Appeal No. UKEAT/0122/16/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 3 November 2016

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR J SCICLUNA — APPELLANT

ZIPPY STITCH LIMITED & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MS EMILY BETTS (of Counsel) Instructed by: Cognitive Law Limited 15a Brighton Place BN1 1HJ
For the Respondents	MR CRAIG BENNISON (of Counsel) Instructed by: Empire HR Limited Empire House 117 Grandholm drive Aberdeen AB22 8AE

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

The Claimant's appeal against the Employment Judge's decision to dismiss his claim for unlawful deductions was allowed, based on the finding that his entitlement to arrears of pay crystallised on termination of the employment. **Delaney v Staples** and **HMRC v Stringer** (both House of Lords) considered. The Respondents' cross-appeal against that finding was dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the London (South) Employment Tribunal. The parties are Mr Scicluna, the Claimant, and Zippy Stitch Ltd and others, Respondents.

2. The Respondents are a group of companies in the business of clothing alteration and repair. It was a family run business. The principal actors were the Claimant, his sister Melanie Beechinor-Collins ("MBC") and her husband Francis Beechinor-Collins ("FBC"). The Claimant and MBC were Statutory Directors. At all relevant times the Claimant was employed as Managing Director until his resignation on 30 June 2014. He then brought claims of constructive unfair dismissal, wrongful dismissal, unlawful deductions from wages ("the wages claim") and breach of contract relating to arrears of wages in the Tribunal.

3. The claims were resisted and came on for hearing before Employment Judge Balogun. Having taken time to consider her decision, that Judge delivered her Reserved Judgment with Reasons on 9 December 2015. She dismissed the unfair dismissal and wrongful dismissal claims on the basis that the Claimant was not dismissed by the Respondents. She upheld his breach of contract claim in respect of arrears of wages, with damages to be assessed, and dismissed the wages claim. Against the decision to dismiss the wages claim the Claimant appeals. Against the decision to uphold the breach of contract claim the Respondents cross-appeal. Both appeal and cross-appeal were permitted to proceed to this Full Hearing by HHJ Eady QC on the paper sift.

4. Attached to the Judgment is an agreed list of issues. Under the heading "Unauthorised Deductions from Wages / Breach of Contract" the following issue is identified:

> **"1. What was the agreement regarding the Claimant's wages, if any?**
>
> **a. The Claimant's case is that there was an oral agreement the Claimant would receive a salary of £100 net per day (equivalent to £36,000 per annum) … Further, whilst the Claimant agreed to defer payment of his salary he did not waive his rights to the salary …**
>
> **b. The Respondents' case is that there was no agreement for the Claimant to be paid a salary … although it was agreed in summer 2013 that the departure of another employee could provide the opportunity for the Claimant to draw a salary …"**

5. The Employment Judge resolved the factual issues there set out in this way. She found (paragraph 27) that "there was an agreement to pay the Claimant £100 net per hour [sic; day]". She was also satisfied that there was an agreement to defer payment until the business could afford to pay it. The Claimant did not waive his entitlement to salary; he simply deferred payment in accordance with what was agreed. However, she went on to find (paragraph 34) that his entitlement to deferred pay was outstanding on termination and therefore his contract claim was made out, subject to the statutory maximum of £25,000 under Article 10 of the **Extension of Jurisdiction Order 1994**. The wages claim failed by reference to section 13(3) of the **Employment Rights Act 1996** ("ERA") on the basis that no identifiable sums were properly payable by the Respondents to the Claimant on any specific occasion by virtue of the agreement to defer pay (paragraph 31).

6. Ms Betts' point in the appeal is that in finding that the Claimant was entitled to his deferred wages on termination of the employment, it necessarily followed that those wages were properly payable under section 13(3) because there was a contractual obligation to pay the deferred wages on termination. As to the wages claim, the first question to consider is whether there was a sum legally due from time to time during the employment. Although the agreed rate of pay was £100 per day net, the Claimant agreed to defer payment, in part, because as he put it (see paragraph 27) "there was not enough cash in the bank to pay staff wages and it was important to keep staff happy". However, so the Employment Judge found, he did not waive

his entitlement to wages. There was to be implied a term that his entitlement to arrears of pay would crystallise upon termination of the employment. That founds the claim for breach of contract, and I reject the suggestion on the cross-appeal that salary would not be payable unless and until the business could afford it regardless of whether the employment was continuing or not. That is clear, in my view, from the finding at paragraph 34 of the Reasons.

7. Thus the question is whether the balance of wages owed, payable on termination, is recoverable by way of a wages claim under Part II **ERA**. I am satisfied that it was recoverable by way of a contract claim under the **1994 Order** as the Judge found.

8. In answering that question, I am greatly assisted by two decisions of the House of Lords which were raised during oral argument before me. The first in time was **Delaney v Staples** [1992] ICR 483; the second is **HM Revenue & Customs v Stringer** [2009] ICR 985. **Delaney** decided that a claim for pay in lieu of notice following wrongful summary dismissal was not recoverable as a wages claim; only by way of a breach of contract claim for damages, then justiciable in the civil courts only; that case having preceded the **1994 Order**. However, in **Stringer** the House of Lords held that a claim for pay in lieu of holiday as provided for in Regulation 14 of the **Working Time Regulations 1998** ("WTR") could also be recovered in a wages claim under Part II **ERA**. The significance there was a difference in limitation provisions between the **WTR** and Part II **ERA**, just as the significance in the present case is between the unlimited financial jurisdiction under Part II **ERA** and the £25,000 cap under the **1994 Order**.

9. Having considered both authorities with the assistance of counsel's submissions, it is clear to me that the material distinction is, as Ms Betts submitted, between a contractual

A obligation to make payment for services rendered during the employment and a payment which arises after termination; the pay in lieu of notice situation referred to by Lord Browne-Wilkinson in his fourth category of case at page 489B-C of **Delaney**.

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10. In my judgment, having rejected the cross-appeal, on the Employment Judge's finding at paragraph 34 payment of the arrears of wages arose on termination: that is, payment for services previously rendered. This case is therefore analogous to the pay in lieu of holiday

C claim under Regulation 14 **WTR** in **Stringer**, justiciable under Part II **ERA**. It is distinct from the pay in lieu of notice claim, Lord Browne-Wilkinson's fourth category, which was under consideration on the facts of **Delaney**. The Employment Judge was wrong to conclude at

D paragraph 31 that no identifiable sums were properly payable on any specific occasion by virtue of the agreement to defer pay. That agreement ended on termination (see paragraph 34), at which time a sufficiently ascertainable sum was payable.

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11. In these circumstances, I shall dismiss the cross-appeal, allow the Claimant's appeal and, no further fact-finding being necessary, vary paragraph 2 of the Employment Judge's Judgment to read:

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> **"2. The unlawful deduction of wages complaint succeeds."**

The matter will now return to the Employment Judge for a remedy hearing in accordance with

G paragraph 54 of her Reasons, bearing in mind that there will be no double recovery in respect of the now successful wages claim and breach of contract claim.

12. Following my Judgment in this case, Ms Betts makes an application for costs on behalf

H of the Claimant, which really falls into two parts. First, she claims the total fees necessary to bring and prosecute his successful appeal in the sum of £1,600. In response, Mr Bennison

makes the point that the appeal succeeded not through any fault of the Respondents but because I took a different view of the law to the learned Employment Judge. As I put to him, that is true of any successful appeal that results in costs against the losing Respondent. The fact that the fees regime has now been extended to the EAT - since July 2013 - makes it consistent with the other appellate courts. I can see no reason why those fees should not be ordered against the Respondent, and I so order.

13. Secondly, Ms Betts seeks a proportion of the Claimant's costs in defending the cross-appeal. A reply to the cross-appeal was lodged, and in respect of that pleading a figure of £600 plus VAT is put forward. Despite Mr Bennison's protestations, it does not seem to me out of the way for solicitors and counsel to charge that amount for that exercise. In addition, Ms Betts asks me to order £600 plus VAT in respect of preparation for and attendance at this hearing in order to resist the cross-appeal. As to the reply, it does seem to me that that is wholly related to the cross-appeal. Although the cross-appeal failed, I note that HHJ Eady QC gave permission for it to proceed to this hearing. In these circumstances, I am not persuaded that pursuing the cross-appeal was unreasonable or otherwise fell within the rubric of Rule 34A(1) of the **Employment Appeal Tribunal Rules**, and it necessarily follows that I am not prepared to make an order for a proportion of the costs of pursuing the matter and attending today. I also take into account Mr Bennison's point that the issues raised in the cross-appeal are intrinsically linked with the issue raised in the appeal, and in these circumstances I make no further order for costs over and above the fees of £1,600.