Appeal No. UKEAT/0111/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 October 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MISS W BRINDLE — APPELLANT

FYLDE MOTOR COMPANY LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondent	MS HIRSCH (of Counsel) Instructed by: Messrs Linder Myers LLP 12 Linder Myers Chapel Street Preston PR1 8BU

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

The Employment Judge decided to hear the case in the Claimant's absence and dismissed her claims. The issue in the appeal was whether he was required, under Rule 27(6) **2004 ET Rules**, to enquire of the Respondent whether they would produce written submissions and bundle exchanged by the Claimant for consideration and/or whether the Rrespondent obliged to make the Claimant's documents available to the Employment Tribunal. Answer; no. Claimant's appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This is an appeal by Miss Brindle, the Claimant before the Manchester ET, against the Judgment of Employment Judge Bright, dismissing her claims of constructive unfair dismissal and unauthorised deduction from wages and outstanding holiday pay, brought against her former employer, the Respondent, Fylde Motor Company Ltd. That Judgment is dated 18 February 2013. Written Reasons were provided on 27 March.

2. The appeal was originally rejected under Rule 3(7) by HHJ Serota QC on the paper sift. However, at a Rule 3(10) Appellant-only Hearing HHJ Shanks directed that the appeal proceed to this Full Hearing on a single ground, all others being dismissed. That live ground of appeal involves a narrow question of construction of Rule 27(6) of the **ET Rules 2004**, then in force. That provision is now contained in slightly different terms in Rule 47 of the **2013 Rules**; its equivalent was formerly to be found in Rule 9(3) of the **1993 Rules**, considered by the Court of Appeal in **Roberts v Skelmersdale College** [2003] ICR 1127.

3. Today Miss Brindle does not appear and is not represented. Enquires were made as to her intentions, which evoked an e-mail response from her daughter, timed at 10.47am, saying that the Claimant was unwell, seemed very upset this morning and her whereabouts were unknown. Apparently, she is not contactable. However, either the Claimant or someone on her behalf has managed to draft an application for a postponement of today's hearing, failing which I am invited to consider detailed written representations in support of the appeal bearing today's date.

4. Ms Hirsch, for the Respondent, opposes the adjournment application. I shall accede to her submission. No compelling reason for an adjournment at the last minute is made out, particularly given the history of this case. I have read and considered the written representations, as has Ms Hirsch, who has addressed me on the case there advanced on behalf of the Claimant.

The Facts

5. Given the limited scope of this appeal now before me the background may be shortly stated. The Claimant was employed by the Respondent as Company Secretary/Bookkeeper from 16 May 2008 until her resignation on 9 August 2010. Her claims, mentioned above, were resisted by the Respondent and came on for hearing before Employment Judge Bright on 30 January 2013. The Claimant did not attend on that occasion; she informed the Tribunal that she was unfit to do so as a result of a road traffic accident. In the event, the Judge decided to proceed with the case in the absence of the Claimant. The total time in which the Tribunal was engaged in this case was three days: 30, 31 January and 1 February 2013. The ruling to proceed with the case is not now in issue before me, as a result of Judge Shanks' Rule 3(10) Decision.

6. Rule 27(5) of the **2004 Rules** provided that, if a party fails to attend a hearing, the Tribunal may dismiss or dispose of the proceedings where no adjournment is ordered. By Rule 27(6):

> **"If the Tribunal wishes to dismiss or dispose of proceedings in the circumstances described in paragraph (5), it shall first consider any information in its possession which has been made available to it by the parties."**

The Employment Tribunal Decision

7. Instead of dismissing the proceedings without more, Employment Judge Bright decided to dispose of the proceedings on their merits, based on the information available to him (see

paragraph 40 of the Reasons). That included, on the Claimant's side, her form ET1 and Further Particulars and evidence from six witnesses called by the Respondent (see paragraph 55) and a bundle of documents prepared by the Respondent (paragraph 56).

8. The Judge did not consider any witness statement from the Claimant (paragraph 40.3) nor any separate bundle of documents from her side.

9. I interpose at this point that, by letter dated 1 September 2012, Regional Employment Judge Doyle directed that the parties may rely on separate bundles rather than a joint bundle and further that, on 29 November 2012, Employment Judge Ross enquired of the parties whether they had seen each others' witness statements, which the Claimant confirmed on 6 December. Thus witness statements had by then been exchanged. I am also told this morning by Ms Hirsch that a bundle prepared by the Claimant was served on the Respondent and the Respondents served their bundle on the Claimant.

10. Based on the material placed before him, Employment Judge Bright rejected each of the Claimant's claims for the reasons given particularly at paragraphs 63-68.

Conclusions

11. Against that background I return to the issue raised in the appeal. The point is succinctly identified by HHJ Shanks in his reasons for allowing the appeal to proceed in these terms:

> **"She [the Claimant] also complained that the EJ failed to have regard to her witness statement and bundle of [documents] although he knew they existed and could have asked the [Respondent] for them; it seems to me this was arguably a breach of [Rule] 27(6) of the 2004 Rules particularly when read in the light of the overriding objective."**

12. In considering that proposition I derive some assistance from the Judgment of Mummery LJ on the differently worded Rule 9(3) of the **1993 Rules** in **Roberts**. In that case, the EAT had allowed, by a majority, the Claimant's appeal against the decision of an Industrial Tribunal (now ET) dismissing his claim at a hearing which he did not attend. The EAT were concerned that, absent a hearing on the merits below, the IT ought not to have dismissed the claim without giving due consideration to the material specified in Rule 9(3). On appeal by the employer, the EAT decision was set aside. The Court of Appeal stated that there was no duty on the IT to investigate the case nor indeed to be satisfied as to the merits of the employer's defence. It was simply required to give consideration to the documents specified in the Rule, i.e. the absent party's pleading and written representations or answer provided under Rules 8(5) and 4(3) respectively. That seems to me a fairly narrow construction of the then Rule 9(3).

13. The material change in Rule 27(6) of the **2004 Rules** is that instead of specifying which documents must be considered by the ET before dismissing or disposing of the claim, the requirement (see the mandatory word "shall" in the rule) is to "consider any information in its possession which has been made available to it by the parties".

14. In this case it is plain that neither party provided either the Claimant's witness statements nor her bundle of documents to the Employment Judge. Assuming that he knew from the earlier directions that the parties had exchanged witness statements and their respective bundles, was the Employment Judge obliged, within the terms of Rule 27(6), to ask the Respondent for copies of any witness statement or statements provided to them by the Claimant and any bundle or proposed bundle of documents served on them by the Claimant to be taken into consideration by him before disposing of the proceedings? Put a different way, was there any obligation on the Respondent to provide such material to the Judge in the absence of the

Claimant, she having failed to provide that material to the ET herself? To both questions the Claimant answers in the affirmative; the Respondent in the negative.

15. I agree with the Respondent. First, purely as a matter of construction, Rule 27(6) requires the ET to consider any information in its possession which has been made available to it by the parties. He fulfilled that obligation. He was not required to consider material which neither party had made available to him.

16. The second question is whether the Judge was obliged to enquire of the Respondent whether they had copies of any witness statements and/or a bundle of documents from the Claimant exchanged pursuant to the earlier ET directions. Again my answer is in the negative. Ms Hirsch has directed my attention to a passage in the Judgment of Sir Hugh Griffiths, sitting in the NIRC, in **Craig v British Railways (Scottish Region)** [1978] 8 ITR 636, cited without disapproval by Peter Gibson LJ in **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531, where his Lordship said this:

> **"18 I can start with *Craig v British Railways (Scottish Region)* (1973) 8 I.T.R. 636. In that case (in relation to an application for a redundancy payment), it had been contended in the National Industrial Relations Court that an Industrial Tribunal has a duty to ensure that all relevant evidence is before it and that that duty was particularly high if one of the parties is not legally represented. In rejecting that contention, Sir Hugh Griffiths, giving the judgment of the Court, said (at p.637):**
>
> > **'It is the duty of the parties to present the relevant evidence before the tribunal. That is not, of course, to say that where persons appearing before a tribunal are not legally qualified and are manifestly unversed in legal procedure that the tribunal will not give them such assistance as they can in presenting their case. But it cannot be too emphatically stated that the duty lies upon the parties to place the relevant evidence before the court.'"**

17. In my judgment that observation of Sir Hugh Griffiths applies equally today. The ET's system remains adversarial, not inquisitorial. This Claimant, representing herself, was given every opportunity by Judge Bright to attend the three-day hearing in Manchester. She did not do so, and there is now no appeal against his decision to continue the hearing to disposal of the

case. That, incidentally, deals with the **Human Rights Act** point, which the Claimant articulates at paragraph 15 of her written representations. In e-mail communications during those three days it was open to the Claimant to lodge her witness statement and bundle for consideration by the Employment Judge. She did not do so. Nor did she suggest, either to the Respondent or to the Employment Judge, that the Respondent should make available to him copies of the material provided by her by way of exchange. In these circumstances I am satisfied that there was no obligation under the Rules, nor indeed as a matter of natural justice, nor in pursuit of the overriding objective, requiring the Respondent to make the Claimant's material available to the Employment Judge.

18. It follows, in these circumstances, that I reject the case advanced by the Claimant on appeal and shall dismiss that appeal.