Appeal No. UKEAT/0018/15/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 May 2015

Before

THE HONOURABLE MR JUSTICE WILKIE

(SITTING ALONE)

DR A W IBARZ APPELLANT

UNIVERSITY OF SHEFFIELD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MRS SARAH FRASER BUTLIN (of Counsel) Instructed by: University and College Union Legal Services Carlow Street London NW1 7LH
For the Respondent	MR BEN WILLIAMS (of Counsel) Instructed by: DAC Beachcroft LLP 3 Hardman Street Manchester M3 3HF

SUMMARY

PART TIME WORKERS

FIXED TERM REGULATIONS

The Employment Tribunal misdirected itself in law in concluding that, as a matter of law, the consistent application of a policy or practice to a series of discrete fixed-term part-time contracts of employment was incapable of amounting to "a series of similar acts" so as to enable a timeous discrimination claim to be brought, giving the Employment Tribunal jurisdiction to hear a claim complaining about acts or failures during both the latest and the earlier fixed-term contracts.

THE HONOURABLE MR JUSTICE WILKIE

Introduction

1. This is an appeal by Dr Ibarz against certain decisions of the Employment Tribunal sitting at Sheffield on 19 and 20 May 2014, set out in a written Decision sent to the parties on 14 August 2014. The Claimant had been engaged by the Respondent, the University of Sheffield, to teach certain modules in its Spanish and Latin American Studies course at the Institute of Lifelong Learning. He had taught those modules from 2004 until the end of the last contract in May 2013. Each academic year, run by that particular institute, was divided into two semesters, with a number of weeks in between each. The Claimant had been engaged in each of the semesters in each of those academic years to teach certain modules, for which he was paid a fee; the duration of each module being separated from the others and, accordingly, there being periods of engagement punctuated by periods of non-engagement lasting a number of weeks. Thus it was that his engagement with the Respondent potentially fell within the terms of the **Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002** and the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000**.

2. Regulation 3 of the **2002 Regulations** and Regulation 5 of the **2000 Regulations** seek to protect, respectively, fixed-term employees and part-time employees against less favourable treatment. Complaints were made by Dr Ibarz of such less favourable treatment extending from May 2013 right back to cover the whole of the period during which he was engaged to teach at the institute, namely back to 2004.

3. The less favourable treatment complained of related to arrangements for holiday pay, for incremental pay progression, in respect of regrading, in respect of access to pension, in respect of wages, and in respect of a reduction in his hours.

The Employment Tribunal Decision

4. The Tribunal considered that it had to determine a number of legal issues which were in dispute. They included whether, given the arrangements for managing the Claimant and the other arrangements concerning his integration into the work of the Institute, his engagements constituted a relationship of employer and employee. The Tribunal also had to make decisions as to whether the true nature of the relationship from 2004 through until 2013 was a single relationship, albeit comprising a series of apparently fixed-term contracts with gaps in between, or whether it properly should be described as a series of separate and discrete contracts of employment, each of them running for the duration of the semester but where, in between, there was no contractual relationship between the parties so as to preclude any question of continuity of employment.

5. The Tribunal came to conclusions in respect of those two issues. It concluded that the Claimant was in an employment relationship when he was engaged to teach the modules but that there was no overarching arrangement between the parties between the semesters and, accordingly, there was no continuity of employment. Rather there was a series of discrete periods of fixed-term employment, each lasting for the duration of the relevant semester, but separated by a period in between semesters when there was no contractual relationship at all.

6. Those conclusions are not sought to be challenged. The nub of the issue before the Tribunal with which I have to deal was the question whether the claims made by the Claimant

of less favourable treatment were brought within time in respect of any of the complaints and, if so, which.

7. There was no argument that, to the extent that any claims were brought out of time, there was any basis for an extension of time on the grounds that it would be just and equitable to do so. The issue for the Tribunal was whether any of the matters of complaint had occurred within three months of the initiation of the claim in the Tribunal, so as to be in time, and whether the claim was also in time in relation to complaints about acts which occurred outside the three-month period, but which were in respect of the last of the fixed-term contracts, and/or in respect of any or all of the previous fixed-term contracts going back to 2004.

8. The Employment Tribunal concluded that all of the complaints made in respect of matters during the last of the fixed-term contracts, that is between February 2013 and May 2013, were brought in time, notwithstanding that some of them may have occurred outside the three-month period. But it concluded that the complaint in respect of acts or failures occurring during each of the earlier separate fixed-term contracts, were brought out of time.

9. Those questions turned on the application of specific statutory provisions. For the purposes of the Employment Tribunal's Decision and for the purposes of this Judgment the provisions in the **2002 Regulations** are not materially different to the provisions of the **2000 Regulations**. In particular, Regulation 7 of the **2002 Regulations** provide, insofar as is relevant:

> **"(1) An employee may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 3 …**
>
> **(2) Subject to paragraph (3) [which is irrelevant for this Judgment], an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning -**

> **(a) in the case of an alleged infringement of a right conferred by regulation 3(1) … with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them;**
>
> **…**
>
> **(4) For the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2)(a) -**
>
> **(a) where a term in a contract is less favourable, that treatment shall be treated, subject to paragraph (b) [which is irrelevant for my purposes], as taking place on each day of the period during which the term is less favourable;**
>
> **…"**

10. The Employment Tribunal was referred to a decision in the Court of Appeal as being relevant binding authority. That decision was **Arthur v London Eastern Railway Ltd (trading as One Stansted Express)** [2006] EWCA Civ 1358, reported at [2007] ICR 193. I shall return, in a few moments, to the terms of the Judgment in that case, in particular the Judgment of Mummery LJ, with whom the other members of the court agreed. It is, however, important first to deal with the way in which the Employment Tribunal dealt with that authority and how it appears to have informed its reasoning.

11. At paragraph 33 of the Decision, the Tribunal said as follows:

> **"It has been held by the Court of Appeal in *Arthur* … that the reference to a series of similar acts is designed to cover a case which can not be characterised as an act extending over a period (by reference to a connecting rule, practice, scheme or policy) but where there is some link between the acts which makes it just and reasonable for them to be treated as in time. This case is reliant on the Respondent's practices and policies in terms of its treatment of engagements of such nature as the Claimant's."**

The Claimant's Case

12. The argument for the Claimant cites this particular passage in the Tribunal's Decision as foreshadowing an approach taken by the Tribunal in its conclusions, which seems to regard the two approaches, namely: whether there was an act extending over a period, on the one hand; and on the other, whether there is a link between the acts complained of which makes it just and reasonable for them to be treated as in time; as mutually exclusive. On that basis the ET

concluded that where the complaint made is of the application of a connecting rule, practice, scheme or policy, this must be approached as a single extended act and cannot constitute a claim which is in time based on the second route, namely a series of similar acts.

13. The Tribunal addressed this issue starting at paragraph 42 of the Reasons, in which it said:

> **"For the purposes of the less favourable treatment claims, the issue is not one of continuity of employment for employment protection purposes, but whether there was a continuing detriment of a type recognised within the Regulations so as to link with the treatment of the Claimant under his fixed term contract which ended on 14 May 2013. A claim in respect of that contract was certainly brought within the requisite 3 month time limit. Pursuant to Regulation (7)(4)(a) of the Fixed Term Employees Regulations 2002 for the purposes of calculating the date of detriment where a term in a contract is less favourable that treatment shall be treated as taking place on each day of the period during which the term is less favourable. That allows a claim based on the period from the commencement of that final fixed term contract on 5 February 2013 to have been brought in time. Prior to 5 February 2013 however there was no contract and therefore no term operable on the Claimant which can have been less favourable."**

14. As far as it goes, no particular complaint is made of that paragraph insofar as it deals with the position in respect of the last of the contracts. It is suggested that there is an error creeping in where it appears that the Tribunal was characterising the question, with which it had to deal, as whether there was, in relation to the earlier contracts, a detriment which could be characterised as a continuing act running through the discrete fixed term contractual periods which ended on 14 May 2013. It is said the question, posed in that way, when seen in the context of the reference to **Arthur** in paragraph 33, foreshadows the application by the Tribunal of an exclusionary rule of law which precluded consideration of the application, on a consistent basis as between different contracts, of certain policies, practices and procedures, as constituting a series of similar acts.

15. The Tribunal considers the question whether complaints in respect of the previous fixed-term contracts had been brought in time by virtue of the statutory provisions. In paragraph 43 the Tribunal said:

> **"Here the Claimant seeks to base his claim on a series of independent and separate contracts for the teaching of various modules but where between each fixed term contract there was no contract of any type in place and no "treatment" of the Claimant in any relevant respect. This was not a series of similar acts as anticipated as a possibility under Regulation 7 (2)(a) but of separate distinct periods of treatment under separate and distinct contracts of employment. …"**

16. Stopping there in the Decision, it is possible to see, and to argue as Mr Williams has sought to argue, that the Tribunal was addressing substantively the question raised in Regulation 7(2)(a), namely whether the matters complained of were, each of them, part of a series of similar acts or failures. One would then expect the Tribunal to set out its reasoning by reference to its findings of fact. What one finds, however, in the balance of paragraph 43 is, in my judgment, a different process of reasoning. The Tribunal says:

> **"… The reference to a series of similar acts is designed to cover a case which can not be characterised as an act extending over a period (by reference to a connecting rule, practice, scheme or policy) but where there is some link between the acts which makes it just and reasonable for them to be treated as in time. This case is in fact reliant on the Respondent's practices and policies in terms of its treatment of engagements of such nature as the Claimant's."**

Then in paragraph 44:

> **"Whilst therefore the Claim is in time in respect of a claim for less favourable treatment arising out of his final fixed term contract, any claim in respect of any earlier contract was out of time. …"**

17. In my judgment, it is clear that the reasoning of the Tribunal in paragraph 43 is to preclude, as a matter of law, the possibility that the consistent application of particular practices and policies by the Respondent to a series of discrete and separate contracts of employment entered into by the Claimant could amount to a series of similar acts. It did so by reference to what the Tribunal understood to be the reasoning of the Court of Appeal in the case of **Arthur**.

The Respondent's Case

18. Mr Williams, in his submissions for the Respondent, has sought to argue, by reference to earlier passages in the Tribunal Decision, where certain findings of fact are made, that, in fact, the Tribunal was applying the 7(2)(a) test, namely whether the matters complained of constituted part of a series of similar acts or failures.

19. I am not persuaded by that argument. It seems to me that, upon a fair reading of paragraphs 33, 42, 43 and the first sentence of paragraph 44, the Tribunal believed that it was precluded, as a matter of law, from applying the 7(2)(a) test in a situation where what was being said was that it was the consistent application of a rule, practice, scheme or policy across a series of discrete contracts which constituted a series of similar acts. The Tribunal concluded, as a matter of law, that it could not and so it did not apply the "series of similar acts" test to the matters complained of.

20. Mr Williams did not seek to argue that, if that was the Tribunal's approach, it was correct as a matter of law. In order to test that concession, one has to look at **Arthur**. **Arthur** was a complaint of discrimination by virtue of what was said to be public interest disclosures. It was said by the complainant that he had been subject to continuing detriment by his employer contrary to section 47B of the **Employment Rights Act 1996**. The detriment complained of consisted of a succession of acts and failures to act involving a number of different people, many of which had occurred more than three months before the presentation of his complaint. The question at the Pre-Hearing Review was whether, and if so which, complaints were out of time pursuant to the statutory provisions in section 48(3) of the **1996 Act** and section 48(4) of that Act. Those provisions are similar to, but not identical with, the provisions in the

Regulations with which I am concerned, but they are sufficiently so for **Arthur** to be regarded as a binding and direct authority on the issues upon which it came to decisions.

The Law

21. Section 48(3) of that Act provides that an Employment Tribunal shall not consider a complaint under section 48 unless it is presented:

> **"(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure to act is part of a series of similar acts or failures, the last of them …"**

Section 48(4) provides:

> **"For the purposes of subsection (3) -**
>
> > **(a) where an act extends over a period, the "date of the act" means the last day of that period …"**

22. It will, therefore, be observed that the same duality of routes is reflected in the provisions of section 48(3) and (4) as is to be found in Regulation 7(2)(a) and 7(4)(a) albeit not in precisely the same terms.

23. In the Judgment of Mummery LJ at paragraph 29, he was dealing with the situation covered by section 48(4) in the following terms insofar as is relevant:

> **"Parliament considered it necessary to make exceptions to the general rule where an act (or failure) in the short three-month period is not an isolated incident or a discrete act. … A vulnerable employee may, for understandable reasons, put up with less favourable treatment or detriment for a long time before making a complaint to a tribunal. It is not always reasonable to expect an employee to take his employer to a tribunal at the first opportunity. So an act extending over a period may be treated as a single continuing act and the particular act occurring in the three-month period may be treated as the last day on which the continuing act occurred. There are instances in the authorities on discrimination law of a continuing act in the form of the application over a period of a discriminatory rule, practice scheme or policy. Behind the appearance of isolated, discrete acts the reality may be a common or connecting factor, the continuing application of which to the employee subjects him to ongoing or repeated acts of discrimination or detriment. If, for example, an employer victimised an employee for making a protected disclosure by directing the pay office to deduct £10 from his weekly pay from then on, the employee's right to complain to the tribunal would not be limited to the deductions made from his pay in the three months preceding the presentation of his application. The instruction to deduct would extend over the period during which it was in force and the last deduction in the three months would be treated as the date of the act complained of."**

24. Mummery LJ then turns to the provision in section 48(3) and he does so at paragraphs 30 and 31 of his Judgment in the following terms:

> **"30. The provision in section 48(3) regarding complaint of an act which is part of a series of similar acts is also aimed at allowing employees to complain about acts (or failures) occurring outside the three-month period. There must be an act (or failure) within the three-month period, but the complaint is not confined to that act (or failure.) The last act (or failure) within the three-month period may be treated as part of a series of similar acts (or failures) occurring outside the period. If it is, a complaint about the whole series of similar acts (or failures) will be treated as in time.**
>
> **31. The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the three-month period and some outside it. The acts occurring in the three-month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. Section 48(3) is designed to cover such a case. There must be some relevant connection between the acts in the three-month period and those outside it. The necessary connections were correctly identified by Judge Reid QC as (a) being part of a "series" and (b) being acts which are "similar" to one another."**

25. In my judgment, the proper reading of paragraphs 29 to 31 in the Judgment of Mummery LJ was that he was there addressing the distinction between section 48(4), "an act extending over a period", and section 48(3), "a series of similar acts", which by reason of some link makes it just and reasonable for them to be characterised as such a series of acts, so that if the latest of that series is in time then it renders the complaint in respect of the earlier acts similarly timeous so as to give the Tribunal jurisdiction. In my judgment, Mummery LJ and the other Judges, who agreed with him, were not saying that, merely because what has been complained of was the repeated application of a discriminatory rule, practice or policy, then the fact that what was complained of could not be said to be "an extended act" or, in the statutory framework of this case, "a term in a contract which was less favourable", thereby the application of the same policy or practice over a series of discrete fixed-term contracts could not, as a matter of law, be characterised as "a series of similar acts or failures" even if, on the facts, there was such a linkage between the acts complained of as, but for the rule of law, would have made it just and reasonable for them to be treated as part of a series of similar acts so as to give the Tribunal jurisdiction to hear the complaint.

Conclusion

26. In my judgment a proper reading of the Employment Tribunal Decision is that it approached this issue on the basis that, because there was a series of separate contracts and no contractual continuity, as a matter of law the application consistently of the same rules, policies and practices across those separate contracts was incapable of being "a series of similar acts" with sufficient linkage so as to make it just and reasonable for them to be treated as in time pursuant to Regulation 7(2)(a). In my judgment, that approach of the Tribunal, based on a misreading of the Court of Appeal decision in **Arthur**, constituted an error of law. It precluded the Tribunal considering, as a matter of substance, whether, and if so to what extent, on the facts which they found and on the evidence which they heard, the consistent application of the various policies, practices and procedures, which constituted the matters of complaint of the Claimant against the Respondent, albeit across a series of discrete and separate fixed-term contracts, nonetheless, applying the guidance to be found in **Arthur**, particularly at paragraphs 30 and 31, did amount to a series of similar acts or failures so as to enable the complaints in respect of the earlier fixed-term contracts to be regarded as brought in time to enable them to be considered by the Tribunal, in addition to the complaints made in respect of the last of the fixed-term contracts, running from February to May 2013.

27. It therefore follows that, by reason of the error of the law, the decision of the Tribunal to rule as out of time, all of the complaints in respect of any of the fixed-term contracts prior to the last one, cannot be allowed to stand. I will therefore quash that part of determination of the Employment Tribunal.

Disposal

28. Mrs Fraser Butlin has urged on me that this is one of these exceptional cases where the findings of fact are so comprehensive and so clear and the arguments are so on her side that the decision to which any Tribunal should come is an obvious one, namely that all of these complaints in respect of each of the previous fixed-term contracts do fall within Regulation 7(2)(a) so as to have been brought in time and that I should therefore substitute my Judgment on this issue for the Decision of the Employment Tribunal which I have just quashed by reason of its error of law.

29. Mr Williams has indicated that he opposes such an approach. If, as I have done, I have concluded that the Tribunal erred in law in its approach, and by doing so failed to apply itself to the test under 7(2)(a) as applied to the evidence and its findings of fact, he suggests that the only appropriate course is that of remitting the case to the Employment Tribunal for it to reconsider the matter in a legally correct way and to come to its decision on the matter upon which it has yet to consider.

30. In my judgment, Mr Williams is correct in his submission as to the appropriate course. The matter will be remitted to the Employment Tribunal for it to take its decision afresh on a proper legal basis. It seems to me that it is highly unlikely that there will be any need for any further evidence, but I anticipate that it may be that the Tribunal would be assisted by further legal submissions. Whether or not that is to be at an oral hearing is a matter of case management which I would leave to the Employment Tribunal to determine. Therefore this appeal succeeds.

Costs

31. I am indebted both to Mrs Fraser Butlin and to Mr Williams for, in her case, her written and oral submissions and, in Mr Williams's case, his oral submissions on the issue of costs. The successful Appellant applies under **Employment Appeal Tribunal Rules**, Rule 34A(2A), for a costs order against the Respondent, albeit limited under that sub-rule to an amount no greater than "any fee paid by the Appellant under a notice issued by the Lord Chancellor". In this case that comprises two elements, an issuing fee and a hearing fee.

32. Mr Williams argues that I should not exercise my discretion to award both or either of those fees on the basis that, although he argued and lost the appeal, there was: the possibility of applying for a review; and the original grounds of appeal were somewhat diffuse and did not necessarily focus on the point which has been successfully argued by the Appellant.

33. In my judgment, there is nothing in the review point. As I have indicated in my Judgment there was an error of law which required this Tribunal to consider it and to reach the decision which I have just reached and to quash the earlier erroneous decision.

34. The other aspect is, in my judgment, inapposite where what is at stake are the issuing fees and the hearing fee. This case is not out of the ordinary, particularly in this Employment Appeal Tribunal, where the general expectation is that the successful Appellant shall be awarded the costs limited, as they are, by Rule 34A(2A).

35. My attention has been drawn to a recent decision of this Tribunal in the case of **Goldwater and Others v Sellafield** UKEAT/0178/14/DXA, on the papers without the benefit of full legal argument. That was to the following effect, that the costs which can be awarded

under Rule 34A(2A), being limited to an amount "not greater than any fee paid by the Appellant under a notice issued by the Lord Chancellor", precludes an order for costs which includes a fee paid by a third party such as a trade union on behalf of the Appellant or an insurance company, where the appeal is funded pursuant to an insurance policy.

36. In my judgment, the decision in **Goldwater** is wrong. It does not read happily with the other provisions in the **EAT Rules**, as amended, to deal with the question of payment of fees, where the phrase "payable by an Appellant" and "the Appellant has not paid the fee" can only make any sense as a matter of practicalities if the wording of the Rules added to "the Appellant" the words "or on his behalf".

37. I have been referred to **Mardner v Gardner and Others** UKEAT/0348/13/DA. It was pointed out, at paragraph 35 in the Judgment of HHJ Eady QC, relying on a series of authorities identified in paragraph 17, that it is contrary to public policy to permit a Respondent to avoid costs consequences, in a case where it had engaged in unreasonable conduct, by relying on a similar provision where, the Claimant, seeking costs, had not paid the costs incurred but had, prudently, entered into a policy of insurance so that a costs award would be paid to the insurance company.

38. There was no reference in **Goldwater** to that earlier, apposite, decision and no fuller consideration of the **Rules**. In particular, there was no reference to paragraphs 13 and 14 of **The Employment Tribunals and the Employment Appeal Tribunals Fees Order 2013** and Rule 17A(1)(b) of the **Employment Appeal Tribunal Rules 1993**, which formed the basis of the submissions of Mrs Fraser Butlin. In my judgment, I am in a much better position, having

heard full legal argument and having been referred both to the other provisions within the **Rules** as amended and the other legal authority, to reach a fully informed decision.

39. I agree with Mrs Fraser Butlin, Mr Williams not seeking to argue the contrary, that the power given to this Tribunal in 34A(2A) includes the power to require the Respondent to pay fees payable in respect of the issuing of the appeal and the hearing fee, even where that fee has not been paid personally by the Appellant but, in this case, by a union acting on his behalf. Accordingly I will order that the Respondent do pay both the issuing fee and the hearing fee to the Appellant.