

Neutral Citation Number: [2003] EWCA Civ 171
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London, WC2
Wednesday, 5 February 2003

B E F O R E:
LORD JUSTICE MUMMERY

MRS J ASSELMAN

-v-
(RANK) XEROX UK LTD & ANR

Applicant/Claimant

Defendant/Respondent

(Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
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(Official Shorthand Writers to the Court)

MRS J ASSELMAN APPEARED IN PERSON
THE DEFENDANT DID NOT ATTEND AND WAS NOT REPRESENTED

J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE MUMMERY: This is an application for permission to appeal. The application is made by Mrs Asselman in person. The decision which she wishes to appeal is that of the Employment Appeal Tribunal on 18th November 2002. The Employment Appeal Tribunal decided not to remit Mrs Asselman's case to the Employment Tribunal for further consideration and dismissed her appeal against the findings of the Employment Tribunal on claims for victimisation and equal pay.
2. The position is that Mrs Asselman started to work for Rank Xerox UK Limited in the helpline team as an analyst. She started work on 23rd January 1995. She was summarily dismissed on 22nd October 1997 in circumstances that led her to present an application to the Employment Tribunal on 16th December 1997, claiming unfair dismissal, sex discrimination, victimisation and equal pay. There was a second originating application, which made further complaints against Xerox of a similar kind. A second tribunal dismissed those on the basis that they were out of time and were barred by res judicata.
3. There was a long hearing in the Employment Tribunal at London North in June 1999. Mrs Asselman represented herself. Rank Xerox were represented by counsel. The Employment Tribunal sent their extended reasons to the parties on 20th September 1999 recording their unanimous decision that: (1) the applicant was not the subject of discrimination on the grounds of her sex; (2) the applicant was initially procedurally unfairly dismissed, but the unfairness was cured at the appeal, the dismissal was therefore fair, and (3) the complaint of equal pay was dismissed.
4. In the extended reasons the Tribunal dealt with each claim under separate headings and summarised their conclusions in paragraph 41. They made certain comments in paragraph 42 on the evidence of Mrs Asselman and the way in which she had perceived her case.
5. There had also been an application for a review of the Tribunal's decision which was refused. There was then an appeal to the Employment Appeal Tribunal. That came before the Appeal Tribunal on 9th March and the appeal was allowed to proceed to a full hearing. It was stated that the points of appeal relating to unfair dismissal, victimisation and equal pay were arguable, though those on sex discrimination and the second Tribunal's decision were misconceived and should be dismissed.
6. The substantive hearing of the Appeal Tribunal took place in October 2002. On 18th November Wall J gave a reserved judgment rejecting allegations of bias on the part of the Tribunal, but stating that the procedures leading to the dismissal and the Employment Tribunal's analysis of them was unsatisfactory. The Tribunal found that the whole process was defective and was not remedied by the internal appeal hearing. On that point the Appeal Tribunal disagreed with the conclusion of the Employment Tribunal.
7. The Appeal Tribunal also said that the Employment Tribunal had failed to make proper findings as to what was the gross misconduct alleged by Xerox as the ground for dismissing Mrs Asselman. The Appeal Tribunal went on to conclude, however, that Mrs Asselman had not appealed against findings by the Employment Tribunal that she was responsible for the breakdown in the employment relationship and had, therefore, contributed to her dismissal to such an extent that the Employment Tribunal found 100 per cent contributory fault. In those circumstances, the Employment Appeal Tribunal said there was no point in returning the matter to the Employment Tribunal to consider the position on compensation. They went on in other parts of their decision to explain their conclusions that there were no errors of law in the Employment Tribunal's reasoning on the dismissal of the victimisation and equal pay claims.
8. Mrs Asselman in her skeleton argument and in her oral submissions has explained why she wishes to have permission to appeal on the equal pay claim, on the contributory fault point and on the victimisation point. At the outset I explained to her that permission to appeal is only granted if there is a real prospect of persuading the full Court of Appeal that there is an error of law or a number of errors of law in the Employment Tribunal's decision. I also explained to her, and should record it in this judgment, that different rules prevail in this court on matters of costs than prevail in the Employment Tribunal and the Appeal Tribunal. I pointed out to her that giving her permission to appeal did not mean that the appeal would succeed, and it also ran the risk that, if the appeal failed, the respondents would, in all likelihood, seek an order for costs in a substantial sum. She said that she appreciated that that was the position. She then explained her criticisms in relation to the equal pay claim and the way it was dealt with by the Employment Tribunal. She complained in particular that she had not been allowed to have an expert's report, and that Xerox had changed its defence at a late stage from initially being one of genuine material factor to the point, on which they won in the Employment Tribunal, that Mrs Asselman was doing a different job than the man who she succeeded. She took me in detail to the documents to support her arguments.
9. On the contributory fault point she had, in my judgment, a more substantial argument that there had been an error in the way that this had been dealt with. First, and I can confirm from my own experience, it is highly unusual, though not impossible, for an employee to be found liable 100 per cent for the dismissal. So that even if the dismissal was unfair, as the Appeal Tribunal thought was the case, she is not entitled to recover anything.
10. Having been taken by Mrs Asselman to her notice of appeal to the Employment Appeal Tribunal, to the judgment given on the preliminary hearing and the judgment given by Wall J, I conclude that there are unsatisfactory features about the way in which the contributory fault point was dealt with in the Employment Tribunal and on the appeal. On that main ground I would give her permission to appeal.
11. The points on equal pay and victimisation are, in my view less strong, but I would not shut them out at this preliminary stage. It is important that the full court should have the total picture presented to the Employment Tribunal. There are

interconnecting factors in relation to these claims.

12. What I therefore propose to do is simply to give permission to appeal, while expressing my view that the main point on which there is a real prospect of success is the issue of contributory fault. I grant an extension of time for appealing. I estimate the length of the hearing of the full appeal at one-and-a-half days.

SMITH BERNAL WORDWAVE