Appeal No. UKEAT/0223/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 January 2019
Judgment Handed Down on 4 July 2019

Before

HIS HONOUR DAVID RICHARDSON

(SITTING ALONE)

DR J GOSALAKKAL — APPELLANT

UNIVERSITY HOSPITALS OF LEICESTER NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

PRELIMINARY HEARING -ALL PARTIES

APPEARANCES

For the Appellant	MR RAVI MEHTA (Of Counsel) Appearing under the Employment Law Appeal Advice Scheme
For the Respondent	MR RICHARD POWELL (Of Counsel) Instructed by: Browne Jacobson LLP 15th Floor 6 Bevis Marks Bury Court London EC3A 7BA

SUMMARY

PRACTICE AND PROCEDURE - Reconsideration

The Employment Judge did not give supportable reasons for refusing the Claimant's application for reconsideration.

HIS HONOUR DAVID RICHARDSON

1. This is an appeal by Dr Gosalakkal ("the Claimant") against a decision of EJ Ahmed contained in a letter dated 31 July 2018. At the time when this appeal was considered on paper there was already listed for 1 day an appeal against a costs decision taken in the same litigation (EAT 0114/18/DA). This appeal was listed for a Preliminary Hearing on the same day. By common consent it was considered desirable to treat the hearing as the Full Hearing of the appeal, thereby potentially saving the cost of a further hearing; and I did so. It was then necessary to reserve judgment in respect of the Costs Appeal; and on the whole I thought it best to deliver judgment on both appeals at the same time.

2. The background to this appeal will be found in the judgment in EAT/0014/18/DA which is being handed down with this appeal: see especially paragraphs 2-10. I will take those paragraphs as read. The following summary will suffice. The Claimant's case was that there were serious failings in the Paediatric department where he worked about which he was bound to and did complain; but that he was unjustifiably excluded on 7 February 2011 and in due course dismissed for gross misconduct on 1 November 2011. He moved immediately to the United States of America where he obtained alternative employment. He brought proceedings before the ET complaining of "whistleblowing" detriment, automatic unfair dismissal for "whistleblowing", ordinary unfair dismissal and wrongful dismissal. Those complaints were dismissed by the ET EJ Ahmed and members (Mr Stopford and Mr Khan) in its Judgment dated 8 January 2015. A subsequent application for reconsideration was rejected.

3. It happens that, some 7 days after the exclusion of the Claimant in February 2011, the tragic death took place of Jack Adcock in the Paediatric department of the Leicester Royal

Infirmary. The Respondent commissioned an investigation. It reported in August 2011; and the report was subsequently updated in 2012. It found that there was no single cause; it identified a series of root causes which may be indicative of problems in the Paediatric department. In November 2015, some time after the ET proceedings, Dr Hadiza Gawa-Bawa was convicted of manslaughter; but she was subsequently suspended, rather than struck off, the Medical Practitioners Tribunal taking into account "multiple systemic failures" found by the Respondent's investigation. This decision has been upheld in the Court of Appeal: see **Gawa-Barda v GMC and another** [2019] 1 WLR 1929. The matter has now become very well known in the United Kingdom; as Mr Powell for the Respondent informed me, there is an internet article devoted to it, which includes a link to the report.

4. By email dated 14 July 2018 the Claimant made to the ET what he described as an "appeal for reconsideration". He said that in April or May 2018 he had become aware of a serious incident report commissioned by the Respondent in February 2011 which found several failings in their children's hospitals. It arose from the Gawa-Bawa case which related to a death in February 2011 six days after he was excluded. He said that this report ought to have been disclosed by the Respondent in the ET proceedings; and in any event that it amounted to fresh evidence which satisfied the **Ladd v Marshall** criteria.

5. Prior to making this application in July 2018 the Claimant had made an application to the EAT on 30 May 2018 to similar effect. That application was rejected by the Registrar of the EAT: by letter dated 7 June 2018 she correctly told the Claimant that he could apply out of time to the ET for reconsideration of the judgment. That is the background to the Claimant's email dated 14 July 2018.

6. The Claimant's email was placed before EJ Ahmed. He rejected it on paper. He said that any appeal against a judgment would be dealt with by the EAT. He said that if the Claimant meant to apply for reconsideration the application was refused as being out of time with no valid reason given for considering it out of time. He said that it was not possible to repeat an application for reconsideration in the absence of any fresh information. He said that there was "no fresh information in this case; only fresh allegations if anything".

7. On behalf of the Claimant it was argued that the reasons of EJ Ahmed are defective in two respects. Firstly, he failed to acknowledge that a valid reason was given for the application being out of time: the Claimant said that he had only learned of the report in April or May 2018. Secondly, he said that there was "no fresh information, only fresh allegations": the Respondent's own findings in its own report cannot sensibly be considered as mere allegations.

8. On behalf of the Respondent it was argued that the evidence in question could not possibly satisfy the **Ladd v Marshall** criteria. Mr Powell took each element of the test. He argued that the evidence could have been obtained with reasonable diligence for use at the ET hearing: the Claimant could have pleaded the matter or applied for disclosure. In any event the controversy was well known long before 2018. He disputed whether the evidence was relevant or would have had an important influence on the hearing, saying that none of failings identified by the report were of the same nature as the complaints which the Claimant was making during the relevant period, and that the report did not reflect on the credibility of the Respondent's witnesses or impact upon the ET's findings adverse to the Claimant. He suggested that the report was not "evidence" – rather an expression of judgment and a series of recommendations.

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9. An application for reconsideration is to be considered in accordance with the **Employment Tribunal Rules of Procedure 2013**: see in particular rules 70-73. In this case there were potentially two matters for the Employment Judge to consider.

B

10. First, there was the question whether an extension of time should be granted. As a general rule an application for reconsideration should be made within 14 days of the Judgment and Written Reasons: see rule 71. But the ET has a wide power to extend time: see rule 5. This

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power is to be exercised in accordance with the overriding objective set out in rule 2. The EJ might take a decision on paper; but he might also call for further information or submissions, or direct a hearing.

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11. Second, there was the question whether the application had any reasonable prospects of success. No doubt if the EJ wished to have further information about the application before

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reaching this decision he was entitled to ask for it. If the EJ considered that there were no reasonable prospects of the original decision being varied or revoked it was his duty to refuse it: see rule 72(1). Otherwise it was his duty to give directions for reconsideration: see rule 72(1) and (2).

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12. These provisions apply where a party applies for reconsideration out of time on the basis of material non-disclosure or the availability of fresh evidence. As to the latter, the law was

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reviewed by the EAT in **Outasight VB Limited v Brown** [2015] ICR (D11): the ET will generally apply the **Ladd v Marshall** criteria, although there is a residual discretion to permit further evidence not strictly meeting those criteria to be adduced if for a particular reason it is in

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the interests of justice to do so.

13. The provisions are not necessarily in watertight compartments. For example, if the EJ considers that there are reasonable prospects of the original decision being varied or revoked, but is concerned as to whether it is just and equitable to extend time for making the application, it would be within his powers to direct that the matters be considered together at a hearing.

14. It is the task of the EJ to apply these provisions. The EAT's task is different. It must intervene only if there is an error of law – which may include want of reasoning or perversity – in the EJ's decision. If there has been an error of law the EAT will remit the matter for further consideration. It will not deal with the merits of the application itself except (1) where the result is mandated by the correct application of the law, or (2) the parties positively ask it to deal the merits of the application (and then only if it considers that it is in a position to do so fairly on the papers before it).

15. EJ Ahmed did not specifically refer to the provisions which I have identified, but he appreciated that he was dealing with an application for reconsideration and I have no doubt that he will have had them in mind. However, accepting the submission made on behalf of the Claimant, I do not think his reasons address the application.

16. Firstly, it seems to me that the EJ was simply wrong to say that the Claimant had given no valid reason why his application should be considered out of time. The Claimant had expressly stated that he learned of the report only in April/May 2018. He was therefore in no position to have made an in-time application for reconsideration based upon it.

17. Secondly, it seems to me that the EJ was also simply wrong to say that the Claimant was only relying on further allegations. It was the Claimant's case that he was relying on material

disclosed by the Respondent's own serious incident report – in other words, not simply on allegations made against the Respondent but on the Respondent's own findings in its own report about failings at the relevant time in its paediatric services. These findings may well be a mixture of factual findings and expert conclusions. Both types are capable of being evidence receivable by the ET in support of an application for reconsideration.

18. I therefore consider that this appeal must be allowed. Mr Powell's submissions to me concerning the application of the **Ladd v Marshall** criteria are, as I have explained, matters for consideration by the ET. I will comment on them only briefly. (1) The Claimant's assertion that he did not know of the report until 2018 (hence was not in a position to place reliance on it at the ET hearing or seek disclosure of it or apply much earlier for reconsideration) might be very difficult to credit if he had remained in practice in the Leicester area or even the UK; but it cannot be rejected out of hand given that he had moved to and was practising in the United States. (2) The EJ (and if a reconsideration proceeds the ET) is in a far better position than the EAT to decide whether the report would have had an important influence on its decision; but, given the report's significant criticisms relating to the period about which the Claimant was complaining, it is impossible for the EAT to rule out that it may have done so. (3) I do not accept that the report did not amount to "evidence" for the purposes of the **Ladd v Marshall** criteria – as I have explained, it was plainly capable of containing relevant evidence of fact and opinion.

19. I will therefore allow the appeal. I have considered whether to remit the matter to EJ Ahmed or to a different EJ. Applying the criteria in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 I consider that it is appropriate to remit the matter to the same EJ assuming he is available. It would have been much better if he had not dealt peremptorily with the application: if he had given himself more time for consideration or sought further information I think he would

have avoided the errors he made. But the matter will have come before him as a piece of box-work; and I understand the sheer volume of box-work which will pass across an EJ's desk. I am confident that he will approach the matter afresh, professionally and carefully in the light of this judgment; and since he was the chair of the ET which took the original decision, he will be well placed – either at the preliminary stage on his own or at a reconsideration with members – to understand and consider the application.

20. I think, however, that I can usefully give some directions as to what should take place before the matter is considered afresh by the EJ. Firstly, I consider that the Respondent should have an opportunity to answer the application: I expect the answer will contain some or all the points which were in Mr Powell's submissions to me. The answer should also append the report in question. Secondly, I consider that the Claimant should have an opportunity to reply to the answer. These documents will assist the EJ; he should, however, keep carefully in mind that under rule 72(1) his task is limited at the preliminary stage to finding whether there is any reasonable prospect of the decision being varied or revoked. These directions will be contained in my order.