Case No: 3313470/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr P Williamson

Respondents: 1. The Bishop of London
2. The London Diocesan Fund
3. The Church Commissioners for England

Heard at: Watford **On:** 8 January 2020

Before: Employment Judge McNeill QC

Appearances:

For the Claimant: Mr J Wynne, Counsel
For the Respondent: Miss C Davies, Counsel

JUDGMENT having been sent to the parties on 9 January 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This case was listed before me for an open preliminary hearing, following an application by the Respondents, to determine whether these Employment Tribunal proceedings were a nullity. The Claimant's claim, which is a claim for age discrimination, was presented to the Tribunal by the Claimant on 1 April 2019.

2. The Respondents contended that the proceedings were a nullity because, at the time of presentation of the claim, the Claimant was subject to a civil proceedings order (CPO), made on 16 July 1997 under s42(1) of the Senior Courts Act 1981 (SCA), by a Divisional Court of the High Court of Justice.

3. Insofar as relevant to the current application, it was ordered on 16 July 1997 that the Claimant was prohibited from instituting any civil proceedings in any Court. The CPO further prohibited the Claimant from making any application, other than an application for leave as required by s42 of the SCA, in any civil proceedings, instituted by any person, unless the Claimant obtained the leave of the High Court, having satisfied the High Court that proceedings or applications were not an abuse of the process of the court in question and that there were reasonable grounds for the proceedings or application.

4. It was not in dispute between the parties that the current proceedings in the Tribunal were instituted without the permission of the High Court. It was also not in dispute that the Employment Tribunal is a Court for these purposes.

Background to the application

5. The Claimant's claim relates to the termination of his tenure as Priest-in-Charge at the Parish of St George, Hanworth Park, when he reached the age of 70 on 18 November 2018. His claim is for age discrimination. I use the words "termination of tenure" advisedly because there is an issue between the parties, which was not before the Tribunal on this application, as to the Claimant's employment status and whether the Tribunal has jurisdiction to hear his claims. That point will be determined at a later date if the current proceedings, or any further proceedings arising from the matters raised in the current proceedings, progress to a final (or further preliminary) hearing.

6. Having presented his claim without the permission of the High Court, and after the Respondents first raised the jurisdictional point arising from the CPO, the Claimant then made an application for leave to the High Court on 12 September 2019 pursuant to s42 of the SCA. In accordance with usual practice, he provided a draft of the order which he sought with his application. The order sought was drafted on an "either/or" basis. The Claimant sought **either** an order that he had permission to pursue the proceedings issued by him in the Tribunal on 1 April 2019, **or** that he have permission to issue proceedings in the Tribunal.

7. A witness statement dated 12 September 2019, from Mr Macey-Dare of Lee Bolton Monier Williams, was provided in support of the application. In that statement, Mr Macy-Date set out the background to the CPO, the chronology of events and the basis for the Tribunal proceedings. He further set out some positive comments in relation to the Claimant's role in the parish and his involvement in the community and explained why the particular age discrimination issue raised by the Tribunal proceedings was a matter of some public importance. There was a section on the Tribunal proceedings, in which Mr Macey-Dare acknowledged that, unfortunately, proceedings were issued in the Tribunal without the Claimant first obtaining the leave of the High Court.

8. In addressing the application under s42, Mr Macy-Dare submitted that the proceedings were not a nullity as the Respondents had contended in the Tribunal proceedings. He did not, however, refer the Court, either in his witness statement or otherwise, to the judgment of Wilkie J in **HM Attorney General v Edwards v Brecker Grossmith Ltd** [2015] EWHC 1653 (Admin), a case in which it was determined that where a CPO was in existence, and Tribunal proceedings were commenced without leave of the High Court, those Tribunal proceedings were a nullity. In circumstances similar to those in the current case, it was held in **AG v Edwards** that, as the proceedings were a nullity, there was nothing to which any retrospective granting of leave could attach.

9. The Claimant's application was dealt with on paper, without a hearing, and

without notice to the Respondents. On the basis of Mr Macy-Dare's witness statement, Mr David Pittaway QC, sitting as a Deputy Judge of the High Court, made an order on 24 September 2019. Following the terms of the draft order attached to the application, he ordered that (1) the applicant had permission to pursue the proceedings in the Tribunal; and, in the alternative, (2) the applicant had permission to issue proceedings in the Tribunal. In short, rather than making one of the two "either/or" orders which were sought, in the alternative, by the Claimant, the Judge made an order which set out both alternatives.

10. Both parties' Counsel sought to explain this order so as to make sense of it. I had to do the best I could to interpret it correctly with the assistance of the parties' submissions. Both parties provided helpful skeleton arguments.

The Argument

11. First, the Claimant submitted that paragraph (2) of the order of 24 September 2019 was intended to refer not to the existing claim but to some further, unspecified claim that the Claimant might bring in the future.

12. The Claimant then submitted that paragraph 1 of the High Court Order was binding on this Tribunal. As it provided that the Claimant has permission to pursue these proceedings, the Tribunal could not now say that he did not have permission. If the Respondents objected to that order, they could have challenged the order through the usual routes in the civil courts.

13. The Claimant relied on provisions in relation to the grant of retrospective leave, which were submitted to be similar to those in s42 of the SCA, under the Charities Act 2011 and in insolvency proceedings. Reference was made by the Claimant's Counsel in his skeleton argument to a passage from Tudor on Charities 10th ed and to two case: **In re Saunders (a Bankrupt)** [1997] Ch. 60 and **Park v Cho and others** [2014] P.T.S.R. 769, although the case were not specifically referred to or the arguments developed in oral submissions.

14. In relation to the judgment of Wilkie J in **AG v Edwards**, the Claimant submitted that the case was wrongly decided. In **AG v Edwards,** Wilkie J wrongly relied on the judgment of the House of Lords in **Seal v Chief Constable of South West Wales Police** [2007] UKHL 31, in which the House of Lords (by a majority) decided that the failure to obtain the leave of the High Court under s139(2) of the Mental Health Act 1983 (MHA) before commencing civil proceedings rendered those proceedings a nullity. Lord Brown (paragraph 74) compared s139(2) to s42 of the SCA and stated that parliament clearly intended to achieve the same result under s139(2) of the MHA as under s42 of the SCA.

15. The Claimant submitted that s139(2) of the MHA is a materially different provision to s42 of the SCA. S42 merely grants the High Court power to make an order, whereas s139(2) places a jurisdictional bar within the terms of the statute itself. The terms of an order, the Claimant submitted, have a different status to those of a statute. The Claimant submitted that

what Lord Brown said about s42 in **Seal** was *obiter dicta*.

16. The Claimant further submitted that **AG v Edwards** was wrongly decided because (1) if Wilkie J were correct, then s42 would interfere with the Court's power to stay proceedings under s49(3) of the SCA; and (2) treating proceedings as a nullity would be contrary to the Court's power to make interim orders. Treating the proceedings as a nullity has the effect of excluding the Courts' jurisdiction over the claim and the overriding objective is better satisfied by an approach that stays proceedings pending a successful application for permission. Preventing the making of interim orders limits an individual's fundamental rights, for example, to urgent injunctive relief.

17. It was submitted that the arguments about charity and insolvency proceedings and about s49(3) were not advanced in **AG v Edwards**. In contrast to **AG v Edwards**, in the current case the High Court has granted permission to commence proceedings with retrospective effect.

18. The Claimant summarised his submissions by reference to three possibilities - either:

    (i) the Tribunal is bound by the order of 24 September 2019 with paragraph 1 being the more material paragraph for the Claimant's primary submission; or
    (ii) the reasoning in **AG v Edwards** should be followed, which the Claimant submits would be incorrect; or
    (iii) the Tribunal is faced with conflicting decisions of the High Court and should prefer the order made in the current proceedings because it is in order made in this case and governed by what the Claimant has called "higher authority".

    The Claimant pointed out that treating proceedings as a nullity imposes a duplication of work and cost because the claim needs to be reinstituted.

19. The Respondents relied on **AG v Edwards** as an authority binding on this Tribunal. The proposition of law established in **AG v Edwards** is that where proceedings have been issued, without the permission of the High Court and in breach of a CPO made under s42 of the SCA, those proceedings are a nullity and the nullity cannot be remedied by obtaining retrospective permission because there is nothing to which any retrospective granting of leave can attach. Wilkie J in **AG v Edwards** applied **Seal** correctly and in the full knowledge of the issue being addressed in **Seal.**

20. The Respondents submitted that if the Judge had intended simply to give permission for the Claimant to pursue the existing proceedings as per paragraph 1 of his order of 24 September 2019, there would have been no need at all for paragraph 2.

21. They submitted that I should treat paragraph 1 of the Judge's order as being of no effect. As a matter of interpretation of the order on its ordinary language, either paragraph 1 applies or paragraph 2 applies. These are

alternatives, otherwise the order does not make sense. The Respondents submitted that I should be guided by the judgment in **AG v Edwards** in deciding which of the two alternatives should be applied. In accordance with **AG v Edwards**, I was bound to find that the proceedings that have been instituted are a nullity and therefore the only proper way of interpreting the order is by reference to paragraph 2, that is that the Claimant has permission to issue proceedings now.

22. If proceedings are issued now, limitation issues will arise. The Claimant may be able to persuade a Tribunal that it is "just and equitable" to allow his claim to proceed but that is by no means a granted. However, the Respondents submit that this is the correct interpretation to be given to the order.

23. Wilkie J in **AG v Edwards** clearly understood what Lord Brown was saying in **Seal.** He did not treat what Lord Brown said at paragraph 74 as part of the *ratio decidendi*. Indeed, at paragraph 13 of **AG v Edwards**, Wilkie J noted that s42 of the SCA was being considered "indirectly" in **Seal**. Dicta by one of their Lordships, which were not dissented from by others, were rightly taken referred to by Wilkie J.

24. The Respondents' short point was that the Tribunal was bound by **AG v Edwards.** Statutory provisions in relation to other areas of law (charities and insolvency) did not advance the argument. The question of a stay did not arise given the clear provisions of s42 which do not refer to a stay. In relation to interim orders, this was effectively an argument under Article 6 of the European Convention on Human Rights. It was an argument considered in **AG v Edwards** at paragraph 18, where reference was made to **Seal** and the fact that the House of Lords in **Seal** decided that the existence of the exclusionary rule under s139(2) of the MHA did not amount to a violation of Article 6.

Conclusions

25. I preferred the Respondents' arguments.

26. As a matter of pure interpretation, I accepted that if the Judge had clearly intended to make an order that the current proceedings, presented without leave, could be continued, there would have been no need for paragraph 2 of the order of 24 September 2019.

27. I rejected the Claimant's interpretation of paragraph 2 of the order. The only claim referred to in Mr Macy-Dare's witness statement was the claim already before the Tribunal which related to termination of the Claimant's tenure. It was plain from reading the witness statement, the wording of the draft order and the application, that what the Claimant was seeking a single order: **either** an order that the current proceedings were permitted to proceed before the Tribunal; **or** an order that, if leave were refused to pursue the current proceedings (on the basis that they were a nullity and there was nothing to which any retrospective granting of leave could attach), that the Claimant should have permission to bring that same claim in the Tribunal by way of a fresh claim. The Claimant's submission amounted to a contention that the Judge's order meant that he could **both**

pursue his current proceedings **and** bring a fresh claim. This was contrary to the plain words of the order which expressed the two permissions in the alternative.

28. In interpreting the order of 24 September 2019, I took into account the circumstances in which the order came to be made. It was as order made on paper only without a hearing and without a Judge being referred to the key authority on the matter raised by the application, **AG v Edwards**.

29. The order itself is ambiguous. It is in the nature of an order of the court that the parties should understand clearly what is intended. In this case, the order has been set out in "either/or" terms.

30. I considered the Respondents' submission that I should approach the interpretation of the order in the light of **AG v Edwards**. I rejected the Claimant's submission that I should approach my determination of the issue before me on the basis that **AG v Edwards** was wrongly decided. The Claimant's criticisms of the approach of Wilkie J to the judgment of the House of Lords in **Seal** were not made out, in my view, for the reasons submitted by the Respondents.

31. The wording of s42 is clear and s42 was the provision at issue in **AG v Edwards**. S42 does not provide for a stay and therefore s49(3) is not applicable. Whilst the arguments raised by the Claimant in relation to s49(3) and the arguments as to analogies to be drawn with charity and insolvency proceedings may not have been raised in **AG v Edwards,** that does not lead me to the view that **AG v Edwards** was wrongly decided. The arguments on interim orders were to some extent at least considered in **AG v Edwards.** I accepted the Respondents' submission that the Claimant's argument on interim orders was effectively an Article 6 point and that this was considered in **AG v Edwards**.

32. In any event, **AG v Edwards** is an authority of the High Court, binding on this Tribunal. If it is to be determined that it was wrongly decided, that must be for a higher court. Arguments in relation to charity and insolvency proceedings, interesting though they were, could not influence my judgment in the face of a binding decision from a higher court specifically relating to s42 of the SCA, the section at issue in the matter before me.

33. I concluded that I should interpret the order in accordance with **AG v Edwards**. On that basis, paragraph 1 of the order was of no effect because the initial proceedings were a nullity so that there was nothing to which the retrospective granting of leave could attach. The alternative paragraph 2, which was the only order which cold be a valid order, was the effective provision and I treat that paragraph 2 as binding on this Tribunal.

34. In case I were wrong in that interpretation and should it be said that **AG v Edwards** and the order of 24 September 2019 constitute conflicting decisions of the High Court, I have gone on to consider which of those decisions I should prefer.

35. Although the Claimant has submitted that I must prefer the order of 24 September 2019, as it was an order made in these proceedings, he has

provided no authority in support of that proposition.

36. I have concluded that I should prefer the decision in **AG v Edwards**, as a reasoned judgment made after argument before the Court from two interested parties, to the order of 24 September 2019, made without notice and on paper and without the Judge being referred to relevant authority.

Outcome

37. For the above reasons, I have concluded in accordance with **AG v Edwards** that the current proceedings are a nullity and that the Tribunal therefore has no jurisdiction to deal with the claims. The Claimant may present a fresh claim to the Tribunal in accordance with paragraph 2 of the order of 24 September 2019.

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Employment Judge McNeill QC

Date: 21 February 2020

Judgment sent to the parties on

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For the Tribunal office