Appeal No. UKEAT/0193/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 October 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR D K VENKATESAN — APPELLANT

(1) SURABI LIMITED (DEBARRED)
(2) HITESH CHAUHAN (DEBARRED) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ANNA MACEY (of Counsel) Bar Pro Bono Scheme
For the Respondents	No appearance or representation by or on behalf of the Respondents

SUMMARY

UNFAIR DISMISSAL - Polkey deduction

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The appeal took issue with the following aspects of the Judgment of the Employment Tribunal in this matter:

1) Unfair Dismissal – the finding that no compensatory award should be made given that a fair procedure would not have resulted in any different outcome and would have taken less time to complete than the period for which the Appellant had been paid to complete.

2) Unlawful Deductions of Wages – this claim (for £5,400) was dismissed but with no Reasons being given.

Taking first the **Polkey** appeal, the approach taken by the Employment Judge solely had regard to the question as to how long a fair procedure might have taken. The point he did not address was whether there was a real chance that - had such a fair procedure been followed - the First Respondent might have concluded that the Claimant in fact had the right to remain in his employment. It was the Claimant's case that, under immigration law, he continued to have the right to live and work in the UK and, had the First Respondent simply contacted UKBA and/or the Appellant's Solicitors, it would (or should) have been so advised. That being so, it was an error to assume - as the Employment Judge had done - that a fair investigation/procedure would have made no difference. The presumption made by the Employment Judge meant that the relevant questions were not considered and, thus, the necessary findings of fact were not made. This was an error of law that vitiated the Employment Judge's Judgment on compensation. The question of compensatory award under the unfair dismissal claim would need to be remitted to a new Employment Tribunal to be considered afresh.

On the question of the unlawful deductions claim, the difficulty was that simply no Reasons had been provided for the dismissal of this claim. This may well have been a simple oversight on the part of the Employment Judge but unfortunately he had since died and this matter was thus not capable of remedy under the **Burns/Barke** procedure. The appeal on this ground would similarly be allowed and the unlawful deductions claim remitted to be considered afresh by the new Employment Tribunal charged with determining the question of compensation for the claim of unfair dismissal.

HER HONOUR JUDGE EADY

Introduction

1. In giving this Judgment I refer to the parties as the Claimant and the First or Second Respondents, as they were below.

2. This is the hearing of the Claimant's appeal against a Judgment of the Nottingham Employment Tribunal (Employment Judge Walker sitting alone on 8 May 2013) – "the ET" - sent to the parties on 23 May 2013, with Written Reasons following on 17 July 2013.

3. The Claimant represented himself before the ET but has had the benefit of representation by Ms Macey, of Counsel, instructed by the Bar Pro Bono Unit at this hearing. The First Respondent was represented by its directors before the ET, and the Second Respondent appeared there in person. Both Respondents were debarred from taking part in this appeal by order of the Deputy Registrar seal dated 5 September 2014, because they had failed to file an Answer to the Notice of Appeal and failed to respond to the EAT's order seal dated 21 August 2014. I have therefore heard only from the Claimant.

4. The ET's Judgment was, relevantly, that the Claimant's claim of unfair dismissal against the First Respondent succeeded but, applying **Polkey**, there would be no compensatory award as the Claimant would have been dismissed in any event had a fair procedure been adopted, which would have taken no longer than the period for which he had been paid. Further, his claim for unauthorised deductions of wages failed and was dismissed.

5. Initially there was an extensive Notice of Appeal submitted by the Claimant, then acting in person. Following consideration on the papers, Langstaff P permitted the appeal to proceed by on two grounds only: (1) whether the **Polkey** finding should have been made on the basis that, with reasonable investigation, there was a real chance that the Claimant could have shown that he was entitled to work in the UK; (2) whether the Reasons for rejecting the claim regarding unlawful deductions were deficient.

The Background Facts

6. The Claimant had been employed by the First Respondent since 19 August 2011 as a Kitchen Assistant at the Chennai South Indian cuisine restaurant. At that time he had a UKBA visa (which the First Respondent has seen), which gave him the right to remain and work in the UK. That was valid until 3 December 2011. The First Respondent held a licence enabling it to employ overseas workers provided it ensured that they had the right to remain and work in the UK. It could be subject to severe penalties if it failed to comply with the terms of its licence.

7. With the assistance of solicitors, the Claimant made an application for his visa to be extended. The application was made in time, and - I understand from Ms Macey - that would mean that, until it was dealt with, the Claimant would be entitled to remain living and working in the UK on the same conditions as previously. Initially his application was refused. He appealed to the Immigration and Asylum Chamber of the First-tier Tribunal, and, on 7 February 2013, his appeal was allowed, giving him discretionary leave to remain for 12 months. Whilst that appeal was pending, as a matter of immigration law - I am again advised by Ms Macey - given he had submitted his appeal in time, he was entitled to live and work in the UK on the same basis as provided in his original visa until the determination of his appeal. So, from 3 December 2011 until 7 February 2013 the Claimant did not hold a visa entitling him to work in

the UK, but as a matter of immigration law, it seems he would have been entitled to do so, on the same conditions as previously.

8. On 1 May 2012, the First Respondent gave the Claimant one month's notice terminating his employment. It in fact then allowed him to remain at work until 30 June 2012, and subsequently the Claimant continued to do some work on a cash basis. It was the Claimant's case that, for the last four months or so of his employment, he was not paid the correct wages and that there was a shortfall of some £5,400.

9. On 14 October 2012, the business transferred to the Second Respondent. There had initially been a suggestion that the Claimant might have continued to work at the business until the point of transfer, but the ET ultimately found that not to have been the case, so the Second Respondent was no longer relevant to the proceedings.

The Employment Tribunal Proceedings and Reasons

10. The Employment Judge considered that the First Respondent's dismissal of the Claimant was for a potentially fair reason under section 98(2)(d) of the **Employment Rights Act 1996**: he was an employee who could not continue to work in the position which he had held without contravention either on his part or that of his employer of a duty or a restriction imposed by or under an enactment. In this case, the Employment Judge the relevant restriction was the absence of the Claimant's having a right to work under the immigration legislation. The Employment Judge found, however, that there was no fair procedure followed in this case and that rendered the dismissal unfair. That said, had a fair procedure been adopted, the Employment Judge concluded that it would have been undertaken well within the one-month period of notice that that the Claimant had been given. Applying **Polkey** therefore, the

Employment Judge found that that there was no further continuing loss as the result would have been the same. Accordingly, he awarded the Claimant a basic award but no compensation.

11. By his Judgment, the Employment Judge further ruled that the Claimant's claim for unlawful deductions failed and was dismissed. The Reasons provided, however, do not address that claim at all.

12. When this appeal was initially considered on the papers at the EAT, HHJ Shanks directed that it should be stayed pending compliance with a request to the Employment Judge for his Reasons for dismissing the unlawful deductions claim. Unfortunately, by that stage, the Employment Judge had died. The Regional Employment Judge accordingly provided a typed up version of the notes taken by Employment Judge Walker at the hearing.

Submissions

13. Appearing before me for the Claimant, Ms Macey reminded me of section 123(1) of the **Employment Rights Act 1996**, which provides that the compensatory award in an unfair dismissal case:

> **"...shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer".**

14. She observed that in **Polkey v AE Dayton Services Ltd** [1988] ICR 142 it was provided that, where a dismissal was rendered unfair by virtue of an employer's failure to follow a correct procedure, it would be proper to consider what effect those steps would have had - on the fairness or otherwise of the dismissal - at the stage of assessing compensation. If the ET considers that there is some doubt as to whether the employee might then have been dismissed, that can be reflected in the compensation awarded.

15. On the question of treatment of immigration status in this regard, Ms Macey drew my attention to the EAT Judgment in the case of **Ram v JD Wetherspoon plc** UKEAT 0080/11/ZT. In that case, the Claimant had been dismissed for reasons unrelated to immigration status but the ET had capped compensation at the expiry of the work permit. The EAT had overturned that decision on the basis that, prior to the date of expiry, the Claimant would have applied for indefinite leave to remain and it would have lawful for him to work whilst that application was being considered. Ms Macey submitted that, in the present case, the Employment Judge had confused the fact that an investigation and correct procedure could have been carried out within the Claimant's notice period as being indicative of the fact that there could be no continuing loss beyond that date. He thereby erred, in failing to consider whether further investigation would have revealed that the Claimant did in fact have the right to work. Neither the Reasons nor the Employment Judge's notes of evidence disclosed that the Employment Judge had turned his mind to that question at all.

16. The Employment Judge further erred in failing to make any finding of fact that it was unlawful for the Claimant to continue with his employment. He appeared to have proceeded on the assumption that it was unlawful for him to do so, but the evidence of the First Respondent was that it did not know and, as a matter of law, that assumption was incorrect. Had a further investigation been carried out, the Claimant contended he would have had a real chance of demonstrating that he remained entitled to work. He had engaged solicitors to assist with the extension of his visa, and the First Respondent had had some contact with those solicitors, who could have explained the legal position. Equally, had inquiries been made of UKBA, an accurate response would again have provided the First Respondent with the information it needed to continue to employ the Claimant.

17. On the unlawful deductions claim Ms Macey observed that this was a major point of the Claimant's case before the ET; the sum in contention was not an insignificant amount for him. The Reasons provided by the Employment Judge simply did not address that claim, save for a very brief passing reference. The Reasons needed to engage with questions as to the hours the Claimant was working at the First Respondent and/or as to the monthly pay rate which had been agreed. The Employment Judge had needed to determine whether or not the Claimant had received wage slips for the last three months of his employment and whether the Claimant's evidence was accepted when he said that he had been told that the First Respondent was losing money and that he would be paid the sums due to him at a later date. Further, the Employment Judge had needed to consider whether the Claimant's evidence was accepted when he said he had been told he might be able to keep his job when the First Respondent was sold if he dropped his demands for his wages. There was no reference to these points or to the evidence of the letters written by the Claimant to the First Respondent requesting his wages after the termination of his employment.

18. Referring to the requirement to give Reasons under the **Employment Tribunal Rules** and the guidance in the case-law as to adequacy of Reasons, the Employment Judge had plainly failed in his obligation in respect of the unlawful deduction of wages claim.

Discussion and Conclusions

19. Taking first the **Polkey** appeal, the approach taken by the Employment Judge in this case solely had regard to the question as to how long a fair procedure might have taken, concluding - as he might have been entitled to do - that it would have taken no longer than the one-month notice period. On that basis, he found that no compensation was due to the Claimant. What the Employment Judge failed to do, however, was to address the question whether there was real-

world chance that, had such a process been followed, the Claimant might have been able to demonstrate that he did have the right to remain and work in the UK; that the assumption made about his immigration status - and, thus, his right to work - was wrong.

20. Had the Employment Judge engaged with the question of the likely outcome of a fair investigation and process, he would have needed to make findings as to what the First Respondent was likely to have then discovered. Ms Macey submits that, as a matter of law, the Claimant did have the right to continue working in the UK at the relevant time. She says - had it properly investigated the matter - the First Respondent would then have moved from a position of not knowing the correct position to learning of the Claimant's continuing right to work, either from the Respondent's solicitors or from UKBA. Contrary to the apparent assumption of the Employment Judge, rather than such investigation making no difference to the outcome - unless the First Respondent disbelieved the advice of the Claimant's solicitors and/or was given an incorrect response by UKBA - it would have been bound to find that it could continue to employ the Claimant on the same terms as previously.

21. On the facts of this case, I am persuaded that this is correct. The Employment Judge erred by wrongly focussing purely on the time period of a fair procedure rather than the percentage chance of a different outcome. The error arose from the failure to engage with the possible outcome of a fair procedure and a failure to make appropriate findings of fact on the questions that would then have been raised.

22. This is not a point, however, where it would be open to me to simply substitute whatever conclusion I might have reached on this point. More than one conclusion remains possible and I am conscious that I have not heard from the First Respondent on these issues. The matter will

need to be considered by a fresh ET. The finding of unfair dismissal already being in the Claimant's favour, the matter of compensation arising from that unfair dismissal will therefore be remitted to a new ET to consider afresh.

23. As for the unlawful deductions appeal, there is a real difficulty in that simply no Reasons were provided for the dismissal of this claim. Ms Macey has directed me to the relevant ET Rules and the case-law on the question of adequacy of Reasons, but one does not need to go so far. In this case there is simply no reasoning provided which would enable anyone reading this document to understand why the unlawful deductions claim was rejected. It is obviously unfortunate that this omission could not be remedied. It may well have been down to simple oversight, and Employment Judge Walker might have been able to remedy that, but clearly that could not happen.

24. The fact is that the Reasons provided failed to identify the issues; failed to disclose relevant findings of fact; failed to refer to the relevant law; and failed to demonstrate how the legal principles had been applied to the findings of fact to reach the conclusion that the claim should be dismissed. This ground of appeal should therefore also be allowed. Accordingly, I direct that the unlawful deductions claim should be remitted to be considered afresh by the ET also charged with determining compensation in respect of the unfair dismissal claim.