Appeal No. UKEAT/0291/19/LA
UKEAT/0298/19/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 10 November 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MS Y AMEYAW — APPELLANT

PRICEWATERHOUSECOOPERS SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

PRELIMINARY & DIRECTIONS HEARINGS

APPEARANCES

For the Appellant

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(of Counsel)

MR ALEXANDER ROYZYCKI
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For the Respondent

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HIS HONOUR JUDGE AUERBACH

1. This litigation has a long and complex history, but I do not propose to go through it in too much detail because it is all a matter of record and has been referred to in previous Decisions. Therefore, I will focus my attention on what I have to decide now.

2. What I have to decide now, following an initial Rule 3(10) Hearing before His Honour Judge Shanks, is which of the proposed grounds of appeal from the Decision of the Employment Tribunal ("ET") chaired by Judge Grewal, which is the subject of the appeal in 0298/19/LA, should proceed to a Full Hearing. The original proposed grounds of appeal attached to the original Notice of Appeal were considered not to be arguable on the paper sift by His Honour Judge Martyn Barklem, but the Appellant requested a Rule 3(10) Hearing and that came before HHJ Shanks on 4 December 2019.

3. HHJ Shanks had before him proposed draft amended grounds of appeal, that draft being dated 22 August 2019. HHJ Shanks permitted some, but not all, of the proposed amended grounds of appeal to proceed, but with two provisos. The first was that he considered that redrafted draft grounds needed to be presented in order to bring into focus and express with clarity the specific grounds that he had permitted to proceed. Therefore, he directed that those should be tabled, but that those should not go beyond what he had allowed. Secondly, he recognised that, insofar as he considered that new grounds that were not in the original Notice of Appeal should be permitted to proceed, that was subject to the right of the Respondent to make representations as to why such amended grounds should not, after all, be permitted to proceed.

4. HHJ Shanks directed that a Preliminary Hearing be convened to consider, following receipt of the draft amended grounds, which of them should finally be permitted to proceed. He directed that that should be an all-parties' Preliminary Hearing, so that the Respondents would have the opportunity to have their say on these points before a final Decision was taken.

5. I observe that ordinarily, and ideally, all of these matters would be considered by the same Judge who presided at the Rule 3(10) Hearing; but evidently HHJ Shanks, who is a visiting Judge, envisaged that this could not be dealt with on paper, and that it required a further Preliminary Hearing; and, in the event, it has come before me today. I indeed had before me the revised draft grounds of appeal, which it was contended by Mr Khan, who appeared on behalf of the Appellant, should be permitted to proceed to a Full Hearing in its entirety. These were drafted by him and his fellow counsel Mr Royzycki and dated 17 December 2019.

6. I heard argument from Mr Khan and from Ms Darwin appearing for the Respondents, by reference to that document; and the ground numbering that I use in what follows reflects the ground numbering in that document. I note that I had the benefit, as well as of hearing oral argument from both those counsel today, of written skeletons and submissions exchanged in the run-up to this Hearing and also, importantly, of being able to refer to HHJ Shanks's Order, the short form Reasons that he issued shortly after the Rule 3(10) Hearing, and a transcript of what he said in his oral Decision at the Rule 3(10) Hearing. I note also that HHJ Shanks made clear that in the event of conflict his Order was the overriding document.

7. I have reminded myself, and been reminded, of what the authorities say about the exercise of the discretion to allow amendments to a Notice of Appeal, in particular **Khudados v Leggate** [2005] ICR 1013 and **Readman v Devon Primary Care Trust** [2011] UKEAT/0116/11/0109.

A I also note what the then President, Underhill J, said in **Readman** at [12] about the liberty to apply that is given to a Respondent to challenge an amended ground that, subject to that liberty to apply, the Judge presiding at a Rule 3(10) Hearing has decided should proceed.

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8. I also bear in mind that the Appellant was, at least in the run-up to the Rule 3(10) Hearing, unrepresented, though she was, at least in part, during the course of the Rule 3(10) Hearing represented by Mr Ogilvy, although it is evident from HHJ Shanks' record that he also heard a C number of submissions from her. Subsequent to that Hearing, she has been represented by counsel who settled the skeletons and who appeared today. I should say that Mr Royzycki was also in court as well as Mr Khan. Mr Khan made the oral submissions.

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9. I turn then to the numbered grounds each in turn. Ground 1, as drafted, challenges the Decision of the Grewal Tribunal during the course of the Hearing before them to refuse an E application by the Appellant to adjourn that Hearing. Ground 1, in the version now before me from December 2019, seeks to argue in limb A that the Tribunal erred in its approach, in summary, to this being a third postponement application and therefore treating the Rule 30A(3) provisions relating to third applications as being engaged; and/or, on the footing that exceptional F circumstances were necessary, erred in concluding that there were none. In limb B, it is argued that the Tribunal failed to take into account relevant facts, and took into account irrelevant facts, when proceeding on the assumption that it ought to refuse the adjournment, even if there were G exceptional circumstances present.

10. Ms Darwin did not object to this ground proceeding provided it was amended in some H way to indicate that the alleged list of irrelevant facts taken into account and relevant facts not taken into account was as set out in paragraphs 4.8 and 4.10 of the draft amended grounds of

appeal tabled in August. Mr Khan submitted that there should be no such restriction. Initially in oral submissions, he seemed to suggest, putting his case at its highest, that the matter should be left entirely at large. But in the course of discussion, he seemed to accept that the Employment Appeal Tribunal ("EAT") would need to know at the Full Hearing which particular matters were or were not said to be irrelevant factors that were considered or relevant factors that were not. However, he suggested that could properly be addressed in the skeleton argument. Further on in the discussion, he said that the Claimant should be permitted, in support of this ground of appeal, to reply on anything identified as an irrelevant factor wrongly considered, or a relevant factor wrongly overlooked, in any part of grounds 4 and 5 of the August draft amended grounds.

11. I note that HHJ Shanks in his Decision referred to grounds 4 and 5 and to all the relevant circumstances. I agree with Ms Darwin that the Respondent should not, in so many words, be ambushed by particular relevant or irrelevant factors being relied upon without fair warning of what they will be. However, it seems to me that if I confine the Appellant to rely only on factors that she says were wrongly taken into account or wrongly overlooked, that are mentioned somewhere in ground 4 or ground 5 as drafted in August, then the Respondent will not be unfairly ambushed, because they will know now that she cannot rely on anything that is not mentioned somewhere in those grounds 4 or 5.

12. I therefore will permit this ground to proceed without the restriction for which Ms Darwin argued, namely that the relevant or irrelevant matters relied upon should be confined to the specific lists in paragraphs 4.8 and 4.10. However, I do say it will be subject to the restriction that only matters referred to somewhere in ground 4 and ground 5 of the August draft amended grounds may be relied upon.

13. Before leaving this ground, I observe, so I am not misunderstood, that I am not expressing a view as to which parts of grounds 4 and 5, apart from 4.8 and 4.10, which specifically and in terms lists things identified as being relevant or irrelevant grounds, can fairly be said to raise or identify relevant grounds that were not considered by the Tribunal or irrelevant grounds that were. I am merely saying that if the Appellant considers that there are other parts of 4 or 5 which do identify such matters, and she wishes on rely upon on them, she can put them forward. It will be for the EAT at the Full Appeal Hearing to decide whether any such parts of 4 or 5 do indeed make that good.

14. I turn to ground 2. This challenges the Decision of the Tribunal, again during the course of the Hearing, to refuse a Rule 50 application. The Tribunal's description of that application and its Decision on it, which it gave in the first instance orally at the Hearing, is recorded as part of its Written Decision at paragraphs 9 to 16. There was more discussion about ground 2 today than any of the other proposed grounds, in the course of which this ground went through a substantial redraft. With the engagement of both counsel, we were able to get to a redrafted version which Mr Khan, on behalf of the Appellant, was content sufficiently covered the ground that he wished to be able to cover in advancing this ground at the Full Appeal Hearing, and which Ms Darwin, on behalf of the Respondent, was content should be permitted to proceed, though of course it will be opposed on all points at the Full Hearing.

15. I therefore need do no more than record the agreed revised terms of ground 2, and I confirm that I agree and direct that, in this revised form, with which both sides are content, ground 2 should proceed to a Full Hearing. The gist is that the ET erred in law in that it refused the Appellant's Rule 50 application on the basis that the restriction on open justice was not justified or necessary to protect her Article 6 and Article 8 rights, in particular, (a) in paragraph 14 by

finding that Article 8 was not engaged with respect to the matters mentioned in that paragraph; (b) in paragraph 15 by finding that the Appellant's Convention rights did not outweigh the open justice principle in relation to the matters mentioned in that paragraph; (c) in respect of the medical report of 10 May 2017 by not considering it and/or its implications for the Appellant's Convention rights and/or by not finding that they tipped the balance in favour of granting her application and; (d) in not considering or attaching sufficient weight to the contents of a letter from the ET relating to an application that the Appellant had made for the reconsideration of the 2017 Decision of Employment Judge Morton, that letter being dated 14 January 2019.

16. I make two observations about ground 2. First, it appears that there may be an issue about whether, or to what extent, directly or indirectly, the Appellant made reference to the matter of medical evidence and/or the 10 May 2017 report, when presenting orally her Rule 50 application. Secondly, there may be an issue as to whether the Tribunal had before it the 14 January 2019 letter and/or was referred to it in the course of that application. The parties should therefore seek to agree a note of the position in relation to both of those matters to be included in the bundle for the Full Hearing. If they are not able to reach agreement in respect of either, then either or both of them may make an application requesting some further step be taken by the EAT, such as a request for Judge's notes or comments.

17. I turn to ground 3. This divides, and again I am using the lettering in the draft amended grounds of 17 December 2019, into five separate sub-grounds, (a) – (e). 3(a) alleges that findings made at paragraph 65 were perverse or not supported by evidence, for reasons set at (i) and (ii). Ms Darwin says that this was raised by way of a proposed amendment and is opposed by the Respondent because, in particular, it is academic. The Tribunal did not need to make a finding about what it may have thought happened at the Hall-Smith Hearing, which is the subject matter

A at paragraph 65, because there was no wrongful dismissal claim, only an unfair dismissal claim. In fact, Ms Darwin said it is the Respondent's case that the Tribunal did *not* make such a finding at paragraph 65, but, rather, was describing there the different evidence that was available to the Respondent when it considered this matter as part of the disciplinary charges that ultimately led to the Claimant's dismissal.

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C 18. Mr Khan in reply says the matter is not academic. He says it was clearly contemplated by HHJ Shanks that it was arguable and should go forward, and, says Mr Khan, it arguably influenced the Tribunal itself in paragraph 120 of its Decision. In addition, he says it is actually flagged up in the original grounds of appeal at paragraph 6.1 in the preamble.

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19. I have decided that this ground should proceed to a Full Hearing as drafted in the December amended grounds. This is, firstly, because it is flagged up in the preamble to 6.1 of the original grounds of appeal. Secondly, HHJ Shanks considered that it was arguable. I wish to be clear that I express no view as to the correct construction of paragraph 65, what it means and what the Tribunal said or did or did not find in that paragraph, nor as to the other arguments advanced today as to the merits of this ground. That can all be argued out at the Full Hearing. It is sufficient that it was flagged up in paragraph 6.1 of the original grounds of appeal and that it was considered arguable by HHJ Shanks.

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G 20. I move on to ground 3(b). This argues that the Tribunal erred in paragraph 131.1 of its Decision by holding that it was reasonable for the Respondent not to have specified, in a letter inviting the Appellant to a disciplinary hearing, the particular misconduct of which she was accused. The complaint was that this was an instance of detrimental treatment because of protected disclosures. The Respondent says this ground is new and, in any case, academic,

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because the claims that there were protected disclosures all, in any case, failed; see paragraphs 123 to 128 of the Decision. Mr Khan says it is not academic, because a later ground also challenges part of the Tribunal's conclusions that there were no protected disclosures in fact and law. Further, he says this was flagged up in the original Notice of Appeal in the preamble to ground 6.3, which refers to paragraph 131.1 and to this feature of it.

21. I will allow this ground to proceed for the following reasons. Firstly, Mr Khan is right that it is flagged up in 6.3 of the original Notice of Appeal. Secondly, HHJ Shanks considered it to be arguable. Thirdly, it is not necessarily academic, because I am going to allow the later ground of challenge, to which I will be coming, concerning the conclusion that there were no protected disclosures, also to proceed, for reasons I will explain when I get to it.

22. Ground 3(c), again sticking to the nomenclature of the draft December grounds, alleges that at paragraph 136 the Tribunal were perverse to find that the Appellant's conduct was likely to bring the Respondent into disrepute, this being the alleged conduct at the Hall-Smith Hearing, when, says the ground, that Hearing was conducted in private. The Respondent says this is another amended ground, deriving, it suggests, from paragraph 7.4.1 of the draft amended grounds from August, which refers to an error in holding that that Hearing was a public forum in paragraph 120. Also, says the Respondent, it does not have reasonable prospects of success.

23. Mr Khan says the original source of this is the original Notice of Appeal paragraph 6.4, which, he says, contains a typo that was corrected by the Appellant before HHJ Shanks: it refers in its preamble to paragraphs 137 and 137 when it meant 136 and 137. I accept that, and so I accept that there was, or was intended to be, some reference to paragraph 136 in the original grounds of appeal, even though what follows in that section does not precisely advance this point.

A However, given that there was a foothold in the original grounds of appeal for it and, given that HHJ Shanks considered that it was arguable, I will allow it to proceed.

B 24. Once again, I am following the guidance in **Khudados** and **Readman**, and erring on the side of allowing to proceed, a ground that had a foothold in the original Notice of Appeal, even if not fully spelled out, and which the Judge at the Rule 3(10) Hearing considered was arguable. Once again though, in relation to this ground, I express no view about what is the correct C construction of what the Tribunal actually said and did in paragraph 136 with respect to the issue of whether the Claimant's alleged conduct at the Hall-Smith Hearing did bring, or was capable of bringing, the Respondent into disrepute. That will be open to argument at the Full Hearing.

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25. Ground 3(d) challenges paragraph 120, in particular saying that it was wrong for the Tribunal to conclude that a hypothetical comparator who had not done any protected acts would E have been treated the same way as the Claimant, this relating to an allegation of victimisation. According to this ground, that is because the Respondent failed to follow its own suspension policy and no explanation was offered by Ms Henry, the relevant witness for the Respondent, for this failure. Ms Darwin says this is a new ground that I should not permit to proceed because it F is totally without merit. The relevant victimisation claim as identified by the Tribunal at paragraph 2.2(a) of its Decision concerned the *decision* to suspend, not the *manner* of suspension. Further, the Tribunal did have an explanation from Ms Henry, which it referred to at paragraphs G 69 and 70 of its Decision. Mr Khan says that this issue was properly raised and flagged up in the Claimant's original Particulars of Claim.

H 26. I will allow this ground to proceed, firstly, because HHJ Shanks considered that it is arguable. Secondly, because the point that HHJ Shanks made was that, if there arguably were

failures to follow the suspension procedure, those might arguably have been said to support an inference in relation to this complaint. The point being made is that the complaint, that the decision to suspend was an act of victimisation, arguably might be said to be supported by findings that the suspension was carried out, or decided upon, in a manner that did not comply with the usual procedure. However, I consider it important in fairness to the Respondent that there be clarity about what are said by this ground to be the failures to follow procedures that are relevant to it. In discussion with Mr Khan about this, he made some oral submissions and also took me to the reply skeleton argument for today and what it had to say about this.

27. Having considered all of that, I am permitting this ground to proceed, but on the basis that what are said to be the relevant alleged failures to follow procedure are the following: the decision not being made at the appropriate business level; the Respondent not having established that there were good grounds for suspension before taking the decision; Ms Henry not having consulted before taking the decision; and the method of communicating the suspension being the delivery of the suspension letter to the Claimant at her home. Again, I stress I express no view as to whether reliance on those matters will or will not make good this ground of appeal, which will all be a matter for argument at the Full Appeal Hearing.

28. Lastly 3(3): that the Tribunal erred in law at 126 and 127 in concluding that the email to the *Evening Standard* was for the purpose of personal gain and therefore not a protected disclosure, without assessing the Appellant's subjective intent in sending the same. Ms Darwin argued that this was another new ground that was hopeless because the Tribunal *had* made findings about that, she said, at paragraph 126. Mr Khan said I should beware of descending into adjudicating the merits of this ground, in light of the guidance in the authorities to which I have already referred; and he maintained that it is arguable.

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29. I have decided that I ought to exercise that restraint, having regard to the fact that HHJ Shanks considered this was arguable and permitted it to proceed to a Full Hearing. I have done so, notwithstanding that it appears to me that paragraph 126 does, at least arguably, present an obstacle to the Appellant, bearing in mind that the Appellant was dependent, to make good this alleged protected disclosure, on fulfilling the requirements of Section 43G rather than the more liberal requirements that apply where the disclosure is said to have been made to the employer, in particular, having regard to 43G(1)(c). I observe, and I raise this neutrally because it may be a relevant authority, that consideration may need to be given to the Court of Appeal's Decision in **Ibrahim v HCA International Ltd** [2019] Civ 2007, but also, and again I say this neutrally, as to whether or to what extent it has any application to a 43G claim. However, I will say no more about it than that, because I have decided that this ground should proceed, so the place for argument will be the Full Appeal Hearing.

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