

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 2 February 2009

Before

THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)

MR K EDMONDSON JP

MR J R RIVERS CBE

MRS C BURNS

APPELLANT

KILLGERM GROUP LIMITED

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MRS L FENTON
(Employment Adviser)

For the Respondent

MR B WILLIAMS
(of Counsel)
Instructed by:
Messrs Milners Solicitors
Crown House
85-89 Great George Street
Leeds LS1 3BR

SUMMARY

JURISDICTIONAL POINTS: 2002 Act and pre-action requirements

Raising a complaint in a County Court pleading does not constitute the making of a complaint for the purpose of the statutory grievance procedure.

THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)

INTRODUCTION

1. This is another case about what constitutes compliance with step 1 of the statutory grievance procedure for the purpose of section 32(2) of the **Employment Act 2002**.

2. It is convenient to set out the statutory provisions at this stage. The relevant parts of section 32 read:

“(1) This section applies to the jurisdictions listed in Schedule 4.”

(We interpose to say that those jurisdictions include an equal pay claim.)

“(2) An employee shall not present a complaint to an Employment Tribunal under a jurisdiction to which this section applies if-

- (a) it concerns a matter in relation to which the requirement in paragraph 6 or 9 of Schedule 2 applies, and**
- (b) the requirement has not been complied with.”**

Chapter 1 of Part 2 of Schedule 2, which sets out the standard grievance procedure, starts with the heading “Step 1, Statement of Grievance” and proceeds to paragraph 6, which reads as follows:

“The employee must set out a grievance in writing and send the statement or a copy of it to the employer.”

FACTUAL AND PROCEDURAL BACKGROUND

3. The Appellant, to whom we will refer as the Claimant, was employed by the Respondent, to which we will refer as the company, as a Human Resources Manager between 21 February 2005 and her resignation to take up other employment with effect from

31 December 2007. The company claimed that under the Claimant's contract of employment she was obliged to repay them a proportion of the cost of training her for a Chartered Institute of Personnel Management qualification, and on 12 February 2008 they issued proceedings in the Leeds County Court claiming £2,033.50 plus interest and costs.

4. On 14 March 2008 the Claimant lodged a Defence and Counterclaim in the County Court proceedings. Her defence was that she had taken what she described as a "salary sacrifice" when she accepted the job in 2005 precisely because she would get the benefit of the training in question, and she understood the cost of that training to be in effect part of her remuneration. On that basis, her primary case was that the money was not due. However, she also contended that if the costs in question could indeed be recouped from her, she should have been paid the same as other (male) managers alongside whom she was working. As she pleaded:

"I am therefore left with no alternative given the company's stance on this matter but to pursue an equal pay claim against them in an Employment Tribunal."

A little later, in the summary section of her pleading, she said this:

"If the company are treating the fees as a loan:

1. They did not advise me of this

2. If this is the case, then I believe they have breached the Equal Pay Act 1970."

In her Counterclaim she sought repayment of the amount of the alleged salary sacrifice "plus £40,000 in an equal pay claim, pursued through the Employment Tribunal".

5. On 6 March 2008 the Claimant sent to the company, by recorded delivery, a questionnaire under section 7(B) of the **Equal Pay Act 1970**; but for some reason it was not delivered promptly and she had to resend it, with the result that it was not received by the company until on or shortly after 22 March.

6. It is common ground that the Claimant had not on any previous date raised any equal pay claim with the company in any way. Its genesis was simply as a response to the County Court claim against her in the way we have set out.

7. On 19 May 2008 the Claimant presented a claim to the Employment Tribunal, being the claim in the present proceedings, seeking equal pay with eight named male comparators. In response to question 3.5 on the ET1, namely “have you put your complaint in writing to the Respondent?”- which of course is designed to elicit whether there has been compliance with the statutory grievance procedure - she answered “yes” and gave the date 6 March 2008, being the date that she had first sought to serve the questionnaire. In its ET3 the company disputed that statement by answering “no” to question 2.5. It did not answer the relevant alternative under question 2.6, namely whether it had received the alleged grievance and why it did not accept it as a grievance. No doubt it should have done so; but the omission may be regarded as venial, since the date 6 March 2008 will have meant nothing to it since it never received any document bearing that date. In any event, to anticipate, no point was later taken by the Tribunal on that failure (such as it was).

8. On 15 September 2008, at the “stage 1” equal pay hearing before the Tribunal in Leeds, chaired by Employment Judge Lee, the company repeated the objection in its ET3, i.e. that no grievance had been lodged. It was common ground that the Claimant had not lodged any distinct grievance in writing since the date of the eventual service of the questionnaire, and she was forced to concede at the hearing that the questionnaire itself could not constitute the raising of a grievance. That was by reason of the terms of regulation 14(1) of the **Employment Act 2002 (Dispute Resolution) Regulations 2004** which provides that:

Where a person aggrieved questions a respondent under any of the provisions set out in paragraph (2), those questions shall not constitute a statement of grievance under paragraph 6 or 9 of Schedule 2 [of the 2002 Act].

The provisions in question include section 7(B) of the 1970 Act. (The effect of regulation 14(1) is self-evident but it has in any event been confirmed in two subsequent decisions of this Tribunal: see **Holc-Gale v Makers UK Limited** [2006] ICR 462 and **Alitalia Airport SPA v Akrif** [2008] ICR 813.) However, the Claimant sought to rely on the passages in the Defence and Counterclaim which we have set out as constituting the statement of a grievance for the purpose of paragraph 6. The Tribunal, by a majority, rejected that submission, for reasons to which we will return, and accordingly held that it had no jurisdiction to entertain the claim.

9. This is an appeal against that decision of the Employment Tribunal. There is also a cross appeal seeking to uphold the Tribunal's decision on other grounds. The Claimant has been represented before us by Mrs Linda Fenton, a representative employed by a body called 24/7 Employment Advice; and the company has been represented by Mr Ben Williams of counsel. We are grateful to both of them for their clear and succinct submissions.

THE TRIBUNAL'S REASONS

10. The company essentially took two points before the Tribunal - first, that the passages relied on in the Counterclaim could not constitute the statement of a grievance in accordance with the terms of paragraph 6 of Schedule 2; and secondly, that even if they could, the Claimant had not "sent" that statement to the company. The Tribunal rejected the first submission but accepted the second, in both cases (it seems) by a majority.

11. As regards the first submission, the Tribunal's reasoning was simply that the terms of the pleading made it clear that the Claimant had a grievance under the Equal Pay Act and adequately indicated its broad nature, and that was sufficient.

12. As regards the second submission, the Tribunal considered itself bound by certain observations of Wilkie J in Gibbs t/a Jarlands Financial Services v Harris UKEAT/0023/07/RN. In that case, the Claimant had commenced proceedings in the employment tribunal which were dismissed for lack of jurisdiction because no prior grievance had been lodged. He subsequently started fresh proceedings. He claimed to have served a written grievance statement in the meantime but he had in fact failed to do so within time. Faced with that difficulty, he sought to rely on the ET1 in the abortive first proceedings as the relevant grievance statement. The tribunal held that he could do so. Wilkie J reversed that decision. He said at paragraphs 15 to 17 of his judgment:

“15. In my judgment, the Employment Tribunal was wrong in this case to conclude that an ET1 could constitute a written statement of grievance for the purposes of satisfying the pre-conditions set out by s32 before an employee can present a complaint which the Tribunal is obliged to accept. I accept the submissions made by Ms Dennis that the statutory structure is such that it envisages that a grievance procedure is invoked before litigation is commenced. Furthermore, once the grievance procedure has been invoked by the sending of a written grievance, the employee cannot immediately thereafter fire off the opening shot in formal litigation before the employer has had the 28 days within which to consider the matter and comply with the requirements of the standard and modified procedure by responding either by holding a meeting or responding in writing. It would run wholly counter to the statutory scheme if, in effect, the employee could litigate on the one hand and on the other hand oblige the employer to engage in the grievance procedure and then, the employer not having satisfied the employee in respect of the grievance thus raised, allow the employee to re-start litigation afresh. The two processes – the litigation process and the pursuit of a grievance – are separate and distinct and call for a separate and distinct approach.

16. It appears that in the present case the employee knew well enough what was required, because when the s32 point was raised the response of the employee was to write a letter of grievance which would have complied with the requirements of the statutory scheme had it not been sent one day out of time. In those circumstances, it seems to me that the Employment Tribunal was misreading the statutory scheme by concluding that a failure on the part of the employee to send a written grievance statement could be made up by the commencement of litigation formally by the sending of an ET1.

17. Furthermore, although Ms Dennis did not actively pursue the, no doubt technical, argument, I, for my part, do find it difficult to see how an employee can be said to have sent a statement of grievance to the employer when what the employee has done is commence litigation by presenting to the Tribunal an ET1. There can be no question of a contractual relationship between Claimant and Tribunal Service whereby it acts as the employee's agent by sending the ET1 to the employer on behalf of the employee. Whether or not that is a good point, it rather points up the inappropriateness of regarding the commencement of proceedings at the same time constituting the invocation of the statutory grievance procedure.”

Wilkie J's observations in those paragraphs, and in particular paragraph 17, were referred to with approval, albeit obiter, by Cox J. in the later case of **Kennedy Scott Limited v Francis** UKEAT/0204/07 (see at paragraph 43).) It was the observation in paragraph 17 that the Claimant in that case could not be regarded as having sent a statement to the employer simply by commencing proceedings in the employment tribunal that the Tribunal in the present case regarded as binding on it.

THE APPEAL AND CROSS-APPEAL

13. The Claimant appeals against the Tribunal's decision on the second ground and the Company cross-appeals against the decision on the first ground. It is convenient to take the cross-appeal first.

14. Mr Williams' point is straightforward. He takes no objection to the actual words used in the Counterclaim: he accepts that if those same words had been presented in a form or context which should have alerted the employers to the fact that they were intended as a statutory grievance, they would have been adequate for the purpose. But he relies on the statement by Elias P. in **Canary Wharf Limited v Edebi** [2006] ICR 719, at paragraphs 24 to 25. Having recited with approval the previous case law to the effect that it would be wrong to require a grievance to be made "in any unduly legalistic or technical manner", Elias P continued as follows:

"At the same time, it must not be forgotten that an employer who receives a grievance and is at fault in failing to take matters further is at risk of paying additional compensation if the claim ultimately succeeds. Indeed, if it succeeds he will have to pay additional compensation to the extent of at least 10 percent. But he cannot fairly be expected to take matters further if he is unaware that a relevant complaint has been lodged.

It seems to me that the objective of the statute can be fairly met if the employers, on a fair reading of the statement and having regard to the particular context in which it is made, can be expected to appreciate that the relevant complaint is being raised."

Mr Williams relies in particular on the phrase “having regard to the particular context in which it is made”. He submits that the context in the present case was such that the company could not reasonably have understood the Claimant to be raising a grievance in the relevant sense. The function of a County Court pleading is as a formal statement of the party in question’s claim or defence for the purpose of those proceedings. Insofar as it requires a response, it is a response in the context of those proceedings, typically by a pleading in answer. It would not normally occur to an employer that a statement made in the context of such a pleading constituted, or should be regarded as raising, the statement of a grievance in the context of the relationship of employer and employee rather than as opponents in litigation. (He might perhaps have made the point, though it is not central to the argument, that that is even less the case where, as here, the relationship had been terminated several weeks previously.) Indeed, as Mr Williams points out, the Claimant herself did not understand her pleading to be raising a grievance: it was, as we have said, the questionnaire on which she relied in answering question 3.5 in the ET1.

15. We are bound to say that we can see no answer to that submission. The policy of section 32(2) is, as is common ground, to promote the use of alternative dispute resolution procedures before the parties proceed to litigation; and it is essential, in the light of that policy, that employers should understand that there is a complaint requiring to be “taken further”, as Elias P put it in the passage which we have quoted from **Edebi** - that is to say, taken further as part of the statutory grievance procedure applying between employer and employee (or, sometimes, ex-employee) - or that “there is a grievance to deal with” as Burton P put it in **Shergold v Fieldway Medical Centre** [2006] IRLR 76 (at paragraph 28), so that he can indeed try to respond to and deal with the grievance.

16. Of course, as the authorities emphasise, the way in which the grievance is expressed is immaterial, and it does not matter in principle, for example, that (as in **Shergold**) it is raised in UKEAT/0548/08/CEA

a document which is expressed as being for some other purpose, such as a resignation letter. But given the statutory object as we have identified it, that approach cannot extend to a document whose context takes it altogether outside the employer - employee relationship.

17. Regulation 14 of the 2004 Regulations, to which we have already referred, is consistent with that approach: as we understand it the reason why the statement of a grievance in the context of a Equal Pay Act questionnaire is not to be regarded as satisfying the obligation under paragraph 6 is that it is essentially part of a litigation process. The position of a County Court pleading seems to us to be, if anything, *a fortiori*.

18. Although our reasoning is not identically expressed to that of Wilkie J in **Gibbs v Harris** because we are dealing with different facts, it seems to us that it is nevertheless closely in line with it.

19. Mrs Fenton, in her submissions to us, emphasises that the words of the County Court pleading could hardly have been clearer: it was quite evident that the Claimant was raising an Equal Pay Act complaint. But that does not answer the problem about the context on which our reasoning is based.

20. Mrs Fenton also submits that there is a fundamental difference between the position, as here, where a complaint is raised in a County Court pleading and the position considered in **Gibbs v Harris** where the complaint had been made in an employment tribunal claim, albeit not the same claim in respect of which the issue arose. We agree that there is some difference between the two situations, which is why we have not based our reasoning simply on following **Gibbs v Harris**. But the underlying point seems to us to be the same, namely that a complaint

raised in the context of litigation cannot reasonably be regarded as a complaint made for the purpose of the statutory grievance procedure.

21. We therefore believe that the arguments advanced by way of the cross-appeal are well-founded, and it follows that the decision of the Tribunal must be upheld, albeit to that extent on different grounds.

22. In the light of that conclusion the question of whether the Tribunal was right on the basis in which it actually decided the case does not arise. If the question had arisen in isolation we would have seen a good deal of force in Mrs Fenton's contention that the word "send" is quite wide enough to cover a situation where, as here, A serves a document on B in the knowledge that B is legally obliged to and will forward it to C. She referred us to the definition of "send" in the Oxford English Dictionary, one variant of which is "cause to ... be taken to a destination". We note the observations of Wilkie J in paragraph 17 in Gibbs v Harris, which appear to suggest that some sort of contractual relationship between the Claimant and the sender is required; but those observations are in fact quite tentative and his final sentence suggests, as we would do, that the real significance of the point is that it reflects the inappropriateness of treating a document generated in the context of legal proceedings as the raising of a grievance for the purpose of Schedule 2 of the 2002 Act. Be that as it may, we are not required to reach a final conclusion on this aspect and do not do so.

23. We must accordingly dismiss this appeal. We do so with some regret in that it is always unfortunate when an employee's substantive complaint fails because of the failure to meet a procedural requirement. It is a regrettable feature of the provisions of the 2002 Act that they have all too often had that effect. Nevertheless, we must interpret them fairly in accordance

with what is plainly their intended purpose. Doing so, it seems to us plain that the Claimant did not comply with the requirements of the statute.