Appeal No. UKEAT/0154/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 March 2015

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

(SITTING ALONE)

---

(1) MR D LUVUALU
(2) MR A TCHABO
(3) MR V KITENGUE

APPELLANTS

(1) FEDERAL MOGUL SINTERED PRODUCTS LTD
(2) ZENITH CONTRACTORS LTD

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	DR ROLAND IBAKAKOMBO (Representative)
For the First Respondent	MR JOHN CROSFILL (of Counsel) Instructed by: Weightmans LLP First Floor St Phillips Point 47 Cannon Street Birmingham B2 5EF
For the Second Respondent	MR SIMON TIBBITTS (of Counsel) Instructed by: DAS Law Solicitors North Quay Temple Back Bristol BS1 6FL

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

The Appellants were contract workers working for the First Respondent through an agency which later became the Second Respondent. It is accepted that they were employees of the Second Respondent and that they were dismissed. They brought claims against the First Respondent relating to direct discrimination, harassment and victimisation and against the Second Respondent relating to direct race discrimination and victimisation only.

An email chain was omitted from the ET bundle. An email from Mr Green, a night shift supervisor, described the events that led to the Appellants leaving site including accusations made by one of the Appellants that Mr Green did not like black men and had no respect for black men, which was repeated later when the Appellants said they were going home. The emails before the ET did not show that this email had been forwarded to Mr Coleman, formerly a manager with the First Respondent responsible for its contract with the Second Respondent. The significance of the omission of the evidence of that email having been forwarded to him is that in his evidence he denied he knew of allegations of racism at the material time.

The Appellants' primary case was that the ET Judge refused to accede to the request by their representative to include the combined emails in the bundle prior to the ET hearing without giving a reason for his refusal contrary to **ECHR** Articles 6(1) and 14.

The EAT was satisfied that no proper application was made to the ET to admit the email chain. If a proper application had been made the ET would have appreciated the significance of the omission and would have been bound to admit the evidence or provide a proper explanation for not doing so. There was no procedural impropriety on the ET's part.

THE HONOURABLE MR JUSTICE SUPPERSTONE

Introduction

1. The Appellants appeal against the Judgment of an Employment Tribunal chaired by Employment Judge Perry sent to the parties on 20 August 2013 following a hearing held at Birmingham on 6, 7 and 10-13 June 2013, dismissing their claims of direct discrimination, harassment and victimisation against the First Respondent and direct race discrimination and victimisation against the Second Respondent.

2. The three Appellants were contract workers working for the First Respondent through an agency which later became the Second Respondent. It is accepted that they were employees of the Second Respondent and that they were dismissed. They submitted a Notice of Appeal on 30 September 2013. The appeal was referred to Her Honour Judge Eady QC in accordance with Rule 3(7) of the **EAT Rules**. The Judge was of the view that the Notice of Appeal disclosed no reasonable grounds for bringing the appeal.

The Rule 3(10) Hearing

3. The Appellants then applied under Rule 3(10) for an oral hearing. At the Rule 3(10) Hearing His Honour Judge Richardson allowed the appeal to proceed only on ground 2.5 in the Notice of Appeal. His Judgment of 7 May 2013 contains material passages on this issue at paragraphs 10 to 14 and 23 to 26.

4. The Judge stayed the appeal pending referral back to the Employment Tribunal to answer the following questions:

> **"Please consider (1) the transcript of the EAT's judgment under rule 3(10), (2) paragraphs 190 and 205 of the ET's reasons and (3) the email chain attached to this order (including in**

particular the email of Mr Coleman dated 17 February in response to being forwarded the email of Mr Green)

1. Did the ET admit or have in its bundle this email chain, in particular the email of Mr Coleman dated 17 February?

2. If not, did the ET receive an application from Dr Ikakakombo on behalf of the Clamiants to admit the email chain, in particular the email of Mr Coleman dated 17 February?

3. If so, how did the ET deal with that application and for what reasons?

The Employment Judge is requested to give the Employment Tribunal's answer (which will be supplied by the Employment Appeal Tribunal to the parties) by reference to his notes and to the file"

5. On 1 September 2014 HHJ Richardson ordered that the appeal be set down for a Full Hearing. At paragraph 3 of his order he granted leave to amend the sole remaining ground of appeal, which he had observed in his earlier Judgment had been unclearly expressed in the Notice of Appeal, to read as follows:

> **"2.5. The Employment Tribunal erred in law by refusing [the] claimants to produce any documents prior [to] the hearing on 6 June 2013 consequently, a combined emails [sic] (4 different emails) [were] provided to the claimants by the second Respondent on 02/03/2012 and then a copy was sent to the Respondent's representative as [a] relevant document to be included [in] the tribunal bundle however the Respondent's representative produced only three single [emails]; the Claimants' representative realised this only [on] 5 June 2013 (please find enclosed a copy of that combined email). The Employment Tribunal declined the Claimants' request to receive the combined emails. The Employment Tribunal ought to have considered whether the contents of the combined emails recorded a protected act and ought to have given reasons."**

The Application for Reconsideration

6. On 2 February 2015 the Employment Tribunal refused the Appellant's application for reconsideration. At paragraphs 7 to 10 of his Reasons Employment Judge Perry stated:

> **"7. Whilst it is correct that the version of the email chain the claimants have produced was not before us, and it does on its face contradict the evidence of the respondents' witnesses I have no recollection of an application being made to include it at the time, my notes do not refer to this yet they make reference to a considerable number of applications that were made and the lengths we went to [to] identify the claimants' complaints for instance, the content of the text message. That is also supported by the failure of the [claimants'] representative to initially identify when that application was made and given the bundle that had been prepared for an earlier hearing on 28 January 2013 that had been postponed, the contents of the bundle should have been known to the claimants before that earlier hearing.**
>
> **8. The claimants' representative had ample opportunity to put the disputed email chain to the [respondents'] witnesses in cross-examination. He did not. Nor did the claimants' representative challenge the witnesses in relation to the answers they gave that conflicted with the contents of the email.**
>
> **9. We took some time at the outset of the hearing to identify the protected acts relied upon. We relay that at paragraph 6 of the Reasons. Despite us suggesting that the claimants'**

representative reconsider his stance he persisted in the view that only one of the acts was being relied upon. He now suggests in his application for reconsideration that four were pursued. That is not correct.

10. Not only do my notes suggest an application was not made to include the email chain relied upon but that is also my recollection of events and that is also supported by the way the tribunal conducted our enquiries in relation to the text message. That email chain evidence was available before the hearing and thus should have been put to the witnesses. It was not."

The Application to the Court of Appeal

7. In the meantime the Appellants had applied for permission to appeal to the Court of Appeal in respect of all other grounds of appeal that had been dismissed when they were considered under Rule 3(7) and 3(10). On 23 September 2014 Sir Stephen Sedley refused the application in its entirety.

The Evidence before the Court

8. Pursuant to the orders of HHJ Richardson, there are the following affidavits and witness statements before this court: (1) the affidavit of Dr Ibakakombo, who represents the Appellants before this Tribunal as he did before the Employment Tribunal. That affidavit is in relation to the chain of emails issue and is at page 132 in the bundle before this Tribunal. (2) The response of Judge Perry dated 1 July 2014 in response to the specific questions posed in the EAT's order of 7 May 2014 and, in particular, his letter dated 16 January 2015 with his comments on the affidavit of Dr Ibakakombo. (3) A letter dated 30 December 2014 from Mr Ronald Jones, a member of the Tribunal that heard the Appellant's case in June 2013. (4) A letter from Miss Pat Pinches, dated 7 January 2015, the other lay member of the Tribunal. In addition there is an affidavit of Mr Andrew Forrest dated 16 February 2015, an associate of Weightmans LLP, instructed on behalf of the First Respondent in relation to the Tribunal hearing and before this Tribunal.

9. In summary, the issue in relation to the emails in the Employment Tribunal bundle and the omission of the email chain is as follows. The email chain shows that an email from Mr Green sent on 17 February 2012 at 03:35 to Mr Gorman was forwarded by Mr Gorman to Mr Coleman on the same day at 06:49. The emails before the Tribunal did not show that Mr Gorman had forwarded Mr Green's email to Mr Coleman. Mr Green's email describing the events that led to the Appellants leaving site included accusations made in the office by one of the Appellants, Mr Kitengue, that Mr Green did not like black men and had no respect for black men, which was repeated later when the Appellants said they were going home when Mr Tchabo, another Appellant, had joined Mr Kitengue in gainsaying that Mr Green had no respect for black people and they had no respect for him.

10. The significance of the omission of the evidence of Mr Gorman, having forwarded the email from Mr Green to Mr Coleman, is that Mr Coleman, in his statement before the Tribunal, and in his evidence, denied that he knew of these allegations of racism until he attended a meeting with the Second Respondent on 6 March 2012.

11. Mr Forrest, in his affidavit, deals with the omission of the email chain from the documents before the Tribunal. He states that he is not legally qualified. His background is HR and employment relations. The material parts of his affidavit are at paragraphs 8, 9, 11, 12, 14, 17, and 21 to 24. At paragraph 21 he states:

> **"I have no recollection of the [Claimants'] representative making any request for the echain now in discussion to be included in the bundle at the hearing on 28 or 29 January 2013 or at the hearing of 6 to 13 June 2013."**

12. At paragraph 22 he states that at the outset of the hearing on 6 June he recalls that Judge Perry asked whether the bundle was agreed and all representatives confirmed that it was. At

paragraph 23 he deals with Dr Ibakakombo's statement that on the first or second day of the hearing he handed emails to Judge Perry but that they were refused. He says:

> **"… I can confirm that I have no knowledge of the [Claimants'] representative doing this. Had he attempted to do so and had he been denied I am sure that I would have recalled this and given that the Judge had been extremely considerate on the morning of day one of the hearing this would have been a major change in the conduct of the proceedings."**

At paragraph 24 he says he has no recollection of the email chain being shown to him or of interpreters being present.

13. The material passage in the statement of Judge Perry in his letter of 16 January 2015 starts at paragraph 3:

> **"3. My notes record that the bundle and witness statements had previously been agreed and exchanged in advance of an earlier postponed hearing which was due to commence on 28 January 2013. …**
>
> **4. It would appear the absence of the contested document from the bundle should thus have been apparent at that earlier postponed hearing and not on 5 June as Dr Ibakakombo suggests.**
>
> **…**
>
> **7. I have carefully considered my notes of the 6 & 7 June 2013 and they make no reference to any application made by Dr Ibakakombo along the lines suggested.**
>
> **8. Whilst Dr Ibakakombo asserts I waived him away that is inconsistent with the approach we adopted; for instance it was at the panel's initiative the text message and the mobile phone were inspected (see paragraph 48 of the reasons).**
>
> **9. We record in the reasons (paragraph 17) one example where Dr Ibakakombo made an application. Had Dr Ibakakombo made an application along the lines now suggested on 6 & 7 June 2013 I am confident I would have recorded it. For the avoidance of doubt and whilst the hearing was over 18 months ago now, I do not recall him doing so or that he challenged the veracity of the email chain that I refer to at paragraph 16.**
>
> **10. Dr Ibakakombo regularly appears in this tribunal and is thus familiar with its procedures. Even had I waived his application away as he asserts, he still could have raised that as an issue with Messrs Coleman and Gorman when he cross examined them both.**
>
> **…**
>
> **14. He [Mr Gorman] told the Tribunal Mr Coleman did not refer him to the email from Mr Green.**
>
> **15. Mr Gorman told the Tribunal he could not recall if he had printed off Mr Green's email from Mr Coleman but he did not forward it to him.**
>
> **16. Both those responses would have been an ideal time for Dr Ibakakombo to put the veracity of the disputed email or its contents to them or indeed the fact that it had been forwarded by Mr Gorman to Mr Coleman at 06:49 on the day in question and thus he would have been aware of it. My notes do not record that Dr Ibakakombo did so.**

> **17. The recipient of the final email in the chain the claimant takes issue with was Ms Reay. It was sent to her at 09:57 on 17 February 2012. An application was made at the outset of the hearing by the second respondent to call her (see paragraph 16 of our reasons). No objection was raised by Dr Ibakakombo and she was eventually called. Again that would have been an ideal opportunity to have put the veracity of the email chain of 17 February 2012 to her. She was on oath in total for 40 minutes. My notes do not record that Dr Ibakakombo did so."**

14. Mr Jones says that he cannot specifically recall the refusal of emails to be included as evidence or any claims of protected acts that were not dealt with during the course of the hearing and subsequently referred to in the decision of the Tribunal. Miss Pinches states that she has no memory of a request for the email to be admitted. She points out that a case management order made on 22 August 2012 required an agreed bundle.

The Appellant's Case

15. Dr Ibakakombo, in his oral submissions, essentially makes three points. First, he submits that Judge Perry's refusal to accede to his request to include the combined emails in the bundle prior to the hearing on 6 June without giving a reason for his refusal was contrary to Articles 6(1) and 14 of the **ECHR**. Second, he submits that the Tribunal failed properly to consider the four protected acts that the Appellants rely on. Third, he submits that the Tribunal's Decision suffers from a deficiency of reasoning in concluding that Mr Coleman was not aware of the contents of the email from Mr Green. It is contended that that conclusion is contrary to the Tribunal's finding that Mr Gorman said that he saw Mr Green's email at around 6.30, and that Mr Gorman told the Tribunal, as did Mr Coleman, that Mr Gorman subsequently relayed the contents of Mr Green's email to Mr Coleman.

16. Dr Ibakakombo explained, in his oral submissions in response to a question that I put to him, that his reason for not cross-examining Mr Coleman about the omitted email in the email chain was that his application to admit that document had been refused by the Tribunal chairman and, in those circumstances, he did not feel that he could press the point.

The Respondents' Case

17. Mr Crosfill for the First Respondent invites me to accept Mr Forrest's evidence and to find that the omission of the "FW" email, forwarding Mr Green's email to Mr Gorman and by Mr Gorman to Mr Coleman was due to inadvertence and nothing more sinister. Mr Crosfill invites me to accept the evidence of Judge Perry, supported by Mr Forrest, that Dr Ibakakombo did not in fact make a proper application to introduce the email chain that he asserts he made. Mr Crosfill contrasts the very short and what he describes as "vague" assertion of Dr Ibakakombo in this regard, written on 1 September 2014, with the carefully written Judgment of Judge Perry and the Tribunal written shortly after the hearing and consideration of the case in chambers.

18. At paragraphs 1 to 8 of the Reasons the Tribunal set out the procedural background, which indicate at paragraphs 5 and 6 the care that was taken with the identification of the issues and at paragraphs 9 to 16 deal with the manner in which the evidence was given. At paragraph 11 there is reference to the agreed bundle. At paragraph 48 there is reference to a text message from Mr Hancocks being added to the bundle, and in that paragraph and in paragraphs 49 and 50 we see how the Tribunal dealt with that matter. By contrast there is no suggestion of any application to add the email chain to the bundle. At paragraphs 203 to 207 the Tribunal revisited the text message in the context of considering the issues in the victimisation claims. What the Tribunal said is:

> **"203. We specifically sought from Dr Ibakakombo clarification whether the text message was argued as a protected act. As we see above we took some time to explain to Dr Ibakakombo the issues pertaining to protected acts and suggested he consider the Equality Act and Code. He asserted it was not. That being so that did not form part of the [claimants'] claim.**
>
> **204. However and irrespective of that we have considered the acts of detriment raised by the claimants in any event. The detriments asserted are the decision of Federal Mogul to refuse to allow the claimants back to site and the decision by Zenith to dismiss them."**

19. Mr Crosfill submits that it is inherently unlikely that the Tribunal would be prepared to add the text to the agreed bundle and reconsider issues but was not prepared to consider an application to adduce other evidence which, on its face, was plainly highly relevant evidence. Mr Crosfill submits that the decision of the Tribunal that Mr Coleman was unaware of the contents of Mr Green's email was, on the evidence before them, one which they were perfectly entitled to reach. At paragraphs 190 to 192 the Tribunal make express findings on the issue as to whether Mr Coleman had seen Mr Green's emails:

> **"190. We accept the evidence of Messrs Gorman and Coleman that Mr Coleman did not see Mr Green's email nor had Mr Gorman informed him there was an allegation Mr Green had been accused of racist behaviour within it. We find Mr Coleman was not aware of that allegation of racism when he made the decision not to permit the claimants back to site.**
>
> **191. We accept Mr Coleman's evidence that the reason he required the [claimants'] removal from site was because the claimants had walked off site and given the history of problems with them going missing whilst they were supposed to be working that was the final straw. We come to that conclusion notwithstanding the First Respondent was aware of the claimants' belief that for some time they were discriminated against in relation to the allocation of work. We found above that that was not so and the work they were asked to do formed part of their duties, whilst the three of them were all black African men they were the only three labourers working on the night shift and thus it followed they would be instructed to do jobs that were dirty and unpleasant. That was part of their role.**
>
> **192. We accept that was the reason for his decision and that the allegation of racism played no part in his decision as he was not aware of the same at the time."**

20. The reasons given by the Tribunal for its Decision were, Mr Crosfill contends, **Meek**-compliant. Mr Tibbitts for the Second Respondent supports and adopts the submissions made by Mr Crosfill on the main issues.

Conclusion

21. I accept that the omission of the email chain from the bundle was due to inadvertence. I agree with Mr Crosfill and Mr Tibbitts that the statements of Judge Perry and Mr Forrest must be read as a whole and in the context of the procedure that was adopted at the hearing, which is carefully set out in the Tribunal's Decision. Adopting that approach I am satisfied, on the balance of probabilities, that no proper application was made to the Tribunal to admit the email chain. If a proper application had been made, the Tribunal would have appreciated the

significance of the omission and would have been bound to admit the evidence or provide a proper explanation for not doing so. The Tribunal, in my view, properly considered the protected acts in issue in the passages in the Decision to which I have referred. The Decision is more than adequately reasoned.

22. I appreciate my decision will be a disappointment for the Appellants, who may feel a sense of injustice. However, there was, in my judgment, no procedural impropriety on the Tribunal's part and I can discern no error of law in their Decision. Accordingly, for the reasons I have given, this appeal is dismissed.