

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

At the Tribunal
On 3 October 2014

Before
THE HONOURABLE LADY STACEY
(SITTING ALONE)

UKEAT/0302/13/JOJ

MR PHILIP JOSEPH T/A T-ZONE APPELLANT

(1) MS J CHOUGHARI
(2) BLUNT LTD RESPONDENTS

UKEAT/0303/13/JOJ

BLUNT LTD APPELLANT

(1) MS J CHOUGHARI
(2) MR PHILIP JOSEPH T/A T-ZONE (DE-BARRED) RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Mr Philip Joseph t/a T-Zone

MR PHILIP JOSEPH
(In Person)

For Ms J Choughari

MR T STREET
(Solicitor)
Tom Street & Co Solicitors
2b Bath Street
Frome
Somerset
BA11 1 DG

For Blunt Ltd

MR KORNHAUSER
(Representative)

SUMMARY

CONTRACT OF EMPLOYMENT

Whether established

Written particulars

Joint and several liability. The respondents had each employed the claimant. The Employment Tribunal found that it was difficult to distinguish between the claimants who were associated employers. It therefore made liability to pay compensation joint and several, that is the whole amount could be enforced against either party. The second respondent accepted liability for the whole sum. The first respondent denied liability for the sum due in respect of employment by the second respondent. The claimant argued that there were sufficient findings to enable the Employment Tribunal to make the award on the basis of joint and several liability. Concern was expressed that the second respondent, a limited company, should not have sole responsibility for payment as it may have no assets. Held: there was no finding that the first and second respondent traded under each other's names. There was no basis for joint and several liability. Each was liable for the period in which the claimant was employed by that entity. Observed that the second respondent was at liberty to make payment and it was noted that there was no explanation for its failure to do so thus far.

THE HONOURABLE LADY STACEY

Introduction

1. This is an appeal by Mr Joseph (Case No. 0302) and an appeal by Blunt Ltd (Case No. 0303). I will refer to the parties as the Claimant, Mr Joseph, and Blunt Ltd. Today the Claimant has been represented by Mr Street, her solicitor. Mr Joseph has appeared in person, and Blunt Ltd has been represented by Mr Kornhauser.

2. Mr Joseph wrote to the EAT by letter of 26 September 2014 stating that he wished to take part in the hearing, and I can confirm that he is entitled to do so in respect of his own appeal (that is, 0302). Mr Joseph sent in a Skeleton Argument and he also asked in his letter that the EAT appoint Counsel to act for him. He has not renewed that before me, and of course the EAT has no power to appoint Counsel to act for anyone. Therefore I have heard Mr Joseph on his own behalf. As I have confirmed at the outset of the hearing, I have had the opportunity to read the papers including the Skeleton Argument beforehand. That Skeleton does not make clear that the writer of it read the Judgment of the Preliminary Hearing, which precedes this Full Hearing and the Judgment of which sets out the parameters of the hearing. Much of the Skeleton Argument deals with matters that are completely irrelevant.

3. A letter signed “Clayton pp Blunt Ltd” on notepaper headed “Blunt Ltd” dated 29 September 2014 has been received by the EAT. In that letter it is stated that Blunt Ltd maintains its position. The company states that T-Zone, which is a name under which Mr Joseph trades, had no involvement in the employment of the Claimant with Blunt Ltd. The letter states:

“We therefore accept responsibility and full liability irrespective of the outcome of the appeal.”

4. Mr Kornhauser has said today that he is instructed to say that Blunt Ltd is prepared to make payment of all sums. I have gone over with him carefully the three sums that are set out in the decision of the Employment Tribunal, and he has confirmed that his client company's position is that they are prepared to make payment of these sums. I have checked with Mr Kornhauser if any attempt has been made to pay the sums either in cash or by sending a cheque to Mr Street, who acts for the Claimant, and he has told me that has not happened. He is not today offering payment. He is stating that his client company accepts liability to pay. He has not been able to give me any explanation, given that acceptance of liability, why payment has not been made before now. It appears that Mr Kornhauser appreciates that this appeal would be unnecessary if payment had been made, and he has been put in the unfortunate position of not being able to tell this Tribunal why the Claimant has been kept from money which his client company accepts is due to her, and why this Tribunal has had to be convened, with the expense that is involved in that, when his client company is, he says, willing to make payment. He has not been able to explain that to me.

The positions of the parties on the appeals

5. That being so, Mr Joseph and Mr Kornhauser have both stated that they want to proceed with their appeals. Their position is of course different. I have outlined Mr Kornhauser's position that his client company is prepared to make payment. Mr Joseph, in contrast, seeks to appeal on the basis that, while he has never denied employing the Claimant for a period, he is not, he says, liable to make payment of all of the sums found due by the Employment Tribunal and he has made clear to me that his position is that he cannot understand why anyone would say that he had to make payment when he did not employ her as the last employer. He has said that his involvement was employing the Claimant at an earlier stage. And, while he was prepared to concede that he may have made mistakes, as he has put it, and while he is prepared

to concede that he is due to make payment of the underpayment of the national minimum wage for the period during which he did employ her, he is not prepared to make payment of the whole sum. Of course, I know from what Mr Joseph has told me and what is in the written paperwork, that Mr Street has -- perfectly properly -- sought to enforce the court order against Mr Joseph. Mr Joseph has said that he finds that that is aggressive, but of course Mr Street is, on behalf of his client, empowered to do that because he has a court order for payment on a joint and several basis.

The Employment Tribunal Decision

6. Because the appeal has proceeded before me, I have considered the whole matter. The decision of the Employment Tribunal is to the following effect. The Claimant was throughout her period of employment as a hairdresser with Mr Joseph and with Blunt Ltd, whether that was all one period of employment or two. She was paid less than the minimum wage and the underpayment for the total time is in the sum of £6,765. The Tribunal found that her claim of unfair dismissal failed, although it did find that it had jurisdiction to hear it. And the only basis on which it can have jurisdiction to hear it is either that the two employers were associated or that there only was one employer. But no money is due under the claim for unfair dismissal because it found on the facts that the claim was not made out.

7. The Tribunal also found that the Claimant was not given a written statement of employment particulars under the legislation which provides for that (that is, the **Employment Rights Act 1996**), and it finds in its paragraph 3 of its Judgment that she should be paid two weeks' wages, which is £350, under section 38(3) of the **Employment Act 2002**. It also found in its paragraph 4 that the employer had failed to respond to a request properly made about

wages, pursuant to section 10 of the **National Minimum Wage Act 1998**, in respect of which breach it ordered a payment of £495, again jointly and severally.

The Preliminary Hearing

8. This case has been the subject of a Preliminary Hearing, in which the President, Langstaff J, gave Judgment. That Judgment sets out the parameters for this hearing. Reasons were given by the President at the Tribunal and are printed at page 83 onwards in this bundle. In those Reasons he set out that Mr Joseph appeared on his own behalf and that Miss Joanne Baker appeared for Blunt Ltd. At paragraph 5 of the Reasons the President points out, conscious of the fact that Mr Joseph and no doubt Miss Baker are not legally qualified, that an apprentice is an employee and he also pointed out that for the National Minimum Wage legislation there is no qualifying period. Apprentices are, as he said, subject to a different wages from employees over 18, and the President also pointed out that the Employment Tribunal did not find, on the facts, that the Claimant was an apprentice. I went over these matters at the outset and I understand from him that he appreciates that the Claimant was not on an apprenticeship contract and he also appreciates that, when she was working with him, she was underpaid in terms of the legislation.

9. Going back to the President's Judgment, he noted in paragraph 10 that the Employment Tribunal had addressed the question of who was the employer. It said that it was difficult to tell, and it ended up making an order jointly and severally against Mr Joseph and Blunt Ltd and, lest there should be any doubt about it, such an order is enforceable to its full extent against either or both of the parties.

10. The two grounds of appeal are addressed by the President at his paragraph 15, and he begins with the lack of notice for the hearing itself at the Employment Tribunal. The President finds there is nothing in that ground of appeal as Mr Joseph did not seek an adjournment even when he realised that it was a Full Hearing. So, taking at its best for Mr Joseph, that is if one accepts for the purposes of argument that Mr Joseph had not had notice, then he still went ahead with the case. So that ground of appeal was not allowed, and is not before me. I merely put this for completeness.

11. The second ground is set out at paragraph 19, where the President raises the question of whether or not the Employment Tribunal may have taken the wrong approach in law. He noted that the case was presented on the basis that the Claimant worked for Mr Joseph between April and December 2010, that she went on holiday, and that in 2011, when she came back, she went to work at the same place but that her payslips were then paid by Blunt Ltd. The President noted that there was no finding by the Employment Tribunal that Mr Joseph traded under different names. He was concerned that the Employment Tribunal may, perfectly properly, have concentrated its mind on the question of continuity of employment, which was necessary for it to have jurisdiction for the unfair dismissal case because of the time limits, for which it is necessary to work before there is any such jurisdiction.

12. As I have said, the position under the national minimum wage legislation is different. However, I share the President's concern that, even if there was continuity of employment with associated employers, there is no finding in the Employment Tribunal Judgment which would enable a joint liability for the shortfall of wages. In my opinion, it would have been necessary for the Tribunal to have decided that either Mr Joseph traded on his own account under the

name of Blunt Ltd or, conversely, that Blunt Ltd traded under the name of Mr Joseph, but no such findings were made.

13. The President points out at paragraph 21 that the question is who pays which part. And he points out that it is for Mr Joseph and Blunt Ltd to consider whether an appeal on this basis is worth fighting given that the Employment Tribunal Judgment was a joint and several liability, that is all of it from either one. If it is agreed that the sums are due to the Claimant and if Mr Joseph agrees that he should pay the first of it and Blunt Ltd the second part of it, then the President gave very clear notice that it is hard to see why this Tribunal's time is taken up with this appeal.

The Claimant's Submissions

14. Today Mr Street has argued that the Employment Judge did not err in law and that he was entitled to find that the reality of the situation was that the Claimant worked for a hairdressing business run by Mr Joseph and his partner, Miss Baker, and that any involvement of a company, Blunt Ltd, came up only from payslips payable from 2011 and Mr Street has argued that the evidence before the Employment Tribunal was quite sufficient for it to take the view that the reality was that the Claimant should be able to enforce any award due to her against each jointly and severally. While Mr Street makes his points clearly and said, I think, all that could be said in defence of the Employment Tribunal's decision, I am not persuaded that it does have sufficient in it for joint and several liability.

Conclusions

15. I emphasise that I have heard nothing today to suggest that there is any reason why Mr Joseph should not be liable for the first period of employment and Blunt Ltd liable for the

second period of employment. While Blunt Ltd apparently is prepared to make payment of it all, it does not as I understand it disagree that it is liable at least for the second part and that Mr Joseph is liable for the first part, and Mr Joseph agrees with that also.

16. I understand Mr Street's apparent frustration with the late admission of liability to make payment of all of it by the limited company today. I think I have made myself entirely clear that I cannot understand why this matter has been allowed to go as far as it has. Mr Street maintains that it is an empty promise and that it is an attempt to deprive his client of an ability to enforce the tribunal's order against two entities, and to have only one against which he may enforce, that one being a limited company which may have no assets. Mr Street may be right about that, but of course I have no way of knowing whether he is right or not. And even he is right, that is not a reason to find that there is joint and several liability. I have come to the view that paragraphs 41 and 42, where the Employment Judge deals with this, do not have sufficient findings in them to enable joint and several liability. It is not sufficient in law simply to say that they are connected with each other.

17. Thus I accept that the Employment Tribunal erred in law in making liability joint and several. I am prepared therefore to allow the appeal to the extent that liability is not joint and several. I will instead make an order that Mr Joseph is due to make payment of the sums underpaid up to and including 4 January 2011 and Blunt Ltd is due to make payments of the sums underpaid from 1 February 2011. No argument has been presented to me that there is anything wrong with the figures given at page 44 of the bundle that Mr Street very helpfully prepared. So the sums calculated by me due by Mr Joseph in respect of the national minimum wage are £3,748 and by Blunt Ltd £2997.

18. As regards paragraph 3 of the Judgment of the Tribunal, which deals with the sum due under the **Employment Rights Act**, the Employment Tribunal had made that joint and several liability. I have found that there is no proper basis for that, and therefore the sum due in respect of the **Employment Rights Act** for failure to set out the terms of employment will be due also by Mr Joseph alone, as he was the person who on his own say-so first employed the Claimant. For the sum due in respect of the failure to give information properly requested under the **National Minimum Wage Act**, the paperwork shows me that a letter was sent to Mr Joseph at the address where the Claimant worked. Today he has said that he did not get it, and he tells me that he was not at that address. He is much too late in making any such assertion. That is the address at which the Claimant worked, and her solicitor was quite correct to send it there. Therefore the sum of £495 is also due by Mr Joseph, and obviously I am not finding that that is jointly and severally liable.

19. Therefore I have allowed this appeal to the extent only of removing joint and several liability. I am pronouncing an order which will come out from this Tribunal, making liability on two separate figures, based on the first period of employment and the second period of employment.

20. I should perhaps finish by saying that I trust that payment will be made immediately by Blunt Ltd and/or by Mr Joseph or by any combination of them. I have carefully noted Mr Kornhauser, appearing in this Employment Appeal Tribunal, in which everything is recorded, stating that his client company is offering to make payment now of the full sum and I trust that that will happen, as I have heard no reason why Miss Choughari has been kept from sums which are due to her for a long period and why this Tribunal has required to sit.

21. I am grateful to you for your attendance and your help.