Neutral Citation Number: [2024] EAT 27

Case No: EA-2021-000933-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 February 2024

Before:

BRUCE CARR KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MISS B PAWLICKA

Appellant

- and –

GREGORY PARK HOLDINGS LTD
T/A FOUR SEASONS HOTEL

Respondent

- -
- -

Miss Barbara Pawlicka the **Appellant** in Person
Mr Benjamin Phelps (instructed by **Couchman Hanson**) for the **Respondent**

Hearing date: 6 February 2024

- -

JUDGMENT

SUMMARY

Practice and procedure

The claimant filed an ET1 in which she advanced health and safety related claims under sections 44 and 100 Employment Rights Act ("ERA"). Those claims were struck out as she was not an employee within section 230(3)(a) ERA. She claimed however that the ET should have recognised that she had whistleblowing claims which she was entitled to advance on the basis that she was a worker within section 230(3)(b). However, given that such claims were not clearly advanced at any stage by the claimant prior to her health and safety claims being dismissed, the ET had not made any error of law in failing to recognise or acknowledge the existence of such claims.

BRUCE CARR KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. I will refer to the parties in this judgment by reference to the titles they held in the Employment Tribunal, namely claimant and respondent.

2. This appeal raises the question of the approach to be taken by a Tribunal in identifying the claims which are being brought before it. The particular context is the extent to which a detriment claim under the Employment Rights Act 1996 (**ERA**) is being pursued. The appeal is in particular against the judgment of the Employment Tribunal (Employment Judge Midgley ("**EJ Midgley")**) dated 21 January 2021. Under that judgment the Employment Tribunal had concluded that the claimant's claim which she had pursued under section 44 of the **ERA** (health and safety detriment) should be dismissed. This was on the basis that in order to bring a claim within that section it was necessary for the claimant to show that she was an employee within section 230(3)(a) **ERA**.

3. The matter was first considered in this Tribunal by HHJ Tucker on 6 June 2022. She ordered a preliminary hearing which came before HHJ Beard on 12 January 2023. He allowed the appeal to proceed on a single ground, namely whether the case should have been struck out as it was one that could be advanced under section 103A or section 47B **ERA**, namely whistleblowing claims, on the basis that the claimant was a worker within section 230(3)(b) **ERA** and therefore may be able to bring such claims.

Relevant facts and procedural background

4. The ET1 in this case was presented to the Employment Tribunal on 17 August 2019. In her Employment Tribunal form ("**ET1 Form**"), the claimant recorded that she had worked for the respondent as housekeeper and that her employment began on 12 October 2018 and came to an end on 3 June 2019. Under box A in the ET1 Form under the heading 'Type of claim', the claimant ticked

the box 'I was unfairly dismissed', but then also ticked the box under the heading 'I am making another type of claim which the Employment Tribunal can deal with', under which she wrote this:

> **"I feel I was dismissed for the assertion of a statutory right relating to health and safety after an accident at work not to my own negligence.".**

5. Under box 8.2 under which she was invited to provide further background and details of her claim, she wrote this:

> **"It has been reported to me that the local GP had concerns with Four Seasons Hampshire with regard to its employees being pressurised to work while sick. This convinced me that I should make a claim upon ACAS reassurance that any dismissal for health and safety reasons is automatically unfair.".**

6. Then under box 9.2 in answer to the question, 'What compensation or remedy are you seeking?', the claimant wrote this:

> **"I am aware of the implications of health and safety for employers but I so far requested nothing but my employer telling me they were sorry for what happened to me. I was injured at work, not due to my own negligence. I was pressurised to continue while injured. I was then dismissed on H&S grounds.".**

7. And then finally under box 15, 'Additional information', the claimant wrote this:

> **"Dear sirs, I identified breaches of section 44 of the Employment Rights Act and health and safety legislation. I suffered detriment after I had to bring up health and safety matters after my accident as contrary to legislation. My employer did not provide me with an accident reporting form nor first aid report was made.".**

8. Then below that appeared the following:

> **"Legal base are Employment Rights Act 1996, section 44, which gives me the right to bring this claim in an event of suffering as a result of H&S procedures. Section 100 I have brought to the employer's attention with my work which I believed potentially harmful to health and safety.".**

9. After the Respondent submitted its Notice of Appearance ("**ET3**") the matter came before Employment Judge Livesey who considered the contents of the pleadings and ordered that a

preliminary hearing take place on 27 May 2020. The purpose of that hearing was identified in the letter from the Tribunal of 3 April 2020 as including "an identification of the issues which will be determined at the final hearing".

10. A telephone preliminary hearing then took place on 27 May 2020. The claimant did not attend. The respondent did attend and was represented by counsel. At that hearing a further preliminary hearing was ordered in order to determine the question of whether or not the claimant was an employee or worker. In addition, the purpose of that further preliminary hearing was to "then confirm the issues". In addition, the case management summary recorded this under paragraph 8:

> **"The email and previous correspondence in respect of this claim were then discussed with Mr Phelps [counsel for the respondent]. He confirmed that he was unaware of the other Tribunal claims the claimant may have made and was also unclear on what basis she relied upon section 44 and/or section 100 of the Employment Rights Act.".**

11. Then at paragraph 15, the Judge recorded as follows:

> **"It was not possible to agree the issues with the parties at this hearing as the claimant did not attend. The Employment Judge suggests the issues in this claim appear to be as follows …".**

12. The Judge then set out a number of specific matters, the first one being whether or not the claimant was an employee or worker. Before dealing under the heading, 'Health and Safety related claims/claims', the Judge raised a question as to the basis upon which the claimant said she was protected pursuant to section 44 and/or section 100 **ERA**.

13. Orders were made following that case management hearing which included a requirement that the claimant provide further information regarding her claim, in particular, "her answers to the questions raised in the suggested issues at paragraph 17.1-17.5 above".

14. The claimant duly provided particulars by an email dated 18 June 2020 in which she specifically addressed the list of issues which had been identified at paragraphs 17.1 to 17.5 without making any

express reference to any claim which may have existed beyond the pleaded claims under section 44 and section 100 **ERA**. There was also within the body of that email a reference to an email which the claimant had sent on 26 May which was said to be "a disclosure in writing", but no more was said about that beyond the mere statement that this email had been sent and had been described as a disclosure.

15. In advance of the preliminary hearing which took place on 6 August 2020, the claimant provided a skeleton argument which again contained no reference to any matter which might suggest that she was intending to advance a whistle blowing claim by reference to either section 47B, or section 103A **ERA**. She advanced the claim that she was an employee consistent with her wish to bring claims under section 44 and section 103 which are claims which are available only to employees, ie, those who are employed under a Contract of Employment. There was, I have said, no obvious signposting of any whistle blowing claim.

16. The judgment in respect of that preliminary hearing was sent to the parties on 18 November 2020. The judgment itself was set out in three paragraphs. Under paragraph 1, EJ Midgley concluded that the claimant was not an employee of the respondent but was a worker for the purposes of section 230 **ERA**. It followed from that under paragraph 2 of the judgment that she was not entitled to bring claims of unfair dismissal pursuant to sections 94 and 100 **ERA**, and that the claims under those sections were then struck out. There was, however, a wrinkle in respect of the claim brought under section 44 **ERA**. The Judge did not determine the question at that stage as to whether that claim should be struck out but invited written argument to be provided to him on the effect of a High Court decision in a judicial review application brought by the Independent Workers' Union of Great Britain, that case being reported as **The Independent Workers' Union of Great Britain R (On the application of) v The Secretary of State for Work and Pensions and Others** [2020] 11 WLUK 139.

17. The reason for that third component of the judgment was that the Judge wanted to give the parties a chance to state their position as to whether in consequence of the **IWGB** judgment, the claimant was in fact able to pursue a section 44 claim. The judgment in the **IWGB** case had in short, held that the UK had failed properly to implement Articles 8(4) and 8(5) of the EU Framework Directive in failing to provide for protection for workers as opposed to employees under sections 44 or 100. The Judge was interested in the question of whether section 44 could in fact be interpreted in such a way as was compatible with the relevant provisions of the Framework Directive, a point which he considered had not been addressed in the High Court's decision.

18. The claimant duly provided her submissions on 9 December 2020, which on the face of it was done in direct response to the Judge's request that this be done, Notwithstanding that, she did in fact refer to a protected disclosure on the second page of her submissions under numbered paragraph 2. She said this:

> "**Where the decision will be held that the claimant was an employee I request a liability only judgment under rule 21 with regards to my claims including the right to a protected disclosure under Public Interest Act**.". (sic).

19. The outstanding issue of how to proceed in the light of the **IWGB** judgment was then dealt with by EJ Midgley in a judgment sent to the parties on 29 January 2021. Under that judgment the claimant's claim under section 44 **ERA** was dismissed. The reasons for that judgment were not provided until much later, not indeed until 11 March 2022 due to an error on the part of the Employment Tribunal. In the reasons which were eventually provided, EJ Midgley , having received the claimant's submissions of 9 December 2020, recorded that the section 44 claim should be dismissed as the decision in the **IWGB** case did not change the law under which that section provided a right to employees only and not to workers. It was also suggested that there needed to be finality in litigation and that meant that there should not be a further delay given at that point there was no

indication that **IWGB** case was going to be appealed. And in any event, both scope and outcome of any such putative appeal was uncertain.

20. The claimant appealed against the original judgment by a Notice of Appeal sent on 4 March 2021. The Notice of Appeal took a number of points, primarily challenging the procedural fairness of the process as well as the conclusion on employment status. The Notice did not contain a reference to a whistle blowing claim, or indeed any other reference to a protected disclosure.

21. The claimant had also made an application for reconsideration of the judgment of 29 January by writing to the Tribunal on 30 January 2021. In that application there was again no suggestion that a whistle blowing claim had been overlooked or was one which the claimant had always intended to advance.

22. On 30 March 2021, the Employment Judge provided reasons for rejecting the application for reconsideration, it being said that the application had no reasonable prospect of success and therefore was rejected under rule 71(2) Employment Tribunal Rules 2013.

The Legal Framework

23. The key question on this appeal is the extent to which a Tribunal can be expected to address claims which are not immediately apparent on the face of the ET1 submitted by a claimant. The first authority to which I have to have regard is a decision of the Employment Appeal Tribunal in **Hyde Walsh v Ashby** UK EAT/0463/07. In that case, the ground of appeal advanced on behalf of the claimant was on the basis that once the Tribunal had found that she was a worker, that finding having been made in a different context, it should nevertheless have recognised that she was entitled to bring a protected disclosure claim on the back of the conclusion as to worker status.

24. At paragraph 13 of the judgment given by HHJ Birtles, the issue was described as follows:

> **"In essence, the Appellant submits that having decided that the Appellant was a worker within section 233 of the Employment Rights Act 1996, they should have gone on to decide that she made a protected disclosure under section 47(b) of the 1996 Act and was therefore entitled to compensation. The Appellant's case is that such a contention was clear in the light of the language used by her in paragraph 5.1 of her complaint form.".**

25. The conclusion reached in that case and set out at paragraph 22 of the Judgment was as follows:

> **"…a failure (if that it be) by the Employment Tribunal in this case to flag up or raise the question of whether or not the Appellant was seeking to make out a case that if the Employment Tribunal found that she was a worker within section 230(3) of the 1996 Act she was also making a claim for compensation for making a protected disclosure under section 47B of the same Act does not give rise to an error of law. To hold otherwise would be to put an intolerable duty upon an Employment Tribunal.**"

26. The second authority which it seems to me to be relevant to this appeal is the Court of Appeal decision in **Muschett v HM Prison Service** [2010] EWCA Civ 25. Ground 1 of that appeal addressed the issue of whether an Employment Tribunal could be criticised for not engaging a fact finding exercise which might have led them to conclude that there was an implied Contract of Employment in circumstances in which they had rejected arguments based on an express contract. The relevant part of the judgment of Rimer LJ appears at paragraphs 29 to 32 as follows:-

> **"29. In my judgment, there is no substance to this ground of appeal. First, as regards Mr Hopkin's point that the employment Judge had a duty towards Mr Muschett, as a litigant in person, to engage in an inquisitorial investigation of the background facts with a view to assisting Mr Muschett to make a case before the tribunal, I consider that Mr Hopkin overstated the employment Judge's duties.**
>
> **30. In *Lemas and Another v Williams* [2009] EWCA Civ 360, in a judgment with which Sullivan and Mummery LJ agreed, I said this:**

> **'57. … Mr Lemas represented himself and, like any litigant in person, he enjoyed a degree of autonomy as to the manner in which he conducted his case. Trying cases in which a party is representing himself can be amongst the more difficult judicial tasks. Judges should be, and are, properly sensitive to the disadvantages that such litigants face; and will ordinarily do their best to ensure that the unrepresented litigant has a proper opportunity to present his case fully. This may, for example, require the granting of adjournments in circumstances in which no like adjournment would be granted to a represented litigant. It may require a degree of indulgence during the litigant's examination of witnesses. It may require the Judge to take a firm line in keeping the litigant to the relevant issues.**
>
> **57. There are, however, limits to what a Judge can and should do in order to assist such a litigant. It is for the litigant himself to decide what case to make and how to make it, and what evidence to adduce and how to adduce it. It is not for the Judge to give directions or advice on such matters. It is not his function to step into the arena on the litigant's side and to help him to make his case….'**

31. Those observations were made in the context of a challenge to a decision of a Circuit Judge but I consider that essentially similar considerations apply to Employment Judges. It is not their role to engage in the sort of inquisitorial function that Mr Hopkin suggests or, therefore, to engage in an investigation as to whether further evidence might be available to one of the parties which, if adduced, might enable him to make a better case. Their function is to hear the case the parties choose to put before them, make findings as to the facts and to decide the case in accordance with the law. The suggestion that, in the present case, the Employment Judge committed some error of law in failing to engage in the sort of inquiry that Mr Hopkin suggested is, in my judgment, inconsistent with the limits of the role of such Judges as explained by this court in Mensah v East Hertfordshire NHS Trust [1998] EWCA Civ 954; [1998] IRLR 531 (see paragraphs [14] to [22] and the cases there cited by Peter Gibson LJ). Of course an Employment Judge, like any other Judge, must satisfy himself as to the law that he must apply to the instant case; and if he assesses that he has received insufficient help on it from those in front of

> **him, he may well be required to do his own homework. But it is not his function to step into the factual and evidential arena.**
>
> **32. I would not therefore accept Mr Hopkin's submission that the Employment Judge failed to perform some supposed duty to help Mr Muschett to unearth and advance all facts that might have been available to him to aid his case. In any event, Mr Hopkin gave us no indication of what those further facts might have been. Mr Muschett did of course give oral evidence and for all I know he may in doing so have expanded on the contents of his written evidence. As, however, we have no note of that evidence, we have no idea what it was.".**

27. There is obviously a difference between that case and this in that it dealt with the extent to which the Employment Tribunal is obliged to engage in a fact-finding exercise or fact-finding enquiry as opposed to examining the legal bases upon which a claim might be being pursued. Nevertheless, it seems to me that the observations made by Rimer LJ are equally applicable to the situation that I have before me.

28. The third authority to which I will refer is another Court of Appeal decision, this time in the case of **Drysdale v The Department of Transport** [2014] EWCA Civ 1083. The facts of that case are different in that it was one in which the claimant had withdrawn his claim during the course of a hearing following which the Tribunal was invited to, and did, dismiss the claim. He then apparently had second thoughts about having withdrawn the matter and asked for the Employment Tribunal to review its decision. At paragraph 2 of his judgment in the Court of Appeal, Barling J, in setting out the scope of the appeal, said this:

> **" The Appellant applied to the ET for a review of its decision (see paragraph 33 below), which was refused on 7 December 2011. On 28 March 2012 the Employment Appeal Tribunal ("EAT") (The Hon Mrs Justice Slade) granted the Appellant permission to appeal against the original decision of the ET. The EAT gave its judgment on 13 February 2013, dismissing the appeal. Permission to appeal that decision was refused on the papers, first by the EAT itself and then by a single Lord**

> **Justice. At a renewed oral hearing on 3 December 2013 Lord Justice Elias granted permission on the following ground:**
>
> > **"whether having regard in particular to the overriding objective and the fact that neither the claimant nor his representative were legally qualified, the Employment Tribunal erred in law in failing to take adequate steps to ensure that the claimant had taken a properly considered decision to withdraw the claim."**
>
> **In his ruling Lord Justice Elias emphasised that he was granting permission only on this single limited point, and not on any of the other proposed grounds of appeal. That is the sole question now before us.".**

29. The claimant's assertion was that the withdrawal was from someone who lacked courtroom experience and had had a very stressful day at the hearing. He argued that the Employment Tribunal had been all too quick to accept the withdrawal without giving him a chance to make a considered decision as to whether or not that was in fact the path he wished to pursue. After an extensive review of the relevant authorities, Barling J (with whom the other two Judges of the Court of Appeal agreed) outlined certain principles which he derived from those authorities and which appear to me to be relevant to the exercise that I am dealing with today:

> **"49. From the authorities to which Mrs Drysdale referred (see above) I derive the following general principles:**
>
> > **(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.**
> >
> > **(2) What level of assistance or intervention is "appropriate" depends upon the circumstances of each particular case.**
> >
> > **(3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any**

> **case, the apparent level of competence and understanding of the litigant and/or his representative.**
>
> **(4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the Tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.**
>
> **(5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the Tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.**
>
> **(6) There is, therefore, a wide margin of appreciation available to a Tribunal in assessing such matters, and an appeal court will not normally interfere with the Tribunal's exercise of its judgment in the absence of an act or omission on the part of the Tribunal which no reasonable Tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant.".**

30. The respondents place particular weight on the sixth principle outlined by Barling J which recognised the wide margin of appreciation that a Tribunal has and the intensity of the review on appeal, an intervention by an Appellate Court being warranted if no reasonable Tribunal would have done or omitted to do that which is under consideration in the instant appeal.

Submissions - The Claimant's case

31. The claimant's case is really that there was sufficient reference made in her ET1 and other documents to indicate that she was in fact pursuing a whistleblowing claim. Her case was that the whistleblowing claim supersedes any other legislation and that the Tribunal should have recognised the paramount status of a claim of that sort. She pointed in particular to box 15 on the ET1 form in which she had stated that she had brought to her attention matters which she believed to be potentially harmful to health and safety, and that she had suffered a detriment after bringing up health and safety

issues after her accident. She said the ET1 form had been completed in a very short space of time after the respondents had apparently wrote to her saying that her engagement with them was at an end.

Submissions - The Respondents' case

32. The respondents answer to this appeal was to submit that there was no whistleblowing claim identified in the ET1 form and that thereafter there were ample opportunities for the claimant to have raised such a claim had she wished to but she had not in fact done so. Mr Phelps submitted that there was no error of law in EJ Midgley's decision to dismiss the section 44 **ERA** claim without going on to consider whether there was in fact any remaining or residual whistle blowing claim which the claimant wished to advance.

Discussion

33. I am bound to accept the respondents' submissions and dismiss this appeal. The starting point is to consider the contents of the ET1. It unequivocally advanced claims only under sections 44 and 104 **ERA**. The specific statutory language of those claims is set out by the claimant and there is no obvious clue to the Employment Tribunal that a protected disclosure and whistleblowing detriment in fact lies within the claims being advanced. The Employment Tribunal therefore cannot be criticised for framing the matter as Employment Judge Gray did following the preliminary hearing on 27 May 2020, she having examined the ET1 and "suggested" that the issues were limited to worker status and the claims brought under section 44 and 100 **ERA**.

34. This was, however, her suggested list and the case management order that she made indicated that the issues would be confirmed at the next preliminary hearing at which the issue of worker status would also be considered. She also ordered that the claimant should provide her response to the suggested list of issues. The claimant indeed did this by her email of 18 June 2020, and whilst that

document referred to a detriment at one point, and also at one point uses the word 'disclosure', again, the Employment Tribunal was entitled to treat that document as a whole as accepting and expanding on the list of issues as suggested by Employment Judge Gray rather than seeking to introduce, or at least flag, some additional claim based on whistleblowing.

35. The claimant then provided her written submissions for the purposes of the preliminary hearing on 6 August 2020 at which worker status was determined. There is nothing within that document which could be seen in my view as a signpost to a whistle blowing claim.

36. Then at the hearing itself on 6 August 2020, I have seen no evidence to suggest that a whistle blowing claim was raised and therefore EJ Midgley dealt with the issue as it had been framed by EJ Gray, namely whether the claimant was entitled to bring an unfair dismissal claim under section 100, or a detriment claim under section 44 in the event that she was able to establish employee status.

37. Following the preliminary hearing on 6 August 2020, EJ Midgley set out his understanding of the section 44 claim and the test for worker status under section 230. Again, it seems to me there is no basis on which to criticise the Judge for proceeding in the way that he did at the preliminary hearing held on 6 August 2020. He then adjourned the matter for further submissions on the outstanding section 44 point based on the High Court decision in the **IWGB** case. Further submissions were invited. The claimant's submissions were sent by her email of 9 December 2020. As I have already indicated, those submissions did contain a passing reference to protected disclosure under what was described by the claimant as the "Public Interest Act" but was plainly intended to be a reference to the Public Interest Disclosure Act.

38. From the reasons belatedly provided by the Employment Judge for the judgment given on 29 January 2021, it is apparent that he did not pick up that reference to which I have just referred as being an indication on the claimant's part that she was advancing, or wished to advance, claims based on section 47B or section 103A **ERA**.

39. The claimant's case, given the authorities to which I have referred, must amount to an argument that no reasonable Tribunal would have omitted to open up the possibility of whistleblowing claims being advanced within the existing proceedings. I cannot accept that the duty on the Employment Tribunal extended that far. The claimant had chosen to put her claims by reference to sections 44 and 104 **ERA**. She had effectively signed up to a list of issues which put the case in a similar way. She had stuck to that course in her submissions for the purposes of the hearing on 6 August 2020, and it would appear she did so at the hearing itself.

40. Whilst the 9 December 2020 email does contain a suggestion that the claimant may have some claim under section 47B or section 103A, given all that had gone before and the stage which had been reached at the proceedings, there is in my view no error of law in the Employment Judge omitting to re-open proceedings and determine the potential scope of any claims which had not to that date been advanced.

41. For those reasons I dismiss the appeal. I should, however, finish by paying tribute to the courteous and articulate way in which the claimant has advanced her arguments in this appeal. It is never a straightforward task to represent yourself, especially in an Appellate Court, but she did so effectively and with good grace for which I extend my thanks. Thank you also, Mr Phelps, for your help.