Neutral Citation Number: [2017] EWCA Civ 1765

Case No: A2/2016/2945 and A2 2016 2944

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT TRIBUNAL

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 13 June 2017

Before:
LORD JUSTICE UNDERHILL

- -

Between:

KAUR

Applicant

- and -

LEEDS TEACHING HOSPITAL NHS TRUST

Respondent

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The **Applicant** appeared in person and was not represented

The **Respondent** did not attend

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Judgment

(Approved)

LORD JUSTICE UNDERHILL:

1. Lewison LJ gave limited permission to appeal in this case on the papers. What is before me is the Appellant's renewed application for permission on those aspects on which he did not give permission. There is a complication in that it emerged at a late stage that the application had mistakenly been considered by Lewison LJ on the basis of the second appeals test. Accordingly, last week I reviewed the application on the basis of the ordinary test, and the Appellant was sent on 9 June a letter from the office incorporating observations by me following the review which I had carried out. I will not repeat here what I say in that note because it is available to the parties, but I to some extent extended and/or clarified the scope of the permission granted by Lewison LJ. I say "extended and/or clarified" because he and to some extent I also have not faced an altogether straightforward task in identifying what arguable points exist. The grounds of appeal are not professionally pleaded, and even now, in the light of my note, the precise way in which the case may be put may not be entirely clear. I think, however, that the broad scope is sufficiently clear and is best defined by reference to the paragraphs of the employment judge's reasons that can be challenged – that is, now, paragraphs 24 to 26. Insofar as there are still uncertainties, the court at the full appeal will, I am sure, be able to sort the wheat from the chaff.

2. I have now been through with the appellant (who appears in person) the areas covered by my observations on which arguably she had not got everything that she wanted. It would be most convenient if I proceed by reference to those observations.

3. I take first the appeal by reference to the substantive decision of the Employment Tribunal – appeal number 2944. So far as that is concerned, the Appellant has confirmed what I say at paragraph 4, namely that paragraphs 1-8 of her grounds are not intended to make any points which are not made more specifically in paragraphs 12-18.

4. As to paragraph 5 of my observations, I extended the permission so as to cover paragraph 9 of the grounds. The Appellant understands and accepts what I say at sub-para (2) – that is, that she does not need to appeal against Judge Eady's order, and indeed she cannot because it has been superseded by Judge Hand's.

5. The one area where the Appellant did try to persuade me to a different conclusion was about paragraph 11 of the grounds, which I said I could not allow to proceed because there was no claim for discrimination before the Employment Tribunal. I have been with her carefully over both the original claim form and the subsequent particulars of claim. That exercise confirms that this is not a case in which any claim for discrimination was ever advanced. She tells me that she had discussed the matter with her solicitor, who had told her that there were grounds for a discrimination claim. I cannot comment on what passed between her and her solicitor, although she did try to show me a letter to that effect: what matters is whether such a claim was never advanced in the tribunal, and it is perfectly clear that it was not. If that is the fault of her solicitors for not advancing a claim that should have been advanced (and I am not for a moment saying it is), I am obviously sorry; but it would be quite unfair to the other parties and an impossible situation for this court for the first time to consider a claim which has never been made before.

6. That then brings me to the second of the two appeals (2945) which appeals against that aspect of the Employment Appeal Tribunal's decision that relates to the refusal of the Employment Tribunal to reconsider. There is, frankly, a good deal of confusion about exactly how the case was put as regards the reconsideration, at least in the Employment Appeal Tribunal, but in any event in substance what it is about is the Appellant's wish to adduce fresh evidence and/or to make a further claim. As I say at paragraph 8 of my observations, we need not be concerned with points that she made in the reconsideration which are in any event in issue in the appeal.

7. There is a serious formal problem about this part of the appeal, because there were no comprehensible grounds of appeal in the appeal to the Employment Appeal Tribunal, and likewise none of the grounds of appeal before me address Judge Hand's reasoning at paragraphs 18 and 19 of his judgment, which is where he dealt with this appeal. It is hard to see how it could be right for me to allow the appeal to proceed when no one has ever really formulated what was wrong, either with the original decision of the employment judge, or the decision of Judge Hand. That, I am afraid, is a sufficient reason for refusing permission. However, I do not want the Appellant to think that she has failed on this aspect simply because she was a litigant in person and did not know how to put her case properly. Therefore, I am prepared to say that in any event I cannot see how the further material that she wanted to rely on, which is in appendices 1-4 of her reconsideration application, could have assisted her claim or given her any further claim. I will briefly explain why.

8. I take first appendix 4, which was intended to advance or support a claim for underpayment of salary. So far as that is concerned, there had been no such claim

advanced at any time up to the date of the strike-out hearing, and it could not possibly be right for it to be allowed to be raised for the first time on a reconsideration application following that strike out. That is all I need say about that.

9. So far as the other appendices are concerned, the Appellant helpfully clarified that the first appendix, which is a witness statement of Mr Beavers, was put in really simply by way of amplifying the background and to fill in some details which may not have been quite accurately stated before. They all relate to the incident of 14 September 2012 and do not bear at all on the reasoning by which the employment judge dismissed the case, so I need say no more about that.

10. Appendix 2 contains documents intended to show that the employment judge was wrong to say that the Appellant did not repeat her request for the attendance of Dr. Callister at the adjourned hearing, although he certainly did accept that she asked for his attendance at an earlier stage and on the appeal. The document which she wishes to adduce appears to show that she did indeed repeat the request following the first adjournment. One preliminary difficulty is that that document was available to her before the hearing. It is not something that emerged subsequently. The Appellant accepts that, but she says that there was considerable confusion about the creation of the bundles, which were the primary responsibility of the Respondents: they had not put in all the documents which she thought were relevant and she had to cobble together, at the last minute, a bundle of documents which she lodged with the tribunal the day before the hearing. It is not clear whether that included these documents or whether the tribunal saw them. None of those points appear to have been made before and they are not supported by any kind of witness statement. It would be quite wrong for me to

allow them to be introduced at this stage. Again, however, I do not want the Appellant to feel that she has lost on a purely technical problem or a problem about the preparation of the case. The real point is that the employment judge, when making his decision to strike out, did not base his reasoning on precisely what requests she may or may not have made for Dr. Callister to attend. Instead, it is quite clear that at paragraph 24 he proceeds on the basis that the employers were entitled not to ask for Dr. Callister's attendance, whether that attendance had been requested or on however many occasions that may or may not have been requested. He says it was plainly a reasonable exercise of its discretion in all the circumstances. That may be right, it may be wrong. That is a matter which can be decided at the full hearing, but it is not going to be affected at all by the further document that shows that a request was made following the first adjournment.

11. Appendix 3 consists of various correspondence with the appeal panel and, in particular, with a letter which the Appellant wrote to the chairman of the appeal panel on 7 July. The same points arise about whether those documents were in fact before the tribunal, but, whether they were or were not, I cannot see how they are material to the actual reasoning on which the employment judge decided to strike the case out. The appeal will stand or fall on whether that reasoning was sustainable and that will not be affected in any way by consideration of these particular documents. The basic point made both by the employment judge and by Judge Hand in the Employment Appeal Tribunal is that the documents which the Appellant was seeking to adduce could have no effect on the decision which the employment judge had made first time round. That was, in my view, plainly a decision that was reasonably open to them, and there is no prospect that an appeal on that basis would succeed. I do not, therefore, give permission to appeal in

relation to 2945, but for that very reason I do not think this presents any serious problem for the Appellant: her case stands or falls on whether she is right in appeal 2944.

12. The Appellant has eloquently said to me that if there were failures in the way in which her case was presented below those should not be allowed to stand in the way of substantive justice; if her solicitors let her down in some respects, or if she did not put things properly at a time when she was representing herself, the court should be concerned with substantive justice not with failures of that kind. Of course I see the force of that, and so far as possible the court will indeed be concerned with substantive justice. But, for the reasons I have already given, the points on which she has not succeeded before me, either because it would be unfair to allow points now to be taken for the first time which have never been taken before, or because the material she now wants to put in, are not of real relevance in any event.

13. The appeal will therefore proceed. I identified the relevant directions at paragraph 11 of my observations and I will not repeat them now.

14. I also, at paragraph 13, express the hope that the appellant should obtain professional representation if she can. She has been pointed in the direction of how to obtain pro bono representation, but I will have to leave that up to her to explore.

15. If the Appellant is not represented – I say this for the transcript so that the Respondents will see it – it may assist the court if the Respondents take responsibility for preparing a bundle of documents. It must, of course, contain all the core documents that the Appellant wants in. I am grateful to her for preparing the bundle for this application - it

is the one which has 291 documents in it and various useful tabs – but it is not in perfect order because, for example, the appeal notices, the grounds of appeal, Judge Hand's decisions and so on are not paginated and are not part of the main bundle. I am not insisting on her giving up responsibility to the Respondents, but they will have the resources of a solicitor's firm and can put a bundle together in a form which will probably be easier for the court to use. I repeat, however, that they must include everything that she wants in it. If she wants a lot of material that they think is irrelevant (and I certainly have had a lot of bundles lodged which I think are irrelevant) that is another matter; but the core materials should be capable of being agreed.

16. One further minor point I would make is that at the original strike-out application the Appellant was represented by Mr Modgill of counsel, and the Respondents by a solicitor. It was only a comparatively short application, and there may well not have been any kind of written submissions or skeleton argument. However, if there were it is always of assistance for the court to see those documents. They are not in the bundle that I have at present and they should be included if available.