Appeal No. UKEAT/0234/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 November 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

LONDON BOROUGH OF WANDSWORTH APPELLANT

MR M C VINING & OTHERS RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR EDWARD CAPEWELL (of Counsel) Instructed by: Sharpe Pritchard Solicitors Elizabeth House Fulwood Place London WC1V 6HG
For 1) Unison, 2) Mr Vining 3) Mr Francis	MS BETSAN CRIDDLE (of Counsel) Instructed by: UNISON Legal Services UNISON Centre 130 Euston Road London NW1 2AY
For 1) GMB 2) Ms N Petrie 3) Mr J Butler	No appearance or representation by the Respondents On Written Submissions

SUMMARY

PRACTICE AND PROCEDURE - Amendment

Respondents to appeal permitted to amend Answer to raise new points not raised below. Exceptional course taken to allow EC/ECHR points to be taken for the first time on appeal; see e.g. **Stringer** [2009] ICR 985, paragraphs 57 to 58.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the London (South) Employment Tribunal. The Claimants fell into two categories: those individuals who were employed by the Respondent, the London Borough of Wandsworth as Parks Constables who were members of the trade union UNISON and those who were so employed and were members of the GMB union. The two trade unions were also Claimants in their own right in relation to a collective consultation claim brought under the **Trade Union and Labour Relations (Consolidation) Act 1992** (TULRCA).

2. The case came before Employment Judge Zuke on 28 September 2012 for determination of two preliminary issues. First, whether the Claimants Mr Vining and Mr Francis, members of UNISON, were excluded from the right to bring their complaints of unfair dismissal following the Respondent's decision to disband their Parks Constabulary (they were entitled to and received appropriate redundancy payments) by virtue of section 200 of the **Employment Rights Act 1996** (ERA) and whether the consultation claims were excluded by virtue of section 280 **TULRCA**. Those two statutory provisions are in materially identical terms.

3. Judge Zuke ruled that the Respondent could not rely on the section 200/section 280 exclusions. Against that decision the Respondent appealed. Having been sifted to a Full Hearing by HHJ Richardson on 16 May 2013 the hearing of the appeal was stayed following my decision in the similar Parks Police case of **McKinnon v Redbridge LBC** on 7 June 2013, reported at [2013] ICR D33. I allowed Redbridge's appeal against the Tribunal decision that section 200 **ERA** did not exclude Mr McKinnon's unfair dismissal claim. There was no claim under **TULRCA** in that case. Against my decision Mr McKinnon appealed. The Court of

Appeal dismissed his appeal [2014] ICR 834, purely as a matter of construction of section 200 **ERA**.

4. After Mr McKinnon abandoned his proposed application for permission to appeal to the Supreme Court, the UNISON Claimants in the present case sought leave to amend their Respondent's Answer to advance a wholly new case, not argued below. The GMB Claimants, on the other hand, accepted the outcome in **McKinnon** as applying to this case and concede, by a letter from their solicitors, Messrs Thompsons, dated 14 November 2014, that the Respondent's appeal be allowed.

5. On the directions of Langstaff P I have heard argument from Ms Criddle on behalf of UNISON in support of the amendment application and Mr Capewell for the Respondent in opposition. In approaching the exercise of my discretion I have considered the helpful summary of principles on allowing new points to be made on appeal: see **Secretary of State for Health v Rance** [2007] IRLR 665, paragraph 50 (HHJ McMullen QC); and permitting amendments: **Khudados v Leggate** [2005] ICR 1013, paragraph 86 (HHJ Serota QC).

6. The special feature of the present case is that the new points which Ms Criddle wishes to take in support of Judge Zuke's decision below involve consideration of Convention rights under the ECHR, incorporated into domestic law by the **Human Rights Act** and Community rights, particularly under Directive 98/59/EC. The obligation on domestic courts to consider Community rights (and by extension Convention rights) was considered by Lord Walker in **Revenue and Customs v Stringer** [2009] ICR 985: see paragraphs 57 to 58.

7. I am satisfied that the proposed amendments are not raised as a result of any tactical decision by UNISON. The matter proceeded below, as it did throughout in relation to section 200 **Employment Rights Act** in **McKinnon**, purely as a matter of construction of domestic legislation. Unsurprisingly, I respectfully agree with the Court of Appeal outcome in **McKinnon**. However, that leaves open the question, not considered in **McKinnon**, as to whether the exclusion of the rights sought to be enforced in these proceedings gives rise to a lack of effective remedy domestically to the UNISON Claimants in the light of their Convention and Community rights.

8. Mr Capewell argues that the proposed amendments are unarguable. I cannot agree. Equally, I am not persuaded, on what I have heard, that Ms Criddle's arguments will ultimately win the day and certainly are not a knockout point, as Brooke LJ put it in **Glennie v Independent Magazines** [1999] IRLR 719. The points are, in my opinion, reasonably arguable and should be permitted, subject to the question of prejudice.

9. If I refuse the amendments the Claimants will have no remedy. If I allow the amendments the Respondent will have to face a different case from that which it faced below. However, no further evidential enquiry is necessary for the purposes of the amendments. Any increased costs may be dealt with by way of a costs application at the conclusion of these appeal proceedings.

10. In these exceptional circumstances I have concluded that the proper course is to permit the amendments contained in the draft Amended Answer dated 15 July 2014 (including paragraph 5.1.3, which does not raise a new point) in order that the European points may be properly argued and determined in this Tribunal.

11. Accordingly, I shall adjourn this appeal, which will be relisted for Full Hearing, Category A, time estimate one day, the amendment having been permitted.