A2/2014/3034

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

Neutral Citation Number: [2016] EWCA Civ 35

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 6 October 2016

B e f o r e:

LADY JUSTICE ARDEN

LORD JUSTICE UNDERHILL

Between:

ROSEMOND EDWARDS

Appellant

v

PARABIS LAW LLP T/A COGENT LAW

Respondents

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Ms E Banton (instructed by Public Access) appeared on behalf of the **Appellant**
The Respondents were not present and were not represented

J U D G M E N T
(Approved)

1. LORD JUSTICE UNDERHILL: The Appellant is a solicitor, although it is material to mention that she initially qualified as a barrister. She was employed by the Respondents, a firm of solicitors now in administration: they were part of a larger group called the Parabis Group. She was summarily dismissed on 6 April 2012. She brought proceedings in the Employment Tribunal for both and unfair and wrongful dismissal. As regards the unfair dismissal claim, her dismissal was alleged to be automatically unfair by reference to section 103A of the Employment Rights Act 1996, the so-called whistle blower provisions. There were other claims with which we need not be concerned. The ostensible reason for her dismissal was an e-mail which she had sent to a Mr Willis, of which I will give more details presently, but it was her case before the tribunal that the Respondents had already decided to get rid of her for unjustifiable reasons arising out of the breakdown of relationships between her and a number of colleagues who had complained about her manner and language towards them.

2. The Appellant's claims were heard before an Employment Tribunal sitting at London South chaired by Employment Judge Zuke between 4 and 8 February 2013. They were dismissed at the end of the hearing and written reasons were supplied on 11 April. The Appellant sought to appeal to the Employment Appeal Tribunal against that decision, but her claim was out of time.

3. On 8 February 2014 the Appellant applied to the Employment Tribunal for a reconsideration pursuant to rule 72(1) of the Employment Tribunal Rules 2013 (in fact she used the old terminology of seeking a "review") on the grounds that new evidence had become available since the hearing which could not have been reasonably known at the time of the hearing. That application was refused by Employment Judge Zuke by letter from the Tribunal dated 21 March.

4. The Appellant appealed to the Employment Appeal Tribunal against that refusal. On 28 August 2014 that appeal as rejected by His Honour Judge Richardson on the papers. He certified the appeal was totally without merit, with the result that there was no right to an oral renewal. The Appellant then sought permission to appeal to this court. It was refused by Lewison LJ on the papers, but permission was given by Laws LJ, albeit with some reluctance, on 15 October 2015. Regrettably, it has taken a year for the appeal to come on.

5. The Appellant has been represented before us by Ms Elaine Banton of counsel, who appeared before Laws LJ though not in the original Tribunal proceedings. She has made all the points potentially available to the Appellant clearly and cogently. The administrators of the Respondents have said that they do not intend to be represented. However, before the firm went into administration they lodged a respondent's notice setting out submissions in opposition to the appeal which we have taken into account.

6. The context in which the new evidence issue arises can be summarised as follows.

7. The Appellant, who has Tobagonian nationality, had dealings with a Mr Willis in her private capacity about the possible purchase of a plot of land in Tobago. In connection

with those dealings, at one o'clock in the morning on 20 February 2012 she sent Mr Willis an e-mail in the following terms:

> "You are a filthy man with a nasty, vile mouth. Charity begins at home and your Church Minister father should have spent more time trying to save the dirty mind of his son instead of ministering to his parishioners.
>
> You live in the 60's when Tobagonians used to be impressed by white men because God knows it is the one thing you keep talking about. Your claim to fame. Thank God you were born white because you would have had no purpose in life. You are a small fish in a big pond full of white men and you are a tiny, tiny man in my eyes. You may impress your Indian wife by declaring yourself as the only white Tobagonian but in my eyes you amount to one big fat zero. You stupid misguided idiot. The homage you expect from me you will never, ever get. Only true White Tobagonian.....my ass.
>
> You still don't get it, do you? Ask your lawyer when the Sales Agreement was executed. You idiot!!!
>
> Don't pretend as if you are doing me a favour because you are not. I hear rumours that you did not even get the land through legal means. But that is ok because you are the only true white Tobagonian..... you want to send the documents to your lawyer in Trinidad, I will allow that small victory because you are a small puny little man. Thank God I am not your wife. Poor thing she has my sympathies.... you fool."

That is self-evidently an extremely offensive and intemperate document to be sent by anyone, let alone a solicitor.

8. On receipt of the e-mail, later that very day, Mr Willis wrote to the Respondents to complain about it. His letter reads as follows:

> "I am writing to you to complain that I am being victimised and racially abused by an employee of your company at the Croydon Branch of Cogent Law.
>
> Ms Rosemond Edwards an "Employment Law Supervisor" at your Croydon Office has contacted me unilaterally to buy a parcel of land I own overseas in Tobago. In October we both signed a purchase agreement to this end. Since that time she and her UK notary public have made several errors in the legal documents.
>
> After pointing out these errors, she has contacted me from your offices as recently as Friday, 17 February 2012 and has launched into a verbal and written tirade of racial abuse directed against my wife and I. I am enclosing a copy of the most recent correspondence from her.
>
> It is repugnant to me that she holds a senior position in your company that

> has built its reputation on defending people against this type of illegal behaviour while practicing it so blatantly in her private life, that is why I am bringing it to your attention."

9. It is important, for reasons which will appear, to note that Mr Willis was evidently already aware that the Appellant was an employee of the Respondent firm, that she was "an Employment Law Supervisor" (the use by Mr Willis of inverted commas showing that he was quoting that title from a document of some kind) and that he understood the Respondents to have a reputation for defending people against what he characterised as racially abusive behaviour.

10. Mr Willis complained to the Solicitors Regulation Authority by letter dated 24 February 2012. More importantly for our purposes, he also made a complaint to the Sussex Police. It seems from the documents now available that his first substantive communication with them was on 23 February. Either then or shortly afterwards there was an interview of some kind which has generated a log and some other records. The complaint was eventually dealt with by the police serving on the Appellant personally on 27 March a so-called "police information notice" which recorded the fact of the complaint and was apparently accompanied by some informal advice to her at the time of service. No other action of any kind was taken.

11. It is convenient to note at this point that on 28 March 2012 Mr Willis wrote to Mr Oliver, the senior partner of the Respondents, to tell him of the service of the police information notice on the Appellant the previous day. The letter refers to two previous letters from Mr Oliver which we do not have and which apparently have not been produced at any stage in the proceedings. Apparently in response to a query raised by Mr Oliver about whether the Appellant's conduct had anything to do with the firm. Mr Willis said:

> "Although it was indeed a private matter, Ms Edwards was receiving communications on this matter at your offices at Croydon. I am in possession of an envelope addressed to her at your offices and I was, therefore, able to establish that she worked at your law firm as a result."

He also went on to point out that one of the documents in the transaction had been notarised by one of her colleagues at the firm, giving the firm's address. That letter was in evidence before the Employment Tribunal.

12. The Respondents treated Mr Willis' complaint as a disciplinary matter. After going through their disciplinary procedure, the Appellant was, as I have said, dismissed. Ms Howe, the Respondents' "national manager", wrote a long letter giving the reasons for the dismissal. I need not set it out in full. The essence was that the e-mail was racist and offensive, that it constituted racial harassment and that its sending brought the Respondent firm into disrepute notwithstanding that it was not written in the course of the Appellant's employment. In the latter connection, Ms Howe said this, which is material to a point I have to consider presently:

> "I have, however, also taken into account the fact that we discovered

> during the investigation that many of the e-mails sent in relation to this conveyancing (albeit not the e-mail to Mr Willis) have been sent during working hours and/or from work e-mail and/or quoting your work signature as an Employment Law Supervisor or supervisor/solicitor for cogent law."

Ms Howe attached importance also to the fact that the Appellant refused to acknowledge that there was anything wrong in the e-mail, which Ms Howe regarded as particularly concerning because it suggested that she was liable to behave equally intemperately in the future.

13. As I have said, the Employment Tribunal dismissed the claims for both unfair and wrongful dismissal. As regards the former, at paragraph 66 of its reasons it explicitly rejected the Appellant's case that the true reason for her dismissal was not the e-mail from Mr Willis but the Respondents' concern, as to which there was no dispute, about the breakdown in relations between her and her colleagues. (The case that the e-mail from Mr Willis was essentially a pretext, hiding the real reason for the dismissal, has been referred to before us conveniently as the Aslef v Brady case, the reference being to the case of that name reported at [2006] IRLR 576.) As regards what it held to be the real reason for the dismissal, that is to say the sending of the e-mail to Mr Willis, the Tribunal held that that was a reasonable response to the Appellant's conduct and that a fair procedure had been followed. It said, at paragraph 64:

> "In our view, it was reasonable for Ms Howe to conclude that the e-mail was rude, offensive and amounted to an act of harassment on racial grounds. It was also reasonable for her to conclude that the Claimant had brought the Respondent into disrepute by sending the e-mail. She identified herself as an Employment Law Solicitor employed by the Respondent."

In relation to whether dismissal was an appropriate sanction, it said this:

> "Given the Claimant's complete absence of remorse, her complete failure to acknowledge even the possibility that her e-mail may have been offensive or tainted by racial harassment, Ms Howe reasonably lost all trust and confidence in the Claimant. It was reasonable for her to apprehend that if the Claimant remained in employment she may in the future act in a manner that could bring the Respondent into disrepute. She also reasonably lost confidence in the Claimant's capacity for sound judgment in her role as an employment lawyer."

It made similar findings, which I need not set out, in relation to the claim of wrongful dismissal.

14. The fresh evidence on which the Appellant relied in support of her application for reconsideration was obtained by under the Data Protection Act her from the files of the Sussex Police. She encountered serious difficulties in obtaining full disclosure and received the material only in two tranches, the first being heavily redacted and the

second only being obtained after she had initiated proceedings for judicial review. At the time of her application for reconsideration she only had the first tranche.

15. In the document by which she made the application for reconsideration the Appellant quoted two passages from the notes of the police interview with Mr Willis. She did not exhibit the documents themselves because, she says, they were so heavily redacted that they were difficult to read. The first is an entry on the file, presumably deriving from Mr Willis, saying of her:

> "It appears that she is a specialist in employment law, unfair dismissal and all types of discrimination, including breach of contract and redundancy."

She says in the application that she had never told Mr Willis that she was an employment lawyer, still less of those details of her practice, and that it should therefore be inferred that he had learnt of them from the Respondent. The second passage is a reference by Mr Willis in his interview to the Appellant as having "bullied" him in the course of the transaction. She says in the application that that language echoed the terms of the complaints made against her by her colleagues and it was likewise to be inferred that that way of characterising her behaviour was fed to him by the Respondents.

16. Those two passages taken together are said to show, or at least raise a reasonable inference, that the Respondent had been “colluding” with Mr Willis. Ms Banton helpfully expounded what was meant by that. She said that it meant that the Respondents had been giving Mr Willis information about the Appellant which he did not otherwise have which would serve to "bolster" his complaint and so make it easier for them to treat it as a reason for dismissing her. Ms Banton accepts that it is not and has never been part of the Appellant's case that the Respondents had anything to do with the making of the original complaint, but she says that the force of that complaint was intensified if, to take one of the two examples, Mr Willis was told that she practised discrimination law because it would be a particularly serious matter for a discrimination lawyer to write an e-mail in the terms that the Appellant did to Mr Willis.

17. In the application to the Tribunal the Appellant referred also to Mr Oliver's letter of 28 March, to which I have already referred, as supporting the case of such collusion, although of course the letter itself was not new evidence and had been before the Tribunal.

18. Employment Judge Zuke's reasons for refusing a review were given in the following terms:

> "On 8th February the Claimant submitted an application to review the Tribunal's judgment sent to the parties on 12the February 2013, on the grounds that new relevant evidence has recently come to light, which could not have been obtained earlier.

> The evidence relates to the Police Information Notice, which the Claimant has further investigated. I am not persuaded that the Claimant could not have carried out this investigation prior to the Tribunal hearing.
>
> In any event, in my view there is no reasonable prospect of the judgment being revoked. In summary, the Claimant was dismissed because she was found to have been abusive to Mr Willis. The Respondent found that she had identified herself as a employment law solicitor - see our reasons para. 46.
>
> There is no reasonable prospect of the judgment being revoked on the grounds that there is evidence of collusion between the Respondent and Mr Willis, as the Claimant now alleges."

19. Judge Richardson's reasons for rejecting the appeal to the Employment Appeal Tribunal were equally brief. He said:

> "The Employment Judge did not commit any error of law in refusing to review the earlier judgment. Indeed, I would go further. He was plainly right. The e-mail which led to the Claimant's dismissal and which she admitted sending was disgraceful. Her case was roundly and properly rejected by the Employment Tribunal in the reasons which it gave in the judgment dated 12 February 2013. The "fresh evidence" provided no basis upon which the Employment Judge could have found it necessary in the interests of justice (see rule 70 of the Employment Tribunal Rules 2013) to reconsider the earlier judgment."

20. As I have already said, the Appellant obtained fuller disclosure from the police after she had received the decision of the Employment Appeal Tribunal and when her application for permission to appeal to this court was pending. She seeks to rely on that further material for the purpose of this appeal. Of course, the decision of the Employment Judge and the Employment Appeal Tribunal cannot be impugned as such on the basis of information which was not before them, but Ms Banton invites us to admit the evidence at this level on ordinary Ladd v Marshall principles. She refers to three passages in the unredacted interview notes which she says reinforce the collusion case which I have already outlined. They are as follows.

21. First, there is a note which reads:

> "Female said she was a lawyer/solicitor, but would not divulge workplace - she is registered with the Law Society."

That is said to be important because it confirms that the Appellant did not tell Mr Willis where she worked. It is convenient to say now, however, that that is not in itself a piece of new evidence because Mr Willis had explained in the letter of 28 March 2012 how he had had to find out where the Appellant worked.

22. The second is a passage which reads:

> "Title is employment solicitor and supervisor, Cogent Law, part of the Parabys Group."

Of course we know that Mr Willis knew the Appellant's title before the first complaint because he gives it in his letter. But Ms Banton says that the fact that the firm was part of the Parabis Group is another example of a piece of information that is only likely to have come from the Respondents and thus reinforces the case of collusion.

23. Thirdly, there is a passage which reads:

> "He is concerned that female is a solicitor and qualified as a barrister in 2001."

Ms Banton's point is that the fact that the Appellant had qualified as a barrister is something which is most likely to have been communicated to Mr Willis by the Respondents and is therefore further evidence of collusion.

24. In short, Ms Banton submits that this material taken together raises a sufficiently arguable case of collusion, in the sense that I have identified, to justify a full reconsideration of the case before the Employment Tribunal. She says that there is a real chance that the material would cause the Tribunal to re-evaluate its acceptance that the sending of the e-mail to Mr Willis was the real reason for the Appellant's dismissal rather than its admitted pre-existing wish to get rid of her because of her poor relationships with her colleagues.

25. I cannot accept that submission. I do not believe that either the material originally relied on in the reconsideration application or that now sought to be introduced would be capable of having an impact on the original decision of the Tribunal. The suggestion that any of it, separately or collectively, demonstrates collusion of the type alleged between the Respondent and Mr Willis is flimsy in the extreme. Taking the components in turn, there is nothing in the least surprising in Mr Oliver having written to Mr Willis, since he had made a complaint about one of the solicitors in the firm. Nor is there anything at all in Mr Willis' reply to Mr Oliver which suggests any kind of collusive relationship: on the contrary. It is equally unsurprising that Mr Willis should have discovered by the date of his interview with the police a list of the Appellant's professional specialisms the kind which is reflected in the notes. I would observe that the list did not refer only to discrimination, which the Appellant and Ms Banton said was the significant point, but also to unfair dismissal, breach of contract and redundancy: in fact, it reads very like something out of a directory or off a website or other equivalent public description of the nature of her work. The information about the Appellant having previously been a barrister and about the Respondents being part of a larger group would likewise be easily publicly available to someone seeking, as Mr Willis evidently was, to find out as much as possible about her with a view to taking action against her. Nor is it suspicious that he referred to her as a bully. That is hardly an unusual term and there is no reason whatever to suppose that it reflects an echo of something that he had been told about the complaints made against her by her colleagues. In short, there is nothing in any of this material to suggest that it was fed to Mr Willis by the Respondents.

26. Further, even if, which is not impossible though there is no reason to suppose it, some of the information in question did derive from some communication between the Respondents and Mr Willis, the kind of collusion hypothesised by the Appellant and Ms Banton seems to me pointless and highly implausible. Giving Mr Willis some further snippets of information about the Appellant would not alter the strength or otherwise of the case for dismissing her, which depended on the terms of the e-mail and, just as importantly, on the Appellant's steadfast refusal to acknowledge that there was anything wrong with it. Indeed, if that were the purpose of the exercise, it is very odd that Ms Howe in her dismissal letter did not refer at all to the issuing of the police information notice (of which the firm had been informed prior to the dismissal decision, even if possibly not before the disciplinary hearing) or to the complaint made by Mr Willis to the Solicitors Regulation Authority.

27. I would finally add that – at least as far as the first tranche of the information is concerned – Employment Judge Zuke was fully entitled to weigh it against the impression that he and his colleagues had formed of Ms Howe and the Respondents' other witnesses at the hearing in deciding whether there was any chance that the supposed evidence of collusion could have altered their view.

28. In connection with Judge Zuke's reasoning, I should briefly refer to one comment emphasised by Ms Banton. He referred explicitly to the finding made by the Tribunal that the Appellant had "identified herself as an employment solicitor employed by the Respondent", though he gave the wrong reference (it is paragraph 64 of the reasons, not 46). Ms Banton submits that that is undermined by the passage in Mr Willis' interview notes in which he says that she had never told him where she worked (though in fact I should note that it was already undermined, if that is what was meant, by the terms of Mr Willis' letter of 28 March). However, I do not accept that the Tribunal meant by that statement that the Appellant had told Mr Willis in terms that she worked for the Respondents as an employment lawyer. The finding in question is clearly a reference back to what Ms Howe said in her dismissal letter in the passage quoted at para. 11 above. That is not saying in terms that the Appellant had directly told Mr Willis of her employment, but only that she had not kept her correspondence with Mr Willis and her work as a solicitor wholly distinct, which is indeed evidenced by the fact that he was able to write to the Respondents within hours of receiving her e-mail. I understand from Ms Banton that the Appellant does not in fact accept that any such mixing up took place, but there is a clear finding of fact to that effect which cannot now be challenged.

29. In summary, nothing in the new material comes close to undermining the finding, wholly unsurprising in itself, that the Respondents dismissed the Appellant because she had written an e-mail in frankly disgraceful terms which called her temperament and judgment seriously into question and reflected on the reputation of the firm.

30. Having reached that conclusion, I need not address the question raised by Employment Judge Zuke, at least as regards the initial application, whether the new evidence relied on could have been obtained sooner. Nor need I address the various particular ways in which the grounds of appeal are framed. As Ms Banton accepted, they all in practice turn on the central question of whether the new evidence was capable of leading the Employment Tribunal to a different view from that which it had originally reached.

31. I would accordingly dismiss this appeal.

32. LADY JUSTICE ARDEN: I agree. I would like to add that I was greatly assisted by counsel's skeleton argument and submissions in this case, which were exceptionally good.