Appeal No. UKEAT/0353/06/MAA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 20 October 2006

Before

HIS HONOUR JUDGE RICHARDSON

DR K MOHANTY JP

MR T HAYWOOD

MRS R L JONES — APPELLANT

VALLEYS TO COAST HOUSING LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR D PANESAR (of Counsel) Instructed by: Messrs Thompsons Solicitors Cromwell House 1 Fitzalan Place Cardiff CF24 0US
For the Respondent	MS J STONE (of Counsel) Instructed by: Messrs Morgan Cole Solicitors Bradley Court 11 Park Place Cardiff CF10 3DP

SUMMARY

Practice and Procedure – Striking out/dismissal

Striking out of part of claim – proportionality – whether fair trial possible – Tribunal erred in failing to have proper regard to proportionality.

HIS HONOUR JUDGE RICHARDSON

1. This is an appeal by Mrs Rachel Jones against a Judgment of the Employment Tribunal dated 3 April 2006. The Tribunal was sitting in Cardiff. Mrs Jones had presented a claim against her employers Valleys to Coast Housing Ltd ("VCA") alleging unfair constructive dismissal and unlawful indirect sex discrimination. The latter claim was struck out by the Tribunal. The last paragraph of the Tribunal's reasons reads:

> **"The Tribunal found the Claimant and/or her Solicitors had shown a complete disregard for the Tribunal orders, and a failure to adequately plead the claim resulted in substantial prejudice to the Respondent's ability to adequately prepare their case, which in turn impacted significantly on their ability to have a fair trial. As a result, the overriding objective required that that part of the Claimant's claim be struck out."**

Procedural history

2. Mrs Jones was employed by VCH in October 1996. She worked in an administrative capacity, full-time. In June 2003 she went on maternity leave. Her absence was extended due to problems with her health and her child's health. She eventually returned to work on 4 January 2005, working part-time in a period of rehabilitation. She resigned on 10 March 2005. She worked her notice, leaving on 7 April 2005. She went to work almost immediately for a local authority.

3. In July 2005 Mrs Jones presented her claim to the Tribunal. She was at all material times assisted by Solicitors, who drafted her claim form and signed it. Her claim of constructive dismissal was based on a number of allegations, which may be summarised as follows: a refusal to work part-time, said to been unreasonable and discriminatory; a failure to provide her with promised counselling support; obstructive and undermining conduct and attitude by her manager; and finally, refusal to deal with a request for absence when her daughter was ill.

4. It is necessary to set out in full the way in which Mrs Jones' claim of indirect sex discrimination was put:

> **"6.1 • Please tick the box or boxes to indicate what discrimination (including victimisation) you are complaining about.**
>
> | | | | |
> |---|---|---|---|
> | **Sex (including equal pay)** | **{x}** | **Race** | **{ }** |
> | **Disability** | **{ }** | **Religion or belief** | **{ }** |
> | **Sexual orientation** | **{ }** | | |
>
> **6.2. Please describe the incidents which you believe amounted to discrimination, the dates of these incidents and the people involved.**
>
> **1. The Claimant believes that the Respondent's requirement that she return to work on a full-time basis was discriminatory. The Respondent's requirement is on the face of it a neutral provision that applies to both male and fema1e employees. However in reality the requirement that the Claimant has to work full-time supposedly for the efficiency of the business has a disparate impact upon more women employees than men due to the reality of childcare commitments and amounts to indirect sex discrimination. The Claimant believes that the job share policy formally in place with the Respondent could and should have been implemented for her post which has largely administrative duties.**
>
> **2. The Claimant believes that less women within her workplace than men can comply with the requirement that work is full-time. The Claimant seeks disclosure of additional information from the Respondent on the disparate impact of the requirement in question. In the alternative the Claimant believes that the tribunal should be entitled to reach a conclusion by using its own industrial relations experience and common sense to find that this particular requirement has a disparate impact upon women employees so that in practice women are less able to comply with this requirement.**
>
> **3. The Claimant does not believe that the requirement that she should work full-time can be objectively justified. The Claimant does not believe that this requirement is actually necessary and not merely convenient. The Respondent has made no real effort to consider employing part-time staff despite being a fairly large employer with an obvious capacity to recruit part-time staff. The Claimant actually worked alongside a temporary member of staff on her return to work.**
>
> **4. No real effort was made to investigate whether this staff member would work complementary hours or whether other part-time staff were available. The suggestion that recruiting another staff member on a part-time basis was too difficult or would adversely affect communication or would cost too much are unsustainable. The Respondent has only ever made assertions that it could not reasonably undertake a simple recruitment exercise. The Respondent has never provided any credible evidence to support this assertion. The Respondent's position on this matter is restrictive and cannot be justified by an objective business need to employ full-time employees. The Respondent's have a job share policy that envisages that job shares can take place. The failure to advertise or employ part-time posts save on a restricted basis is unjustifiable.**
>
> **5. The Claimant believes that the Respondent's decisions to deny her request to work part-time on 4 August 2004, 13 September 2004, 6 December 2004, 26 January 2005 and 28 February 2005 were acts of unlawful discrimination. The Claimant relies upon these acts of discrimination in her claim that she has been constructively dismissed."**

It is right also to add that particulars of the constructive dismissal claim made it plain that Mrs Jones was saying she was disadvantaged by the failure to offer her part-time work.

5. VCH put in a response opposing Mrs Jones' case, saying that she was treated sympathetically and that she was allowed a period of rehabilitation when she was permitted to work part-time. VCH accepted that Mrs Jones had asked them to vary her contract hours and said that the application was denied on the grounds that it would have a detrimental effect on VCH's business. No particulars were given by VCH of what the detrimental effect would be. VCH said that Mrs Jones had been offered part-time employment in, as we understand it, a different role.

6. On 20 September 2005 there was a pre-hearing review. Some limited directions were made on that day. There was a direction that by 11 October Mrs Jones should provide full details of pay for 11 April 2005 until 11 September 2005. VCH had to provide its documents to Mrs Jones' Solicitors 28 days before the hearing and her Solicitors then had to prepare an agreed bundle 21 days before the hearing. Witness statements had to be exchanged 14 days before the hearing. There was no general order for disclosure. There was no application by VCH for any particulars of the indirect discrimination claim. There was, it seems, discussion of statistics and an indication by Mrs Jones' Solicitors that they would provide statistics supportive of the indirect discrimination claim. Some time later the hearing was fixed to last three days, commencing on 30 January 2006.

7. On 20 January 2006 the Tribunal made a further order. The order contained three provisions: Mrs Jones' Solicitors were to provide VCH's Solicitors with a revised schedule of loss, setting out four particulars of Mrs Jones' pay from 11 April 2005 until 10 January 2006; Mrs Jones's Solicitors were to provide "full particulars and supporting statistical information" in respect of the indirect sex discrimination claim, and; Mrs Jones' Solicitors were to provide a bundle of agreed documents. These orders were to be complied with by 24 January 2006. It was provided in the order that "any further failure to comply with Tribunal orders will result in the

claim being struck out, subject to permitting the Claimant the opportunity to show cause why such an order should not be made".

8. Underlying the making of this order were continuing issues between the parties concerning the preparation of the case. Firstly, there was an issue about pay details. Mrs Jones did not comply with the order made in September. She did, however, send a draft schedule of loss to VCH's Solicitors on 9 January 2006. That schedule limited her claim to one day's pay at full-time rate on the basis that she had secured new employment on 11 April. A single pay slip relating to the month of September was supplied. This pay slip is difficult to read and it is not a compliance with the September order, but certainly some details of pay were given. The failure to comply with the order for pay details was one reason why VCH's Solicitors sought and obtained the order on 20 January. The order on 20 January was not complied with. Mrs Jones' Solicitors wrote again challenging the need for the order in the light of the draft schedule of loss and the limited claim made.

9. Secondly, there was an issue between the parties as to statistics. VCH's Solicitors complained that no statistics had been provided, as discussed at the pre-hearing review. Again an order was made on 20 January. In fact by 18 January a substantial body of statistics had been provided; those were the statistics upon which Mrs Jones relied. Partly they came from published information, partly they came from a response provided by VCH themselves to an earlier sex discrimination questionnaire.

10. The third issue related to particulars. As we have recorded, no particulars had been asked for at all prior to 10 January, but on 10 January, when VCH's Solicitors complained of the lack of statistics, they also asked for particulars. They did not specify what particulars, apart from statistics, were said to be lacking. Hence the order for particulars made on 20 January was in

wholly general terms. By the date of the hearing the position was as follows; the statements had been exchanged; statistics had been provided; a bundle had been prepared. The things that were missing were any further particulars of the indirect discrimination claim and the full wages detail.

The Tribunal's reasoning

11. The Tribunal set out the procedural history of the case and then summarised the arguments of the parties. Having done so, it set out its conclusions in paragraph 11 and 12 of its reasons. We have already quoted paragraph 12. It is essential to read paragraph 12 with paragraph 11, which reads as follows:

> **"11. The Tribunal decided to strike out this part of the Claimant's claim due to a clear failure of the Claimant to comply with the Order of Disclosure dated 20 September 2005 regarding the pay details and particulars of the claim. There was still a failure to comply even after the directions were challenged and the Tribunal confirmed on 20 January 2006 that there was to be compliance. The Tribunal rejected the Claimant's argument that they had complied with the directions. The information regarding the wages for the relevant period had not been provided at any stage. The particulars of claim were inadequately pleaded because the relevant criterion, provision or practice in question was not specified nor how it applied to the Claimant, nor why and what basis it was said to be to the detriment of a considerably larger proportion of women than men, what was said to be the correct pool for comparison and how the application of the relevant criterion provision or practice was said to be to the Claimant's detriment. These were significant issues going to the heart of the claim yet they had not been particularised. Although the Claimant had provided some statistical information it was of a generalised nature and did not adequately address the particular issues in this case."**

12. It is clear to us, and we think for all practical purposes common ground today, that there is an error of fact in the first sentence in this paragraph. This sentence refers to a failure to comply with the order dated 20 September 2005 "regarding the pay details and particulars of the claim". As we have seen, however, there was no order for particulars of the claim on 20 September 2005. The first order for particulars was the one made in general terms on 20 January 2006.

Submissions

13. On behalf of Mrs Jones, Mr Panesar made the following submissions. Firstly, he submitted that the Tribunal erred in law in finding that Mrs Jones had not given adequate particulars. He relied on the claim form, which we have quoted above. He referred us to **Burn v Financial Times Ltd** [1991] IRLR 417, where the following general principles were set out at paragraph 18:

> **"General principles affecting the ordering of further and better particulars include: that the parties should not be taken by surprise at the last minute; that particulars should only be ordered when necessary in order to do justice in the case or to prevent adjournment; that the order should not be oppressive; that particulars are for the purposes of identifying the issues, not for the production of the evidence, and; that complicated pleadings battles should not be encouraged, justice is not infrequently achieved by limited sufficient pleadings."**

14. He submitted that the pleaded case was more than sufficient for the Tribunal to deal fairly with the issues between the parties. He submitted that in this case it was clear that the criterion applied to the Claimant was that she was required to work part-time and that the criterion was being imposed that applied to her as one that a smaller proportion of women than men could comply with, and that it would be a detriment to women by reason of the fact that a larger proportion of them than men work part time. He referred to **Home Office v Holmes** [1984] IRLR 299, and **London Underground v Edwards** [1998] IRLR 364 in support of the proposition that comprehensive statistical evidence or detailed particulars might not be necessary in such a case.

15. Secondly he submitted that it was a perverse decision that Mrs Jones or her Solicitors had shown a complete disregard for Tribunal orders. As regards pay, some details were given and the claim for financial loss was extremely limited. As to particulars, substantial particulars had been given in the claim form. As to statistical evidence, that was given by 18 January.

16. Thirdly he submitted that the Tribunal erred in law in reaching a decision which was not open to a Tribunal directing itself properly in law. The sanction of striking out was not proportionate. A fair trial was entirely possible. He took us to authorities on this question, the effect of which we will summarise later in this Judgment.

17. On behalf of VCH, Ms Stone made the following submissions. Firstly she submitted that the Tribunal did not strike out the claim for indirect discrimination merely on the basis that it was poorly particularised. That, she accepts, would be an error of legal approach. Rather she submits that the key finding of the Tribunal is in paragraph 12 of its reasons. The Tribunal struck out the claim for failure to comply with the order dated 20 January which, she emphasises, contained a specific warning of striking out. She submits that, effectively, not to comply with the order at all was the trigger for the Tribunal's conclusions in paragraph 12 of its reasons. She submitted that the areas which the Tribunal identified in paragraph 11 required particularisation and there was none.

18. Secondly she submitted that it was impossible for this Appeal Tribunal, which is a Tribunal dealing only with questions of law, to reject the Tribunal's conclusion that Mrs Jones or her Solicitors had shown a complete disregard for Tribunal orders. There had, she submitted, been no compliance with two paragraphs with the Tribunal's order dated 20 January and substantial non-compliance with part of the Tribunal's order dated 20 September.

19. Thirdly she submitted that the Tribunal's finding that striking out was appropriate did not offend the principle of proportionality. She submitted that the Tribunal's conclusion in paragraph 12 was adequate and proper in this respect.

Our conclusions

20. The principles applicable to a Tribunal's exercise of a power to strike out all or part of a claim are now very well established in a series of recent authorities in the Appeal Tribunal. These include **De Keyser Ltd v Wilson** [2001] IRLR 324, **Bolch v Chipman** [2004] IRLR 140 and **Weir Valves & Controls (UK) Ltd v Armitage** [2004] ICR 371. They were summarised by Sedley LJ in **Blockbuster Entertainment Ltd v James** [2006] IRLR 630. He said:

> **"This power, as the Employment Tribunal reminded itself, was a draconian power not to be readily exercised. It comes into being if, as in the judgment of the Tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent regard of required procedural steps or that it has made a fair trial impossible. If these conditions are fulfilled it becomes necessary to consider whether, even so, striking out is a proportionate response."**

21. Later in his judgment he referred to questions which the Tribunal might take into account in determining the proportionality issue. He said:

> **"The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike out power exists. The answer has to take into account the fact, if it is the fact, that the Tribunal is ready to try the claims or, as the case may be, that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct, without which the question of proportionality would not have arisen. But it must, even so, keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptionable case with a history of unreasonable conduct, which has not until that point caused the claim to be struck out, will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out, it is an important check in the overall interests of justice upon their consequences."**

22. In the first instance it is, of course, for the Tribunal to exercise the strike out power and to apply principles of the kind which we have outlined. An appeal to an Employment Appeal Tribunal lies only on a question of law. An interlocutory decision will only be challengeable where the Tribunal exercises discretion under a mistake of law, or in disregard of principle, or under a misapprehension as to the facts, where it took into account irrelevant matters, failure to take into account relevant matters, or where the conclusion was outside the generous ambit, within which reasonable disagreement is possible. We keep those principles firmly in mind.

23. As we consider the Tribunal's reasoning, we consider first the question of particulars. This, to our mind, must have been the central matter in the Tribunal's consideration. The failure to provide wage details would have impacted, insofar as it impacted upon merits at all, on a constructive unfair dismissal claim as well, and the Tribunal did not strike out the unfair dismissal claim. Moreover, the question of particularity occupies a significant part of the Tribunal's reasoning.

24. We think the Tribunal may well have approached this aspect under a misapprehension. As we have said, it is not right to say that the order dated 20 September 2005 dealt with particulars of the claim. All that was ordered on 20 September was particulars of pay. VCH did not ask for further particularisation until just three weeks before the hearing.

25. In our judgment the Tribunal placed a weight on the provision of particulars which it could not bear in this case. Indirect discrimination is, of course, a highly technical area of law, which can give rise to great difficulty and complexity. But on the scale of complexity this case was at the low end. Whether the case has merit is for the Tribunal to decide, but we find it difficult to see how there was substantial prejudice to VCH given what is set out in the claim form. We are encouraged in this view by the fact that no reference was made to the provision of particulars at the pre-hearing review on many of the matters which the Tribunal identified at paragraph 11 of its reasons.

26. There is, in the Tribunal's reasoning, no express finding that a fair trial was impossible; rather, a reference to significant impact on the ability to have a fair trial. There is no express reference to proportionality. The last paragraph of the judgment of Sedley LJ would not have

been available to Tribunal in this case, but it is only an application of principles now well laid down by the Appeal Tribunal in other cases, some of which we have mentioned above.

27. In this case there were, in our judgment, certainly alternatives less than immediate striking out to be considered. The obvious one would have been to clarify with the parties what particulars really were required and then to order Mr Panesar to produce them straight away. If that had caused any delay at all it could have been visited in costs. We find it difficult to envisage that any particulars that he would have provided would then have required an adjournment of the whole case. Be that as it may, the Tribunal proceeded to strike out the claim in circumstances where there was, without doubt, a lesser alternative.

28. So far as wages details are concerned, again it is, in our judgment, quite possible for the Tribunal to have dealt with the issue without a strike out. Insofar as failure to provide them led to legitimate doubts about the Claimant's evidence, for example about her reason for resignation, this is a matter the Tribunal would have been entitled to take into account in its findings. Alternatively, in a three-day hearing there could have been a peremptory order for them to be provided straight away. It is certainly unfortunate that Mrs Jones' Solicitors, in the face of an order, queried the order rather than providing the information, but in this case, in our judgment, proportionality was not properly considered and the result was a strike out which was disproportionate in all the circumstances. For these reasons we consider that the appeal must be allowed and the striking out order set aside.

29. We have been told that the unfair dismissal claim remains part heard and that the case for VCH has not yet begun. In those circumstances it seems to us that, although ultimately it will be a matter for the Tribunal, it still ought to be possible for the Tribunal to deal with the indirect discrimination claim at the same time as the unfair dismissal claim. If VCH still seeks

particulars or any other interlocutory order then, in our judgment, that should be stated with precision straight away. If there is any issue as to what must be done then the Chairman can and should consider the matter before the hearing resumes.