

Appeal No. UKEAT/0211/07/JOJ

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 23 August 2007

Before

HIS HONOUR JUDGE ANSELL

(SITTING ALONE)

DICK LOVETT LTD (T/A PORSCHE CENTRE SWINDON)

APPELLANT

MS L EVANS

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR H KNILL
(Solicitor)
Reeves & Company
27B The Mansions
252 Old Brompton Road
London SW5 9HW

For the Respondent

No appearance or representation by
or on behalf of the Respondent

SUMMARY

Practice and Procedure – 2002 Act and pre-action requirements

Chairman wrong in holding that there was a valid grievance letter. The context mentioned by Elias J in **Canary Wharf** could not include a meeting after the alleged grievance document.

HIS HONOUR JUDGE ANSELL

1. This is an appeal by the employers, Dick Lovett Ltd, against an order of a Chairman, Mr Toomer, sitting alone in relation to an issue at a pre-hearing review, as to whether section 32 of the **Employment Act 2002** had been complied with. The Chairman concluded that there was a valid grievance in this case and, as a result, the three month time limit had been extended by regulation 15(3)(b) of the 2004 regulations and therefore the complaint to the Tribunal which had been presented on 19 September was valid.

2. The claim related to sex discrimination and equal pay. The factual background was that, on 10 April 2006, the employee was told that she would not be getting a pay rise, either because of or for reasons connected with her pregnancy. She went home from the meeting in distress and was off work for a week. When she returned, she completed an absence report form which appears to have been completed on 18 April. That form simply says:

“Following on from meeting with Richard and Mark, went home very upset. Didn’t sleep and suffered numerous nose bleeds.”

3. This is the document relied upon by the employee as a grievance which entitles her to pursue a claim under the Act. Section 32(2) requires that an employee shall not present a complaint to an Employment Tribunal under a jurisdiction to which a 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.

4. Schedule 2 of the Act which deals with grievance procedures requires under paragraph 6 that, as a first step, the employee must set out the grievance in writing and send the statement or

a copy of it to the employer. “Grievance” is defined by regulation 2 of the **Employment Act 2002 (Dispute Resolution) Regulations** as:

“... a complaint by an employee about action which his employer has taken or is contemplating taking in relation to him.”

5. The grievance procedure sets out the next stage which is a step 2 meeting, and that meeting must not take place unless, and I quote from paragraph 7(2):

“... (a) the employee has informed the employer what the basis for the grievance was when he made the statement under paragraph 6, and (b) the employer has had a reasonable opportunity to consider his response to that information.”

The timing of the grievance letter is important because, under section 32(3), the employee is not allowed to present a complaint to an Employment Tribunal unless 28 days have passed since the date on which the requirement was complied with.

6. The Chairman in his comments noted that the document completed by the employee seems, on the face of it, to allege that she went home because she was upset and does not indicate why. It was argued before him by the employers that that document could not possibly amount to a grievance within the definition. The Chairman went on to note that some days later there was the first of two meetings which took place between employer and employee, and the Chairman formed the view that although there was some uncertainty as to what was said, it was likely, and I quote from paragraph 6 of the decision:

“... that a Tribunal would conclude that at that meeting the Claimant explained that she had been upset because it had been suggested to her that her lack of a pay rise was in some way connected with her pregnancy.”

The Chairman accepted that the notes of the meeting could not amount to a grievance since it was the Claimant who had to set out the grievance in writing.

7. He was then referred to the decision of Elias P, in Canary Wharf Management Ltd v Edebi and quoted in particular paragraph 25 where the President had said this:

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

8. The Chairman then construed context not simply as to what happened before the purported grievance was sent to the employee. He went on to say this:

“I think it is wider than that and can refer both to what happened before the grievance letter and what happened immediately after it. If, within a matter of days, there is a discussion between the Claimant and the Respondent in which the Claimant explains in more detail what it is that has upset her and she makes it clear at that stage she was upset because it was suggested she would not get a pay rise for reasons related to her pregnancy, then the employer reading that document, again in the context of what has been said, can clearly understand that this is, in fact, a complaint of sex or pregnancy discrimination.”

Therefore, he effectively came to the view that the “context” in terms of what had happened at a meeting some days later, read in with the letter or in this case the note in the return-to-work book, satisfied the requirements of a grievance.

9. The employers have appealed that decision before me today. Ms Evans has not appeared nor is represented. Brief grounds of resistance were put in by her solicitors and they also referred to the submissions that were put in before the Chairman, and I have considered those. The short point made by the appellants today is that it is not permissible to use the context of a later meeting to supplement an earlier document if that earlier document can in no sense be read as amounting to a grievance. They argue that there has to be some substance of complaint appearing from the document itself which can be further understood in the context of the meeting.

10. I raised today what I perceived as a further difficulty in the Respondent’s position in this case, namely whether events which occur after the document said to amount to a grievance

comes into existence. I raised the practical difficulty of trying to assess, for example, when the 28-day period would be calculated, whether it would date from the document itself or from the date of the later meeting. I also raised a difficulty in that it might be suggested that that meeting some days later was capable of amounting to the step 2 meeting. That step 2 meeting must of course take place after the grievance letter has been received and therefore I found it difficult to understand how what was said in the step 2 meeting could therefore be read back into an earlier document to form part of the Step 1 procedure.

11. In support of this view, one goes back to paragraph 25 of the **Canary Wharf** case and, reading the whole paragraph, the learned President said this:

“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 for the particular context in which it is made, can be expected to appreciate that the relevant complaint is being raised. I do not think this formulation is essentially different to that urged upon me by Mr Solomon for the Appellant, namely ‘how a reasonable employer with the actual or constructive knowledge of the employer at the time he received the grievance would have understood it’, although I would prefer to avoid concepts of actual or constructive knowledge. Nor do I think that any of the earlier cases to which I have made reference are at all inconsistent with my approach.”

12. Taking the formulation, therefore, that was advanced before Elias P by Mr Solomon, which in broad terms the President agreed with, that formulation required the knowledge of the employer to be assessed at the time he received the grievance, in other words, at the time the document came into existence. I therefore find great difficulty in the proposition advanced by the Chairman in this case that one can look forward and take notice of events which occurred after the document came into existence. I fully accept that it may be permissible to look back to events which have taken place before the document comes into existence, but in this case the Chairman made no findings that the meeting which prompted Ms Evans to go on sick leave for a week added to the context in which the document she created a week later could be understood as amounting to a grievance.

13. As far as Mr Knill's main submission before me today, in addition to relying on paragraph 25 of Canary Wharf from which he derived support in the proposition that it must be a combination of the document which he suggests must set out some form of complaint coupled with the context in which it was written, he derives additional support from a passage in the other recent case of Shergold v Fieldway Medical Centre (UKEAT/0487/05) where, at paragraph 37, Mr Justice Burton, said this:

“In our judgment, provided that the general nature of the grievance in writing was substantially the same as the matter which then forms the subject matter of the claim, its different description or a difference by way of precise ingredients or particulars does not affect the statutory compliance. It will be difficult to lay down guidelines as to precisely when there will be a material or substantial difference but, rather like an elephant, it will be apparent to a Tribunal.”

14. He makes a point that, in this case, the comment contained in the return-to-work document really gave no indication of any form of grievance whatsoever and certainly bore no relation to the complaints of sex discrimination and equal pay that were subsequently filed. He makes a point that effectively what the Chairman has done in reality is to ignore the document completely and simply taken the context of the later meeting, ignoring the absence of any form of grievance from the document itself. Had the employee in this case, when being told of the news about the lack of pay rise, given some indication at that stage orally to her employers that she was unhappy, then it seems to me that a different view may have been taken as regards the document, but there was no finding of fact that any form of oral complaint had been made at that hearing.

15. The Respondent's written submissions are, as I say, mainly a repetition of what was put before the Chairman which was a request to look at the whole context in order to check whether a step in a statutory procedure has been complied with. Indeed, it was based on those submissions that the Chairman came to the view that he did.

16. The grievance's disciplinary procedure provisions have, of course, led to a wealth of litigation, some taking the view that they had introduced, as it were, unnecessary complications into an area of law which is already fairly complicated. For this reason, tribunals and this court have tried to take as liberal approach as possible, particularly as the grievance documents are often those created by the employees themselves. However, I do not feel that even with a broad, generous interpretation, the Chairman was entitled to come to the view that he did.

17. I repeat that I am of the view that events which occur after the creation of the document cannot be used as a context in which to interpret that document and, in any event, the document itself, it seems to me, has to give some indication of a grievance. Accordingly, for these reasons, I would allow the appeal. The final paragraph of the Respondent's submissions before the Tribunal has raised the alternative possibility of extending time under the just and equitable principles. Although there is no comment about that in the Chairman's decision, I am told by Mr Knill that it was agreed by the parties at the time that that alternative approach was not relevant to this case and, in any event, there is no cross-appeal before me.