

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

At the Tribunal
On 29 November 2019

Before
HIS HONOUR JUDGE SHANKS
(SITTING ALONE)

MRS M ITULU

APPELLANT

LONDON FIRE COMMISSIONER

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

Mr David Baker
(Of Counsel)
Instructed By
Bar Pro Bono Unit

For the Respondent

Miss Rebecca Thomas
(Of Counsel)
Instructed By
London Fire Commissioner
(LFC)
London
SE1 OLL

SUMMARY

PRACTICE AND PROCEDURE

The EJ struck out the Claimant's claims of disability discrimination on the grounds that her conduct in relation to the provision of expert evidence by doctors as ordered by the ET had been unreasonable.

The EAT rejected her appeal against the striking out order:

- (1) The EJ had provided sufficient reasons for his finding that her conduct had been unreasonable;
- (2) He had found, as he was entitled to, that her unreasonable conduct made a fair trial impossible;
- (3) He confirmed that he had considered a lesser sanction, in particular an "unless" order, but he had concluded as he was entitled to that such an order would not have been appropriate in all the circumstances.

A **HIS HONOUR JUDGE SHANKS**

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1. This an appeal against an order by Employment Judge Baron striking out certain claims made by the Claimant, Mrs Itulu, under the **Equality Act 2010** based on the protective characteristic of disability following a hearing on 9 June 2017. It is very regrettable that over two years have passed since the appeal started. The appeal was initially rejected on the sift by Judge Eady on 29 May 2018. The Claimant’s **Rule 3(10)** application came before Judge **C** Barklem in December 2018 and he set the case down for a Preliminary Hearing. The President, Mr Justice Choudhury, allowed it through to a full hearing on 23 May 2019. I should say that Judge Barklem also referred various questions back to Employment Judge Baron which have **D** been referred to during this hearing.

Factual Background

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2. The Claimant started employment with the Respondent, London Fire Commissioner, on 21 October 1991. She was an administrative officer.

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3. On 1 February 2015, she lodged a claim for which included claims based on race, sex, and disability discrimination, the latter claim including one of failure to make reasonable adjustments. The response from the Fire Commissioner on 4 March 2015, took issue with her claim that she was disabled at the relevant times for the purpose of the **Equality Act 2010 (the** **G** **“2010 Act”)**. At a Preliminary Hearing, on 30 March 2015, the Claimant identified the two relevant impairments: the first was work related stress; and the second was musculoskeletal pain in her back, shoulders, arm, and wrist.

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A 4. Following on from that, there was a long procedural history relating to the question of
disability and substantial delay. During this period, there have been two dates arranged for full
hearings of the claims: the first for 10 days starting on 30 November 2015; and the second
B probably also for 10 days starting on 13 February 2017. Both of those full hearing dates have
been lost. I am told today that what survives from this claim form, along with other cases
brought by Mrs Itulu, is now listed for a four-week hearing in September 2020.

C 5. In any event, to return to the history of the proceedings, so far as they relate to
disability: on 14 August 2015, Employment Judge Baron held a Preliminary Hearing on the
phone which considered, among other things, the question of medical evidence. The
D Respondent had indicated that it wished to have experts appointed to advise the Tribunal on the
question of disability on either basis that I have mentioned. The Claimant said that she could
not see any reason for experts to be appointed and said that the **2010 Act** did not include a
requirement for expert reports.

E 6. The Employment Judge decided that the Tribunal was going to have to make a decision
about the question of disability and whilst the burden was on the Claimant to prove she was
F disabled, it would not be fair for her to decide what evidence was provided to the Tribunal and
justice required that the Respondent be able to have her examined by doctors so that it could
provide evidence to the Tribunal. He recorded that the Respondent was not seeking permission
G to appoint its own expert but was asking the Tribunal to order the joint experts. He also
recorded, as had been the position, that the Respondent was willing to pay the whole of the
costs. He said, "That seems to me more than fair to the Claimant" and also that such procedure
H would assist the Tribunal in coming to a just conclusion on the point. He therefore made orders
enabling suitable doctors to be identified and instructed.

A 7. Applying that procedure, two doctors were selected by the Claimant, from names put forward by the Respondent: a Dr Cutting, was a psychiatrist; and a Professor Povslen who was an orthopaedic surgeon. There then followed problems with the instruction letters and with the question of the Claimant's medical records being disclosed to those doctors.

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C 8. There was yet another Preliminary Hearing on 26 November 2015 at which the Judge made amendments to some draft instructions and asked for the Respondent to provide a revised copy to the Claimant for her final approval. At that hearing, he strongly urged the Claimant to object only to a point which was of great importance. So far as medical records were concerned, he told her that experts must be in possession of all material information and urged her to provide necessary consent so that experts could have access to the records.

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E 9. In December 2015, after the Claimant had given access to her medical records, she was contacted by Dr Cutting to arrange for a consultation. Unfortunately, he contacted her before he had been sent formal instructions in the case. It is not really clear to me why but that caused the Claimant to raise an objection to Dr Cutting.

F 10. On 19 January 2016, the Respondent applied for a further Preliminary Hearing to settle the wording of the instruction letter, to consider whether it was appropriate to instruct Dr Cutting, and to settle the list of issues to be decided by the Tribunal. Unfortunately, that hearing did not happen until 7 July 2016 which is nearly a year on from the Preliminary Hearing on 14 August 2015. On 7 July 2016, the Judge again had to deal with the question of the medical records, and basically said that it was generating considerable unnecessary heat, he had to settle the form of the letters of instruction, and then he dealt with Dr Cutting. He said that the Claimant had objected to Dr Cutting being instructed. He recorded that she had chosen

A him, that he “jumped the gun”, as the Judge puts it, and that she objected to this but that he failed to see how it could affect the suitability of Dr Cutting to provide advice to the Tribunal as an expert.

B 11. On 14 July 2016, a week later, the Claimant sent an email to the Tribunal asking for the order to be varied to substitute a Dr Bashir for Dr Cutting. Tribunal Judge Baron refused to vary his order on 5 September 2016 saying that:

C **“The Claimant has again objected to my order that Dr Cutting be appointed and now seeks to appoint another expert, the Respondent objects. That matter was fully ventilated the hearing. I see no reason to vary my order.”**

D 12. It seems that the Claimant was not really prepared to accept the order in relation to Dr Cutting. She was still refusing to see him and had written a letter saying that if the Respondent went ahead to instruct him, he would be incurring such costs of his own choice. Therefore on 28 November 2016, the Respondent applied for an order striking out the disability discrimination claims on the grounds that the Claimant’s conduct in regard to the instruction of medical experts had been unreasonable and therefore vexatious.

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F 13. Following that, problems also arose in relation to Professor Povslen. The Judge, at paragraphs 8 to 10 of his Judgment, sets out some correspondence, which I am not going to read into the Decision, but in which the Professor said, in response to a question about whether he would examine her physically, that he would indeed examine both upper limbs to assess the strength and range of movement of her fingers, elbows and shoulders, so as to provide a report on condition and prognosis. He said that the examination would cover the Claimant’s ability at the present time and that he would ask her some questions about her past and present health.

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H He then records that in the joint letter of instruction, he had been asked to provide report on her physical impairment including any relevant pre-existing conditions and treatments received for

A the period 19 December 2013 to 25 February 2015 which, as I understand it, was the relevant period for the claim for disability discrimination.

B 14. The response from the Claimant on 6 December 2016 was that the Tribunal order did not cover her ability at the present time, and therefore she was unwilling to contact the Professor's secretary to arrange a medical examination because he did not have the authorisation to carry out the physical examination of her body that he was intending to carry out. She then cited some alleged breaches of the **Data Protection Act** and the **Human Rights Act**. The position therefore, by December 2016, was that the Respondent took the view that her conduct in relation to the Professor was also unreasonable and that was an additional basis for the application which they had made back on 28 November 2016.

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E 15. Unfortunately again, one sees the problem of delay in these cases. The hearing of the application, for whatever reason, did not come until 9 June 2017 and Judgment was sent out on 31 July 2017. At the hearing, as recorded in paragraph 11 of the Judgment, the Judge said:

F **"The correspondence was discussed. After clear questioning from me, the Claimant specifically stated that she refused to allow any physical examination to take place by Professor Povslen and that all she was prepared to do was to answer questions about her abilities during the relevant period. The Claimant was absolutely adamant on the point."**

G Additionally, so far as Dr Cutting was concerned, the position recorded at paragraph 50 was that the Claimant was still refusing to be examined by him despite the Judge's order of 5 September 2016 and that she was now citing another reason for that.

The EJ's decision

H 16. Taking account of the history which he set out, broadly what I have just set out, the Employment Judge decided, first, at paragraph 18:

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“My clear conclusion is that the Claimant is doing all she can to prevent being examined by either Dr Cutting or Professor Povslen. That is unreasonable behaviour in the context of claims based upon the protected characteristic of disability.”

He then said at paragraph 21:

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“I am satisfied that a fair trial cannot be held without the Tribunal having the benefit of the experts’ reports, and without the ability of the Respondent to cross-examine the Claimant and address the Tribunal on them. The Respondent is entitled to insist upon such independent evidence.”

Again, at paragraph 22:

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“The issue now is not whether I have the jurisdiction to strike out the disability claims, but whether I should exercise my discretion to do so. It is well recognised that such power should be a sparingly exercised as a striking out has the effect of preventing a Claimant from pursuing a claim which may have validity. In my judgement, the circumstances of this case justifies such an order being made. By reason of the past conduct of the Claimant I have no confidence whatsoever that if different experts were now to be sought, then the claims could proceed without further delay. I have also noted the prejudice to the Respondent already suffered as a consequence of the retirement of witnesses that are now therefore not under the Respondent’s control. I therefore rule the claims based on the fact of disability be struck out.”

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The law

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17. The law on striking out on the grounds that a Claimant has conducted the proceedings in a way that is unreasonable is to be found in a very short passage at paragraph 15 of the Decision in **Abegaze v Shrewsbury College of Art and Technology** [2009] EWCA Civ 96 in the decision of Elias LJ. Paragraph 15 says:

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“The relevant legal principles applicable to this case are not in dispute. In the case of a strike out application brought under paragraph (c), it is well established that before a claim can be struck out, it is necessary to establish that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings; that the result of that conduct was that there could not be a fair trial; and that the imposition of the strike out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial, then the strike out should not be employed.”

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The appeal

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18. The Notice of Appeal raises three main points, which I am going to take out of order because, logically, ground 2 comes first. Ground 2 is a challenge to the adequacy of the reasons given by the Judge for the findings that the Claimant’s conduct in relation to the two doctors was unreasonable.

A 19. First, in relation to Dr Cutting, at ground 2(a), it is said that the Employment Judge
failed to deal with the merits of the Claimant's objection to him, mainly that Dr Cutting may
not have been registered on the Data Protection Register until February 2016 which was after
B he had been instructed. It is very hard to see how this, had it been established, would have been
relevant to the real issue, particularly as he was registered by the relevant date, June 2017. As
the judge expressly said in paragraph 19: "I do not consider that that has any relevance to his
C [the doctor's] independence nor his ability to examine the Claimant and provide a report for the
benefit of the Tribunal." It therefore seems that he did make a finding as to the relevance, if
any, of the complaint raised by the Claimant about Dr Cutting's registration with the
Information Commissioner. However, the important point made today, again by Ms Thomas,
D and clear from the Judgment was that this complaint about Dr Cutting was something that was
raised for the first time by the Claimant at the hearing on 9 June 2017 after other objections had
been raised to Dr Cutting which had gone on for over a year and in circumstances where she
was still objecting to being seen by Dr Cutting in any event; I refer again to paragraph 5.12 in
E the Judgment. It was that context which led the Employment Judge to the conclusion, at
paragraph 18, that the Claimant was doing all she could to prevent herself being examined by
Dr Cutting and to his comment that this was a new point which was "dug up" for that purpose,
F which is the way the Judge characterised it, perhaps a little bluntly in paragraph 19 of the
Judgment. That, namely his conclusion about the relevance and his conclusion that this new
point was designed to achieve avoidance of being seen by Dr Cutting seems to me a sufficient
G basis for the conclusion that the Claimant was behaving unreasonably in relation to Dr Cutting
which is not a conclusion which is challenged in itself. It does not seem to me that anything
more was required and in particular it does not seem to me that it was necessary for the
H Employment Judge to descend any further into the issues and complaints about the **Data
Protection Act.**

A 20. Ground 2(b) relates to the finding that the Claimant's refusal to be examined by
Professor Povslen was unreasonable. It says the reasoning about this was inadequate because it
B fails to take into account correspondence from the Professor which the Claimant found
objectionable. As I understand it, this is a reference to the Professor's letter dated 28 November
C 2016, which I have already referred to, and which is to be found in full at page B45A in the
bundle. Looking at that letter and the correspondence that surrounds it, it seems to me totally
clear that the approach being taken by the Claimant was "unreasonable" even if it was based on
D some misconception or misunderstanding on her part. Obviously, as I said during the hearing,
the doctor, who was going to consider the orthopaedic issues, would have to make a physical
examination and assessment of the position on the day that he saw the Claimant in order to
E express any useful view about the state in which she was at the earlier relevant period. In any
event, what the Claimant told the Employment Judge at the hearing of the application is set out
at paragraph 11 in the Judgment and however much misunderstanding or misconception or
F subtlety there may have been in the earlier position, the Employment Judge was quite clear that
the Claimant was refusing, absolutely, to be physically examined by Professor Povslen and she
did not qualify that at the hearing. It seems to me that that was, in itself, clearly sufficient to
warrant the finding in relation to the Professor that her conduct was unreasonable. I therefore
reject the notion that there was insufficient reasoning in relation to the finding of unreasonable
conduct.

G 21. I turn, then, to ground 1(a). This ground is that the Employment Judge failed to
consider whether the results of that unreasonable conduct was that there could not be a fair trial.
In fact, as I have already read, he stated at paragraph 21 in the Judgment, that a fair trial
required experts' reports. Clearly that cannot be challenged. Earlier in the Judgment, he had
H set out the whole history. That was that two experts had been instructed in accordance with his

A directions and that the Claimant was unreasonably doing all she could, on his findings, to avoid
being examined by those experts who had been identified. On that basis, the experts having
been identified, and the Claimant effectively refusing to see them, there clearly was no prospect
B of a fair trial in relation to the disability claims and the Employment Judge's decision about that
really cannot be faulted.

C 22. The Claimant says through Mr Baker that the Employment Judge should have sought to
address the Claimant's concerns and appointed new experts or at least an expert in place of Dr
Cutting so that a fair trial with different experts could have been achieved. I do not think that it
is necessary in considering whether a fair trial is possible, in effect to re-write the "rules" of the
D trial which is already contemplated. I do not see why a different trial, with different rules, at a
different time possibly, to that being contemplated at the date of the hearing of the application
should be considered. The fairness of the trial is the fairness of the contemplated trial and, as I
have already indicated, that trial should have involved the experts who had been already
E identified and in those circumstances that trial was not going to be able to be fair. It seems to
me that considerations of the type that have been raised by Mr Baker as to who the experts
might be, should more logically come at the next stage, that is when considering whether there
F is some lesser sanction which may be more appropriate than a strike out.

G 23. That brings me to ground of appeal 1(b) which is the suggestion that the Judge failed to
consider whether a lesser sanction may have been appropriate. As to that, it is suggested in
particular that it would have been appropriate to make an unless order along the lines agreed
between the Claimant's counsel and Judge Barklem at the Rule 3(10) hearing in September
H 2018 and referred back to Employment Judge Baron. That unless order would have required
the Claimant to attend an appointment with Dr Bashir, a different psychiatrist, and to attend an

A appointment with Professor Povslen and stated that she was to consent to a physical examination by the Professor “if and to the extent that the Professor considered it necessary.”

B 24. In considering whether there was an alternative, more appropriate and lesser sanction I agree with Ms Thomas that I should look at matters as they were in July 2017 when the Judge made the decision to strike out; it would not be right to take into account matters that have happened since. It is fair to say that the Employment Judge does not, in his Judgment, mention the possibility of an “unless” order. He was specifically asked about whether he considered this by Judge Barklem’s order, and his response, at page A177, dated 18 October 2018, was that he did consider it. He then says again that he explored with the Claimant very clearly and specifically whether she would agree to be physically examined by Professor Povslen and that she had replied, categorically, that she would not do so and she would only answer questions. He also refers, at page A177 to the continued refusal to be examined by Dr Cutting.

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E 25. It seems to me that given what was said in the Judgment, and in particular those two points, an “unless” order would clearly not have been appropriate. Although the Judge does not expressly say so, it is obvious that if the Claimant was refusing to be physically examined or to even see one of the experts, an unless order was going to be pointless and incidentally involve unnecessary delay and expense. That would be the position if the “unless” order related to Professor Povslen and Dr Cutting. As to the idea of instructing different experts, it seems clear that the Claimant’s objection at the hearing to Professor Povslen was not to him personally but to any physical examination. Therefore, it is hard to see how instructing someone else would have helped matters. However, in any event, the Judge found, at paragraph 22, that by reason of her past conduct, he had no confidence whatever that, even if different experts were now to be sought, the claims could proceed without further delay. I note that he had also said, in

A paragraph 19 while dealing with the position in relation to Dr Cutting, that he noted the suggestion of substituting Dr Bashir for Dr Cutting, but in the light of what had happened, he had no confidence that the Claimant would not also find reasons to object to him.

B 26. It seems to me that the Judge could properly consider on that basis that it would not be appropriate to direct that there should be different experts or to make an “unless” order providing for different experts. That consideration also explains the relevance of the statement
C about the Respondent having already suffered prejudice from the delay. It seems to me that in considering whether an alternative would be an order involving new experts the Employment Judge was entitled to consider the prejudice that that would involve for the Respondent and to
D consider such prejudice in the context of everything that had already happened and the prejudice that they had already suffered. It therefore does not seem me that an appropriate alternative would have been to involve new experts at that stage, in July 2017.

E **Disposal**

27. Although it is fair to say that the Employment Judge’s reasoning is somewhat telescoped in parts and shows a measure of, perhaps, understandable exasperation, I do not
F consider that any of the grounds of appeal are valid. I therefore dismiss the appeal. I very much hope that this means that the hearing in September 2020 can proceed without further interlocutory disputes. Before leaving the case, I pay tribute to the very professional and skilful
G way in which both advocates presented their cases.

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