Appeal No. UKEAT/0533/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 June 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

G4S SECURE SOLUTIONS (UK) LIMITED APPELLANT

MR J JONES RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ADAM WILLOUGHBY (of Counsel) Instructed by: G4s Secure Solutions (UK) Ltd Sutton Park House 15 Carshalton Road Surrey SM1 4LD
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE

Amendment

Striking-out/dismissal

Amendment to add claim of unfair dismissal based on constructive, rather than actual dismissal wrongly permitted. As to actual dismissal, relied on by the Claimant in Form ET1, a lesser sanction short of dismissal was applied on internal appeal. The original dismissal 'vanished' (see **Roberts v West Coast Trains** (CA)). Accordingly the claim ought to have been struck out.

Respondent's appeal allowed on both amendment and strike-out.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Manchester Employment Tribunal. The parties are Mr Jones, Claimant, and G4S Secure Solutions (UK) Limited, Respondent. This is an appeal by the Respondent against orders made by Employment Judge Bright at a substantive hearing held on 13 March 2013 (a) refusing the Respondent's application to strike out the Claimant's complaint of unfair dismissal and (b) permitting the Claimant to amend his form ET1 to include a complaint of unfair dismissal based on constructive dismissal as opposed to actual dismissal by the Respondent. Those orders, with Reasons, were promulgated on 5 April 2013.

2. The appeal was originally rejected on the paper sift under Rule 3(7) by HHJ Richardson in a letter dated 24 June 2013: however, it was permitted to proceed to this Full Hearing at a Rule 3(10) oral hearing before HHJ Birtles.

3. The Claimant has taken no part in these appeal proceedings and has been debarred from taking any further part, having failed to file an Answer, by order of the Deputy Registrar dated 20 February 2014. He does not appear today and is not represented. Mr Willoughby of Counsel appears on behalf of the Respondent, as he did below.

Background

4. The Claimant commenced employment with the Respondent as a Security Officer on 2 June 2009. He was assigned to the Respondent's guarding contract at Media City in Manchester in about December 2010. On 27 October 2011 he was issued with a final written warning for falsification of timesheets.

5. At a disciplinary hearing held on 13 January 2012 the Claimant was dismissed for misusing his mother's disabled badge in order to park his vehicle in a disabled bay at Media City, taking account of the extant final warning. He appealed that dismissal internally.

6. On 19 January, before his appeal was heard, the Claimant presented his form ET1 to the Tribunal. In it he complained of unfair dismissal and associative disability discrimination. That latter complaint was later dismissed on withdrawal by the Claimant at a CMD held before Employment Judge Howard on 10 May 2012. The Claimant gave as the effective date of termination of the contract 13 January 2012 and sought, by way of remedy, compensation and reinstatement into another position.

7. His internal appeal was heard on 1 February 2012. It was successful. By letter dated 3 February the original final warning was changed to a written warning and the sanction of dismissal was changed to that of a final warning. The result was that he was reinstated or perhaps re-engaged, it matters not, into his old job as a Security Officer on the same terms but was directed to work at Manchester Town Hall in accordance with the mobility clause in his contract, Media City having indicated that they did not want him back.

8. He was instructed to attend for work at the Town Hall site on 10 February 2012, but did not do so. Indeed he never returned to work for the Respondent.

The Tribunal Decision

9. Following directions given at the CMD for a substantive hearing, no point then having been taken on the effect of the internal appeal decision on the original dismissal by the Respondent, the parties attended before Employment Judge Bright on 13 March 2013.

10. At the outset Mr Willoughby applied for an order striking out the unfair dismissal claim on the basis that there was no dismissal. The effect of the internal appeal, he submitted, was to retrospectively revive the contract of employment which had been terminated by the original dismissal. He relied on the Court of Appeal Judgment in **Roberts v West Coast Trains Ltd** [2004] IRLR 788. He also sought an alternative strike-out order for non-compliance by the Claimant with ET orders. That was rejected by the Judge and is not pursued in this appeal.

11. As to the vanishing dismissal point, the Judge rejected the strike-out application. Her reasoning is set out at paragraph 11 thus:

> **"In respect of the respondent's application to strike out the claim on the ground that the Tribunal had no jurisdiction, I considered the parties' submissions above and the extent to which evidence would need to be heard to determine the jurisdiction issue. I concluded that the question of whether the claimant was expressly dismissed or whether the contract was continued by reinstatement may depend on the contractual terms and would require evidence to be heard and findings of fact to be made regarding the events surrounding and including the claimant's appeal. I considered that this was an issue for the Tribunal to decide having heard all the evidence and was not, therefore, a preliminary jurisdiction point which could be decided on the basis of submissions alone. I therefore determined to refuse the respondent's application for strike out. However, it may be appropriate for the Tribunal at the full Hearing to consider the issue."**

12. At paragraph 12 the Judge records that, following the Respondent's argument that the Claimant had resigned and was not expressly dismissed, the Claimant, then appearing in person, made an application to amend his claim to include a claim of constructive dismissal in the alternative.

13. I should interpose that Mr Willoughby tells me that that was an alternative way of putting the case which was first raised by the Judge herself and then gratefully adopted by the Claimant in person.

14. That application was granted. The Judge treated it as a re-labelling exercise (see paragraph 18) merely adding a different type of dismissal, constructive rather than actual (cf

s.95(1)(c) and 95(1)(a) respectively of the **Employment Rights Act 1996**) and, applying the well-known **Selkent Bus Co Ltd v Moore** [1996] ICR 836 principles as she saw it, allowed the amendment. I am told, again by Mr Willoughby, that no written amendment was produced by the Claimant.

The Appeal

15. Mr Willoughby takes three grounds of appeal in the following order: (1) the Judge misdirected herself in law in allowing the amendment; (2) she proceeded as if the Claimant had made application to amend when he had not; and (3) the decision to dismiss the Respondent's strike-out application on the unfair dismissal jurisdictional point relating to dismissal was legally perverse. I shall deal with each ground in turn.

The Amendment

16. I agree with Mr Willoughby that it is impossible to read the original Form ET1, settled after legal advice was taken by the Claimant, as setting out facts from which a complaint of constructive, as opposed to actual dismissal, can be discerned (compare paragraph 18 of the Reasons). It is absolutely plain that the Claimant was relying on the Respondent's actual dismissal on 13 January 2012, the effective date of termination which he gave. Even if there was a complaint of repudiatory conduct by the Respondent, the reference to "my recent dismissal" at section 5.2 of the Form ET1 can only refer to the Respondent's dismissal on the date given, 13 January. Further, there is no acceptance of breach by the Claimant pleaded. Such acceptance could only have occurred when he failed to attend work at the new site on 10 February following his successful appeal. That event post-dated the Form ET1 lodged on 19 January.

17. In these circumstances I am satisfied that the Judge fell into error in mischaracterizing the proposed amendment as a re-labelling exercise (category 1 of the *Harvey* classification); it was a new cause of action based on facts not originally pleaded (category 3). It therefore raised a limitation question not considered by the Judge.

18. That said, as the Judge pointed out, the jurisdictional point was not raised by the Respondent until the substantive hearing. It was not, but could have been taken in the Form ET3, lodged after the internal appeal outcome or at the CMD before Employment Judge Howard. Equally, as Arden LJ pointed out in **Roberts** (paragraph 35), it was open to the Claimant to complain of constructive dismissal once the appeal decision was communicated to him. He did not do so until just over a year later. It also seems to me that changing the nature of the case from unfairness based on the actual dismissal to constructive dismissal is little different from the facts of **Selkent**, where the Claimant sought to add a claim of automatically unfair dismissal for a trade union reason to an "ordinary" unfair dismissal claim.

19. Applying the **Selkent** principles, I would allow this appeal on the amendment ground and set aside the permission granted by the Judge. This was a new claim, raised out of time, at the last minute. The balance of prejudice here favours the Respondent.

The Amendment Application

20. It follows that the second point taken by Mr Willoughby is rendered moot. Whether or not an application to amend was made by the Claimant, it ought not, in my judgement, to have been granted.

Strike-out

21. Mr Willoughby submits that the relevant facts were not in dispute. The Claimant was dismissed by the Respondent on 13 January 2012. He brought his claim of unfair dismissal on 19 January, claiming reinstatement and compensation. On 3 February, as a result of his internal appeal, he was reinstated. There was then no dismissal to found the Tribunal's jurisdiction to consider the unfair dismissal complaint (see **Roberts**). Accordingly, he submits, strike-out must follow.

22. The real question here is whether the Judge was entitled to conclude (paragraph 11) that an evidential inquiry was needed in order to determine whether the contract was continued by the appeal outcome.

23. In the absence of the Claimant or representation on his behalf, I have drawn Mr Willoughby's attention to two unreported EAT cases referred to in *Harvey* v.1/D1/376 following the Court of Appeal decision in **Roberts**. The first is **Saminaden v Barnet Enfield and Haringey NHS Trust** (EAT 0018/08 7 July 2008), HHJ Jeffrey Burke QC presiding; the second is **Piper v Maidstone and Tunbridge Wells NHS Trust** (EAT 0359/12 18 December 2012), in which I considered and followed **Saminaden**.

24. Those cases distinguish **Roberts** on the basis that, on the particular contractual disciplinary procedures in those cases, there was, as Mr Willoughby categorises it, a bilateral arrangement whereby any sanction short of dismissal which the employer wished to impose at the appeal stage required the consent of the Claimant.

25. Having raised the point with Mr Willoughby, he tells me and I accept from the Bar that within the bundle of documents lodged for the substantive hearing before Employment Judge Bright was a copy of the relevant contract of employment and disciplinary procedure. That was in what may be termed standard form akin to that in the case of **Roberts**. There was no option for the employee to object to a penalty short of dismissal imposed on the internal appeal which he himself had brought. In these circumstances, it seems to me that the Judge was wrong to conclude that an evidential inquiry was necessary in this case. I bear in mind that a strike-out application under the then 2004 Rules could be made at any time up to and including the final hearing of a case and that, on such an application, the Judge may consider evidence. On the basis that the written contractual documentation made it clear that the discretion lay entirely with the Respondent employer as to what sanction permitted under the contract short of dismissal ought to be imposed on the appeal, it seems to me that there was no need for an evidential inquiry. The **Roberts** principle applied on the agreed facts of this case and ought to have been applied on the strike-out application. Accordingly, I shall further allow this appeal on the strike-out point.

Disposal

26. It follows that the appeal is allowed. The Judgment of the Employment Judge is set aside. Permission to amend the Form ET1 is refused and the claim, as originally formulated, will be struck out on the basis that the Tribunal had no jurisdiction to entertain it, there being no extant dismissal in place at the time of this hearing below.