

Appeal No. UKEAT/0009/19/LA

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

At the Tribunal
On 9 April 2019

Before

THE HONOURABLE MRS JUSTICE SLADE

(SITTING ALONE)

MISS J SIMPSON

APPELLANT

AIR BUSINESS LIMITED

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MISS HEATHER PLATT
(of Counsel)
Instructed by:
Direct Public Access Scheme

For the Respondent

No appearance or representation by
or on behalf of the Respondent

SUMMARY

VICTIMISATION DISCRIMINATION – Protected disclosure

PRACTICE AND PROCEDURE – Striking-out/dismissal

There is an issue between the parties as to the cause of detriments, the subject of the alleged victimisation contrary to the **Equality Act 2010**. The Claimant alleges that they were because of an admitted protected act, the bringing of a grievance alleging sex discrimination, the Respondent alleges that they had a multiplicity of causes. The Employment Judge erred in deciding that the claim had little prospect of success because “it was difficult to see...that the reason for those things happening was because of the protected act itself rather than a continuation of an ongoing state of affairs”. That observation failed to appreciate the case advanced by the Claimant. The Claimant asserted that the detriments were actions taken by HR in relation to her work arrangements and dismissal. Previous allegations had been of actions of others, her co-workers about acts of a different nature, their personal conduct towards the Claimant. The Employment Judge erred in failing to appreciate the factual dispute about the most important issue to be determined: the cause of the detriments. This can only be determined on findings of fact after trial of the evidence. This and other errors led to the appeal being allowed. The deposit order was set aside.

A THE HONOURABLE MRS JUSTICE SLADE

B 1. Miss Simpson, (“the Claimant”) appeals from the decision of Employment Judge Martin (“the EJ”) at a Preliminary Hearing by her judgment sent to the parties on 7 November 2018 (“the Judgment”). The EJ ordered the Claimant to pay a deposit of £750 as a condition of being permitted to continue to take part in proceedings in which she alleged victimisation by reason of her sex under the **Equality Act 2010** (“the EqA”) by being subjected to detriments for making
C allegations of sex discrimination against her former employer (“the Respondent”). A grievance raised by the Claimant on 3 June 2016 was an admitted protected act.

D 2. Before the Employment Appeal Tribunal (“the EAT”) at this hearing, the Claimant has been represented by Miss Heather Platt of counsel. As they have written understandably because of proportionality and expense, the Respondent has appeared and is not represented. In their
E Answer in the EAT the Respondent relies on the grounds of the EJ for making the deposit Order and also on certain submissions made by them to the Employment Tribunal (“ET”).

Outline facts relevant to the appeal from the deposit Order

F 3. On 2 July 2007, the Claimant commenced work as a Software Developer for a predecessor company. Following a transfer under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** the Claimant was employed by the Respondent. There were
G difficulties between the Claimant and her colleagues. On 27 April 2012, the Claimant raised a grievance. The grievance was not upheld.

H 4. In 2014 the Claimant made an informal complaint to a manager. The Claimant alleged that she was denied a promotion as a result of making the 2014 allegation. At a separately

A recorded decision taken at the Preliminary Hearing, which also resulted in the decision under appeal the EJ held that the complaint of victimisation based on an alleged protected act in 2014 was out of time and should not proceed.

B 5. In the period leading up to the formal grievance of 3 June 2016, the admitted protected act relevant to this appeal, the Claimant asserted that she had been bullied by colleagues at work. The grievance containing the allegations of bullying by co-workers is set out in a 10-page letter, **C** which is in the EAT bundle and which was no doubt before the EJ. The allegations made in the grievance of 3 June 2016, were of bullying and conduct towards her by the Claimant's co-workers.

D 6. The Claimant alleged that 10 detriments were caused by the protected act, her grievance of 3 June 2016. These are set out at paragraph 2 of the Judgment of the EJ.

E 7. After referring to the grievance of 3 June 2016, the Claimant listed the detriments upon which she relied to support her claim of victimisation. They all allege detriments by action of Mrs Satterthwaite, a manager employed by the Respondent in HR, or actions taken by the **F** Respondent regarding her employment, such as detriments 5, 6, 9 and ultimately 10, her dismissal.

G **The Judgment of the EJ**

8. The EJ set out the contentions of the parties. In summary, the Claimant contended that the detriments of which she complained in the current claim were of acts carried out by Mrs Satterthwaite of HR and of employment decisions of the Respondent. They were not of **H**

A complaints about the actions of her co-workers. This was in contrast to the subject of her previous allegations of detriment, bullying by her co-workers.

B 9. The Claimant contended that each of the separate 10 detriments was caused by the protected act, namely the lodging of the grievance of 3 June 2016 alleging sex-based bullying behaviour. The Respondent contended that the detriments relied upon in the current claim were a continuation of conduct previously complained about. It was alleged that it could not be said
C that they were caused by the Claimant raising the grievance of 3 June 2016. It was submitted that the detriments relied upon resulted from a multiplicity of causes.

D 10. The Respondent therefore submitted that it was inherently unlikely that the Claimant could make out her claim. The Respondent also contended that it was inherently unlikely an alleged detriment taking place in November 2017, the dismissal, was caused by a protected act carried out more than a year earlier, in June 2016.
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11. The EJ directed herself to have regard to the likelihood of the Claimant being able to establish the facts necessary to make out her claim of victimisation. The EJ referred to the grievance letter of 3 June 2016 and observed that it set out circumstances stretching back long
F before her first alleged protected act.

G 12. The EJ directed herself at paragraph 16 that the Claimant has first to show that there was a protected act as defined and also that she suffered a detriment because of that protected act. The EJ continued:

H “.... The Claimant has described what she says is a long campaign by the Respondent to remove her from the business going back to a period long before she made any protected act. Although things happened after the protected acts, it is difficult to see from what I have before me that the reason for those things happening was because of the protected act itself rather than a continuation of an ongoing state of affairs. I accept the Respondent’s submission that it is an inherently unlikely with a multiplicity of proximate causes that this claim can be made out.”

A 13. The EJ continued at paragraph 17:

“...It may be that the Respondent has embarked on a campaign against the Claimant, this will be something for the final hearing, however what the Claimant has to show for a victimisation claim is the protected act was the reason for the treatment received. I consider that those difficulties meant that her claim has little reasonable prospect of success and that it is appropriate to make a deposit order....”

B 14. The **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**

Schedule 1 provide in Regulation 39(1):

C “(39). -(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.”

The grounds of appeal

D 15. In ordering the appeal to proceed to a Full Hearing, His Honour Judge Auerbach decided:

“(1) The protected act relied upon is a grievance of June 2016. The Tribunal accepted the Respondent’s argument that it was the Claimant’s case that there had been a long campaign of trying to remove her, both before and after the protected act, making it less likely that treatment coming after was *because* of the protected act; but, argues the Claimant, it should not have done so, because it is her case that the treatment before the grievance (and which was its subject), and the treatment after, was of a different character, and had a different purpose.

E (2) The Tribunal accepted that there were a multiplicity of possible proximate causes of the treatment complained of, making it less likely that the link to the grievance could be made out; but the Claimant says that her case was that there were a number of specific features tending to show that the treatment (or at least some of it) was a reaction to the making of the grievance.

F (3) The Tribunal illogically concluded that because the HR officer said to be generally responsible for the detriments, was not among those complained of in the grievance, they were not likely to have victimised the Claimant for raising it. I do not think this is arguable as a distinct ground, as the Tribunal did not actually rely on this point in its own conclusions (at paragraphs 14-17 of the deposit reasons).”

G 16. By her Notice of Appeal, the Claimant asserted, amongst other matters, in paragraph 3 that the EJ referred to the fact that certain matters have arisen prior to the protected act, and therefore could not have been as a result of it. It was submitted that is what one would expect, bearing in mind that issues must have arisen to lead the Appellant to submit a grievance in the first place. The EJ appears to have concluded that the detriments advanced could not be because of the protected act if they had arisen to any extent before the protected act itself. Instead the EJ

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A states that she accepted the Respondent's submission that with the multiplicity of proximate causes of the detriments the case could not be made out.

B 17. In paragraph 5 of the Grounds of Appeal it is said that, it is apparent from the pleadings and from the reconsideration application that the Appellant did advance detriments which do not predate the protected act. However, such matters appear to have been misconstrued or misunderstood by the EJ, such that the decision to disregard them is an error of law and perverse.

C 18. As for paragraph 7 of the Grounds of Appeal it is said that the Tribunal has gone too far in reaching conclusions about the strength of the Appellant's allegations of detriment. This is not the type of case or factual matrix which would lead the Tribunal correctly to conclude that claims advanced have no reasonable prospect of success or little reasonable prospect of success. The Tribunal has engaged in speculation and in effect is denying the Appellant the opportunity to have her case heard at trial.

D 19. In the conclusion it is said in paragraph 7, that the Tribunal incorrectly characterised the Claimant's case involving a multiplicity of proximate causes when the focus should have been on analysing what happened after the grievance was lodged and whether there is evidence of a causal link between the grievance and the alleged detriments on a point-by-point basis.

E 20. Miss Platt counsel who appeared for the Claimant submitted that the EJ misunderstood the Claimant's case on detriment. The detriments alleged were all of events after the 3 June 2016 grievance. They were alleged to have been perpetrated not by co-workers, as was the case with the previous complaint but by HR, particularly Mrs Satterthwaite.

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A 21. The complaints of detriment were different in nature. They were not of behaviour of individuals but of acts of an employer regarding employment decisions. Further, it was said that each detriment should have been considered separately. Most importantly, as the EJ herself
B recognised, that at the heart of the dispute between the Claimant and Respondent was the contention that cause of the detriments was her grievance of 3 June 2016.

C 22. The Respondent was saying that there was a multiplicity of causes, including difficulty with co-workers. The Claimant was alleging that there was a single cause of the detriment, her grievance of 3 June 2016.

D 23. In their Answer the Respondent relies on the decision of the EJ. Very fairly in the absence of attendance or representation on behalf of the Respondent, Miss Platt drew attention to the submissions of the Respondent to the ET in a written document.

E 24. In order to make a deposit order an ET has to be satisfied that the claim has little reasonable prospect of success. At the heart of the claim of victimisation for the making of the grievance of 3 June 2016, an act admitted by the Respondent to be protected act, was the question
F of the cause of the detriments relied upon.

G 25. The detriments were listed at paragraph 2 of the ET's Judgment. There was a dispute between the parties as to the cause of those detriments. The Claimant said that there was a single cause; the making of a formal grievance on 3 June 2016. The Respondent contended that there were a multiplicity of causes stretching back to before the making of the grievance on 3 June
H 2016.

A 26. This was clearly a factual dispute on a fundamental issue in considering the claim of
victimisation. It could not be resolved without hearing evidence on either side and the ET making
findings of fact on the cause of the detriments relied upon. In my Judgment this plainly could
B not be determined without hearing evidence. On that ground alone, the decision of the EJ cannot
stand.

C 27. There are other problems with the Judgment. The EJ appears to have misunderstood the
Claimant's claim. The claim was of detriments after the grievance of 3 June 2016. The
detriments alleged were of acts perpetrated not by co-workers, the subject of the grievance and
previous grievances, but by HR. The subject matter of the detriments alleged was not of personal
D behaviour of co-workers but of employment decisions taken by the Respondent in respect of the
Claimant.

E 28. The fact that there was no complaint against Mrs Satterthwaite in the grievance does not
lead to a conclusion that she could not or was unlikely to have been involved in a detriment by
reason of that complaint. Further, each detriment is to be considered individually.

F 29. The appeal succeeds. The Order for payment of the deposit is set aside. I am told that
the deposit of £750 has been paid. It is therefore to be repaid.

G 30. There is a hearing of the complaint of victimisation and of unfair dismissal listed for five
days to start on 13 May 2019. By reason of this Judgment, it would not be in the interests of
justice for EJ Martin to have further involvement in the Claimant's claim.

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