Neutral Citation Number: [2023] EAT 53

Case No: EA-2020-000775-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

16 November 2022

Before :

HIS HONOUR JUDGE MARTYN BARKLEM

- -

Between :

MR M HUMED **Appellant**
- and -
SIGHT AND SOUND SECURITY SOLUTIONS LIMITED

Respondent

- -
- -

Mr J Stuart (instructed by Advocate) for the **Appellant**
Ms S Clarke (instructed by Ashfords LLP) for the **Respondent**

Hearing date: 16 November 2022

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JUDGMENT

SUMMARY

Victimisation

An Employment Tribunal erred in striking out a claim of victimisation under the Equality Act. The claim was prolix and badly worded by a litigant in person for whom English was not his first language. It was difficult to understand. Attempts to ascertain the true basis of the claim had served only to complicate matters. It was understandable, in the course of a busy list, that the true basis for the claim was not identified but it is the duty of an employment tribunal carefully to examine the papers in the case to establish the true nature of the claim. Unlike the tribunal the EAT had the advantage of a careful explanation by experienced counsel lasting an hour, following which it became clear that the tribunal had erred and the only possible outcome would have been that the victimisation claim had been brought in time and could proceed. All other claims had been validly struck out. The claimant advised to reflect, when preparing further documents, on the problems to which his unfocused drafting style had given rise.

HIS HONOUR JUDGE MARTYN BARKLEM:

1. This is an appeal against the decision of Employment Judge Balogun following a hearing on 31 July 2020. The judge ordered that all the claimant's claims be struck out. These included claims which the Tribunal had no jurisdiction to consider as well as claims of constructive unfair dismissal, a PIDA detriment claim, and breach of contract. I am concerned only with an **Equality Act** claim ("**EqA**") The judge dealt with that in the following paragraphs of the reasons to the order:

> **"17. The claimant brings claims of direct race discrimination, harassment and victimisation. He had previously been told that he could not pursue a sexual harassment claim that was based on allegations of sexual harassment against him.**
>
> **18. The claimant describes himself racially as black. He alleges that in September 2017 (no exact date was given), Mr Noor Mohammed told him that he did not like black people because they are lazy. This is potentially a complaint of direct discrimination and/or racial harassment.**
>
> **19. The claimant further alleges that when he reported the matter to Mr Charley that same day, no action was taken. The claimant contends that Mr Charley's failure to act was an act of harassment and victimisation.**
>
> **20. The claimant presented his claim on 15.2.19. By section 123 of the Equality Act 2010, claims under the act must be brought after the end of 3 months starting with the date the act complained of was done. As the alleged comment of Mr Mohammed was made in September 2017, the claim should have been presented in December 2017. Even allowing for a reasonable time of, say, a month, for Mr Charley to look into the complaint, the claim in relation to that omission should have been presented by January 2018 at the latest. The claims are therefore out of time.**
>
> **21. The tribunal does have the power to extend time where it considers it to be just and equitable to do so. However, the claimant has given no reasons at all as to why he delayed in presenting his claim even though the draft list of issues set out the time point to be dealt with today. There is therefore no basis for me to extend time on just and equitable grounds."**

2. This appeal is limited to the question whether the judge ought to have identified that, properly analysed, the claim was not as she characterised it but rather that the dismissal was the last in a series of detriments arising from disclosures made by him in September 2017. In essence, Mr Stuart, for the claimant, submitted that when looked at carefully as he says the law requires, it ought to have been apparent to the judge from the documents which were before her, that this was

at the heart of his claim.

3. The appeal was originally dismissed at the sift stage but, following a rule 3(10) hearing it was allowed to proceed to a preliminary hearing, HHJ Tayler commenting that the Employment Judge (EJ) may not have fully got to grips with the way in which the claimant sought to advance his claim and sent the matter to a preliminary hearing at which it was hoped that the claimant might have the benefit of free legal assistance and/or representation.

4. That preliminary hearing was before HHJ Auerbach who, having heard argument from Mr Stuart, then appearing under the aegis of the ELAAS scheme, considered that it was arguable that the EJ erred in overlooking that there was a live **EqA** victimisation claim, as summarised above. He allowed the appeal to proceed to a full hearing on that basis.

5. Mr Stuart has represented the claimant before me *pro bono* under the Advocate scheme. Ms Clarke represented the respondent as she has done throughout. I am grateful to each of them for their written and oral submissions.

6. The claimant is a litigant in person. The documentation in this case shows that he has a habit of writing prolix, wide-ranging and difficult to understand letters and, despite being plainly a man of intelligence, that he either cannot or will not engage with simple questions. That said, English is not his first language.

7. In **Malik v Birmingham City Council** UKEAT 0027/19 Choudhury J, then President said as follows, at paragraph 50:

> **"The claimant was not professionally represented. He had, however, produced a detailed witness statement which, as set out above, contained some material which might support an allegation of race discrimination. He also placed before the Tribunal other documents in which he attempted to set out his case. These included documents entitled 'Additional Information' which are appended to the claim form, and which contain some of the matters referred to in his witness statement."**

Paragraph 51:

> **"In my judgment the obligation to take the claimant's case at its highest for the purposes of the strikeout application, particularly where a litigant in person is**

> **involved, requires the Tribunal to do more than simply ask the claimant to be taken to the relevant material. The Tribunal should carefully consider the claim as pleaded and as set out in relevant supporting documentation, before concluding that there is nothing of substance behind it. In so far as it concludes that there is nothing of substance behind it, it should, in accordance with the obligation to adequately explain its reasoning, set out why it concludes that there is nothing in the claim."**

8. Subsequently, in **Cox v Adecco and Others** UKEAT 0339/19 ("**Adecco**") HHJ Tayler set out a number of propositions including, at paragraph 28(vii):

> **"In the case of a litigant in person the claim should be ascertained only by requiring the claimant to explain it while under the stresses of a hearing. Reasonable care must be taken to read the pleadings, including additional information, and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing."**

At paragraphs 29 and 30 he went on:

> **"If a litigant in person has pleaded a case poorly, strike out may seem like a short cut to deal with a case that would otherwise require a great deal of case management. A common scenario is that at a preliminary hearing for case management, it proves difficult to identify the claims and issues within the relatively limited time available. The claimant is ordered to provide additional information and a preliminary hearing is fixed at which another EJ will, amongst other things, have to consider whether to strike out the claim or make a deposit order. The litigant in person who struggled to plead the claim initially, unsurprisingly struggles to provide the additional information and in trying to produce what has been requested under increasing pressure produces a document that makes up for in quantity what it lacks in clarity. The EJ at the preliminary hearing is now faced with determining a strike out in a claim that is even less clear than it was before. This is a real problem. How could the judge assess whether the claim has no or little reasonable prospects of success if he or she does not really understand it. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings and any core documents in which the claimant seeks to identify the claims may show that there really is no claim and there are no issues to be identified. But more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying in reasonable detail the claims and issues. Doing so is a pre-requisite of considering whether the claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the protected disclosure context it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing. However, it is generally not possible to analyse the issue of wrongdoing without considering what information the claimant contends had been disclosed and what type of wrongdoing the claimant intends the information tended to show."**

9. The present case had had three preliminary hearings. On 1 April 202 EJ Hyde referred to the claimant's contention that, having raised with his manager an allegation that a Mr Mohammed had made derogatory comments about "black people" in September 2017 the manager did not deal with it and indeed started harassing him. The judge raised the issue of time limits. She directed that clarification of the claim should be provided in accordance with the detailed directions that she made. At a further hearing on 3 June 2020, EJ Balogun noted that the claim remained unclear and directed the respondent to write seeking details of the claim in the form of a series of questions to which the claimant was required to respond. The final hearing was the one at which the EJ struck out the claims on 31 July 2020.

10. I have been taken carefully through the documentation which was before the EJ on that occasion. It includes the grievance letter which was appended to the Form ET1, running to 9 pages, the letter written in response to the letter from the respondent's solicitor, running to 19 pages and a witness statement dated 30 July 2020, the day before the hearing. I do not propose, neither would it be proportionate, to analyse those documents in detail. It took Mr Stuart over an hour to take me through them and to point out that it is evident, when stripped of the mass of extraneous detail, that the claimant has been contending all along that the dismissal was the last in a series of detriments at the hands of his line manager, culminating with, among other things, alleged sexual harassment by him of a member of staff at the college at which he worked as a security officer. The detriments followed the making by him of two protected disclosures. The first, as outlined in his grievance letter of 13 December appended to the Form ET1, was on 6 or 7 September 2017. The second was, as I understand it, on 11 September when he made a further complaint about racist remarks having been made to him by the site manager to the same supervisor.

11. The grievance letter then goes on to set out a range of detriments, albeit not labelled as such, to which he was subject by the supervisor culminating in his dismissal. The grievance letter says on the first page and using his language:

> **"After being experienced all sorts of abuse and breach of employment law Equality Act 2010, Human Rights Act 1988 and Data Protection Act 2018. On**

> **prolonged period of time of one year from 6 September 2017 to our present date Mr Sebastian found unlawful excuse just to get rid of me. I therefore have no option only to involve the law makers of the country. This statement is based on over one year documented evidences of long term work related problems which are all based on point of law. The main point person who is responsible is the line manager Mr Sebastian whom I hold in direct responsible for all unlawful issues that I have been experienced in the past and present since 6 September 2017."**

12. I have enormous sympathy for the judge hearing this case faced with the prolix documents identified above in the course of which I can be confident was a very busy day. All previous attempts to have the claimant clarify his case had, arguably, served only to have him over complicate it. But this is exactly the "rabbit in the headlights" scenario referred to above. What was required as HHJ Tayler said in **Adecco** was the rolling up of sleeves and identification of the issue. Ms Clarke referred me to other dicta in **Adecco** as to the duty imposed on claimants and to the extraordinary latitude given to the claimant even to the extent, unusually, of requiring the respondent to formulate questions which the claimant was to answer. I have read the letter which contains those questions. With respect, and perhaps understandably, it does not get to the nub of the point raised, namely that the reason for his dismissal was concocted as a result of the protected acts which were not themselves individual, self-standing claims.

13. The claimant had less than two years' service so the respondent was entitled to disregard any formal disciplinary procedure. In the event, however, following the claimant's suspension on 7 December 2018, he was asked to attend an investigation on 11 or 13 December. He replied, saying that he was seeking legal advice and asked that the meeting be postponed to 20 December. This delay was said by the respondent to be unacceptable, and a disciplinary meeting was then held on 18 December 2018 in the claimant's absence, following which specific allegations of sexual harassment and bullying were upheld as "being substantiated." On the same day as the dismissal letter, 18 December, another letter was written to the claimant purporting to dismiss his grievance, that having been set out in his letter dated just five days earlier. The reason was said to be: "The company could not find a valid reason within your request for a grievance to be upheld."

14. Ms Clarke points out that the person who made the decision to dismiss was Mr Purchase,

not the supervisor to whom the claimant attributes previous detriments as well as the dismissal. Plainly, pending disclosure, there is no way of knowing what investigative process took place or whose evidence was relied upon in relation to the substantiated findings and thus whether any doctrine of transferred malice might be engaged. The way in which the grievance was handled might also be of relevance, but these are not matters before me and on which I therefore express no view.

15. I agree with Mr Stuart's analysis that the judge's decision under appeal significantly misconstrued the nature and the scope of the claimant's **EqA** claim. It is surprising that she noted that "No exact date was given as to the act of direct discrimination and/or harassment." when the date 6 September appears quite frequently at various places in the documentation. Of course, I draw that overall conclusion having the advantage, which the EJ did not, of a careful analysis from a skilled advocate, much of the sleeve-rolling having been performed by him.

16. But having had the wheat sorted from the chaff, it seems to me, applying **Jafri and Lincoln College** [2014] EWA Civ 449 that there was only one conclusion to which an ET correctly directing itself on the law could have reached on the present case, namely that the claimant's true claim in relation to the **EqA** was that his dismissal was the last in a series of detriments arising from his making protected disclosures in 2017. This was in time and should not have been struck out.

17. I stress that all other heads of claim were validly struck out and the claimant, who may well resume his role as litigant in person, should take careful note of the narrow ambit of his claim which is permitted to proceed and should reflect when preparing further documents on the problems which his unfocused drafting style has given rise to.

18. I have asked Mr Stuart to consider whether, given his knowledge of the case, he would be prepared to settle amended grounds of claim or at least bullet points which will enable the EJ tasked with the next preliminary hearing which will be required to make directions leading to a full hearing, to understand more clearly the ambit of the claim and, in particular, the protected acts and the detriments. I have not required an answer from him to that question conscious as I am of the

considerable time he has already given *pro bono* to the claimant who I hope recognises the enormity of the assistance which he has received.

19. The appeal is allowed.