Appeal No. UKEAT/0102/15/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 August 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MRS G DUHOE APPELLANT

SUPPORT SERVICES GROUP LTD - IN LIQUIDATION RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LAURA PRINCE (of Counsel) Bar Pro Bono Scheme
For the Respondent	No appearance or representation by or on behalf of Respondent

SUMMARY

PRACTICE AND PROCEDURE

Appellate jurisdiction/reasons/Burns-Barke

Costs

The Employment Judge did not give **Meek**-compliant Reasons in respect of her decision not to uplift any part of her award under section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**.

The Employment Judge omitted to decide an application for costs made by the Appellant. Observations on how to address a case where there are applications for both a costs order and a preparation time order, having regard to Rule 75(3) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Mrs Gloria Duhoe ("the Claimant") against part of a Judgment of Employment Judge Gill sitting in the Bristol Employment Tribunal dated 17 September 2013. By her Judgment the Employment Judge upheld claims for unfair dismissal, outstanding holiday pay and failure to give written reasons for dismissal. The Claimant had made these claims against Support Services Group Ltd ("the Respondent"). The Employment Judge awarded compensation and costs.

2. There are two short grounds of appeal set out in an amended Notice of Appeal for which permission was given by HHJ Serota QC in January this year. One ground relates to an uplift under section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**. The other ground relates to an outstanding application for costs.

3. The Respondent has taken no part in this appeal. It has been put into creditors' voluntary liquidation, and the liquidators have written to the Employment Appeal Tribunal to say that they do not intend to appear. Ms Laura Prince, who appears on the Claimant's behalf, informs me that there may be some resources in the liquidation to pay the claims. The amounts with which the appeal is concerned are small, and it must be doubtful to what extent the Claimant will, if successful, recover them. Nevertheless, the appeal must be dealt with on the correct legal principles.

The Background Facts

4. The Claimant was employed by the Respondent as a security officer from 5 October 2010 until 3 August 2012 under a form of contract that the Employment Judge described as a zero hours contract. The Claimant submitted grievances in late 2011. One concerned failure to provide her with a uniform; another, the failure to meet a claim for holiday pay. She did not work after submitting those grievances. It appears that she was unwilling to do so while the grievances were outstanding, but it was the Respondent's case in any event that there was no work in her area in 2012.

5. On 3 August 2012 her contract of employment came to an end. The Respondent said at the time that she had agreed to leave; she disputed this. The Employment Judge found that she was dismissed, that the primary reason for dismissal was that there was no work for her to do and that the dismissal was unfair because the Respondent went through no proper process of information or consultation.

6. The Claimant instructed solicitors in August 2012. They wrote to the Respondent asking for written reasons; the Respondent did not reply. They drafted the Claimant's ET1 claim form claiming outstanding holiday pay, unfair dismissal and failure to give written reasons. By the time the Employment Tribunal proceedings came to be heard, however, the Claimant was representing herself.

Uplift under Section 207A

7. The Employment Judge awarded the Claimant £836 for holiday pay, £398 compensation for unfair dismissal and a further £398 for failure to give written reasons. There was no award for loss of earnings, because the Respondent had no work for her and she was in fact working

elsewhere. The Claimant sought an uplift on the basis that there had been a breach of the **ACAS Code of Practice on Disciplinary and Grievance Procedures** (hereafter "the Code"). The Employment Judge dealt with this very briefly. She said:

> **"22. … I have considered the ACAS code and if I consider it to be just and equitable to do so I can make an award under that head. I think on all the circumstances of this case I decline to make such an award. …"**

8. Ms Prince on behalf of the Claimant submits that this reasoning is not sufficient in law to deal with the question of uplift; it does not demonstrate that the Employment Judge considered the question properly, and it does not meet the standards required for an Employment Tribunal's Reasons (see Rule 62 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("ET(CRP)R") and **Meek v City of Birmingham District Council** [1987] IRLR 250). I agree with her. It is not possible to see how the Employment Judge reached her conclusions. It follows that, unless on a proper application of the law the Claimant's claim for an uplift could not succeed, it must be remitted (see **Jafri v Lincoln College** [2014] IRLR 544).

9. I now turn to the question of whether the claim for an uplift could succeed. Section 207A(1) and (2) provides as follows:

> **"(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.**
>
> **(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that -**
>
> > **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
> >
> > **(b) the employer has failed to comply with that Code in relation to that matter, and**
> >
> > **(c) that failure was unreasonable,**
>
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."**

10. By virtue of Schedule A2, section 207A applied to the Claimant's claim for unfair dismissal and her claim for outstanding holiday pay; it did not apply to her claim for an award in respect of failure to give written reasons.

11. It is, I think, helpful to work through the requirements of section 207A. The first question for consideration is whether the claims to which the proceedings relate concerned a matter to which a relevant Code of Practice applies. Ms Prince submits that the Code was applicable.

12. The claim for unfair dismissal concerned the Claimant's dismissal in August 2013. This, as we have seen, was found by the Employment Judge to be a dismissal on the grounds of redundancy because the Respondent had no work for the Claimant. The Respondent had additionally asserted at one time that the Claimant had left voluntarily, but this was either not pursued or rejected by the Employment Tribunal. The Code specifically states that it "does not apply to dismissals due to redundancy". There is ACAS guidance relating to dismissals for redundancy, but it is not in a statutory code, to which section 207A applies.

13. Ms Prince submits that unfair dismissal may still be a matter to which the Code applies, for the following reasons. Firstly, she submits that the Employment Judge did not reach a definitive finding that the reason for dismissal was redundancy; the matter is still open to argument. I do not accept that submission. The Employment Judge did make a definitive finding in paragraph 20 of her Reasons. Secondly, she submits that the unfair dismissal may still be a matter to which the Code applies because the Code encompasses grievance procedures; the Claimant had presented grievances, and they had not been adequately dealt with. I do not accept this submission. Once granted that the dismissal was for redundancy, it

was not in any real sense related to the grievances that the Claimant had brought many months earlier concerning uniform and holiday pay. I do not think it can be said that the unfair dismissal claim concerned the grievance procedures. Different considerations apply, however, to the claim for holiday pay. This *was* the subject of one of the Claimant's grievances; it was unresolved. The claim for holiday pay concerned a matter that was the subject of a grievance to which the Code applied.

14. This leaves the remaining requirements of section 207A: whether the Respondent failed to comply with the Code in relation to that matter and whether the failure was unreasonable. There are some findings in the Employment Judge's Reasons concerning the way the Claimant's complaint was dealt with, but these are not directed to the question of compliance or to the question of whether any failure was unreasonable. Accordingly, the question of an uplift for holiday pay must be remitted.

15. On remission the questions for the Employment Judge will be: (1) whether there were any failures to comply with the Code in respect of the holiday pay issue; (2) whether any such failures were unreasonable; and (3) whether it is just and equitable to increase the award and if so, by how much. On this last question Ms Prince helpfully referred me to cases decided under section 31(3) of the **Employment Act 2002**, which also provided for an uplift on "just and equitable" grounds (see especially **Lawless v Print Plus** UKEAT/0333/09 at paragraph 10(4)), but I do not think that this appeal, where I have heard from one party only, is a suitable one for giving any general guidance about section 207A.

Costs

16. At different points the Claimant made two relevant applications to the Employment Tribunal: the first for a costs order, the second for a preparation time order. A costs order can be made in respect of costs incurred while the Applicant is legally represented (see Rule 75(1)(a)). A preparation time order can be made in respect of preparation time while the Applicant is not legally represented (see Rule 75(2)).

17. The Claimant made her first application by letter dated 9 April 2013. This was an application for legal costs, a sum of £1,625 paid by her to the solicitors who engaged in correspondence on her behalf and submitted her claim form. She did not to any significant extent set out the grounds of the application. I understand them to be that the Respondent simply did not engage with the correspondence put forward. The Employment Tribunal wrote to her to tell her that her application would be considered at the hearing of her claims.

18. The Claimant's second application related to an adjournment. The case had originally been listed in April 2013. The Respondent's general manager arrived half a day late; an adjournment was ordered. The Employment Judge noted that the Claimant might make an application for a preparation time order and said it would be inappropriate to determine it then "since there is an outstanding application for costs in any event". The Claimant indeed applied for a preparation time order to cover time thrown away by the unnecessary adjournment.

19. At the adjourned final hearing at the end of August the Employment Judge dealt with the application for a preparation time order. She awarded the sum of £462 for the time thrown away by the adjournment. She did not, however, deal with the costs application. It is the Claimant's submission that she erred in law by failing to address the application.

20. The Employment Judge has been asked about the matter. She had no note or recollection of the application for costs. In my judgment, however, it was properly before her. The Employment Tribunal had acknowledged the application, the Claimant had been told that it would be addressed at the hearing of her claims, and the Employment Judge at the adjourned hearing in April had expressly acknowledged in the Reasons given that it was a live application for consideration. In my judgment, the Employment Judge was required by law to determine it or at minimum to explain why she did not determine it.

21. I would add that the Claimant today has put before me a statement saying that during the hearing in August she handed in the letter dated 9 April together with supporting documentation that was not in the bundle and that she sought to raise the matter again at the end of the hearing. I do not, however, need to make any findings concerning that evidence. It is sufficient to say that the application for costs was outstanding and should have been addressed.

22. One might expect a mishap of this kind to be dealt with by an application for reconsideration, and Ms Prince has made such an application on the Claimant's behalf. The Regional Employment Judge dealt with the application, the Employment Judge no longer being available. He acknowledged that the Claimant's application for costs remained outstanding, but he pointed to a difficulty. By August 2013 the relevant Rules governing an award of costs were the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (see the transitional provisions in Regulation 15 of the Regulations). Regulation 75(3) provides as follows:

> **"A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make."**

23. The Employment Tribunal is therefore not able to make both a costs order and a preparation time order. What is the position if it is faced with applications for both types of order in a case where, as here, the Applicant was represented for part of the time and unrepresented for part of the time? In my judgment, it should not require the Applicant to make a choice about which type of application to pursue. The Applicant is entitled to make both applications. The Employment Tribunal may decide the question of entitlement to each order and then decide which type of order to make. There will no doubt be cases where an Applicant for both kinds of order is entirely unaware of Rule 75(3). This indeed may have been one of them. In such a case it would be good practice for the Employment Tribunal to explain the provision and invite submissions about the type of order to be made. Indeed, if this is done as soon as the existence of one of the two kinds of application is noticed, it may result in a voluntary withdrawal of one application or another.

24. In this case the Employment Judge overlooked the existence of the costs application, she did not decide the costs application, nor did she make any conscious decision about the type of order to be made. These were errors of law; the matter must be remitted.

25. Since the Employment Tribunal cannot make both orders, I must, in order to clear the field for the Employment Tribunal, set aside the preparation time order as part of this Judgment. This does not mean that the Employment Judge is prevented on remission from making a preparation time order; indeed, it has already been decided in principle that a preparation time order in the sum of £462 would be appropriate. The purpose of setting aside the preparation time order is simply to clear the field so that the Employment Judge can decide which type of order to make.