Appeal No. UKEAT/0095/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 12 July 2019

Before

THE HONOURABLE MR JUSTICE SWIFT

(SITTING ALONE)

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(1) MR G KALU
(2) MR O OGUEH — APPELLANTS

BRIGHTON & SUSSEX UNIVERSITY HOSPITALS NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR AYOADE ELESINNLA (of Counsel) Direct Public Access
For the Respondent	MR THOMAS KIBLING (of Counsel) Instructed by: Cater Leydon Millard Limited 68 Milton Park Abingdon Oxfordshire OX14 4RX

SUMMARY

PRACTICE AND PROCEDURE – Imposition of deposit

The appeal was against Orders by the Tribunal requiring the Appellants to pay deposits under Rule 39 of the **Employment Tribunal Rules**. The Tribunal had made the Orders in respect of parts of each claim (a) on the basis that there was little reasonable prospect of success that a Tribunal would conclude that those parts of the claim had been commenced in time; and (b) that on their merits there was little chance of success that those parts of the claim would succeed. The appeal was dismissed. As to (a) it had been open to the Tribunal to conclude that the Rule 39 standard was met in respect of the Appellants' argument that the matters complained of were part of conduct extending over a period. As to (b), the conclusions reached were within the range of assessment available to the Tribunal, save for on one issue (§23(3) of the grounds in the ET1 Form). However, given the conclusion on (a), the Order made by the Tribunal would stand.

THE HONOURABLE MR JUSTICE SWIFT

1. This is an appeal against a Decision of the Employment Tribunal ("the Tribunal") to make a Deposit Order under Rule 39 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the 2013 Rules"). The Tribunal Hearing took place on 23 February 2018; the Order was sent to the parties on 7 June 2018, together with the reasons for the Decision. The Respondent, the Brighton and Sussex University Hospitals NHS Trust ("the NHS Trust"), had also made applications to strike out part of the Appellant's claims (pursued under Rule 37 of **2013 Rules**). These applications were considered at the same hearing, but were refused by the Tribunal.

2. The Deposit Orders related to one part of the claims presented by Appellants to the Tribunal on 29 September 2017. The Appellants are consultants employed by the NHS Trust. The material part of the claims concerned treatment afforded to them in the course of a grievance investigation that had taken place between July and August 2015. That grievance had arisen from events going back to the beginning of 2014. In February 2014, Ms Erin Burns raised a grievance against Dr Lyfar-Cisse concerning events that had taken place at a meeting in January 2014. From July 2014, Ms Burn's complaints were investigated by Colin Hann. His conclusion, reached towards the end of 2014, was that the complaints were not well-founded. On 12 January 2015, the Black and Minority Ethnic Network ("the Network") at the NHS Trust raised a grievance against Ms Burns in respect of comments she was alleged to have made about the Network that had come to light during the course of the grievance process before Mr Hann. Further details of that grievance were provided on 3 July 2015 and 27 July 2015. By the middle of 2015, the NHS Trust had taken the decision to appoint Henrietta Hill QC to look at that grievance together with a further grievance raised by Ms Burns under the NHS Trust's Dignity

at Work policy. As I understand it, that further grievance effectively repeated matters that Ms Burns had complained about in February 2014. Ms Hill's investigation started in July 2015 and her report was provided on 13 August 2015. On 18 January 2016, disciplinary proceedings were commenced against the Appellants.

3. These events formed the basis for complaints directed to Ms Hill and her report, set out at paragraphs 20 to 24 in the ET1 forms. (The claims made to the Tribunal also relied on other matters up to and including decisions to dismiss the Appellants which were made on 27 September 2017.) The complaints directed to Ms Hill were that her conclusions amounted to direct discrimination against each Appellant on the grounds of race, and that she had victimised the Appellants, contrary to the provisions of the **Equality Act 2010,** and/or that she had subjected the Appellants to detriments by reason of protected disclosures contrary to section 47B of the **Employment Rights Act 1996**. The particulars of the complaints directed to Ms Hill's investigation are at paragraphs 22 and 23 of the ET1 forms, and are as follows:

> **"22. Ms Hill QC's finding amounted to racial discrimination, unlawful racial victimisation and a detriment pursuant to section 47B of the Employment Rights Act 1996.**
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> **<u>Particulars of Racial Discrimination</u>**
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> **(1). Ms Hill QC failed to make any reference to the grievances dated 3 July 2015 and 27 July 2015 which clarified the Claimants' complaints against Ms Burns and the Respondent. She would not have failed to deal with these important documents if they were white.**
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> **(2). Ms Hill QC was provided with all of the correspondence in which the Claimants objected to her appointment and this was further reason why she was frustrated and wanted to punish the Claimants.**
>
> **(3). Ms Hill QC found that the collective grievance may well have been made in good faith, but it amounts to potential bullying because it was lodged as a formal grievance. This was fortified because it was likely that a lodging of a grievance would have amounted to a detriment.**
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> **(4). Ms Hill QC stated that the Claimants could have expressed their views by other means rather than using the procedures provided by the Respondent which amounts to less favourable treatment than that Ms Hill QC afforded to Ms Burns on racial grounds. Ms Burns was entitled to her opinions which she could express in formal grievances, but the Claimants were not allowed the same rights.**
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> **23. Further and/or alternatively, Ms Hill QC's findings amounted to racial victimisation and/or detriments pursuant to Section 47B of the ERA.**

Particulars

(1). Ms Hill QC failed to consider and/or make any findings as to whether or not the grievances dated 12 January 2015, 3 July, and 27 July 2015 amounted to protected acts within the meaning of Section 27 of the Equality Act 2010.

(2). Alternatively, if she did consider them, she chose not to refer to them because they made the case for a protected act inevitable.

(3). On Ms Hill QC's findings, she concluded that the Claimants had a case to answer simply because they had used the Respondent's procedures in play on 12 January 2015, 3 July and 27 July 2015 and this amounts to a detriment within the meaning of Section 27 of the Equality Act 2010."

The Deposit Orders made by the Tribunal related to these complaints only. The Deposit Orders made by the Tribunal were made for two reasons. The Appellants' appeal is directed to each of those reasons.

(1) First reason for the Deposit Orders. Little prospect of success – the time limit issue

4. The first reason was that the Tribunal concluded there was little prospect that either Appellant would succeed in establishing that the claims at paragraphs 22 to 24 of the ET1 forms, had been brought in time. The Appellants contended that the claims had been brought in time because Ms Hill's actions were part of conduct extending over a period that continued up and until the date when the decisions to dismiss the Appellants were taken.

5. The Employment Judge summarised the Appellants case on this point, at paragraph 25 of the Decision, as follows:

> **"25. It was the claimants' case before me that Ms Hill's report was a significant event during a series of discriminatory acts during their relationship with the respondent. They argue that this report was the trigger that commenced the disciplinary process which ultimately led to their dismissal. It was the first in a series of discriminatory acts which ended in their dismissal and was therefore in time by virtue of the continuing act principle. They submitted that there was no way of divorcing this report from the subsequent chain of events and that it was therefore in time. This was an entirely different case from that brought by Dr Lyfar-Cisse who had not brought a claim about the termination of her employment. Her claim did involve concerns about Ms Hill's report but did not include all the subsequent events and issues about which the claimants now bring a claim, including their dismissal."**

The Employment Judge's conclusions were at paragraph 31 and were as follows:

> **"31. However, I do consider that there are little prospects of success in the claimants establishing that this was part of a continuing act by the respondent as opposed to a one of incident with continuing consequences. It is a report prepared by a third party after which the respondent decides to take action. Mr Elesinnla made no submissions about it being just and equitable to extend time if the tribunal were to find it out of time. I therefore conclude that on the time point alone the claims are likely to have little prospect of success."**

6. In this appeal, the Appellants contend that that conclusion was reached on the basis of an error of law. First, it is said that the judgment of the Employment Appeal Tribunal in **Hale v Brighton & Sussex University Hospital NHS Trust** UKEAT/0342/16/LA, is authority for the proposition that once an employer has instigated a process all steps in that process are parts of a course of conduct extending over a period. In **Hale**, part of the complaint made concerned the use of disciplinary proceedings. It was contended that decisions successively, to initiate the procedure, to invite the Claimant to attend a disciplinary process as part of that procedure, and then at the end of it to dismiss him, comprised conduct extending over a period. Choudhury J accepted that submission. At paragraphs 42 to 43, he stated as follows:

> **"42. By taking the decision to instigate disciplinary procedures, it seems to me that the Respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the Respondent would subject the Claimant to further steps under it from time to time. Alternatively, it may be said that each of the steps taken in accordance with the procedures is such that it cannot be said that those steps comprise "*a succession of unconnected or isolated specific acts*" as per the decision in Hendricks, paragraph 52.**
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> **43. In my judgment, the Tribunal erred in treating the first stage of the process as a one-off act. Mr Kibling submits that this is a clear finding of fact and notes that the decision is not challenged on the basis of perversity. However, the Tribunal here, for reasons already set out, lost sight of the substance of the complaint as defined by the agreed issue. Having done so, it then incorrectly treated the sub-divided issue as a one-off, when it undoubtedly formed part of an on-going state of affairs created by the initial decision."**

7. I do not consider that the judgment in **Hale** establishes any point of principle that can be read-across to the facts of the present case. Mr Elesinnla submits that in this case there is no basis for the distinction drawn by the Tribunal between the process conducted by Ms Hill QC, and the disciplinary process started by the employer a number of months later. The argument before me has focussed on the extent to which it is justifiable to draw a distinction between those two processes (or whether they ought to have been regarded as a single incident of conduct extending

over a period). The Appellants submit that in all but name, the process before Ms Hill QC either covered or substantially covered the ground that was later covered by the investigation stage of the disciplinary process conducted under the Maintaining High Professional Standards ("MHPS") procedure, and that for that reason, the complaints about the grievance procedure were presented in time. The Appellants also contend that the Tribunal was wrong to place reliance on the fact that Ms Hill QC was not an employee of the NHS Trust. This latter submission arises from the Tribunal's comment at paragraph 31 of the Decision that the report was prepared by a "third party." The Appellants' contend that the fact that Ms Hill was not an employee of the NHS Trust says nothing as to whether the process conducted before her was a discrete set of events for the purposes of section 123(3) of the **Equality Act 2010**.

8. It may well be that the argument on this point has been developed more fully before me than it was before the Tribunal. Nevertheless, the question for me is only whether it was open to the Tribunal to conclude as it did – i.e. that in this case the grievance process was logically distinct from the disciplinary action, such that the conclusion reached by Ms Hill QC that there was a case for each Appellant to answer was not such as to require the process she conducted to be regarded as part and parcel of an act/conduct extending over a period that included the subsequent disciplinary proceedings. If it was open to the Tribunal to reach that conclusion on that issue, then it seems to me that the Tribunal was entitled to go on to conclude that the matters pleaded at paragraphs 22 and 23 of the ET1 Forms had little prospect of success by reason of the time limit issue.

9. In my view it was open to the Tribunal to reach the conclusion that the grievance process and the disciplinary action did not, collectively, comprise conduct extending over a period for the purposes of section 123(3) of the **Equality Act 2010**. Ms Hill's terms of reference required her

to conduct her enquiry under the NHS Trust Dignity at Work policy. The matters she was asked to address were logically distinct from the later application of the MHPS policy. It may be that a different Tribunal on a different day might have evaluated these matters differently, but that possibility does not warrant the conclusion in this appeal that this Tribunal committed any error of law. In this case, it is clear that Ms Hill QC's investigation under the Dignity at Work Policy, and the subsequent MHPS procedure were not unconnected. But the significance of such connection as there was, was a matter for the Tribunal to evaluate. The Tribunal's assessment of the evidence, took account of all material matters. I accept that the comment to the effect that Ms Hill QC was a "third party" says little as to the application of section 123(3) of the **Equality Act 2010** in this instance, since Ms Hill was undoubtedly engaged by the NHS Trust as the investigator for the purposes of giving effect to its own Dignity at Work Policy policy. However, little significance attaches to this because if the Tribunal's Decision is read in the round, it is clear that, even disregarding that comment, the Tribunal did reach a conclusion on the application of section 123(3) of the **Equality Act 2010,** that was properly open to it on the facts before it.

(2) Second reason for the Deposit Orders. Little prospect of success – merits of the pleaded case

10. The second basis for the Tribunal's decision to make the Deposit Orders was that there was little reasonable prospect that the Appellants would establish that the procedure conducted before Ms Hill QC had entailed acts of unlawful discrimination and/or victimisation. This conclusion is directed to the substance of the complaints pleaded at paragraphs 22 and 23 of the ET1 Forms.

11. Mr Elesinnla's first submission is that the Tribunal did not address the argument at paragraph 42 of his written submissions, which concerned paragraph 23(3) of the pleaded case in

the ET1 forms. That submission was to the effect that Ms Hill's recommendation in respect of the Appellants amounted to an act of victimisation. I accept that the Tribunal did not address this point in its Decision. It is also clear to me that this part of the Appellants' case (i.e., the complaint at paragraph 23(3) of the ET1 forms), does not fall into the class of arguments having little reasonable prospect of success. To this extent, the Tribunal ought not to have concluded that the Appellants' case had little reasonable prospect of success.

12. I now turn to the remaining part of Mr Elesinnla's submission on this part of the appeal. The material part of the Tribunal's Decision is at paragraphs 36 to 38; it deals first with the application to strike out, and then with the Deposit Order application.

> **"36. I accept that the previous determinations of Ms Hill's report have been thorough and well-reasoned and come to conclusions about the report and its impact with regard to a specific set of circumstances. However, the impact of the report and its conclusions have not been determined within the context of the facts that these claimants advance. I cannot therefore say with certainty that this part of the claim has no prospect of success because I have not been able to consider and determine all those facts and therefore I cannot order this part of the claim to be struck out.**
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> **37. I cannot conclude that, in the context of a different factual matrix, the claimants would not be able to establish that the report is discriminatory or an act of victimisation when viewed in a broader or different factual matrix than that which the previous tribunals considered it or that which I have been given the opportunity to consider at this preliminary stage.**
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> **38. However, I do consider that the detail and assessment of the previous tribunals' judgments leads me to conclude that this part of the claimants' claim has little prospect of success. The previous tribunals that have considered the report found it to be carefully written, well considered and have no element of race discrimination in it. I have also read it and cannot see, on the face of it, any aspect of race discrimination in the report. Nothing has been presented to me that indicates that there is something that will change those conclusions but, as stated above, I cannot be certain that it will not be given the different context. This is not me concluding that 'something might turn up' (Patel v Lloyds Pharmacy Ltd [2013] UKEAT/0418/12) in evidence but is a recognition of the differences between the claimants' claims and those of Dr Lyfar-Cisse which cannot be properly explored at this preliminary stage."**

13. The Appellants first submission is that these paragraphs do not address or refer to the arguments that they made or the evidence that they gave. In my view, this complaint leads nowhere. In substance, it is a reasons challenge but in my view the reasons as given by the Tribunal are consistent with the standard required of it.

14. The second submission is that as a matter of substance, the ET's reasons are not sufficient to support the little reasonable prospect of success conclusion. I consider the ET was entitled to reach the conclusion it did. It relied, in particular, on the findings made at the earlier Tribunal hearing of a claim by Dr Lyfar-Cisse. Ms Hill QC was the Second Respondent in those proceedings. I have been referred to the Decision of the ET in that case, in particular at paragraphs 47 to 54. Taking the contents of those paragraphs into account, as the ET in this case clearly did, the conclusion that the complaints at paragraphs 22(1)2(4) and paragraph 23(1)2(2) had little prospect of success was a conclusion that was properly available to the ET.

(3) Conclusion

15. Although ground two succeeds insofar as it concerns the claim at paragraph 23(3) of the ET1 Forms, it does not seem to me that that caveat requires variation to the Order made by the ET, which covers paragraphs 20 to 24 in their entirety, including paragraph 23(3). This is because I have dismissed the appeal on ground one (the time issue), and that the Tribunal's conclusions in relation to time issue are a sufficient basis for a deposit Order covering all of the paragraphs referred by the ET in its Order. In the premises, this appeal is dismissed.

16. The Appellants apply for permission to appeal. The grounds of the proposed appeal follow the same course as the grounds of appeal pursued before me today. Should the matter go forward to the Court of Appeal, the question for that court will still be whether there was any error of law on the part of the ET. For the reasons set out in the Judgment I have just given, I do not consider that there was any error of law on the part of the Tribunal. Its decision concerned only matters of factual evaluation that fell within the ambit available to it. In those circumstances, I do not think that there is any reasonable basis on which to allow an application for permission

to appeal, and I refuse that application. If the Appellants wish to pursue the application without permission they are entitled to renew it directly to the Court of Appeal.