objection made by Mr Smith was that the two specific protected disclosures referred to (those in June and July 2015), being after
E the termination of employment, were irrelevant.

27. Mr Kenward says that the Respondent had time to object to the paragraphs in the ET1 from the date that it was lodged, which was many months before the application for redaction
F was made. Further, the witness statement of the Claimant, to which objection was taken in respect of certain paragraphs, was exchanged in August 2016; again, many months before the application made in November.

G 28. Further, it is said by Mr Kenward that the Regional Employment Judge reached a case management decision which was within his wide ambit of discretion, and that discretion should
H only be interfered with on appeal in very limited circumstances.

A **Discussion and Conclusion**

29. The date of termination of the employment of the Claimant and whether the termination was consensual or by dismissal is in issue. The parties take competing positions. The fact that the Respondent says that the employment was terminated on 13 June 2014 is by no means conclusive. The Respondent themselves put alternative cases as to the date of termination. The Claimant states that the date of termination is 28 July 2015. The date of termination of the employment and the means by which it was terminated are issues to be determined at a Full Hearing.

30. The Respondent says that protected disclosures in June and July 2015 are not relevant because of their contention as to when the effective date of termination of the employment of the Claimant occurred. This is not so. The date of the alleged dismissal asserted by the Claimant is 28 July 2015. Events leading up to the alleged dismissal may be relevant.

31. The fact that no protected disclosure claim was made by the Claimant, in my judgment, is not relevant. Protected disclosure can be a reason for a dismissal, or play some part in it, even if no claim is made in relation to it. One of the issues in these proceedings is, if there was a dismissal, what was the reason for it? In my judgment it was important for the Regional Employment Judge to consider whether each paragraph to which objection was taken was relevant to the issues in the claim which were to be determined. No doubt the Regional Employment Judge would consider the relevance of each paragraph or each part of the evidence to which objection is taken. If he were to determine that the particular paragraph was not relevant, no doubt he would also consider and deal with individually the question as to whether the material in that paragraph was prejudicial.

A 32. In my judgment it is not sufficient, as Mr Kenward submits, to take a broad-brush approach to this matter. A specific application was before the Regional Employment Judge and, with respect to him and his great experience, it required consideration of each paragraph to which objection was taken.

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C 33. It is well known that in case management matters Employment Tribunals have a broad measure of discretion. This can only be overturned on appeal if the discretion is exercised in a way that no reasonable Employment Tribunal would have exercised it, or if the Employment Tribunal had omitted or included matters which they should have included or excluded. To that list must be added the issue as to whether the Employment Tribunal has acted in breach of the rules of natural justice. This is one such case.

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E 34. Regional Employment Judge Parkin was dealing with an application at short notice, a very few days before the Full Hearing. Rightly, he did not regard those features as a reason for refusing the application. He heard it. In my judgment, the application could only be fairly determined by considering each paragraph to which objection is taken, considering its relevance to the issues to be determined. If the paragraphs are decided to be not relevant, exclusion should be considered where the paragraphs may be considered prejudicial and not relevant.

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G 35. Accordingly, the appeal is allowed and the application of 29 November 2016, together with its attached list, is remitted to the Regional Employment Judge for determination.

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