Appeal No. UKEAT/0119/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 March 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR V MBUISA — APPELLANT

CYGNET HEALTHCARE LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR VUSUMZI MBUISA (The Appellant in Person)

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

The Claimant, acting in person, pursued a number of claims before the Employment Tribunal ("the ET") arising out of his employment with the Respondent and what he claimed was his constructive dismissal. He did not have sufficient continuous service to pursue a claim of unfair dismissal under section 98 **Employment Rights Act** ("ERA") but claimed he had been automatically unfairly (constructively) dismissed for a reason contrary to section 100 **ERA**. After attempts to clarify the Claimant's claims at two Preliminary Hearings, the ET indicated it was considering whether the section 100 constructive dismissal claim should be struck out. After receiving further written representations from the Claimant, the ET went on to strike out this claim, concluding that - on the Claimant's own case - he was not suggesting the matters that had caused him to resign from his employment (assaults, a threatened assault and being required to carry out lifting work when he was not fit to do so) had occurred by reason of any actions he had taken for section 100 purposes.

The Claimant appealed. The Respondent did not contest the appeal.

Held: *allowing the appeal*

The ET erred in striking out this claim as it had assumed a case for the Claimant that did not fully engage with what he was trying to say. While the immediate reason/s why he left his employment - the assaults, threatened assault and requirement to do lifting work - might not have occurred directly because of anything he had said or done relevant to section 100, the Claimant was saying that the Respondent had allowed circumstances to exist such that these things could happened because of his section 100 concerns. The question for the ET was whether there was no reasonable prospect of the Claimant being able to show that his raising of matters falling under section 100 was the reason or principal reason for why the Respondent allowed circumstances to

arise such that he could be assaulted, threatened with assault or required to do lifting work. Appreciating the challenges faced by the ET in seeking to case manage claims that were poorly pleaded, striking out the claim had been a draconian step (depriving the Claimant of the right to have his case determined on the merits) that was premised on a misunderstanding of the case. The decision could not stand and would duly be set aside. The appropriate course to take in this case was to record how the case was in fact being put, ensure that the original pleading was formally amended and make any appropriate deposit order if it was considered that the case had little reasonable prospect of success.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns a decision to strike out a claim, in circumstances in which an issue had been raised regarding the reason for what was said to have been a constructive dismissal.

2. In giving this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against the Judgment of the Leeds Employment Tribunal (Employee Judge Cox sitting alone; "the ET"), sent out to the parties on 16 February 2018. The Claimant at all times represented himself before the ET, as he has done on this hearing. The Respondent was previously represented by a consultant.

3. By its Judgment, the ET struck out the Claimant's claim of constructive unfair dismissal for a health and safety reason. The Claimant seeks to challenge that ruling and, after an Appellant only Preliminary Hearing before His Honour Judge Shanks, at which the Claimant was assisted by counsel acting under the Employment Law Advice and Assistance Scheme, the appeal was permitted to proceed on the following amended grounds:

> **"Ground 1**
>
> **1. The employment judge erred in law in the application of section 100 Employment Rights Act 1996 in that**
>
> **(A) the judge failed to apply the principles in Abernethy v Mott Hay and Anderson [1974] ICR 323 at 330B to the concept of reasons within the section in that the claimant asserted facts, which were known to the employer, which caused the inaction of the employer which in turn caused his constructive dismissal.**
>
> **(B) the judge failed to apply the principles in Berriman v Delabole Slate [1985] ICR 546 in the context where the conduct of the employer causing the constructive dismissal as a failure to act on disclosures of breaches of health and safety requirements; the judge should have asked whether there was any reasonable prospect of the claimant successfully showing the facts and matters known by the employer which explain the employer's failure to act (which in turn caused a constructive dismissal);**
>
> **Ground 2**
>
> **2. The judge erred in law in striking out the claimant's claim under section 100 Employment Rights Act 1996:**

> **(a) in failing to take account of the assertions within the Particulars of Claim dated 28 January 2018 provided by the claimant which demonstrated that the Claimant was asserting that the reason for his constructive dismissal was his assertion of rights under section 100 and other actions under that section.**
>
> **(b) In failing to consider whether, having regard to that document and the assertions made in it, there was an alternative to striking the claim out, namely permitting amendment of the Claim Form in accordance with the issues set out in the Particulars of Claim."**

4. For its part, the Respondent does not resist the appeal and has not entered a Respondent's answer or any written representations for the purposes of today's hearing.

The background and the ET's decision and reasoning

5. Although there was a dispute between the parties as to when the Claimant's employment with the Respondent had started - the Claimant contended this was on 17 December 2016; the Respondent that it was 7 February 2017 - it was common ground that it had ended on 30 August 2017, when the Claimant resigned, having been absent from work on sick leave from 22 May 2017. It was the Claimant's case that his resignation was in response to the Respondent's fundamental breach of his contract of employment; he had been constructively dismissed. That was denied by the Respondent.

6. On either case, the Claimant did not have sufficient continuity of service to complain of unfair dismissal under section 98 of the **Employment Rights Act 1996** (the ERA"). He lodged ET proceedings, however, in which he made various complaints of the breach of contract, unauthorised deductions from wages and for holiday pay, of detriment and constructive unfair dismissal on the ground of public interest disclosures and of constructive unfair dismissal for health and safety reasons; he also complained of race and disability discrimination.

7. At this stage I am concerned only with the Claimants claim of constructive unfair dismissal for health and safety reasons, contrary to section 100 of the **ERA**, which provides (relevantly) as follows:

"100 Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that-

…...

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."

8. Over the course of two Preliminary Hearings, the ET sought to assist the Claimant in clarifying his claims and the issues to be determined. The Claimant clarified that the breaches of contract on which he relied to make good his case of constructive dismissal were breaches of the implied obligation to maintain trust and confidence, covering what he claimed were various acts of disability and race discrimination and the Respondent's failure to act on his complaints about breach of safety procedures. He also claimed he resigned because of the Respondent's breach of the implied duty to take reasonable care for his health and safety, arguing that his constructive dismissal was (automatically) unfair because the sole, or principal, reason for his dismissal was that he took one of the health and safety related actions identified by section 100 of the **ERA**.

9. At one of the earlier Preliminary Hearings, the ET had indicated its provisional view that the Claimant's claim of unfair dismissal for health and safety reasons had little reasonable prospect of success and the Claimant was given the opportunity to make written representations as to why this claim should not be struck out. It is the ET's subsequent ruling, striking out the claim, that is the subject of the current appeal.

10. In explaining its reasoning for its Judgment in this regard, the ET stated:

> **"2. …. When identifying the reason for a constructive dismissal, the Tribunal looks at *the reason for the conduct alleged to amount to a fundamental breach of the employee's contract of employment.* Nothing the Claimant said in his claim form or at the Preliminary Hearings indicated that the Claimant believed that *the reason why* the Respondent committed the conduct that breached his contract of employment was any action he took within Section 100…."**

11. The ET referred to the Claimant's further written representations in support of his claim, summarising his case under section 100 as follows: "*Claimant resigned for health and safety reasons and therefore his dismissal was automatic unfair dismissal on health and safety reasons under section 100 (1)(c)(d) and (e).*"

12. The ET was not persuaded, explaining its reasoning as follows:

> **"The Claimant's representations are based on a continuing misunderstanding of the basis on which the Tribunal has been assessing the strength of this aspect of his claim. The Tribunal has made no findings of fact and is assessing the claim on the assumption (but without finding) that the Claimant did indeed take various actions that fell within Section 100. The Claimant has not, however, asserted in his claim form or at either of the Preliminary Hearings that *the reason why the Respondent breached his contract of employment* was any conduct of his falling within Section 100. The Tribunal has therefore concluded that this aspect of his claim has no reasonable prospect of success."**

The appeal and the Claimant's submissions

13. By his first ground of appeal, the Claimant contends the ET erred in its approach to section 100 of the **ERA**, failing to apply the principles laid down in **Abernethy v Mott Hay and Anderson** [1974] ICR 323 to the determination of the reason for dismissal. It was the Claimant's case that he had asserted matters, known to the Respondent, that fell within section 100 **ERA** and that this caused the inaction of the Respondent, which in turn led to his resignation, properly to be characterised as a constructive dismissal. Applying the approach laid down by the Court of Appeal in **Berriman v Delabole Slate**, he contended that the ET ought to have asked whether there was any reasonable prospect of his successfully showing the facts and matters known by the Respondent, which explained its failure to act, and which ultimately caused him to resign.

14. By his second ground of appeal, the Claimant further argues that the ET erred in law in striking out his claim, failing to take into account his representations within his Particulars of Claim of 28 January 2018, which demonstrated that he was saying that the reason for his constructive dismissal was his assertion of rights under section 100 and other actions under that section. Specifically, the Claimant contended that the Respondent had been in denial regarding incidents reported by the Claimant and unwilling to take any positive measures to reduce the risk; it was, instead, embroiled in defending breaches of health and safety regulations and requirements.

15. The Claimant also argued that the ET erred by failing to consider - having regard to his further Particulars of Claim - whether there was an alternative to striking out the claim, in particular in considering whether the Claimant might be granted leave to amend.

Discussion and conclusions

16. The first issue raised by the Claimant's complaint of automatic unfair dismissal on health and safety grounds was whether he had been dismissed. By section 95(1)(c) of the **ERA,** "dismissal" is defined as including cases where "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*" – constructive dismissal.

17. It is the complainant who bears the burden of proving that he has been constructively dismissed - a question that is to be determined according to the guidance laid down by the Court of Appeal in **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221: the employee must demonstrate that the employer has acted in fundamental breach of contract; that he, the employee, left in response to that breach and that he did not waive the breach.

18. The Claimant's case was that the relevant breach of contract was of the implied obligation to maintain trust and confidence. If established that would be a fundamental breach. He was contending that the Respondent had failed to take action to protect his health and safety at work and that had led to incidents in which he was assaulted, or threatened, or required to carry out lifting work when he was unfit to do so. More particularly, he says the Respondent's inaction arose because he had raised matters such as would engage section 100 of the **ERA**.

19. The ET's power to strike out a claim for having no reasonable prospect of success derives from Rule 37 Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"). The striking out of the claim amounts to the summary determination of the case. It is a draconian step that should only be taken in exceptional cases. It would be wrong to make such an order where there is a dispute on the facts that needs to be determined at trial. As the learned authors of **Harvey on Industrial Relations and Employment Law** explain (see P1 [633]):

> **"It has been held that the power to strike out a claim under SI2013/1237 Schedule 1 Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (Tayside Public Transport Co Limited (trading as Travel Dundee) v Reilly [2012] CSIH 46 [2012] IRLR 755 at para 30) or specifically cases should not as a general principle be struck out on this ground when the central facts are in dispute (see Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330 [2007] IRLR 603 [2017] ICR 1126; Tayside Public Transport Co Limited (trading as Travel Dundee) v Reilly [2012] CSIH 46 [2012] IRLR 755; Romanowska v Aspirations Care Limited UKEAT/0015/14 25 June 2014 unreported). The reason for this is that on a striking out application, as opposed to a Hearing on the merits, the Tribunal is in no position to conduct a mini trial with the result that it is only an exceptional case that it would be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence…"**

20. Such an exceptional case might arise where it is instantly demonstrable that the central facts in the claim are untrue or there is no real substance in the factual assertions being made, but the ET should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents, see **Ukegheson v London Borough of Haringey** [2015] ICR 1285 at para 21 per Langstaff J at para 4.

21. Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see **Hassan v Tesco Stores Ltd** UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where - as Langstaff J observed in **Hassan** - the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form.

22. That is not to say that I have no sympathy for the ET faced with a lengthy statement of case, presented in narrative form, with apparently irrelevant citations from statute or case law. In the present case, the Further Particulars the Claimant submitted on 28 January 2018 comprised 49 pages ranging over the various claims he had sought to make in his ET1. It was a document that no doubt took the Claimant a considerable amount of time to prepare but, while there were references to section 100 of the **ERA** and to the ways in which the Claimant claimed he had raised matters falling within the terms of that provision, it remained less than clear how he was saying his raising of such matters had caused the Respondent to take action such as then led to the various incidents that had caused him to resign. That said, the Particulars did include an allegation that, having had various health and safety matters brought to its attention by the Claimant, the Respondent had reacted defensively, denying those breaches and failing to take the necessary steps to avoid future incidents. From this, it was possible to discern the Claimant's case: having failed to respond to his health and safety concerns - raised in such a way as to engage section 100 of the **ERA** - the Respondent then allowed the circumstances to arise that led him to

resign (the assaults, or threatened assaults, by patients and a requirement to undertake lifting work when he had a back injury). The Claimant was not saying that the reason for the assaults, or threatened assault, or requirement to undertake lifting work, was his raising of matters that would fall under section 100, but he was arguing that the Respondent's inaction, in response to his concerns, was.

23. Proceeding on the assumption that the Claimant had indeed taken actions such as would bring him within the ambit of the protection afforded by section 100 of the **ERA**, the ET had taken the view that this did not assist him, because he was not saying that the reason why the Respondent breached his contract of employment was due to his actions for section 100 purposes. That being so, on the ET's reasoning, even if the Claimant could show that he was constructively dismissed, he had no reasonable prospect of showing that this was an automatic unfair dismissal - something he would need to do, because he had insufficient service to bring a claim of unfair dismissal under section 98 **ERA (a**lthough the burden of proof of demonstrating the reason for dismissal would normally fall on the employer, that would not be so where a complaint depends upon the establishment of an automatically unfair reason for the dismissal, see **Maund v Penwith District Council** [1984] ICR 143).

24. The difficulty with the ET's decision to strike out is, however, that it assumed a case for the Claimant that did not entirely encompass what he was trying to say. If asked what was the immediate reason or reasons why he left his employment, the Claimant pointed to the assaults, threatened assault, and requirement to do lifting work. Although he was not saying that any of those matters occurred directly because of anything he had said or done relevant to section 100 of the **ERA**, he was saying that the Respondent had allowed the circumstances to exist such that these things could happen, and that it had done so because of the Claimant's section 100 concerns.

25. Adopting the approach laid down for the determination of the reason for a constructive dismissal in **Berriman v Delabole Slate** [1985] ICR 546, the question for the ET was whether there was no reasonable prospect of the Claimant being able to show that his raising of matters falling under section 100 was the reason, or principal reason, for why the Respondent allowed circumstances to arise such that he could be assaulted, threatened with assault, or required to do lifting work when unfit to do so. The Claimant was saying that the Respondent had failed to act because he had raised matters falling within section 100 and that, by reason of the Respondent's failure to act, he had faced circumstances that had caused him to leave his employment. That, the Claimant was contending, amounted to a constructive dismissal. The reason for that constructive dismissal was his raising matters under section 100: there might be more than one link to the chain of causation but his argument demonstrates how the case might succeed, albeit in a way apparently missed by the ET.

26. As I have sought to make clear, I appreciate the difficulties faced by ETs in case managing claims that are poorly pleaded and where a litigant has failed to articulate their case in a readily comprehensible way. That said, in such cases, striking out the claim is rarely the correct answer. Here, the remaining claims pursued by the Claimant were still to proceed. The automatic unfair dismissal case under section 100 **ERA** was part and parcel of his overall complaint against the Respondent; very little was served by striking it out and one might question the case management objective in doing so. More to the point, however, it was a draconian step that robbed the Claimant of the right to have his complaint determined on its merits. The right course was to record how the case was being put, ensure that the original pleading was formally amended so as to pin that case down, and - if it was then considered that the case had little reasonable prospect of success - make an appropriate deposit order.

27. The ET failed to understand the Claimant's case on automatically unfair constructive dismissal under section 100 **ERA**. It was not straightforward, and the Particulars provided required some unpacking, but it had been an error to strike out the claim. The Claimant's appeal would thus be allowed and the claim of automatic constructive unfair dismissal for health and safety reasons under section 100 of the **ERA** will be remitted to the ET for consideration along with the remaining claims.