

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 20 May 2009
Reasons for Judgment handed down on 23 July 2009

Before

HIS HONOUR JUDGE McMULLEN QC

MR T MOTTURE

MR H SINGH

MRS G WILLIAMS

APPELLANT

CATER LINK LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR J SYKES
(Representative)
R C Hall Solicitors
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For the Respondent

Mr M GRANT
(of Counsel)
Instructed by:
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SUMMARY

PRACTICE AND PROCEDURE: Bias, misconduct and procedural irregularity

On a hearing before the EAT findings of fact as to allegations of actual and apparent bias by an employment judge were rejected applying **Abegaze**.

This is a classic case where a claimant is dissatisfied as to the dismissal of her case where Rimer J in **Hackney LBC v Sagnia** UKEAT/0600/03 observed the false logic in which a claimant says I have a strong case, I have lost so the court must be biased against me. This judge was not biased nor gave the appearance of bias against the claimant, these allegations are unfounded.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about allegations of actual and apparent bias made by the Claimant Ms Williams in her Tribunal proceedings against the Respondent Caterlink Ltd.

2. These are reserved reasons for a judgment we gave on 20 May. It is the judgment of the court to which all members appointed by statute for their diverse specialist experience have contributed.

Introduction

3. It is an appeal by the Claimant in those proceedings against a judgment of Employment Judge Southam sitting alone at Watford registered with reasons on 30 July 2008. The Claimant was represented by counsel who we will refer to as Mr D. He was instructed by Mr Eruteyan of RC Hall Solicitors. Today she is represented by Mr Joe Sykes. The Respondent was represented there by Ms Sarah Lippold and today by Mr Grant, both of counsel.

4. The Claimant is black. She made a number of claims against the Respondent including race discrimination, unfair dismissal and unpaid holidays. The Judge acceded to the Respondent's application to strike out the race discrimination and holiday pay claims, refused to strike out the unfair dismissal claim and declined to make a costs order against the Claimant. It was ordered that the unfair dismissal would be tried over four days. The Claimant appealed against the strike out. She also alleged actual and apparent bias by the judge. On the paper sift of this appeal, HHJ Ansell directed evidence relating to the bias allegations should be adduced and sent the appeal to a preliminary hearing. At that hearing conducted by HHJ Peter Clark and members for which reference should be made to the transcript, the appeal against the strike out of the race discrimination claim failed but would become live again if the bias allegation succeeded. Since Judge Clark had no evidence from the Respondent he said there was nothing

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to gainsay the Claimant's evidence at that stage and ordered the bias allegation to be heard at a full hearing in accordance with the procedure set out in **Facey v Midas Retail Security and Anor** [2000] IRLR 812.

5. He also ordered the holiday pay appeal to be heard, giving his opinion that it was reasonably arguable that the claim should not have been struck out without first the imposition of an unless order on the Claimant to comply with previous orders.

6. At the conclusion of our hearing, Mr Grant who appears for the Respondent consented to this ground of appeal being allowed. This is a proper case in which we can set aside the order pursuant to paragraph 15 of the Practice Direction for it appears that the Respondent had conceded at the Employment Tribunal that a fair trial was still possible. Although the judge considered relevant authorities, the most important authority now on strike out is **Abegaze v Shrewsbury College** [2009] EWCA Civ 96 from which it is clear that a strike out should not be made until an unless order has been tried and breached. Since we have set aside by consent that part of the judge's order, the matter is now in our hands and we will order that the Claimant provide further information on the holiday claim which will be struck out unless this material is provided within 21 days. If it is, that claim can be bolted onto the unfair dismissal claim already going ahead.

Procedure

7. This appeal now consists solely of a trial of the allegation that the judge showed actual or apparent bias. The procedure dealing with this is set out in a judgment I gave on behalf of the Employment Appeal Tribunal in **Abegaze v Shrewsbury College** [2007] UKEAT/0176/07 which was not affected by the Court of Appeal's judgment. The EAT acts as a court of first instance to determine the facts. The test is whether a fair reasonably informed observer would UKEAT/0393/08/DM

consider there was a real possibility the judge was biased. If the judge has an actual interest in the case there is automatic disqualification.

8. The law on recusal of a judge because of a relationship with a party or a representative is set out in **Locabail (UK) Ltd v Waldford Investment Corporation** [2000] IRLR 96 and for the purposes of this hearing paragraph 25 is relevant together with paragraph 7.2.4 of the Guide to Judicial Conduct published by the Judges' Council in March 2008 which provides as follows:

“Friendship or past professional association with counsel or solicitor acting for a party is not generally to be regarded as sufficient for disqualification.”

The evidence

9. We heard evidence from the Claimant, Mr Eruteyan and Ms Lippold, the last two giving evidence in accordance with their affidavits. Mr Sykes applied for permission to examine in chief and this was given in respect of all three witnesses. We preferred the evidence of Ms Lippold and would adopt that where there is a dispute. This is because as Mr Eruteyan said, she is a confident and fluent speaker. She referred to her notes of the hearing. Her account contained no inconsistencies and it gives an easily understandable description of the circumstances.

10. The Claimant's evidence contained inconsistencies, for example, as to whether or not Mr D had made an objection to the judge sitting. She had to be warned during the course of our hearing about her conduct in instructing loudly Mr Sykes on a matter while he was cross-examining Ms Lippold and we formed the impression that she is a forceful articulate client capable of giving clear instructions in conference and in open court to her representatives.

11. Mr Eruteyan gave evasive answers and came up with new allegations during the course of his evidence. He asserted that he had not put everything into his affidavit for otherwise it

would last for 10 pages but he made a new allegation against the judge when confronted with the proposition that the judge had not acceded to all of the Respondent's applications and had found in favour of the Claimant, which was that he instructed Mr D to object to the judge brushing Mr Eruteyan aside and taking direct instructions from the Claimant. He added that there was an affectionate relationship between the judge and Ms Lippold so that the case was conducted as though only two of them were there. He gave his opinion as to how Mr D was affected by this, saying that Mr D was intimidated. He gave no explanation as to why Mr D was not sought as a witness. He alleged for the first time that the judge had said in open court to Mr D that his case was hopeless. He alleged for the first time that he was himself berated by Ms Lippold. He has little experience in employment tribunals whereas Ms Lippold has an extensive practice, being called to the Bar in 1999. Given his own short experience of employment tribunals, it is surprising that he did not seek evidence from Mr D.

12. With those observations on the witnesses in mind, we set out what occurred at the Employment Tribunal.

13. Ms Lippold arrived and noticed that she was to appear in front of Employment Judge Southam. She recollected she had been instructed by him when he had been a solicitor at the London Borough of Waltham Forest, for Ms Lippold's chambers is on the panel of solicitors which that local authority instructs. She had been instructed by him once at a hearing which involved talking to him for about 10 minutes and on one other occasion.

14. Judge Southam was at that time also a part time Employment Judge but at the time of the hearing was a full time salaried Employment Judge. She raised that connection with Mr D and with the clerk. This was done outside the hearing of the Claimant and her solicitor. Mr D did not report this to the Claimant or her solicitor.

15. At the opening of the hearing the judge raised it. The judge said in open court that he was now a full time judge and there was no possibility of instructing Ms Lippold, that he had considered guidance, and that the connection lasted for only two sets of instructions. Mr D was asked whether there was an objection to the judge sitting and he in terms made no objection.

16. The judge then raised with the parties the issues to be decided. After about 30 minutes an adjournment was sought and given which lasted for 70 minutes. During the course of the adjournment the Claimant, who was unhappy about the connection between the judge and counsel, and also by the judge's conduct, raised the issue with Mr D. The Claimant accepted counsel's advice that an objection should not be made.

17. During the course of the hearing the judge was interventionist with both counsel asking each of them questions. We reject the Claimant's evidence, variously put, that Ms Lippold was allowed to speak uninterrupted for 30 or 20 minutes, whereas Mr D spoke for only five. In a hearing of this sort that is simply incredible. We reject Mr Eruteyan's complaint that the judge was chummy and affectionate with Ms Lippold. He conducted the case properly as relevant to the issues at this pre-hearing review to determine the strike out.

18. The Claimant contends that the judge was "gleaming". We understand her to mean that he was smiling. Smiling does not seem to us to be a defect in a judge. The Claimant contended that two representatives of the Respondent were sitting in the back of the tribunal sniggering and laughing. The Claimant noticed but she did not draw the attention of Mr D to this, nor of the judge. The judge did not notice any of this nor does the Claimant say that he should.

19. Mr D acknowledged that he was in some difficulty over at least part of the Claimant's case, that is the holiday pay claim noting that redrafting was required. The judge has provided comments in which he says he had consulted the Regional Employment Judge as to the recusal and was advised that since the relationship was professional and not personal and not extensive it was not inappropriate for him to hear the case.

Conclusions

20. On the first proposition of the Claimant, that the judge was automatically disqualified for hearing the case by reason of the professional relationship, we firmly reject this as a matter of law. Each case must be taken on its particular facts. The fact of a solicitor/client relationship previously existing before a judge's promotion is not in itself a reason for recusal. If the professional relationship was extensive, lengthy, recent and/or ongoing different considerations might apply. The judge had previously instructed counsel a year or so earlier on two matters each of them very short. There was no reason for him to recuse himself. Indeed in her evidence to us the Claimant accepted that if the extent of the relationship was as we have now found she would not be making that complaint.

21. The second complaint relates to the judge's conduct. This is an allegation of apparent bias. We hold that there was no real possibility that the judge by his conduct had shown that he unfairly favoured Ms Lippold and her client. The questioning of both counsel was entirely appropriate given the task faced by Mr D in resisting a strike out application and issues of jurisdiction. It is inconceivable that during a PHR where a number of issues were in play, with both sides represented by counsel, one should have been allowed to speak for 30 minutes. We hold that there was intervention of an appropriate degree in respect of each counsel. Mr D did not object to the judge either pursuant to the first claim of automatic recusal nor in respect of any treatment thought to be unfair of his case. If Mr Eruteyan did instruct Mr D to object to the
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further hearing of the case by the judge, the Claimant, as she says in her affidavit, accepted counsel's advice. There was thus waiver both of the right to make an objection as a result of the relationship between the judge and counsel, and as to the conduct of the judge before the adjournment and we hold after the adjournment given our appreciation of the Claimant's forceful ability to give instructions to her representatives.

22. We reject the contention (not now made by the Claimant) that the judge ought to have known about sniggering and laughing. The simple fact is that Mr D was not aware of this; Ms Lippold was not either for she would have stopped it, as she told us, and there is no direct allegation against the judge that he saw this and allowed it to continue. We reject the contention that the judge was "gleaming" in any sense indicating favouritism to Ms Lippold and her case.

23. Turning against Mr D, for the purposes of today's hearing, Mr Eruteyan considered that he was weak and feeble. That is not the impression Mr D makes on us through the evidence of for example Ms Lippold and the judge. Ms Lippold has substantial experience in employment tribunals and dealing with counsel which Mr Eruteyan does not. We have no material upon which to hold that Mr D did not put forward his client's case to the best of his ability. Indeed he successfully fought off the strike out of the unfair dismissal claim, and avoided a costs order.

24. That being so, it would be illogical for the judge to be biased in part. Mr Sykes did not shrink from the submission that if he succeeded on the bias points all of the orders made by the judge that day would fall including those in favour of his client. The whole issue would be determined again. We have seen no authority in which a judge has been found to be biased in part, so that part of his or her judgment has been set aside for bias and other parts remain. In the absence of authority we can see that it is not impossible for a judge to view with disfavour

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certain types of claim made by a claimant. But it does make difficult the task of showing that he was biased against a claimant when he has upheld only part of the respondent's contentions against her.

Disposal

25. In those circumstances the allegation of actual and apparent bias by the judge is rejected. The appeal is dismissed save for the strike out of the holiday pay claim which has been ordered to proceed to a full hearing.