Appeal No. UKEAT/0023/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 June 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

MR A HAYDAR — APPELLANT

PENNINE ACUTE HOSPITALS NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS MARGARET PENNYCOOK (of Counsel) Free Representation Unit
For the Respondent	MS RACHEL WEDDERSPOON (of Counsel) Instructed by: Weightmans 100 Old Hall Street Liverpool L3 9QJ

SUMMARY

PRACTICE AND PROCEDURE - Costs

1. The Claimant challenged the Employment Tribunal's refusal to make a PTO in his favour, contending that the Employment Tribunal erred in law by failing to give any consideration to whether the Respondent's defence of the unfair dismissal claim had any reasonable prospect of success, and whether the Respondent in fact acted unreasonably in defending the unfair dismissal claim in the particular circumstances of this case.

2. The appeal was allowed. The Employment Tribunal did not address the specific ground raised by the Claimant that there was no merit in defending the unfair dismissal claim in light of the absence of any subsequent misconduct following the October 2010 warning that could justify activating that final written warning and justify the Claimant's dismissal.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This is the appeal of Dr Haydar from the Judgment of an Employment Tribunal sitting at Manchester, comprised of Employment Judge Sherratt and members (Mr Clissold and Mr Roxburgh), refusing to make a preparation time order ("PTO") in Dr Haydar's favour. I refer to Dr Haydar and the NHS Trust as the Claimant and Respondent, as they were before the Tribunal, for ease of reference.

2. Although the Claimant acted in person throughout the proceedings in the Employment Tribunal, today he has had the benefit of representation by Ms Margaret Pennycook of counsel. The Respondent appears by Ms Rachel Wedderspoon of counsel. I am grateful to both counsel for their clearly stated submissions.

3. The Claimant commenced proceedings in the Employment Tribunal on 14 January 2011. In his ET1, he set out his complaint on the following basis. He said:

> **"I am complaining about malicious activity against me by members of [the Respondent] most prominently Caroline Beirne - HR, Dr Bashir Ahmed, and Dr Neil Snowden Medical Director."**

He went on to describe the malicious activity as consisting of the construction of false allegations, the misuse of the disciplinary process, the production of biased investigation reports claiming a case to answer to trigger hearings for the purposes of achieving severe sanctions leading to his dismissal.

4. In the additional information section, he gave further particulars of why he said the allegations were false, but his document concluded with the following words:

> **"I was discriminated against. The outcome was a final written warning. Present was Dr Anton Sinnich, Pauline Anderson, Nadia Khan, Caroline Raza, myself and the BMA.**

> **The 2nd and this 3rd hearing outcomes were made to add to dismissal - wrongly - the appeal is on March 29 2011."**

Significantly, at the end of the additional information section, he refers to the fact that the ultimate outcome of the disciplinary process, which was previously notified to him as being a final written warning, was dismissal from his employment by the Respondent. He challenged this as unfair and unlawfully discriminatory.

5. The claim was defended by the Respondent. In the ET3 the Respondent contended that the outcome of the disciplinary hearing was a conclusion that the Claimant's behaviour constituted gross misconduct justifying a decision to dismiss. At paragraph 19, the ET3 states:

> **"(19) After due consideration the hearing considered that the conduct alleged in allegations (1) and (3) constituted gross misconduct, the sanction for which is dismissal. The hearing was also made aware that the Claimant was currently subject to a final written warning issued on 15th October 2010 for a period of twelve months. The hearing concluded that it was appropriate to terminate the Claimant's employment for gross misconduct with effect from 19th November 2010, the Claimant being dismissed with three months notice."**

The ET3 referred to the fact that there was an appeal, but that the appeal had not yet been heard or determined.

6. In the course of the proceedings in the Employment Tribunal there were a number of interlocutory hearings, including a hearing in December 2013 to consider applications for strikeout orders pursued on both sides. Those applications were refused by an order dated 18 December 2013 by Employment Judge Ross. There was a substantive hearing thereafter, and by a Judgment sent to the parties on 14 April 2014, the Employment Tribunal (presided over by Employment Judge Sherratt) upheld the claim for unfair dismissal subject to findings of contributory fault, and dismissed eight other claims, including claims of unlawful

discrimination and whistleblowing detriment. Relevantly for the purposes of this appeal, at paragraphs 75 and 76 the Employment Tribunal held as follows:

> **"75. We conclude that on the evidence of the respondent's own notes of the second disciplinary hearing, which Pauline Anderson had the opportunity to check for accuracy before they were issued, that she did not make a finding of gross misconduct against the claimant, and that had Nadia Khan not referred her to the existence of another final written warning then the proceedings against the claimant would have ended after she had announced her decision to impose a final written warning.**
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> **76. In this case, the first final written warning did not include the wording set out in the Trust's own policy concerning the consequence of "any further misconduct". As a matter of fact there was no subsequent misconduct. The misconduct relied upon by the respondent to dismiss was prior misconduct which, in our judgment, should not have been relied upon by Pauline Anderson once she had made and announced her decision to give a final written warning. It is for this reason that the Tribunal does not find the sanction of dismissal was fair because the proper use of the Trust's own procedure would have resulted in a different outcome, namely the claimant remaining as an employee subject to a second final written warning with the two written warnings running together for a period with the total period under which he was subject to a final written warning being extended to 12 months from the date of the imposition of the second final written warning."**

7. Thereafter, by a Remedy Judgment sent to the parties on 6 August 2014, the Employment Tribunal made an award of approximately £38,000 in the Claimant's favour. This was made up of a basic award of £3,600 and a compensatory award of £34,860. The Respondent sought a stay in relation to that award because of a costs application it indicated it would pursue in relation to the failed claims. It was concerned about making a payment in circumstances where it anticipated receiving an award on costs.

8. That costs application was duly made by the Respondent and, by email dated 17 September 2014, the Claimant applied for a PTO. That application was made outside the ordinary time limit for doing so, but the Tribunal extended time and dealt with that application on its merits.

The Judgment under Appeal

9. The Tribunal referred to Rules 75 and 76 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"). These provide for the making of a preparation time order in an appropriate case.

10. The Claimant's application was based on a number of actions taken by the Respondent during the course of his employment but which, in reality, had no relationship with the Tribunal proceedings. The Tribunal dealt with those as matters of background. Secondly, he relied on case management hearings which he contended were unnecessary and ought not to have been required or pursued. The Tribunal addressed each of the case management hearings and orders resulting, and concluded that there was nothing unreasonable in the Respondent's conduct under this heading, such as to trigger a PTO.

11. In relation to the hearing to deal with the strikeout application pursued by the Respondent, although that application failed, the Tribunal noted the conclusions of Employment Judge Ross that the Claimant had indeed behaved unreasonably but since a fair trial remained possible, the sanction of strikeout would be disproportionate. The Tribunal concluded, therefore, that the application made by the Respondent was not made unreasonably and did not merit a PTO in the Claimant's favour.

12. So far as the substantive hearing to address liability was concerned, the Tribunal observed that there were nine claims and that the Claimant succeeded on one only. It continued at paragraphs 19 and 20 as follows:

> **"19. The way in which the claimant put his case was that he alleged that there was a conspiracy being undertaken within the respondent to get him out. Caroline Beirne was the principal conspirator and he referred to her today as being very much involved in the way in which the decision to dismiss him was taken. Looking at the way in which the claims were put by the claimant, given that the witnesses called by the respondent in the main dealt with more than one allegation, it seems to us that the respondents could not**

reasonably have defended the claims brought by the claimant without calling them. It would not have been reasonable to have split off the unfair dismissal given the way in which the case was put.

20. The claimant asks us to conclude that various people told lies when they were giving their evidence. He has in his document submitted that many people told lies during the course of our hearing. The Tribunal did not make such findings of fact when it sat to consider the whole of the evidence. The Tribunal is not in a position today to make such findings retrospectively in respect of matters that were heard before it some three and a quarter years ago. We are unable today to find that the respondent's witnesses lied their way through the Tribunal hearing in support of a conspiracy against the claimant."

13. The Tribunal concluded that it was not unreasonable for the Respondent to proceed to a Remedy Hearing in circumstances where there was no suggestion that the Claimant would settle for a figure anywhere near £38,000.

14. Finally, the Tribunal considered whether there was any basis for a PTO by reason of a breach of any order by the Respondent or as a consequence of any postponement. The Claimant put his case under this heading on the basis of the Respondent's failure to pay the sum due under the Tribunal's award (the basic and compensatory awards) thereby forcing the Claimant to take steps to enforce the award. He also relied on the Respondent's delay in providing its witness statements.

15. As to failure to pay the award, the Tribunal noted the application for a stay, the payment of the award and the reason for that application, and concluded that a PTO was not appropriate in the circumstances. So far as late witness statements are concerned, the Tribunal said this was addressed by Employment Judge Ross in her Judgment dealing with the strikeout applications. She noted delay in exchange of witness statements but concluded that the Claimant had the witness statements sufficiently in advance of the substantive hearing which commenced on 6 January 2014, and was therefore able to prepare his cross-examination in good time. There was no prejudice to him and a strikeout on that basis was regarded by her as disproportionate. The

Tribunal concluded that irrespective of the delay, the Claimant would have had to spend the same amount of time reading the witness statements and preparing his cross-examination based on those witness statements, so that the delay did not materially affect the conduct of the litigation or the steps he would have had to take in any event. In the circumstances, the Tribunal concluded that it was not appropriate to make a PTO in this regard (paragraph 35).

The Appeal

16. The Claimant has leave to pursue a single ground of appeal only. He contends that the Tribunal erred in law by failing to give any consideration to whether the Respondent's defence of the unfair dismissal claim had any reasonable prospect of success, and whether the Respondent in fact acted unreasonably in defending the unfair dismissal claim in all the circumstances. It is emphasised on the Claimant's part that this was a ground on which he relied below. In particular, at paragraph 50 of his letter to the Tribunal dated 6 March 2017 setting out the grounds of his PTO application, the Claimant argued that "the Respondent knew that they have no reasonable prospect of success in relation to the unfair dismissal component, yet still pursued it". The Claimant reiterated his argument that the Respondent's defence to the unfair dismissal case had no reasonable prospect of success, and the Respondent was aware of this from the outset; see paragraphs 48, 49 and 53 of the letter.

17. Ms Pennycook submits that although, at paragraphs 18 to 22 of the Judgment, the Employment Tribunal made reference to the Respondent's defence and to the fact that the Claimant's unfair dismissal claim succeeded, there is nothing in those paragraphs or any other part of the Judgment to demonstrate that the Judge did in fact consider, as he was required to do pursuant to Rule 76(1)(b), whether the defence of the unfair dismissal claim had any reasonable prospect of success. Had this issue been considered by the Tribunal, she submits in light of the

findings made in the earlier Liability Judgment, and in particular at paragraphs 75 and 76, where she refers to other findings as well, the Tribunal would have concluded that the defence of the unfair dismissal claim had no reasonable prospect of success so that the threshold condition for a PTO was met, and the Tribunal would then have had to consider whether to exercise its discretion in favour of making such an award.

18. Ms Pennycook has drawn my attention, in the course of today's hearing, to the following particular findings made in the Liability Judgment:

(i) Paragraph 40 which shows that Ms Anderson (the disciplinary decision maker on behalf of the Respondent), did say after the disciplinary hearing (and consistently with the Claimant's account) that she intended to issue the Claimant with a final written warning. That was evidence she gave in chief, at paragraph 15 of her witness statement, which read as follows:

> **"I then went on to indicate that in the light of the evidence I was issuing a final written warning for threatening behaviour on 12 March and for the inappropriate discussions about LR's attendance with him at a conference in Birmingham. I confirmed that I had considered dismissal but had decided ultimately to issue a final written warning. However, I was then informed by the adviser to the hearing that the claimant was also subject to a final written warning which had been issued just a very short time prior to the disciplinary hearing I conducted on 19 November 2010. In those circumstances I considered that, taking the existing final written warning together with the new matters on which I had considered a final written warning, it was appropriate to terminate the claimant's employment. I therefore confirmed that the claimant would be dismissed for gross misconduct with notice but that the date for dismissal would be 19 November 2010 and that he would receive payment in lieu of notice."**

Accordingly, it was Ms Anderson's position that but for the incorrect reliance on an earlier final written warning, the Claimant would have retained his employment, as the Respondent had not concluded otherwise that immediate dismissal or dismissal with notice was justified in all the circumstances.

(ii) The Tribunal found there was no misconduct subsequent to the misconduct for which the Claimant received the final written warning issued in October 2010. Rather, there was misconduct resulting in a final written warning in October 2010, and the conduct that formed the basis of his dismissal (which occurred in March 2010) was also misconduct that predated the October 2010 warning. As a matter of logic it must have been clear that it was inappropriate to rely on the final written warning in October 2010 to convert what would otherwise have been a final written warning into a dismissal. Further the Respondent also knew that the October warning was under appeal and there was material before the Tribunal, in the form of an email dated 17 February 2011 from a representative of the BMA, indicating that the Respondent's HR Manager, Roger Pickering, had acknowledged that it was not appropriate for the Respondent to rely on the October 2010 final written warning when dismissing the Claimant on 14 November because that final written warning was subject to appeal.

(iii) The Respondent's own policy did not allow, unsurprisingly, for reliance on prior misconduct to activate a final written warning.

19. In light of those findings (described by Ms Pennycook as a catalogue of errors by the Respondent in relation to the Claimant's dismissal) she contends that it was wholly foreseeable that the Tribunal would find that the misconduct relied on was prior misconduct which should not have been relied on or activated so as to lead directly to dismissal. Ms Pennycook submits that the Respondent must have known that it was inappropriate to rely on the final written warning, and that Pauline Anderson's own evidence in chief was clear and reached the conclusion that the misconduct, in light of the Claimant's 27-year-history as a doctor, did not justify dismissal but only justified a final written warning. She submits that the only logical explanation for the Respondent switching horses, as it were, to allege that the conduct justified

gross misconduct by itself was a realisation of these difficulties. Ms Pennycook contends that when one considers the Tribunal's findings (summarised above) in the Liability Judgment, they show the truth of the matter and that the Respondent plainly sought to re-characterise the conduct found to warrant a final written warning as gross misconduct justifying dismissal by itself because of its realisation. For all those reasons, she submits the Respondent ran a defence that had no reasonable prospect of success, characterised the case as one of gross misconduct when it knew that its own dismissal officer considered a final written warning to be the appropriate sanction, and therefore must have known that the defence of the unfair dismissal claim was likely to fail. She contends that these were not matters properly considered by the Employment Tribunal in relation to the PTO, and that the Employment Tribunal therefore did not get to the stage of exercising discretion as to whether or not to make the PTO sought.

20. Ms Wedderspoon, for her part, challenges those submissions. She maintains her written argument that the Tribunal did consider this ground. She submits that paragraphs 19 and 20 of the Judgment make that clear. These paragraphs must be read in their entirety, and in the context of the way the Claimant put his case on liability to the Employment Tribunal, a case based on conspiracy and lies made deliberately. The Tribunal was entitled to consider the way the Claimant put his case and having dismissed the Claimant's conspiracy theory, and considered the need for the Respondent to call a number of witnesses to deal with the various causes of action it was entitled to conclude that it was not reasonable to split off the unfair dismissal based on conspiracy from the unmeritorious claims, and was entitled to dismiss the Claimant's contentions that the Respondent's witnesses were deliberate liars. The Tribunal made sufficient findings to show that it addressed this ground of the PTO and concluded implicitly that it was not unreasonable for the Respondent to defend the unfair dismissal claim.

21. Ms Wedderspoon, when pressed, accepted nevertheless that it was difficult to support the reasoning of Pauline Anderson, as reflected at paragraph 15 of her witness statement, with no explanation for the process of concluding that, from a final written warning for the March 2010 conduct, the Claimant was to be dismissed without notice, because there was another final written warning issued subsequently, but in relation to prior misconduct.

The Legal Framework

22. Rules 75 and 76 of the **ET Rules** provide as follows:

> **"75.** ***Costs orders and preparation time orders***
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> **(1) A costs order is an order that a party ("the paying party") make a payment to -**
>
> > **(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;**
> >
> > **(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or**
> >
> > **(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.**
>
> **(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.**
>
> **(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.**
>
> **76.** ***When a costs order or a preparation time order may or shall be made***
>
> **(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that -**
>
> > **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
> >
> > **(b) any claim or response had no reasonable prospect of success.**
>
> **(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.**
>
> **(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if -**

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing."

23. The proper approach to an award of costs in the Employment Tribunal is now well established and applies whether the costs in question are the costs of legal representatives or preparation time costs. Costs are the exception and not the rule. An award of costs involves a two-stage approach. First, consideration of the threshold question whether any of the circumstances identified in Rule 76(1) apply. At the second stage, if the first stage is met, the Tribunal considers whether it would be appropriate to exercise discretion to make an order for costs in the particular circumstances of the case. There is a third stage, if it is reached, at which the Tribunal determines the amount of costs to be awarded or refers that question for assessment to a Judge in the County Court or a Tribunal Judge.

24. As Mummery LJ made clear in **Yerrakalva v Barnsley Metropolitan Borough Council** [2012] IRLR 78, in exercising discretion to award costs, Tribunals should consider the whole picture of what happened in the case and ask whether there has been unreasonable conduct by the putative paying party in the bringing, defending or conducting of the case, and in doing so should identify the specific conduct relied on, what was unreasonable about that conduct, and what effect it had on the proceedings.

The Appeal

25. The single issue raised by this appeal is whether the Employment Tribunal addressed adequately or at all the argument raised below by the Claimant that the Respondent's defence of the unfair dismissal claim was bound to fail from the outset in light of the Tribunal's findings. I have considered paragraphs 19 and 20, both in their entirety and in the context of the way the Claimant put his case before the Employment Tribunal. It is certainly true that the Claimant relied on a conspiracy theory that required the Respondent to call a number of witnesses. However, carefully and benevolently as I read these paragraphs, it does not appear that the Tribunal addressed the specific ground raised by the Claimant that there was no merit in defending the unfair dismissal claim in light of the absence of any subsequent misconduct following the October 2010 final written warning that could justify activating that final written warning and lead to the Claimant's dismissal for the March misconduct. The points made by Ms Pennycook (summarised above) demonstrate that there was merit in the Claimant's argument. Reading the Judgment carefully and in context I cannot discern any consideration of this point, or any consideration of whether the threshold test was met at the first stage in this specific respect.

26. In those circumstances, the fact that Tribunal expressed itself as not satisfied that the threshold test in Rule 76 was met by reference to the other grounds on which the application was made cannot assist the Respondent. This is not a question of interfering with the exercise of a judicial discretion; it is a conclusion that a ground for awarding costs was not considered and addressed and was not dealt with in the Judgment.

27. Having concluded that the first stage was not met, it is unsurprising in the circumstances that the Tribunal did not go on to address the discretionary considerations at the second stage in

relation to this ground of the PTO. It seems to me, in those circumstances, in agreement with Ms Pennycook, that the Tribunal did err in law and that the appeal must be allowed on this ground. The question whether the Claimant is entitled to a PTO must therefore be remitted to the Tribunal since it is not possible to conclude that only one outcome is possible.

28. The remission is made on a limited basis and is not at large. The only question for the Employment Tribunal to address on remission is whether, in light of its findings and conclusions on liability in relation to the unfair dismissal claim, the defence pursued by the Respondent was doomed to fail and was unreasonably pursued. If the Tribunal accepts that is so, it will then have to go on to consider at the second stage whether to exercise discretion in favour of or against the award of preparation time costs. At that stage, its decision will be at large, but to emphasise, so far as the first stage is concerned, the Tribunal's remit is a limited one as I have just explained.

29. For all those reasons, the appeal is allowed. The application for a PTO is remitted to the same Tribunal by agreement on both sides. I understand there is to be a hearing in any event to deal with the Respondent's costs application in August. It may be convenient to deal with the PTO at the same hearing. It may be that there is insufficient time to do so. I leave that to be dealt with as a matter of case management for the Employment Tribunal to consider.