

JERSEY / JUDGMENT

Jennifer Mitchem-Bailey v States Employment Board, Catherine Madden and Nicholas Falle

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IN THE JERSEY EMPLOYMENT AND DISCRIMINATION TRIBUNAL BETWEEN JENNIFER MITCHEM-BAILEY APPELLANT AND STATES EMPLOYMENT BOARD CATHERINE MADDEN NICHOLAS FALLE RESPONDENT (1) RESPONDENT (2) RESPONDENT (3) LEAVE TO APPEAL JUDGMENT Reference: [2023] TRE 84 Before: Advocate I C Jones, Deputy Chairman DECISION The Claimant's application for leave to appeal is refused. DECISION The Appellant's application for permission to appeal against the decision of the Tribunal dated 19th January 2024 (the "Judgment") is refused. 1.

INTRODUCTION

1.1. The Appellant seeks leave to appeal pursuant to Article 94(1) of the Employment (Jersey) Law 2003 (the "Law") which states as follows: "A person aggrieved by a decision or order of the Tribunal may, on a question of law only, appeal to the Royal Court by applying to the Tribunal for leave to appeal." [EMPHASIS ADDED] 1.2. Accordingly the Appellant will not be granted leave to appeal unless the ground of appeal raises a 'question of law'. The Tribunal has previously considered the nature of a 'question of law' generally and in the context of Article 94(1) of the Law, recently in Parker -v- Ecoheat [22nd May 2017], which characterises a 'question of law' as follows: (i) the Tribunal has misdirected itself in law or misunderstood the law or misapplied the law; and / or (ii) there was no evidence to support a particular conclusion or finding of fact; and / or (iii) the decision was either perverse in that it was one which no reasonable tribunal, directing itself properly on the law, could have reached, or alternatively, was one which was obviously wrong. I can see no reason not to adopt the above definition or otherwise qualify / modify it. I note that the Appellant does not address the relevant tests set out above and which one (or all) that she seeks to rely on. 1.3. The Appellant contends that the the Tribunal: (i) 'got the law wrong or misapplied the law'; (ii) had no evidence to support a conclusion or a finding of fact; (iii) made a decision that no reasonable tribunal could have made or reached a decision that was obviously wrong; and / or (iv) did not follow the correct procedures. 2. THE GROUND(S) / DISCUSSION 2.1. From a close review of the appeal contentions filed by the Apellant, it is not a straight-forward task to identify what the ground / grounds of appeal are, by reference to the above-captioned test or otherwise. 2.2. The Appellant states / explains as follows in her appeal contentions: "To be clear, my claim and my appeal, is based on the singular fact, that by failing to ensure Dr McKinlay

completed the task he had evidently started and actually produce the finished written apology, they (Falle / SEB), preferred his interests over mine as he did not have to humble himself in the act of contrition that the written apology would represent... 13. The claim is not confused. My real complaint is clear and has nothing at all to do with a draft wording and whether or not I feel I deserve an apology. FACT I have not had a written apology and to his end the Deputy Chair, did not pursue this point with Advocate Meiklejohn, and even I asked if Advocate Meiklejohn 'was the written apology with him to produce', he did not answer... 14. It is not failure to provide the written apology, it is failure to act to ensure Dr McKinlay execute a finished and complete written apology." 2.3. The Judgment arises from an interim hearing the subject of which was a strike-out application by the Respondent. That strike-out application was successful. As per the Judgment: "The real difficulty faced by the Claimant is that there is no explanation or detail as to how she has been treated less-favourably by either Mrs Madden or Mr Falle. In addition, the Claimant does not explain with any precision how the less favourable treatment is linked to the factors set out in Article 27(2) of the Discrimination Law...

18. In my judgment the Discrimination Claim is hopeless and therefore has no reasonable prospect of success. I accordingly accede to the application made on behalf of the Respondents and strike out the Discrimination Claim." 2.4. I also note that the decision to strike out the Discrimination Claim (as defined in the Judgment) was an exercise of my discretion. The Appellant does not specify precisely what the ground of her appeal is but by reference to the test, it seems to me that her argument must be that my decision was unreasonable, in the sense that it was not open to me to make it. 2.5. Given that the subject of the application was a strike-out based on the content of the pleadings and no evidence was heard it is difficult to see how the Appellant could succeed on an appeal that was based on ground (ii) above and if the Appellant is arguing an error / misapplication of the law, such error or misapplication is not identified. 2.6. The question then is was the decision unreasonable? Was the decision reached a decision that it was not open to me to reach? I have little hesitation in concluding that the decision cannot properly be characterised as unreasonable. In my view the Discrimination Claim had (and had) no prospect of success. That view has not changed. 2.7. If the Claimant proves what is set out in her claim form (which well she might at a final hearing) it would not and could not ground a victimisation claim, for the reasons set out in the Judgment. The factual matrix pleaded in relation to the apology letter and the alleged actions of Mr Falle and Mrs Madden may well be evidence that proves to be significant in the context of an unfair dismissal claim, if there are findings in favour of the Appellant on those points. Indeed, I anticipate that both Mr Falle and Mrs Madden will be cross-examined on those points. What flows from that evidence and how significant that is remains to be seen. 2.8. I make this point to make it as clear as possible to the Appellant that the fact I have struck out the Discrimination Claim does not mean that the evidence upon which it was based become irrelevant. That is not necessarily the case. The effect of the strike-out application succeeding is that there is not an additional head of claim for the Appellant to pursue. 2.9. In my judgment, it was open to me to strike out the Discrimination Claim exercising my discretion; the Appellant identifies no defect in that

exercise. To the extent that the application for leave to appeal identifies any grounds pursuant to Article 94(1) of the Law, I refuse leave on the basis that any such grounds are not arguable and accordingly have no prospect of succeeding.

ORDERS

ACCORDINGLY Advocate Ian Jones, Deputy Chair Date: 28 February 2024

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