

EMPLOYMENT APPEAL TRIBUNAL
ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 11 November 2019

Before
HIS HONOUR JUDGE SHANKS
(SITTING ALONE)

MRS R PARKIN

APPELLANT

LEEDS CITY COUNCIL

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR MUKHTAR SINGH
(of Counsel)
Direct Public Access
and
MRS R PARKIN
(The Appellant)

For the Respondent

MR N NEWMAN
(Solicitor)
Instructed by:
Weightmans LLP
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SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

The Appellant brought two sets of proceedings in the ET alleging numerous forms of discrimination in long, repetitive pleadings which were very difficult to follow. The EJ struck out any claims of sex discrimination or sexual harassment on the basis that they had no reasonable prospects of success. Other types of claim were made the subject of deposit orders and others were allowed to proceed unconditionally.

Although the sex discrimination and sexual harassment claims were certainly not properly particularised it was wrong to say that there were no acts alleged to have involved sex discrimination or sexual harassment or that there were no facts from which such discrimination or harassment might be inferred. Further, the EJ did not expressly consider whether, even if on the current state of the papers such claims had no reasonable prospects of success, it was just to strike them out in all the circumstances at this stage in the proceedings, particularly given that many types of claim arising from the same story were proceeding, and there were insufficient grounds for inferring that the EJ had considered this second stage.

Striking out was therefore an error of law and the claims would be remitted to whichever judge was responsible for case management of the Appellant's complaints.

A **HIS HONOUR JUDGE SHANKS**

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1. This is an appeal against the decision of Employment Judge Lancaster in Leeds whereby he struck out any claims for sex discrimination or harassment on the basis that they had no reasonable prospects of success. The claims he was concerned with arise in two sets of proceedings brought by the Claimant against her employers in 2018, numbered 1805188 and 1805579 which were brought on 18 April and 21 May 2018 respectively. I am told there are a further six sets of proceedings which have been brought. There are ongoing interlocutory battles arising from all these claims and, as far as I am aware, no date for a court hearing of Mrs Parkin's claims has been arranged.

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2. The decision to strike out the particular claims I am concerned with was notified to the parties as long ago as 14 September 2018; 14 months ago. His Honour David Richardson allowed the appeal to proceed only on three grounds which are set out in an amended Notice of Appeal at a hearing on 4 June 2019. The Reasons for the Employment Judge's decision are to be found in four short paragraphs at page 2 in my quite long bundle.

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3. The background facts are as follows and are largely taken from the position as set out in His Honour David Richardson's decision on the Rule 3(10) hearing on 4 June with characteristic clarity and conciseness and I quote extensively from what he says. Mrs Parkin was employed by Leeds City Council as a Housing Support Worker. Her employment started on 2 June 2010 with an arm's-length management organisation. Her employment was transferred to Leeds City Council itself on 1 October 2013. Following two periods of maternity leave in close proximity, she returned to work in early 2014 and a grievance was upheld in

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A April 2014 in relation to changes to her place of work and leave entitlement. His Honour David Richardson's summary continues:

B "The recent history started in November 2017 at a time when Mrs Parkin was working 16 hours a week on a Monday and Tuesday. She became unwell; she describes herself as having a mental breakdown. She remained off work for a substantial period thereafter. In February 2018 a report found she was unfit to attend work due to depression and recommended exploration of redeployment. There was a policy of attendance management which was activated. She raised grievances about her treatment."

C Thereafter these two sets of proceedings were issued. She was in fact dismissed on 4 December 2018. An internal appeal was heard and was rejected on 28 February 2019. I have already mentioned that further proceedings followed from that.

D 4. These proceedings, the two cases I am concerned with, have been managed together in the Leeds Employment Tribunal. The ET1 claim forms were very lengthy; one runs to about 38 pages, the other to 82. They made reference to many potential causes of action but they were generally unclear as to what precise facts were relied on and how the case was put; they are not at all easy to follow. The focus of the Claimant appears to be the treatment from December 2017 onwards but there were many references to complaints years before.

F 5. There was a Preliminary Hearing for case management before Judge Jones on 12 July 2018; a couple of claims were withdrawn and dismissed. There was a refusal of leave to amend the claim of unfavourable treatment because of maternity or pregnancy. The Employment Judge gave directions to the Claimant to produce a schedule of allegations identifying the legal claim and the basis of the claim and directed a Preliminary Hearing to consider whether any of the claims should be struck out or a deposit order made in respect of them.

H 6. In response to that, the Claimant prepared a document headed Allegation Schedule. It is long and repetitive; the copy in my bundle runs from page 331 to page 448. The Council were

A able respond to that in a document starting at page 482 which runs to page 503. So far as the
allegation schedule is concerned, each allegation has a date starting November 2017, many
B potential causes of action are mentioned but there are recurring themes; failure to support the
Claimant during sickness absence or to redeploy her, failure to provide her with policy
documents or documents relating to her case despite repeated requests, failure to appoint her to
various jobs for which she applied and failure to address her grievances.

C 7. The matter came before Employment Judge Lancaster on 28 August 2019 and among
other orders, he struck out, as I have said, the sex discrimination and harassment claims with
which I am concerned today. He also made some deposit orders for the sum of £50 in respect
D of four separate heads of claim and he allowed some claims to go through. I am told the deposit
orders have not been complied with because the Claimant said she could not afford the £50 for
each head of claim.

E 8. The law in relation to striking out claims in the Employment Tribunal on the basis they
have no reasonable prospect of success is encapsulated in Mr Singh's helpful skeleton argument
at paragraphs 14 to 20. It has been said many times that only in the most obvious and plain
F case should a discrimination claim be struck out. Caution is to be exercised in relation to
pleadings: even a very badly pleaded claim may not be appropriate for striking out since it may
not represent the final position, there may be other ways of refining or defining the issues and
G the reverse burden of proof provisions may operate to assist a Claimant. In any event, a two-
stage process must be followed: the Tribunal must first ask itself whether the ground for
striking out has been established (in this case whether there is a reasonable prospect of success)
H and then, even if that is established, at the second stage the Tribunal must ask itself whether it is

A just to proceed to strike out in all the circumstances, which would include lesser measures designed to elucidate the possible claims.

B 9. The reasons given by the Judge, as I have said, were very short. He said, at paragraph 1, that: “Any complaints of sex discrimination (or harassment on the grounds of sex if this is alleged) have not been properly particularised.” That, I think, would be hard to argue with. It goes on: “It is not possible reading the two claim forms or the further documentation about those claims to identify specific acts where the Claimant says somebody treated her less favourably (or subjected her to unwanted conduct) treatment because she was a woman. Certainly, it does not identify any relevant male comparator, either real or hypothetical.” I am afraid that second sentence simply does not seem to be right. In the schedule of allegations that I have seen, there are factual statements made relating to dates and then in many cases among other things there is an allegation that it amounted to sex discrimination. It is therefore not right to simply say that she does not, anywhere, allege that things happened because she was a woman.

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F 10. The Respondent says that in making that statement, the Judge considered all that was said at the hearing and took into account the way things were explained by the Claimant herself. The problem with that suggestion is that there is simply no evidence before me as to what anybody said at the hearing and on those circumstances I am certainly not going to find against the Claimant that she, at the hearing, said, for example, that she accepted that something she was alleging was not on the grounds of sex discrimination. That is the first point that seems to me problematic with the Judge’s Decision.

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H 11. He goes on, in paragraph 2, to say that:

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“2. Even if such an act could be identified the Claimant does not, either in the two claim forms or the further documentation about these claims, identify any facts which she will seek to establish before the tribunal from which it could be inferred that she was treated in a particular way because of her sex.”

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That really goes to the quality of the pleading. However, when I asked Mr Singh for help on that, he pointed out that it was an essential element to the background of this whole dispute that the Claimant said that she had not been treated properly on return from maternity and that that was something which would be a fact which would need to be taken into account in considering any appropriate inferences.

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12. At paragraph 3, the Judge does deal with the question of maternity leave but in my judgement, not in a satisfactory way so as to show they could, on no basis, be supportive of an inference of sexual discrimination. Therefore, I do not think that what the Judge says at paragraph 3 rescues the point.

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13. Additionally, at paragraph 4, he says:

“4. There is therefore no reasonable prospect on this pleaded case of the Claimant being able to prove the primary facts necessary for the burden of proof to shift to the Respondent under section 136 of the Equality Act 1996. There is no case to answer in respect of any alleged detrimental treatment on the grounds of sex.”

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Even assuming that he was right up to then and that he was right to look fairly narrowly at the pleaded case, it seems to me self-evident that he did not apply the two-stage test by standing back and saying, “Is it appropriate and just to strike out the case on that basis?” In particular, he does not appear to have considered whether the fact that the case was going to continue in respect of quite a lot of claims and that the facts were going to have to be gone into in some way may have made it inappropriate to strike out the claim just on the heading of sex discrimination.

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A 14. The Respondent says that it is evident that he did consider the second stage and he did think about lesser measures because he, as I have described, made deposit orders in relation to a number of heads of claim and allowed other heads of claim through. I am afraid that point is not sufficiently clear to indicate that he has asked himself the right questions in relation to the claims that he has struck out. I do not think I can simply read across that he has given it the thought that he ought to have at the second stage.

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C 15. Therefore, on either of the bases, either it was not right that there was no reasonable prospect of success or that he failed to apply the stage two test, it seems to me the Judge has fallen into error and that the appeal should be allowed. I should say that this is not the last word even on strike out: the matter will have to go back and it will have to be considered again in the context of case management which is still going on, with a hearing already arranged quite soon in relation to some of the other claims the Claimant is bringing.

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E 16. I cannot leave the case without acknowledging and sympathising with the position of this Employment Judge and other Employment Judges in this kind of case; it really is difficult to see how they can be managed in a way that does justice to both sides. However, I must say that it seems to me that sometimes with these cases the best answer may be to just list them for a Full Hearing at the earliest opportunity and not keep making interim orders that are appealed and cause endless delays and bewilderment, I suspect, to Claimants. That way the Claimant is able to give evidence, tell her story, facts are decided upon, and then the results of those can be adjudicated on.

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A 17. I therefore allow the appeal and order that the matter should be remit any sex discrimination and harassment claims to be case managed with the remainder of Mrs Parkin's claims.

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