

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

[2024] EWHC 944 (KB)

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 22 March 2024

BEFORE:

MR JUSTICE GOOSE

BETWEEN:

KENNY JOHNSTON

Claimant

- and -

GIVING.COM LIMITED

Defendant

MR MATOVU appeared on behalf of the Claimant
MS DARWIN appeared on behalf of the Defendant

JUDGMENT
(Draft for Approval)

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1. MR JUSTICE GOOSE:

Introduction

This is a renewed application for permission to appeal the decision of HHJ Melissa Clarke ("the judge") dated 2 November 2022, following a trial of preliminary issues in a claim for damages by Kenneth Johnston, the applicant, against Giving.com Limited, the defendant. The claim was issued by the applicant on 19 July 2021 in the County Court Business Centre. It was subsequently transferred to the Reading County Court. The applicant sought damages for discrimination, contrary to the Equality Act 2010, and secondly, for personal distress and loss caused by the negligence of the defendant. A defence was served denying liability and the defendant made an application to dismiss the claims. That application was refused, but directions were made for a trial of the preliminary issues. Those issues were as follows:

- (i) whether the claimant's claim relates to a contravention of Part 3 of the Equality Act 2010 and, therefore, one which the County Court has jurisdiction to hear, pursuant to Section 114 of the Employment Act ("the jurisdiction issue"); and
- (ii) whether the defendant owed a duty of care to the claimant ("the duty of care issue").

On 20 May 2022 HHJ Clarke gave judgment dismissing both claims and subsequently refused permission to appeal.

2. **Background**

The applicant suffers from mental ill health, which has affected his life profoundly. His disability drew him into charitable work. He formed a charitable company called Counselling Life Advice Suicide Prevention Limited, known as CLASP. The applicant was the trustee, the chief executive officer and its only employee, from its formation in 2013. The company was registered with the Charity Commission on 23 October of that year. Initially, the work of the company was with the NHS and Public Health Services, to assist people with mental health disabilities from self-harm and suicide prevention. In later years, the company focused on the rights of people with mental health issues, learning disabilities and hidden disabilities.

3. The respondent is a charitable giving and collection, online platform, using the name JustGiving. The service which it provides is for different types of customers. Charity customers are registered charities and non-profit organisations holding a Gift Aid number. They pay a commercial fee on a monthly basis, which varies according to the services they use. Part of those services involve a dedicated web page on the defendant's website, which could be used to promote their charitable causes and receive money. The applicant's company, CLASP, was a charity customer with the defendant. Other organisations require different services, for example, corporate clients who were not charitable organisations used the defendant's website for corporate fundraising and event partnerships; public service companies or organisations have different needs for crowdfunding and donation collection services, including for individual members of the public to allow them to fundraise or donate to charitable causes. The significance of these different services becomes more relevant when considering the applicant's grounds of appeal.
4. The applicant's claim for damages, the liability for which was the subject of the preliminary issues, is based upon the contention that he was discriminated against personally by the defendant, who failed to make reasonable adjustments and treated him unfavourably as a consequence of something arising from his mental health disability. Further, that the defendant breached a common law duty of care owed to the applicant personally, causing him foreseeable loss. The defendant denies that it has discriminated against the applicant or breached any duty of care owed to him. Upon the dismissal of the defendant's application to dismiss the claims of the applicant, the court directed that the preliminary issues be dealt with ahead of the trial itself.
5. **The judgment on the preliminary issues**

The judge was assisted by comprehensive skeleton arguments on behalf of both the applicant and the defendant. Further, witness statements were provided of the evidence relied upon for determination of those issues. That evidence was tested in cross-examination. The judge provided a careful judgment, leading to dismissal of the applicant's claims. The judge concluded on the jurisdiction issue that the applicant's claim was not one which related to a contravention of Part 3 of the Equality Act 2010 and accordingly is not one which the County Court had jurisdiction to hear pursuant to Section 114 of 2010 Act. Further, that there was no arguable duty of care which arose,

which could give the applicant a claim for damages in negligence.

6. **The applicant's grounds of appeal**

The applicant raises the following grounds of appeal:-

- (i) The decision of the judge was wrong and/or unjust because she failed to take material evidence into consideration. This ground relies upon the contentions that the judge did not take into account that the applicant was also an employee of CLASP as well as its chief executive officer and trustee; failed to take into account the applicant's disability; failed to consider that due to the applicant's disability, his understanding of the difference between himself and CLASP should have been anticipated.
 - (ii) The judge wrongly interpreted Section 31(5) of the Equality Act 2010.
 - (iii) The judge wrongly concluded that the discrimination claim fell outside the jurisdiction of the County Court.
 - (iv) The judge was wrong to conclude that the applicant did not seek to obtain personal services from the respondent.
 - (v) The judge was wrong to conclude that there was no duty of care owed to the applicant by the respondent.
 - (vi) The judge failed to give proper reasons as to why she concluded that the services provided by the respondent were only to CLASP and not to the applicant.
- Further, the applicant argues that there is a compelling reason for the appeal to be heard, because it raises an important point of principle or practice which is of general public importance.

7. **The single judge**

In considering the application for permission to appeal on the papers, the Single Judge stated that grounds 1 and 2 were not arguable because the judge was not incorrect in the findings that were made. Further the judge properly interpreted the provisions under the Equality Act 2010 and did not find that the applicant obtained personal services from the respondent. The judge also correctly dealt with the law relating to the duty of care, contrary to ground 5, and in ground 6 the Single Judge concluded that the judge at trial gave sufficient and appropriate reasons for the findings challenged. It followed from the decision of the Single Judge that no compelling reason existed for an appeal to be heard.

8. **Oral submissions on behalf of the applicant**

It has not been necessary for the applicant to repeat all of the submissions set out comprehensively in his skeleton argument. Nevertheless, it was submitted on behalf of the applicant by Mr Matovu that the judge was wrong in finding that the applicant was not a section of the public when receiving the services of the respondent. He submitted that the judge failed to consider the issues correctly, also that CLASP as a registered charity was itself a section of the public, because the services provided by the respondent were available to everyone. Mr Matovu also submitted that there was obvious proximity when the respondent dealt with the applicant, even though he was representing the charity. The duty of care and a claim for tortious loss must have arisen, he submitted.

9. **Oral submissions on behalf of the respondent**

Ms Darwin, KC submitted that the services were provided to CLASP only and not to the applicant. CLASP was a charity which required significant formality in its formation before it could operate as a registered charity. In seeking the services of the respondent, it was not part of the public sphere nor was it a section of it. Ms Darwin further submitted that the judge had correctly analysed the legal principles relating to the tortious duty of care and was right to dismiss the claim.

10. **Discussion**

Whilst the applicant has identified six grounds of appeal, they might more easily be encompassed in three essential topics. Firstly, grounds 1, 4 and 6 address issues in relation to the evidence and conclusions based thereon, which are criticised by the applicant as having been wrong. Secondly, grounds 2 and 3 concern the interpretation of the Equality Act and the conclusion reached by the judge in respect of the jurisdiction issue. Thirdly, ground 5 concerns the issue of duty of care at common law. Finally, there is the question of whether there is some other compelling reason for the appeal to be heard.

11. For the applicant to succeed on grounds 1, 4 and 6, it must be demonstrated that the judge in making a clear finding as to the services provided by the respondent, was wrong and failed to take into account relevant evidence; also whether the provided services were personal to the applicant or not; and whether the judge failed to give

proper reasons for preferring the evidence from one witness to another. The difficulty for the applicant upon these grounds is that the judge had the benefit of observing the witnesses in evidence during the trial of these preliminary issues. That evidence included knowledge of the applicant's mental illness and how it had affected him in his life and the difficulties that it had caused.

12. An important issue for determination upon the evidence in the context of the discrimination issue was centred on Section 29(1) of the Equality Act 2010, which provides:

"(1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service."

13. There is no dispute that the respondent is a service provider. The factual issue is whether its service was to the public or a section of the public or not. On this factual issue, the judge heard evidence on behalf of both the applicant and the respondent. Most significantly is a passage within the transcript of the evidence which is contained in the supplementary bundle of documents at page 35:

"MS DARWIN [counsel for the respondent]: So, Mr Johnston, we have looked at all of these messages and all of the information in the bundle this morning, and I am suggesting to you that all of these interactions relate to the charity customer service that JustGiving provides to CLASP.

ANSWER: If that is your belief, I agree.

JUDGE MELISSA CLARKE: Mr Johnston, with the greatest respect to Ms Darwin, I am not interested in her belief. She is not a witness in this case. It is only your view, Mr Johnston. So this is being put to you and you can agree with it or you can disagree with it, and what is being put to you is that since CLASP was incorporated, I suppose in 2013, all of your interactions with JustGiving after that related to charity customer services provided to CLASP and not you as an individual in your personal capacity.

ANSWER: Thank you for verifying that. In that case, yes, it was to do with CLASP.

MS DARWIN: I am going to suggest to you that since 2013,

JustGiving has never provided you personally with any service.

ANSWER: Correct."

14. Although a witness on behalf of the respondent initially conceded that some personal services may have been provided, that was later corrected by the respondent during the trial.
15. It is clear from the judgment that the judge had sufficient opportunity to assess the credibility of the witness evidence and expressly concluded that she found the applicant to be an honest witness doing his best to tell the truth. Her conclusion, therefore, based upon the evidence heard by the judge, was that the applicant's concession that he had never been provided with services to him personally since 2013 was correct. It followed that the services provided by the respondent were to the charitable company only. This was an appropriate finding of fact that was open to the judge to make and cannot arguably be shown to be perverse or wrong. It was also an important piece of evidence. I am not persuaded that in reaching this conclusion on the evidence, the judge failed to take into account any other relevant evidence or to provide proper reasoning. Accordingly, I find no arguable merit in grounds 1, 4 and 6.
16. Grounds 2 and 3 concentrate on the interpretation of 2010 Act and the jurisdiction issue. It is contended by the applicant that the judge fell into error when she concluded that Part 3 of the 2010 Act did not apply to the services provided by the respondent and therefore the jurisdiction issue meant that the claim should be dismissed. The judge having concluded on the evidence that the services provided by the respondent were not personal to the applicant, but were only to the charitable company, meant that his claim in discrimination could not succeed. The applicant argues that this reasoning was incorrect and that given a proper interpretation of 2010 Act, the judge should not have refused jurisdiction in the County Court. It is argued that dealing with an individual with a known disability created an anticipatory obligation and not merely a reactionary one, and involved dealing with a section of the public.
17. The respondent argues, as it did before the judge, that the provision of a service to a charitable company only, is neither to the public or to a section of the public. The fact that the applicant dealt with the respondent on behalf of a charitable company does not

make the applicant the public or a section of the public, whether he was an employee, chief executive officer or a trustee. In the course of oral submission it has been argued that the charity itself was acting in the public sphere and able therefore to receive the services of the respondent. It followed from that reasoning that if the respondent was dealing with a representative of that company, that too was dealing with the public or a member of the public. Mr Matovu agreed that logically, if the position was that the charity was not part of the public, then nor would the individual acting on behalf of it.

18. The judge concluded correctly in my judgment that on the evidence she heard, it was clear that the respondent provided its services to CLASP only and not to the applicant. The fact that he was acting on behalf of CLASP as CEO, trustee and employee does not mean that he was the public or a section of the public. On the contrary, he was the voice of the registered charity client of the respondent. Accordingly, Section 29(1) of the 2010 Act does not raise a discrimination claim against the respondent. Nor does the fact-specific exception within Section 31(5) of the 2010 Act assist the applicant. The circumstances anticipated therein do not bear any similarity to those which were found by the judge in this case. Accordingly I do not find that there is any arguable merit in grounds 2 and 3.
19. Ground 5 concerns the issue as to whether a common law duty of care arose by the respondent to the applicant. This can be dealt with shortly. In paragraphs 33 to 41, the judge carefully considered whether a duty of care could be found in the circumstances that existed in this case, where the CEO/trustee/employee of a charitable company was owed a duty of care by the provider of a service with some awareness of his mental health disability. The judge considered the relevant authorities, in particular *Caparo Industries PLC v Dickman* [1990] ALL ER 568 and *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4. I find no arguable merit in the contention that the judge fell into error in her analysis of the issues and the conclusion that a duty of care does not arise in the circumstances she found upon the evidence heard at trial. Her conclusions at paragraphs 64 and 65 of the her judgment are impeccable.
20. Finally the applicant argues that there is some other compelling reason for the appeal to be heard, because it raises an important point of principle or practice of general public

importance. This is explained on the basis that if an employer's employee had contacted a service provider, and one of the reasons the employee contacted the provider was to personally complain about how its dealings with his employer affected him personally, are they a member of the public or a section of the public within the meaning of Section 31(5) of the Equality Act 2010? I do not find that the question raised is one that is arguably of general public importance, nor does it raise an important point of principle or practice. The clear evidence at trial was that the applicant had received no service himself. The respondent's services were solely for the benefit of the charitable company. In the circumstances, attempts to complain to the provider about the service provided to the charitable company does not give rise to an important point of principle or practice of general public importance. Therefore I do not find that this is a reason to grant permission to appeal.

21. **Conclusion**

Accordingly, I do not find that the grounds of appeal contain arguable merit, and I agree with the conclusion of the Single Judge to that effect. It must follow therefore that this renewed application for permission to appeal is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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