Case No: EA-2021-000475-AT (Previously UKEATPA/0296/21/AT)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 October 2021

Before :

HIS HONOUR JUDGE WAYNE BEARD

- -

Between :

MR PHILIPE FRANCIS	**Appellant**
- and -	
FORD RETAIL LIMITED T/A TRUST FORD	**Respondent**

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Ms E Godwins (AQ Archers Solicitors) for the **Appellant**
Mr W Smith (Integra Legal Limited) for the **Respondent**

Hearing date: 7 October 2021

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JUDGMENT

SUMMARY

JURISDICTIONAL/TIME POINTS

PRACTICE AND PROCEDURE

The Employment Appeal Tribunal dismissed the ground of appeal raised against the exclusion of background evidence but upheld the ground raised against the order of a deposit.

The Employment Tribunal was entitled, when considering background matters pleaded in a discrimination claim, to come to a conclusion as to whether there was "sufficient relevance" of the background to the substantive complaints without hearing evidence and based on the pleaded case. An interlocutory decision of that type was a case management decision where the Employment Appeal Tribunal was confined to considering whether an Employment Judge had erred in legal principle in the exercise of the discretion, or had failed, in a **Wednesbury** sense, to give a rational decision. The Employment Judge was entitled to decide that issue at a preliminary hearing, considering the overriding objective, particularly when otherwise it would have a significant impact on preparation for the substantive hearing for a respondent because of the lapse of time. The Employment Judge had considered the issue of relevance and the decision was one he could properly reach. **HSBC Asia Holdings BV & Anor v Gillespie** [2011] IRLR 209 applied.

The Employment Judge had been entitled to decide that there was little reasonable prospect of the claimant establishing an issue was not discrete but part of a continuing act. Further he was entitled to come to a conclusion that there was little reasonable prospect of the claimant establishing that the primary time limit had not passed. However, he had not heard any evidence as to reasons for the late presentation in circumstances where the claimant had been unrepresented at the time the claim was presented. On the basis of the pleaded case of the claimant and the respondent there was some indication (without dates) of the claimant having sickness absence. It is a requirement when considering a just and equitable extension of time for relevant factors for the late presentation of a claim to be considered, in the absence of evidence, where the pleaded case does not demonstrate the

reason is insufficient, the Employment Judge did not have a proper basis to conclude that there was little reasonable prospect of success. In any event the judgment does not give reasons for the decision and is not **Meek** compliant.

HIS HONOUR JUDGE WAYNE BEARD:

Introduction

1. This appeal, against an interlocutory decision of Employment Judge Burgher in the East London Tribunal, concerns deposit orders and background evidence in a discrimination claim. There are two Grounds of appeal:

i The tribunal erred by effectively "striking out" the claimant's background facts;

ii The tribunal gave insufficient reasons and came to erroneous conclusions in deciding to make a deposit order relying on time limits.

I shall refer to the claimant and respondent as they were at the Tribunal hearings.

2. The claimant, then acting without representation, presented his claim to the Employment Tribunal on 30 January 2020. The ET1 presented by the claimant was insufficient and an order that further details should be provided was made by Employment Judge Tobin. The further details indicated that the claimant contended he had suffered direct discrimination and harassment on racial grounds, he also complained of victimisation (in addition there was a claim for unpaid holiday pay).

i The direct discrimination complaint (also relied on as a harassment complaint in paragraph 19) is set out at paragraphs 17.1 to 17.7 of the further details provided and relates to alleged conduct by two named colleagues between January 2019 and 23 January 2020 detailed as:

a. comments being made about designer clothing and accessories worn or carried by the claimant;

b. accusations of using a mobile telephone in the office;

c. touching the claimant on the shoulder and asking "what is wrong with you" in a patronising way;

d. declaring during the claimant's sickness absence that he was absent because of dealing drugs to younger colleagues;

e. failing to follow up the claimant's complaint about the comment on drug dealing

until a complaint was raised;

f. not dealing with the complaint fairly and providing a result which was unfair and downplayed the incident;

ii The complaint at 17.8 is of a specific incident on 2 September 2019 where it was alleged a third colleague accused the claimant of being intimidating.

3. The victimisation complaint relies on a grievance raised about the drug dealing comment, and concerns raised by the claimant about racism and stereotyping. The claimant complains about the failure to deal with the former and adverse treatment such as recording a non-working day as leave and placing the claimant on a performance review.

4. Those further details also indicated that the claimant contended that he had experienced incidents of racially discriminatory treatment from 2009 onwards. In paragraphs 5 to 13 of the further information document the following allegations are made as demonstrating a culture:

i In 2009 he and two other black colleagues were singled out by a manager after an audit on work levels. His two colleagues were dismissed but, because of direct evidence from his line manager, he was not. He names three white individuals who were "idle" but who were not treated in that way;

ii In 2009 after expressing an interest in promotion, a white individual with less service was promoted when he was not;

iii In 2010, because of adverse weather, other colleagues were permitted an option of using a taxi at the respondent's expense, whereas the claimant's address was given, without his permission, to a colleague who he was told would be picking him up. That arrangement was made without the claimant being given a choice;

iv In 2010 that the claimant had been video recorded by a fourth colleague, who told others with reference to also video recording another person, who was also black;

v In 2011 a shift change was imposed, white colleagues were allowed to change because of family responsibilities where the claimant was not;

vi In 2012 the claimant was disciplined for not wearing a headset, where other white colleagues were not;

vii In 2013, the claimant was not given an annual pay rise as his white colleagues;

viii That the claimant's complaints about these matters were not dealt with;

ix Between 2017 and 2018 the claimant was challenged on the authenticity of medical certificates by a fourth colleague, whereas his white colleagues were not.

5. There is reference in the claim form to medical certificates and the ET3 refers to a period of sickness absence ending in March 2020.

6. The Employment Tribunal hearing had originally been listed to consider a strike out application by the respondent. However, due to practical problems, arising from Covid issues, the Judge converted the hearing to a case management hearing. However, the judge still went on to decide the issue of whether Deposit Orders should be made.

Submissions

7. The claimant's submissions were that:

i In respect of Ground 1:

a. The Employment Judge had not properly considered the relevance of the background evidence. That the background evidence is relevant to the claimant's case here, in particular, when examining the further details paragraph 8. That relates to the same department in which the claimant was working and involves an allegation that in 2010 assertions made about the claimant being a drug dealer, which related to him owning a BMW. This allegation is supported in contemporaneous documents belonging to the respondent. This 2010 allegation is relevant to similar assertions relating to drug dealing in the complaints that were allowed to go forward by the Judge. Ms Godwins also referred to paragraphs 10 and 13. In those paragraphs allegations of discrimination involved a perpetrator who is also complained about in the live claims.

b. Ms Godwins continued by indicating that background is important in discrimination cases in supporting the drawing of inferences. In addition, she argued that it is important in deciding whether such conduct supports a conclusion that a permissive environment is created for discriminatory behaviour.

c. The Employment Judge heard no evidence and was solely reliant on submissions. It is apparent from his reasoning that he had taken account of difficulties for the respondent in dealing with those old complaints. However, he did not approach the question of relevance in his conclusions.

d. That **HSBC Asia Holdings BV & Anor v Gillespie** [2011] IRLR 209 required an enquiry into the relevance of background evidence to the pleaded claims;

e. That the Employment Judge, having heard no evidence, on the relevance of the background matters to the claim a should not have excluded it;

ii In respect of Ground 2:

a. That the tribunal did not hear evidence from the claimant on time points;

b. Based on the *ratio* in both **Van Rensburg v The Royal Borough of Kingston-Upon-Thames & Ors.** [2007] UKEAT 0096/07 and **Tree v South East Coastal Ambulance Service NHS Foundation Trust** UKEAT/0043/17 there should be an evidential basis for the Tribunal to conclude that there was little reasonable prospect of the claimant establishing an essential fact of the claim, here that it would be just and equitable to extend time.

8. The respondent submitted that:

i. In respect of Ground 1:

a. There was no effective striking out, there was a case management order under rule 29 **Employment Tribunals Rules of Procedure 2013**.

b. That as such it was an appropriate discretionary order for the Judge to make as

it related to the "conduct of the hearing" as permitted by rule 53(1) of the **2013 Rules**.

c. That submissions were made by both parties;

d. That the Tribunal was not required to consider a general inquiry into the respondent's culture, only specifics of the allegations made;

e. Relying on **Adams and Raynor v West Sussex County Council** [1990] IRLR 215 that the Appeal Tribunal can only review the exercise of discretion insofar as it amounts to an error of law, with three questions: did the Judge have the power to make the order? Did he exercise his discretion in making the order? Was the discretion exercised taking account of **Wednesbury**[1] reasonableness?

a. That the exclusion of the evidence was also made on the basis of the overriding objective.

b. That there is only one of the matters referred to as background that could be said to show overt racism. The remainder could only be considered racist if inferences were drawn.

c. **Gillespie** doesn't require the hearing of oral evidence, the exercise is solely considering relevance, the Employment Judge was entitled to undertake that exercise based on the pleadings. He argued that the substantial impact on the respondent's preparation was taken account of in **Gillespie** as a reason to deal with the matter at a preliminary hearing. The background was not sufficiently relevant to the claims, it was old and generally didn't involve the same people and on that basis this case was on all fours with **Gillespie**.

d. The Judge saw the further information and the nature of the allegations. There were individuals no longer employed by the respondent and if the claimant were

[1] Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223

allowed to give evidence of the background matter that would involve carrying out a significant enquiry with consequent difficulties in the preparation of the case.

ii In respect of Ground 2:

a. The Employment Judge correctly reminded himself of the Law both in terms of the rules and case law;

b. The Employment Judge gave his reason for ordering the deposit, that the claims were discrete matters and because of that there was little prospect of the claimant establishing it was just and equitable to extend time.

9. In reference to Ground 1 in the Employment Tribunal Judgment, having referred to the claimant's contention that there was a culture of discrimination, at paragraph 13 the Employment Judge states that the claimant's:

> "allegations between 2010 and 2019 involve a wide range of different issues and people ------ it is not the Tribunal's task to undertake a general enquiry into a culture of discrimination within the Respondent. The Tribunal is required to consider whether specific people committed specific--- acts"

10. He then goes on to draw these conclusions in paragraph 14:

> "it would not be fair, just or appropriate for the Claimant to seek to circumvent the time limits required for allegations to be made and allow an enquiry to be embarked upon as to what allegedly happened between 2010 to 2019. The Claimant raises disparate allegations and claims relating to different alleged proponents of discrimination. ------I do not allow the Claimant to refer to background information ---- specified in for (*sic*) paragraphs 5 to 13--- as part of the ----Claims----. These matters should have been brought as specific Tribunal complaints against the relevant people at the relevant time and it is not in accordance with the overriding objective for such matters to be considered as purported background."

11. The Employment Judge in dealing with the issue of the deposit order states at paragraph 17 (and repeated in toto at paragraph 19 in respect of the claim of harassment) that the allegation relating to paragraph 17.8 of the further details was a discrete act of discrimination. He provides a conclusion that there was little prospect of the claimant being able to (a) show the claim was in time (b) that the claimant could establish it was just and equitable to extend time on that complaint.

The Law

12. The **Employment Tribunal Rules of Procedure 2013** provide as follows:

i Rule 29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. The particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

ii Rule 39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

iii Rule 53.—(1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the following—

(a) conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);

(b) determine any preliminary issue;

(d) make a deposit order under rule 39;

13. The approach to appeal of an interlocutory order of this nature is as set out in **Adams and Raynor v West Sussex County Council** [1990] IRLR 215. The Appeal Tribunal does not have a general power of review of interlocutory orders made by an Employment Judge. An appellant must demonstrate that an Employment Judge had erred in legal principle in the exercise of the discretion or had failed to take into account relevant considerations or had taken irrelevant factors into account, or that no reasonable tribunal, properly directing itself could have reached the conclusion that the Judge did.

14. In **Gillespie** answering his own question upon the relationship between relevance and admissibility Underhill J stated:

> "That question is reviewed in Phipson on Evidence (17th ed.) at para. 7-07. In my view the language of "sufficient relevance" gives a better idea of the nature of the judgment required; but the difference is one of terminology only. Likewise, it makes no real difference, as Hoffmann LJ observes in ***Vernon v. Bosley***, whether the exercise of judgment required is described as the exercise of a discretion."

Thus revealing that any question of admissibility is a judicially exercisable discretion. He also goes on to indicate, because it is notorious that in discrimination claims there is a tendency to introduce many incidents of alleged ill treatment, that may be the type of case that may benefit from a preliminary hearing on the admissibility of evidence. However, he also states that where there is "genuine room for argument about the admissibility of the evidence, a tribunal at a preliminary hearing may be less well placed to make the necessary assessment". At sub paragraph 10 of paragraph 13 of the Judgment the following is set out:

> "Whether a pre-hearing ruling on admissibility should be made in any particular case will depend on the circumstances --------- it will not always be possible to make a reliable judgment on the issue of relevance at an interlocutory stage. In the context of discrimination claims in particular, tribunals will need to bear in mind --------- that such cases are generally fact-sensitive --------- (p)rior incidents which are not complained of in their own right (typically because they are out of time) may still be important as shedding light on whether the acts complained of occurred or constituted discrimination-------- **Anya v. University of Oxford** [2001] ICR 847, ----------(b)ut each case is different, and caution should not be treated as an excuse for pusillanimity. If a Judge is satisfied on the facts of a particular case that the evidence in question will not be of material assistance in deciding the issues in that case and that its admission will (in Hoffmann LJ's words) cause "inconvenience, expense, delay or oppression", so that justice will be best served by its exclusion, he or she should be prepared to rule accordingly."

15. In **Tree v South East Coastal Ambulance Service NHS Foundation Trust** UKEAT/0043/17 it was held that when making a Deposit Order, an Employment Tribunal needs to have a proper basis for doubting the likelihood of a claimant being able to establish the facts essential to make good their claim. In other authorities cited before me it is clear that there is no requirement for evidence to be given if there is sufficient material for such a conclusion on a proper basis. Further it is clear that such decisions are not confined to legal issues but may rely on factual matters even

those in dispute.

Discussion

16. In respect of Ground 1:

i The Employment Judge was entitled to consider this question without evidence. The further details delineate between complaints and background and set out the facts of each as they would be relied upon at a hearing. There is nothing to prevent a judge, considering such a pleading, asking how relevant is that fact, pleaded as background, to that live complaint which the tribunal has decide.

ii In a similar way the Judge was entitled to consider the matter as a preliminary point. **Gillespie** points out that a negative impact on preparation for a substantive hearing, may be a good reason for it to be considered appropriate to deal with admissibility of evidence at a preliminary hearing. Here the respondent was pointing to the length of time since the events complained of and the difficulties both with a turnaround of staff and with memories fading with the effluxion of time. I can see no legitimate criticism of the Employment Judge considering this issue as a preliminary point given that background. Indeed, given those problems the Employment Judge, might have been described as showing "pusillanimity" if he had not at least considered the issue.

iii Dealing further with ground 1, the Employment Judge clearly had in mind factors of relevance. His indication at paragraph 13 of the Judgment demonstrates that when he refers to different issues and people. Despite the attractive submissions of Ms Godwins as to the specific relationship between events in 2009 through to 2013, it seems to me that in answering the question whether there was sufficient relevance, as required in **Gillespie**, the Employment Judge took account of the distance in time; he was entitled to do so. Even if there were some connections the Employment Judge was entitled to say that the passage of time had worn away those connections. I do not consider he can be criticised in that regard.

iv However, paragraph 13 of the further details, contains information of much more recent matters in 2017 and 2018. The absence of relevance therefore is less obviously clear. Miss Godwins referred to the fourth colleague as being mentioned at paragraph 13 and also in the live complaints at paragraph 20.3 of the further details. However, the connection to the later pleaded element simply records that the claimant had a conversation with her where he contended that treatment he had endured had been as a result of racism. I take the view that given the approach in **Gillespie** the Employment Judge gave sufficient reasons for concluding that there was insufficient relevance between those events and the complaints about the specific conduct of his other two colleagues when he stated that there were different issues. I do not uphold this aspect of the appeal.

17. In respect of Ground 2 the Judge considered the judgments in **Van Rensburg** (above) and **Hemdan v Ishmail and Al-Megraby** UKEAT/0021/16. It is clear that he was carefully balancing the appropriate questions as to whether a deposit order should be made. However the question for me is whether he had sufficient material to provide a proper basis for him to decide that there was little reasonable prospect of establishing the time limits issue.

i The finding that paragraph 17.8 of the further details is a discrete incident, given the description of the incident and the person involved, is in my judgment something the Employment Judge was entitled to conclude. Given the incident complained of was dated as 2 September 2019 and the claim was not presented until 30 January 2020, I also have little difficulty in also concluding that a finding the primary time limit had expired was decided on a proper basis.

ii However, I looked for the reasoning that supported a conclusion that there was little prospect of a Tribunal considering that it was just and equitable to extend time. A just and equitable extension of time requires consideration of the circumstances relevant to the reason for late presentation along with other matters. Employment Tribunal Judgments need to be considered in the round and not treated as Chancery documents. However, I

was not able to find such reasoning within the body of the Judgment, even read as a whole. When I asked for assistance as to where I might find the reasoning for a finding that there was little reasonable prospect of the claimant establishing it was just and equitable to extend time, Mr Smith conceded that there was none he could point to.

iii In my judgment, in circumstances where, on the face of the materials before the judge there was an indication (without dates) of a sickness absence and the provision of medical certificates which might have relevance. But, where there was no evidence from the claimant about that beyond the pleadings, and the only material was the time limit itself. I do not consider that there was a proper basis for the Employment Judge to conclude that there was little prospect of time being extended. It is a requirement when considering a just and equitable extension of time for relevant factors for the late presentation to be taken account of. In the absence of evidence, unless the pleaded case demonstrates such reasons, the evidence is, as here, insufficient. The Employment Judge did not have a proper basis to conclude that there was little reasonable prospect of success. In any event the Judgment does not give reasons for the decision and is not **Meek**[2] compliant.

18. Having considered the requirements set out in **Sinclair Roche & Temperley & Ors v. Heard & Anor** [2004] UKEAT 0738/03, I consider that there is no reason why this cannot be remitted to Employment Judge Burgher, (unless for administrative convenience the Regional Employment Judge considers it appropriate to assign to a different Employment Judge) it will be for him (or a substitute) to consider the just and equitable time issue afresh and decide whether a deposit should be ordered or the issue dealt with at any substantive hearing.

[2] Meek v City of. Birmingham District Council [1987] IRLR