

IN THE SUPREME COURT OF JUDICATURE No. EATRF 99/0163/A1
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday 25th February, 2000

B e f o r e:

LORD JUSTICE HENRY
LORD JUSTICE ROBERT WALKER
AND
MR JUSTICE SCOTT BAKER

ROGER STORER

Appellant

- v -

BRITISH GAS PLC

Respondent

Computer Aided Transcript of the Typewritten Notes of
Smith Bernal Reporting Limited
Telephone No: 0171 421 4050 Fax No: 0171 404 1424
(Official Shorthand Writers to the Court)

Mr Storer appeared in person
Sean Wilken Esq (instructed by British Gas plc for the Respondent)

J U D G M E N T

(As Approved by the Court)
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Lord Justice Henry:

1. This is an appeal from the decision of the Employment Appeal Tribunal dismissing Mr Storer's appeal against the decision of the Industrial Tribunal dismissing his application (inter alia) for constructive unfair dismissal on the grounds that his originating application was not filed in time.

2. The appellant, Mr Storer, was employed (ultimately as Assistant Financial Services Manager) by British Gas from 1967 (when he was 18) until 23rd December 1996. The last years of his employment were not happy: by his account (which I have no reason to doubt) he was victimised and bullied throughout 1994 by his then manager, resulting in stress, followed by depression, culminating in the recognition of certain symptoms of post-traumatic stress disorder by his consultant psychiatrist a year before the termination of his contract. He took paid sick leave for two months later that year. He was clinically depressed, and reluctant to take the drugs prescribed. When he returned to work after his sick leave, he was offered voluntary redundancy, which he finally took, leaving with an agreed severance payment of £85,163.47. It was the employer's case that this voluntary departure accompanied by a substantial payment put significant hurdles in the way of any further claim against them, but that was never explored before us because this claim was dismissed for failure to comply with time limits, and therefore the merits have not been considered.

3. Mr Storer's claim was founded on the fact that he had been victimised and bullied, that to permit such treatment of him was a breach of his contract of employment, and that the termination of his employment was constructive unfair dismissal.

4. Section 111(2) of the Employment Rights Act, 1996 provided that:

... (i) An Industrial Tribunal shall not consider a complaint under this Section unless it is presented to the Tribunal

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

5. Here, his originating application making these claims was presented to the Tribunal on 20th June 1997, nearly six months after termination, or nearly three months too late.

6. This point was taken at a preliminary hearing before and by direction of an Industrial Tribunal chairman, Mr D M Booth sitting alone, held on 4th November 1997. Mr Storer was presenting his own case. British Gas were represented by Counsel. Mr Storer expected to go first, and had prepared a 262 page bundle documenting his case, which he hoped to take the Chairman

through.

7. Instead, the Chairman took matters into his own hands, and questioned Mr Storer for an hour and a half. Mr Storer in the result feels that he was not given the chance to do his case justice. His case was that he was simply too ill, too depressed, to contemplate over that period anything to do with the last years of his employment. His mother, who lived a long way away in Clacton (he lived in Edgware) was dying. He visited her often, sometimes as an emergency. She died on 4th June, two weeks or so before he presented his originating application. Until then he felt he had to be ready to drive to see her at a moment's notice. So he could not look at work-connected papers for fear that they would so upset him that he would have to take to his bed. He knew of the three month time limit, but was sure that the Tribunal would recognise that it was not reasonably practicable for him to submit his originating application in time while he was in the grip of disabling depression. I have no doubt but that he was depressed, and was also telling us the truth as he saw it of how he felt at the time.

8. He also had another reason, itself typical of the man. He was aware that costs could be ordered against him if his claim was frivolous or vexatious. This caused him considerable anxiety. It was not until June that he believed his case was strong enough to put forward.

9. The Chairman reserved his decision in order to have time to properly consider the bundle of documents that Mr Storer had produced so that he:

... could consider more fully the nature of the illness which [Mr Storer] said prevented him from completing this form."

10. He refused Mr Storer's application to extend time. His conclusion was:

I have concluded that it would not be unreasonable to expect an intelligent man of Mr Storer's standing and experience to be able to fill in a two page form at some time between his weekly visits to his mother, albeit some of them may have been at short notice. It was quite open to him to seek legal advice to take any of the drafting pressure off his shoulders, and whilst he may have not liked to address the issues at that stage and indeed found it uncomfortable to do so, that does not mean it was not reasonably practicable. It is significant that he was able to write significant letters about the bullying aspect of his case."

11. Mr Storer sought a review of its decision, which was refused. He then appealed to the Employment Appeal Tribunal (EAT). There he took a new point, namely his case had not been heard in public, as the Regulations required. The EAT rejected that on the basis that, on the facts, the hearing could be described as a public hearing.

12. In relation to the other points, the EAT concluded:

i)the Chairman was entitled to conduct the case in the way he had.

ii)No injustice had been caused by the respondent sending to the Chairman, after the hearing

but before the decision, copies of four letters Mr Storer had written (including one to the Chairman of British Gas) over the months in question.

(iii) There was no basis under the "just and equitable" or the "reasonably practicable" tests for extending time.

13. Accordingly, there was no arguable point of law in the appeal and it was dismissed.

14. Mr Storer appealed to the Court of Appeal. The Full Court gave leave on one point only: that the hearing of the Industrial Tribunal on 4th November was not a public hearing, and both the Industrial Tribunal and the EAT erred in law in asserting that it was.

15. This was a point that Mr Storer had not taken before the Industrial Tribunal. It arises in this way. Rule 8(2) and 8(3) of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations, 1993 provide:

(2) Any hearing of or in connection with an originating application shall take place in public except where a Minister of the Crown has directed a Tribunal to sit in private on grounds of national security in accordance with paragraph 1(4A) of Schedule 9 to the 1978 Act.

(3) Notwithstanding paragraph (2), a tribunal may sit in private for the purpose of—

(a) hearing evidence which in the opinion of the tribunal relates to matters of such a nature that it would be against the interests of national security to allow the evidence to be given in public; or

(b) hearing evidence from any person which in the opinion of the tribunal is likely to consist of—

(i) information which he could not disclose without contravening a prohibition imposed by or under any enactment, or

(ii) any information which has been communicated to him in confidence, or which he has otherwise obtained in consequence of the confidence reposed in him by another person, or

(iii) information the disclosure of which would cause substantial injury to any undertaking of his or to any undertaking in which he works for reasons other than its effect on negotiations with respect to any of the matters mentioned in section 244(1) of the 1992 Act. "

16. The gravity of the limited exceptions to the rule that Industrial Tribunals (as they were then called) must sit in public points to the importance of the rule.

17. The facts are these. At this Centre, 12 Industrial Tribunals were sitting on that day. The lists of cases to be heard in each were on public display. There was also a list of floating cases, ie cases which had not been allocated to a court, but would be heard as and when a court became available. Mr Storer's case was one of these. As the morning wore on, it seemed clear that his case would not

be reached unless it was heard in a room not normally used as a court-room. One was available – namely the office of the Regional Chairman, as that position was unfilled at the time. As a judge was available, and as the room was available, the court authorities took the decision to have the hearing there. They did not consult Mr Storer on this. The parties (including Mr Storer's wife) were escorted there by a guide. No member of the public accompanied them. It is accepted that Mr Storer's application for leave to appeal to the Court of Appeal accurately summarises the geographical situation of the room that was used:

(a)The hearing was held behind a locked door which separated the area to which the public had access from that part which the learned judge described as the 'secure area' on the second floor of the Tribunal office. This 'secure area' [is] protected by the door locked with a push-button coded lock [which] provides the only means of access to the large open plan office off which the Regional Chairman's room is located.

(b)This locked door is clearly marked with a large sign stating 'Private' in black letters on a white background.

(c)All access stairs from the public areas on the ground and first floors to the second floor where [the] locked door is located are marked clearly with a large sign stating

PRIVATE

NO ADMITTANCE

TO PUBLIC BEYOND

THIS POINT"

18. When the point was taken on appeal to the EAT, they held:

It is right to say that [the Regional Chairman's Office] is in the secure part of the building, but there is no suggestion that any member of the public was prevented from attending the meeting, and in our view it can properly be described as a public hearing."

19. It is plain that the test as to whether a hearing is in public or in private cannot depend on whether in fact any member of the public was prevented from attending the hearing. Were that not the case, then it would be a simple stratagem not to list any case which the court administration wished to be heard in private.

20. Before us, Mr Wilken for British Gas concedes first, that this hearing was "... in connection with ..." the originating application made by Mr Storer, so the Rule 8(2) obligation to have a public hearing applied, second that the requirement to have such a hearing in public was mandatory, and not merely directory, and third that he was not contending that the rules provided for a private hearing in chambers in interlocutory matters, such as is the case in the High Court and the County Court.

21. From this starting position he makes the following points:

22. First, whether a hearing is in public is a question of fact and degree for the trial judge. Therefore, it is a matter of discretion, to be exercised with regard to the overall interests of justice. Second, the judge was entitled to find that this hearing was in public, having regard to the absence of available courtrooms, the desirability of the parties' time and expense not being wasted, and that there was no evidence that any member of the public was excluded. Third, the decision was made public by entry on the register, and there was available (and now has taken place) a full appeal in public to the EAT.

23. In general support of the first two submissions, Mr Wilken relied on R –v– Denbigh Justices [1974] 3 WLR 45. Though I will deal with each of those submissions in detail, that authority does not greatly assist him. There, the Court was sitting in Llanrwst, in Court 2, a small court. There, in a list of minor offences, two members of the Welsh Language Society were being prosecuted for using their televisions without licences. They attended for their trial with 20 or 30 friends or supporters. When the parties, their lawyers and the press had been admitted to the court, only five seats were available for the general public. The Chairman of the Bench responsible for the conduct of the case in public, invited the defendants to nominate five of their friends. When the first defendant's application to have the case heard in Welsh was refused, the defendant and two of his friends left the court, after creating a disturbance. When the second defendant's similar application was also refused, he and the remaining supporters left. The Divisional Court held that the court was undoubtedly sitting in public at the beginning of the trial, and (obiter) even if the court had refused to permit the five vacated seats to be filled thereafter, there would have been every possible justification for the Chairman to refuse to have the seats filled given the behaviour of the first batch of friends and supporters. The Court said:

I do not think that the question of open court or no can depend on such minutiae as to whether at a particular moment there was a particular member of the public anxious to come in who was wrongly refused."

24. I agree in general terms with that decision. Whether a court is sitting in public may be, in any individual case a question of fact and degree for the judge, a matter of discretion. But it would be a wrong exercise of that discretion not to take proper account of the need for that rule. The source of the debate on this issue is the well-known case of Scott –v– Scott [1913] AC 417. That case concerned Section 45 of the Divorce Act, 1857 which

25. "... was substantially to put an end to the old procedure and to enact that the new Court was to conduct its business on the general principles as regards publicity which regulated the other courts of justice in this country. These general principles ... lay down that the administration of justice must so far as the trial of the case is concerned ... by conducted in open Court" (at 434)

26. That principle was to be subject to certain well-known exceptions (none of which apply here). Those exceptions are where a hearing in private is required either to do justice or to prevent injustice:

As the paramount object must always be to do justice, the general rule as to publicity, after all only a means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

27. Later in that case, Lord Shaw of Dunfermline (at 476) said "that publicity in the administration of justice .. one of the surest guarantees of our liberties", and on 477 cites passages from *Bentham* and *Hallam* in support of the general thesis that in Bentham's phrase "Publicity is the very soul of justice". The principle is as important now as it was then – for a modern statement of it see the passage from Sir Jack Jacob's Hamlyn Lecture, *The Fabric of English Civil Justice* (1987), quoted by Lord Woolf MR in Hodgson –v– Imperial Tobacco Limited [1998] 1 WLR 1056 at 1069G.

28. An application of the principles in Scott –v– Scott is to be found in McPherson –v– McPherson [1936] AC 177, a decision of the Privy Council's in a Canadian case. There the undefended divorce of a well-known politician was conducted not in a court room (though there were empty courts available) but in the Judges' Library. There was direct public access to the courts, but not to the Judges' Library. It can be approached from the same corridor which encircles the building and provides direct access to the courts, but only through a double swing door, one side of which is always fixed, and on which there is a brass plate with the word "Private" in black letters on it. Through this swing door was another corridor, on the opposite wall of which was a further door to the Judges' Library. Both this internal door and the free swinging half of the double doors were in fact open during this hearing. The question for the Court was

29. "... whether those swing doors with "Private" marked upon one of them were not as effective a bar to the access to the library by an ordinary member of the public finding himself in the public corridor as would be a door actually locked." (p 198)

30. Their answer, while accepting that no actual exclusion of the public was intended, was that

31. "... even although it emerges in the last analysis that their actual exclusion resulted only from that word "Private" on the outer door, the learned judge on this occasion, albeit unconsciously, was, their Lordships think, denying his court to the public in breach of their right to be present, a right thus expressed by Lord Halsbury in Scott –v– Scott: 'every court of justice is open to every subject of the King'." (that rule is of course subject to all the strictly defined exceptions referred to above).

32. Mr Wilken seeks to distinguish that authority by the nature of the proceedings – divorce – with which the court was concerned. He submits that in such cases there is greater importance on cases being heard in public than in industrial tribunals. I do not accept that, certainly not where, as

here, Parliament has not only required all hearings "connected with" an originating application to be heard in public, but has not provided for any chambers-type procedure. The "industrial jury" is intended to function in public, and in my judgment all the arguments of principle as to the importance of that requirement apply here.

33. The reality is that this is a clear case. This is a stronger case than McPherson, because the coded door lock would be an actual physical barrier, lacking in McPherson, to prevent all access to the public. There was no chance of a member of the public dropping in to see how Industrial Tribunals (as they then were) were conducted, and the fact that none attempted to does nothing to show that this Tribunal was conducting the trial of this preliminary issue in public. I willingly accept that what was done was done for the best of motives, but the Tribunal was sitting in private, and (as Rule 8(3) did not apply) it did not have jurisdiction to sit in private.

34. What consequence follows from that? The principle is an important one. As the passage from Sir Jack Jacob quoted by the Master of the Rolls in Hodgson –v– Imperial Tobacco (above at 1069) reminds us:

The need for public justice, which has now been statutorily recognised, is that it removes the possibility of arbitrariness in the administration of justice, so that in effect the public would have the opportunity of 'judging the judges': by sitting in public the judges are themselves accountable and on trial. This was powerfully expressed in the great aphorism that, 'it is not merely of some importance but is of fundamental justice that justice should not only be done but should manifestly and undoubtedly be seen to be done'. The opposite of public justice is of course the administration of justice in private and in secret, behind closed doors, hidden from the view of the public and the press and sheltered from public accountability."

35. That importance is reflected in the use of the mandatory word "shall" used in the Rule, which raises an inference that the failure to do the required act renders the decision unlawful (see DeSmith, 5th Edition 5–058).

36. While Parliament has laid down the prescribed manner for the hearing to be conducted (in public) it has not laid down the consequences for the unlawful act of non-compliance. Under Order 59, Rule 10(3) we have power to make any order which ought to have been given or made. So we have the full range of powers open to us: from remitting for a rehearing in public to concluding that no rehearing was necessary. We look to the importance of the provision made mandatory,

37. "particular regard being given to its significance as a protection of individual rights " (DeSmith, 5th Edition, 5–061).

38. I for my part regard the obligation to sit in public as being, on the facts of this case, both fundamental to the function of the employment tribunal and important in its own right. I would accordingly quash the decision of the Industrial Tribunal and remit the matter for rehearing before another tribunal.

39. In order to overcome the time barrier, that hearing will be centrally concerned with how ill Mr Storer was in the three months following the termination of his employment, and what, in his depressed state, was "reasonably practicable". That factual decision seems to me to be pre-eminently one for the full three-member panel of the "industrial jury" to consider. I trust that can be arranged.

40. Further, on two occasions now different constitutions of this Court have suggested that this case cries out for mediation. Twice British Gas has refused that suggestion. It should be reconsidered in the light of Mr Storer's 29 years service with the company. It was in their service that his health suffered.

41. Lord Justice Robert Walker:

42. I agree.

43. Mr Justice Scott Baker:

44. I also agree.

ORDER: Appeal allowed with costs; permission to appeal to the House of Lords refused.