Appeal No. UKEAT/0116/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 February 2014

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MISS S M SAHA — APPELLANT

VIEWPOINT FIELD SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS EMMA PRICE (of Counsel) Bar Pro Bono Unit
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

CONTRACT OF EMPLOYMENT

The Claimant was a telephone interviewer who worked on an ad hoc basis between 7 and 43 hours almost every week. The Employment Judge made an express finding having heard evidence that the Claimant was not obliged to work any week when she did not want to and the employer was not obliged to offer her work. On that finding of fact her appeal against the conclusion that she was not an employee could not succeed. An alternative case (not advanced before the EJ) that she was an employee when working on specific assignments and that she had sufficient continuity under section 108 ERA was not a viable way of putting the claim since it was not the termination of any particular assignment that she was complaining of but the termination of the umbrella arrangement, which was not a contract of employment.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal by the Claimant, Ms Saha, against a Judgment of Employment Judge Macinnes, sitting in the London (South) Employment Tribunal, whereby he decided that she was not an employee of the Respondent and struck out, amongst others, her claim for unfair dismissal on that basis.

2. The Claimant was represented today by Ms Emma Price, extremely ably. The Respondent was not represented because the company went into administration on 4 December 2013. The administrators have written to the EAT, saying they do not intend to defend any claim by the Claimant. Nevertheless, notwithstanding that indication, it is necessary that I am persuaded that there has indeed been an error of law by the Employment Judge before I allow the appeal.

Background

3. The Respondent company provided fieldwork to market research companies. The Claimant worked in their telephone unit. For obvious reasons, the amount of work in the telephone unit would depend on the particular projects which the Respondents managed to take on. They therefore retained a number of ad hoc telephone unit staff including the Claimant.

4. She started to work with them in November 2006. Earlier in that year, she had filled in an application form, which was before the Tribunal Judge, which is at my page 1. It is headed "Application form for position of telephone interviewer" with the name of the Respondent company at the top. It then has various details given by the prospective telephone interviewer and asks "Current job if any", asks "Reason for wishing to join Viewpoint as a telephone interviewer" and then has a heading "Availability for work", under which is stated "Shift times

are as follows: **10am-2pm, 2pm-6pm, and 6pm-9pm."** And then it says "We would require commitment of at least two shifts per week." Then the applicant is asked to give details of each day of the week and Miss Saha gave various shifts that she would be willing to work. Friday is blank. Wednesday has a question mark. Monday, Tuesday and Thursday say either 10-2 or 2-6 plus 6-9. Saturday and Sunday say 10-2 and 2-6. That document was, surprisingly, the only document recording the arrangement in any way.

5. At the hearing the Employment Judge heard evidence from the Claimant herself, from her line manager, who organised the work, a Miss Trevett, and he was shown a number of documents including the application form and other documents which I have seen which comprise a schedule of the work actually carried out by the Claimant in the period 7 March 2011 to the week commencing 27 February 2012. There is also another version of that document, annotated by the Claimant to show the reasons for her not working on various occasions.

6. The important findings made by the Employment Judge are at paragraphs 12, 14 and 16 of the Judgment. Paragraph 12 says this:

> **"The arrangement was that the [telephone interviewer] would notify the Respondent by the end of each week of his or her availability for the following week. If work as available Ms Trevett would allocate it according to the availability of the people. The Claimant's availability was good. So in Ms Trevett's 'pecking order' for allocating work she was high to middle. The Claimant worked between 43 and 7 hours per week. She worked according to the availability of work and her availability."**

I should interject there that Ms Price criticises the Judge somewhat for the way he summarizes the work she did each week. She says to categorize it as between 43 and 7 is not giving the full picture. She says 7 hours work is only on very few weeks and there is a reasonably consistent

higher number than that over the weeks, though I am bound to say they do seem to vary quite substantially. Paragraph 14 says this:

> **"If work was not available the TI would not work even if they said they were available. This was clearly recognised by the Claimant who would e-mail changes in her availability 'if there is work'. She confirmed in evidence that this was her understanding of the situation. The Claimant was also able to cancel her availability after she had committed even if work was available for her. She did this on several occasions for reasons of ill health (uncertified) and other commitments (eg on one occasion a festival in Paris) without any repercussions. On other occasions when the Claimant cancelled her availability for what she said to me was on grounds of ill health although it was uncertified. It was not clear whether this was on grounds that the Claimant was actually and genuinely unfit for work or whether there was a lesser level of discomfort or inconvenience."**

Paragraph 16 records the termination of the arrangement. The Judge says:

> **"In January 2012 following an audit the Respondent was advised that the [telephone interviewers] did not have employee status and on 26 January 2012 they wrote to [them] including the Claimant as follows:**
>
> > **'Following [an audit] we have had to review our employment terms with relation to the telephone unit positions within the Company.**
> >
> > **The Company has used the Employment Status Indicator...tool provided by HMRC to check the employment status of our Telephone Unit personnel.**
> >
> > **This test has indicated that the role of a Telephone interviewer should be self employed. We therefore are required to give you 30 days notice of the termination of your contract. We hope that you will decide to continue working with the Company as a self employed person.'"**

7. Notwithstanding that they seem to have understood up until January 2012 that a Telephone Interviewer was an employee, the Respondent maintained at the Employment Tribunal, as was their right, that the Claimant was not in fact an employee for the purposes of the **Employment Rights Act,** maintaining instead that she was a "worker". The Employment Judge found that, so far as the **Ready Mix Concrete** criteria were concerned, the Claimant's relationship with the Respondent would clearly have been that of the employer and employee. But, he found, because there was no obligation to provide or take work, there was no mutuality of obligation such as to make her an employee. That is a separate criterion and a precondition to the **Ready Mix Concrete** criteria to which I have referred.

8. This finding is to be found at paragraph 20 of the Employment Judge's Reasons. He said:

> **"I find that the arrangement was that while the [telephone interviewers] if they wished to offer availability to work had in practice to do in shifts of four to five hours and two shifts per week, nevertheless the Respondent was under no obligation to offer work to any of the [telephone interviewers] or the Claimant. Nor was the Claimant obliged to accept such work. Indeed she was entitled to refuse work she had already accepted. While I have no doubt the arrangement would rapidly come to an end if a TI regularly did so...that does not I find affect the substance of the arrangement."**

Then at paragraph 21 he states the conclusion:

> **"It was clear to me that at the level of management that this arrangement operated there was no understanding of the legal definition of employee or whether there was any distinction between the two..."**

The appeal

9. On a preliminary hearing, on 14 August 2013, Judge David Richardson allowed the appeal to proceed on four grounds, which were drafted by an ELAAS representative who had appeared on that hearing for Miss Saha. It is convenient to deal with grounds 2, 3, and 4 first.

Grounds 2 and 3

10. Grounds 2 and 3 go together. Ground 2 says:

> **"The Employment Judge ought to have made a clear finding as to whether at the start of the Claimant's work with the Respondent there was an agreement that the Respondent would offer at least two shifts every week -- see the ET1, paragraph 5.2."**

That is a reference, at page 20 in my bundle, to a statement made by the Claimant in her ET1 document that there was a mutual obligation:

> **"...for the company to offer me at least two shifts per week every week and for me to commit to this as stated in the application form. Otherwise I would not have got the position."**

Ground 3 in the Notice of Appeal goes on to say:

> **"Such an agreement might have been express or by implication from the application form. If there was such an agreement mere breach by the Respondent afterwards would not negate a contract of employment."**

11. So far as those two grounds are concerned, it seems to me they face the insuperable difficulty that the Tribunal Judge, at paragraph 20, made an express finding about what the obligation was when he said that if a Telephone Interviewer wished to offer availability for work, he or she had to offer shifts of four to five hours and two shifts per week but that that did not mean that the Respondent was under an obligation to offer work to any particular Telephone Interviewer or the Claimant; nor was the Claimant obliged to accept any such work. It is right to say that he has not there expressly referred to the application form, although he does record it, and he does record the commitment to two shifts per week at paragraph 10 in his Judgment. Although he does not record it and although in principle it might be possible to infer such an obligation from the wording of the application form, it is clear that the Judge made a finding of fact that there was no obligation to offer any shifts per week on the part of the Respondent or indeed to work any shifts per week on the part of the Claimant. It seems to me that, in those circumstances, grounds 2 and 3 must fail.

Ground 4

12. Ground 4 of the Notice of Appeal says:

> **"The Employment Judge placed impermissible weight on the evidence of Miss Trevett as to the substance of the relationship with particular reference to documentary evidence."**

I am not clear, and I think Ms Price was frank enough to indicate that she was not really clear either, as to what exactly ground 4 was to comprise. The Employment Judge, as I say, heard evidence from the Claimant and Miss Trevett. It was for the Employment Judge to decide what

weight to put on the evidence from Miss Trevett and, unless he was perverse in the weight that he gave it, I cannot see that this ground of appeal has any basis.

The wider basis

13. That deals with grounds 2, 3 and 4. But, in fairness to Ms Price, today she seeks to put the appeal in a rather wider way by reference to the decision of this Tribunal in the case of **St Ives Plymouth Ltd v Mrs Haggerty** UKEAT/0107/08 (unreported), which was handed down on 22 May 2008 and is a decision of Elias J, sitting with two lay members. It is right to say that the Judge does not refer to that decision in his Judgment and that it does give some helpful guidance. It is one that is clear Employment Tribunal Judges should have in mind. The relevant passages, in particular, in Elias J's Judgment, start at paragraph 26. Elias J said this:

> **"In our judgment, it follows that a course of dealing, even in circumstances where the casual is entitled to refuse any particular shift, may in principle be capable of giving rise to mutual legal obligations in the periods when no work is provided. The issue for the tribunal is when a practice, initially based on convenience and mutual cooperation - an alternative if less personal description may be market forces - can take on a legally binding nature."**

He then, in paragraph 27, quotes from Sir John Donaldson in a case called **O'Kelly**. He carries on in paragraph 28:

> **"On this analysis, the only issue is whether the Tribunal in this case [that is the *St Ives* case] was entitled to find that there was a proper basis for saying that the explanation for the conduct was the existence of a legal obligation and not simply goodwill and mutual benefit. The majority consider that it is important to note that the test is not whether it is necessary to imply an umbrella contract, or whether business efficacy leads to that conclusion. It is simply whether there is a sufficient factual substratum to support a finding that such a legal obligation has arisen. It is a question of fact, not law. The majority place weight on the fact that nowhere does Lord Irvine state that the only proper conclusion for the Tribunal was to find a lack of mutual obligations [that is a reference to the decision of Lord Irvine in the *Carmichael* case]. The emphasis is on this being a finding that the Tribunal was entitled to make."**
>
> **29. It is in truth a highly artificial exercise for a tribunal, not least because there are no clear criteria for determining when it is the one rather than the other, or indeed both (which we suspect will frequently be the case). However, in the judgment of the majority [that is a reference to the majority of that EAT], there was a sufficient basis here. We recognise that in part it may be said that the Tribunal's reasoning is finding the legal obligation arising out of the practical commercial consequences of not providing work on the one hand or performing it on the other. But we do not see why such commercial imperatives may not over time crystallise into legal obligations.**

> **30. Furthermore, there were other factors which were taken into account, including the lengthy period of employment, the fact that the work was important to the employers, and the work was regular even if the hours varied. One might also readily infer, although it was not spelt out, that the employers felt under an obligation to distribute the casual work fairly, rather as did the allocator in the *Nethermere* case."**

14. In short, Ms Price's submission would be that in this case the Employment Judge has not applied his mind to whether he can infer the obligation to provide work and to be available for work from the kind of practical factors that the EAT are referring to in the **St Ives** case. In this case, such factors would have been that there was a lengthy period of employment, no doubt the work was important to the employers and, so far at least as Miss Saha's work was concerned, her work was regular, although I have already commented on how regular. Furthermore there were two additional factors that Ms Price would have relied on. One was the holiday pay point, though on analysis it turned that that was simply a percentage of actual money earned from hours worked. And finally there was the fact that, throughout her dealings with the Respondent up till she received the letter of termination, they had always described her in all the documentation, appraisals and so-on, as an employee.

15. It may be that a Tribunal, taking into account all those points, would have been entitled to find as a fact that the mutual legal obligations to which I have referred had arisen out of the course of dealing and it may have been that, if such a finding was made, and an appeal was brought against it, that appeal would have failed in the same way as the appeal in the **St Ives** case. But the same point works, I am afraid, the other way round. The Tribunal had, as I have described, evidence from the two protagonists. It had the documents. The Judge made his findings of fact, particularly at paragraph 14, and he reached his conclusions at paragraph 20. The issue is one of fact, as is made clear by Elias J. Unless the Judge's conclusions are perverse, and it seems to me impossible to suggest that they are perverse in this case, and that is not a ground of appeal that was set out in the Amended Grounds, an appeal put on this new, wider basis simply has no prospect of success and I therefore reject it.

Ground 1

16. Ground 1 says:

> **"The Employment Judge failed to consider whether there was a contract of employment during each individual assignment which the Claimant worked and [the] implications for continuity."**

There is then a reference to a case called **Drake v Ipsos Mori** [2012] IRLR 973, which is a decision of Judge Richardson.

17. So far as this ground is concerned, it is clear that it was not how the Claimant was putting her case in the Tribunal. She was relying on an umbrella contract, and that is clear from her ET1 at page 19 and then at pages 20 and 23 in my bundle, where she gives a whole host of reasons for suggesting that she was an employee continuously from the very outset in November 2006 until termination. Although her ET1, I am told, was drafted by her, it has the hallmark of being done by someone who knows what they are talking about and what they are trying to achieve.

18. In any event, ironically, it was the Respondent which provided the basis for putting the case as to whether she was an employee in this way in the Grounds of Resistance. There are a number of statements to the effect that the Claimant was only employed while on specific commissions during specific weeks or specific assignments, and there is in fact reference to the fact that she was on an assignment for the period 27-29 February 2012 and that that was her most recent period of continuous employment. 29 February 2012 was of course the last day of the notice which brought an end to the overall arrangement.

19. The evidence before the Employment Judge included a schedule of the Claimant's working weeks and it appears that she did indeed work for some hours almost every week in the year running up to February 2012 and, as I have said, she made notes on the schedule, indicating reasons why she did not work in those few weeks in which she did not work. Based on that, her position, if ground 1 was to be put forward, would be that there were a series of short-term assignments, that if they were considered together the requirement in section 108 of the **Employment Rights Act** for one year's continuous employment could be satisfied and then it could be said she was an employee on the date of dismissal with the requisite continuous employment and therefore she had a right not to be unfairly dismissed on that date.

20. She did not put forward this case, but it is said that the Employment Judge should have investigated it himself, knowing it is a familiar alternative case in these kind of casual worker situations. I am prepared to accept that the Employment Judge, given that Miss Saha was representing herself at the Tribunal hearing, should have investigated whether this was a feasible way of her putting her case. To that extent, the ground of appeal may have some legs.

21. However, thinking about it further, it seems to me clear that a claim put on this basis was never going to succeed because, in simple terms, the dismissal or termination of which the Claimant complains is not the termination of the assignment which ran from 27 to 29 February (and which, for all I know, had already come to an end earlier in the day on 29 February) but the termination of the overall arrangement and it is only the termination of the overall arrangement that will give to a viable complaint of unfair dismissal. So it seems to me that ground 1 may have been an idea worth exploring but was not actually going to get her anywhere.

Conclusion

22. I therefore reject this appeal.

23. I should say that I have considerable sympathy with the Claimant and I have no doubt she deserves some compensation. I particularly have sympathy with her in that she now has an "open goal" so far as the Respondents are concerned, and she may, had she been able to pursue the matter, have some rights against the DBIS. But I have to apply the law as I understand it. If it is any consolation, I will say that there can be no doubt that this is an area which is crying out for some legislative intervention not least because, as Elias J said nearly six years ago, the exercise in these cases, so far as Tribunals are concerned, is highly artificial.