Appeal No. UKEAT/0280/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 February 2020

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

BRITISH GAS — APPELLANT

1)MR MARK DECOSTA
2)MR CHRIS ALLEN THOMAS
3)MR KEVIN WILSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS RACHEL BARRETT (of Counsel) INSTRUCTED BY: Pinsent Masons LLP 13 Queen Road Aberdeen AB15 4YL
For the Respondent	MR MARK DECOSTA (The First Respondent in Person) and MR CHRIS ALLEN THOMAS (The Second Respondent in Person) and MR KEVIN WILSON (The Third Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE

The EJ allowed amendments to the particulars of claim without properly applying the **Selkent** guidance; in particular:

(1) he allowed amendments to add new claims simply because those new claims were "in time" without considering any other criteria like whether the claims were viable in any event;

(2) he allowed amendments to the existing claims (which were out of time) without giving any consideration to whether an extension of time to bring them should be granted;

(3) he did not carry out a proper overall assessment of relative prejudice before giving leave for all the amendments sought.

The question of amendment would be remitted to the ET to be reconsidered by a new EJ.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by British Gas against a Decision of Employment Judge Cadney which was sent out 25 April 2019. In that Decision he allowed amendments to claims which had been started by the three Claimants in April 2018.

2. The Claimants are litigants in person, and they have been throughout this Tribunal process, although they have had some help from their union. Mr Decosta did most of the talking on behalf of the three of them at this Hearing. I also had a skeleton argument from the Claimants as well as a skeleton argument from Ms Barrett on behalf of the Appellant British Gas.

3. The background facts are these. The Claimants were all Customer Sales Executives working for British Gas Trading Limited. Their job, as I understand it, consisted of making outbound calls in a sales context, so they were effectively cold-calling for business on behalf of British Gas.

4. During 2017 or possibly even before, a process of change began and over a period of time it emerged that their role was changing, first in that they would be expected to receive inbound calls as well as making outbound calls, but also that they would be working not just in relation to sales, but also dealing with other inbound calls from customers which might be raising queries, might be responding to other things which would be of a sales nature, but might also be complaining or raising queries: so a whole different range of activities.

5. In May 2017, they raised grievances about this process. Those grievances were not finally dealt with until the appeal outcomes came in January/February 2018. I was told today by Mr Decosta that in a sense the grievances amounted to asking a question as to what was going to

happen going forward and the answer only came, and I think not the final answer anyway, when they had the appeal outcome in January/February 2018.

6. In April 2018 they started claims against their employer. In one case there was a tick against redundancy payment. There were no other particularly relevant ticks. There were narrative complaints, using the term neutrally, attached to each of their claim forms, which basically rehearsed the changes that they were objecting to and the grievance process. They were, at this stage, still employed and they had remained employed through the grievance process. Nowhere in their claim forms is there a suggestion that they regarded themselves as having been dismissed.

7. The response from British Gas was that effectively to say that there was no jurisdiction on the part the Employment Tribunal because they had not been dismissed and they had not suggested they had been dismissed. They did not take any time bar point in their response document, but they did suggest that they were going to apply to strike out the claims in any event.

8. Sometime over the summer of 2018, the Claimants became aware of an unusual case, called **Hogg v Dover College** [1990] ICR 39, which suggested that where an employer puts forward new job role and an employee carries on working under the new terms, that might be regarded as a dismissal and being taken on again in a different capacity and therefore founding the basis for a claim of unfair dismissal or a redundancy payment. As I say, that is a pretty unusual case and whether it would apply in this case, I do not know but I would think pretty unlikely.

9. Having learnt of that case, in due course they suggested that they would now like to claim unfair dismissal based on what had happened in relation to the change of their terms. However,

A in the meantime, on 23 July 2018, Mr Alan Thomas, the second Claimant, actually resigned. At that point, at least arguably, he would have a claim of constructive dismissal. On 4 September 2018, Mr Wilson resigned in the same way. Mr Decosta remains employed.

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10. On 10 September 2018, they wrote an email to the Tribunal from Mr Wilson's email address in these terms:

> **"To Whom It May Concern,**
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> **I wish to inform you that myself and Christopher Alan Thomas have resigned from British Gas. I resigned 4 September; Mr Alan Thomas resigned July 23rd. We believed we have been constructively dismissed from the company in addition to being unfairly dismissed from our outbound energy sales role. We believe the situation we've been put in by the company left us with no reasonable option other than to resign. [Then he produces a copy of the resignation email]. I've given reasons why I believe that I've been constructively dismissed by the company in addition to being unfairly dismissed from my outbound energy sales role. Both myself and Christopher Alan Thomas wish to amend our claim to include constructive dismissal in addition to our claim of unfair dismissal of our outbound energy sales role."**

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I have noted as I read that email that it does not mention Mr Decosta, but I think we have worked on the basis that it indicated that Mr Wilson and Mr Alan Thomas wanted to bring claims for constructive unfair dismissal arising from their resignations, but also that all three of them wished to bring claims for unfair dismissal arising from the earlier matters on the **Hogg v Dover College** basis. That is how I understand it.

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11. That letter led to a Hearing for directions before Employment Judge Sharp. On 27 November 2018, she pointed out to the Claimants that they needed to get on paper an articulation of what their new claims were, and they were given time to do that. The Respondents agreed to that course subject to any objections they might have to the amendments as proposed.

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12. On 20 December 2018, an email was written setting out in detail what the new claims were by way of a document headed "Claim amendment request" which is at page 112 in my bundle. The application to amend was unfortunately not heard for another four months until 4

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April 2019, by Employment Judge Cadney. He sent out his Decision, which is the one appealed from, on 25 April 2019.

13. His Decision, in very brief terms, was that he was did not strike out the original claim. He said he would have imposed a Deposit Order, which indicates that he thought it was a pretty weak claim. He said that the constructive unfair dismissal claims by Mr Wilson and Mr Alan Thomas were in time, in other words made within three months of the constructive dismissal, and that therefore he would give leave for an amendment to raise those. That decision impacted on his decision in relation to what I call the **Dover College** claims, because although they were significantly out of time on any view, the same material, the same background would have to be gone into in deciding whether there was an unfair constructive dismissal as in deciding whether there had been a **Dover College** unfair dismissal earlier on. Finally, insofar as Mr Decosta was concerned, although he did not have a constructive unfair dismissal claim because he had not resigned, the same factual background was going to have to be gone over in relation to his **Dover College** claim so that leave to allow an amendment for that purpose would follow.

14. The Appellants rightly say that the well-known case of **Selkent Bus Co Ltd v Moore** [1996] UKEAT/151/96/205 must govern the way that a Judge approaches such an application and the way that he exercises his discretion. I am not going to read the relevant principles from **Selkent** in the interests of time. They are familiar. They are set out in the skeleton argument. And the Claimants have seen them.

15. There are two arguments raised by the Appellant which I reject. First, it is said that the application to amend to add the two constructive unfair dismissal claims was made more than three months after the resignations and they were therefore out of time. That is obviously an

important factor to be considered, but I do not think that the Appellants are right to say that that was the case or that the Judge ought to have regarded it to be the case. I mention again that the Claimants were acting in person, and I have already read out the letter of 10 September 2018, which was well within the three-month period and which makes it clear that the intention is to apply to amend to claim constructive unfair dismissal. They were then told to fully articulate it. If there been a hearing more quickly than November, they would have been told that at a much earlier stage. In any event, it seems to me unfair to suggest that they should be penalised for making the amendment application more than three months after the claims would have accrued.

16. The second argument is this: it was said that the Judge was wrong not to strike out the original claims, instead saying that he would, if it had been relevant, have ordered deposits. It is right that the claim forms, as they stood, did not bear a lot of analysis; I think they could fairly be described as "inchoate" and there were obviously enormous problems with them. However, it seems to me too much to say, on the material that I have heard and that the Judge had, that the claims deserved to be struck out without further consideration. In any event, if the Judge had approached things from a different angle and looked at amendment first and/or looked at the quality of the original claims as part of the overall amendment decision, it would not have mattered since, even if the claims as originally formulated were completely hopeless, there could still have been an amendment which would have rescued them. It does not seem to me that there is anything to be gained by challenging the decision not to strike out the original claims.

17. However, there are two main points made that I am afraid I must accept. The first is this; the Judge appears to have simply assumed that because the new constructive unfair dismissal claims were made in time, i.e. within three months of the resignations, that that automatically meant that there should be leave to amend the claim forms to allow them to be raised. That, I am afraid, is just not necessarily so. It requires a consideration of the overall context. It may require

A a consideration of how viable they are, and the Judge does not seem to have given that any thought at all.

B 18. The second relates to the **Dover College** claims. The Judge said that they were significantly out of time, but he failed to consider the question of whether or not an extension would be allowed. That is something that **Selkent** expressly says needs to be considered. If he had done that, he may have reached the view that on no view was an extension going to be C allowed, which may have been decisive in saying that amendments should not be allowed. Furthermore, he did not come back to the issue of time limits in relation to the **Dover College** claims when looking at the overall balance.

D 19. There is a third point that partly arises out of those two points which is that he did not, before deciding to give leave for all the amendments, carry out an overall assessment of the balance of prejudice in the whole context of the case. It seems to me that too is a valid complaint. E

20. Therefore, although the question of amendment was a matter for his discretion, it seems to me that there are a number of ways in which the Judge did not exercise that discretion properly F and the matter will have to be remitted to the ET, I think to another Judge, who can decide what if any amendments to allow and how the case should proceed thereafter.

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