Appeal No. UKEAT/0074/13/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 17 July 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR D J JENKINS OBE

MR G LEWIS

MRS B GWARA APPELLANT

MID ESSEX PRIMARY CARE TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

AMENDED

APPEARANCES

For the Appellant	MR NICHOLAS EDWARDS (Advocate) Taylor Rose LLP 15 Old Bailey London EC4M 7EF
For the Respondent	MR IAN SCOTT (of Counsel) Instructed by: Capsticks 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

PRACTICE AND PROCEDURE

Bias, misconduct and procedural irregularity

Costs

The Employment Tribunal did not comply with rule 38(9) of the Employment Tribunal Rules of Procedure (Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**) in that it did not afford the Claimant an opportunity – which means a fair and reasonable opportunity – to give reasons why the order for costs should not be made. Other criticisms of Employment Tribunal's reasoning also justified.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Miss Beauty Gwara against part of a Judgment of the Employment Tribunal sitting in East London dated 25 July 2012, Employment Judge Ferris presiding. The Tribunal adjourned the Claimant's case part heard expressing the order to be on terms which included an order that the Claimant pay Mid Essex Primary Care Trust, the Respondent, costs assessed in the sum of £4,500 pursuant to rule 40 (para 1) of the Employment Tribunal Rules of Procedure. The costs were said to be:

> **"Thrown away by the Respondent in the successive adjournments of this case on 20th and 21st June 2012."**

The background facts

2. The Claimant was employed by the Respondent as a registered nurse with effect from 8 December 2008. She was a disabled person by reason of being HIV positive and she had other medical conditions. She was off work throughout 2010. There was discussion of redeployment. Eventually she was dismissed with effect from 11 March 2011.

3. With the assistance of the legal department of the Royal College of Nursing she brought a claim to the Employment Tribunal complaining of unfair dismissal and disability discrimination. Essentially it was said that the Claimant had started taking medication, her health was improving and she could and should have been helped to return to work.

4. The first day of the hearing was Tuesday 19 June 2012. The Claimant was represented by counsel instructed by solicitors appointed by the Royal College of Nursing. Her evidence was taken and concluded. The Employment Judge posed some questions to her counsel at the

end of the day "in an attempt to take stock of the Claimant's case". He was told that the answers would be provided in the morning after she had taken instructions.

5. On Wednesday 20 June however the Claimant's counsel did not attend. The Claimant was left unrepresented. She put in a short statement requesting an adjournment saying:

> **"1. I wish to seek legal representation as I am no longer being represented by the RCA. I feel that it would be unfair for me to carry on without representation as the respondent is being represented.**
>
> **2. Secondly, due to yesterday intense cross-examination I have suffered severe headache, I had difficulty sleeping and will need to seek medical advice as soon as possible."**

6. At an earlier stage on that day prior to determining the application for an adjournment the Tribunal gave the Claimant a costs warning saying to her that her case was not strong, that if she lost it may well be a case where the Employment Tribunal decided that her conduct was unreasonable and that it had power to order costs against her.

7. The Tribunal later heard her application for an adjournment. The Claimant continued to say that she needed to seek her doctor. The Respondent's counsel, Mr Scott, opposed the application. In the course of doing so he referred to the prejudice which the Respondent would suffer. The Employment Judge pointed out that the prejudice to the Respondent might be balanced by money and asked what the costs of the adjournment might be and whether the Claimant had means to pay. The Respondent's counsel gave a figure. The Employment Judge asked her how she would pay an order for costs in the sum of £3,000. The Claimant said she would borrow from family members, son and daughter.

8. The Tribunal's decision was to put the case back until 12.00 pm the following day to enable the Claimant to attend her doctor that evening and to prepare questions for a witness.

The balance of the case, including two other short witnesses, would be heard on the Friday. Subject only to the question of the Claimant's health the Tribunal said it was confident it would be able to complete the evidence satisfactorily so that an adjournment of the whole proceedings would not be necessary.

9. On the following day, Thursday 21 June, the Claimant renewed her application for an adjournment. She had been to the doctor. This time her application was supported by medical evidence. The doctor said:

> **"This is to confirm that I have seen and examined Mrs Gwara this evening and she tells me that she has had a severe headache for the last 24 hours. Mrs Gwara has ongoing medical problems and is on a number of regular medications. She has HIV disease and is on long-term anti-viral treatment and this can predispose people to troublesome headaches. I have suggested some treatment for her but feel it is unlikely that she will be fit to attend the Tribunal and give it the attention it deserves for the next few days."**

10. The Tribunal, having read this medical advice, adjourned the hearing giving directions. We have an agreed note of what happened on 21 June. The Employment Tribunal came into the tribunal room at 12.22 pm. It dealt with an application which had been made the previous day to strike out the proceedings saying that it was premature to strike out the claim. It gave reasons for allowing the adjournment and making an award of costs. It did not hear any application for costs as such or receive any submissions on the question of costs above and beyond the exchanges which had taken place during the application for an adjournment the previous day.

The Tribunal's reasons

11. The Tribunal's formal Judgment was issued with reasons on 25 July 2012. It is noteworthy that the reasons do not suggest that the Tribunal heard an application for costs and they do not record any submissions from the Claimant on that question. The Tribunal's reasons

set out the issues (paragraphs 1 and 2), the procedural background up 20 June (paragraphs 3 to 7), reasons for the costs warning (paragraphs 8 to 27), and the circumstances of the adjournment on 21 June (paragraphs 28 to 32). The reasoning concerning costs is in the following paragraphs:

> **"33. The trigger for this hiatus lies in the very unimpressive evidence which the Claimant gave on the first day of the hearing, following which the RCN ceased to represent her.**
>
> **32. The Tribunal heard evidence from the Respondent to the effect that the wasted costs arising from the lost second day of the hearing (20 June) amounted to £3,000 in fees for the Respondent's solicitors, and a figure in excess of £5,000 following the third day, and in the Tribunals judgment a conservative figure for the Respondent's costs thrown away by the two days now lost (21 and 22 June) is £4,500. The Tribunal exercises its discretion to order the Claimant to pay those costs.**
>
> **33. Accordingly this case will now be adjourned pending the events identified in the judgment. The Claimant must pay £4,500 in costs to the Respondent which have been wasted as a result of the adjournments on 21 and 22 June 2012."**

Statutory provisions

12. The relevant statutory provisions are to be found in the Employment Tribunal Rules of Procedure - Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**. It is sufficient to cite the following:

> **"38 General power to make costs and expenses orders**
>
> **(9) No costs order shall be made unless the Secretary has sent notice to the party against whom the order may be made giving him the opportunity to give reasons why the order should not be made. This paragraph shall not be taken to require the Secretary to send notice to that party if the party has been given an opportunity to give reasons orally to the Employment Judge or tribunal as to why the order should not be made.**
>
> **40 When a costs or expenses order may be made**
>
> **(1) A tribunal or Employment Judge may make a costs order when on the application of a party it has postponed the day or time fixed for or adjourned a Hearing or re-hearing review. The costs order may be against or, as the case may require, in favour of that party as respects any costs incurred or any allowances paid as a result of the postponement or adjournment.**
>
> **(2) A tribunal or Employment Judge shall consider making a costs order against a paying party where, in the opinion of the tribunal or Employment Judge (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or Employment Judge may make a costs order against the paying party if it or he considers it appropriate to do so.**
>
> **(3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.**

41 The amount of a costs or expenses order

(2) The tribunal or Employment Judge may have regard to the paying party's ability to pay when considering whether it or he shall make a costs order or how much that order should be."

Procedure

13. It is convenient first to consider a submission by Mr Edwards, who appears on behalf of the Claimant, concerning the procedure followed. He submits that there was no compliance with rule 38(9). No written notice had been given and the Claimant was not afforded an opportunity to give reasons orally as to why the order for costs should not be made. The Claimant should have been given an opportunity to make submissions; moreover the rules envisage a fair opportunity. The order for costs was made at a time when the medical evidence suggested she was not fit to make any submissions upon it.

14. In response Mr Scott, who appears today, as he did below, for the Respondent submits that it was sufficient that the Tribunal raised the question of costs in the context of the adjournment application on 20 June. He argues that the Claimant had the opportunity then to say anything she wished on the question of costs and ability to pay.

15. We prefer the submissions of Mr Edwards. In our judgment it was not sufficient that the Tribunal briefly discussed the questions of costs during the application for an adjournment in the context of the prejudice that the Respondent might suffer.

16. Rule 38(9) requires the Tribunal to ensure that the party against whom the order for costs may be made has an opportunity - which of course means a fair and reasonable opportunity - to give reasons why the order should not be made. As rule 38(9) makes clear advance written notice is not necessarily required. Many simple issues concerning costs can be dealt with fairly

at the end of a hearing without separate written notice. In such circumstances, the party seeking costs will usually make an oral application setting out the basis of the application and explaining the figure of costs sought. This, together in many cases with some time on the day to consider the application, will be sufficient for the party affected to have a fair and reasonable opportunity to make submissions.

17. In this case exceptionally there was no such application. If the Tribunal was minded of its own motion to make an order for costs it was required to inform the Claimant in plain terms that it was minded to do so and on what basis and in what amount. It should then have given her an opportunity to make submissions, allowing her a reasonable time to do so. These principles apply whether the Tribunal is minded to order costs under rule 40(1) or under rule 40(2) and (3). The requirement of rule 38(9) is underpinned by basic principles of fairness and natural justice.

18. In a sense it is easy to understand why the Tribunal did not give the Claimant such an opportunity. It had just decided to adjourn the case on the basis of the medical letter it had received which put into the question the Claimant's fitness to participate in the hearing. It would not have been straightforward to reconcile the reason for an adjournment with an expectation that the Claimant should address it on the question of costs. However if the Tribunal considered that the Claimant was not fit or may not have been fit to do so it should have adjourned consideration of the question of costs until the next hearing.

19. It follows that on that ground this appeal must be allowed. The Employment Tribunal did not afford the Claimant a fair opportunity to be heard on the question of costs, the order for costs must be set aside.

The decision to award costs

20. On behalf of the Claimant Mr Edwards also criticised the decision of the Employment Tribunal to award costs on a number of grounds. We will deal briefly with this aspect of the case given our conclusion that the appeal must in any event be allowed. Mr Edwards argues that the award was essentially punitive in nature, imposed by reason of the Tribunal's disapproval of the actions of the Claimant's representatives. He further argues that the award of costs under rule 40(1) is intended only to compensate the opposite party for costs incurred by reason of the adjournment; and the Tribunal has failed to identify how such a high figure as £4,500 has been incurred in this way. Thirdly he argues that the Tribunal failed to explain whether and how it took account of the Claimant's means.

21. In response to these points Mr Scott argues that the Employment Tribunal committed no error of law, He points our correctly that rule 40(1) provides a ground for the award of costs which is independent of rule 40(2) and (3): see **Ladbroke Racing Ltd v Hickey** [1979] IRLR 273. He further submits that rule 40(1) confers upon the Tribunal a wide discretion; see **Beynon v Scaddon** [1999] IRLR 700. He submits that the award was not punitive, that the Tribunal sufficiently investigated the amount of costs and that it was not obliged to take the Claimant's means into account.

22. We will state our conclusions briefly. We do not think the Employment Tribunal intended the award of costs to be punitive. We are satisfied that it intended its award to be compensatory in nature. However in deciding whether to exercise its discretion it was essential for the Tribunal to keep in mind and focus upon the reasons for the adjournment. This it could hardly do without hearing proper submissions from the Claimant.

23. The Tribunal did not make any real findings as to the way in which its order for costs was made up. Mr Scott today could justify the figure only by submitting that part of his overall brief fee should be attributed to the days of adjournment. We doubt very much whether the Tribunal appreciated that this was the exercise it was undertaking.

24. If the Employment Tribunal did not intend to take account of the Claimant's means it should have stated briefly why not. If it did intend to take account of the Claimant's means it should have set out its findings and explained briefly how it took the Claimant's means into account.

25. While we have these criticisms of the Tribunal's approach to the question of costs the fundamental reason for allowing the appeal, as we have already explained, is that the Claimant was given no opportunity properly to address the question of whether an award for costs should be made against her.

26. As foreshadowed in the Notice of Appeal, Mr Edwards submits that the only approrpaite course is to remit the matter to the Tribunal with a direction that not merely the costs application but the hearing as a whole should start in front of a fresh Tribunal. Mr Scott submits that this is a draconian, disproportionate and unnecessary course of action to take. We are satisfied that we have the power to take the course that Mr Edwards suggests, derived from section 35 of the **Employment Tribunals Act 1996**, and that we should apply principles broadly speaking derived from **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 when doing so.

27. In our judgment the best course is to direct that not merely the costs application but the whole case should start before a fresh Tribunal. Our reasons are as follows. Firstly, we have found that the Tribunal acted in breach of rule 38(9) and the rules of natural justice in proceeding to make its order for costs in the circumstances in which it did. Secondly, we are conscious that the Tribunal not only gave a costs warning to the Claimant at a time when she was seeking an adjournment and informing the Tribunal that she was unwell but also has given, for reasons that are not entirely obvious, lengthy and very full justification for the costs warning in its set of reasons. Thirdly, we would add that to our mind this is precisely the sort of case where the Tribunal might have been well advised to consider the application for adjournment first and to reserve any question of a costs warning until afterwards (see, for the dangers of such warnings, **Gee v Shell UK Ltd** [2003] IRLR 82). Further, the application for costs itself could, we think, not possibly be sent back to the same Tribunal in the circumstances of this case. Finally, as a matter of practical common sense, it is now more than a year since the one day of hearing that has taken place before the Tribunal, and there would be difficult for the Tribunal and the parties to recapture what happened a year or more ago.