Appeal No. UKEAT/0005/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 February 2019

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MR D AKHIGBE — APPELLANT

BERKELEY HOMES (URBAN RENAISSANCE) LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS KIRK (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR JAMES WILLIAMS (of Counsel) Instructed by: Goodman Derrick LLP 10 St Bride Street London EC4A 4AD

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

VICTIMISATION DISCRIMINATION - Whistleblowing

An employment judge had not erred in law by deciding that the appellant's allegation that the respondent employer had subjected the appellant to a detriment by persistently refusing to disclose documents pursuant to a "subject access request" under the then **Data Protection Act 1998** had no reasonable prospect of success and should be struck out without a trial.

THE HONOURABLE MR JUSTICE KERR

1. I am going to give a judgment on a preliminary point. This is the first of two appeals listed to be heard consecutively, as they have the same appellant and arise out of the same facts. The background and procedural history is quite complex. It is unnecessary for present purposes to set out that background other than in the briefest outline. I can omit much of the procedural history that is not relevant to this first appeal.

2. The appellant was the claimant below and I will refer to him as the claimant. He began working for the respondent, or, possibly, for an associated company of the respondent (for present purposes it does not matter which) on 22 September 2014. He was dismissed on 13 February 2015 during his initial probationary period.

3. After his dismissal he was involved in contentious correspondence with the respondent. On 24 July 2015, he wrote to the respondent making a subject access request under the then **Data Protection Act 1998**. The request was for "all data that you hold on me." It was to include in particular, but not be limited to, his personnel file, various emails up to the date of his dismissal and all documents "relating to and containing my information." Further correspondence followed arising from that request.

4. On 27 August 2015, the respondent wrote to the claimant saying they were gathering together copies of personal information as requested and hoped to provide this on 3 September 2015. On that date, the respondent wrote to the claimant enclosing a lever arch file containing paper copies of documents. The letter recorded in the usual way the purposes for which the claimant's personal data had been processed and the recipients or classes thereof to whom it was

A or had or may have been disclosed. There was also a statement that personal data covered by one of the statutory "exemptions" was not being provided.

B 5. The letter concluded by stating that the claimant's email account had not yet been successfully recovered following its deletion on termination of employment and that if it could be recovered it would be reviewed, but that meanwhile the work email accounts of named individuals with whom the claimant had had email correspondence was available and had been C included among the disclosure where it contained the claimant's personal data.

6. After that there were some difficulties with delivery of the letter and enclosed file to the D claimant but eventually he received them. He was not satisfied. On 22 September 2015, he emailed the respondent complaining that there was "a lot missing." He itemised certain categories of documents of which he continued to seek disclosure.

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7. On 6 October 2015, having looked through the documents that had been disclosed, he complained that it included unjust accusations made against him during the short period of his employment. After that, the correspondence continued and matured into allegations that the F claimant had suffered detriments, combined with requests for further documents.

8. On or about 5 January 2016, he brought a claim in the employment tribunal against the G respondent among others. The nature of the claim was helpfully summarised in paragraph 9 of the subsequent decision of the employment judge to which I am coming in a moment.

> **"The Claimant claimed that during his employment he made qualifying disclosures on 3 and 12 November 2014, about alleged breaches of the law as well as health and safety concerns. As a consequence, he suffered a number of detriments, such as being excluded from emails; being issued with a verbal warning; being falsely accused of being asleep while at work; being humiliated at a meeting; being physically assaulted; given menial jobs; his employment being terminated without due process on 13 February 2015; failure to provide a reference on 11 February 2015; on 18 August 20[1]5, placing malicious and false statements on his personal**

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> **review file, and on 9 October 2015, persistent refusal to release his personal data despite his subject access request."**

9. The phrase "persistent refusal to release his personal data" was derived from the wording of his particulars of claim set out in his ET1 form. A preliminary hearing was held before EJ Bedeau at Watford Employment Tribunal on 6 January 2017 (not 2016 as the judgment wrongly states). Among other issues considered at the preliminary hearing was the respondent's application to strike out the claim as having no reasonable prospect of success.

10. The tribunal's treatment of that issue is dealt with at paragraphs 35 to 55 of the reasons. Between paragraphs 36 and 49 the judge set out the history of the correspondence starting with the subject access request of 24 July 2015, reciting the course of that correspondence approximately as I have just done above and ending with reference (see paragraphs 47 and 48) to a numbered list of documents in a letter to the tribunal, copied to the respondent, dated 11 February 2016.

11. In that letter the claimant asserted that the respondent had "failed to provide me with all of my personal data." He complained specifically that among the documents not provided were documents categorised in a list which he marked with letters (a) to (j). The Tribunal at paragraph 47 of its decision referred to that document and to his contention that, with one or two exceptions, continuing non-disclosure of items within that list bearing the letters (b) to (i), formed part of his case on "persistent refusal to disclose personal data."

12. At paragraph 48 of its decision, the respondent's position was set out; namely that those particular documents had indeed not been disclosed and that the respondent only became aware of the claimant's requests for them when it received a copy of his letter of 11 February 2016. At

paragraph 49 the tribunal recorded that the claimant did not know whether it was Mr Wall "who had persistently refused to release his personal data despite his subject access request." Mr Wall was the solicitor who had been responsible for dealing with the subject access request and had conducted some though not all the correspondence in the latter part of 2015.

13. The tribunal went on to record briefly the submissions of the parties. The claimant relied on non-disclosure of the documents listed in his letter of 11 February 2016 and, as the tribunal recorded, alleged that Mr Wall "was in some way influenced by his qualifying disclosures in failing to supply his personal data…." (paragraphs 50 and 51). The respondent, then appearing through Ms K Donnelly of counsel, submitted that the requests were responded to "where it involved his personal data" (paragraph 51).

14. The judge then set out his conclusions. Materially for present purposes, he professed himself unconvinced that "there was evidence which tended to show that Mr Wall had engaged in persistently refusing to release the claimant's personal data" (paragraph 52). He described the process of the correspondence which was to the effect that Mr Wall had undertaken enquiries in good faith and responded as best he could.

15. At paragraph 53, the tribunal recorded that it was the claimant's case that he, the claimant, had suffered a detriment in that Mr Wall had persistently refused to release his personal data. At paragraph 54, the judge said he had "been told that the documentary evidence before me amounts to all of the evidence a tribunal would need to consider in determining the matter whether the claim should be struck out?"

16. In the concluding part of that paragraph he stated the following:

> **"54. …Of importance, is the chronology of events in September to October 2015 and I am satisfied that Mr Wall did disclose information to the claimant. His conduct could not be described as 'persistent refusal' and I am also satisfied that the respondent did disclose information to the claimant prior to Mr Wall's involvement. Where information could not be disclosed the respondent's position was communicated to the claimant. I was not satisfied that by 9 October 2015, the respondent had engaged in persistently refusing to disclose personal data to the Claimant under s 7 of the Data Protection 1998…"**

17. At paragraph 55, the tribunal reminded itself that "…tribunals must tread very carefully before striking out a claim as it is seen as a draconian step, particularly where there are disputed matters…" but went on to state that:

> **"…with all of the relevant evidence before me I am in a position to determine this issue. I have come to the conclusion that were this case to continue to a final hearing the claimant's position is unlikely to improve. In respect of this last act relied upon as part of his public interest disclosure detriment claim, it has no reasonable prospect of succeeding. Accordingly, that claim is struck out."**

18. Such was the relevant part of the tribunal's decision and reasoning. This appeal is brought on a number of grounds. For now, it is unnecessary to go through them all as the parties agreed that I should deal with a preliminary issue in the appeal which could, depending how I decide it, be determinative of the appeal.

19. Among the grounds on which the appeal is brought is ground 2 which is set out in the following terms in the grounds of appeal: "[t]he Employment Judge further erred in law striking out a claim in which the central facts are in dispute and about which all the evidence had not been heard, without first identifying whether exceptional circumstances existed making that course an appropriate one…"

20. Beneath that four paragraphs appeared, including the following two:

> **"…..**
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> **8. It is not accepted that the Employment Judge had all the documentary evidence before them to decide the issue of whether the claim should be struck out… It had not heard, for example, from Mr Wall.**

> **9. Applying the guidance in *Ezsias*, there was a crucial core of disputed facts over the allegations of detriment, which was not susceptible to determination otherwise than by a hearing and by evaluating the evidence, including via cross-examination of [Mr Wall]**
>
> **…"**

21. Mr Williams for the respondent takes a preliminary point in relation to that second ground of appeal. He submits that the judge made a finding that the claimant's allegation that he suffered the particular detriment at issue, namely persistent refusal to disclose documents in response to his subject access request, had no reasonable prospect of success. Mr Williams submits that this finding made by the employment judge is unassailable and not flawed by any error of law.

22. Mr Kirk, appearing *pro bono* for the claimant (for which the appeal tribunal is as always very grateful), disagrees but accepts that if I were to accept Mr Williams' contention that the judge's finding on that point is unassailable, that would determine the appeal against the claimant because the other grounds of appeal would, as is common ground, fall away.

23. I need not go into detail about why that is so. In brief, ground 1 (attacking the judge's treatment of the onus of proof) would not have any purchase on the outcome of the appeal; ground 3 would not arise since the judge would have been correct in having found that the other aspects of the whistleblowing claim are out of time; and ground 4, dealing with the identity of the employer, would not need to be dealt with in any event.

24. Therefore, I consider Mr Williams' preliminary point. His main submissions can be summarised briefly as follows. He said that the judge had made a clear finding that the claimant had not suffered the detriment alleged. He took me to the manner in which the "persistent refusal" detriment had been stated by the claimant in his grounds before the tribunal below. He took me through the judge's treatment of the issue, in particular at paragraphs 52 and 53.

25. He submitted that the judge was right and entitled to say in paragraph 54 that he had available to him all the documentary evidence that he needed to determine the point. Mr Williams submitted that the judge was plainly well aware that the claimant was saying he had asked for certain documents but not received them; that is to say those enumerated in the letter of 11 February 2016. That much is clear from paragraphs 47 to 48 of the judge's decision.

26. Mr Williams submitted that Mr Wall's state of mind was not relevant to whether, objectively speaking, the claimant was or was not subjected to the detriment alleged. Either the detriment is shown to exist or it is not. The wording of the provision defining what a detriment is, was looked at during the debate.

27. It is in section 47B(1) of the **Employment Rights Act 1996** ("**ERA**"): "[a] worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer…" The rest of that subsection states that the act or deliberate failure to act must be "done on the ground that the worker has made a protected disclosure."

28. Mr Williams submitted that the obligation under sections 7 and 8 of the then **Data Protection Act 1998** was only an obligation to make a reasonable and proportionate search and not an obligation to disclose every document asked for. The onus of establishing the existence of a detriment is on the employee not the employer. He relied in this regard on **Serco Ltd v Dahou** [2015] IRLR 80 per Simler P at [48]. She said, among other things, "Have there been acts or deliberate failures to act by an employer? On this, of course, the employee has and retains the onus…".

29. Mr Williams submitted that the present case was one in which there was no core of disputed fact such as alluded to in the judgment of Kay LJ **North Glamorgan NHS Trust v Ezsias** [2007] IRLR 603 at [29]. That was the start of the passage in his judgment where he warned against taking the tempting shortcut of a strike out in a case other than an exceptional one, where absence of a reasonable prospect of success is plain even without a trial. He relied on the judgment of Underhill LJ in **Xerox (UK) Ltd v Zeb** [2017] EWCA Civ 2137 (at [15], [18] and [28]) as an example of a case where, exceptionally, a striking out decision could be proper even where facts are disputed.

30. In the present case, said Mr Williams, a trial would have added nothing. There would be no purpose in hearing evidence from Mr Wall or anyone else; the communications were before the tribunal and were all sent to the claimant's personal email account after his dismissal. It was not suggested that there was any other material contact between the claimant and Mr Wall or anyone else from the respondent by telephone or otherwise.

31. The judge had reminded himself of the need to "tread very carefully." His decision to strike out the claim was not flawed. In reply, Mr Williams added that subsequently discovered documents disclosed long after the event in response to the subject access request do not throw light on whether at the time the judge properly considered the issue on the evidence and documents available to him; it was wrong to treat the respondent's response as undermining its denial of a persistent refusal to disclose.

32. By way of riposte to those submissions, Mr Kirk for the claimant made three main points. First, he submitted that he did not need to amend grounds 2 of the grounds of appeal to argue the claimant's corner on this issue which is, he said, squarely incorporated within the way that ground

A is formulated. It was clearly stated, he reminded me, that this is a case where there was a core of disputed fact and a need for oral evidence, in particular from Mr Wall.

B 33. Second, Mr Kirk pointed to the formulation by the judge and, in the grounds of the claim, by the claimant of this issue as one of "persistent refusal" to disclose documents. He submitted that those words are wide enough to encompass a deliberate failure to act as required under section 47B(1) of the **ERA**.

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34. He accepted that the words "persistent refusal" were the Claimant's but reminded me that at the time he had been acting in person and without legal advice. He submitted that the words D should be read as including and indeed embracing what is contained in the words of the statute, namely the words "deliberate failure to act."

E 35. Mr Kirk referred me to a dictionary definition of the verb "refuse" in the Oxford English Dictionary: "to indicate or show that one is not willing to do something." Mr Kirk said that that corresponded to the natural and ordinary meaning of the verb and that one can refuse to do something by inaction, as well as by a statement of refusal.

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36. He submitted that the judge had been bound to find that it was at least arguable that there had been a deliberate failure to supply all the requested personal data. He took me to subsequently G disclosed documents which, he submitted, vindicated that submission after the event. He pointed out that a detriment is no more than a disadvantage; see **Ministry of Defence v Jeremiah** [1980] ICR 13 per Brandon LJ at 26C.

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37. Mr Kirk argued that recently disclosed documents in belated response to the subject access request should have been disclosed earlier and, had they been, the judge would have been properly asked to draw inferences from their previous non-disclosure that could have led to a finding of "persistent refusal" to disclose them. The subsequent disclosures show the pitfalls of dealing with the matter summarily, which he should not have done.

38. Mr Kirk also argued that evidence from Mr Wall was needed on the issue of persistent refusal to disclose documents in response to the subject access request. His evidence was not relevant only to causation of loss, as the respondent contended. As Mr Wall was not called to give evidence, the claimant was disabled from putting to him that he had not merely omitted to disclose documents by oversight, but had deliberately chosen not to disclose them.

39. In relation to the burden of proof (the subject of ground 1 of the appeal, which I do not address here), he submitted that section 48(2) of the **ERA** placed the burden on the employer not merely to establish the ground on which any act or deliberate failure to act was done, but to show the absence of any detriment alleged.

40. In short, Mr Kirk submitted that the judge had ignored the warnings of the Court of Appeal in Kay's LJ Judgment in the **Ezsias** case and that this case was very far from the unusual facts in the **Xerox** case relied on by a respondent.

41. Having considered those rival contentions, I come to my reasoning and conclusions.

42. First, the claimant's position in relation to this part of the appeal is properly raised in and encompassed within the formulation of ground 2 of the appeal. The claimant is not shut out on

any pleading point. The issue is whether the employment judge erred in law in finding, without a trial, on the documents he had and the submissions made to him, but without any oral evidence, that the claim to have suffered the detriment of "persistent refusal to release my personal data despite a subject access request" had no reasonable prospect of success.

43. Second, I accept that a persistent refusal to release personal data requested in a subject access request could in principle amount to a detriment in the form of a "deliberate failure to act." A detriment is simply something that ordinary reasonable people would consider to be a disadvantage to the person subjected to it. That is the uncontroversial approach of the Court of Appeal in **Ministry of Defence v Jeremiah**.

44. Third, I think the claimants' invocation of section 48(2) of the **ERA** is, with respect, misplaced. It provides as follows: "[o]n a complaint under subsection… (1)(a) … it is for the employer to show the ground on which any act or deliberate failure to act was done." That places the onus on the employer to show the ground on which an act or deliberate failure to act is done. It does not place any onus on the employer to show that any act was done or not done. That is, in the normal way, an evidential burden on the employee.

45. Fourth, the claimant was able to show, here, that the respondent's compliance with the subject access request did not extend to every document the respondent had on the subject of the claimant. It is plain that the judge was aware of this. This respondent responded in a normal way to the claimant's subject access request by disclosing some documents, relying on exemptions in relation to others and searching without success for yet other documents.

46. Fifth, the employment judge's account of the documentary evidence in the decision is not open to criticism. He simply set out the facts from the documents in the form of the course of correspondence that was before him and is now before me. He also recorded correctly the claimant's submission at paragraph 50 of the decision that withholding the documents listed in the letter of 11 February 2016 amounted to a detriment.

47. Sixth, he directed himself that he should "tread very carefully before striking out a claim as it is seen as a draconian step, particularly where there are disputed matters…" It is therefore not tenable to suppose that he was unaware of the jurisprudence to which I have been referred. He went out of his way to differentiate between cases where facts are agreed and those where facts are disputed. He then clearly stated again at paragraph 55 that he had "all of the relevant evidence before me." He therefore considered himself "in a position to determine this issue."

48. In stating thereafter that the claimant's case was "unlikely to improve," it is plain that he was there referring to the test of whether a claim has reasonable prospect of success or not. That is also reflected in what he had said earlier at paragraph 52. He considered in that paragraph what might be added by cross-examination of Mr Wall. He noted that the claimant had accepted that he "could not be sure" that Mr Wall had been influenced by third parties in deciding to withhold certain documents.

49. The key finding is then in paragraph 54 that Mr Wall's conduct in disclosing only some information to the claimant "could not be described as "persistent refusal.'" That was a finding that the claimant had no reasonable prospect of showing persistent refusal. The judge then went on to deal with the issue of any causal link between any detriment (persistent refusal) and the making of the protected disclosure. I am not here addressing his treatment of that issue now,

since though it forms part of this appeal, it is not within the compass of Mr Williams's preliminary issue.

50. My conclusion is that the judge's finding that there was no reasonable prospect of success in showing that this particular detriment occurred, is not flawed by any error of law. I do not think it assists the claimant to assert that the concept of a deliberate failure to act is to be equated with the claimant's phrase "persistent refusal." It is plain that his case below was that the deliberate failure to act comprising this detriment was a conscious refusal to disclose documents to the claimant to which, the respondent believed, he had an entitlement under the **Data Protection Act 1998**. The claimant was not relying on an innocent failure in good faith to disclose documents which the respondent did not consider itself obliged to disclose.

51. Nor do I consider that the claimant is assisted by pointing to the content of documents subsequently unearthed and recently disclosed by the respondent to the claimant pursuant to his subject access request. The judge's task was to decide the strike out application on the evidence and information that was before him at the time. The content of subsequently disclosed documents does not help me to determine whether he erred in law in the way he approached the issue. It does not follow that any content in those subsequently disclosed documents that might favour the claimant's then case demonstrates either an error of law in the treatment of the detriment issue or an absence of good faith on the part of Mr Wall or anyone else dealing with the subject access request at the time.

52. In the light of that conclusion the remaining parts of this appeal, even if successful, would not enable the claimant to have the decision overturned and the matter remitted. It therefore turns

A out that Mr Williams' preliminary point is decisive of the appeal, which must therefore be dismissed.

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