

IN THE COURT OF APPEAL – CIVIL DIVISION

Neutral Citation Number: [2017] EWCA Civ 2683

Case No: A2/2016/2382

Courtroom No. 63

Room E311
The Royal Courts of Justice
Strand
London
WC2A 2LL

10.44am – 10.54am
Wednesday, 25th October 2017

Before:
THE RIGHT HONOURABLE LORD JUSTICE LEWISON

B E T W E E N:

OKEKEARU

and

LONDON BOROUGH OF CAMDEN

MS OKEKEARU appeared In Person
NO APPEARANCE by or on behalf of the Respondent

JUDGMENT
(Approved)

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LORD JUSTICE LEWISON:

1. This is an application for permission to appeal against a decision of the Employment Appeal Tribunal, His Honour Judge Shanks, on 24 February 2016 dismissing the appeal of Ms Okekearu against the decision of the Employment Tribunal.
2. It is important to say right at the outset that the Employment Appeal Tribunal can only interfere with a decision of the Employment Tribunal if the Employment Tribunal has made an error of law. Likewise, this court can only interfere with a decision of the Employment Appeal Tribunal if that Tribunal has made an error of law. Decisions on the facts, including decisions about whose evidence to accept and whose to reject, are questions exclusively within the competence of the Employment Tribunal, and whether they are right or wrong in the factual conclusions to which they come, neither the Employment Appeal Tribunal nor this court can interfere.
3. There are five points that Ms Okekearu made in support of her application for permission to appeal. The first is that at a meeting in August 2014, she and Ms Harvey[?] and Ms West entered into a binding agreement that Ms Okekearu would return to four-weekly supervision at the end of a formal performance plan or move to Stage 2 if there had not been sufficient improvement in her work. The note of that meeting also fixed the date and time of the next meeting of 10 September 2014.
4. The point that is being made is that the note of that meeting was a binding agreement between the London Borough of Camden and Ms Okekearu that there would be no escalation of the problem to Stage 3 of the disciplinary procedure. The Employment Tribunal quoted from Camden's Underperformance Tribunal [sic] which contains clause four headed 'Serious underperformance and acts of negligence' which reads as follows:
 - '4.1. In exceptional circumstances, underperformance may occur suddenly and may be of a serious nature. For example, the performance levels may be seriously detrimental to service delivery or could potentially seriously endanger the health and safety or well-being of staff and the public. Alternatively, serious professional misjudgment could potentially seriously damage the Council's property or reputation.
 - '4.2. If the case is deemed to amount to gross lack of competence, the case may progress immediately to a formal employment review hearing at Stage 3 of the procedure, where dismissal may be merited'.
5. There is no reason, in my judgment, to suppose that Ms Harvey or Ms West had the authority to vary Camden's disciplinary and underperformance process. The mere recording of the outcome of a meeting could not, in my judgment, amount to a binding contract between Camden and Ms Okekearu that Camden would suspend their contractual underperformance procedure. In addition, I cannot see that any consideration was given by Ms Okekearu which would have supported the making of a binding contract by offer and acceptance. I accept that the point that is being made under this head is a question of law, but it is one, in my judgment, which has no real prospect of success and one which Judge Shanks was correct to reject.
6. The remaining points Ms Okekearu made are all questions of fact for the Employment Tribunal. She has submitted for instance, that the respondent lied and that everything they knew in September when the decision was taken to escalate to Stage 3 was

already known in July. However, that is not the finding which the Employment Tribunal made and whether the Tribunal were right or wrong in their finding of fact, it is not something with which this court can interfere.

7. Likewise, the third point that Ms Okekearu made was that Ms Harvey also lied, and Ms Okekearu made the point that after the meeting on 5 August she was on leave and that cases were removed from her and that the Employment Tribunal were therefore wrong in saying that she had failed to meet her targets. In addition, she says the respondent lied about the targets and that she achieved gains higher than the targets and, in any event, how could she be expected to meet targets when Camden had taken away many of her cases? Again, those were questions of fact for the Employment Tribunal and not questions of law on which the Employment Appeal Tribunal or indeed this court can interfere.
8. The last point goes to the question of victimisation. It is said that the reason or one of the reasons why the procedure was escalated from Stage 2 to Stage 3 was the fact that Ms Okekearu had made a complaint to ACAS. The Employment Tribunal dealt with this at paragraphs 163 and 164 of their decision. They recorded the evidence of Ms Sylvan[?] who said that she could not remember whether she had mentioned the ACAS call to Ms West but accepted that she might have done so at a prearranged meeting. They recorded Ms West's evidence that Ms Sylvan had informed her that there had been a call, but there were no details, and there was no mention of it being about a race discrimination or potential race discrimination complaint. Ms West was adamant that she was only informed on 24 September 2014 after the meeting which she and Ms Harvey had had with Ms Okekearu.
9. There were two conflicting or potentially conflicting accounts of the date at which Ms West was aware of the complaint to ACAS. The weighing of those two accounts was a question of evidence for the Employment Tribunal. That Tribunal made it clear at paragraph 196 that Ms West was not aware of the protected act, so no part of her decision to refuse postponement could have been because of that protected act, and they repeated that finding at paragraph 220. Again that was a question of fact for the Employment Tribunal and is not a matter with which this court could interfere.
10. There is one final matter to which I should refer, which I referred to in my written reasons for refusing permission to appeal, and which has not been addressed this morning. That is the delay in filing the appellant's notice. The decision of the Employment Appeal Tribunal was given on 21 February 2016, but the appellant's notice was not filed until June of that year. Some of the delay may be explicable because Ms Okekearu did not get a copy of the judgment until 15 April 2016, but there is no real explanation for the delay between April and June. Be that as it may, I do not consider that there is any real prospect of success in an appeal.
11. For those reasons, I refuse permission to appeal.

End of Judgment

Transcript from a recording by Ubiquis
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This transcript has been approved by the judge.